

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)**

BETWEEN:

AHMED ABDULLAHI

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANTS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case is about the essential elements of the definition of a ‘criminal organization’.

2. The Appellant was convicted of multiple substantive firearms offences, all arising from a single incident on March 31, 2013. The Appellant’s co-accused was charged with firearms offences arising from April 2013, in which the Appellant was not involved. Both the Appellant and his co-accused were charged and convicted of participating in the activities of a criminal organization. The Crown did not lead any direct evidence about the existence of the alleged criminal organization, its membership, its structure, continuity, hierarchy, or other features. Instead, the Crown led ‘gang expert’ evidence from a police officer who testified, in general, about urban street gangs and their culture, customs, symbols, terminology, slang, activities, and other characteristics that he described as ‘indicia’ of gang membership. The jury heard a voluminous amount of intercepted phone conversations, some of which involved the Appellant, and the rest of which involved other members of the alleged criminal organization – who were friends or acquaintances of Somali ethnicity who lived in the same area, many of whom were involved in similar types of criminal activity. However, the intercepts did not contain any discussions indicating a hierarchy or structure to the alleged criminal organization and demonstrated both cooperation, competition, and independent criminal activity amongst the various other alleged members. The Crown invited the jury to apply Det. Kerr’s ‘urban street gang’ indicia to the wiretapped phone conversations and to certain photographs of the Appellant wearing clothing or making hand symbols consistent with these indicia in order to find the existence of an urban street gang in which the Appellant was a member, and thereby convict him of participating in the activities of a criminal organization. The defence vigorously argued that this body of evidence was consistent with a number of friends from the same neighbourhood and cultural background involved in criminal activity who cooperated occasionally on an *ad hoc* basis and did not establish the structure and continuity required for a criminal organization.

3. In his jury charge, despite receiving written submissions from defence counsel that structure and continuity were live issues, the trial judge instructed the jury on the definition of ‘criminal organization’ simply by reading the text of s. 467.1(1) of the *Criminal Code*. He did not provide

the jury with any indication that structure and continuity were required to make a finding that a criminal organization existed or that these were essential elements necessary for a conviction on the criminal organization count.

4. A majority of the Court of Appeal for Ontario held that the trial judge's charge on the definition of 'criminal organization' was not deficient, as the legislative regime is intended to be flexible in its approach to the structure of criminal organizations and the trial judge's review of Det. Kerr's expert evidence in relation to the wiretapped conversations ensured that the jurors heard the portions of the evidence relevant to the issues of structure and continuity in the charge. Moreover, defence counsel told the jury in his closing address that the law required structure and continuity to find the existence of a criminal organization. The Crown's closing address, meanwhile, made reference to evidence of 'cohesiveness' and 'a continuous enterprise'. The majority found that, as a result of these closing submissions, the jury would have appreciated the requirements for finding that a group constituted a criminal organization, even in the absence of explicit instruction by the trial judge. The lack of objection from defence counsel was seen as supporting the adequacy of this charge.

5. Justice Paciocco, dissenting, held that the trial judge's failure to provide any indication that structure and continuity were required to find the existence of a criminal organization was non-direction amounting to misdirection, and required a new trial on the criminal organization count. He held that – in light of this Court's decision in *Veneri* – structure and continuity are essential elements of the definition of criminal organization which distinguish that exceptional regime from conspiracies and other illegal activity. The trial judge's review of some evidence relevant to these issues did not render the charge adequate, as he never told the jurors they could not convict the Appellant of the criminal organization offence without those required elements. Nor did the defence closing submissions ameliorate the trial judge's non-direction: the defence told the jury that the law required findings of structure and continuity, but the Crown did not. There was no reason that the jury would have listened to the defence rather than the Crown, particularly since the trial judge's charge on criminal organization made no mention of structure or continuity. Nor was there any basis to believe that counsel's failure to object was tactical.

6. The Appellant, appealing as of right on the dissent, submits that Paciocco J.A. was correct. With respect to the definition of ‘criminal organization’, the requirements of structure and continuity are necessary to ensure that the scope of this exceptional regime is properly limited to its legislative purpose. These essential elements are not obvious from the statutory text of the *Criminal Code* and thus it is vital that jury instructions effectively communicate the need for such findings when the requisite structure and continuity and coordination of an alleged criminal organization are a live issue at trial. The risk that the trial judge’s non-direction would result in an overbroad approach to ‘criminal organization’ was particularly serious in this case, given the Crown’s reliance on the application of generic indicia of ‘urban street gangs’ to establish the existence of a criminal organization, many of which were characteristics likely to be shared by people of a similar age and ethnic or racial background who live in the same neighbourhood and cultural milieu. There was a real danger that, absent instructions that the Appellant could not be convicted of the criminal organization offence without finding that the alleged group had structure and continuity, the jurors could rely on the generic indicia of gang culture to conclude a criminal organization existed, having never turned their minds to these core elements of the offence.

B. Statement of Facts

1. The Substantive Offences

7. On Friday, March 29, 2013, as a result of information received from ongoing wiretaps in relation to Project Traveler, Det. Sgt. Kevin Fraser was directed to send an on-call team from the physical surveillance unit of the O.P.P. to Windsor to assist Toronto Police with an investigation related to a group planning to transport guns from Windsor to Toronto. At 11:57 a.m. on Sunday, March 31, 2013, Fraser was advised that one target – the Appellant – was believed to be en route to Windsor in an unknown rental vehicle, but the team could not locate him. At 1:54 p.m., Fraser was advised that the Appellant was on the 401 back to Toronto. The team drove towards that area. At some point, Fraser saw a white Chrysler car with licence plate FGY1261. He knew this make and model was frequently used by rental services. He saw two black males sitting in the front seats, consistent with the surveillance information package. Another officer on his team, Cst. DiPietro drove his Toyota Venza beside the Chrysler and believed “that [the Appellant] was the passenger”. DiPietro testified that this man had fully reclined his seat. After this, DiPietro and Fraser continued

to follow the Chrysler from a short distance back. At 4:40 p.m., the Chrysler exited the highway, and DiPietro, followed by Fraser, pursued it onto Dixon Road.¹

8. As he drove, Fraser called for marked OPP cars to assist in a vehicle stop. One marked cruiser arrived and performed a U-turn to follow them. It passed both surveillance vehicles to pursue the Chrysler with its police lights on. At this point, the Chrysler began driving more erratically “like they were trying to get away”. DiPietro testified that, at 4:43 p.m., the Chrysler turned left into a Dixon Road apartment complex. The marked car, DiPietro, and Fraser all turned left to follow it. In the apartment complex, DiPietro could not see the Chrysler and drove around to look for it. Fraser saw the Chrysler drive behind a short wall. He went to that location and saw it was an entrance to underground parking. The garage door had been “driven through” and had a hole in it. Fraser advised the other officers of this over the radio. DiPietro joined him at 4:46 p.m. and the two entered the garage, finding the Chrysler near a stairwell. No one was in the vicinity.²

9. Fraser did a cursory search of the vehicle. He saw a black cloth grocery bag on the front passenger seat. In this bag, there were three handguns inside black socks. In cross-examination, he agreed that someone looking inside the bag would not know that these objects were guns. DiPietro testified that, at 5:02 p.m., the scene was handed over to the Organized Crime team. Officer Dwayne Pursel testified that, while walking around the car, he observed three cell phones inside.³

10. Officer Robert Jitta, a forensic identification officer with Toronto Police, testified that he examined the Chrysler on April 2, 2013. In the trunk, there was an orange bag, containing mail addressed to the Appellant and multiple earlier car rental records from Discount and Hertz in his name. Det. Cst. Lawrence Parasram, a fingerprint identification expert, testified that a fingerprint found on the exterior of the driver’s side door matched that of the Appellant’s left ring finger. Jitta also found a bottle of Sprite and a bottle of Tim Horton’s peach drink on the front passenger’s side of the car. Parasram testified that a fingerprint found on the Sprite bottle matched a fingerprint of Daud Hussein, another target of Project Traveller. Hussein’s DNA was found on the Sprite and

¹ *Evidence of K. Fraser*, Vol. 3, 9/1-16/10, 19/1-30/25; *Evidence of P. DiPietro*, Vol. 4, 15/5-34/30.

² *Evidence of K. Fraser*, Vol. 3, 30/20-40/25; *Evidence of P. DiPietro*, Vol. 4, 34/30-45/15.

³ *Evidence of K. Fraser*, Vol. 3, 48/10-53/20, 64/15-65/15; *Evidence of D. Pursel*, Vol. 3, 78/15-80/30; *Evidence of P. DiPietro*, Vol. 4, 45/15-47/30.

Tim Horton's bottles. In the glovebox, police found a Hertz rental package for the Chrysler and a wallet containing identification and banking cards in the Appellant's name.⁴

11. Sandra Randell, the fleet coordinator for Hertz Canada, was shown the rental package and testified that the rental record indicated that at 10:42 p.m. on March 30, 2013, the customer Ahmed Abdullahi rented a 2011 Chrysler 200 LX with the licence plate FGY1261 from the Hertz Canada location at Pearson Airport in Toronto. She testified that the customer would have had to come to the counter in person to obtain the car. The rental record indicated that the customer produced a driver's licence in his name in order to rent the vehicle and paid with Mastercard. Randell testified that the rental documents indicated the customer did not have permission for anyone else to drive the car. The phone number provided by the customer was (647) 832-8535. Randell was not present when the Chrysler was rented, and agreed that the only way to know if a driver's licence belongs to the customer renting the car is by comparing their licence to the customer in person.⁵

12. On April 2, 2013, Officer Dwayne Purcell, a firearms verifier with the OPP, examined the three firearms seized from the Chrysler. Two were Ruger P95 semi-automatic 9mm pistols. The third was a .40 calibre Smith & Wesson, Military & Police gun, with a stamp on the slide marked "Detroit PD". In cross-examination, Purcell agreed that these guns could be bought easily in the United States and that they could be purchased in Canada with a firearms licence. It was admitted that the two Ruger P95 handguns were prohibited firearms for which no registration certificates had been issued. It was admitted that the Smith & Wesson semi-automatic gun was a restricted firearm for which no registration certificate had been issued. It was admitted that neither the Appellant, Daud Hussein, nor Khadra Omer, had ever held a registration certificate for any firearm, a firearms acquisition certificate, a licence to possess any firearms, or an authorization to transfer any firearms. Det. Cst. Greg Hoffman was shown the Smith & Wesson and testified that a normal M&P would not be stamped with "Detroit PD". He believed the firearm was manufactured for a specific purpose, although it was possible that the stamp was added after it was manufactured. In

⁴ *Exhibit 17: Admissions of Fact*, Appeal Book, Vol. VI, pp. 1520-1525; *Evidence of Jitta*, Vol. 4, 69/30-102/15, 105/1-114/30; *Evidence of Parasram*, Vol. 4, 116/15-150/30; *Exhibits 54: Hertz Rental*, Appeal Book, Vol VI, p. 1594-1608.

⁵ *Evidence of S. Randell*, Vol. 11, 72/10-81/30, 84/20-96/10.

cross-examination, he agreed that although the Smith & Wesson gun is labelled ‘Military & Police’, one does not need to be a member of the military or police in order to purchase that gun.⁶

2. The Intercepted Communications

13. The jury was played recordings of wiretaps. The majority of the intercepted conversations included Somali and Jamaican Patois. Mahamad Osman and Kurt Eccleston, civilian employees of the Toronto Police Service hired to translate Somali and Patois, respectively, both of whom were involved in the production of transcripts for the jury, gave opinion evidence on their translations.⁷

14. No voice identification evidence was led. The Crown alleged the identities of the parties to these calls based on the names and nicknames that the voices used to refer to themselves and to each other. On three calls to TD Credit and BMO placed from the phone number (647) 832-8535, a male identified himself as Ahmed Abdullahi. On March 31 and April 21, 2013, a male called Hertz Rent-a-Car, identified himself as Ahmed Abdullahi, and reported that a white car he had rented had been stolen, with his wallet still in the car. The second of these calls was placed from (647) 303-0974. That day, on another call from that number, the user told a friend, who referred to him as ‘Abdullahi’, that this was his new phone number. The Crown alleged that this voice could be heard in other intercepted calls – including at the phone number (226) 246-1231 associated with the seized Huawei phone and at (647) 303-0974 – in which he was referred to as ‘H’ and ‘HNI’.⁸

⁶ *Evidence of D. Pursel*, Vol. 3, 86/10-103/20; *Evidence of Det. G. Hoffman*, Vol. 20, 72/75-30. *Exhibit 17: Admissions of Fact*, Appeal Book, Vol. VI, pp. 1520-1525.

⁷ These translated wiretap transcripts were compiled in two binders – A and B – for the jury to follow along with the audio recordings and, if they accepted the expert opinion evidence of the translators, to rely on the translations. The binders went with the jurors during deliberations but were, by oversight, not filed as exhibits. Their contents have been re-assembled and are included in the Appeal Books; *Evidence of M. Osman*, Vol. 16, 14/1-103/15; *Evidence of K. Eccleston*, Vol. 85/1-149/30.

⁸ *Intercepts: Sessions 1, 452, 527, 9260, 77 & 116*, Appeal Book, Vol. I, pp. 1-85. *Intercepts: Sessions 1970, 7505, 4207, 16, 16192*, Appeal Book, Vol. I, pp. 86-151.

15. The key intercepts in the Crown’s case against the Appellant were:

- On March 28, 2013, a man alleged to be Ayanle ‘Trap’ Omar told an unknown woman that a friend of his was dead, that people were calling him who “all want guns”, and that he intended to bring “at least five guns to the Dot right now for the men.”⁹
- On March 29, 2013, at 12:16 p.m., a man alleged to be the Appellant, using the phone (226) 246-1231, called a man alleged to be Abdulkadir ‘Illa’ Bihi and told him that he planned to bring “five stories” to the neighbourhood – four for himself and “an extra one”.¹⁰
- On March 30, 2013, at 12:52 p.m., a man alleged to be Ayanle Omar called (226) 246-1231 and told a man alleged to be the Appellant to “give [him] money” and that Omar would “bring it” to the bus stop after “the girls” go “get the things out of the house.”¹¹
- On March 31, 2013 at 5:27 a.m., a man alleged to be Daud Hussein called (647) 832-8535 and told a man alleged to be the Appellant, “I think I have somebody for you to go with” named Hannah.¹²
- On March 31, 2013, at 5:39 a.m., there was a conversation between a man alleged to be Ayanle ‘Trap’ Omar and a woman alleged to be Hanna Hassan. Hassan told Omar that Lionel (allegedly Daud Hussein’s nickname) wanted her to go to Windsor, but thought that she was “too expensive”. A voice alleged to be Hussein then told Omar that he knew someone who would do so for less money. Hassan then spoke privately to Omar, who told her that he had two guns but that Lionel and HNIC “don’t want to help me.” Hassan confirmed that they had told her “Trap is too hot. We can’t deal with him.” Omar wanted Hassan to come visit him. She indicated that ‘H’ and Lionel would only bring her if she agreed to transport guns for them. Omar told Hassan “Fuck them” and “Fuck HNIC” for being unwilling to transport Omar’s guns. Omar claimed ‘HNIC’ would go to Windsor even if Hassan did not agree to transport HNIC and Lionel’s guns, and suggested she travel with HNIC but, upon arrival, “just ditch him”, and transport Omar’s guns to Toronto

⁹ *Intercept: Session 3357*, Appeal Book, Vol. II, pp. 298-320.

¹⁰ *Intercept: Session 7505*, Appeal Book, Vol. III, pp. 647-660.

¹¹ *Intercept: Session 3845*, Appeal Book, Vol. III, pp. 689-692.

¹² *Intercept: Session 1092*, Appeal Book, Vol. III, pp. 693-695.

instead. Omar then told Hussein, “Do you want to bring my girl to bring guns for you? That’s not happening bro.” Hussein replied, “I could care less. I don’t want to see you.”¹³

- At 6:30 a.m. on March 31, 2013, a man alleged to be Hussein called (647) 832-8535 and told a man alleged to be the Appellant that they would “have to stick with Batman.” The Crown alleged that ‘Batman’ referred to a woman named Khadra Omar.¹⁴
- At 4:40 p.m. on March 31, at the time of the car chase, a man alleged to be the Appellant placed a call from (647) 832-8535 and told a man that he believed he was being followed and someone said, “Did the cruiser make a U?”. At 4:45 p.m., in a follow-up phone call, he said that he was at the “fortieth”, which the Crown alleged referred to 340 Dixon.¹⁵
- At 4:59 p.m., a call was placed from Siyadin Abdi’s phone, on which two men alleged to be the Appellant and Hussein discussed the whereabouts of a blue bag and a black bag, and whether “the girl” had one of them.¹⁶
- At 5:02 p.m. on March 31, 2013, a man alleged to be Siyadin Abdi placed a call to a man alleged to be Mohamed Siad and told him about “what happened in the hood” that day: that “Head and Big L” “bought some shit” from “the Dub” but realized that they had been followed, ran, and “gave a girl the things.” Abdi told Siad that “the girl is missing right now” and that “[s]he has like five of them on her.” Abdi said people were “looking for H.N.I.C.’s car”. An unknown man said “I found her” and Abdi said “Send her to my house.”¹⁷
- At 5:49 p.m., there was a conversation between men alleged to be the Appellant, Abdi and Hussein, in which Abdi told the Appellant that the girl was with him and Hussein and that she said “she put [the stuff] somewhere”. The voice alleged to be the Appellant indicated that “they” have his car and his ID and contemplated whether his phone was tapped.¹⁸
- On April 1, 2013, at 1:27 p.m., a man alleged to be the Appellant told a man alleged to be Ayanle Omar, who called him ‘HNI’, that he thought “the stories was bugged or my phone was tapped”, that he lost “three to police and two to the hood.” He said that “We came there

¹³ *Intercept: Session 4048*, Appeal Book, Vol. III, pp. 696-738.

¹⁴ *Intercept: Session 1094*, Appeal Book, Vol. III, pp. 736-738.

¹⁵ *Intercepts: Session 1292 & 1294*, Appeal Book, Vol. III, 741-748.

¹⁶ *Intercept: Session 2049*, Appeal Book, Vol. III, pp. 753-756.

¹⁷ *Intercept: Session 2051*, Appeal Book, Vol. III, pp. 760-766.

¹⁸ *Intercept: Session 9268*, Appeal Book, Vol. III, pp. 780-787.

with a girl trying to put her on the bus but there was no bus. It was a holiday yesterday.” He said to Omar, “guess what was written on [one of the stories]? [...] It was the city that you and the kid got turned back from. The police is written on it.” He then described the pursuit by police, driving through the basement door and fleeing the scene.¹⁹

- On April 1, 2013 at 1:49 p.m., the man alleged to be the Appellant again described the pursuit and the loss of the guns to Ayanle Omar and Ahmed Farah.²⁰
- On April 23, 2013, a man alleged to be the Appellant placed a call from (647) 303-0974 and told an unknown male about being followed by police, including one in a Venzo, about his concerns “let[ting] this girl loose in the city with five girls”, about fleeing police in “the white car”, breaking the wall of the parking garage, and reporting the car as stolen.²¹
- On May 1, 2013, there was a conversation between a man alleged to be the Appellant and a woman alleged to be Omer, about where she put “the stuff” in which she indicated that she “took two out” of the car and that ‘Lionel’ took them, sold them, and took the money.²²

3. Evidence Relating to Charges Against the Co-Accused, Naimo Warsame

16. The Crown led evidence that the Appellant’s co-accused Naimo Warsame transported a firearm from Windsor to Toronto on April 9, 2013 for Mohamed Siad and Siyadin Abdi. The Crown led numerous intercepted conversations allegedly between Warsame, Siad and Abdi, both arranging for her to travel to Windsor with Abdi and as she took the bus back to Toronto, as well as a video of a bar in which Abdi purchased a firearm from Lamar Porter. Warsame was charged with possession in relation to guns found in her bedroom at 370 Dixon Road, Apartment 1507 on April 25, 2013, only one of which related to this trafficking. Warsame was also charged with participation in the activities of a criminal organization.²³

¹⁹ *Intercept: Session 4207*, Appeal Book, Vol. III, pp. 808-823.

²⁰ *Intercept: Session 4214*, Appeal Book, Vol. III, pp. 824-838.

²¹ *Intercept: Session 116*, Appeal Book, Vol. III, pp. 926-958.

²² *Intercept: Session 323*, Appeal Book, Vol. III, pp. 959-980.

²³ *Intercepts*, Appeal Book, Vol. IV, pp. 981-1272; *Evidence of P. Plunkett*, Vol. 19, 105/1-124/30; Vol. 20, 6/10-48/30.

4. The Gang Expert

17. Det. Steven Kerr was qualified as an expert to give opinion evidence on the nature, culture, customs, characteristics, identifiers, geographic areas, symbols, terminology, behaviour and activities of street gangs in Toronto. Kerr testified that Toronto has many urban street gangs, which are “generally involved in drug trafficking, firearm trafficking, robberies, thefts, sexual assaults, theft from autos, and frauds.” Although Canadian street gangs do not take direction from the Bloods or Crips in the United States, many “symbolically identify” with those names. He testified that there had been an increase in gang violence across Canada with “[a] lot of our Somalian community in particular”, although Somali gangs can also fall under the umbrella categories of Bloods and Crips. Under these umbrellas, street gangs typically operate within a specific bounded area or neighbourhood, and identify strongly with it – “which would be their hood or their turf” – be it where they grew up, went to school, or live. These gangs will often name themselves after an area, park, or building, and demarcate their “turf” with graffiti of its name. Kerr had never encountered a gang without a name. Kerr testified that their “turf” is where gang members “feel safe”, and “conduct their illegal business”, since members are familiar enough with the area to “have known escape routes”, friends to act as lookouts, and “places that they know where they can stash and hide firearms”. Girlfriends or women may be used by gang members to hold or transport contraband because police are less likely to focus on women. Members of the same gang may have disagreements or conflicts with one another, but will protect each other from police or interference with their illicit activity. He opined that “a turf is essential to the operation of their business” and provides a benefit to the gang members in the community.²⁴

18. Det. Kerr testified that gangs often used coded and covert language, as well as street slang. He testified that much of this terminology is “generally the same” and common to street gangs across the GTA. For example, he testified that “the hood” is gang language referring to the neighbourhood or territory in which the gang commits its illegal activity. Terms like “my boys”, “my youths”, “my group”, “homies”, “mandem” and “road dogs” refer to other members of one’s gang, as does “my crew”, “my circle”, “fam”, and “family”. He further explained that gangs

²⁴ *Evidence of Det. S. Kerr*, Vol. 19, 3/5-14/20, 34/20-35/5, 39/15-20, 40/5-30, 45/15-30, 60/10-63/30, 101/5-30.

operating in particular ethnic communities can also use their mother tongue as coded or covert language. In cross-examination, Kerr agreed that many of the words that he asserted were used by gang members are not unique to gang members, but also commonly used by members of urban and inner city communities, as well as people who are not poor but “identify with urban culture”.²⁵

19. Det. Kerr testified that members of gangs affiliated with the Bloods or the Crips often wear clothing with those gangs’ associated colours – red for Bloods and blue for Crips. For example, a gang member affiliated with the Bloods might wear red clothing, red bandannas, red baseball caps, red shoes, or shoes with red shoelaces. However, recently, to avoid detection, gang members instead wear black or grey clothes with only a little bit of red or blue. Kerr testified that gang members also display hand signs to communicate their affiliation. For example, one Bloods’ hand sign resembles the ‘okay’ hand sign – an index finger and thumb in a circle, with the other three fingers pointing upwards. Gang members also sometimes use tattoos to display their loyalties – a “five-point crown” for the Bloods. These tattoos typically signify membership in, allegiance with, or respect for those groups. In Kerr’s opinion, the more of these signifiers displayed by an individual, the more likely it is that they are a member of a Bloods gang.²⁶

20. Det. Kerr was shown pictures of the Appellant making hand gestures and testified that these were symbolic ‘Blood’ hand signs. Kerr further noted that in one of these pictures, he was wearing a red baseball cap, a black and red scarf and had red laces on his white running shoes. Kerr opined that these were indicia of being in a Bloods gang. In cross-examination, he agreed that the Appellant was wearing blue in some pictures, the colour associated with the Crips. Kerr was also shown a picture of the co-accused Warsame with a man and opined that they were both making Bloods hand signs, and that the man had a five-point crown tattoo. In cross-examination, Kerr agreed that it was necessary to be “very careful” when using certain criteria to label someone a member of a street gang because people commonly pose in pictures making hand signs associated with gangs or wearing certain clothing to “act cool” or seek a sense of belonging. He agreed that

²⁵ *Evidence of Det. S. Kerr*, Vol. 19, 15/15-28/20, 64/25-66/5, 75/5-30, 78/1-30.

²⁶ *Evidence of S. Kerr*, Vol. 19, 40/30-48/20.

wearing red does not necessarily mean someone is a member of the Bloods and that the recent decrease in gang members wearing colours makes identifying gang members more difficult.²⁷

C. The Charge to the Jury on the Definition of ‘Criminal Organization’.

21. At the trial judge’s request, counsel submitted their theories of the case in writing for the pre-charge conference. In those written submissions, counsel for the Appellant clearly indicated that the existence of a criminal organization was a live issue, specifically with respect to the issues of structure and continuity. Trial counsel wrote:

- **R. v. Venneri (2012 SCC 33) – crim org needs some form of structure and a degree of continuity to the group**
- **Where is the structure and continuity to this group that is alleged to be a crim org?**
- You have a number of people on the wires talking about bringing sheekos (stories; which the Crown alleges to be guns) to Toronto from Windsor on Easter Week-end (March 30-31, 2013)
- No organizational structure is ever discussed on the wires
- In fact, this seems like a group of persons that formed randomly for the immediate commission of a single offence which is what the Criminal Code says is not a criminal organization.²⁸ [Emphasis added]

Defence counsel for the Appellant thus clearly took the position that structure and continuity were live issues that needed to be resolved by the jury.

22. In his charge, the trial judge instructed the jury that the existence of a criminal organization was an essential element of the offence of participating in a criminal organization. He explained:

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

²⁷ *Evidence of S. Kerr*, Vol. 19, 79/20-92/30; *Exhibits 133, 134, 135, 138, 139, 144: Images Extracted from Blackberry*, Appeal Book, Vol. VI, pp. 1729-1741; *Exhibits 158, 161, 165*.

²⁸ *Exhibit M3: L. Dallas Theory of Ahmed Abdullahi*, Appeal Book, Vol. V, p. 1459.

(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.

It is necessary to elaborate upon each of the components of that definition. 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 trial judge's sole mention of either structure or continuity in his charge was when he noted, in his summary of the defence theory, that "[t]he organizational structure of the alleged group was not discussed in any of the conversations." No elaboration or instructions on structure and continuity and their role in assessing the existence of a criminal organization were provided.²⁹

D. The Decision of the Court of Appeal for Ontario, Brown and Trotter JJ.A.

23. Justice Brown, for the majority of the Court of Appeal, held that the trial judge's charge on the definition of criminal organization was not deficient in the context of the trial as a whole. He emphasized that the determination as to whether a group is a 'criminal organization' must take a "flexible approach" and that only "a minimal amount" of structure and continuity will suffice. Justice Brown first held that the charge was not deficient because it contained a review of some evidence that was relevant to the issues of structure and continuity. Det. Cst. Kerr had given expert evidence about urban street gangs and indicia of gang membership such as customs, culture, slang terminology, clothing, and so forth. Justice Brown emphasized that, in his review of the evidence, the trial judge related Det. Kerr's testimony about such indicia to photographs of the Appellant and portions of intercepted phone calls, such that the jury would have understood how to determine whether a criminal organization existed.³⁰

²⁹ *Charge to the Jury*, Vol. 26, 149/1-10, 201/25-202/15.

³⁰ *R. v. Abdullahi*, 2021 ONCA 82 at paras. 73-74.

24. Justice Brown further held that, in light of the closing submissions, the charge was not inadequate. He noted that the Crown highlighted evidence to prove “the cohesiveness of this gang” and that it was “a continuous enterprise”. Meanwhile, defence counsel explicitly told the jury that “[t]he law tells us that to substantiate a criminal org charge you need some form of structure and a degree of continuity to the group” and suggested that the group alleged by the Crown to be a criminal organization lacked the necessary structure and continuity. In Justice Brown’s view, this indicated that the parties were in agreement that a criminal organization required continuity and either ‘cohesiveness’ or ‘structure’ and that this was communicated to the jury. Justice Brown further held that defence counsel’s failure to object was “indicative of the legal adequacy” of the charge on the definition of criminal organization.³¹

E. The Dissenting Opinion of Paciocco J.A.

25. Justice Paciocco, dissenting, held that the trial judge failed to adequately charge the jury on the definition of criminal organization and would have thus set aside the Appellant’s conviction of participating in the activities of a criminal organization. He found that, as a matter of law, a criminal organization must have structure and continuity, that these were live, material issues in the case, and that the absence of structure and continuity was central to the Appellant’s defence on the criminal organization charge. Justice Paciocco found that, despite this, the trial judge did not communicate the requirements of structure or continuity to the jury and that this was non-direction amounting to misdirection.³²

26. Justice Paciocco rejected the suggestion that, in the circumstances of this specific case, the evidence at trial supported the sufficiency of the charge. He agreed with the majority that some of Det. Kerr’s ‘gang expert’ testimony, and its potential application to the intercepted phone calls and photographs of the Appellant, could be relevant to the issues of structure and continuity. However, he found that the existence of evidence relevant to these issues did not render the jury charge sufficient. Indeed, this only emphasized that the jury needed to be adequately equipped to assess this evidence – which required the jury to understand that structure and continuity were essential

³¹ *R. v. Abdullahi*, 2021 ONCA 82 at paras. 75-81.

³² *R. v. Abdullahi*, 2021 ONCA 82 at paras. 119-137.

elements of the definition of ‘criminal organization’, without which they could not convict the Appellant of participating in the activities of a criminal organization.³³

27. Justice Paciocco also rejected the suggestion that the otherwise inadequate jury charge in this case was rendered sufficient by the context of the parties’ closing submissions. He noted that, in addition to defence counsel’s written pre-charge submissions indicating that structure and continuity were live issues, closing submissions by defence counsel indicated that structure and continuity were live issues and requirements for the existence of a criminal organization. However, defence counsel’s submissions did not ameliorate the trial judge’s non-direction. Defence counsel explicitly stated that the law required the jury to find structure and continuity, but Crown counsel did not. Crown counsel simply suggested in her closing address that certain evidence supported findings that the group had “cohesiveness” or that it was “a continuous enterprise”, but did not articulate these as necessary requirements for finding that a criminal organization existed. Justice Paciocco found that the jury would have, as instructed, taken the law from the trial judge and not from counsel – particularly since counsel did not articulate the same legal requirements. The trial judge’s non-direction on the essential elements of structure and continuity thus could not have been rendered adequate by the closing submissions. Nor was there any tactical reason for defence counsel to have failed to object such that the trial judge’s non-direction on key elements of a live issue should be overlooked.³⁴

PART II – STATEMENT OF QUESTIONS IN ISSUE

- (1) What constitutes adequate instruction on the definition of ‘criminal organization’ with respect to the elements of structure and continuity?

³³ *R. v. Abdullahi*, 2021 ONCA 82, at paras.138-142.

³⁴ *R. v. Abdullahi*, 2021 ONCA 82, at paras. 143-157.

PART III – STATEMENT OF ARGUMENT

28. The Appellant submits that structure and continuity are critical features of a criminal organization for the purpose of offences under the regime set out beginning at s. 467.1 of the *Criminal Code*. These are not incidental issues with respect to such offences, nor are they simply concepts that may provide guidance to the jury. Structure and continuity are essential elements of the definition which must be present, as a matter of law, in order for the jury to find the existence of a criminal organization – itself a necessary precondition to convicting the Appellant of participating in the activities of a criminal organization. The majority of the Court of Appeal erred by relying on the flexible nature of criminal organizations to effectively treat structure and continuity as interpretive guidelines that could be adequately communicated to the jury via the existence of relevant evidence and the closing submissions of defence counsel, without any instruction from the trial judge. This was not a case of an imperfect but adequate jury charge. It was a case of complete non-direction on a central element of the offence that was a live issue for the jury to determine.

29. The ‘criminal organization’ offences are an exceptional legislative regime designed to target a particular form of crime that is considered to pose an elevated threat to society. In s. 467.1 of the *Criminal Code*, ‘criminal organization’ is defined as follows:

“criminal organization” means 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.³⁵

Neither structure nor continuity are explicitly included as part of this statutory definition.

³⁵ *Criminal Code*, s. 467.1 (1)

30. In *Venneri*, 2012 SCC 33, Fish J. conducted a purposive analysis of these provisions and held that, although the legislative regime was intended to be sufficiently flexible to capture criminal groups that are organized in a variety of different ways, structure and continuity are necessary attributes of a criminal organization. He explained that:

while the definition must be applied ‘flexibly’, structure and continuity are still important features that differentiate criminal organizations from other groups of offenders who sometimes act in concert: see *R. v. Sharifi*, [2011] O.J. No. 3985 (Ont. S.C.), at paras. 37 and 39; *R. v. Battista*, [2011 ONSC 4771](#). [...]

In this context, flexibility signifies a purposive approach that eschews undue rigidity. That said, by insisting that criminal groups be “organized”, Parliament has made plain that some form of structure and degree of continuity are required to engage the organized crime provisions that are part of the exceptional regime it has established under the *Code*.

Qualifying “organized” in s. 467.1 by “however” cannot, as a matter of language or logic, be taken to signify that no element of organization is required at all. “Organized” necessarily connotes *some form* of structure and co-ordination ...

... Thus, the phrase “*however* organized”. Is meant to capture differently structure criminal organizations. But the group must nonetheless, at least to some degree, be organized. Disregarding the requirement of organization would cast a net broader than that intended by Parliament. [...]

The structured nature of targeted criminal organizations also sets them apart from criminal conspiracies: see *Sharifi*, at para. 39. Stripped of the features of continuity and structure, “organized crime” simply becomes all serious crime committed by a group of three or more persons for a material benefit. Parliament has already criminalized that activity through the offences of conspiracy, aiding and abetting, and the “common intention” provisions of the *Code* (see e.g. ss. 21 and 465(1)). The increased penalties and stigma associated with the organized crime regime distinguish it from these offences.

Fish J. held that the criminal organization provisions are not only intended to capture stereotypical models of organized crime and that a group with “even a minimal degree of organization over a period of time” may meet the definition and pose “an elevated threat to society due to the ongoing and organized association of [its] members”. However, groups “that operate on an *ad hoc* basis with little or no organization cannot be said to pose the type of increased risk contemplated by the regime.”³⁶

³⁶ *R. c. Venneri*, 2012 SCC 33, at paras. 27-36; *R. v. Kwok*, 2015 BCCA 34.

31. Appellate jurisprudence since *Veneri* has repeatedly emphasized the importance of structure and continuity as necessary elements that limit the scope of the ‘criminal organization’ regime to its proper purpose. In *Beauchamp*, the Court of Appeal for Ontario held that there was “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”.³⁷ In *O’Reilly*, Mainville J.A. held that:

To constitute a “criminal organization” a “group” must be composed of “three or more persons” and, even if this is not expressly set out at ss. 467.1(1) have a certain structure and continuity, as provided by the definition in the *Convention*. It is these elements of structure and continuity that distinguish a criminal organization from a simple conspiracy involving three or more persons and thereby avoid attributing an overbroad scope to the *Criminal Code* provisions relating to criminal organizations. [...] The structure and continuity of criminal organizations thus distinguish them from criminal conspiracies.³⁸

In *Cabezas*, Gagnon J.A. characterized the difference between a criminal organization and periodic *ad hoc* cooperation as interdependence rather than simple association:

Comme le rappelle à juste titre la Cour d’appel de l’Ontario dans l’arrêt *Saikaley*, chaque conspiration ne constitue pas nécessairement une organisation criminelle, bien qu’une telle organisation implique dans tous les cas une entente entre plusieurs individus pour réaliser une fin illicite:

The appellant argues, and we agree, that every criminal organization will involve a conspiracy but not every conspiracy is a criminal organization. Assuming that the trial judge was correct in finding the existence of a conspiracy, the appellant submits that there was insufficient evidence of permanence or hierarchy to ground a finding of the existence of a criminal organization.³⁹

Les membres d’une organisation criminelle se distinguent généralement en raison du rôle joué par chacun qui permet d’établir entre eux un lien d’interdépendance plutôt qu’un simple lien d’association à un groupe à la seule fin d’effectuer une

³⁷ *R. v. Beauchamp*, 2015 ONCA 260, at para.153.

³⁸ *R. c. O’Reilly*, 2017 QCCA 1283, at paras. 169-171.

³⁹ *R. v. Saikaley*, 2017 ONCA 374, at para. 118.

transaction criminelle unique et mutuellement avantageuse pour des parties n'ayant entre elles aucun lien de dépendance.

La détermination de l'existence d'une structure et d'une continuité suffisantes nécessite par ailleurs de répondre à la question de savoir si le groupe présente un risque élevé pour la société en raison des liens continus et organisés de ses membres.
[...]

Ce qui distingue essentiellement les deux concepts c'est la nécessité que l'organisation criminelle se caractérise par sa structure et sa continuité.⁴⁰

The Appellant submits that the jurisprudence clearly establishes that structure and continuity are not simply concepts that may provide guidance as to whether a group is a criminal organization or a mere interpretive gloss on the statutory definition. They are essential elements that form the key distinction between the type of 'criminal organization' targeted by the exceptional legislative regime and other forms of illegal group activity. It is therefore vital that the trial judge effectively instruct the jury on these requirements when either structure or continuity are live issues on an alleged criminal organization charge.

32. It is further worth noting that *Veneri* and the associated cases in which appellate guidance was necessary concerning the requirements of structure and continuity were judge-alone trials. The Appellant submits that this highlights the importance of ensuring that the jury is instructed on the requirements of structure and continuity. If trial judges have not always been able to appreciate the requirements of structure and continuity from the phrase "however organized" in the text of the *Criminal Code* definition without guidance from the Supreme Court, a jury lacking in any legal training almost certainly would not appreciate the need to find these essential elements without adequate instruction.

33. The existence of a criminal organization was a contested issue in this case that the jury needed to determine. In particular, the presence or absence of structure and continuity were live and material issues that were central to the Appellant's defence. The Crown alleged that the Appellant was part of an alleged unnamed urban street gang consisting of himself and a number of other friends and acquaintances who lived in his former neighbourhood. However, the Crown did

⁴⁰ *Cabezas c. R.*, 2018 QCCA 1616, at paras. 68-70. 93.

not lead any direct evidence of the existence of a specific street gang, or any evidence from police or alleged gang members about the structure or hierarchy of the alleged criminal organization. Instead, the Crown relied primarily on the ‘gang expert’ testimony of Det. Cst. Kerr, who provided evidence about generic indicia of urban street gangs – including customs, culture, symbols, terminology and so forth. The Crown invited the jury to apply Det. Kerr’s generic indicia of urban street gangs to the large body of intercepted phone calls and certain photographs of the Appellant.

34. The intercepted phone calls – the bulk of which did not include the Appellant as a participant – contained significant evidence that numerous young people of Somali background who lived (or, in the case of the Appellant, had recently lived) in the same neighbourhood and were friendly with one another were engaged in criminal activity, including firearms trafficking. The Crown told the jury that the “most important thing about this gang” was “their neighbourhood” – that the alleged members committed crimes together in the same area. She further argued that evidence that proved the criminal organization count against the Appellant included that:

[A building where some alleged gang members lived was] on his Blackberry along with numerous photos of himself. The photos of himself in terms of his gang culture of – in terms of his being immersed in the gang include photos of him giving the Bloods sign in various locations. You’ll notice on his wrist there is a large – go back one? There’s a large square wrist watch on his left wrist. And in many of the calls he talks about everything’s for sale, I’m about the money, give me the lag. When you – one of the photos that’s on his phone that shows that he’s into this gang lifestyle includes the photo where he has a fistful of money, and you can see that same watch. ... In the photos where he’s wearing all red and making the gang sign, he has the combination of the colours, the gang sign. He’s – Officer Kerr testified that this is, this is a good example right down to the shoelaces being red of somebody representing for the Bloods.⁴¹

and that, when fleeing the police on March 31, he was able to rely on friends in the neighbourhood to help him escape.

35. This evidence was weak and ambiguous on the issues of structure and continuity. The only intercepted communications that proved the Appellant’s involvement in a substantive offence were those related to the March 31 incident. He was not shown to have planned or participated in the

⁴¹ *Crown Closing*, Vol. 24, 82//5-83/10.

offence with which his co-accused was charged, or crimes committed by other members of the alleged criminal organization. There was no indication of any hierarchy or of a leader from whom others took direction.⁴² There was no clear division of labour or consistent roles. Indeed, while the Crown only led evidence of two instances of trafficking, the intercepts contained multiple conversations in which alleged members discussed their involvement in criminal activities, indicating that they often operated independently or in competition with one another for their individual financial benefit, had different sources for purchasing firearms that they did not reveal to each other, and, while friendly, cooperated in illicit activity on a periodic *ad hoc* basis for personal financial benefit. Even the wiretaps related to the March 31 incident for which the Appellant was convicted contained a conversation in which Hanna Hassan and Ayanle Omar allegedly discussed the Appellant's and Hussein's unwillingness to transport Omar's firearms in addition to their own. The existence of more than one incident in which a woman transported or concealed firearms for a man in the hope that she would receive less attention from police did not prove an organizational structure – different people using a similar method to commit crimes is not necessarily evidence that the alleged group were working together on an ongoing, organized basis. The only evidence that the alleged members referred to themselves as a defined group was Kerr's opinion that certain terms could mean 'members of the same gang' – but words such as 'homies', 'boys', 'mandem' and 'crew' are common slang not exclusive to gangs. The use of Somali by alleged members of the organization was similarly ambiguous and unsurprising, given their common ethnic background. The ambiguous indicia of coloured clothing and hand signals that could be associated with Bloods in pictures of the Appellant and Warsame were especially weak evidence, since no substantive evidence was led that the other alleged members of the alleged organization also used these signifiers or that the alleged criminal organization was a 'Bloods'

⁴² At sentencing, the Crown argued that the Appellant's nickname, H.N.I.C., stood for "Head N-word in Charge" and that this was evidence that he was the leader of the criminal organization. However, neither the meaning of this nickname nor the suggestion that it should be taken literally were advanced before the jury. Moreover, while there was evidence that the Appellant planned the March 31 incident for which he was convicted of substantive offences, the Crown did not advance evidence of other instances of him directing the criminal activities of other alleged gang members; Vol, 27, 27/15-30.

gang. It may have been possible for the jury to infer a continuous group based on a shared neighbourhood, loyalty to one's friends, and the commission of similar crimes – or perhaps even in combination with the shared cultural indicia – but the trial judge was required to adequately equip them to assess this evidence. Without any directions instructing the jurors of the need to find structure and continuity, there was a serious risk that they would simply focus on Det. Kerr's indicia of urban street gangs and treat that as dispositive of the issue.

36. The definition of criminal organization must be applied consistently and neutrally across all cases. Without ensuring that the requisite structure and continuity are proven, charges and convictions for criminal organization offences could easily expand beyond the scope of the regime's purpose. This risk is particularly pernicious in the context of allegations connected to actual or perceived 'urban street gangs'. The risk, which arose in this case, is that certain factors often advanced as shared characteristics that may support inferences of membership in a group – communication in a foreign language, clothing style, the use of similar slang, a shared neighbourhood, and other cultural markers in common – are more likely to arise in the context of people charged with offences who are from the same area and cultural milieu, particularly ethnic or racial minorities with shared backgrounds. A jury that is properly instructed on the elements of structure and continuity can consider this type of evidence in the context of the legal requirements for the existence of a criminal organization. A jury that is not directed on these issues may be confronted with evidence that multiple people with a shared ethnic background and cultural context live and socialize in the same neighbourhood and engage in similar types of criminal activities – sometimes together, sometimes separately, sometimes in competition – but find that these people constitute an 'urban street gang' due to generic indicia of gang culture, and then conclude that the Crown has proven the existence of a criminal organization without turning their mind to the core of the definition – whether there was the requisite degree of structure and continuity that justify the increased stigma and enhanced penalties that accompany this exceptional regime.

PART IV – SUBMISSION ON COSTS

37. The Appellant is not seeking costs in this matter.

PART V – ORDER SOUGHT

38. It is respectfully requested that the appeal herein be allowed, the Appellant's conviction quashed, and a new trial ordered on the count of participating in the activities of a criminal organization.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at TORONTO, ONTARIO this 28th day of JULY, 2022.

 for:

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PART VI – SUBMISSIONS ON CONFIDENTIALITY INFORMATION

39. There are no publication bans or sealing orders in effect that would have any impact on the Court's reasons.

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	Paragraph References (to Memorandum)
<i>Cabezas c. R.</i> , 2018 QCCA 1616	31
<i>R. v. Abdullahi</i> , 2021 ONCA 82	23, 24, 25, 26, 27
<i>R. v. Battista</i> , 2011 ONSC 4771	30
<i>R. v. Beauchamp</i> , 2015 ONCA 260	31
<i>R. v. Kwok</i> , 2015 BCCA 34	30
<i>R. c. O'Reilly</i> , 2017 QCCA 1283	31
<i>R. v. Saikaley</i> , 2017 ONCA 374	31
<i>R. c. Venneri</i> , 2012 SCC 33	21, 30, 31, 32
Statutes, Regulations, Legislation:	
<i>Criminal Code</i> , s. 467.1 Code criminel s. 467.1	22, 28, 29

PART VII – STATUTES, REGULATIONS, LEGISLATION