

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
)  
HER MAJESTY THE QUEEN ) David McKercher and Bill Boutzouvis, for  
) the Public Prosecution Service of Canada  
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)  
**- against -** )  
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)  
)  
MOHAMMAD MOMIN KHAWAJA ) Lawrence Greenspon and Eric Granger, for  
) the Accused  
)  
)  
)  
) **Sentence Hearing:** February 5, 12 and 13,  
) 2009

**Mr. Justice Douglas Rutherford**

**REASONS FOR SENTENCE**

[1] On October 29, 2008 I gave judgment in this case with reasons for finding Mr. Khawaja guilty on seven counts. I went into the evidence in considerable detail in the reasons for judgment ([2008] O.J. No. 4244; 238 C.C.C. (3d) 114) and I do not think it would serve any useful purpose to repeat the evidence in any great detail today.

[2] The evidence established that in the period 2002 to 2004, while in the United Kingdom and in Pakistan, Momin Khawaja became involved with a group consisting of Omar Khyam, Salahuddin Amin, Junaid Babar, Anthony Garcia and others, and that not only was the group a terrorist group, as defined, Momin Khawaja was clearly aware and knowledgeable of some of the terrorist activities and objectives the group had among its purposes.

[3] The first two of the seven counts focused directly on the ‘U.K. fertilizer bomb plot’ which members of the group were advancing. Those counts required proof that Momin Khawaja had some knowledge of that specific plot. I found that the prosecution had not proven such knowledge beyond a reasonable doubt, and I found Momin Khawaja not guilty as charged, but guilty of the included offences pleaded in those counts, offences under paragraphs 81(1)(a) and (d) of the *Criminal Code*, namely of “working on the development of a device to activate a detonator, with intent thereby to cause an explosion of an explosive substance likely to cause serious bodily harm or death to persons or likely to cause serious damage to property”; and of “having in his possession or under his care or control an explosive substance with intent thereby to enable another person, namely Omar Khyam and others, to endanger life or to cause serious damage to property.” [See: paragraphs 92-107 in the Reasons for Judgment, *supra*]

[4] While the prosecution failed to establish beyond a reasonable doubt Khawaja’s knowledge of the specific terrorist objective of the U.K. fertilizer bomb plot contemplated by counts one and two, it is clear that in working on the development of and possessing an explosive device, the ‘hifidigimonster,’ Momin Khawaja’s activity was directed at assisting his terrorist associates in a way that could only result in serious injury, death and destruction to people and property somewhere. As I said in paragraph 131 of the reasons for judgment, “...there is ample evidence... establishing that Momin Khawaja knew he was dealing with a group whose objects and purposes included activity that meets the *Code* definition of terrorist activity. His most tangible and visible facilitation of that activity was his work in developing the hifidigimonster, the remote trigger for an IED. He agreed to build about 30 of them. On the evidence, it is unclear what he knew or anticipated as to where they would be used, or that Khawaja even cared where they would be used. His Emir or leader asked him to provide them and he agreed. There is no suggestion that he would exercise any control over their deployment once he placed them in Khyam’s possession.”

[5] The evidence relating to counts three through seven established that Momin Khawaja participated in or contributed to the activity of the terrorist group with a view to facilitating its terrorist activity. His activity included his receiving training with the group, his direct and indirect financing of the activities of the group, his making available to the group a residence in Rawalpindi, his transporting supplies for the group, his offering it electronics and other training, and of course his dialogue, meetings and provision of information concerning the development of the remote detonator, the hifidigimonster. The counts and the evidence in support of each demonstrated Momin Khawaja’s involvement and support for this terrorist group from a different transactional point of view. Each formed part of the overall picture. A more detailed account of the evidence establishing his guilt on counts three through seven is set out in paragraphs 133-139 of the Reasons for Judgment (*supra*).

[6] In preparation for and to assist the Court in the task of sentencing, I ordered a pre-sentence report to be prepared and I heard submissions from counsel for the prosecution and for the defense over the course of 3 days. In addition to submissions as to the legal principles to be considered, Mr. Greenspon filed with the Court brief statements signed by each of Momin’s parents.

### **The Positions of the Prosecutors and of the Defense**

[7] Pared to their cores, the positions of the prosecutors and of the defense are unusually far apart as to what sentencing terms should be imposed. For the defense, Mr. Greenspon argued that the offenses warranted gaol terms which, in their aggregate, would amount to 7.5 years but that since credit should be given at the rate of 2 for 1 for the almost 5 years custody Khawaja has already undergone since his arrest, and given some credit too for the trial time saved by the significant factual admissions made by the defense, Mr. Khawaja had been imprisoned for longer than necessary and should now be released. For the prosecution, Mr. McKercher argued that the circumstances warrant nothing less than a life sentence. Specifically he suggested life imprisonment on counts one and four; 10-14 years on count two; 8-10 years on each of counts three and five; 6-10 years on count six and 12-14 years on count seven. That, according to my calculation and in light of the requirement for consecutive sentences when dealing with terrorism offenses, would produce a total sentencing of 2 life terms with concurrent fixed consecutive terms totaling between 44 and 58 years.

[8] Both sides presented an array of cases, from Canada and abroad, in support of their vastly disparate positions. The sentence range in the cases referred to was very broad, from short terms right up to life. Indeed, the prosecution even included reference to the cases of Albert Guay and Genereux Ruest who were both convicted of the 1949 murder of Guay's wife and executed for their crime. [see: *R.v. Ruest* (1952), 104 C.C.C. 1 (S.C.C.)] Reference was made to the cases of the members of the Omar Khyam terrorist group who were convicted in the actual U.K. fertilizer bomb plot. They all received life sentences. See: *Omar Khyam, Salahuddin Amin, Jawed Akbar, Anthony Garcia and Waheed Mahmood*, [2008] EWCA Crim 1612 (C.A.).

[9] The difficulty with such a wide range of sentencing precedents is that sentencing is a task of fashioning an appropriate penalty in what is inevitably, more or less, a unique set of circumstances and personal factors. The assistance that can be drawn from these precedents is more in the balancing of applicable sentencing principles than in matching precedents, particularly in that this is the first sentencing under Canada's Part II.1 Terrorism provisions. Moreover, as will be seen in due course, the provisions Parliament has enacted governing sentencing in a terrorist case, and particularly one in which the overall activity of the accused has been broken down as in this case into a number of particular counts, make it especially difficult to compare particular sentences with those in non-terrorist cases. I will turn to the applicable provisions and principles in due course.

### **Momin Khawaja the Individual**

[10] We know some of the details of Momin Khawaja's life history. From the statements of his parents submitted by Mr. Greenspon, we know that Momin Khawaja's parents met and married in their native Pakistan and began to raise a family after moving to Canada in 1975.

Momin is the third of 5 children. He was born in Ottawa in 1979 and was about to turn 25 when arrested. He will be 30 years old next month. A little over a year after Momin's birth, his mother took the children back to Pakistan for 3 years while his father completed his university studies in political science in the United States. The family reunited in Toronto in the late 1970s when Momin's father obtained a teaching job at the University of Toronto. Momin began his elementary schooling in Toronto. The father's employment history, however, took the family to Libya, Pakistan and then Saudi Arabia in the 1980s.

[11] The family moved back to Ottawa in 1993. For the next 3 years Momin's father traveled between Ottawa and Syracuse, New York, where he completed doctoral studies in interdisciplinary and social science. In 1999 the father obtained work in Saudi Arabia and lived there until Momin's arrest in 2004. Meanwhile, Momin completed his elementary schooling and high school education in Ottawa public schools. After high school, he enrolled in computer studies at Algonquin College, receiving his diploma in a 3 year Computer program in 2001. From June 2002 until his arrest in March 2004 he was employed by a company doing computer programming work under contract at the Department of Foreign Affairs and International Trade. A supervisor at his employer company described Khawaja as a "good employee...a conscientious worker."

[12] In her written statement Momin's mother made these observations about his growing up,

13. I would describe my family as a traditional Muslim family, but not a strict Muslim family. We pray five times per day and attend mosque. It is important in our religion that our children were to learn not to lie, not to cheat, not to deceive, not to steal, not to harm other people, and generally not to do bad things. Momin learned religion through attending mosque and talks at the mosque, through his upbringing at home, and through reading books, including a series of English language Islamic books. Our family has attended the Bilal mosque in Orleans ever since we've been in Ottawa.

14. Momin took his faith reasonably seriously. He generally said his prayers and attended mosque. Often times he would not get up in time for the early morning prayer which is to take place before sunrise, but that would not be atypical for a young Muslim.

16. Momin was a good child, he was always smiling, but he had an adventurous and independent streak. For instance, when he was 12 and the family was living in Saudi Arabia he once pierced his ear himself using a needle and started wearing one of my earrings. He had a phase where he was always wearing ripped jeans. When he was set to graduate from high school, he shaved half of his head and dyed half of his hair blond. These aside, he never gave us any serious trouble. He has never been one to drink or use drugs.

[13] His father made the following observations,

8. ...In a traditional Muslim family, education is the focal point. You need to have respect for your parents, your family, your elders, the rule of law, institutions, and society

in general. Being born in Canada, my children were taught how our faith was not in conflict with other faiths, such as Christianity. Momin was brought up in an open-ended way and taught moral concepts by his family.

9. Momin was interested to learn more about religion, he attended mosque, and around the end of high school started teaching Arabic to children at the mosque. Momin was also very proficient in math. In high school Momin placed the second highest in Ontario on a secondary school math exam.

11. I had no problems with Momin while he was growing up. The lines of communication were always open with us. He would tell us if he was going out. He would help his younger brothers and participate in family activities. He was good and regularly attended to his five daily prayers.

14. Momin was a self-confident individual with a sense of curiosity. He was not rigid, but flexible. If there was the slightest hint of trouble, for instance there was one occasion where I thought Momin was fooling around with the wrong crowd, I would tell Momin what I thought, he would listen, and he would abide by what I said.

[14] Both parents said that once Momin was released he would be free to return home and live with them again, and that they were prepared to support him however long it might take him to complete his education and find employment.

[15] While in custody before and since his trial, Momin Khawaja has pursued studies by correspondence through Thomson Rivers University in British Columbia. In 2006-7 he studied Modern European History, completing the course with a B grade. In 2007-8 he completed a course in the History of Science with a B+ grade. In December 2008 he enrolled in English Literature and Composition and was also enrolled in the Bachelor of Technology Computing program.

[16] The Director of the Islamic Centre of Ottawa told the author of the Pre-Sentence Report that he had known Momin for 11 years, had been his spiritual advisor for several years and has visited him regularly in gaol. He said that Khawaja had memorized the Koran, which in his view is only achieved by very disciplined individuals. He described Mr. Khawaja as “a very quiet person but he has become a new person since his incarceration; he is talking much more and communicates effectively with others.” He noted Mr. Khawaja has a positive influence on other inmates, helping them transition into the institution and was chosen by the chaplain of Ottawa Regional Detention Center to represent inmates on ‘their provision of their spiritual and religious care of all denominations.’

### **The Kienapple Principle – Count Two**

[17] Mr. Greenspon argued that pursuant to the principle enunciated in *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524, [1975] 1 S.C.R. 729 (S.C.C.), the Court should not impose any

sentence but should stay any further proceeding in relation to count two on which Khawaja was found guilty of possession of an explosive substance. The explosive substance was the hifidigimonster detonating device, an 'explosive substance' by virtue of the definition of that term in the *Criminal Code*.

[18] The principle that emerged from Kienapple is that where the same transaction gives rise to two or more offences with substantially the same elements and an accused is found guilty of more than one of those offences, that accused should be convicted of only the most serious of the offences. The other charges should be stayed. The principle was elaborated further in *R. v. Prince*, [1986] 2 S.C.R. 480 (S.C.C.), and was discussed more recently in *R. v. R.K.*, [2005] O.J. No. 2434 (Ont. C.A.). Doherty J.A. explained,

32 Dickson C.J.C. for a unanimous court in *Prince*, held that the Kienapple rule precluded multiple convictions for different offences only where there was both a factual and a legal nexus connecting the offences. The factual nexus is established where the charges arise out of the same transaction. The legal nexus exists if the offences constitute a single wrong or delict.

34 While there will inevitably be close cases, the factual nexus inquiry dictated by the Kienapple rule is relatively straightforward. The legal nexus inquiry, however, is more nuanced. A comparison of the constituent elements of the offences in issue is an essential part of the legal nexus inquiry. However, the mere fact that offences share common elements does not establish a sufficient legal nexus between those offences to warrant the application of the Kienapple rule. The legal nexus inquiry is directed not at finding common elements between offences, but at determining whether there are different elements in the offences which sufficiently distinguish them so as to foreclose the application of the Kienapple rule.

[19] Mr. Greenspon argued that the facts underlying the findings of guilt on counts one and two were the same. It was Momin Khawaja's actions in developing the detonating device for the Khyam group which gave rise to his being found guilty of both working on and for possessing the explosive device. Mr. McKercher did not dispute this contention, but argued that the offenses did not have the legal nexus required to apply the Kienapple principle. A person may work on the development of a device, without being in possession of it, he argued, and similarly, a person may possess such device without being involved with its development. His submission was that apart from the commonality of factual underlay in this case, the two offenses aim at different aspects of what a person may do in relation to an explosive substance or device.

[20] On the facts of this case, it was the same activity on his part that renders Khawaja culpable of both the development charge and the possession charge. The factual nexus is clear. In terms of the legal nexus, it seems to me that the inquiry involves not just an examination of the charging sections in the abstract, but in the context of the facts of the case. Otherwise, an inquiry that determined that the charging sections of two offences in the abstract were so identical as to invoke the Kienapple principle would be tantamount to finding

that one or other charging section was legally redundant. The two offences at issue here aim, potentially at different aspects of dangerous conduct, prohibited in the name of protection of the public. While I agree that the charging sections describe offences that may be committed by acts that are significantly different, in the context of the facts of the Khawaja case, the acts overlap completely. Maybe this is one of those close cases that Mr. Justice Doherty had in mind. In any event, this seems to me a case for the application of the Kienapple principle. I am assisted towards that view in part in light of s. 83.26 of the *Criminal Code* which requires that terrorism offence sentences be consecutive to each other and to any other sentences imposed for offences arising out of the same events. This means that all sentences that I impose in this case must be consecutive to each other and where exactly the same facts give rise to more than one offence, the integrity of the sentencing process would in my view be compromised by proceeding to impose sentences for each of the offences committed by the same acts.

[21] Pursuant to the Kienapple principle, therefore, proceedings will be stayed and no sentence imposed on count 2 in the indictment.

### **Applicable Sentencing Principles**

[22] The *Criminal Code* lays out a number of sentencing principles that are applicable to this case. The fundamental purpose and relevant objectives of a sentence are found in s. 718 which provides,

**718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[23] The principal objective of a prison sentence is punishment, although the sentence must be determined in accordance with the principles set out in the *Code*. [R. v. L.M., 2008 SCC 31]. The purposes of criminal punishment are various; protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes

overlap and none of them can be considered in isolation from the others when determining an appropriate sentence in a particular case. [*Veen v The Queen (No 2)*, (1988) 164 CLR 465 (Aus. H.C.).

[24] In terrorism sentencing cases particular emphasis is placed on the elements of denunciation, deterrence, and protection of the public by separating the offender from it. Moreover, where acts of terrorism are pursued for religious or ideological cause, it may be considered that even personal deterrence may be of less significance than protection of the public. In *R v Martin*, (1999) 1 Cr App R (S) 477 at 480, Lord Bingham C.J. said at p. 480 : “In passing sentence for the most serious terrorist offences, the object of the Court will be to punish, deter and incapacitate; rehabilitation is likely to play a minor (if any) part”. In *Lodhi v. Regina*, [2007] NSWCCA 360 the New South Wales Court of Criminal Appeals said, “Rehabilitation and personal circumstances should often be given very little weight in the case of an offender who is charged with a terrorism offence. A terrorism offence is an outrageous offence and greater weight is to be given to the protection of society, personal and general deterrence and retribution.”

[25] In the case at hand, I accept that denunciation, deterrence, both personal and general, and protection of society must weigh heavily in the sentencing process. Canada values its history of multi-cultural and multi-ethnic tolerance. Canadians are proud that people of many languages, religions and backgrounds can co-exist in a peaceful and orderly society. In a world where in so many, many places, tribalism, generations of hostility and hatred, and religious and ideological differences lead to violence and bloodshed, Canada’s albeit short history of relative peaceful co-existence is a beacon of hope for the future. We must jealously guard our individual freedoms, the respect for the worth of every individual, and our peaceful social order. To this end, sentencing in cases of terrorist activity must strongly repudiate activity that undermines our core values. Canada must certainly not accept the exportation of terrorism from within its borders to victimize innocent people in other parts of the world.

[26] Notwithstanding the emphasis on denunciation, deterrence and protection of the public, the potential for rehabilitation and promotion of a sense of responsibility on the part of the offender cannot be overlooked. Momin Khawaja is still a young man. There is evidence of some redeeming qualities in him. He has been successful in his education and continues to pursue academic learning while imprisoned. He has been helpful to other offenders while in the Regional Detention Centre. His employer referred to him as a good employee and a conscientious worker.

[27] On the other hand, the Court knows virtually nothing about his potential for reformation, of any sense of responsibility or of any remorse he may feel for his criminal conduct, or of the likelihood of his re-offending. The only words heard from him throughout these proceedings were his pleas of ‘not guilty’ when arraigned and his answer ‘no’ when asked if he wished to say anything before I determined what sentences to impose. The purpose of a pre-sentence report is to provide information about an offender, including as to his “maturity, character, behaviour, attitude, and willingness to make amends.” This would assist the court in imposing sentence. Neither Momin Khawaja nor his parents were willing to

be interviewed in the course of the preparation of the court-ordered pre-sentence report, and so it was of limited value.

[28] The signed statements provided by Momin's mother and father through counsel make no reference to Momin's activities giving rise to his prosecution, or to any reflection by them or by their son on that activity. Indeed, reading those statements, one might think that this was a very normal family situation. There was no mention of the array of military style rifles, the crates of ammunition, the other weapons, the projectile-pocked human target on the basement wall, the mini-library of violence and warfare-oriented books or the workshop of electronic constructs found throughout the family home when police searched it. It is impossible to think that the others members of the family were oblivious to Momin's preoccupation with and proclivity to participate in violent jihad. What did his parents think was going on when Momin wanted the tenants out of the Rawalpindi residence so he could make it available to others? Their statements shed virtually no light on the areas of concern this Court has for the future of their son.

[29] What is the Court to make of the total absence of information about Momin Khawaja's attitude, his current thinking about what he was doing, and his future behavior? Mr. Greenspon was at pains to let the Court know that his client's refusal to be interviewed for the pre-sentence report was consistent with the advice he gave him. But what is to be made of this. While I cannot regard this silence, this dearth of information as an aggravating factor, it can lead to only one inference, and that is that there is nothing that can be said on behalf of Momin to lend weight to the mitigating factors relating to his rehabilitation, including his taking responsibility for his actions, making amends, feeling remorse or determination not to re-offend.

[30] The next applicable *Code* provision deals with 'proportionality.' Section 718.1 provides that,

**718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[31] There is no question that Momin Khawaja was fully responsible for his actions that led to his being found guilty. In his mid-twenties, 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 who also implicated another, Ms A, in funneling money to the group.

[32] The gravity of the offences cannot be gainsaid. In his submissions, Mr. Greenspon seemed to suggest that Khawaja's lack of knowledge of the U.K. fertilizer bomb plot significantly mitigated or minimized the seriousness of his support for the terrorist group.

While his building of the detonating device, and promise to build some 30 more for Khyam and company was not shown to be knowingly or specifically part of the mayhem to flow from the U.K. fertilizer bomb plot, it was intended to unleash fireworks at other as yet unspecified places in aid of the jihad. I refer to the broader knowledge of the scope of terrorist activity Khawaja embraced with this terrorist group set out in detail in paragraph 130 of the Reasons for Judgment. I see nothing mitigating in the doubt that Khawaja was specifically aware of the U.K. fertilizer plot.

[33] Fortunately, effective security and law enforcement work, particularly in the United Kingdom, intervened before the group's objectives were achieved. As well, it was apparent that Momin and his brother Qasim lacked expertise in their effort to perfect the hifidigimonster. Sgt. Fiset said it was an amateurish effort. The device, as seized, would not do the job, although it would take only minor modifications to change that. There were several cases referred to by counsel in which, fortunately, amateurish efforts by seriously intended terrorists, resulted in explosive devices failing or in one or more instances blowing up prematurely such that the lives of innocent victims were spared. That Momin Khawaja's efforts may have been amateurish and terminated before they were completed is hardly mitigation of the seriousness of his criminal intent.

[34] That the offences are very serious is reflected in Parliament's fixing of the sentence ranges under the provisions involved. The maximum sentences provided are as follows.

count one	s. 81(1)(a)	life imprisonment
count three	s. 83.18(1)	10 years
count four	s. 83.21(1)	life imprisonment
count five	s. 83.03(a)	10 years
count six	s. 83.18(1)	10 years
count seven	s. 83.19	14 years

That being said, one can always imagine more aggravated forms of criminal conduct than what one sees. Where the obvious consequences of one's criminal plans if allowed to be carried out involves human deaths and destruction of property, the offences are very serious.

[35] The next of the statutory sentencing principles involves certain aggravating and mitigating factors. The relevant portions of the provision are

**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,

(i) evidence that the offence was motivated by bias, prejudice or hate based on ... religion, ... or any other similar factor,

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

Accordingly, the religious ideology Khawaja revealed in his email communications, an ideology that energized his participation in and support for the Khyam terrorist group and its activities, is an aggravating circumstance for the purposes of sentencing. While the margin of doubt as to his knowledge of the U.K. fertilizer bomb plot meant that his guilt on count one was not for an offence in the Terrorism Part of the *Code*, his efforts in building the hifidigimonster were directed towards death and destruction and the offence in the circumstances of the case is tantamount to a terrorism offence.

[36] The next sub-section provides that

**718.2 (b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

As I said earlier when outlining the positions of the parties and the cases referred to me, finding a similar offender and similar offenses in similar circumstances is an elusive pursuit. As Mr. McKercher noted in his sentencing submissions [transcript p. 2278],

This case stands out almost alone at this point in history, and Your Honour will have noted the difficulty that both counsel had in finding applicable cases that would be of really clear help in guiding Your Honour in sentencing.

This is the first case to reach sentencing under Canada's terrorism provisions and, we are in an era in which terrorism offenses tend to raise different concerns and considerations than did more isolated acts of terror in decades gone by, making the application of this provision very difficult.

[37] For the prosecution, Mr. McKercher urged the Court to follow the Court in the United Kingdom that confirmed the life sentences imposed on Omar Khyam and the other members of the terrorist group in London. I am not persuaded that Momin Khawaja should be characterized as a similar offender in similar circumstances as those men. He was a willing helper and supporter, but Khyam, Amin, Akbar, Garcia and Mahmood were away out in front of Momin Khawaja in terms of their determination to bring death, destruction and terror to innocent people. In my view, Momin Khawaja's offenses, the circumstances in which they were committed and his personal circumstances do not warrant his being sentenced to life imprisonment. I appreciate that there will be those who argue that I have been reading too

much 'John Updike,' but that is my view. In my opinion, lesser and fixed terms of imprisonment are required here.

[38] The final sub-section in this provision admonishes that,

**718.2 (c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

This is an important principle where, as here, there are multiple offenses and a sentence must be imposed for each one. Generally, multiple sentences may be made to run concurrently, that is, all at the same time, or, consecutively, so that one sentence does not begin to run until the one before it is completed. Conventionally, where one event or series of events gives rise to multiple convictions and sentences, the sentences are more likely to be made concurrent. Where the convictions are for offenses that are relatively unconnected in time or context, they will more likely be made to run consecutively. It is usually a call for the exercise of judicial discretion. In the case of terrorism offences, however, Parliament has intervened and eliminated any judicial discretion as to sentences being concurrent. Included in the terrorism provisions added in 2001 as Part II.1 of the *Criminal Code* is the following,

**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;

[39] Accordingly, the sentences I impose must be consecutive terms. At the same time, however, in light of s. 718.2 (c) I must ensure that in their totality, they are not *unduly long or harsh*. In *R. v. C.A.M.*, [1996] 1 S.C.R. 500 Chief Justice Lamer explained this principle as follows,

42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

- The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

He went on to note that

43 Whether under the rubric of the "totality principle" or a more generalized principle of proportionality, Canadian courts have been reluctant to impose single and consecutive fixed-term sentences beyond 20 years.

[40] The next *Code* provision I must bear in mind is that,

**719.(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.

This too is an area in which the sentencing court is expected to exercise discretion. Writing for the Court in *R. v. Wust*, [2000] 1 S.C.R. 455, Arbour J. said,

44 I see no advantage in detracting from the well-entrenched judicial discretion provided in s. 719(3) by endorsing a mechanical formula for crediting pre-sentencing custody. As we have re-affirmed in this decision, the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. I adopt the reasoning of Laskin J.A., *supra*, in *Rezaie*, [(1996), 112 C.C.C. 3d. 97 (Ont. C.A.) at p. 105, where he noted that:

- ... provincial appellate courts have rejected a mathematical formula for crediting pre-trial custody, instead insisting that the amount of time to be credited should be determined on a case by case basis... . Although a fixed multiplier may be unwise, absent justification, sentencing judges should give some credit for time spent in custody before trial (and before sentencing). [Citations omitted.]

45 In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the Corrections and Conditional Release Act apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left [page480] to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

[41] In *R. v. Thornton*, [2007] O.J. No. 1865 (C.A.) Moldaver and LaForme JJ. A held that,

24 Contrary to what some may think, the trial judge was not required to automatically give more than 1:1 credit because of a lack of programming at EMDC (Elgin-Middlesex Detention Centre). Each case must be looked at individually, on its own particular facts and circumstances.

[42] Momin Khawaja was taken into custody and charged in this matter on March 29, 2004 and has been in continuous custody in the Regional Detention Centre for the almost 5 years that have now passed. The Detention Centre is not a facility intended for long terms of imprisonment. Neither its physical design nor its programs and services are designed for that. A combination of factors account for the passage of such a long period between arrest and this sentencing date. The case was far from a simple one, involved international cooperation between security and law enforcement agencies, tested new legislation and pre-trial procedures, and included time-consuming appeals. This is not the occasion for me to make critical comment on the pre-trial processes, save to say that we must find ways to bring cases involving such features to trial much more expeditiously.

[43] The fact is that Momin Khawaja has been imprisoned for virtually 5 years now. Most of it was prior to his having been found guilty, and was, therefore, while he was clothed with the presumption of innocence. As noted earlier, positive things have been said of his behaviour during this time, including that he had succeeded in pursuing college level educational courses by correspondence. In determining what sentences to now impose, I must certainly take into account this past period of custody. The question is, 'How much account?' How much credit to give for pre-sentence custody. In *Wust (supra)* reference was made to the "often applied ratio of 2:1." In rarer cases the ratio has been even greater, and in other cases less. In *R. v. J.B.*, [2004] O.J. No 2559 (C.A.) Moldaver J.A. expressed judicial frustration with the mathematical calculation of credit for time served before sentence in this footnote to his judgment for the Court,

1. ...It seems to me that lately, the issue of credit for pre-trial custody is taking on a life of its own. Unchecked, it can skew and even swallow up the entire sentencing process. In short, it may be time to revisit the manner in which credit for pre-trial custody is assessed. However, since the matter was not raised or argued, it is best left for another day.

[44] Mr. Greenspon argued that Momin Khawaja should be credited with 2 years imprisonment for each year he has been in custody prior to today. Mr. McKercher said that the prosecution didn't take issue with Greenspon's 2:1 submission, however, his concession has to be understood in light of his position that on counts one and four, Khawaja should be sentenced to life imprisonment. Credit for time served, regardless of how much credit, would be an illusory and academic concept in the prosecutors' scheme of sentencing.

[45] I do not think giving credit for the 5 years pre-sentence custody on a 2:1 basis is appropriate in the circumstances of this case. As noted earlier, the dominant objectives of sentence in this case must be to denounce, to repudiate and to punish Khawaja's misconduct,

to reinforce our Canadian values of individual worth and peaceful, tolerant co-existence, to deter others from such misconduct, and to protect the public from any further such criminal conduct. Giving 10 years credit for 5 years of pre-sentence custody would, in my view, skew the sentencing that would tend to accomplish those objectives either by reducing the terms below what would be appropriate, or by requiring an artificially and unjustifiably higher notional sentence or starting point in order to arrive at a suitable result. Put another way, it seems incompatible to include in a predominantly denunciatory sentence, a credit of 10 years in prison for 5 years pre-sentence custody. Such a large block of credit cannot but invite public suspicion, even if unfairly, that the sentencing is being manipulated by delay in going to trial, with the result that public confidence in the proper administration of criminal justice is likely to be eroded.

[46] By comparison, in cases of murder, the most serious of crimes, where life sentences with limited parole eligibility are mandatory, the effective credit towards the time at which parole could be granted is effectively only 1:1 in terms of pre-trial and pre-sentence custody. This is the effect of s. 746 of the *Criminal Code*.

[47] I don't think that specifying a precise or particular arithmetic formula for giving pre-sentence custody credit in this case is necessary or appropriate. It simply invites the further use and adoption of such formulae, tending to make sentencing appear a mechanical cookie-cutting process. It is not. It is a highly individualized process in which individual judgment and general principles work together over the circumstances of individual cases. Put simply, in determining the sentences in this case, I take into account that Momin Khawaja has already spent 5 years being confined in a detention centre that is not suited for long-term imprisonment, and that the punitive, denunciatory and deterrent impact of that alone is significant.

[48] Mr. Greenspon also urged the Court to give some credit to Khawaja in the sentencing process for the admissions made by the defense which shortened the trial and saved public expense. At trial, a good deal of evidence went into the record by admission. This included the email correspondence of Momin Khawaja, the evidence of surveillance and interception of conversations in the Greater London area in the U.K., and the detailed search and seizure evidence at the Khawaja home. Had the prosecutors been required to adduce all that evidence without such admissions, the trial would have taken longer than the 27 sitting days consumed, and there would also have been significant additional public expense and use of resources.

[49] On the other hand, there is an ethical duty on trial counsel not to unnecessarily take up the time of the law courts. [For a discussion of this and the extent to which it may embrace a duty to make admissions, see *Report of the Review of Large and Complex Criminal Case Procedures* by Patrick J. LeSage & Michael Code (Toronto: Ontario Ministry of the Attorney General, 2008) at pages 83 - 90.] As well, the making of admissions often involves strategic considerations. An accused may not benefit by requiring the prosecution to go to great effort to prove facts about which there is ultimately no doubt. There are cases in which belabouring some aspects of the evidence may well be against defense interests. One might well ask how, in this case, listening at length to the live testimony from British Security Service agents,

illustrated with still and video images and accompanied by audio recordings of conversations all focusing on Momin Khawaja in company with Omar Khyam and associates as they went about their meetings in and around London, could have advanced the defense interests.

[50] Mr. Greenspon referred me to *R. Dass*, [2008] O.J. No. 1161 (Sup. Ct.) in which the defense argued that the way the charges were disposed of was the equivalent of a guilty plea and asked for credit for that in sentencing. Clark J. said,

74 ... while the accused is to be commended for his realistic outlook and the resultant saving of considerable court time, it is not as though he had pleaded guilty. A plea of guilt is worthy of a reduction in sentence not only because it saves the time and expense of a trial, but also, and more importantly, because it is a sign that the accused is sorry for what he has done. That is considered to be important in terms of the accused's rehabilitation and, accordingly, indicates a lesser need for an exemplary sentence: *R v. Hoang*, supra, at para 110. Even though the trial was greatly expedited, the fact remains that the accused pleaded not guilty, and, while that cannot be held against him, nor can he ask...for the leniency that usually follows a guilty plea as a proper recognition of the remorse reflected in such a plea: *R v. Pavich*, [2000] O.J. No. 4209, (C.A.).

75 ...a plea of guilt is also worthy of a reduction in sentence because of the recognition that there must, as a practical matter, be some incentive to an accused person to plead guilty: *R v. E.(R.W.)*, 221 C.C.C. (3d) 244, (Ont. C.A.), at para. 40, citing *R v. Druken*, [2006] N.J. No. 326 (QL), 215 C.C.C. (3d) 394, (N.L.C.A.), at para. 19. With that consideration in mind...I am prepared to give the accused some credit for the fact that...he greatly shortened the trial. It will not be, however, the equivalent consideration that I would have given him had he pleaded guilty.

[51] Notwithstanding trial counsel's ethical duty not to use court resources unnecessarily, I think there is value to providing some specific incentive to make admissions of fact where such facts are not disputed and can ultimately be established. I will, therefore, as did Clark J. in *Dass*, give some credit to Khawaja in determining the sentences. For the same reasons I gave in the context of credit for time served, I am not inclined to specify a precise arithmetic formula for assigning a numerical value to such credit.

### **Delay in Parole Eligibility**

[52] There is one final statutory provision that must be taken into account in determining the sentences that are appropriate in this case. It is as follows,

**743.6** (1) ... where an offender receives...a sentence of imprisonment of two years or more...on conviction for an offence...[including under paragraph 81(1)(a) or (d) of the

Criminal Code]...that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

(1.2) ... where an offender receives a sentence of ...two years or more...on conviction for a terrorism offence...the court shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less, unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act*.

(2) For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.

[53] Put simply, and in the context of this case, these provisions say that to the extent I impose terms of two years or more, in relation to count one I may and in relation to counts three through seven I must, require that Khawaja serve half the terms before being eligible for full parole, unless I am satisfied in all the circumstances that the denunciatory and deterrent objectives of the sentences are adequately served by the normal statutory regime, which would allow full parole after serving one-third of the terms. The paramount guiding principle in the exercise of this discretion is that denunciation and deterrence are to take precedence over rehabilitation of the offender.

## **The Sentences**

[54] Having found Momin Khawaja guilty as indicated in the Reasons for Judgment, and after staying further proceedings on count two for reasons given earlier, convictions are entered on the remaining counts. After taking into account and trying to properly balance the principles and objectives of sentencing as I have set them out, and considering the circumstances of the offenses themselves and of Momin Khawaja, including the five years he has already served and the admissions made at trial, I have concluded that he should be sentenced to a further term of ten and one-half years in penitentiary. Because of the number of counts the prosecutors chose to include reflecting Mr. Khawaja's overall misconduct and the statutory requirement that the sentences all be consecutive, the terms to be imposed are as follows;

count one	four years
count three	two years
count four	two years
count five	two years
count six	three months
count seven	three months

for a total of ten and one-half years. The relatively short terms for counts six and seven reflect my view that they overlap significantly with the facts underlying the other counts.

[55] I outlined earlier why the sentencing in this case had to emphasize denunciation and repudiation of terrorism, had to punish such behavior, had to have both special and general deterrent impact, and had to protect society at large from the repetition of such misconduct. In light of that and in light of the absence of any indication that Momin Khawaja is in any way repentant for his misdeeds or willing to make amends and commit to future behavior that complies with Canada's laws and values, I have really no option but to require that he serve half of the terms of two years or more before being eligible for full parole. That means he will not be eligible for full parole until serving at least 5 of the total of ten and one-half years. To order otherwise would, in my view, fail to adequately serve the interests of the expression of society's denunciation of the offences and the objectives of specific and general deterrence.

### **Ancillary Orders**

[56] Mr. McKercher sought three ancillary orders in his closing sentencing submissions. The first was an order under s. 487.051 of the *Criminal Code* for the taking of samples from Momin Khawaja for forensic DNA analysis and storage in the national DNA bank. This is mandatory where, as here, convictions have been entered for 'primary designated offenses,' unless the defense establishes that the impact of such order on the individual's privacy and personal security would be grossly disproportionate to the public interests in effective law enforcement. Mr. Greenspon made no attempt to dissuade the Court from making such an order, but asked only that its execution be delayed by 30 days, presumably to allow time in which to appeal and seek a stay of the order pending appeal. In *R. v. Briggs* (2001), 53 O.R. (3d) 124 (C.A.) the Court of Appeal ruled such a stay pending appeal could be granted. I see no reason to deny the defense the opportunity to seek that relief. Accordingly, a DNA order will go, but its execution will not take place before April 13, 2009 at the earliest

[57] The prosecution also sought an order prohibiting Momin Khawaja from possessing weapons, ammunition or explosives in the future. Mr. McKercher relied on s. 109 (1)(a) and ss. 109 (2) (a) and (b) of *Criminal Code*. Mr. Greenspon made no submissions relating to this request. Frankly, I am surprised that such weapons prohibitions do not seem to be specifically provided for in cases of terrorism convictions. Mr. McKercher's reliance on s. 109 (1) (a) and its inclusion of an 'offence in which violence is threatened' is arguably a bit of a stretch of that term. In the absence of submissions from the defense, however, and in circumstances that to me cry out for such a remedial order, a lifetime order will issue prohibiting Momin Khawaja from possessing any firearm, prohibited firearm, restricted firearm, prohibited or restricted weapon or device or ammunition, cross-bow, or explosive substance.

[58] Finally, the prosecution sought an order under s. 490.1 of the *Criminal Code* for the forfeiture of 'offense related property,' including many of the items seized when the Khawaja home was searched. The request included the large amount of cash found under Qasim Khawaja's mattress, the firearms, other weapons and ammunition found, the electronic components including the hi-fidigimonster, and the literature seized from Momin Khawaja's desk area. Because of the lack of adequate notice given for such application, I told the prosecutors that I would not deal with this request unless a formal written application was brought, on notice, and I remain seized of that matter, if and when such application is returned.

Original signed by  
RUTHERFORD J.

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Mr. Justice Douglas Rutherford

**Made part of the Court record in this case and released:**

Thursday March 12, 2009

**COURT FILE NO.:** 04-G30282

**DATE:** 2009/03/12

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

HER MAJESTY THE QUEEN

- and -

MOHAMMAD MOMIN KHAWAJA

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**REASONS FOR SENTENCE**

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Mr. Justice Rutherford

**Read into the Court Record and Released:**

March 12, 2009