[2020] JMSC Crim 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CRIMINAL DIVISION

CLAIM NO. CACT201800451

BETWEEN **REGINA**

AND **CARLINGTON GODFREY AND OTHERS**

IN OPEN COURT

Ms Abina Morris and Mr Evan Evans for Carlington Godfrey

Mr Russell Stewart for Lindell Powell

Mr Donald Bryan and Mr Alexander Shaw for Rannaldo McKennis

Mr O'neil Brown and Mr Michael Lorne for Derval Williams

Mr Everton Bird and Mr Aston Spencer for Hopeton Sankey and Copeland Sankey

Mr Shawn Osbourne for Christon Grant

Mr Lloyd Shackleford and Mr O'neil Brown for Ricky Hall

Ms Denise Hinson and Ms Kamesha Mittoo for Sean Sukra

January 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, February 3, 4, 6, 6, March 15, July 3, 6, and 7, 2020

CRIMINAL LAW – CRIMINAL JUSTICE (SUPPRESSION OF CRIMINAL ORGANISATIONS) ACT – STATUTORY INTERPRETATION – MEANING OF CRIMINAL ORGANISATION – SECTIONS 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 AND 16

SYKES CJ

[1] This written judgment is primarily in respect of the law that the court has applied in this particular case. A brief analysis of the evidence will be given to demonstrate why the defendants were acquitted.

[2] The trial began with nine defendants. The defendants were charged with various offences under Criminal Justice (Suppression of Criminal Organizations) Act ('CJSOCOA'). The Crown did not proceed against Mr Ricky Hall and he was acquitted at the commencement of the trial. The court upheld no case submissions in respect of Mr Hopeton Sankey and Mr Sean Sukra. The trial proceeded after the no case submission against Mr Carlington Godfrey, Mr Lindell Powell, Mr Rannaldo McKennis, Mr Derval Williams, Mr Christon Grant and Mr Copeland Sankey.

[3] This trial involves a new statute – the Criminal Justice (Suppression of Criminal Organizations) Act ('CJSOCOA') – if we can call a five-year old statute new. The statute has introduced new offences, new concepts to our criminal law. The understanding is that the law was passed to give effect to the United Nations Convention Against Transnational Organised Crime ('the Convention')

[4] The court will outline its interpretation of the statute. It is far better to focus on the text that is actually used. This is all the more so when it is said that the law was passed to give effect to Jamaica's international obligations. Under our constitutional system, treaties signed by the Executive are not self-executing in domestic law. Under our system of government, the Executive is held accountable by being required to seek legislation if it wishes to transform its international obligations into domestic law. Parliament, subject to the Constitution, has complete control over what becomes law. The Executive has the power to conclude treaties but Parliament has the right to reject any Bill brought by the Executive seeking to give effect to the treaty. The legislature also has the right to take parts of a treaty and reject other parts. The legislature

undoubtedly has the right to reframe the ideas (not the provisions) in the treaty in its own image and likeness to make it conform to Jamaica's domestic reality.

[5] The duty then of the court is to examine the statute in its entirety and from the words used determine the purpose of the statute. The reason is that regardless of the objective of the legislature there may be many ways to get there but one may have been chosen. The court has no choice but to give effect to the words chosen.

[6] Within recent times many words have been spoken and written about the purposive interpretation of statutes. Precious little has been said about where and how to find the purpose.

[7] The purposive interpretation if not understood can lead to a judicial power grab to wrest control of legislative content from the legislature. In the same way that judges can use words of limitation and expansion so too can the legislature. Judges have no inherent monopoly on clarity of expression. The legislature is composed of persons from various backgrounds and experiences and they, like judges, can express what they really want to say in words. They, like us, rely on the grammatical rules of the language and syntax in order to convey the meaning intended to the minds of judges.

[8] Thus when judges come to interpret a statute, we are not trying to find out the intention of Parliament (and we should stop using that formulation) but we are seeking to interpret the words used. The literal meaning rule has been given a bad name these days. The truth is everyone starts there and judges are no exception. When the text is placed before us we look and begin to read. The words used in the text have a conventional meaning and that prima facie meaning is the literal meaning, that is to say, the prima facie meaning of the words are taken as indicating what was meant. We read the text. We give the words their prima facie meaning. Reflection and re-reading may either confirm our initial understanding or bring about a nuanced meaning. The nuanced understanding often comes from reading the entire statute. When the entire

statute is read, the interpreter engages in serious thought about what has been read. As the understanding gets better it may be that the prima facie meaning may not be the appropriate one for the text. Most persons take the words at face value and act on them unless there is something in the text or context that suggests that the prima facie meaning needs to be nuanced or rejected for some other meaning.

[9] The Jamaican Parliament, just like any other legislative body, is thoroughly equipped to make rational choices about what any legislation contains. With that the court now turns to the text of the CJSOCOA.

The provisions

[10] The long title states that it is '[a]N ACT to Make provision for the disruption and suppression of criminal organizations; and for related purposes.'

[11] The Act received the Governor General's assent on April 7, 2014. The statute revolves around the two concepts of criminal organization and serious offences. To take the latter first, serious offence 'means an offence specified in the First Schedule.' This means that the legislature has selected offences from the criminal calendar and placed them in the First Schedule and called them serious offences.

[12] Under section 2 of CJSOCOA criminal organization means:

> *any gang, group, alliance, network, combination or other arrangement among three or more persons (whether formally or informally affiliated or organized or whether or not operating through one or more bodies corporate or other associations) –*
>
> *(a) that has as one of its purposes the commission of one or more serious offences; or*
>
> *(b) in relation to which the persons who are a part thereof or participate therein (individual, jointly or collectively) issue threats or engage in violent conduct to –*

(i) create fear, intimidate, exert power or gain influence in communities, or over other persons, in furtherance of unlawful activity; or

(ii) obtain, directly or indirectly, a financial or other material benefit,

but does not include any combination or arrangement among three or more persons, whether formally or informally organised, acting in contemplation or furtherance of an industrial dispute within the meaning of the Trade Union Act.

[13] This case is only concerned with part (a) part of the definition.

[14] From this definition a number of points emerge. First, there is no need for any formality as in articles of association or any written documentation to be in existence before it can be said that a criminal organization exists. Second, the language used is quite wide and encompasses even what may be called loose arrangements provided that the other requirements are met. The statute does not require any permanence in the arrangement and neither does the arrangement need be long term. An arrangement among three or more persons for the commission of one and only one serious offence is sufficient. Third, the minimum number of persons required for a criminal organization to exist is three. Fourth, the Crown only needs to prove that one of the purposes of the three or more is to commit at least one serious offence. Fifth, there is no need for the Crown to prove that the commission of a serious offence is the dominant purpose. There is no main purpose or dominant criterion as in the Canadian legislation that provided the inspiration for the Jamaican statute. All that needs to be established is that the commission of at least one serious offence is a purpose of the arrangement. Sixth, paragraphs (a) and (b) are alternatives but they are not mutually exclusive. This means that the prosecution can establish the existence of a criminal organization by providing either paragraph (a) or (b) or both. Seventh, in respect of paragraph (a) there is no need for any serious offence to have been committed in order to establish the existence of a criminal organization. Once the Crown proves the arrangement involving a minimum of

three persons and that one of or even the sole purpose of the arrangement is the commission of at least one serious offence then a criminal organization exists within the meaning of the statute.

[15] A criminal organization may have legitimate and lawful purposes. Indeed, to borrow the words of Mackenzie JA from the Canadian case of **R v Terezakis** 2007 BCCA 384, [2007] B.C.W.L.D. 6278, [2007] B.C.W.L.D. 6281, [2007] B.C.W.L.D. 6282, [2007] B.C.W.L.D. 6292, [2007] B.C.J. No. 1592, 223 C.C.C. (3d) 344, 245 B.C.A.C. 74, 405 W.A.C. 74, 51 C.R. (6th) 165, 75 W.C.B. (2d) 20 at paragraph 65, with appropriate modification:

> *65 As noted, in my view, the target of Parliament is criminal organizations. It is well recognized that criminal organizations may have legitimate, legal purposes and activities, but if a citizen who is part of a group knows that the group also has [as one of it purposes the commission of one or more serious offences] … the citizen knows that the group is within the definition of a criminal organization. There is no need for the Crown to prove subjectively that an accused shares the criminal purpose or activity, that is, supports it intellectually or participates in it.*

[16] This point is important. It is not unknown for criminals to use charitable acts to ingratiate themselves in communities but these charitable acts cannot deflect of a finding that a criminal organization exits if one of the purposes among the charitable ones is the commission of at least one serious offence. There is no Robin Hood defence if serious criminal activity is involved.

[17] The passage just cited highlights the importance of the mental element in determining whether a person is a part of or a member of criminal organization. Before anyone can be convicted of being a part of or a member of a criminal organization under this statute, the person must have knowledge of the matters specified in (a) or (b) or both of the definition. It is important to keep in mind that wilful blindness is sufficient for establishing the mental element of being a part of or a member of a criminal organization.

[18] Organization is an ordinary English word. It suggests some degree of structure. It remains to be examined how structured must the group be before it can be described as an organisation. This is a problem that has troubled the Canadian courts for nearly a decade and even the decision of the Canadian Supreme Court in **R v Venneri** 347 DLR (4th) 1, [2012] 2 SCR 211 has not resolved completely the difficult question of how organized must the entity be before it can be regarded as a criminal organization.

[19] A comparison will be done with the Canadian provisions to show that the Jamaican statute casts a wide net.

The Canadian provisions

[20] In 1997 the Canadians, more particularly, the Province of Quebec, had a problem with biker gangs and the attendant mayhem wrought by these groups. A gang war had been going on between the Hells Angels and the Rock Machine for quite some time. In the three-year period 1994 – 1997 'there had been 424 acts of violence …including 94 murders, 103 attempted murders, 85 explosions, and 142 fire bombings.' [1]

[21] In 1997 the Criminal Code had inserted into it the following provision which became section 467.1 of the Code:

> *467.1*
>
> *(1) — Participation in criminal organization*
>
> *Everyone who*

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[1] Katz, Karen Marie, Gangsterism: Canada's Law of Criminal Organizations, (2013) (Thompson Reuters), pg 48.

> *(a) participates in or substantially contributes to the activities of a criminal organization knowing that any or all of the members of the organization engage in or have, **within the proceeding five years**, engaged in the commission of a series of indictable offences under this or any other Act of Parliament for each of which the maximum punishment is imprisonment for five years or more, and*
>
> *(b) is a party to the commission of an indictable offence for the benefit of, at the direction of or in association with the criminal organization for which the maximum punishment is imprisonment for five years or more*
>
> *is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.* (emphasis added)

[22] The wording of the statute erected formidable hurdles for the prosecution which were not easily overcome. For example, proving that one of the members knew that another member had engaged in the commission of a series of indictable offences in the previous five years was a near impossibility. In addition to proving what has just been stated, the prosecution also had to prove that the person was 'a party to the commission of an indictable offence **for the benefit of, or at the direction of or in association with the criminal organisation**.' (my emphasis). Do note that none of these highlighted words appears in the Jamaican statute.

[23] Given these legal standards it was not surprising that the statute was seen to be ineffective. In the years following its passage successful enforcement of the statute appeared to have been limited. [2]

[24] The Code was amended and the expression 'criminal organization' was introduced and defined in the Code. Section 467 (1) was repealed and replaced with the following provision and other provisions were added.

> *467.1(1) Definitions*

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[2] Supra n 1 p 71 – 82.

The following definitions apply in this Act.

"criminal organization" means a group, however organized, that

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

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

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

"serious ***offence****" means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.* (my emphasis)

[25] This new provision had less onerous legal ingredients but two that stand out are (a) there must be at least three persons involved and (b) its main purpose or main activity must be the facilitation or commission of one or more serious offences. It has another limitation, namely, the prosecution must show that if the serious offence is committed it would be likely to result in a material benefit to the group or any person in the group. By contrast there is no main purpose or main activity test in the Jamaican statute. There is no requirement under the Jamaican statute of '*if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group*.' Very significantly the Jamaican legislation does not have this restriction: *It does not include a group of persons that forms randomly for the immediate commission of a single offence.* The Canadian amendment removed the series of indictable offences criterion as well as the five-year standard.

[26] All of what has been said was explained by the Ontario Court of Appeal in **R v Beauchamp** 2015 Carswell Ont 5412, 2015 ONCA 260, [2015] O.J. No. 1939, 123 W.C.B. (2d) 262 where the court said at paragraph 145:

> *The criminal organization provisions were first introduced into the Criminal Code in 1997. However, they proved to be inadequate, partly because criminal organizations were able to avert their impact by restructuring themselves in different ways to avoid the strictures of the then definition of "criminal organization". In 2001, the Government proposed amendments to address these concerns and to ensure that the provisions applied in a focussed but flexible way to a broad range of criminal activities posing an elevated threat to society.*

[27] Undoubtedly, the Jamaican legislators were aware of these difficulties regarding structure of a criminal organization and therefore sought to make the definition as wide as possible.

[28] Since that amendment the courts have striven mightily to restrict the operation of the statute in such a manner so that what has been called ordinary conspiracies are excluded from the statute's ambit. The statute, it has been said, is to capture only serious organized crime. For example, in **R v Venneri** 2012 SCC 33, [2012] 2 S.C.R. 211, [2012] S.C.J. No. 33, 101 W.C.B. (2d) 341, 286 C.C.C. (3d) 1, 347 D.L.R. (4th) 1, Fish J of the Supreme Court of Canada said at para 35:

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

[29] This dictum by the learned judge took place in the context of discussing how structured must the organization be before it can be said to be a criminal

organization. The problem for Fish J is that even conspiracies do, as a matter of fact, require some degree of continuity even for a nanosecond for there to be an agreement. Until agreement is reached by at least two persons there is no conspiracy. The moment agreement is reached there is a conspiracy and necessarily some structure regardless of how amorphous.

[30] Do note Fish J's reference to material gain. To repeat, the Jamaica statute does not require that the persons commit crimes for material benefit before they can be regarded as a criminal organization.

[31] In **Venneri** the Crown and the defence were at odds as to how structured must the organization be in order to meet the statutory definition introduced by the amendment. The Supreme Court noted the range of approaches in the appellate courts in the provinces. In the words of Fish J in **Venneri** at para 27:

> *Some trial courts have found that very little or no organization is required before a group of individuals are potentially captured by the regime: see R. v. Atkins, 2010 ONCJ 262 (Ont. C.J.); R. v. Speak [(Ont. S.C.J.)], 2005 CanLII 51121. Others, properly in my view, have held that while the definition must be applied "flexibly", structure and continuity are still important features that differentiate criminal organizations from other groups of offenders who sometimes act in concert: see R. v. Sharifi, [2011] O.J. No. 3985 (Ont. S.C.J.), at paras. 37 and 39; R. v. Battista, 2011 ONSC 4771 (Ont. S.C.J.), No. 08-G30391, August 9, 2011, at para. 16.*

[32] Before **Venneri** arrived in the Canadian Supreme Court MacKenzie JA of the British Columbia Court of Appeal observed in **R v Terezakis** (2007) 223 CCC (3d) 344 at para 34:

> *The underlying reality is that criminal organizations have no incentive to conform to any formal structure recognized in law, in part because the law will not assist in enforcing illegal obligations or transactions. That requires a flexible definition that is capable of capturing criminal organizations in all their protean forms.*

[33] This position of MacKenzie JA was endorsed and approved by Fish J in **Venneri** at para 29:

> *I agree with Mackenzie J.A. that a flexible approach favours the objectives of the legislative regime. In this context, flexibility signifies a purposive approach that eschews undue rigidity. That said, by insisting that criminal groups be "organized", Parliament has made plain that some form of structure and degree of continuity are required to engage the organized crime provisions that are part of the exceptional regime it has established under the Code.*

[34] Fish J further held at para 31:

> *"However" and "organized" — the two words read together, as they are written — are complementary and not contradictory. Thus, the phrase "however organized" is meant to capture differently structured criminal organizations. But the group must nonetheless, at least to some degree, be organized. Disregarding the requirement of organization would cast a net broader than that intended by Parliament.*

[35] Notice that the problem Fish J was grappling with was: '*the group must nonetheless, at least to some degree, be organized*.' What is that 'some degree.?'

[36] His Lordship prayed in aid the Convention. That Convention defines organized criminal group in this manner in Article 5:

> *(a) "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;*

[37] Having referred to structured group in the definition of organised crime the Convention went on to define structured group in this way in Article 2:

> *(c) "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does*

not need to have formally defined roles for its members, continuity of its membership or a developed structure;

[38] Before going on it is important to note that the Jamaican statute does not make any reference to this concept. Quite likely it was this concept in the Convention that may have caused the Canadian legislature to include this as part of the definition in the amended law: *It does not include a group of persons that forms randomly for the immediate commission of a single offence.*

[39] This was the background to Fish J's observations at para 35 of **Venneri**. His Lordship went on at para 36 to say:

> *Working collectively rather than alone carries with it advantages to criminals who form or join organized groups of like-minded felons. Organized criminal entities thrive and expand their reach by developing specializations and dividing labour accordingly; fostering trust and loyalty within the organization; sharing customers, financial resources, and insider knowledge; and, in some circumstances, developing a reputation for violence. A group that operates with even a minimal degree of organization over a period of time is bound to capitalize on these advantages and acquire a level of sophistication and expertise that poses an enhanced threat to the surrounding community.*

[40] Counsel for Mr Venneri had urged upon the court what may well have been described as check list that could be used to determine whether an organization has the indicia of a criminal organization. Fish J was wary of this approach and said at paras 37 – 41:

> *37 Counsel for Venneri suggests that the criteria outlined in R. v. Lindsay [(Ont. S.C.J.)], 2005 CanLII 24240, and considered in Battista, should be accepted by this Court as a means by which to gauge whether a given group has the necessary attributes of a criminal organization (see paras. 854-62). The "common" characteristics of criminal organizations identified in Lindsay may well be "common" to highly sophisticated criminal entities, such as notorious motorcycle gangs, Columbian drug cartels, and American "crime families".*

38 Care must be taken, however, not to transform the shared attributes of one type of criminal organization into a "checklist" that needs to be satisfied in every case. None of these attributes are explicitly required by the Code, and a group that lacks them all may nonetheless satisfy the statutory definition of "criminal organization".

39 The difficulty and disadvantage of setting out what may be perceived as a prescriptive "checklist" is aptly described by Alexandra Orlova and James Moore in the following passage:

> *It is notable that while the definition of an "organized criminal group" refers to some elements that characterize such groups, other equally valid elements, frequently discussed in legal and academic debates, are omitted. For example, no references are made to the potential for the utilization of violence and corruption, which are arguably some of the most commonly utilized methods by organized criminal entities. In part, the omissions are understandable as it is rather difficult and arguably not that useful to create a "check-list" definition of organized crime that incorporates all possible elements of organized criminal groups. The challenge of creating a comprehensive "check-list" stems in part from the lack of consistency between organized criminal groups as well as their constantly changing and evolving nature as a response to changes in legitimate societal structures. [Emphasis added; footnotes omitted.]*
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> *("'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organized Crime in International Law" (2004-2005), 27 Hous. J. Int'l L. 267, at p. 284)*

40 It is preferable by far to focus on the goal of the legislation, which is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members. All evidence relevant to this determination must be considered in applying the definition of "criminal organization" adopted by Parliament. Groups of

> *individuals that operate on an ad hoc basis with little or no organization cannot be said to pose the type of increased risk contemplated by the regime.*
>
> *41 Courts must not limit the scope of the provision to the stereotypical model of organized crime — that is, to the highly sophisticated, hierarchical and monopolistic model. Some criminal entities that do not fit the conventional paradigm of organized crime may nonetheless, on account of their cohesiveness and endurance, pose the type of heightened threat contemplated by the legislative scheme.* (emphasis in original)

A closer look at CJSOCOA

[41] The Jamaican statute did not use the definition found in article 5 the Convention. Of special import is that the Jamaican statute did not say that criminal organization must '*existing for a period of time and acting in concert*.' Neither did the Jamaican statute indicate that the criminal group must be acting in concert '*to obtain, directly or indirectly, a financial or other material benefit.*' Thus there is no necessary link that has to be made between the group and material benefit as far as the Jamaican statute is concerned.

[42] Instead of using the phrase 'however organized' the Jamaican Parliament used expression which themselves connote different levels of formality. Hence we find, 'criminal organization' means any gang, group, alliance, network, combination or other arrangement among three or more persons (whether formally or informally affiliated or organized or whether or not operating through one or more bodies corporate or other associations).'

[43] In effect, then, the Jamaican Parliament opted for a broad definition that minimises significantly the complications that arose in the Canadian context. The CJSOCOA coverage ranges from gangs (an organized group of criminals), to arrangement (a plan or preparation for a future event) and all in between covered by the words used in the definition such as group ('a number of people that work

together'), alliance ('union or association formed for mutual benefit'), network ('a group or system of interconnected people'), and combination ('joining or merging of different parts'). The words in quotation marks are the dictionary meanings of the words - group, alliance, network and combination – that are used in the definition of criminal organisation. [3]

[44] This court accepts that there has to be some degree of organisation but having regard to the definition of criminal organization the evidential threshold necessary to meet the standard of organization is not very high. What is definitely excluded is the spontaneous formation of a group that may arise in a spur-of-the-moment bar fight. Friends may have gone out to have a night of entertainment and relaxation with no criminality in mind. A fight erupts and the friends rally to assistance of one of their number. This would not qualify as a criminal organization. The court will now examine those provisions of immediate relevance to the present case.

Leadership of a criminal organization

[45] Under section 7 (1) (a) of the statute it is an offence to lead, manage or direct a criminal organization. Section 7 (1) (b) makes it an offence to knowingly counsel, give instruction or guidance to a criminal organization in furtherance of its participation or involvement in criminal activity. It is important to note the definition of criminal activity in section 2. Criminal activity means the planned, ongoing, continuous or repeated participation or involvement in any serious offence. This definition of criminal activity reinforces the point made earlier that a criminal organization can exist if the purpose is to commit one serious offence. It is significant that the legislature has defined criminal activity in this matter. This stands in contrast with the definition of criminal organisation. Whereas a criminal organization may be found to exist with having the purpose of one serious

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[3] The words in brackets are definitions from the Online Oxford Dictionary.

offence, thereby capturing the coming together for the one-off event, the definition of criminal activity captures the group that makes the commission of serious offences a lifestyle. In effect, an agreement by three or more to commit one serious offence means that a criminal organization has come into existence. If the one-off planned serious offence is executed that is simply evidence of putting plan into action but was not a legal requirement for a criminal organization to exist. If the execution of serious crime is continuous a criminal organization exists. In short, the legislation criminalises all the steps from agreement by three or more to commit at least one serious offence right through to continuing commission of serious offences which is now called criminal activity.

[46] It is to be noted that section 7 takes aim at those at the policy making level of the criminal organization and their consultants and advisers (together called enablers by the court). The enablers may not be part of the criminal organization but lend their time and expertise in a manner that furthers the criminal organization's ability to engage in criminal activity. If the court is permitted to borrow the lexicon found in international war crimes trials, section 7 is directed at the command and control ability of the criminal organization as well as at those who may not be part of the criminal organization but provide advice, professional help, and recommendations to the criminal organization so that it can further its criminal activities. Section 7 (a) is criminalizing those persons who guide, influence, organize, or are in charge of a criminal organization. Section 7 (1) (b) is focused on those who are not necessarily leaders or managers of the criminal organization but who provide advice to the criminal organization on how to carry out its criminal activities.

[47] Put another way, section 7 offenders may not be the persons committing the actus reus of the crime but are nonetheless providing leadership (section 7 (1) (a) and consultancy advice (section 7 (1) (b)) to the criminal organization. If the person providing the 'know-how' and management is part of the criminal organization, then they are caught by section 7 (1) (a). If they provide the same

service but are not part of the criminal organization, they are caught by section 7 (1) (b).

[48] The verbs lead, manage or direct are not synonyms but rather overlapping concepts that are intended to cover the entire ground of policy formulation and how to execute the policy. It is entirely possible, depending on the size and structure of the criminal organization that all the roles are combined in one person but that is not necessarily the case. The leader of a criminal organization is not necessarily a manager. The leader may be the policy maker. The manager is more the kind of person who gives effect to the decisions of the leader. Direct means to aim in a particular direction or control the operations or manage a group of persons.

Section 8 of the Criminal Justice (Suppression of Criminal Organizations) Act (CJSOCOA)

[49] Section 8 (1) and (2) creates two offences. Section 8 (1) criminalizes anyone who knowingly provides a benefit to a criminal organization. Section 8 (2) proscribes anyone from knowingly obtaining a benefit from a criminal organization or from its criminal activity.

[50] Benefit includes any money or other property, service or advantage (section 2). The use of ‘includes’ instead of ‘means’ in the definition indicates that benefit is not limited in meaning to either money or property. There is no general class established by the words money, property, service or advantage. The words that follow includes are so distinct from each other that when taken with includes show that the definition was intended to be very wide.

[51] Advantage is a term of wide meaning. As a noun there are two meanings: (a) a condition or circumstance that puts one in a favourable position or superior position; or (b) the opportunity to gain something; benefit or profit. From these two meanings and having looked at the entire statute, it seems to this court that advantage means anything

that a criminal organization may gain or provide including a frightening reputation for violence.

[52] The use of the adverb knowingly indicates that the person must know that he/she is providing a benefit to a criminal organization or obtaining a benefit from a criminal organization. Consistent with the principle that ignorance of the law is no excuse, the person need not know that what he/she provided or obtained amounted to a benefit in law. What is necessary is that the person must know, consciously, that he/she is providing something to a criminal organization or obtaining something from a criminal organization. It is also necessary that at the time of the providing or obtaining the person intended to provide or obtain whatever is the benefit. The Crown must also prove that a criminal organization exists at the time of the providing or obtaining of the benefit. The person must also know that whatever he/she is providing or obtaining it is being provided to or obtained from a criminal organization. What is a benefit in any particular case will be a question of fact.

The offence of facilitation.

[53] Section 6 (1) (b) of the CJSCOA makes it an offence to facilitate knowingly the commission of a serious offence by or on behalf of a criminal organisation. This is a new offence. Careful attention must be paid to the words used. It is not aiding, abetting, counselling, or procuring although evidence that may support these offences may also support this offence of facilitation. Facilitate is an ordinary English word which means to make action, act or doing something easier. It is quite wide. There is no requirement that the facilitator needs to be present at the crime scene so as to make him/her a principal in the first or second degree/aider and abettor. There is no specification in the statute of where the person needs to be at the time the serious offence is committed by the criminal organization. Thus concepts of principal in first or second degree/aiding, abetting, counselling or procuring are not imported into this offence although what would amount to being a principal in the first or second degree/ aiding, abetting, counselling or procuring may also amount to facilitation. There is no requirement that the facilitator must be a member of the criminal organization though that may be the case. The sole

question is whether the facilitator made the commission of the serious crime easier and at the time the facilitator acted or omitted to act knew that the act or omission would be facilitating the commission of a serious offence or whether it was known that the facilitation was on behalf of a criminal organization. Thus a person who places a call to distract the police and this was done with a view to making it easier to commit a serious crime the offence has been committed even if that person is not a member of the criminal organization.

[54] Section 6 (1) (b) makes it plain that facilitation can be committed in two ways. The first is by facilitating, with the requisite knowledge, the commission of a serious crime by the criminal organisation itself. The second is to knowingly facilitating the commission of a serious offence on behalf of the criminal organisation.

[55] The Canadian case of **R v Lindsay** 182 CCC (3d) 301 had to address the question of facilitation in the Canadian statute. Fuerst J held, at first instance, at paragraph 58 cited by J C McPherson JA at paragraph 22:

> *The word "facilitate" also has a clear meaning. It is defined in The Concise Oxford English Dictionary (10th ed.) to mean, "make easy or easier". Black's Law Dictionary (7th ed.) indicates that the word "facilitation" has a recognized meaning in the context of criminal law, as follows: "The act or an instance of aiding or helping; esp. in criminal law, the act of making it easier for another person to commit a crime";*

[56] What is necessary is that the conduct, whether act or omission, relied on was done with the intention to facilitate the commission of a serious offence by the criminal organization or the person's conduct was on behalf of a criminal organization. In either situation the person must know of the existence of the criminal organization and with that knowledge facilitated the organization or engaged in the conduct on its behalf. It is the knowledge of the existence of the criminal organization at the time of the facilitation and the intention to facilitate the serious offence or engaging the conduct on behalf of the organization that attracts criminal liability under section 6 (1) (b).

Evidence to prove the existence of a criminal organization

[57] There is no limit to the type of legally admissible evidence that may be adduced to prove the existence of a criminal organization. Many of the offences in the CJSOCOA contain the words 'criminal organization.' It means that an essential legal ingredient of many offences under this law requires proof that a criminal organization exists. One way of proving that such an organization exists is to adduce evidence of things done or said or things both said and done that are offences even though they are not charged in the indictment. This opens the possibility of prejudicial evidence which may lead to an impermissible chain of reasoning, stigmatised in **Makin v Attorney General for New South Wales** [1894] A.C. 57 which itself may culminate in a conviction based on who the defendant is rather than whether the evidence has established that he committed the offence with which he has been charged. The way to manage this risk is to determine whether the evidence adduced is greater in probative value than the risk of the impermissible chain of reasoning.

[58] The Canadian courts have had to grapple with this issue of evidence of uncharged or unindicted conduct being admissible to prove the crimes charged. In **R v Batte** 134 OCA 1, 145 CCC (3d) 449, the Ontario Court of Appeal had to deal with this question. It involved a sexual offence but the core of the reasoning can be applied here. The issue before the court, as stated by Doherty JA, at paragraph 12:

> *Did the trial judge err in admitting evidence of the appellant's sexual abuse of the complainants at places and times not encompassed within the indictment?*

[59] Doherty JA stated at paragraphs 97 – 105:

> *97 Propensity reasoning involves two inferences. First, one infers from conduct on occasions other than the occasion in issue that a person has a certain disposition (state of mind). Second, one infers from the existence of that disposition that a person acted in a certain way on the occasion in issue: R. v. Watson (1996), 108 C.C.C. (3d) 310 (Ont. C.A.), at 325. Assuming the evidence can reasonably support both inferences, there is nothing irrational or illogical in using propensity reasoning to infer that an accused committed the act alleged. Viewed in this way, the evidence of the accused's discreditable conduct is a form of circumstantial*

evidence and meets the legal relevance criterion: R. v. Arp, supra, at pp. 338-9.

98 Despite its relevance, evidence that depends on propensity reasoning for its admissibility is usually excluded because its potential prejudicial effect outweighs its probative value: R. v. Arp, supra, at p. 339. Often the evidence has little probative value because either or both of the necessary inferences needed to give the evidence probative force are tenuous. For example, the inference that an accused has a certain disposition based on evidence of a single discreditable act could be so tenuous as to have virtually no probative value. Similarly, where discreditable evidence is probative of a disposition, the inference that an accused acted in accordance with that disposition on the occasion in question will often be a very weak one. For example, evidence that an accused repeatedly abused "A" would not, standing alone, support the inference that he was disposed to abuse "B" on the occasion alleged in the indictment.

99 Even where the discreditable conduct is such as to reasonably permit the inferences necessary to give propensity reasoning probative value, that evidence can still be misused by the jury. Often, evidence which can support propensity reasoning will have a much greater potential to improperly prejudice the jury against the accused. As Sopinka J. observed in R. v. D. (L.E.), [1989] 2 S.C.R. 111 (S.C.C.), at 127-28, a jury may assume from the evidence of discreditable conduct that the accused is a bad person and convict on that basis, or they may convict in order to punish the accused for the discreditable conduct, or they may become embroiled in a determination of whether the accused committed the alleged discreditable acts and lose sight of the real question - did he commit the acts alleged in the indictment? The risk that the jury will be led astray by evidence of discreditable conduct usually overcomes the probative force of that evidence where the probative force rests entirely on propensity reasoning.

100 Propensity reasoning also imperils the overall fairness of the criminal trial process. It is a fundamental tenet of our criminal justice system that persons are charged and tried based on specific allegations of misconduct. If an accused is to be convicted, it must be because the Crown has proved that allegation beyond a

reasonable doubt and not because of the way the accused has lived the rest of his or her life. An accused must be tried for what he or she did and not for who he or she is. The criminal law's reluctance to permit inferences based on propensity reasoning reflects its commitment to this fundamental tenet: McCormick on Evidence, 5th ed., p. 658; R. Lempert, S. Saltzburg, A Modern Approach to Evidence (1982) at p. 219.

101 The wisdom of excluding evidence which relies entirely for its cogency on propensity reasoning is beyond doubt. In most situations, the evidence will provide little or no assistance in determining how an accused acted on the occasion in issue. It may, however, leave the jury with the clear sense that this accused is a bad person who merits punishment or at least does not merit the benefit of any reasonable doubt.

102 The criminal law's resistance to propensity reasoning is not, however, absolute. There will be situations in which the probative force of propensity reasoning is so strong that it overcomes the potential prejudice and cannot be ignored if the truth of the allegation is to be determined. The probative force of propensity reasoning reaches that level where the evidence, if accepted, suggests a strong disposition to do the very act alleged in the indictment. For example, if an accused is charged with assaulting his wife, evidence that the accused beat his wife on a regular basis throughout their long marriage would be admissible. Evidence of the prior beatings does much more than suggest that the accused is a bad person or that the accused has a general disposition to act violently and commit assaults. The evidence suggests a strong disposition to do the very act in issue — assault his wife. In such cases, the jury is permitted to reason, assuming it accepts the evidence of the prior assaults, that the accused was disposed to act violently towards his wife and that he had that disposition on the occasion in issue. The existence of the disposition is a piece of circumstantial evidence that may be considered in deciding whether the accused committed the alleged assault.

103 The admissibility of prior assaults as evidence that the accused assaulted the same person on the occasion in issue is well established in the authorities: e.g. R. v. F. (D.S.) (1999), 132 C.C.C. (3d) 97 (Ont. C.A.); McCormick on Evidence, supra, 665-66. While

the authorities refer to the evidence as relevant to demonstrate motive or animus, these labels merely describe the disposition that is established by the discreditable conduct evidence. They do not detract from the fact that the evidence derives its probative force through propensity reasoning: R. Lempert, S. Saltzburg, A Modern Approach to Evidence, supra, 226-27, 229-30.

104 In R. v. B. (L.), supra, my colleague, Charron J.A. provided an insightful analysis of the role played by propensity reasoning in the determination of the admissibility of discreditable conduct by the accused. She first observed, relying on R. v. B. (C.R.), [1990] 1 S.C.R. 717 (S.C.C.), at 727 that propensity reasoning underlies the circumstantial value of evidence of discreditable conduct in most cases where that evidence is received. She then said, at pp. 503-504:

...propensity reasoning in and of itself is not prohibited. Indeed, it is usually inevitable, given the nature of the evidence and the reason for its admission....

It is propensity reasoning that is based solely on the general bad character of the accused, as revealed through this evidence of discreditable conduct, which is prohibited. [Emphasis added.]

105 In describing how propensity reasoning should be addressed in deciding whether the evidence was sufficiently probative to merit its reception, Charron J.A. said, at pp. 504-505:

Therefore, in assessing this aspect of the probative value of the evidence, it is important to circumscribe the meaning of 'disposition' or 'propensity', much in the same way as the notion of prejudice described above. The forbidden line of reasoning is that which leads to the conclusion that the accused committed the offence with which he is charged based, not on the strength of the evidence which has a connection to the issues in the case, but rather, on the strength of the evidence that he is "a bad person" who would have a tendency to commit this offence.

Admittedly, the distinction may not always be an easy one to make. But, given the potentially high prejudice inherent in evidence of this kind, this requirement is meant to ensure that only evidence with a

> *real connection to the case will be admitted as opposed to evidence that merely adds to the risk of a wrongful conviction....*
>
> *106 My colleague has captured the crucial issue to be addressed when determining whether discreditable conduct evidence should be admitted on the basis of propensity reasoning. Evidence which tends to show no more than a general disposition must be distinguished from evidence which demonstrates a disposition to do the very thing alleged in the indictment. If the evidence of the discreditable conduct is such that it shows a strong disposition to do the very act alleged in the very circumstances alleged, then the evidence has a "real connection" to the very issue to be decided — did the accused commit the act: R. Delisle, "Similar Facts: Here We Go Again" (1999), 20 C.R. (5th) 38 at 41. The probative potential of propensity reasoning will be highest where the discreditable conduct is temporally connected to the allegations in the indictment and involves repeated acts of the same kind with the same complainant as those alleged in the indictment.*

[60] One of the purposes of admitting evidence of commission of serious offences that may not have been charged in the indictment is to determine the existence of a criminal organization. It would be quite remarkable if evidence that a person who consistently finds himself in circumstances where serious crimes are being committed by three or more persons should not be admitted to rebut the defence of innocent presence and therefore not part of a criminal organization. The statutory definition of criminal organization in and of itself places no limit on the evidence that may be used to prove (a) the existence of the criminal organization and (b) that the persons who are charged on the basis that they members of the organization are in fact members of the organization. Such proof may well involve proof of conduct that show serious crimes have been committed other than those covered by the offences for which the defendants are on trial. This does not violate the fundamental principle that persons are to be tried for specific offences because the legal ingredients of that specified offences may legitimately be proved by evidence of previous conduct similar to or identical to the offence for which they are being tried.

[61] In the present case the prosecution is seeking to establish that a criminal organization exists and that the defendants before the court are members of that organization by adducing evidence of their behaviour on other occasions. The prosecution is asking the court to say that the absence of paraphernalia, signs, tattoos or other markings do not mean that a gang does not exist. The Crown is asking the court to say that when one examines the pattern of behaviour over time, then the inescapable inference is that these persons habitually associated with each other and committed serious crimes together, not on a random basis, but because they were a criminal organization and that there is no other reasonable or rational explanation for these persons to be in each other's company, carrying out repeated acts amounting to serious offences other than being part of a criminal organization. The pattern of behaviour is so consistent with deliberate and persistent association in the context of committing serious offences that it would be contrary to reason to say that the behaviour was the result of random behaviour that serendipitously involved the same persons over and over again. But for the existence of the organization what other reasonable and rational conclusion can there be for same group of persons to be persistently in the company of each other for a period of at least eighteen months to twenty-four months committing serious offences.

[62] It seems to this court that evidence that does go beyond mere propensity but tends to prove the existence of a criminal organization would be admissible because the past criminality is not directed to showing that the defendant is of bad character but rather to show that he/she is a member of criminal organization.

[63] The other thing to bear in mind is that a bench trial does not always permit the application of the rules of evidence to applied in the same way as in a jury trial. In a jury trial the judge acts as gate keeper to admissibility. In a bench trial the judge is jury and gate keeper. Combining both roles in one person means that the judge will often hear prejudicial evidence but will have to ignore it for the purpose of determining guilt of the defendant. The safeguard here is that the judge has to give reasons for his or her decision especially if there is a guilty verdict. The judge will have to outline the evidence used and the manner in which the evidence was used to arrive at the guilty verdict.

[64] These then are the principles that will be applied in this case.

Brief summary and analysis of the evidence

[65] Having regard to the decision of the court it is not necessary to examine the evidence in great detail but sufficient needs to be said to about the evidence.

[66] The prosecution sought to prove that the defendants were part of a criminal organization. The Crown sought to prove this by evidence which it said showed that the defendants were engaged in the commission of serious offence over the period 2015 to 2018. The case theory was that if the same group of men were involved in the commission of serious offences over a period of time then the inference to be drawn is that they were part of a criminal organization. Nothing is inherently wrong with this approach. The Crown was not seeking to prove the existence of a criminal organization by reference to tattoos, dress, signs, language or any of those features which have been used in cases in other jurisdictions to prove the existence of a criminal organization. The Crown relied on one witness ('Witness A') to prove the case

[67] Witness A stated that he was a murderer, murderer for hire, robber, scam artist, and rapist. He said that was part of these many criminal acts of the defendants and so was able to speak to them first hand. Witness A therefore is an accomplice. That is to say, he admitted to being involved in the serious offences with which the defendants are charged with committing. The law states that it is desirable to have corroboration of an accomplice's testimony. Corroboration means independent evidence that tends to show that (a) the crime charged was committed and (b) the defendant before the court committed the crime. Independent here means evidence from a source other than the witness. In this case, evidence from a source other than Witness A. Why does the law take this position regarding accomplices? The reasons are grounded in common sense and experience. Experience has taught the courts that accomplices may minimise their role and maximise the role of others. Accomplices may seek favour from the prosecuting authorities or even be granted immunity from prosecution in exchange for their testimony. If this is the case, they have every incentive to stick to their incriminating story even if it is inconsistent with other evidence. Why? They do not wish to be

prosecuted for their crimes. In this particular case, Witness A said that he had not been charged with any offence.

[68] Also in this case Witness A said that he testified for the Crown because a number of his relatives were murdered. He was not present when these alleged murders took place. Apparently, he formed the view that it was the gang of which he was a part who committed the murders. If true, what this means is that his fear of his gang members exceeded the fear that he had of the state and so he decided to preserve himself by turning himself in and agreeing to give evidence against his former associates.

[69] The law does not say that corroboration must be present before the accomplice evidence can be accepted and relied on to convict but the court should look for corroboration. The law also says that if the court looks for corroboration and finds none but nonetheless is convinced that the accomplice is telling the truth then his evidence can be relied on to convict the defendants.

[70] Not only was there no corroboration of Witness A's testimony but there was no supporting evidence of any kind for most of his evidence. What the Crown was asking the court to do is to rely exclusively on the testimony of a man who said he murdered, raped, robbed, scammed. Of course what the Crown was asking is legally possible. However, the credibility of such a person would need to be substantially intact at the end of all the evidence in the case. The court is mindful that there will be inconsistencies between a witness's evidence and any previous statement he/she may have given.

[71] The law tolerates inconsistencies but it is a matter of degree. Any explanations given by the witness is taken into account. The law takes account of the internal logic of the witness's evidence and how it fits with other evidence in the case. The court will now refer to some of the evidence and inconsistencies to give a flavour of the frailties of Witness A's evidence.

The alleged murder of Na Laugh

[72] Witness A testified that he, Mr Carlington Godfrey ('Tommy'), Mr Kevon Smith ('Tito') (the then gang leader), and Mr Lindell Powell ('Lazarus') went on a search and murder mission. The target was Na Laugh. They went to Na Laugh's brother's house, kicked in the door, searched but no Na Laugh. They burnt the house to the ground. The went to the mother's house. Witness A stated that by this time, he was told to go by the nearby cross roads to look out for the police. Witness A said that he and Mr Powell were carrying out sentry duties at the cross roads. He said he heard shots fired and after an hour the men came to where he was and then they left.

[73] This was a very detailed account of a group of men going in search of the target, visiting two places where they thought the target would be and when he was not found, they set fire to both houses. There is no mistaking the evidence. Witness A is saying he went with these men, and at some point was acting as the look- out man.

[74] In the statement given to the police, Witness A said he did not go anywhere with the men. He was at King's Valley at the time the men were at Na Laugh's brother's and mother's houses. He also said in the statement that he saw the men return to King's Valley three hours after they left King's Valley.

[75] The version to the police is that he did not leave King's Valley to go Na Laugh's mother's house. He was not there when the mother's house burnt to the ground. Witness A is saying that he never went to Na Laugh's brother's house. He was not there when the brother's house was burnt down. Indeed, Witness A is saying that he was not even acting as the look-out man? Why would he say all this to the police and change his mind when in court? Why would he now seek to say in court that he was along with the men on this operation when his position up to the time he actually testified was that he was not present? What this means is that not even the prosecution were expecting him to place himself at the scene of the arson of both houses.

[76] Incidentally, no evidence was presented to the court supporting this narrative of any house being burnt. This was Witness A's naked assertion in a context where he had maintained the opposite position.

[77] Rationally, one cannot be at the houses and not be at the houses in the same time and space. One cannot be and not be at the same time, in the same space and the same relationship. These two versions are irreconcilable. When asked about these two versions and how he explained them, Witness A said that perhaps he was speaking too quickly and the police were recording too quickly and the combination of these two factors may account for the error. The difficulty with this explanation is that Witness A stated that he read the statement after he gave it. He made no corrections and signed it as true and correct. This is not an acceptable explanation.

Mr Copeland Sankey

[78] Witness A stated that Mr Copeland Sankey ('Tupac'), Witness A and others went by Na Laugh's mother's house. This evidence is clearly saying that he was present and saw Mr Sankey among a group of men who went on to search for Na Laugh. In his statement to the police, Witness A said that he had never been on any mission with Mr Copeland Sankey. Why would he suddenly change his position in relation to Mr Copeland Sankey?

Mr Sean Sukra

[79] Witness A gave evidence of seeing Mr Sukra committing offences. In the statement he clearly said that he had not been on any mission with Mr Sukra and on the occasion that Mr Sukra invited him to participate in a mission of criminality he refused. As can be seen Witness A changed his position in relation to Mr Sukra. Why? Was it to maintain his uncharged status? Did he feel he had to improve on the statement to make sure he remains uncharged for any criminal offence?

[80] From what has been said so far, the wisdom of the law of stating the desirability of corroboration has been vindicated. If not corroboration but some support consistent with the witness's narrative. When a witness suddenly changes tack and seeks to incriminate persons in crimes where he had not done so before, any court would be failing in its duty if it did not take a long hard look at the testimony of such a witness.

Hard and difficult questions must be asked and the answers must be found in the evidence presented or the experience of the court.

Mr Lindell Powell and rape

[81] Witness A said in evidence that he and Mr Powell were involved in the rape of a female. In his statement he did not name Mr Powell as one of the persons present when the female was allegedly raped. Here again, Witness A had not incriminated Mr Powell in any rape but added him. The question that must be asked is whether this is a propensity of Witness A. Is he in the habit of suddenly incriminating persons where previously he had not? If there any reasonable explanation coming from him? The answer is yes and therefore this must translate into reasonable doubt, that is to say, a doubt based on good reason.

[82] It should be noted that there was no supporting evidence of this rape. No victim. No police report. Nothing.

Other evidence

[83] The prosecution sought to prove that Mr Rannaldo McKennis (‘Ratty) was a murderer for hire. Two alleged instances of murder were adduced in evidence. These two murders were linked to count 3 which charged the defendants with being part of a criminal organization. In the first case, Witness A made the claim that he and Mr McKennis went to murder one Stinga. Witness A said that he was the one who shot Stinga and Mr McKennis was present. There was no supporting evidence of the death of anyone known as Stinga. There was no post-mortem report, no evidence that Stinga was missing. Remarkably, no police officer from the Westmoreland Division where this murder is alleged to have taken place turned up to say that they had any report of any murder of any Stinga. This is all the more remarkable because Stinga was said to be a shop keeper.

[84] The second case of murder that Witness A said Mr McKennis involved was that of someone name Kwan. When Witness A gave his evidence the court was left with the impression that he knew Kwan. Cross examination revealed that he did not know Kwan

and the picture he identified as that of Kwan was after the time of the alleged death of Kwan. Also it was somebody who pointed to the picture and told him that that was Kwan. There was no evidence supporting the death of Kwan, not even a missing person's report.

[85] There was no evidence other that Witness A' say so that Stinga and Kwan are dead because they were murdered.

[86] Witness A testified that he and Mr Lindell Powell had robbed a number of motor cyclists of their motor cycles at Glasgow Bridge, Westmoreland, by stretching a piece of rope across the road thereby dislodging the riders and then taking their motorcycles. The impression given was that this was an on-going activity. There was nothing to support this evidence. No evidence from the police of any reports of this kind of activity in the vicinity of Glasgow Bridge was presented.

Death of Mr Ika Clarke

[87] Witness A testified that he was called by Mr Godfrey and told that he ('Godfrey') and others had killed Mr Ika Clarke. This conversation took place by phone. Witness A gave the telephone numbers of his and Mr Godfrey's phone. From the evidence, these were cellular phones. There was no supporting evidence consistent with the authenticity of the numbers or that there was telephone traffic between the two numbers at or around the time of the death of Mr Clarke.

[88] Mr Powell confessed to participating in the murder of Mr Clarke. However, what he said about other persons in the document is not evidence against them. What Mr Godfrey said about participating in the murder and the role of others is not evidence against those persons. There was no evidence that Witness A participated in or even knew that this murder was planned or executed. There was supporting evidence of the death of Mr Ika Clarke. His body was identified by his father. The body was seen by the police. The pathologist examined the body. He found injuries consistent with the details of Mr Powell's confession. According to Witness A Mr Godfrey told him about the manner and nature of Mr Clarke's death.

[89] The prosecution's theory here was that when one looks at the details allegedly given by Mr Godfrey to Witness A and when that is compared with the details of Mr Powell's confession the coincidence is so striking that the best explanation for this is that Mr Godfrey and Mr Powell were indeed present at and facilitating the murder of Mr Clarke. Can confidence be placed in Witness A's assertions given the glaring differences between what he said to the police about the presence of himself and others at scenes of crime and what he said in evidence? Can it be accepted that the telephone numbers he gave even exist?

[90] The court took the view that in light of Witness A's proven unreliability – which has been documented above – no confidence could be placed on Witness A's ability to recall the exact words allegedly spoken to him by Mr Godfrey. In addition, given the manner in which the prosecution sought to prove the existence of the criminal organization, namely, by the commission of serious offences over a period of time by three or more persons, this evidence did not meet the threshold number of three required by the statute. The Crown was required to prove that the murder was committed by a criminal organization and not that the person was murdered by a person or persons. This was not proved.

Conclusion

[91] The court concluded that the Crown failed to prove any of the counts in the indictment. All the defendants were acquitted.