SUPREME COURT OF CANADA

CITATION: R. *v.* Khawaja, 2012 SCC 69

DATE: 20121214
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BETWEEN:

Mohammad Momin Khawaja
Appellant
and
Her Majesty the Queen
Respondent
- and -
Attorney General of Ontario, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and British Columbia Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 132) McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ. concurring)

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R. *v.* KHAWAJA

Mohammad Momin Khawaja *Appellant*

v.

Her Majesty The Queen *Respondent*

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Attorney General of Ontario, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and British Columbia Civil Liberties Association *Interveners*

Indexed as: R. *v.* Khawaja

2012 SCC 69

File No.: 34103.

2012: June 11; 2012: December 14.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Accused convicted of terrorism offences under Part II.1 of Criminal Code — Whether provisions, in purpose or effect, violate right to free expression — Canadian Charter of Rights and Freedoms, s. 2(b); Criminal Code, R.S.C. 1985, c. C-46, s. 83.01(1)(b)(i)(A).

Constitutional law — Charter of Rights — Fundamental justice — Overbreadth — Terrorism offences — Provision criminalizing participation in or contribution to activities of terrorist group — Whether provision broader than necessary to achieve purpose or whether provision's impact disproportionate — Whether provision contrary to principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7; Criminal Code, R.S.C. 1985, c. C-46, s. 83.18.

Criminal law — Appeals — Terrorism offences — Trial fairness — Trial judge finding that clause defining terrorist activity as being for political, religious or ideological purpose unconstitutional — Court of Appeal overturning decision on constitutionality but upholding convictions — Whether Court of Appeal erred in applying curative proviso — Whether convictions unreasonable — Criminal Code, R.S.C. 1985, c. C-46, ss. 83.01(1)(b)(i)(A) and 686(1)(b)(iii).

National security — Terrorism — Sentencing — Totality principle — Accused guilty of terrorism offences sentenced by trial judge to 10 and a half years of imprisonment, with parole eligibility set at 5 years — Court of Appeal substituting sentence of life imprisonment coupled with 24 years of consecutive sentences, with

parole eligibility set at 10 years — Whether Court of Appeal erred in overturning sentence.

After becoming obsessed with Osama Bin Laden and his cause, K communicated with an American who eventually pled guilty to providing material support or resources to Al Qaeda and with the leader of a terrorist cell based in London, England, who was convicted along with several co-conspirators of a plot to bomb targets in the U.K. and elsewhere in Europe. K repeatedly offered them support, provided funds, designed a remote arming device and recruited a woman to facilitate transfers of money. He travelled to Pakistan and attended a small arms training camp, and proposed that a supporter of the terrorist cell be sent to Israel on a suicide mission.

K was charged with seven offences under the Terrorism section of the *Criminal Code* (Part II.1). He brought a preliminary motion seeking a declaration that several provisions are unconstitutional. The motion judge held that s. 83.01(1)(*b*)(i)(A), which provides that a terrorist activity must be an act or omission committed in whole or in part "for a political, religious or ideological purpose, objective or cause" (the "motive clause"), was a *prima facie* infringement of ss. 2(*a*), (*b*) and (*d*) of the *Charter* that could not be justified under s. 1, and accordingly severed the clause from s. 83.01(1). At trial, since two of the offences — wanting to cause an explosion with specified consequences at the behest of a terrorist group and possessing an explosive substance with the intent of enabling a terrorist group to

endanger others — required knowledge of the U.K. group's bomb plot, which the Crown had failed to establish beyond a reasonable doubt, the trial judge found K guilty of lesser included offences (working on the development of a detonator and keeping an explosive substance). He also convicted K on five counts which engage ss. 83.03 (providing or making available property or services for terrorist purposes), 83.18 (participating in or contributing to the activity of a terrorist group), 83.19 (facilitating a terrorist activity) and 83.21 (instructing people to carry out an activity for a terrorist group). The judge sentenced K to 10 and a half years in a penitentiary, gave no credit for time served on the basis that that would be incompatible with a denunciatory sentence, and set parole eligibility at 5 years to reflect the absence of any evidence of remorse, willingness to make amends or commitment to future compliance with Canada's laws and values. The Court of Appeal held that the motive clause was not unconstitutional and should not have been severed, but dismissed the conviction appeal, applying the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*. It dismissed K's appeal from the sentences, but allowed the Crown's cross-appeal and substituted a sentence of life imprisonment on the conviction for building a detonator to cause a deadly explosion. Emphasizing the seriousness of the conduct, it substituted a total of 24 years of consecutive sentences for the remaining counts, to be served concurrently with the life sentence, and set parole eligibility at 10 years instead of 5.

Held: The appeal should be dismissed.

Constitutionality of the Provisions

K challenges the constitutionality of the legislation on the ground that the motive clause would produce a chilling effect on the expression of beliefs and opinions and thus violates s. 2 of the *Charter*. In their companion appeals (*Sriskandarajah v. United States of America*, 2012 SCC 70), S and N also claim that the legislation's purpose violates s. 2 of the *Charter*. They also challenge the constitutionality of s. 83.18 for overbreadth, under s. 7 of the *Charter*. For convenience, all these constitutional claims are considered in this appeal.

Section 83.18 does not violate s. 7 of the *Charter*. A purposive interpretation of the *actus reus* and *mens rea* requirements of s. 83.18 excludes convictions (i) for innocent or socially useful conduct that is undertaken absent any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity, and (ii) conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The legitimate purpose of the Terrorism section of the *Criminal Code* is to provide means by which terrorism may be prosecuted and prevented. This purpose commands a high *mens rea* threshold. To convict under s. 83.18, a judge must be satisfied beyond a reasonable doubt that the accused specifically intended to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity. There may be direct evidence of this intention. Or the intention may be inferred from evidence of the knowledge of the accused and the nature of his actions. The use of

the words "for the purpose of" in s. 83.18 requires a subjective purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity. The accused must specifically intend his actions to have this general effect. Further, the *actus reus* of s. 83.18 does not capture conduct that discloses, at most, a negligible risk of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The scope of the provision excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The determination of whether a reasonable person would view conduct as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity hinges on the nature of the conduct and the relevant circumstances. When the tailored reach of s. 83.18 is weighed against the objective of the law, it cannot be said that the selected means are broader than necessary or that the impact of the section is disproportionate.

The purpose of the law does not infringe freedom of expression. While the activities targeted by the Terrorism section of the *Criminal Code* are in a sense expressive activities, most of the conduct caught by the provisions concerns acts or threats of violence. Threats of violence, like acts of violence, are excluded from the scope of the s. 2(*b*) guarantee. Moreover, the particular nature of the conduct enumerated in ss. 83.01(1)(*b*)(ii)(A), (B), (C) and (D) justifies treating counselling, conspiracy or being an accessory after the fact to that conduct as being intimately connected to violence — and to the danger to Canadian society that such violence represents. As such, the conduct falls outside the protection of s. 2(*b*) of the *Charter*.

However, it is not necessary to decide whether counselling, conspiracy or being an accessory after the fact fall outside the s. 2(*b*) guarantee as a general matter. Read as a whole and purposively, s. 83.01(1)(*b*)(ii)(E), which is directed to acts that intentionally interfere with essential infrastructure without which life may be seriously disrupted and public health threatened, is also confined to the realm of acts and threats of violence. However, it cannot be ruled out that s. 83.01(1)(*b*)(ii)(E) might in some future case be found to capture protected activity. In such a case, the issue would be whether the incursion on free expression is justified under s. 1 of the *Charter*.

In this case, it is impossible to infer, without evidence, that the motive clause (s. 83.01(1)(*b*)(i)(A)) will have a chilling effect on the exercise of s. 2 freedoms. The impugned provision is clearly drafted in a manner respectful of diversity, as it allows for the non-violent expression of political, religious or ideological views (s. 83.01(1.1)).

Application of the Provisions in this Appeal and Sentencing

The re-insertion of the motive clause by the Court of Appeal did not make K's trial and convictions unfair. The trial judge made a specific finding that the motive component of the definition of terrorist activity had been proved beyond a reasonable doubt, which suffices to fully support the motive requirement of the convictions. Also, the evidence of motive, and K's knowledge that the motive was shared by him and the terrorist cell, was overwhelming and essentially undisputed.

There is no air of reality to K's statement that he could have, or would have, testified to raise a reasonable doubt on motive, had the clause not been struck. In essence, no prejudice flowed from the reinsertion of an essential element of the offence on appeal.

The uncontradicted evidence before the trial judge established beyond a reasonable doubt that K's conduct did not fall within the armed conflict exception in s. 83.01(1)(*b*), *in fine*, which provides that terrorist activity does not include acts or omissions committed during an armed conflict in accordance with international law. The Crown bears the burden of proving beyond a reasonable doubt that the acts alleged against an accused fall within the definition of terrorist activity, and any reasonable doubt must be resolved in the accused's favour. However, since the armed conflict exception functions as a defence, the accused must raise it and make a *prima facie* case that it applies. Here K could not do so, as there was no evidential foundation to support its applicability. The trial judge expressly found that K knew that the terrorist group's activities extended beyond the armed conflict in Afghanistan and that he supported the terrorist objectives, and the evidence is overwhelmingly contrary to the proposition that K's acts were part of an armed conflict governed by international law. There is no air of reality to the suggestion that K believed that the group intended to act in compliance with international law, or that he cared if it did.

There is no merit to K's submissions that the convictions are unreasonable. However, the trial judge made critical errors in sentencing. He

effectively devalued the seriousness of the appellant's conduct in a way that was inconsistent with the evidence, and failed to give adequate weight to the ongoing danger K posed to society. While the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis, here the absence of evidence on rehabilitation prospects justified a stiffer sentence than otherwise might have been appropriate. Finally, the heightened gravity of the terrorism offences at issue in this case was sufficient to justify imposition of consecutive sentences running over 20 years, without violating the totality principle. The general principles of sentencing, including the totality principle, apply to terrorism offences.

Cases Cited

Considered: *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; **distinguished:** *R. v. Déry*, 2006 SCC 53, [2006] 2 S.C.R. 669; **referred to:** *Sriskandarajah v. United States of America*, 2012 SCC 70; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *United States of America v. Nadarajah*, 2010 ONCA 857, 109 O.R. (3d) 680; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Ahmad* (2009), 257 C.C.C. (3d) 199; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Greater Vancouver Transportation*

Authority v. Canadian Federation of Students — British Columbia Component, 2009 SCC 31, [2009] 2 S.C.R. 295; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Downey*, 2010 ONSC 1531 (CanLII); *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

Statutes and Regulations Cited

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United Nations. Security Council. U.N. Doc. S/Res/1373, September 28, 2001.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Moldaver and Cronk JJ.A.), 2010 ONCA 862, 103 O.R. (3d) 321, 271 O.A.C. 238, 82 C.R. (6th) 122, 273 C.C.C. (3d) 415, [2010] O.J. No. 5471 (QL), 2010 CarswellOnt 9672, overturning a constitutional ruling by Rutherford J. (2006), 214 C.C.C. (3d) 399, 42 C.R. (6th) 348, 147 C.R.R. (2d) 281, [2006] O.J. No. 4245 (QL), 2006 CarswellOnt 6551, affirming convictions entered by Rutherford J. (2008), 238 C.C.C. (3d) 114, [2008] O.J. No. 4244 (QL), 2008 CarswellOnt 6364, and varying sentences imposed by Rutherford J., (2009) 248 C.C.C. (3d) 233, [2009] O.J. No. 4279 (QL). Appeal dismissed.

Lawrence Greenspon and *Eric Granger*, for the appellant.

Croft Michaelson and *Ian Bell*, for the respondent.

Michael Bernstein, for the intervener the Attorney General of Ontario.

Yan Paquette and *Louis-Philippe Lampron*, for the intervener Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Anil K. Kapoor and *Lindsay L. Daviau*, for the intervener the Canadian Civil Liberties Association.

Kent Roach and *Michael Fenrick*, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The appellant, Mohammad Momin Khawaja, was convicted of five offences under Part II.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, the Terrorism section. He faces a life sentence and a concurrent sentence of 24 years of imprisonment, with a 10-year period of parole ineligibility. He appeals on a variety of grounds, which may be summarized as follows: (1) that the provisions in Part II.1 of the *Criminal Code* under which he was convicted violate the *Canadian Charter of Rights and Freedoms* and are unconstitutional; (2) that the provisions were misapplied or misinterpreted, resulting in an unfair trial or an unreasonable verdict; and (3) that the Ontario Court of Appeal erred in imposing his sentence.

[2] For the reasons that follow, I would reject each of the contentions of the appellant. The issues in this appeal overlap with some of the issues in the companion appeals of Sriskandarajah and Nadarajah (*Sriskandarajah v. United States of America*, 2012 SCC 70). For convenience, I will consider all the constitutional issues in these reasons.

II. The Evidence

[3] The facts underlying the offences were largely undisputed. Voluminous email correspondence attested in graphic detail to the appellant's ideological commitment to violent "*jihad*" and to his acts in Canada and elsewhere to further *jihad*-inspired terrorist activities.

[4] While living with his siblings in Canada, the appellant became obsessed with Osama Bin Laden and his cause. The appellant began communicating with other people committed to violence in the name of Islam, some of whom he referred to as "the bros". He entered into covert email correspondence with Junaid Babar, an American of Pakistani descent who eventually pled guilty in New York City to five counts of providing material support or resources to Al Qaeda. He also communicated extensively with Omar Khyam, the leader of a terrorist cell based in London, England, who was convicted along with several co-conspirators of a plot to bomb targets in the U.K. and elsewhere in Europe.

[5] The appellant repeatedly offered Khyam and Babar support. He gave Khyam money for an explosives operation in the United Kingdom or elsewhere in Europe. He gave Babar cash, supplies and SIM cards so that Babar could contact Khyam when transporting detonators to Europe. He provided funds to support Babar, Khyam and "the bros" in their jihadist efforts. He designed a remote arming device for explosives that he referred to as the "hifidigimonster", and offered to smuggle it into the U.K. and train the U.K. cell on its use. He recruited a woman in Ottawa to facilitate transfers of money. He also offered to procure night goggles for use by the group.

[6] The appellant travelled to Pakistan alone and with Khyam, and attended Babar's small arms training camp. He made his parents' home in Pakistan available to the "bros". He suggested members of the U.K. group travel to Canada for weapons training. He also proposed to Khyam via email that a supporter of the Khyam group be sent to Israel on a suicide mission.

[7] On March 29, 2004, the RCMP arrested the appellant and searched his house in Orleans, Ottawa. They seized the "hifidigimonster", electronic components and devices, parts suitable for constructing more remote arming devices, documents corroborating the assembly process for the device, electronics, instructional literature and tools, military calibre rifles and ammunition, other weapons, hard drives, $10,300 in one-hundred dollar bills, military books and *jihad*-related books. No blasting caps, other detonators or explosives components were discovered.

III. Judicial History

[8] By direct indictment, the appellant was charged with seven offences under the Terrorism section of the *Criminal Code*. The appellant brought a preliminary constitutional motion (allowed in part) and a motion for a directed verdict of acquittal (dismissed). He elected to be tried by judge alone, and was convicted on five counts and found guilty of two included offences.

A. *The Pre-trial Charter Challenge (2006), 214 C.C.C. (3d) 399*

[9] Prior to trial, the appellant sought a declaration that several terrorism provisions of the *Criminal Code* (ss. 83.01(1), 83.03(*a*), 83.18, 83.18(1), 83.18(3)(*a*), 83.19, 83.2 and 83.21(1)) are unconstitutional. The motion judge found that the impugned provisions are neither unconstitutionally vague nor overbroad.

[10] However, the motion judge held that s. 83.01(1)(*b*)(i)(A), which provides that a terrorist activity must be an act or omission committed in whole or in part "for a political, religious or ideological purpose, objective or cause" was a *prima facie* infringement of s. 2(*a*), (*b*) and (*d*) of the *Charter*. He found that the effect of this "motive clause" would be "to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups", which in turn would produce a chilling effect on the expression of beliefs and opinions (para. 58). He found that the infringement could not be justified under s. 1 and accordingly severed the motive clause from s. 83.01(1).

B. *The Trial (2008), 238 C.C.C. (3d) 114*

[11] The trial proceeded on the basis that the motive clause was severed from the legislation. The trial judge found the appellant guilty of seven offences.

[12] The trial judge held that the first two counts (wanting to cause an explosion with specified consequences at the behest of a terrorist group and possessing an explosive substance with the intent of enabling a terrorist group to endanger others) required knowledge of the U.K. group's bomb plot, which the Crown failed to establish beyond a reasonable doubt. Since defence counsel had admitted that there was evidence of lesser included offences, the trial judge found the appellant guilty of working on the development of a detonator contrary to s. 81(1)(*a*) of the *Criminal Code* and keeping an explosive substance contrary to s. 81(1)(*d*). He conditionally stayed proceedings on the latter count, under the *Kienapple* principle (*Kienapple v. The Queen*, [1975] 1 S.C.R. 729). He held that the remaining five counts were not restricted by a requirement that the appellant know the U.K. group was planning a bomb plot. His findings with respect to each count can be summarized as follows:

> Count 3: The appellant participated in a terrorist group by taking weapons training at the camp in northern Pakistan for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity;

Count 4: The appellant deceived a young woman into acting as a conduit to pass funds for the purpose of enhancing the ability of the Khyam group to facilitate or carry out a terrorist activity;

Count 5: The appellant made his parents' residence in Pakistan available for the use of the Khyam group in pursuit of a common objective of violent *jihad*, thereby making property available for the purpose of facilitating a terrorist activity or for the benefit of a terrorist group;

Count 6: Everything the appellant did in relation to developing the remote detonator device amounted to participating in or contributing to the activity of a terrorist group for the purpose of enhancing the group's ability to carry out a terrorist activity; and

Count 7: The appellant knowingly facilitated terrorism by, *inter alia*, transporting money, a medical kit, SIM cards and invisible ink pens to Babar; offering to acquire equipment; suggesting that Khyam and another group member come to Canada for shooting practice; offering a course in electronics; suggesting that a third party be sent on a suicide mission to Israel; discussing putting his computer skills to work to assist "the bros".

[13] The trial judge found that the U.K. cell qualified as a terrorist group within the meaning of the Terrorism section of the *Criminal Code*. On the basis of

judicial notice of facts available, *inter alia*, from documents on the United Nations website, he held that the insurgents' conduct in Afghanistan is terrorist activity, because it results in death and destruction and it is intended to intimidate the Afghan population and diminish support for the legitimate government. Consequently, by preparing for and supporting the insurgency against the coalition forces in Afghanistan, the U.K. cell was facilitating terrorist activity and qualified as a terrorist group. The trial judge held that the appellant "knew he was dealing with a group whose objects and purposes included activity that meets the *Code* definition of terrorist activity" (para. 131).

[14] The trial judge refused to apply the exception for armed conflict in the definition of "terrorist activity" in s. 83.01(1)(*b*), *in fine*. Pursuant to that subsection, terrorist activity does not include acts or omissions committed during an armed conflict in accordance with international law. The trial judge found that neither the appellant nor any member of the U.K. cell was engaged in armed conflict.

C. *The Sentence (2009) 248 C.C.C. (3d) 233*

[15] The trial judge took into account the mitigating personal circumstances raised by the appellant, but noted that there was no information available respecting his attitude or expected future behaviour, because he had refused to be interviewed for a pre-sentence report. The trial judge held that while terrorism sentencing must

emphasize denunciation, deterrence and protection of the public, the potential for rehabilitation could not be overlooked. He refused to order a life sentence similar to those given to the cell members in the U.K. because he was not persuaded that the appellant was a similar offender in similar circumstances, as opposed to just a willing helper and supporter.

[16] The trial judge sentenced the appellant to 10 and a half years in a penitentiary. He gave no credit for time served on the basis that that would be incompatible with a denunciatory sentence. He set parole ineligibility at 5 years to reflect the absence of any evidence of remorse, willingness to make amends or commitment to future compliance with Canada's laws and values.

D. *The Court of Appeal, 2010 ONCA 862, 103 O.R. (3d) 321*

[17] The Court of Appeal dismissed the appellant's conviction appeal. However, the Court of Appeal held that the trial judge had erred in finding the motive clause unconstitutional. It stated that expressive activity that takes the form of violence is not protected by s. 2(*b*) of the *Charter*, since violence is destructive of the very values that underlie the right to freedom of expression. For the same reason, threats of violence are not protected by s. 2(*b*). Thus, the legislation limits a form of expression that is destructive of the principles underlying freedom of expression and, consequently, cannot constitute an infringement of s. 2(*b*). Moreover, the Court of Appeal held that the trial judge's conclusion that the impugned provisions had a chilling effect was founded entirely on speculation, rather than on evidence to the

effect that members of the community actually felt constrained in the expression of their beliefs or opinions.

[18] The Court of Appeal found, as had the trial judge, that the armed conflict exception did not apply to the appellant's conduct. There was no evidence that the appellant or the insurgents in Afghanistan undertook armed conflict *in accordance with international law*. The record showed that the appellant himself viewed the violent *jihad* he was committed to as unlawful. Moreover, the appellant's actions were directed at supporting terrorist activities inside and outside of the forum of conflict in Afghanistan.

[19] The Court of Appeal stated that the trial judge did not err in taking judicial notice of the nature of hostilities in Afghanistan. Further, the verdicts reached by the trial judge were amply supported by the record at trial and were reasonable.

[20] Finally, the Court of Appeal dismissed the appellant's appeal from the sentences, but allowed the Crown's cross-appeal. The Court substituted a sentence of life imprisonment on the conviction for building a detonator to cause a deadly explosion. Emphasizing the seriousness of the conduct, it substituted a total of 24 years of consecutive sentences for the remaining counts, to be served concurrently with the life sentence, and set parole ineligibility at 10 years instead of 5.

IV. The Legislation

[21] The *Anti-Terrorism Act*, S.C. 2001, c. 41, part of which now forms Part II.1 of the *Criminal Code*, was passed in 2001, in the aftermath of the Al Qaeda attacks in the United States and Resolution 1373 of the United Nations Security Council, which called on member states to take steps to prevent and suppress terrorist activity (U.N. Doc. S/Res/1373). The purpose of the legislation is to provide a means by which terrorism may be prosecuted and prevented: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248.

[22] While the immediate impetus for the legislation may have been concern following the terrorist attacks of September 11, 2001, the legislation has a much broader history and context. As the recitals to the U.N. Resolution make clear, these events were part of an unfolding and escalating international problem. Canada, which had experienced the Air India and Narita bombings, was no stranger to this problem. The legislation is not emergency legislation, but a permanent part of the criminal law of this country: *Application under s. 83.28 of the Criminal Code (Re)*, at para. 39.

[23] The appellant says that the definition section of the legislation, s. 83.01(1), offends *Charter* guarantees, notably freedom of religion and freedom of expression. I will at this point describe in general terms the definitions of "terrorist activity" and "terrorist group", and the offences that the provisions create. The full text of the relevant provisions is reproduced in the Appendix.

[24] "Terrorist activity" is defined (i) as an act or omission committed inside or outside Canada that, if committed inside Canada, would constitute one of the

Criminal Code offences enumerated in s. 83.01(1)(*a*), or (ii) as an act or omission, a conspiracy, an attempt or threat to commit any act or omission, counselling an act or omission and being an accessory after the fact to an act or omission, that causes one of the consequences described in s. 83.01(1)(*b*)(ii)(A) to (E). These consequences are: causing death or serious bodily harm to a person by the use of violence (clause (A)); endangering a person's life (clause (B)); causing a serious risk to the health or safety of the public or any segment thereof (clause (C)); causing substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in clauses (A) to (C) (clause (D)): or causing serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C) (clause (E)). However, conduct otherwise captured by s. 83.01(1)(*b*)(ii)(A) to (E) does not constitute "terrorist activity" if it falls within the exception for armed conflict conducted in accordance with international law (s. 83.01(1), *in fine*).

[25] Furthermore, the act or omission that causes one of the consequences enumerated in 83.01(1)(*b*)(ii)(A) to (E) only constitutes "terrorist activity" if it is accompanied by the requisite mental state. The act or omission must be done with the intention of causing one of the enumerated consequences. In addition, the act or omission must be done with the ulterior intention of intimidating the public or a segment of the public as regards its security, or to compel a person, a government or

an organization — whether inside or outside of Canada — to do or refrain from doing any act (s. 83.01(1)(*b*)(i)(B)). Finally, the act or omission must be done in whole or in part for a political, religious or ideological purpose, objective or cause (s. 83.01(1)(*b*)(i)(A)).

[26] "Terrorist group" is defined as a person or group that has as one of its purposes or activities the facilitation or carrying out of any "terrorist activity", or a person or group identified in a regulation adopted under s. 83.05.

[27] Based on these definitions, the legislation goes on to create a number of offences, including:

- Providing or making available property or services for terrorist purposes (s. 83.03) (maximum term of imprisonment of 10 years);

- Participating in or contributing to the activity of a terrorist group (s. 83.18) (maximum term of imprisonment of 10 years);

- Facilitating a terrorist activity (s. 83.19) (maximum term of imprisonment of 14 years);

- Instructing people to carry out an activity for a terrorist group (s. 83.21) (liable to imprisonment for life).

[28] The counts on which the appellant was convicted variously engage all of these offences.

[29] The terrorism offences attract specific sentencing provisions. Pursuant to s. 83.26, sentences for terrorism offences must be served consecutively. Further, s. 718.2 provides that the commission of a terrorism offence is to be considered an aggravating factor for the purposes of sentencing. Finally, I set out the provisions of the *Charter* relevant to the appeal. The overbreadth argument advanced in the companion appeals is grounded in s. 7 of the *Charter*:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[30] The appellant in this appeal bases his argument that the provisions are unconstitutional on s. 2 of the *Charter*:

> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (*c*) freedom of peaceful assembly; and
>
> (*d*) freedom of association.

[31] Breaches of *Charter* guarantees can be justified under s. 1, which provides:

> **1.** The *Canadian Charter or Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

V. Issues

[32] A. *Constitutionality of the Provisions*

1. Does Section 83.18 of the *Criminal Code* Violate Section 7 of the *Charter*?
   - (a) *The Test for Overbreadth*
   - (b) *The Scope of the Law*
   - (c) *The Objective of the Law*
   - (d) *Are the Impugned Provisions Broader than Necessary or is their Impact Disproportionate?*

2. Does the Law, Specifically the Motive Clause, Infringe Section 2 of the *Charter*?
   - (a) *Unconstitutional Purpose*
   - (b) *Unconstitutional Effect*

3. Conclusion on the Constitutionality of the Provisions

B. *Application of the Provisions*

1. Did the Deletion and Subsequent Re-insertion of the Motive Clause Make the Trial and Convictions Unfair?

2. Does the Armed Conflict Exception Apply?

3. Were the Verdicts Unreasonable?

C. *Did the Court of Appeal Err in Overturning the Sentence Imposed by the Trial Judge and Substituting a Term of Life Imprisonment?*

[33] The appellant challenges the constitutionality of the legislation only on one ground: that its chilling effect violates s. 2 of the *Charter*. The appellants in the companion appeals also allege a violation of s. 2 of the *Charter*, and additionally challenge the constitutionality of s. 83.18 for overbreadth pursuant to s. 7 of the *Charter*.

VI. Analysis

A. *Constitutionality of the Provisions*

1. Does s. 83.18 of the *Criminal Code* Violate Section 7 of the *Charter*?

[34] The appellant challenged the provisions under which he was charged as unconstitutional for vagueness and overbreadth on a pre-trial constitutional motion. The trial judge rejected this submission and the appellant does not pursue it before this Court. However, s. 83.18 of the *Criminal Code* is challenged for overbreadth in the companion appeals. Since all three cases depend on the ultimate constitutionality of the legislation, I propose to consider all the constitutional arguments, including overbreadth, in these reasons.

[35] It is a principle of fundamental justice that criminal laws not be overbroad. Pursuant to s. 7 of the *Charter*, laws that restrict the liberty of those to whom they apply must do so in accordance with principles of fundamental justice. Criminal laws that restrict liberty more than is necessary to accomplish their goal violate principles of fundamental justice. Such laws are overbroad. The appellants Nadarajah and Sriskandarajah say that the combined effect of the definition of terrorist activity (s. 83.01(1)) and of the provision prohibiting participation in terrorist activity (s. 83.18) results in overbreadth, by criminalizing conduct that creates no risk of harm and is only tenuously connected to Parliament's objective of preventing terrorist activity.

[36] I will first review the legal test for overbreadth. I will then apply this test to the definition of terrorist activity and the prohibition of participation in terrorist activity.

(a) *The Test for Overbreadth*

[37] In *R. v. Heywood*, [1994] 3 S.C.R. 761, this Court explained that a law is overbroad if the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective. In determining overbreadth, a measure of deference must be paid to the means selected by the legislator.

[38] The appellants argue that the law is overbroad because it is grossly disproportionate to the objective it seeks to achieve. The appellants conflate

overbreadth and gross disproportionality. *Heywood* suggested that gross disproportionality was a concept subsumed by overbreadth: "The effect of overbreadth is that in some applications the law is arbitrary or disproportionate" (*Heywood*, at p. 793). However, gross disproportionality seemed to be recognized as a distinct breach of principles of fundamental justice in the marihuana case *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571. Some confusion arises from the fact that *Malmo-Levine*'s companion case *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, could be read as suggesting that gross disproportionality is simply the standard by which overbreadth is measured. Indeed, this Court wrote in *Clay* that "[o]verbreadth ... addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is *grossly* disproportionate to the state interest the legislation seeks to protect" (para. 38 (emphasis in original)).

[39] The authorities continue to suggest that overbreath and gross disproportionality are – at least analytically – distinct. Indeed, Professor Hogg refers to gross disproportionality as the "sister" doctrine of overbreadth (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 47-58). Further, in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, this Court considered overbreadth and gross disproportionality under separate headings (paras. 133-35).

[40] For the purposes of this appeal, I need not decide whether overbreath and gross disproportionality are distinct constitutional doctrines. Certainly, these concepts are interrelated, although they may simply offer different lenses through which to consider a single breach of the principles of fundamental justice. Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are "so extreme as to be disproportionate to any legitimate government interest": *Canada (Attorney General) v. PHS Community Services Society*, at para. 133 (emphasis deleted); see also *Malmo-Levine*, at para. 143. In order to address the appellants' s. 7 constitutional challenge, I will: (1) examine the scope of the law; (2) determine the objective of the law; and (3) ask whether the means selected by the law are broader than necessary to achieve the state objective and whether the impact of the law is grossly disproportionate to that objective. Thus, I will examine both overbreadth and gross disproportionality in a single step, without however deciding whether they are distinct constitutional doctrines.

(b) *The Scope of the Law*

[41] Section 83.18(1) criminalizes participation in or contributions to the activities of a terrorist group. It requires for conviction that the accused (a) knowingly (b) participate in or contribute to, (c) directly or indirectly, (d) any activity of a terrorist group, (e) for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity. Subsection (2) specifies that, in order to

secure a conviction, the Crown does not have to prove that (a) the terrorist group actually facilitated or carried out a terrorist activity, that (b) the accused's acts actually enhanced the ability of a terrorist group to do so, or that (c) the accused knew the specific nature of any terrorist activity facilitated or carried out by a terrorist group. As the Ontario Court of Appeal found in *United States of America v. Nadarajah*, 2010 ONCA 857, 109 O.R. (3d) 680:

> s. 83.18 applies to persons who, by their acts, contribute to or participate in what they know to be the activities of what they know to be a terrorist group. In addition, those acts must be done for the specific purpose of enhancing the ability of that terrorist group to facilitate or carry out activity that falls within the definition of terrorist activity. [para. 28]

[42] The appellants argue that s. 83.18 is overbroad because it captures conduct that does not contribute materially to the creation of a risk of terrorism, such as direct and indirect participation in legitimate, innocent and charitable activities carried out by a terrorist group. They contend that, "[i]n the absence of some explicit dissociation from the group's terrorist ideology, participating in <u>any activity</u> of the group could be viewed as intending to enhance the group's abilities to carry out terrorist activities" (Nadarajah factum, at para. 35 (emphasis added)). Thus, innocent individuals, who may or may not sympathize with the cause of a terrorist group, could be convicted under s. 83.18 purely on the basis of attending a visibility-enhancing event held by the charitable arm of a group that also engages in terrorist activity. Professor Roach has opined that even lawyers and doctors who legitimately provide their professional services to a known terrorist could be convicted under s. 83.18: see

K. Roach, "The New Terrorism Offences and the Criminal Law", in R. J. Daniels, P. Macklem and K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), 151, at p. 161. According to the appellants, these scenarios demonstrate that the law is overbroad.

[43] The first step in assessing the validity of this argument is to interpret s. 83.18 to determine its true scope: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, *per* Lamer C.J., at para. 10.

[44] The Terrorism section of the *Criminal Code*, like any statutory provision, must be interpreted with regard to its legislative purpose. That purpose is "to provide means by which terrorism may be prosecuted and prevented" (*Application under s. 83.28 of the Criminal Code (Re)*, at para. 39) — *not* to punish individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity.

[45] This purpose commands a high *mens rea* threshold. To be convicted, an individual must not only participate in or contribute to a terrorist activity "*knowingly*"; his or her actions must also be undertaken "*for the purpose*" of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The use of the words "for the purpose of" in s. 83.18 may be interpreted as requiring a "higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity": K. Roach, "Terrorism Offences and the Charter: A Comment on R. v. Khawaja" (2007), 11 *Can. Crim. L. R.* 271, at p. 285.

[46] To have the *subjective* purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, the accused must *specifically intend* his actions to have this general effect. The specific nature of the terrorist activity, for example the death of a person from a bombing, need not be intended (s. 83.18(2)(*c*)); all that need be intended is that his action will enhance the ability of the terrorist group to carry out or facilitate a terrorist activity.

[47] The effect of this heightened *mens rea* is to exempt those who may unwittingly assist terrorists or who do so for a valid reason. Social and professional contact with terrorists — for example, such as occurs in normal interactions with friends and family members — will not, absent the specific intent to enhance the abilities of a terrorist group, permit a conviction under s. 83.18. The provision requires subjective fault, as opposed to mere negligent failure to take reasonable steps to avoid unwittingly assisting terrorists: see K. Roach, "Terrorism Offences and the Charter: A Comment on *R. v. Khawaja*", at p. 285. For example, a lawyer who represents a known terrorist may know that, if successful at trial, his client will thereafter pursue his contributions to terrorism. However, the lawyer could only be convicted under s. 83.18 if his intent was specifically to enable the client to pursue further terrorist activities, as opposed to simply affording his client a full defence at law.

[48] To convict under s. 83.18, the judge must be satisfied beyond a reasonable doubt that the accused intended to enhance the ability of a terrorist group

to facilitate or carry out a terrorist activity. There may be direct evidence of this intention. Or the intention may be inferred from evidence of the knowledge of the accused and the nature of his actions.

[49] The appellants argue that, even if the scope of s. 83.18 is narrowed by the high *mens rea* requirement, it is still overbroad because it captures conduct that, while perhaps animated by the intent to enhance the abilities of a terrorist group, is essentially harmless. For example, a person who marches in a non-violent rally held by the charitable arm of a terrorist group, with the specific intention of lending credibility to the group and thereby enhancing the group's ability to carry out terrorist activities, is not necessarily contributing to terrorism in any meaningful way. Yet, on the basis of the plain meaning of s. 83.18, that person could be convicted for participating in terrorism.

[50] This argument relies on an incorrect interpretation of s. 83.18. The *actus reus* of s. 83.18 does not capture conduct that discloses, at most, a negligible risk of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. Although s. 83.18(1) punishes an individual who "participates in or contributes to ... <u>any activity</u> of a terrorist group", the context makes clear that Parliament did not intend for the provision to capture conduct that creates no risk or a negligible risk of harm. Indeed, the offence carries with it a sentence e of up to ten years of imprisonment and significant stigma. This provision is meant to criminalize conduct that presents a real risk for Canadian society.

[51] A purposive and contextual reading of the provision confines "participat[ion] in" and "contribut[ion] to" a terrorist activity to conduct that creates a risk of harm that rises beyond a *de minimis* threshold. While nearly every interaction with a terrorist group carries some risk of indirectly enhancing the abilities of the group, the scope of s. 83.18 excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group *to facilitate or carry out a terrorist activity*.

[52] The determination of whether a reasonable person would view conduct as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity hinges on the nature of the conduct and the relevant circumstances. For example, the conduct of a restaurant owner who cooks a single meal for a known terrorist is not of a nature to materially enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity: K. E. Davis, "Cutting off the Flow of Funds to Terrorists: Whose Funds? Which Funds? Who Decides?", in R. J. Daniels, P. Macklem and K. Roach, eds., 299, at p. 301. By contrast, giving flight lessons to a known terrorist is clearly conduct of a nature to materially enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity: *House of Commons Debates*, vol. 137, No. 95, 1st Sess., 37th Parl., October 16, 2001, at p. 6165 (Hon. Anne McLellan).

[53] I conclude that a purposive interpretation of the *actus reus* and *mens rea* requirements of s. 83.18 excludes convictions (i) for innocent or socially useful

conduct that is undertaken absent any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity, and (ii) conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity.

[54] Having determined that the scope of the law is narrower than was argued by the appellants, I turn to the second step of the analysis, the objective of the law.

(c) *The Objective of the Law*

[55] The parties agree that the objective of the terrorism provisions is to prosecute *and prevent* terrorism. The need to prosecute acts that support or assist terrorist activity that may never materialize into acts of terrorism flows from the great harm resulting from terrorism offences, the Crown contends. The appellants agree that it is legitimate for the state to prevent terrorist acts from taking place.

(d) *Are the Impugned Provisions Broader than Necessary or is Their Impact Disproportionate?*

[56] Finally, I must ask whether the impugned provisions are broader than necessary to prevent and prosecute terrorism, or have an impact that is grossly disproportionate to that objective.

[57] The appellants argue that, in relation to its objective, s. 83.18 is broader than necessary and has a grossly disproportionate impact because it criminalizes acts: (1) which do not disclose a risk of harm; (2) which are not connected to a real or contemplated terrorist act; and (3) which are preliminary to the commission of an inchoate offence. The first two arguments are answered by the limited scope of s. 83.18. As we have seen, conviction under s. 83.18 entails: (1) an *actus reus* that excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity, and (2) a high *mens rea* (specific intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity). The Crown must prove both these elements beyond a reasonable doubt. Conduct that meets both these requirements discloses a non-negligible risk of harm and is sufficiently connected to real or contemplated terrorist activity.

[58] As stated above, the appellants' third argument is that the impact of s. 83.18 is grossly disproportionate to Parliament's objective of curbing terrorism because it criminalizes acts that are preliminary to the commission of an inchoate offence. The appellants agree that stopping a terrorist act before it takes place is a legitimate legislative objective. However, they argue that the existing crimes of conspiracy and attempt are sufficient to achieve this objective, and that it is unnecessary and disproportionate to reach back further and criminalize activity that is preliminary or ancillary to those preparatory acts.

[59] The appellants rely on this Court's statement in *R. v. Déry*, 2006 SCC 53, [2006] 2 S.C.R. 669, *per* Fish J., that criminal liability does not attach "to fruitless discussions in contemplation of a substantive crime that is never committed, nor even attempted, by any of the parties to the discussions" (para. 37). They argue that s. 83.18 goes even further and criminalizes "indirect and fruitless contributions to non-terrorist activities where the intention is to enhance the ability of a group to commit such preliminary acts as conspiring or counselling, even where no terrorist act is facilitated or carried out and the accused is unaware of the specific nature of the act contemplated" (Nadarajah factum, at para. 43).

[60] In my opinion, *Déry* does not assist the appellants. First, *Déry* was concerned with interpretation, not constitutional boundaries. Indeed, the reasons contemplate that Parliament could, if it wished, create an offence of attempted conspiracy: "Recognition of attempted conspiracy as a crime might well capture cases of feigned agreement, but this sort of change in the law is best left to Parliament" (para. 36).

[61] Second, the reason given in *Déry* for not punishing acts preceding the commission of an inchoate offence is that such acts would not be sufficiently proximate to a substantive offence and the harmful conduct that it seeks to address (see *Déry*, at paras. 43-46). Here, there is no problem of remoteness from a substantive offence because Parliament has defined the substantive offence, not as a

terrorist act, but as acting in ways that enhance the ability of a terrorist group to carry out a terrorist activity.

[62] I return to the central question: is s. 83.18 broader than necessary or does it have a grossly disproportionate impact, considering that the state objective is the prevention and prosecution of terrorism? It is true that s. 83.18 captures a wide range of conduct. However, as we have seen, the scope of that conduct is reduced by the requirement of specific intent and the exclusion of conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. On the other side of the scale lies the objective of preventing the devastating harm that may result from terrorist activity. When the tailored reach of the section is weighed against the objective, it cannot be said that the selected means are broader than necessary or that the impact of the section is disproportionate.

[63] I add this. The breadth of the impugned provisions reflects Parliament's determination that "there is substantive harm inherent in all aspects of preparation for a terrorist act because of the great harm that flows from the completion of terrorist acts": *R. v. Ahmad* (2009), 257 C.C.C. (3d) 199 (Ont. S.C.J.), at para. 60. In the context of the present analysis, it is appropriate to exhibit due deference to this determination. The criminalization under s. 83.18 of a broad range of interactions that have the potential — and are intended to — materially enhance the abilities of

terrorist groups is not grossly disproportionate nor overbroad in relation to the objective of prosecuting and, in particular, of preventing terrorism.

[64] For the foregoing reasons, I conclude that s. 83.18 does not violate s. 7 of the *Charter*.

2. Does the Law, Specifically s. 83.01(1)(*b*)(i)(A), Infringe Section 2 of the *Charter*?

(a) *Does the Purpose of the Law Violate Freedom of Expression?*

[65] The appellants in the companion appeals argue that Part II.1 of the *Criminal Code* criminalizes expressive activity and therefore infringes the s. 2 guarantees of freedom of expression, freedom of religion and freedom of association. A law may limit, or infringe, a right either by its purpose or by its effect. The appellants contend that the terrorism legislation, by its very purpose, limits the rights guaranteed by s. 2 of the *Charter*.

[66] The critical right at issue is freedom of expression, because the s. 2(*b*) argument as framed is the broadest of the *Charter* infringement claims. If freedom of expression is not infringed, on the facts of this case there is no basis to contend that freedom of religion and association are infringed, as the Court of Appeal observed in this appeal (para. 96).

[67] The activities targeted by the legislation — committing a terrorist activity, assisting in the commission of a terrorist activity, enhancing the ability of others to commit a terrorist activity and instructing others in the commission of a terrorist activity — are in a sense expressive activities. However, violent activities are not protected by s. 2(*b*): *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The Crown argues that this extends to all the conduct caught by the terrorism provisions of the *Criminal Code* and that consequently, s. 2(*b*) protections do not apply to Part II.1 of the *Criminal Code*.

[68] The appellants accept that activity that takes the form of violence is not protected by s. 2(*b*). However, they argue that the Court of Appeal noted that this Court has not yet set out "the exact parameters of the violence exception to the broad meaning of expressive activity protected by s. 2(*b*)" (C.A. *Khawaja*, at para. 102). The violence exception, it is argued, should be construed narrowly to exclude from s. 2(*b*) protection only expressive activity that involves actual physical violence.

[69] The trial judge in the companion cases, Pattillo J., held that the violence exception extends to threats and other acts supporting violent activity. The Court of Appeal in this case found it unnecessary to decide the issue, holding that even if conduct captured by the definition of "terrorist activity" fell within s. 2(*b*), the conduct would nevertheless not be protected because it undermines the values underlying the right to freedom of expression — the pursuit of truth, participation in society and individual self-fulfillment.

[70] This Court's jurisprudence supports the proposition that the exclusion of violence from the s. 2(*b*) guarantee of free expression extends to threats of violence: *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 28; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 107; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 588. As this Court held in *Greater Vancouver Transportation Authority*, "violent expression <u>or threats of violence</u> fall outside the scope of the s. 2(*b*) guarantee" (para. 28 (emphasis added)). It makes little sense to exclude acts of violence from the ambit of s. 2(*b*), but to confer protection on threats of violence. Neither are worthy of protection. Threats of violence, like violence, undermine the rule of law. As I wrote in dissent in *R. v. Keegstra*, [1990] 3 S.C.R. 697, threats of violence take away free choice and undermine freedom of action. They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression (at pp. 830-831). I therefore reject that the violence exception to s. 2(*b*) is confined to actual physical violence, without however deciding the precise ambit of the exception. Threats of violence fall outside the s. 2(*b*) guarantee of free expression.

[71] Most of the conduct caught by the terrorism provisions in Part II.1 of the *Criminal Code* concerns acts of violence or threats of violence. As such, the conduct falls outside the protection of s. 2(*b*) of the *Charter*. The violent nature of the conduct targeted is clear. Part II.1 prohibits acts of serious violence and threats of such acts, which go beyond the scope of protected expressive activity. A "terrorist

activity" is defined as an act or an omission that "intentionally" "causes death or serious bodily harm", "endangers a person's life", "causes a serious risk to the health or safety of the public", or "causes substantial property damage . . . likely to result" in these bodily harms: ss. 83.01(1)(*b*)(ii)(A), (B), (C) and (D). These acts, and threats to commit them, constitute serious violence or threats of serious violence, and hence are not protected by s. 2(*b*). The provision also captures counselling, conspiracy and being an accessory after the fact in relation to conduct enumerated in ss. 83.01(1)(*b*)(ii)(A), (B), (C) and (D). I need not decide whether counselling, conspiracy or being an accessory after the fact fall within the violence exception to the free expression guarantee *as a general matter*. In the case of the impugned terrorism provisions, however, the conduct enumerated in ss. 83.01(1)(*b*)(ii)(A), (B), (C) and (D) rises to a high level of gravity. The particular nature of the enumerated conduct justifies treating counselling, conspiracy or being an accessory after the fact to that conduct as being intimately connected to violence — and to the danger to Canadian society that such violence represents. Consequently, counselling, conspiracy or being an accessory after the fact to conduct enumerated in ss. 83.01(1)(*b*)(ii)(A), (B), (C) and (D) can find no protection under s. 2(*b*).

[72] More problematic is the extension of the meaning of "terrorist activity" in s. 83.01(1)(*b*)(ii)(E), which catches: "an act or omission ... that ... causes <u>serious interference</u> with or <u>serious disruption</u> of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in

any of clauses (A) to (C)". This provision, it is argued, captures "interference" and "disruption" that involve neither violence nor threats of violence, and that thus may be protected by the free expression guarantee of s. 2(*b*) of the *Charter*.

[73] Read as a whole and purposively, s. 83.01(1)(*b*)(ii)(E) is confined to the realm of acts of violence and threats of violence. The subsection is directed to acts that intentionally interfere with essential infrastructure, upon which people depend, and without which life may be seriously disrupted and public health threatened. First, clause (E) is confined to "serious interference" and "serious disruption". Second, this disruption must be to an "essential service, facility or system". Third, the subsection specifically excludes "advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)". Clauses (A) to (C) respectively target death or bodily harm by violence, endangering a person's life and serious risk to the health or safety of the public. This removes from the ambit of clause (E) a large slice of expressive activity, provided it is not aimed at the violent, dangerous ends contemplated in clauses (A) to (C).

[74] I am not persuaded on the submissions before us that the activities targeted by s. 83.01(1)(*b*)(ii)(E) fall within the protected zone of free expression. This said, I would not rule out the possibility that s. 83.01(1)(*b*)(ii)(E) might in some future case be found to capture protected activity. In such a case, the issue would be whether the incursion on free expression is justified under s. 1 of the *Charter*.

[75] I conclude that the purpose of the law does not infringe freedom of expression.

(b) *Does the Effect of the Law Violate Freedom of Expression?*

[76] The appellants all argue that s. 83.01(1)(*b*)(i)(A), the motive clause, is unconstitutional because (1) it has the effect of chilling the exercise of freedom of expression, freedom of religion and freedom of association; and (2) it would legitimize law enforcement action aimed at scrutinizing individuals based on their religious, political or ideological beliefs. The trial judge in this case accepted this argument and severed the motive clause; the Court of Appeal disagreed and restored it.

[77] The Crown responds that there is no evidence of a chilling effect on expression or of illegitimate targeting. The respondent further argues that the conduct caught by the provisions is not protected by the s. 2(*b*) guarantee, as it amounts to violence or threats of violence and does not fall within the purposes that underlie the guarantee. If there is no chilling effect with respect to the exercise of freedom of expression, there can be none with respect to freedom of religion or association.

[78] The first question is what sort of evidentiary basis is required to establish that legislation has a chilling effect on the exercise of s. 2 freedoms. The appellants say that a chilling effect can be inferred on the basis of logic, common sense and the academic literature, as the trial judge did. The respondent says that there must be

proof of a chilling effect in the form of credible empirical or anecdotal evidence, as the Court of Appeal held.

[79] In some situations, a chilling effect can be inferred from known facts and experience. For example, no reasonable person would dispute that a law that makes the press liable in damages for responsible reporting on political figures will probably have a chilling effect on what the press says. In such a case, it may be unnecessary to call evidence of a chilling effect. Therefore, if the Court of Appeal is understood as suggesting that a claimant under s. 2 of the *Charter* must always call evidence of a chilling effect, I could not agree.

[80] However, in this case, it is impossible to infer, without evidence, that the motive clause will have a chilling effect on the exercise of s. 2 freedoms by people holding religious or ideological views similar to those held by some terrorists. The reasons of the Court of Appeal detail why such an inference cannot be made.

[81] First, a causal connection between the motive clause and the chilling of expression of religious or ideological views has not been demonstrated. The chill in the expression of religious and ideological views referred to by the trial judge flowed from the post-"9/11" climate of suspicion, not from the motive clause in the terrorism legislation.

[82] Second, a chilling effect that results from a patently incorrect understanding of a provision cannot ground a finding of unconstitutionality. Indeed,

the motive clause would only have a chilling effect on individuals who have cursory or incomplete knowledge of s. 83.01. Anyone who reads the entire provision will take notice of s. 83.01(1.1), which expressly declares that "terrorist activity" within the meaning of the *Criminal Code* does not include the non-violent expression of a political, religious or ideological thought, belief or opinion. Only individuals who go well beyond the legitimate expression of a political, religious or ideological thought, belief or opinion, and instead engage in one of the serious forms of violence — or threaten one of the serious forms of violence — listed in s. 83.01(1)(*b*)(ii) need fear liability under the terrorism provisions of the *Criminal Code*.

[83] Third, any chilling effect that results from police misconduct, such as profiling based exclusively on ethnicity or religious belief, is not a chill created by the terrorism legislation. I agree with the following statement made by the Court of Appeal, at para. 134:

> Nor can improper conduct by the state actors charged with enforcing legislation render what is otherwise constitutional legislation unconstitutional. Where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement, not to declare the statute unconstitutional: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 133-35.

Criminal liability should not be based on a person's political, religious or ideological views. Police should not target people as potential suspects solely because they hold or express particular views. Nor should the justice system employ improper

stereotyping as a tool in legislation, investigation or prosecution. In the present case, the impugned provision is clearly drafted in a manner respectful of diversity, as it allows for the non-violent expression of political, religious or ideological views. It raises no concerns with respect to improper stereotyping.

[84] For these reasons, I agree with the Court of Appeal that the appellants have not established that the motive clause has a chilling effect on the exercise of s. 2 liberties and results in an infringement of s. 2 of the *Charter*. The motive clause is constitutional and need not be excised from the law, as the trial judge held. This is not altered by the fact that terrorist legislation in some countries does not contain a motive clause, or by the argument that the clause is unnecessary to the Canadian legislative scheme.

3. Conclusion on the Constitutionality of the Law

[85] I conclude that the impugned provisions do not infringe s. 7 or s. 2 of the *Charter*. It is therefore unnecessary to consider s. 1 of the *Charter*.

B. *Was the Law Correctly Applied?*

1. Did the Deletion and Subsequent Re-insertion of the Motive Clause Make the Trial and Convictions Unfair?

[86] The trial judge found the motive clause unconstitutional and severed it. The trial proceeded on the basis that this clause was removed from the legislation,

and the accused was convicted on the charges from which he appeals. The Court of Appeal held that the motive clause is constitutional and should not have been severed. It nevertheless upheld the convictions under the curative proviso of the *Criminal Code*, s. 686(1)(*b*)(iii), on the ground that the trial judge concluded that motive had been proven in any event.

[87] The appellant argues that the removal and later re-insertion of the motive clause made his trial and the convictions unfair. He argues that he has been convicted of different crimes on appeal than those he faced at trial. The curative proviso cannot be applied, he argues, to errors committed by a trial judge that compromise the fairness of the trial. By convicting the appellant of different charges (i.e. under different provisions) than he faced at trial, the Court of Appeal ran afoul of this principle. The appellant says that had motive been an essential element of the offence at trial, he would have testified in his own defence to raise a reasonable doubt.

[88] I cannot accept the appellant's submissions. First, the trial judge made a specific factual finding that the motive component of the definition of terrorist activity had been proved beyond a reasonable doubt, which suffices to fully support the motive requirement of the convictions. At para. 89, he stated:

> … I consider my pre-trial ruling [concerning the constitutionality of the motive clause] to have no real effect on the case. I say that because there is such an abundance of evidence that what was being done by Khawaja, Babar, Khyam, and his associates was clearly motivated "in whole or in part for a political, religious or ideological purpose, objective or cause." <u>Whether that is an essential ingredient of these offences or not, it has been abundantly proven.</u> [Emphasis added.]

[89] Second, the evidence of motive and the appellant's knowledge that the motive was shared by him and the Khyam terrorist cell was overwhelming and essentially undisputed. The appellant's extremist religious ideology suffused his actions and emails. He literally describes dedicating his life to violent *jihad*. His own correspondence established beyond dispute that his religious motive was shared by Khyam and the other "bros" in the terrorist cell, and that the appellant was aware of that fact. The appellant's motives were, simply put, beyond reasonable doubt.

[90] Third, there is no air of reality to the appellant's statement that he could have taken the stand and testified to raise a reasonable doubt on motive, had the clause not been struck. The facts just recited completely undermine the idea that it would have been possible for the appellant to offer testimony putting in doubt his knowledge that the Khyam terrorist cell shared his religious motivation and commitment to violent *jihad*.

[91] Fourth, it is disingenuous of the appellant to claim that, but for the pre-trial ruling on the constitutionality of the motive clause, he would have made different tactical decisions during the course of his trial. Although the pre-trial ruling removed motive as a legal issue, motive remained a live factual issue. Crown evidence regarding motive had the potential to ground inferences with respect to the legal issues of knowledge and intent to enhance the abilities of a terrorist group to carry on or facilitate a terrorist activity. There is simply no credible basis on which to conclude

that the appellant's defence would have been conducted differently absent pre-trial severance of the motive clause.

[92] In essence, this is a case where no prejudice flowed from the re-insertion of an essential element of the offence on appeal. It is abundantly clear that the trial judge would have convicted with or without the motive clause, and it is irrational to suppose that the overwhelming evidence of religious, political and ideological motivation could have been challenged.

[93] This is an exceptional result, appropriate in the exceptional circumstances of this case. Generally speaking, if an appellate court finds that the offence for which an appellant was convicted includes an additional essential element, fairness would require ordering a new or directed trial. In this particular case, however, this Court can be confident that the appellant suffered no prejudice deserving of a new trial only because the evidence on the additional element of the offence was overwhelming, as indeed the trial judge found, and it is plain that the appellant's strategy would not have changed had the element been recognized at trial.

[94] I would dismiss the argument that the Court of Appeal erred in applying the curative proviso and upholding the convictions.

2. <u>Does the Armed Conflict Exception Apply?</u>

[95] Counts 3 to 7 arguably dealt with insurgent activities in relation to Afghanistan. The appellant claims that to the extent that his involvement with these activities was shown, he fell within the armed conflict exception to the definition of terrorist activity. The appellant contends that the onus was on the Crown to prove beyond a reasonable doubt that he did not fall within the armed conflict exception, and that the Crown did not do this.

[96] The trial judge held that the appellant was not engaged in armed conflict, because his conduct did not fall within the definition of the term, and because there was no armed conflict underway in Canada, Pakistan and the United Kingdom, where the alleged acts were carried out. He took judicial notice of the conflict in Afghanistan and of the counter-insurgency against the government and the civilian population. The Court of Appeal affirmed the propriety of taking judicial notice and the finding that the alleged activities did not fall within the armed conflict exception. However, it held that the trial judge erred in holding that the armed conflict exception is restricted to acts or omissions carried out within the territorial limits of an area of armed conflict.

[97] A number of sub-issues emerge. The first is whether the Crown must prove beyond a reasonable doubt that the armed conflict exception is inapplicable. The second concerns the use of judicial notice to decide whether the alleged acts fall within a particular armed conflict or not. The third is the scope of the armed conflict exception to the definition of terrorist activity.

[98] On the burden of proof, the Crown bears the burden of proving beyond a reasonable doubt that the acts alleged against an accused fall within the definition of terrorist activity. The ultimate burden of showing this is on the Crown, and any reasonable doubt must be resolved in the accused's favour. However, the armed conflict exception functions as a defence. The accused must raise the exception and make a *prima facie* case that it applies. In the present appeal, the accused could not make a *prima facie* case that the exception applied, as there was no evidential foundation to support its applicability. There was simply no air of reality to the claim that the armed conflict exception applied.

[99] On the second issue, I agree with the courts below that judicial notice could be taken of the ongoing war in Afghanistan and the counter-insurgency acts in that country which, subject to the armed conflict exception, meet the definition of terrorist activity. These facts were beyond contestation, and thus meet the test for judicial notice.

[100] The critical question in this case is whether the conduct of the appellant, as found by the trial judge, falls within the scope of the armed conflict exception. Like the courts below, I conclude that it did not. The purpose of the armed conflict exception is to exempt conduct taken during an armed conflict in accordance with applicable international law. There is no evidential foundation for the application of this exception in the present case: the conduct cannot be said to have been taken

solely in support of an armed conflict, nor was it in accordance with applicable international law.

[101] First, the trial judge expressly found that the appellant knew that the Khyam group's terrorist activities extended beyond the armed conflict in Afghanistan, and supported these terrorist objectives (paras. 130-31). Thus, the appellant's actions were not "directed solely at supporting the insurgency in Afghanistan" (C.A., at para. 168). Even if the appellant's efforts with respect to Afghanistan could be considered part of an armed conflict governed by international law, the verdicts would stand.

[102] Second, the evidence is overwhelmingly contrary to the proposition that the appellant's acts were part of an armed conflict governed by international law. There is no air of reality to the suggestion that the appellant believed that the Khyam group intended to act in compliance with international law, or that he cared if it did. The evidence showed only that "the appellant was a fervent purveyor of hatred, anti-Semitism, religious bigotry and adulation for mass atrocities, who was making detonators, and providing other support, for 'amazing bros … who felt the same way'" (R.F., at para. 39). The violent *jihadist* ideology espoused by the appellant in his numerous communications is fundamentally incompatible with international law. The Geneva Conventions prohibit acts aimed at spreading terror amongst civilian populations, which are considered war crimes. The appellant, by contrast, did what he did in support of a group whose credo was to take arms against whoever supports

non-Islamic regimes and that recognized that suicide attacks on civilians may sometimes be justified by the ends of *jihad*.

[103] This was the evidence before the trial judge. Uncontradicted, it established beyond a reasonable doubt that the appellant's conduct did not fall within the armed conflict exception to the definition of terrorist activity.

3. Were the Verdicts Unreasonable?

[104] The appellant contends that the convictions for counts 3 to 7 are unreasonable for three reasons: (1) the Crown failed to establish his knowledge of the U.K. bomb plot; (2) there is no evidence that he knew that the Khyam group was a terrorist group; and (3) the Crown failed to prove the necessary particulars of these counts.

[105] These submissions are without merit. Counts 3 to 7 were not confined to the U.K. bomb plot. The trial judge appropriately convicted the appellant only of included offences of making an explosive with respect to the U.K. plot (counts 1 and 2). Second, the trial judge, amply supported by the evidence, expressly found that the Khyam group was a terrorist group within the definition in the *Criminal Code* and that the appellant was aware of the terrorist objectives and knowingly supported and participated in them. Finally, much of the argument on unreasonable verdict is

premised on the armed conflict exception, which cannot succeed for the reasons discussed above.

C. *Did the Court of Appeal Err in Overturning the Sentence Imposed by the Trial Judge and Substituting a Term of Life Imprisonment?*

1. The Trial Judge's Sentence

[106] The trial judge found the appellant guilty of seven offences. On the first two counts, he held that the appellant's knowledge of the U.K. bomb plot was not proved and convicted him only for acts related to the development of the "hifidigimonster" for unspecified bombings. On counts 3 to 7, he convicted the appellant for various acts related to the Khyam group's terrorist activity.

[107] The trial judge sentenced the appellant to 10 and a half years of imprisonment in addition to the 5 years he had already served in custody. He held that the appellant should be sentenced in respect of only one of the offences included in counts 1 and 2 on the *Kienapple* principle, since both related to the same acts — development of the "hifidigimonster".

[108] The trial judge reviewed the principles and purposes of sentencing and stated that in terrorism cases, denunciation, general deterrence and public protection should be emphasized over personal deterrence and rehabilitation. He concluded that in the absence of any evidence bearing on rehabilitation, this factor did not attract

weight, and noted the gravity of the offences and the aggravating effect of the appellant's motivation.

[109] The trial judge rejected the Crown's argument that the appellant should receive the same sentence imposed in the U.K. on Khyam, one of the leaders of the London bomb plot, because the appellant's participation was at a lower level and did not merit life imprisonment. The trial judge referred, in his reasons for sentence, to the "amateurish efforts" of the appellant (at para. 33), and found that Khyam and his associates "were away out in front" of the appellant, who was but "a willing helper and supporter" (para. 37).

[110] The trial judge noted that s. 83.26 of the *Criminal Code* requires that consecutive sentences be imposed for terrorism offences. However, he held that this was subject to the "totality principle" that the combined sentence should not be unduly long or harsh and should not exceed the overall culpability of the offender.

[111] The trial judge declined to give the appellant strict "two for one" credit for time served, in view of the need to denounce the conduct. However, he took into account generally the fact that the appellant had already spent five years confined to a detention centre not suited to long-term imprisonment. Similarly, without adopting a precise mathematical formula, he gave some credit for the appellant's admissions at trial.

[112] In conclusion, the trial judge imposed the following sentence amounting to a total of 10 and a half years imprisonment: 4 years for count 1; 2 years for count 3; 2 years for count 4; 2 years for count 5; and 3 months for each of counts 6 and 7. He added the following terms: no parole eligibility for 5 years; a mandatory DNA order (stayed pending appeal); and a lifetime order prohibiting possession of firearms.

2. The Court of Appeal's Sentence

[113] The Court of Appeal found three errors of principle in the trial judge's sentencing and increased the sentence to life imprisonment for count 1 and consecutive terms of imprisonment totalling 24 years for the remaining counts.

[114] The first error was the trial judge's finding that the appellant's level of involvement was of a low order, compared to Khyam and his associates who were "away out in front" of him. The Court of Appeal held that this conclusion was unreasonable on the basis of all the evidence. The second error was in not treating the absence of evidence on rehabilitation prospects as an important factor in sentencing. The third error was in not imposing consecutive sentences, which was contrary to the requirement of s. 83.26

3. Analysis

[115] At the outset, I wish to underscore that the temptation to fashion rigid sentencing principles applicable to terrorism offences as a distinct class of offences

should be avoided, subject to the provisions in the *Criminal Code* that specifically pertain to those offences. The general principles of sentencing, including the totality principle, apply to terrorism offences.

[116] As regards the sentences imposed on the appellant, I agree with the Court of Appeal that the trial judge made critical errors in sentencing.

[117] The first error identified by the Court of Appeal was the trial judge's unreasonable devaluation of the seriousness of the appellant's conduct. The Court of Appeal interpreted the trial judge's comments in this regard as concluding that the appellant was less morally blameworthy than Khyam and other associates. The trial judge's comments might also be interpreted as merely concluding that the appellant was not as directly involved in terrorist activities as others. On either view, however, it appears that the trial judge effectively devalued the seriousness of the appellant's conduct in a way that was inconsistent with the evidence.

[118] The evidence, in brief, showed that the appellant: was determined to help the Khyam group perpetrate a number of acts of mass violence against civilian and military targets; helped finance the Khyam group; offered training in electronics to Khyam; built devices intended to serve as remote triggers for improvised explosive devices (the "hifidigimonster"); and went to Pakistan to train for "combat" in Afghanistan. His emails showed that he encouraged and applauded violent *jihad*. Particularly chilling is his email speaking in positive terms of using a troublesome person as a suicide bomber in an Israeli nightclub.

[119] A typical message gives the flavour of the emails the appellant sent:

> Ok nigga, i'll make a booking now, InshaAllah i'm thinking of comin down on the February 20th or around then. Lemme know if that's good with u. also let me know soon how you want the device. I just want to do a demo of it and show you how it works and stuff, its range, and other things. so we gotta find a way we can get it into UK, maybe i can courier it over, i don't know if UK customs will grab it or not. pray to the most high, he'll find us a way. we're startin to work on a few other much more sophisticated projects that can be of great benefit to the J, i'll speak to you about them when we meet ... [Trial judgment, at para. 42]

[120] Indeed, the trial judge was clear that Khawaja was "fully responsible for his actions" (reasons for sentence, at para. 31). As the trial judge explained (at para. 31):

> …he went far out of his way, from his home, from his country and from his gainful employment to engage with the Khyam group and participate as he did in and to the group's endeavors. This is not a case of a vulnerable young person being lured or beguiled into criminal misconduct in which he was not inclined to participate. Khawaja was a willing and *eager* participant…. [Emphasis added.]

[121] In short, the appellant's subjective "determination to bring death, destruction and terror to innocent people" (at para. 37) appears to have been strong — indeed, as strong as that of other members of the Khyam group.

[122] The second error identified by the Court of Appeal is that the trial judge failed to treat the absence of evidence of the appellant's rehabilitative prospects as an important factor in sentencing. I agree that the absence of information on the

likelihood of the appellant re-offending was relevant to sentencing, particularly in regard to s. 718(*c*) and to the need to separate offenders from society, where necessary. Indeed, as O'Connor J. wrote in *R. v. Downey*, 2010 ONSC 1531 (CanLII), at para. 31:

> Where it is apparent that the offender is a dangerous person, who is likely to compromise public safety if released, he should be detained for a period of time sufficient to reasonably conclude that such danger has subsided. The duration of the sentence must be sufficient to give the correctional authorities the necessary time to properly treat the offender and for the National Parole Board to assess the risk of his reoffending.

[123] The absence of evidence on the appellant's likelihood of re-offending gave the trial judge no assurance that he was no longer committed to violent *jihad* and terrorism, or that there was any chance that, over time, he could change and be released from state control without undue risk of harm to the population. The lack of information on a person's probability of re-offending, in the face of compelling evidence of dangerousness, is sufficient to justify a stiffer sentence.

[124] I cannot accept the broad proposition that "the import of rehabilitation as a mitigating circumstance is significantly reduced in [the] context [of terrorism] given the unique nature of the crime and the grave and far-reaching threat that it poses to the foundations of our democratic society": (C.A. *Khawaja*, at para. 201). The terrorism provisions catch a very wide variety of conduct, suggesting that the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis. This does not, however, negate the fact that on

the evidence in this case, the absence of evidence on rehabilitation prospects justified a stiffer sentence than otherwise might have been appropriate.

[125] The third error identified by the Court of Appeal is that the trial judge erred in interpreting s. 83.26, which provides that convictions under ss. 83.02 to 83.04 and 83.18 to 83.23 require consecutive sentences. The Court of Appeal took the view that the "totality principle", which requires that the cumulative sentence rendered for multiple offences not exceed the overall culpability of the offender, should be moderated or altered in the case of terrorism offences so that "the customary upper range [of 15 to 20 years] for consecutive fixed-term sentences will not be applicable" (para. 210).

[126] While I agree with the Court of Appeal that s. 83.26 requires that sentences for terrorist offences be served consecutively, I do not agree that this result is inconsistent with the totality principle on the evidence in this case. The only restriction imposed by the totality principle is that the sentence not exceed the overall culpability of the offender. While the practice in Canadian courts is to impose sentences of between 15 to 20 years if a life sentence is not appropriate, this practice is not binding and is *not* part of the totality principle: see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 56 (*per* Lamer C.J.). The fact that sentences of over 20 years may be imposed more often in terrorism cases is not inconsistent with the totality principle. It merely attests to the particular gravity of terrorist offences and the moral culpability of those who commit them. I conclude that the heightened gravity of the

terrorism offences at issue in this case was sufficient to justify imposition of consecutive sentences running over 20 years, without violating the totality principle.

[127] After reviewing the three errors committed by the trial judge, the Court of Appeal went on to state that the sentence he imposed failed to adequately reflect three critical matters.

[128] First, the sentence imposed did not reflect the gravity of the appellant's actions. I agree. The appellant was a willing participant in a terrorist group. He was committed to bringing death on all those opposed to his extremist ideology and took many steps to provide support to the group. The bomb detonators he attempted to build would have killed many civilians had his plan succeeded. A sentence of 10 and a half years does not approach an adequate sentence for such acts.

[129] Second, the Court of Appeal found that the sentence did not reflect the continuing danger this committed and apparently remorseless man would pose to society on release. For the reasons discussed earlier, I agree. The trial judge's sentence failed to give adequate weight to the ongoing danger the appellant posed to society.

[130] Finally, the Court of Appeal faulted the trial judge's sentence for failing to send a "clear and unmistakable message that terrorism is reprehensible and those who choose to engage in it [in Canada] will pay a very heavy price" (para. 246). Without suggesting that terrorism offences attract special sentencing rules or goals, I

agree that denunciation and deterrence, both specific and general, are important principles in the sentencing of terrorism offences, given their seriousness: see s. 718.2(*a*)(v) of the *Criminal Code*; H. Parent and J. Desrosiers, *Traité de droit criminel* (2012), vol. 3, *La peine*, at pp. 76-78.

[131] For these reasons, I would dismiss the appeal from sentence.

VII. Conclusion

[132] I would dismiss the appeal and affirm the convictions and the sentence imposed by the Court of Appeal.

APPENDIX

Criminal Code, R.S.C. 1985, c. C-46

83.01 (1) …

"terrorist activity" means

(*b*) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any *act*, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public private, other than as a result of advocacy, protest, dissent or stoppage of work that is

not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or tentative threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

"terrorist group" means

(*a*) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(*b*) a listed entity,

and includes an association of such entities.

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (*b*) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) An offence may be committed under subsection (1) whether or not

(*a*) a terrorist group actually facilitates or carries out a terrorist activity;
(*b*) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
(*c*) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

(3) Participating in or contributing to an activity of a terrorist group includes

(*a*) providing, receiving or recruiting a person to receive training;

(*b*) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;

(*c*) recruiting a person in order to facilitate or commit

(i) a terrorism offence, or

(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;

(*d*) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and

(*e*) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit

(i) a terrorism offence, or

(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.

(4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused

(*a*) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;

(*b*) frequently associates with any of the persons who constitute the terrorist group;

(*c*) receives any benefit from the terrorist group; or

(*d*) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.

83.26 A sentence, other than one of life imprisonment, imposed on a person for an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 shall be served consecutively to

(*a*) any other punishment imposed on the person, other than a sentence of life imprisonment, for an offence arising out of the same event or series of events; and

(*b*) any other sentence, other than one of life imprisonment, to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the

offence or the offender, and, without limiting the generality of the foregoing,

...

(v) evidence that the offence was a terrorism offence

719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

. . .

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.

Appeal dismissed.

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