

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
)
)
- against -)
)
)
)
MOHAMMAD MOMIN KHAWAJA) Lawrence Greenspon and Eric Granger, for
) the Accused
)
)
)
) **HEARD:** June 23-27, July 2-4, 7-11, 14-
) 16, 22, 24, August 19, 20, 26, 27, 29,
) September 8-10, and 12, 2008

Mr. Justice Douglas Rutherford

REASONS FOR JUDGMENT

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Case Setting and Charges

[1] Momin Khawaja was arrested by the RCMP in Ottawa on March 29, 2004 and charged with two counts under the *Criminal Code*. On December 16, 2005 before a preliminary inquiry was held, an indictment alleging 7 offences under the Terrorism Section, Part II.1 of the *Criminal Code* was preferred against him by the Deputy Attorney General of Canada, with the Attorney General’s consent. The counts are as follows.

- (1) That he the said Mohammad Momin Khawaja between the 13th day of July, 2003 and the 30th day of March, 2004 at or near the City of Ottawa, in the East Region of the Province of Ontario, and at or near the City of London and the Town of Slough, in the United Kingdom, with Omar Khyam and others, did work 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, thereby committing an indictable offence under paragraph 81(1)(a) of the *Criminal Code*, and that he committed the said indictable offence for the benefit of, at the direction of or in association with a terrorist group, namely Omar Khyam and others, thereby committing an offence under section 83.2 of the *Criminal Code*.
- (2) That Mohammad Momin Khawaja between the 13th day of July, 2003 and the 30th day of March, 2004 at or near the City of Ottawa, in the East Region of the Province of Ontario, and at or near the City of London and the Town of Slough, in the United Kingdom, with Omar Khyam and others, did make, or have 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, thereby committing an indictable offence under paragraph 81(1)(d) of the *Criminal Code*, and that he committed the said indictable offence for the benefit of, at the direction of or in association with a terrorist group, namely Omar Khyam and others, thereby committing an offence under section 83.2 of the *Criminal Code*.
- (3) That Mohammad Momin Khawaja between the 12th day of January, 2002 and the 30th day of March, 2004, at or near the City of Ottawa, in the East Region of the Province of Ontario, and in Pakistan knowingly participated in or contributed to activity of a terrorist group, namely Omar Khyam and others for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity, as defined in section 83.01(1), by receiving training, within the meaning of paragraph 83.18(3)(a) of the *Criminal Code*, and did thereby commit an offence under paragraph 83.18(1) of the *Criminal Code*.
- (4) That Mohammad Momin Khawaja between the 12th day of January, 2003 and the 30th day of March, 2004, at or near the City of Ottawa, in the East Region of the Province of Ontario, and at or near the City of London and the Town of Slough, in the United Kingdom, with Omar Khyam and others, did knowingly instruct [Ms A.] to open a bank account and conduct financial transactions on his behalf for the benefit of a terrorist group, namely Omar Khyam and others, for the purpose of enhancing the ability of the said terrorist group to facilitate or carry out a terrorist activity, as defined in section 83.01(1), thereby committing an offence under subsection 83.21(1) of the *Criminal Code*.
- (5) That Mohammad Momin Khawaja between the 1st day of September, 2002 and the 30th day of March, 2004, at or near the City of Ottawa, in the East Region of the Province of Ontario, and at or near the City of London and the Town of Slough, in the United Kingdom and in Pakistan, with Omar Khyam and others, did provide, invite a person to provide, and make available property and financial services, to Omar Khyam, Mohammed Junaid Babar, Anthony Garcia, an individual known as Salahuddin Amin (aka Khalid), and others, intending or knowing that they would be

used, in whole or in part, for the purpose of facilitating or carrying out terrorist activity, as defined in section 83.01(1), or for the purpose of benefiting the said Omar Khyam, Mohammed Junaid Babar, Anthony Garcia, Salahuddin Amin (aka Khalid), and others who were facilitating or carrying out terrorist activity, thereby committing an offence under section 83.03(a) of the *Criminal Code*.

- 6) That Mohammad Momin Khawaja on or between the 12th day of January, 2002 and the 30th day of March, 2004, at or near the City of Ottawa, in the East Region of the Province of Ontario, and at or near the City of London and the Town of Slough in the United Kingdom, did knowingly participate in or contribute to, directly or indirectly, an activity of a terrorist group, namely Omar Khyam and others, for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, as defined in section 83.01(1) of the *Criminal Code*, namely participating in dialogue, meetings, or exchanges of information relating to the development of an explosive device intended to endanger life or cause serious damage to property, thereby committing an indictable offence, contrary to section 83.18 of the *Criminal Code*.
- 7) That Mohammad Momin Khawaja on or between the 12th day of January, 2002 and the 30th day of March, 2004, at or near the City of Ottawa, in the East Region of the Province of Ontario and at or near the City of London and the Town of Slough, in the United Kingdom and in Pakistan, did knowingly facilitate a terrorist activity, as defined in section 83.01(1) of the *Criminal Code*, thus committing an indictable offence contrary to section 83.19 of the *Criminal Code*.

[2] Mr. Khawaja elected to be tried by a judge without a jury and following protracted proceedings pursuant to s. 38.04 of the *Canada Evidence Act* in the Federal Court of Canada, the Federal Court of Appeal, and in 2 applications for leave to appeal to the Supreme Court of Canada, the trial of these charges proceeded before me commencing on June 23 last. After twenty-seven sitting days of trial, closing arguments were completed on September 12, at which time I reserved judgment.

[3] There is not much in factual dispute. The central issues are what inferences as to knowledge and intent on the part of Khawaja in doing what he did may reasonably be drawn, and what legal culpability arises from his actions in light of those findings. Before turning to those issues, I will try to relate what I think are the important facts presented in evidence in a sort of chronological narrative, to the degree that is possible, while at the same time organizing them topically. I have not attempted to refer to all the evidence presented, but have reviewed it and considered it in its entirety.

The Facts

General Background

[4] I have pieced together these family background facts on the basis of what Momin Khawaja told others in a few of his email communications that were introduced into evidence on consent. Momin Khawaja, his older brother Qasim, and a younger sister were all born in Ottawa as a consequence of their father having come to Canada to study in the 1960s. The father decided to work in Muslim countries and in the mid-1980s, he moved the family to Libya where he taught at the University of Tripoli. During their 2 years there, Momin Khawaja recalls sirens and U.S. bombing raids, and their mother hiding the children under the dining room table. They then spent 2 years in Pakistan followed by a number of years in Saudi Arabia before returning to Ottawa. At the time of his arrest in 2004, Momin Khawaja was about to turn 25 and had been living in the family home in east Ottawa for about a decade, although his father and mother had apparently moved back to Saudi Arabia. From references to various bedrooms in the house by police officers who searched it when Momin was arrested, it appears that his brother Qasim, a younger sister and two younger brothers were living in the house as well. Momin had obtained a diploma in Computer Programming from Algonquin College in 2001 and was employed on some basis in a computer software related project in the Albert Street offices of Canada's Department of Foreign Affairs and International Trade at the time of his arrest.

[5] Khawaja's arrest came about as a result of the detection of his activity with a number of individuals in the greater London area in the UK in the course of an investigation by the British Security Service, code-named Operation Crevice. Surveillance evidence revealed Khawaja visiting London in February 2004 and discussing a remote detonator he was building at the instance of Omar Khyam, and meeting with him and several other London area residents. The day after Khawaja's arrest in Ottawa, Khyam and five others, Anthony Garcia, Shujah Mahmood, Waheed Mahmood, Jawad Akbar, and Salahuddin Amin were arrested in London. A seventh man was arrested later when he returned from Pakistan. All seven were

tried for conspiring to cause an explosion likely to endanger life or property, and other related counts. Momin Khawaja was a named but unindicted co-conspirator, and the evidence of his dealings with the Khyam group was introduced at their trial. On April 30, 2007, the jury in London found Khyam, Garcia, W. Mahmood, Akbar and Amin guilty and all were sentenced to life imprisonment.

[6] It was shown in the London trial, and admitted in Khawaja's trial, that Garcia had purchased 600 kg. of ammonium nitrate-rich fertilizer in November 2003 and that Khyam had arranged for its storage in a storage locker. A quantity of aluminum powder was found in a container with Khyam and S. Mahmood's finger prints on it. There was also evidence that Khyam and others had obtained access to CD Rom disks originating with National Grid Transco, which owns and operates Britain's high voltage electric system and high pressure gas system. The CDs contained information revealing the location of high pressure gas and oil pipelines, high voltage underground cables and high pressure transmission mains. Evidence obtained by acoustic probes in Khyam's car and his residence provide records of conversations involving Omar Khyam, Shujah Mahmood, Jawad Akbar, and others in which many aspects of violent Islamic Jihad were discussed, including the possibility of targets in London or elsewhere in the U.K. including airports, large nightclubs, gas, water and power utilities.

[7] The testimony of three witnesses, Junaid Babar, Ms A. and Ms Zeba Khan, whose roles I shall come to, sheds this light on the term 'Jihad' in the Muslim world. It seems it can mean anything from an internal struggle one has within one's self, such as with a perceived weakness, it can be a struggle with one's faith, and it can mean a physical fight or battle. The evidence makes it clear that in the case of Momin Khawaja and those he associated with in the London area Khyam group, and those he connected with in relation to the northern Pakistan training camp, 'Jihad' meant a violent struggle with the objective of establishing Islamic dominance, wherever possible. Khawaja's ideology emerges in detail in a number of his email communications, a number of which I shall refer to later.

[8] For introductory purposes, however, I quote what Khawaja wrote in his email message of December 27, 2003 to Fatima Bham. “...*i always wanted to be a soldier, cuz when i waz like 5 yrs old: me mum and I would read story bout Ali radiAllahuAnhu and how he chopped off the head of Marhab the kafir and bout jihad and stuff. ~~lolz, i loved it even then and wud repeat that story of Ali radiAllahuAnhu over an over again...*” Five days earlier he had described to her how he had gone to Pakistan in 2002 with a view to fighting in Afghanistan. He wrote,

lemme tell u sumthin bout me...few yrs ago, when the kuffar amreekans invaded Afghanistan, that was...the most painful time in my whole life cuz I loved the...mujahideen and our bros in afghanistan so so much that I couldn't ...stand it. it would tear my heart knowing these filthy kaafir dog...americans were bombing our muslim bros and sisters. besides that,...Shaykh Usama bin laden is like the most beloved person to me in the...whole world, after Allah... I love...Shaykh Usama most in the world, i wish i could even kiss his blessed...hand. So I hooked up wit some bros from UK and else, and we all...went over to pakistan to support Jihad in Afghanistan in 2002. we...got there and stayed bout 3 months there, till Allah willed we came ...back. Then we had problems that none of the foreign mujahideen bro's...could get jihadi training cuz all the jihad training camps were shut...down in Pakistan cuz of those Munafiqeen government of Musharraf, ...

[9] Khawaja's description of traveling to Pakistan with some U.K. 'bros' in 2002 is backed up by travel documents in exhibit # 37 showing him flying from Ottawa to Heathrow on January 12, 2002 and thence on to Islamabad, returning to Ottawa via Heathrow in mid-April of that year.

The July 2003 Trip to Pakistan and the Training Camp

[10] Momin Khawaja flew to London and on to Pakistan again just over a year later, in July 2003. The most detailed evidence of that 2 week visit came from Junaid Babar, a 34 year old, Pakistani born, but New York raised, man. Disaffected by things as he saw them, Babar had left his studies in pharmacology in New York shortly after September 11, 2001 and returned to Pakistan, staying a few days in the U.K. en route. He had decided maybe it was now time to go to Afghanistan to fight. He had made contacts with Islamic groups and scholars in the USA

and in the UK who influenced his thinking, and he had become more and more radical in his views. He had come to believe in a 'Jihad' that meant physical fighting to remove occupiers and existing governments by force throughout the Middle East in order to establish fundamental Islamic governments throughout. Babar testified that he sought out and associated with people who shared his view of violent Jihad, and named Khyam, Garcia and Amin among such individuals he had become acquainted with in the U.K.

[11] Babar, it should be noted, was brought to Ottawa to testify, in custody, by U.S. federal authorities. He was arrested in the U.S.A. following the arrests in Operation Crevice in the U.K., and entered 'guilty' pleas in District Court in New York to 5 counts of providing material support or resources to a foreign terrorist organization, namely, al Qa'eda. Facing a maximum possible prison term of 70 years, and even the possibility of being extradited to face trial in Pakistan in relation to a conspiracy to assassinate its President, Babar agreed to truthfully and completely disclose all his information concerning the inquiries made by the Department of Justice, and to truthfully testify before any grand jury and court that the Department requested. Babar was still facing sentencing under this arrangement when he testified before this Court. He said his most optimistic hope was that he might be freed from custody sometime next year, but knew there were no guarantees. Notwithstanding these circumstances under which he presented his evidence, he was not seriously challenged by the defense on any material fact, nor was it argued that his evidence is unreliable.

[12] Babar established himself in Lahore and described a number of persons he met and dealt with in transactions ranging from stealing computers from his employer to give to other 'bros' and, as sinister as passing along a weapons cache left by one associate, to another. The cache was for potential use in a plot to assassinate Pakistani President Musharraf. Babar was back and forth between Lahore and London in late 2002 and in April 2003, keeping up contacts with like-minded 'Jihadists,' including Khyam, Garcia, Amin and others, and helping raise money to support planned activities in Pakistan.

[13] In 2003 Babar had been told that a Canadian named Momin Khawaja was going to come to Pakistan and that he had a residence of some sort he would make available to people

who needed it when they came to Pakistan to participate in the group's activities. Babar himself provided residence for people who came to Pakistan, some "*To go fight in Afghanistan. Some were at the flat just to –you know, just to receive explosives training,*" he testified. He recalled that Omar Khyam and others received explosives training arranged through Amin, and that Khyam in turn arranged such training for Babar and Garcia.

[14] In March 2003, Babar and two of his associates from the U.K. traveled up to the mountainous Malakand area in northern Pakistan, some 16 hours journey from Lahore. They arranged with a local 'maulana' [a religious teacher] to set up a camp there for light weapons training. This was done at the instance of Khyam, who confirmed the arrangement and was to provide the necessary funding.

[15] In July 2003, Khyam put Khawaja and Babar in touch by email. Babar described the system they used on various email accounts, whereby their communications were not actually sent back and forth but were simply saved as drafts and accessed by those with passwords to the account, the intent being to make detection or interception of their communications more unlikely. Khawaja arrived in Lahore and stayed with Babar for a few days. Khyam was also there. He and Momin Khawaja went up to the training camp and spent 3 or 4 days there before returning to Babar's residence in Lahore where they stayed a few days. Babar recalled Khawaja giving Khyam some money during that time, and that it was part for 'zakat' [a form of charitable giving] and the rest for 'the other thing, the brothers.' Babar had earlier had discussions with Khyam and was aware that he had some sort of operation in the U.K. or Europe involving explosions, possibly at pubs, nightclubs or train stations, under consideration and assumed that was the purpose for which Khawaja was giving him money.

[16] Babar said that Khawaja told him he'd fired the weaponry available at the camp and seemed quite excited and enjoyed the training camp experience. Others at the camp included Garcia, Imran [Immy] and Khyam's brother Shujah Mahmood. In his email communication to Fatima Bham on December 22, 2003, from which I quoted earlier, Khawaja described his camp experience this way,

...this summer, the foreign mujahideen setup training camp near...Afghan-pak border region in NWFP province in pakistan. We spent sum time there in the summer, and...we got even one video of us...at the camp, to cover our faces we all wearing scarf..lol. it looks...like all us wearing niqaabs or somthin...tho it was...amazing, the best experience in my whole life, cuz u know the...hardship purifies the nafs...there was some amazing Ulema...there who had spent their whole life in Jihad in Afghan and Kashmir...they graduated from Jalaluddin Haqqani's (I'm sure u heard of him...from afghan jihad) madressa and were All into Jihad...After that, some of the bros were kept in pakistan for specialized... training for guerilla, and sniper training and things like...that, and some bros sent to different parts of the world by the arab...mujahideen to help out in the jihad worldwide.

[17] Following Khawaja's departure from Pakistan later in July, 2003, Babar, Khyam, and several other of their U.K. associates went back up to the training camp, this time taking the ingredients to bring about an explosion, ingredients Khyam had previously instructed Babar to assemble. This included nitric acid, aluminum powder, ammonium nitrate, urea and more. Babar testified that he had those ingredients, as well as some blasting cap detonators in his residence while Momin Khawaja was there. He had already agreed with Khyam to try to smuggle the detonators into the U.K. for him. On this occasion at the camp, the group, under instructions from Khyam, successfully concocted and exploded an improvised explosive device, blowing a small crater in the earth.

[18] It was Babar's view, that while Khyam planned on using the camp to experiment with explosives, not all who attended the camp were aware of this. Babar testified as follows concerning his understanding of the purpose of the camp,

Originally I had set it up just for – you know, they can do physical activity there, learn how to fire AK47s and light machinegun and the rocket-propelled grenade. And at the time that I set it up, I did not know that Ausman [Khyam] would also be doing explosives training, but I would then find out later on that that's what Ausman [Khyam] had in mind.

[19] He confirmed that all those who attended the training camp, including Khawaja, shared his philosophy of violent Jihad, and that at the camp, in addition to physical and weapons training the participants discussed the virtues of Jihad. On cross-examination, Babar testified that while some of those who attended the camp that summer were privy to Khyam's plans for explosives training and use, others, including Momin Khawaja, were not.

[20] Babar described his understanding of the organizational relationships individuals he was dealing with had. Khyam worked for a man named Q who lived in Luton, near London. Q and Abdul Waheed had ties to al Qaeda, respectively. Salahuddin Amin also worked under Q insofar as U.K. matters were concerned, but under Abu Munthir as concerned Pakistani operations. Munthir was a leader in Pakistan, who responded to al Qaeda higher-up, Sheikh Abdul Hadi. I have tried to avoid getting lost in the welter of names that filled the prosecution evidence with too little organizational explanation as the case went in. In any case, apart from his actual dealings with individuals, there is no direct evidence that Momin Khawaja knew who all these people were or how they related to others.

[21] Before Khyam left Pakistan in August 2003, he discussed his operational plans for U.K. and Europe with Babar, indicating he wanted Imran, one of the training camp participants, to take part in a suicide operation. The latter apparently declined. Babar testified that Khyam went to the northern tribal region and discussed his plans with Abu Munthir, informing him of his operational plans and seeking advice as to their carrying out. Babar noted that “...at this time, [Khyam] didn’t have any, you know, specific targets, he just had general ideas. So, the plan was to go back and to discuss specific targets, how they would be carried out, every – like, just everything like that with Abu Munthir.” Again, there is no direct evidence Khawaja was in any way privy to the plans or to these discussions as he was back in Canada by this time. I mention this kind of detail only as background against which Khawaja’s actions may be understood.

The October 2003 Trip to Islamabad

[22] Momin Khawaja flew from Ottawa to London again on October 13, 2003. After an overnight in London, he flew on to Islamabad, Pakistan. He left Islamabad 4 days later returning to Ottawa via London’s Heathrow Airport. Junaid Babar testified that he picked up Khawaja at the airport in Islamabad. Khawaja had brought with him from Khyam, a medical kit, 2 SIM cards, some invisible ink pens and lights to render the ink visible, and 800-1000 pounds sterling and a quantity of Canadian currency. The SIM cards were for Babar so he

could keep in touch with Khyam while traveling, but the other items Khawaja handed over to Salahuddin Amin at a meeting Babar arranged. Amin was to get them to Abu Munthir. At that meeting, Amin, knowing that Khawaja had computer expertise, asked him about other things he might help out with, including the possible spreading of computer viruses, communications by internet and the possibility of encrypting messages, and a project Momin and his brother Qasim were working on involving the navigation of a model aircraft by use of a GPS device. They discussed Abu Munthir's need for night-vision goggles for ambushes and fighting at night in Afghanistan and Babar told Amin that he and Khawaja would work on obtaining some. When the meeting ended, Amin told Khawaja to keep him informed of everything he was doing, through Khyam.

[23] On this visit to Pakistan, Khawaja planned to meet Zeba Khan, a young woman living with her father and sister in Islamabad, with whom he had become acquainted over the internet. Their extensive internet correspondence between August 8, 2003 and February 8, 2004 is contained in exhibit # 63. Khawaja and Babar went to Zeba Khan's home twice. On the first visit, they met Ms Khan's father and sister, and arranged to return for dinner a day or two later.

[24] Meanwhile, Khawaja and Babar returned to the Malakand region where the training camp had been held, a much shorter trip from Islamabad, because Khawaja wanted to fire the rocket-propelled grenade launcher again. When they inquired of the 'maulana' if it could be done, they were informed that there was no more ammunition for the weapon, so they returned to Islamabad. The night before Momin Khawaja left Islamabad, he and Babar had dinner with Zeba Khan, her father and her sister. The discussion involved general religious and Islamic viewpoints. Khawaja then returned to Ottawa via London's Heathrow and Toronto.

Provision of a Residence in Rawalpindi and of Money

[25] There was evidence that to support Babar, Khyam and the ‘bros’ in their jihadist efforts, Momin Khawaja provided money [in addition to the currency he handed over to Amin, referred to already] and made available a residence owned by his parents in Rawalpindi. Khawaja told Zeba Khan *“My parents have a house in Pakistan, which they have given to me, and i let my foreign bros. use it, but since bros have a tendency to move around like jack-rabbits, i’ve got tenant-issues on my growing list of headaches...I’ve gotta find bros. who can stay put and at least take care of the house.”* [exhibit 63, page 19]

[26] Just before his trip to Pakistan and the training camp in July 2003 he emailed Babar, saying

The house is ready, you must contact the person in pindi NOW, his name is Arif Butt, call him right away: area code: 51 number: 4845682 . Someone has to move into the house right away, or else we will loose this chance. Bro, i am arriving on july 15 so I need to know how to meet/contact you.

[27] Babar discussed the use of the house with Khawaja when they met in Lahore a few days later. He testified

The house had been empty for a while because first, I had said I would move in. Then we thought maybe some of the people that Ausman [Khyam] was working with, they would move. Then we thought Q would move into the house, but there still would’ve been three to four months the house is empty. So – and Momin had his uncle or whoever it was clear the –house, but it still was empty after this time, so he’s trying to tell us that we have to put somebody into that house.

On August 29, 2003 Khyam emailed Khawaja saying

There is a big problem right, the spooks followed the brother and his family that were going to staying in ur house, they had 4 cars after him, and i dont know where he is, so we just waiting on that, so i dont think he will be using your house, too on top for him and your house, so right now I got a message that he wont be using the house right now coz we don’t know where he is?? iam waiting on a bro to let me know wot they gonna do with the house, if no one uses it I will get some1 to return the keys,”...

Khawaja replied,

Bro this is bad news. May the most high help out the bro. is there anyway to get anyone else (foreign bros) to move in ASAP? What bout john lewis [Anthony Garcia] and immy [Imran] and them bros or Kash [Babar]? Even if you can get someone to move in for 4 months, I can come around december myself and take over. this is really important bro, as you know I forced my parents to kick out the other tenants b4. talk to the bros, and try.

And about 6 weeks later on October 18 he emailed again to Khyam

Bro, we still don't have my house being used. Its still empty, so do you know any bros from UK that wanna go to PK anytime soon so we can put them up there. I need a solution for this bro, so try and ask around the bros if anyone wants to head for PK they can live there.

[28] In late October and early November of 2003, Babar emailed Khawaja asking for money to help pay his travel costs back to the United States. Khawaja wired him 37,972 Pakistani rupees, the equivalent of about \$880 CDN by Western Union Money Transfer.

[29] Khawaja also enlisted the assistance of a young Muslim woman, Ms A, in Ottawa to transfer money to Khyam and his associates in the U.K. He contacted the woman, then in her teens, by email in the fall of 2002, and her evidence suggests that he likely got her email address from Anthony Garcia. Khawaja was using an alias, Ibn Hamza. He enlisted her help in sending money and depositing money Khawaja provided into a bank account for which he was given the debit card. She did this for him because he explained that the banks sometimes made it difficult for men to do these transactions but didn't suspect anything if a woman did it. The defense admitted, and the documents supported transactions by her on Khawaja's behalf in these terms

MR, GREENSPON: Your Honour, it's – we're prepared to admit that there were transactions that were conducted by Ms. A. upon Momin Khawaja's instruction, and they included the 13th of January 2003, she wired \$5,180 via Western Union to Omar Khyam's wife, a woman named Saira Khan, who resides in the United Kingdom.

A second transaction, the 17th of January 2003, Ms. A. opened a Bank of Montreal account in her name, and then provided Mr. Khawaja with a debit card number 5007660628074679. This is the same debit card that was later found in the possession of Omar Khyam as he transited Stansted Airport on February 2nd, 2004.

It's also admitted that on January 28th, 2003, Ms. A. deposited \$500 into the bank of Montreal account, and a further \$1,500 on March 28th, 2003, into that Bank of Montreal account.

[30] Khawaja opened a hotmail account for him and Ms A to use to communicate and taught her the ‘save draft’ method of communicating without actually sending an email. She testified that he also told her that “...*he was going to Pakistan to go to Afghanistan, so it centered around that, and that he wanted to use the debit card that I gave him for food when – while they were in Pakistan.*” Ms A. stopped communicating with Khawaja some time after he returned from Pakistan in July 2003. She explained

I stopped talking to him because I actually thought he was dishonest. Like, when I found out his name, like, he wrote an e-mail once with – the same e-mail with two names, and, yeah, I didn’t know what he was doing. Like, I just didn’t understand what he was doing and I didn’t want to be part of what he was, so I just – I stopped talking to him. I didn’t even send him an e-mail or anything, I just stopped.

[31] It would also appear that Khawaja was putting Khyam and his associates in funds on other occasions. In a message dated January 12, 2004, Khyam wrote to Khawaja, “*Also, nigga needed to know if u got the next 2000 pounds, if u have, mail me nigga.*” [Babar explained that ‘nigga’ is a slang term used to refer to a person, or persons if plural, whose identity would be apparent in the context of the communication]. Khawaja responded, “*about the cash, bro my situation is changing a bit here right now, so we will have to make it ½ the amount for now, 1000 pounds. Let me know. This might affect things for bros.*” On January 30 Khyam asked, “*when u come can u bring the 1000 pounds with you, or is difficult for you right now?*” and Khawaja replied, “*...i’ll plan a trip soon, i’m gonna try an see when I get earliest booking over. i’ll bring the 1000 pounds with me when i come down.*”

Momin Khawaja’s Mindset

[32] Between August 2003 and February 2004, Momin Khawaja and Zeba Khan engaged in extensive and detailed email correspondence. Although they came face to face only during the October 2003 visit to her home, Khawaja revealed his views on the world and his role as a young Muslim in it. I propose to refer to several excerpts, as I think they are relevant to an understanding of Khawaja’s activities in relation with the Babar, Khyam, Amin, Akbar and others group. In his message of August 8, 2003, he wrote

I did try leaving before, after afghanistan happened, I left and went to pakistan like many emotionally charged brothers, intending never to return, vowing to become the west's mortal enemies. A few months later, circumstances forced almost everyone back...I was not content with the idea of a 9 to 5 life where you put on a smily face and pretend you cant do anything, change anything, while the muslim world is in flames. so i traveled a bit, and met some amazing bros in the UK, who felt the same way and were like solid rocks in dedication and willing to go the extra mile or thousands of miles for that matter. We headed for pakistan again, and it was the most amazing and unforgettable experience of our lives. We went to the north tribal areas near the pak.afghan border, and trekked to a village in the mountains. There, we met some of the most sincere, kindest people with the biggest hearts in the world. when you see the faces of old men with while beards and turbans, beautiful little muslim children living in poverty yet happy, you begin to get in touch with reality which is lost with life in the west. You look around and realize that your own muslim brothers and sisters need you, and the muslim Ummah needs you now more than ever. Life in the west is a veil over ones eyes; you never really see through till u leave...i made my intention then to leave the west permanently. that was 2 weeks ago in pakistan...I'm not from the States, but from Canada. we've got blue passports, tall skyscrapers, a really long street, and a messed up society too. except we pay our allegience to the queen, not bush. But who cares, they're all on the same boat

On August 12 he wrote

As for my goals in life, My main goal is to live as a Muslim in a state that Allah is pleased with me. I've got many other smaller goals or things i'd like to accomplish in life, but for starters I'll talk about my main goal. I strongly believe in the concept of Hijra and Jihad. Basically, migrating to preserve and build our Deen, and supporting our oppressed brothers and sisters in any and every way possible, whether physically, financially, or morally, in deterring those who wish to destroy Islam and the Muslims. So, that's the gist of it, and through this I hope to be a better Muslim.

Later the same day he wrote

I'm just a wanna-be gung-ho Islamic. I'm kinda looking for someone more active than I am so I can join them in Islamic Activism.

On September 18 he wrote

For a sincere Muslim, guns, warfare, and weaponry are a means of defense, a means of deliverance, and something which enables him to carry out the obligation of Jihad...., So engaging in Jihad also requires us to prepare in the best of ways. Not only spiritually in Deen, but also train with excellence in warfare and the best of weaponry...A war-like mentality is needed against the Kuffar (governments, armies, supporters) because they *are* at war with us. America is at war with Islam, Israel is at war with Islam, so we do not treat Ariel Sharon and George Bush with compassion, do we? They have slaughtered tens of thousands of our brothers and sisters. The blood of the Ummah has

been spilt... This is the precise reason for the Jihad, the training, warfare, weaponry, and war-like mentality against those who commit acts of aggression... This is why the preparation and equipment is needed, so that its presence emanates a prowess that deters any who might harbour ill intentions, like the example of a 300 pound football player who does not need to tell people about his strength, since his sight alone will intimidate any.

and continued a little later,

It was then, by the will of Allah that I met a brother from England who was in the effort of Jihad, and part of a group of brothers who were leaving to go to Pakistan and join the Mujahideen already in Afghanistan. Although, untrained brothers are not sent to the front-lines of Jihad, with the immense favor of Allah I was able to join a few brothers and spend time at a Mujahideen training camp...Not a day goes by, that I do not wish to be with the Mujahideen in the front-lines of Jihad. By the will of Allah Ta'ala I will continue to strive in this cause always turning to my Creator in hopes of attaining 2 of the best things; Victory or martyrdom...

[33] Then, in his message of October 24, 2003, Khawaja explained to Zeba Khan why he feels that certain acts which at face value seem totally wrong, may very well be permissible, justified and even noble. These excerpts from a very long message illustrate his understanding of what is permissible.

So under certain specific circumstances, a major sin becomes a praiseworthy, noble, and mandatory action...True economic J is when we go after the governments and various institutions and scam large, pulling off elaborate scams worth millions and using that for the J. Its about bringing down the kuffar enemy dealing blow after blow, by whatever means available or necessary...Picture this, a young bro wearing an explosive vest walks into a busy Israeli nightclub and in midst of all the partying, he presses a button and detonates, killing himself and dozens around him. Suicide or Martyrdom? First of all, we all know that there's no way to get any weapons into Israel, they strip you naked at each check-point, so you cant fight them using common weapons and the ONLY way you can conduct the J is by doing Martyrdom operations since explosives are made from common items found everywhere. Besides, All the youngsters there are soldiers anyway, so its halal to kill em all. Now think about this, Islam forbids suicide as a heinous crime, a very major sin. So how on earth can such a huge sin be considered one of the most noble acts, martyrdom? The rank of a Shaheed is just below the Prophets, right? The reason why this is permissible and noble is because there is absolutely NO other way of fighting them except this...So sometimes things that seem wrong from face-value due to our lack of info or understanding, such as certain operations that Muj carry out against the kuffar, may in fact be very noble deeds with great long-term benefits for the Muslim Ummah.

He then described his notion of 'economic jihad' in these terms.

What is accurate, effective economic J in the proper and honorable way? Ok, we know that the only way the Kuffar support their wars are with their economies. So we have to come up with a way that we can drain their economy of all its resources, cripple their industries, and bankrupt their systems in place. All so that they are forced to withdraw their troops, so they cannot afford to wage war, get them so entangled with problems at home that they dare not worry about attacking us or supporting others in attacking us. We need constant economic J, blow after blow, until they cripple and fall, never to rise again. Lets look at the effects of Sept. 11 from the economic J perspective. What did Sept. 11 do to America? Because of Sept. 11, the Airline industry is dead, travel and tourism is dead, the U.S. dollar is dead, the U.S. economy is practically in a state of recession. Trillions of dollars in lost revenues, thousands of businesses bankrupt and the negative impact still continues till this day. Would you not say that the actions of 19 men on Sept. 11 are the most accurate, effective, and honorable way of conducting economic J? Imagine if there were 10 Sept 11's, wouldn't that accurately bring America down, never to rise again? Yes, I understand that innocent human beings died, but there is absolutely no other way of achieving the same objective with the same effect. The intention was to bring down the U.S. economy, not harm innocent people. I understand that the Kuffar used that to wage even more wars against us, but again, these wars are just killing their economies even more since they are not going as planned. Allah ta'ala willed for events to occur in this manner, so they're happening as decreed. Our job is to contribute as best as possible the destruction of the enemies of Allah, and help out the cause of Deen so that the word of Allah dominates over all other ways.

[34] In the course of their correspondence, Momin and Zeba explored their respective views on marriage and related aspects of married life, first of all in a general way, but it evolved into a plan to marry that included his having a conversation with her father on the telephone and then the face to face visit in mid-October 2003. Throughout the correspondence, both before and after the October visit, Khawaja seemed at pains to disclose his views on Jihad and his role in it, to ensure that Zeba understood his overarching priority to the Jihad before they married. In one email he told her his mother had warned him to make sure that Zeba knew of and was accepting of his involvement in Jihad.

[35] Following the October visit, their correspondence became detailed as to possible dates and arrangements for a wedding. Zeba pressed Momin to set a date but he demurred. On December 7 he emailed her saying,

I thought about it a bit, and it seemed like I might have been making decisions too quickly for my own good. It's not that I didn't want something to progress, but I'd rather

be sure of what I was doing so that I don't regret anything later. The thing about marriage is that, well, once you get married, you're with that person for your whole life. That's a big thing, so I'm sure none of us want to make that choice in haste...Apart from that, my own intentions in the J also affect my decisions. The situation in regards to the J changes constantly, and my own obligations and responsibilities change as well. This is the major area of concern right now for me. I'm not sure if I can get married in the next 3 months, because marriage would mean giving up the J period, and choosing a settled life...And if I leave in the next 2 months, I'm not sure if I'll ever come back...So, that's basically where it stands with me right now.

[36] In a message dated December 25, 2003, Khawaja said, "*I have made my decision. I'm retracting my engagement proposal.*" Although he wavered, even asking in a message on February 8, 2004 if there was any possibility of "*a second chance at a matrimonial correspondence,*" their relationship was at an end.

[37] In her testimony, given by video-link from Dubai, Zeba Khan said she did not think Momin Khawaja would participate in terrorism, in the kind of things aimed at killing innocent civilians. She did not take some of his talk about jihad seriously. She said she saw a difference between the things he talked of in the emails and the things he would do. She was surprised to hear of his arrest and charges as it was against what she knew to be his nature. She agreed with Mr. Greenspon's suggestion that Khawaja had a strong concept of what was right and what was wrong, and that blowing up innocent civilians was wrong. She said she had been prepared to marry Momin Khawaja, and would not have had he thought otherwise.

[38] On the other hand, in her statement to RCMP investigators taken in Dubai on September 19, 2005 under oath and marked exhibit # 69 as her testimony in chief at trial, she said that she didn't believe in killing civilians, "*I don't think you just go kill all the kaffirs, blow everything up, steal money fund whatever...it's not allowed it is simply not allowed.*" But as for Babar and Momin Khawaja, she said, "*I can't tell you whether or not they agree with this. I am not a mind reader.*" In addition, she was unaware of Khawaja's involvement in building remote detonating devices for Khyam and his group.

The Development of the Remote Detonating Device 'hifidigimonster'

[39] No sooner back in Ottawa following his October 2003 trip to London and Islamabad, Khawaja reported to Khyam on the Islamabad portion of the trip. He confirmed

I gave Kman [Amin] the money, and the medical kit, and your notes. I also talked to him about the computer stuff, communicating safely, so i will try to setup something soon for all the bros so we can have a better way of staying in contact. Kash [Babar] is doing good, I gave him his money also, and the two phone cards with the numbers and explained the costs of using them in the mobile. We went to the village, but none of the niggaz are there right now...

[40] He then began the first of a series of email exchanges with Khyam about a project in which he was to devise a remote detonating device at the instance of Khyam. His message continued

Also bro, I will start on the remote devices thing right away, and will let u know once we have it ready for testing. and I find some of the things for testing, Urea, nitro phosphate, anything else we need?

He added

Bro I think Kman [Amin] said they needed night vision goggles, and that stuff here is cheaper, so if u want we can try to get some for the bros from here at the cost of maybe 300 UK? I can look into it...anything else bro that we need to do, or any help needed with anything?

Khyam replied on October 21

Nigga look for the Urea and Nitro stuff, work on wot we discussed and. get ur bro to work on it as well making sure only limited is told to him...About night goggles n that if they cheap then get them and anything else you think will be good..

A week later Khawaja advised

Ok nigga, we can get the devices, the cost to make em is about 4 pounds each, remote detonation, i think the range is around 2 kilometers, it is a small in size...we can try a few out here and let u know how things go...also I' m looking for the other things...

He then added

also bro, when I was in PK me and kash [Babar] talked about immy, wats he gonna do there?... we have a suggestion, to use the bro for a one-way operation to the most high... maybe in Yahoodi land...what do you think?

[Babar testified that ‘a one way operation to the most high in Yahoodi land’ meant a suicide operation in Israel.]

The same day, Khyam responded

bro let me know asap when u find out this is really good... about imy we will need to discuss that i person.

On October 31 Khawaja reported

ok bro, we will try to have a few devices ready for testing give me 2 weeks, and I’ll give u more details on how it works an stuff... abt Immy, we will talk in person bout that...

He emailed further on November 10

nigga we workin on it, just small delay cause of fastin an all...hopefully we shud get somthin in a few weeks...rememba wat I said bout the main man in de summer, its all happenin. in Saudi, then the eclipse, now the fireworks, gotta get into that place b4 next few months...

[41] After several weeks had passed, Khyam asked “*howz it going bro stay in touch?*” to which Khawaja replied

Things goin good nigga. We started up work on the project again, the things that need to be done. We still need a few weeks bro, its not as easy as we thought it would be. Lots of custom electronic work, equipment, but it should be excellent once we finish. I will show some sample pics to you next 2 weeks. we have to design the whole thing ourself, and there are 2 parts to it. one transmitter, that sends the signal, another receiver that will be at distance of 1 or 2 km that will be attached to the wires and send out 5 volts down the line and then we get fireworks! we pray to the most high we can do this in December. as soon as its ready we will do a demo for you bros. hows things goin wit u bros, any plans lately?

Khyam responded on December 13

yea nigga that’s excellent news keep up the good work, and the most high be with you nigga ...you know us nigga same old things going on in the hood! Lol yea gonna wait for ur demo nigga the, niggas in PK asking about it, so far so good.

On December 24 Khawaja reported

good to hear from u nigga, we finished designing the baby, now we just gotta put things together and test out next week or two, if all goes well i'll come down and show u the baby... wat else happening, u staying in kuf land for now nigga?

to which Khyam replied

that's excellent news nigga, yea iam in kuff land for now and waiting for ur surprise.

By January 19, 2004, Khawaja was still reporting problems. He advised

Doin alright here bro, we got the device transmitter and receiver done, praise the most high, but its not working correctly yet. maybe we need few more days on this.

His message ended, "*r u planning on staying in kuf town for now or leaving?*"

On January 22 he reported

we're fixing up our screwups with the devices here, hope to the most high we jus got a few more days on it...i'll try an make a booking to visit u niggas in next couple weeks...as soon as i get something i'll let u know before I come over...i'll giv u an update in a few days...talk to u soon nigga.

On January 25, the problems seemed solved. Khawaja announced

nigga praise the most high, we got the devices working done nigga. praise the most high. alright bro, I'm gonna try and get a booking asap to come over and see u niggas, will try and arrange to come down soon. Gimme a week or two. In the meantime we'll test out the stuff an make sure things go smooth, also gotta find a way to get this stuff to UK if u boys wanna see it there. If all goes well, we can start making lots of these. anyhow will let u know soon.

Khyam's response was positive, but did not overlook the quest for money.

that's excellent news nigga, praise be to the most high, I hope to see ya soon nigga, so we can see it too. when u come can u bring the 1000 pounds with you, or is difficult for you right now?

[42] The email exchanges then took up the concern of how to bring the device into the U.K. On February 2, Khawaja raised it. After confirming he'd bring the 1000 pounds, he asked

another thing i wanted to ask u bout was, how should i bring the devices? ? i don't know if its safe to bring that on the plane, u think? maybe we could parcel it over to u niggs, but i don't know if UK customs will take it or anything like that. any ideas on how i shud bring it over? take care nigga, and hope to see u real soon!

Khayam responded, saying “about *the device I will let u know soon.*” Khawaja’s next message was on February 8. He said

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

[43] Khyam’s reply on February 10 sounds a caution about trying to get the device into the U.K. It also reveals more about the bank transactions with which Ms. A. had helped Khawaja and the authorities looking into the bank card Khawaja had provided to Khyam. His message read

20th feb shud fine nigga, make sure the flight arrives either b4 10am or after 8pm on 20th feb coz I will at work, try for heathrow coz i will in the city, i think the best thing is to make one here, i think it will too dangerous to mail or send anything u know these kuffs are tight these days...One more thing u remember that bank u opened for us , the kuffs took a photocopy of it recently so make sure ur carfull with it, u decide whats the best action if u want to carry on using it or cancel it i will leave that to you...

[44] Two days later Khawaja confirmed his arrival at Heathrow on February 20, and says this about getting the device into the UK.

...about the devices bro, its too hard to make them over there cuz we have all the parts and equipment over here...I have a good way of getting it over without piggers finding out.. just gimme a girls address &...i will use my company name and courier...a package as small computer part cuz you cant tell the difference...for now i just wanna show u niggs one sample... if I send it, it will get there in a day or two...and I’ll deal with the account thing...

And on February 18, Khawaja emailed again saying

For the devices, u let me know by tomorrow night, i can courier that stuff over, otherwise we can send them over later or maybe show you some pics of what it looks like.. It’s up to you, we can talk more bout these projects when I see u. Also I’ll bring the cash with me.

Khyam responded the next day

bro don’t worry we’ll be there to pick u up, about the device its better we leave it wil xplain later we will discuss it and maybe show pics at most.

[45] Khawaja flew to London arriving the following day, February 20, 2004. The British Security Service had Omar Khyam and his brother Shujah Mahmood under surveillance as they met Khawaja at Heathrow and drove him to Khyam's house. Surveillance and probes in Khyam's car and his house in Slough permitted the recording of still and video images of them and of some of the conversations Khawaja participated in and others he did not, during the 2 days he spent in and around London before he returned to Ottawa on February 22. Transcriptions of recorded conversations, to the extent they are comprehensible, were filed in a binder along with local London area maps and some still photographs of premises, as exhibit # 13.

[46] On route from Heathrow to his house, Khyam can be heard telling the others of the need to be secretive, to keep activities to small groups, and not to mix cells so as to avoid everyone getting caught if one goes down. He also stressed the need for strict obedience by each person to his 'Emir' or leader, a concept called 'Amataship' that Babar testified was taught at the training camp.

[47] Once inside Khyam's house, they discussed a number of brothers going to Pakistan and the gear for them to take. Khyam said they were going in March and Khawaja said he'd like to go near the end of March. *'If you do, you can link up with us there,'* Khyam told him. Further discussion of necessary camping equipment and clothing, and the possibility of Khawaja bringing some with him when he came, ensued. Khyam then asked Khawaja if he got that device ready. Khawaja told him he brought a picture of it, and tried to explain what it was and the problems they had building it. Speaking of the frequency it uses, he said *"...it's actually impossible for them near urban areas to block it out because they literally use a lot of that themselves..."*

[48] The three of them then drove to a local internet café where Khawaja showed Khyam and Mahmood a photograph of the device he had built, by accessing an email attachment named 'hifidigimonster', a digital photograph of the device on his computer at his house in Ottawa. Both that digital photograph and the device in the photograph were found and seized as evidence when Momin Khawaja was arrested and the house searched about 6 weeks later.

[49] The three were followed as they drove to various places that afternoon and evening, including to Akbar's residence. The next morning the three returned to Khyam's house. The probe picked up scraps of conversation between Mahmood and Khawaja. He appears to have showed Mahmood his driving licence, a document that sounds like it may have been a firearms acquisition permit or possibly even a 'carry' permit, and they discussed outdoor clothing being assembled and to be acquired. They also discussed a video camera and its capacity and the problem of chargers. "*You can charge them at the village,*" Khawaja observed. There was discussion of whether Mahmood or Khawaja would be '*...going to do a permanent job...become a permanent paki...*,' of the hours of trekking it had taken them to get to the training camp and of the people who were there and their experience including the small arms training. At one point after much discussion of the skills of shooting various long guns, Khawaja suggests to Mahmood that "*You guys should come for a few days out in Canada go shooting and stuff it would be fun.*"

[50] Around the supper hour on February 21 after being kept under surveillance as they drove around to a number of places, the probe in Khyam's car picked up portions of conversation in which Khawaja is discussing electrical and electronic details with Khyam and Mahmood. This exchange is clear

Khawaja	I can teach you the theory of it. Cover all the facts and all those other bits, then in the summer I'll set up a course together, someone can deliver it to the grunts of course.
Khyam	Do you think I've got to have a course do you.
Khawaja	That's a good idea .
Khyam	If you think I should have a course I want to go on that, I learnt the basics, what will the course be like, the basics or ...
Khawaja	Yeah basics, the theory will be covered in two or three days, you know like how to calculate electric surge, voltage...

[51] The three then went to a house at 2 the Hollow, the residence of one Gulzar. Later that night there is conversation recorded in Khyam's car as he drives about with other males, but Khawaja's presence is not detected. Notably, the prosecutors pointed out, one of the men was

identified as Mohammed Siddique Khan, a man later identified as one of the suicide bombers in the London Subway Bombings on July 7, 2005 that killed 52 commuters and injured another 700 persons. The conversation, dominated by Khyam, is sinister, involves hard-to-understand references to many things, predominantly, however, to brothers preparing for and going to Pakistan. Khyam's car was seen parked overnight near 2 the Hollow.

[52] Late the next morning, February 22, Khyam, Mahmood and Khawaja returned to Khyam's house. Conversations in the house involving Khawaja were recorded. They predominantly involved boots, outdoor jackets, other trekking gear and problems of how much to take and how to get it into Pakistan without detection. It includes this exchange.

Khawaja There is a company in Canada what they do is they use
 a...company through the government right and the government
 sends...foreign affairs stuff...

Khyam Yeah.

Khawaja And of course the company asks them too...they send stuff all the
 time.

Khyam Yeah.

Khawaja Cool...they send to Pakistan all the time.

Khyam Find out the details from your side.

[53] At about 1:15 that afternoon, Khyam drove Khawaja back to Heathrow Airport and he flew back to Ottawa.

[54] Further evidence of conversations recorded by probes in Akbar's house in Uxbridge and in Khyam's vehicle following Khawaja's departure from London forms part of exhibit # 13. For reasons I will come to in due course, I will not get into them in the kind of detail I have when Khawaja is a participant. Suffice it to say, this further evidence sheds considerable light on the kind of ideas and planning Khyam, Shujah Mahmood, Jawad Akbar and others were developing, not only for support of Jihad efforts in Pakistan and Afghanistan, but for

terrorist bombings of civilian targets in the London area or elsewhere in the U.K. A long conversation between Khyam and Akbar late on February 22 reflects consideration of a variety of potential targets in the UK, including water, electric and gas utilities, public places, nightclubs and more. Mr. McKercher described much of Khyam's part in that conversation as a virtual 'terrorist manifesto.' The intercepted conversation between Akbar and his wife on March 10 as he was searching for the National Grid Transco CDs he had hidden for his imminent meeting with Khyam, and the subsequent conversation with Khyam add the most serious reality to the group's zeroing in on potential targets. A conversation between Khyam and Waheed Mahmood in the former's car on March 19 suggested the possible imminence of some small explosion or explosions, and, of course, the video surveillance clip of March 15 showing Khyam inspecting and marking the 600 kg. bag of ammonium nitrate fertilizer that he, Garcia and Hussain had stashed in a storage locker since the previous November, all pointed to the most serious terrorist activity in the greater London area or elsewhere in the U.K., notwithstanding all the related talk of going off to Pakistan.

[55] Back in Ottawa, Khawaja responded to Khyam's inquiry as to how things were going.

yeah bro, things are cool...got home safe...will work on making any improvements to our device, test out stuff, also buy equipment for the niggaz...how bouts u niggaz, everything cool?

Which drew Khyam's response

Ok nigga that's cool, be carefull nigga, yea we all ok jus keep up the work be in contact wid constantly.

Khawaja replied on March 3

ok nigga, i'll stay in contact, will continue some work on our stuff from here, once we get some testing done in next few weeks I'll let u know how stuff works, also will try an do some shopping for the niggas.

[56] Later in March, sometime from the 18th to the 21st, Khawaja sent Khyam 2 messages suggesting he come over. He said

ma nigga, im seriously considerin hookin up with u niggas in tha motherland. any advice ma man? what do u think it best fer me, shud i come down for good? is there activities i cud help out with? hows the nigga kash [Babar] doin? make sure that dude dont leave cuz

they are being very strict at the airports these days, i got held up on my way back too nigga. anyhow bro, the news looks bad, so i wanted to get some advice from u. if u think it would be a good idea for me to pack up and head down with u niggas. of course, i would do loads of shopping for the niggas first. lol, lemme know bro.

And then a day or 2 later

how r things going nigga? i hear tense stuff about PK, man what should we do? Pakis munafiqs are doing all the dirty work for the kufs. lemme know how things are goin with u bros. u need anything? im gonna be doin shopping fer the niggas, will pick up the stuff we talked about. let me when it is best for me to come over.

Shortly thereafter, Khyam sent this terse message

Bro things are bad, jus be prepared in it nigga we will let you know the in near future nigga. keep the good work up

To which Khawaja replied

ok nigga, pray to the most high, we will go full speed ahead with our projects...im putting together up to 30 devices for u niggas, we will test out stuff too...also, we can manufacture our own torches, the LED ones, with headset, for very cheap from right here....only a few dollars per...we get stuff going too...also, will get supplies for the niggas...is there anythign specific u bros want?...i'm thinking bout preparing for hijra too bro, make dua for me...i wanna get these things i mentioned done in the next 2 months and make a move...u bros need anything?...we can get military gear, like vests, bags, magazine vests, etc..stuff like that from here for cheap, so let me know if u need anything...hows the situation in general with the bros, and u?.

[57] On March 26, 2004 the RCMP intercepted a telephone conversation between Momin Khawaja and his brother Qasim. The audio substance of the conversation and a transcribed version are exhibit # 16 A and B. In it, the brothers discussed the withdrawal of money from Momin's Bank of Nova Scotia account and converting it into hundred dollar bills. Qasim told Momin he had already taken all his money out. They then discuss the making of a list that Momin had told Qasim about the previous day. Qasim told Momin he had already done that. The exchange then proceeded

Momin Of ah, and

Qasim All the parts.

Momin Times how many?

Qasim Uh huh.

Momin How many?

Quasim Huh?

Momin Times what?

Qasim Ah, ten and twenty-five.

Momin Ten and twenty-five? OK.

Qasim It's cheaper that way.

Momin And what did it come to?

Qasim I don't know, I didn't do the pricing on Digit Key.

[58] Invoices seized when the Khawaja home was searched support the fact that various electronic components had been ordered from Digi-Key.com, an American electronic parts supplier in December 2003 and in January and February 2004 and shipped to the Khawaja home, some to Momin Khawaja and some to Qasim Khawaja. Some of the Digi-Key parts were identified in the 'hifidigimonster' device found in the search of the Khawaja home.

The Search of the Khawaja Residence

[59] On March 29, 2004, the RCMP searched under warrant the house in which Momin Khawaja and his brothers and sister were living at 672 Princess Louise Drive in Ottawa. RCMP Cpl. Taro Tan produced a large number of items seized, many of which are shown as found on location in Photographs Book 3 marked as exhibit #17. Principal among the items seized were numerous electronic components and devices; electronics instructional literature and tools; an electric model airplane engine; a model airplane in parts; 2 Russian made and one NATO made semi-automatic 7.62 cal. military rifles; a pellet rifle; a paintball gun; a butterfly knife and a large sheath knife. Under Momin Khawaja's bed were two wooden crates containing a total of 640 rounds of 7.62 cal. ammunition. The military rifles were non-restricted weapons and properly registered to Momin Khawaja. One had a telescopic sight

accessory and another was equipped with a fold-away bayonet. Two had magazines that held more than the lawfully permitted 5 rounds and were 'prohibited devices'. I can't but connect this fact with the conversation between Khawaja and Shujah Mahmood recorded by probe at the Khyam residence in London a couple of months earlier on February 21. They were discussing their weapons experience at the training camp. Khawaja can be heard imitating the sound of a semi-automatic rifle, 'tooh tooh tooh tooh tooh' and saying, 'Five, five stop because...No, because it's illegal. Well we did last week you can take out the plastic bit and you can fit 10 rounds as well you can buy longer mags from the internet and stuff but if anyone sees you with it it's illegal...' He went on to note that 'You can get 30 round mags as well...It's illegal that's the only thing.'

[60] The RCMP also seized \$10,300 in hundred dollar bills under the mattress in Qasim Khawaja's bedroom and the hard drives from 5 computers; 2 in Qasim's bedroom; 2 in the open area in the basement, and 1 from Momin's basement bedroom. From Momin's bedroom they also seized some thematic literature including books titled *Defence of the Muslim Land*; *U.S. Special Forces Physical Conditioning Program, Get Tough!*; *Military Manual on Self-Defence*; *A Complete Guide to Hand-to-hand Combat*; *CIA Special Weapons and Equipment*; *The Religious and Moral Doctrine of Jihad*; *Join the Caravan*; *Decisive Battles of Islam*; *Sun Tzu, The Art of War*; *Guerilla Warfare*; and a VHS tape titled *The Martyrs of Bosnia, Part 1, stories of foreign Mujahideen killed in Bosnia*.

The Remote Detonating Device

[61] Expert opinion evidence concerning the electronic equipment and components found in the Khawaja household was given by Sergeant Sylvain Fiset of the H.Q. Technical Investigation Services, Explosives Disposal & Technology Branch of the RCMP. His qualified areas of expertise were 'explosives disposal and technology, explosive substances and devices, and related electronics.' Sgt. Fiset holds an Electronics Engineering Technology Diploma and 23 years of related experience. His evidence was given, for the most part, in highly technical terms, backed up by 3 fat volumes of technical reports [exhibits #43 and#

45], but his conclusions were not really in dispute. I shall endeavour to relate the highlights in less technical detail.

[62] There was unimpeded access throughout the house and there were electronic components, tools and parts in various places in the house, including Momin Khawaja's bedroom. It was, however, Qasim Khawaja's bedroom that seemed to be the site in which the 'hifidigimonster' device, the photograph of which was taken in the basement, stored on Momin's computer and shown to Khyam and Shujah Mahmood in the London internet café, was being developed and modified. Electronic schematic drawings for it were found on the hard drives of the computers in Qasim Khawaja's bedroom and one of the computers in the open area of the basement. The 'hifidigimonster' device itself, filed as exhibit # 44, was non-commercial and had been built from raw components. The basic circuitry had been printed out from the computer schematics into hard copy, traced or laid out on printed circuit boards, and then using an acid etching process, turned into copper circuits. Commercial grade electronic components were added by hand in a customized assembly fashion. All the parts and tools necessary to the process were present, as was instructional literature. Invoices and delivery documents from at least three commercial electronics supply sources corroborated this hand-made assembly process.

[63] The device consisted of two basic modules, a transmitter and a receiver. The former encoded a radio frequency signal at the frequency of 916.48 megahertz, amplified or boosted to increase its range of transmission, and sent it to the receiver module, the decoder of which matched the encoder on the transmitting side. Only the precise coded signal would activate the receiver. That precise signal, when received, would cause a circuit to allow an electric current to flow from a battery, to power whatever might be connected to that circuit. That could include a light-emitting diode, a buzzer, a detonator and so on. The current from the battery was governed by a power regulator. The device found had been modified somewhat from the photographed stage. It had a larger antenna than the photographed model, and the power regulator had been changed from a 1 amp to a .1 amp regulator.

[64] Sgt. Fiset built similar devices from identical components to virtually duplicate the hifidigimonster both as photographed and as found, so he could test them without risk of compromise to the items found. Based on his testing, he testified that the hifidigimonster as photographed had the capacity to send the encoded radio frequency signal between the transmitting module to the receiving module over a distance of some 300 metres in open terrain, and about 150 metres in a downtown urban setting. He explained the reduced range in a downtown setting as the impact of the steel and concrete of the buildings and many other ambient radio frequency signals bouncing around, on the receiving capacity of the device.

[65] The range of the actual hifidigimonster as found was actually less than the one photographed. Sgt. Fiset testified that its range was only 200 metres in the open and 100 metres downtown. It was his opinion that by installing a longer antenna, the builders would likely have thought it would increase the range of the device, but for reasons he expressed in terms of the wave length of the antenna, the modified antenna actually reduced the range of the device. He also testified that another flaw, the absence of a 'ground plane' to absorb 'environmental noise' surrounding the transmitter, reduced its transmitting efficiency.

[66] Additional components that could be used in building more such devices were found in the house. Sgt. Fiset identified seven additional encoders, 7 additional decoders, an additional transmitter, and an additional power amplifier. He noted that to complete another hifidigimonster device, an additional receiver would also be required. He testified that as found, the hifidigimonster device was potentially capable of being used as a triggering or arming device in an improvised explosive device [IED]. He conceded, however, that it would not work with the power regulated at such a low level and would need the higher power setting. The .1 amp power regulator was only suitable for triggering an LED circuit.

[67] No blasting caps or other detonators or any explosives components were found at the Khawaja residence. Sgt. Fiset noted that 'urea' and 'nitro-phosphates, ingredients found in fertilizers, were substances capable of being used in home made explosives. When asked to comment on a quantity of 600 kg. of ammonium nitrate fertilizer, he said

600 kilograms of explosive ammonium nitrate, obviously, if I compare it to Oklahoma bombing, if I may, it would not be as great as the Oklahoma bombing in terms of devastation, but it would provoke certainly structural damage, structural damage to infrastructure such as electrical conduits, gas pipelines located underground because of the seat of the explosions, it would likely, if there are individuals, people around, it would provoke death and serious injuries.

[68] Sgt. Fiset also found three 'jamming' devices among the other electronic materials on a table in Qasim Khawaja's bedroom. They were commercially purchased abroad, being illegal in Canada. Two had been custom modified, he testified, so as to change their factory-set frequency range to that of the hidigimonster.

[69] Having explained and described IEDs, Sgt. Fiset went on to explain how such 'jammers', if operating at the same frequency as a remote radio frequency detonating device, could jam signals at that frequency thus allowing someone to connect the remote detonating device to high explosives in an IED with reduced risk that an accidental signal at that frequency might trigger the detonator while connection was being made. The jammers in question would have an operating range of up to at most, about 25 metres.

[70] On cross-examination, Sgt. Fiset conceded that if a person had the technical knowledge to modify a cell phone to activate a circuit when called, such as a cell phone activates a circuit to a vibrator or a ringer when called, it was feasible to adapt a pair of cell phones as a remote detonator device for an IED. Here is the exchange.

Q. It's technically fairly simple to use the current voltage from that to generate the sort of heat you would need to set off a detonator?

A. Well, you would have to modify and add some ways of amplifying the current flow, because it is my opinion that the current flow directly from a vibration system from a cell phone would not suffice to trigger a complete circuit for a detonator.

Q. It's feasible, though?

A. It is feasible.

Q. And then all you would have to do is telephone that mobile from the other mobile?

A. In order to activate it, yes.

Q. All right. If there's mobile coverage, you would have a very great range indeed, would you not?

A. Absolutely, you could cover from let's say Montreal to Vancouver, if you want.

Q. I appreciate, sir, you're being somewhat cautious, but we can agree that it's a quick and simple way to create a remote device, is it not?

A. It is somewhat simple if a person has the technical knowledge to execute that modification.

Q Much quicker than PCBs [printed circuit boards] and schematics and diagrams and burning PCBs in acid trays, much quicker than all that is just to adjust, adapt one of the two mobile phones, is it not?

A. That, I will agree.

Q. But, of course, that would only work if you were designing a scheme to use in an area with mobile coverage, correct?

A. That's correct.

[71] Sgt. Fiset confirmed Mr. Greenspon's suggestion that remotely detonated IEDs were used extensively in the conflict in Afghanistan and in Iraq, and while he accepted that there was cell phone coverage in London, England, he was unable to say to what degree it existed in Afghanistan.

[72] According to Sgt. Fiset, however, a person wishing to explode an IED might not want to use a modified cell phone triggering device since when operating, cell phones leave electronic location and usage data in the system, and, even the unit that was attached to the explosive usually leaves fragments that might lead to identifying markers.

Applicable *Criminal Code* Provisions

[73] I have set out the provisions in the *Criminal Code* that underlie the counts in the indictment in an Appendix that follows these reasons for judgment.

Discussion and Analysis

The Common Purpose Rule

[74] The applicability of the rule of evidence that enables the acts and declarations of co-participants in a common criminal purpose or plan to be used to incriminate other co-participants to the extent that those acts and declarations are in furtherance of the common plan was the subject of considerable debate in the course of the trial. The rule, variously referred to as the co-conspirators rule, the common purpose rule or the *Carter* principle, carves an exception to the general rule against hearsay evidence, and was the subject of rulings I made on June 24 and further on July 24 during the trial. I will not repeat here what I have already said about the rule.

[75] In my view, the rule is not a proper one to invoke in the circumstances of this case. Its applicability in criminal law depends upon there being a common criminal design, plan or objective shared by co-participants. In this case, the prosecutors have described the common criminal plan in very broad terms. In his argument on the defense motion brought on July 22 asking me to rule on the applicability of the rule before putting the accused to his election, Mr. Boutzouvis said

...it must be borne in mind when assessing the availability of the hearsay exception and the appropriate time at which to apply it, that the overall common design is violent Jihad wheresoever it might ultimately be committed. [Underlining mine.]

[76] In his submissions on the defense motion for directed verdicts of acquittal on August 26, Mr. McKercher put it this way

In the Crown's submission, the evidence of common design is amply set out in Mr. Khawaja's own e-mails. What we're dealing with here is not a specific U.K. bomb plot but prosecution of "war against the Kuffar" as set out in Mr. Khawaja's e-mails. He is dealing with violent armed Jihad against the entire civilian population, in effect. He writes in an e-mail to the individual known as Fazzeen that the only solution for the Iman or the Muslim Ummah worldwide is Jihad all out. [Underlining mine.]

[77] In his cross-examinations and in his argument, Mr. Greenspon emphasized the difference between ideas and plans, and it seems to me that it is an important distinction when

it comes to criminal law and the common purpose rule. Toppling existing governments by the use of violent Jihad and replacing them with fundamentalist, Islamic regimes may be someone's vision, his grand idea and ideal. It does not follow, however, that all those who share that vision or ideal necessarily implicate and incriminate each other with any criminal step any one of them may take in furtherance of that vision.

[78] The common purpose rule requires, in my view, a much more focused and specific criminal plan or design before fault, moral blameworthiness and criminal culpability can be attributed to co-participants by the acts in furtherance of another. The difference between an idea or ideal and a criminal plan is, I think illustrated by comparing devotion to 'violent Jihad, wheresoever it may ultimately be committed' and participation in a plan to bomb civilian targets in the greater London area. The latter would likely attract the application of the common purpose rule, but I don't think the former can. Ideas, ideals or ideologies have been protected in free societies. But when one embarks on a criminal plan of action, specific intended conduct, an actual purpose or design to carry the idea into action, the law intervenes to protect those who would be the victims, those who would be harmed.

[79] I see the provisions in the Terrorism Part of the *Criminal Code* as having been designed to address the difficulties applying the common purpose rule to the *modus operandi* of terrorists, with activities being assigned to small cells, and information being limited on a strict 'need to know basis.' This was explained to the Special Senate Committee in October 2001 as I related it in my pre-trial ruling on the Charter attack on the legislation. See: *R. v. Khawaja*, [2006] O.J. No. 4245, at paragraphs 31 and 32.

[80] The mechanism introduced into the terrorism offence provisions, qualifiers or interpretation clauses such as are set out in ss.s 83.18(2), 83.19(2) and 83.(21)(2), as I said at paragraph 39 of that 2006 pre-trial ruling,

...allow for the subjective guilty knowledge to be non-specific, lacking in detail or generalized. They also allow for culpability when the object of a guilty intent goes unrealized, or is wasted. It is unnecessary that an accused be shown to have knowledge of the specific nature of terrorist activity he intends to aid, support, enhance or facilitate, as long as he knows it is terrorist activity in a general way. It doesn't have to be shown that

an accused actually facilitated terrorist activity as long as it can be shown that he intended to do so. It doesn't matter if an accused knows the identity of the one he instructs to carry out terrorist activity, as long as he knowingly instructs someone to do so. And so on.

[81] That said, however, there remains the requirement to prove a level of subjective guilty knowledge or *mens rea* on the part of a party charged with a terrorism offence, sufficient to justify moral blameworthiness justifying a criminal conviction. If I may borrow once more on the words of my pre-trial ruling at paragraph 38, I said that it must be

...shown that an accused both knowingly participated in or contributed to a terrorist group, but also knew that it was such a group and intended to aid or facilitate its terrorist activity. According to the word "knowingly" this broad construction in these offences is consistent with maintaining a high degree of subjective *mens rea* and accords with...constitutional norms.

[82] In the circumstances of this case, with the use of small and separate cells operating on 'need to know' principles and with information walls between them, the common purpose rule is not an appropriate mechanism in searching for the *mens rea* or guilty knowledge required for criminal culpability. I think that the terrorism provisions with their qualifyier or interpretation clauses provide the adequate operable concepts.

[83] I do not therefore intend to examine hearsay evidence in Momin Khawaja's absence, such as discussions Babar may have had with Khyam about the latter's operational plans, or that Khyam had with Jawad Akbar and others about possible bombing targets in London and elsewhere in the U.K., pursuant to the 3 step *Carter* approach in order to determine if that evidence, or some of it, is admissible to incriminate Momin Khawaja under the common purpose rule. I prefer to look at the evidence admissible against him directly, in the context of the provisions in the *Code*.

[84] Having said that, however, that does not mean that all the evidence of the activity of others in the absence of Khawaja cannot be considered as background that may give meaning to Khawaja's own actions. As Weiler J.A. said in *R. v. Gagnon*, [2000] O.J. No. 3410 (C.A.) at the end of paragraph 51

In order to give meaning to the accused's own acts and utterances it is permissible to consider them against the context of the acts of others which may be hearsay.

Elements of the Offenses and 'Terrorist Group' and 'Terrorist Activity'

[85] Each one of the 7 counts in the indictment alleges that Momin Khawaja did something which related to a 'terrorist group' or to 'terrorist activity.' The counts may be paraphrased as follows.

Count 1 Khawaja worked on the development of a detonating device with intent to cause an explosion with specified consequences, *for the benefit of, at the direction of or in association with a terrorist group.*

Count 2 He possessed an explosive substance intending another person to endanger life or property... *for the benefit of, at the direction of or in association with a terrorist group.*

Count 3 He knowingly participated in or contributed to *activity of a terrorist group*, by receiving training, *for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity.*

Count 4 He instructed another person to undertake financial transactions...*for the benefit of a terrorist group...for the purpose of enhancing the ability of the said terrorist group to facilitate or carry out a terrorist activity.*

Count 5 He provided property and financial services to specified persons and others, intending or knowing that they would be used, in whole or in part, *for the purpose of facilitating or carrying out terrorist activity, or for the purpose of benefiting the specified persons or others who were facilitating or carrying out terrorist activity.*

Count 6 He knowingly participated in or contributed to, directly or indirectly, *an activity of a terrorist group for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity*, by participating in dialogue, meetings, or exchanges of information relating to the development of an explosive device intended to endanger life or cause serious damage to property.

Count 7 That he did knowingly *facilitate a terrorist activity.*

[86] What Khawaja actually did is not really in issue. What is in issue in this case is whether and to what extent there was a terrorist group and whether his actions were undertaken 'knowingly,' that is with knowledge of the group's terrorist activity, in order to

support of facilitate that activity. It is necessary, therefore, to focus on those elements of the offences.

[87] A 'terrorist group is defined in ss. 83.01(1), for purposes of this case, as

an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity

[88] 'Terrorist activity' has an extensive definition in the same section. For the purposes of this case, only ss. (b) is relevant. It provides

"terrorist activity" means

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

(i) that is committed

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

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

(ii) that intentionally

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

(B) endangers a person's life,

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

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

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

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

[89] I should say, that in examining the facts in light of the definition of ‘terrorist activity,’ I consider my pre-trial ruling mentioned earlier ([2006] O.J. No. 4245) in which I held the ss. (b)(i)(A) ‘motive’ clause of that definition to be unconstitutional and severed it from the definition, to have no real effect on the case. I say that because there is such an abundance of evidence that what was being done by Khawaja, Babar, Khyam, and his associates was clearly motivated “in whole or in part for a political, religious or ideological purpose, objective or cause.” Whether that is an essential ingredient of these offences or not, it has been abundantly proven.

[90] We know from all the evidence, that Babar, Khyam, Amin, Garcia, Akbar and others were in fact a terrorist group engaged in terrorist activity. Babar pleaded guilty to terrorism offences in the U.S. Courts and the Khyam, Garcia and Amin were among those convicted in the U.K. courts of conspiring to cause an explosion.. Moreover, the evidence in this trial demonstrated clearly their terrorist plans and the steps they were taking to carry them into effect. Their discussions, the plot to cause explosions in the U.K. or elsewhere, the zeroing in on possible civilian targets, the acquisition of the ammonium nitrate fertilizer and aluminum powder, Babar’s agreement to smuggle blasting cap detonators into the UK for Khyam’s use, and so on, puts well beyond any doubt that their objectives included terrorizing segments of the public in the U.K. and elsewhere with regard to their security, including their economic security by intentionally causing death and destruction to people and property.

[91] The important question is whether and to what degree Momin Khawaja was a knowledgeable participant in this terrorist activity. In examining this, it is necessary to deal

with counts one and two on a different footing than the other counts. This is because the focus of the prosecution was significantly narrower in the first 2 counts than in the others.

Counts 1 and 2 – The Fertilizer Bomb Plot

[92] On the second day of the trial, while arguing about hearsay evidence, Mr. Boutzouvis said that ‘*counts 1 and 2 centre on the fertilizer bomb plot.*’ Then, in his submissions on the motion for directed verdicts, I questioned Mr. McKercher about the first 2 counts.

The Court Am I to take the focus of counts 1 and 2 to be Mr. Khawaja’s role in relation to the fertilizer bomb plot, then?

Mr. McKercher Yes. My friend has chosen to characterize it as a plot for Central London. That’s not particularized in the Indictment, and if it’s my friend’s position it was actually going to be done in Afghanistan, a fertilizer bomb plot is a fertilizer bomb plot, although the prospect of the conspirators I suppose loading up backpacks with, among them, 600 kilograms of fertilizer and humping it through the Khyber pass into Afghanistan to put together a fertilizer bomb there is one that I would suggest is somewhat remote.

.....

The Court All right. So your position is that essentially – what was being done with that explosive, whatever the explosive substance, was the focus of counts 1 and 2, but that the others contemplate a much broader range of support for terrorist activity on a broader basis.

Mr. McKercher Yes.

[93] On this basis, it seems to me that for Momin Khawaja to be found guilty as charged on count 1 or 2, it is necessary to find that he had some knowledge of the so called fertilizer bomb plot, or, in other words, some knowledge of the plans Khyam and others had for terrorist explosions in the greater London area or elsewhere in the U.K., using the 600 kgs. of ammonium nitrate fertilizer they had acquired, and presumably one or more of the remote detonating devices Khawaja agreed to make. That, as I understand the submissions of the prosecution, is the *mens rea* required to establish guilt on those first 2 counts.

[94] As I said in my ruling on the motion for directed verdicts, what one knows and what one intends, what one has in his thoughts and in his mind and heart, is not directly provable and must be discerned from one's words, and one's acts. Knowledge and intention are findings of fact that must be derived, in whole or part, by inference from other proven facts. Finding facts from inference, involves a consideration of all the evidence and the application of reason and common sense. There is no direct evidence that Khawaja knew of the ammonium nitrate fertilizer or the consideration of domestic targets.

[95] Because the necessary *mens rea* or guilty knowledge in any offense is an essential element to be proven, where, as in this case, it is essentially a circumstantial finding, one that must be made by inference from the surrounding facts and circumstances, it must be the only reasonable inference to be drawn from them.

[96] It is certainly possible that Khawaja was privy to Khyam's plans for domestic U.K. terror explosions. As I explained in my ruling on the directed verdicts motion, I don't think it would be an unreasonable inference to draw. Babar assumed that Khawaja knew something about it when he witnessed Khawaja giving Khyam money for '*the other thing*' after they had been at the training camp. On the other hand, when I consider all the relevant facts, I don't think a finding that Khawaja knew about the fertilizer bomb plot is the only reasonable inference in the circumstances. In coming to that position, I have considered a number of things. The first is that in the evidence gathered by the acoustic probes while Khawaja was in London in February 2004 to show Khyam the hifidigimonster, no mention of the fertilizer bomb plot is overheard in Khawaja's presence. Yet there is a lot of talk about it after he returns to Canada.

[97] Second, there is the high degree of secrecy, 'need to know,' and separation of cells throughout everything that was going on. Babar himself conceded that while he was aware that Khyam was planning something in the UK or elsewhere in Europe, and while he agreed to smuggle blasting cap detonators into the U.K. for him, and had even volunteered to do a suicide mission for him, he had no knowledge of the ammonium nitrate fertilizer that had been acquired or of the targets under consideration.

[98] Given this sort of secrecy, one wonders why terrorists like Khyam, Garcia, Akbar and others would share details of such a fertilizer bomb plot with a foreigner like Khawaja, unless it was necessary to do so. And it wasn't. He seemed willing to help in any way he could. Ask him to send money? He did. Ask him to take supplies to Babar and Amin in Pakistan? He did. Ask him to build a remote detonator device? He did, or was well into a work-in-progress. Ask him to build more? He said he would. Bring more money? He did. In fact, he offered time and again to do more. But his having knowledge of their domestic U.K. bomb plot was not necessary. He wasn't a required link when it came down to that knowledge.

[99] There was the evidence about concern how to get the hifidigimonster into the U.K. but it was in the context of showing Khyam and others how it worked. While there is no evidence relating to how to transport the remote detonating devices to Pakistan, Afghanistan or any other place, there is an abundance of evidence that Momin Khawaja's central objective was to play a role in the fighting in Afghanistan. He talked of getting night-vision goggles and other equipment suitable for outdoor life in rugged terrain. His computer contained numerous pictures of military equipment and clothing. He and Shujah Mahmood were heard discussing the kind of outdoor equipment that they would need when they 'went over.' His email messages are replete with assertions that he wanted to get into the action in Afghanistan, to help the 'bros'.

[100] While Khawaja did make reference to the authorities not being able to block the frequency of the hifidigimonster in urban areas, there is also Sgt. Fiset's evidence supporting the suggestion that in an area with cell phone coverage, modifying a pair of them would be a far simpler way to make a remote detonating device than making the device Khawaja and his brother were producing. The inference the defense wished to raise by bringing this out was that the hifidigimonster was more likely intended for use in undeveloped territory than in the urban U.K.

[101] When I look at all the surrounding circumstances, I am unable to say that the only reasonable inference to draw is that Khawaja knew that he was assisting in the fertilizer bomb plot that Khyam and others were hatching. Other reasonable inferences include that Khawaja

thought that his remote detonating devices were to be used elsewhere, in Afghanistan, possibly in Iraq, or indeed anywhere that the forces of Jihad took them, or that he was simply leaving it to his 'Emir,' his leader, Omar Khyam, where they would be used. The evidence does not lead inescapably, or beyond a reasonable doubt, to the conclusion that Momin Khawaja was privy to the fertilizer bomb plot or its existence. On that basis, given the narrow focus cast by the prosecution on counts 1 and 2, the necessary *mens rea* or guilty knowledge of the fertilizer bomb plot has not been established to the requisite level of proof, and I am unable to find Momin Khawaja guilty as charged on those 2 counts.

[102] That, however, is not the end of those 2 counts. Each of them pleads the commission of an indictable offence under ss. 81(1) of the *Criminal Code*. Count 1 contains the allegation that

Khawaja, with Omar Khyam and others, did work 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, thereby committing an indictable offence under paragraph 81(1)(a) of the *Criminal Code*.

[103] Count 2 contains the allegation that

Khawaja, with Omar Khyam and others, did make, or have 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, thereby committing an indictable offence under paragraph 81 (1)(d) of the *Criminal Code*.

In relation to this allegation, since 'explosive substance' is defined in s. 2 of the *Code* as including "anything, or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance," the hifidigimonster would qualify as an explosive substance.

[104] When arguing his motion for directed verdicts of acquittal, Mr. Greenspon conceded that there was evidence on which Momin Khawaja could be found guilty of these included offences in counts 1 and 2 and that directed verdicts acquitting Khawaja on those

counts were not appropriate. In his final submissions, I understood him to concede that Mr. Khawaja would be found guilty of these included offenses. Mr. Greenspon said

With respect to Counts 1 and 2, Your Honour, in my submission, they should be allowed to stand as lesser and included offences as there is evidence of possession by virtue of knowledge and control. Subject to that, I would ask that all seven counts related to terrorist activity be dismissed.

[105] In case I misunderstood Mr. Greenspon's submission as a concession of guilt on the included offenses in counts 1 and 2, I do find that Momin Khawaja is guilty of them beyond any reasonable doubt on the evidence in any case. Notwithstanding the role his brother Qasim seems to have been playing in helping in the construction of the device, the development and building of the device was a project between Momin Khawaja and Khyam. The latter told Momin early on to *'get ur bro to work on it as well making sure only limited is told to him...'* Khawaja reported their progress to Khyam throughout in terms of "we," and as a matter of law, I don't think there is any room for doubt that he, Momin Khawaja 'worked on the development of the device' and was 'in possession' of it. It is not only those who dig a ditch who 'work' on its development. He who is commissioned to get the job done, he who designs it and sets the specifications, he who is involved in acquiring the necessary tools and equipment, he who supervises the labour, and indeed all those whose efforts contributes to the product, 'work' on it.

[106] Insofar as the charge of possessing an explosive substance is concerned, given the definition of 'possession' in s. 4 of the *Code* and the extensive jurisprudence developed in relation to it, largely in drug and narcotics cases, there can be no doubt that the evidence establishes beyond any reasonable doubt that Momin Khawaja was in possession of the device even when it was in his brother's bedroom. Clearly, his brother was acting at his instance and in support of his project. Momin had full knowledge of the device and exercised such dominion and control over it that he was in law, 'in possession' of it. There is equally no room for any reasonable doubt that Momin Khawaja's work on and his possession of the device was with the intent specified in the counts and in the charging sections in ss. 81(1)(a) and (d) of the *Criminal Code*. His description to Khyam of how it works, including that *'...one transmitter, that sends the signal, another receiver that will be...attached to the wires*

and send out 5 volts down the line and then we get fireworks' together with his reported plan for testing it, '*...and will let u know once we have it ready for testing and I find some of the things for testing, Urea, nitro phosphate,...*' leave no doubt that Momin Khawaja knew he was building a device to trigger explosions. That the explosions were intended to cause injury or death and serious property damage is clear from the whole context of violent Jihad which brought Khawaja together with Khyam, Babar, Amin, Garcia, Akbar and others.

[107] The evidence demonstrates Momin Khawaja's guilt on the included offences in counts 1 and 2, and I find him guilty of those included offenses.

Terrorism and Counts 3-7

[108] Nothing said or done by the prosecutors, nor the language of the balance of the counts, confines or focuses them beyond their terms as was the case with counts 1 and 2. The prosecutors argue that Khyam and others constituted a terrorist group whose terrorist activity was manifest in their activities in pursuit of violent Jihad. It was the prosecution's express assertion that preparation for and support of the insurgency against the coalition forces in Afghanistan constituted the enhancing or facilitating a terrorist group and terrorist activity.

[109] It was the defense position that Momin Khawaja's express intention in all that he did was to participate in the armed conflict in Afghanistan, and that his activity fell outside the definition of terrorist activity by virtue of the exclusionary provision at the end of the definition saying that it

...does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict,...

[110] I must say that with the all the emphasis over the conflict in Afghanistan and Khawaja's frequent assertions in his emails and his conversations that he wanted to get involved in it, and with the argument over the relevance of this exclusionary 'armed conflict' clause, it would have been helpful to have had some expert evidence as to the geo-political

and military situation in Afghanistan and particularly as to the conduct of the hostilities by the insurgents opposing the Afghan and coalition forces. Mr. McKercher urged me to simply take judicial notice of how that conflict was being conducted, particularly by the insurgency. He filed the following treatises or articles in dealing with the treatment of various participants in hostilities, some aspects of customary international humanitarian law, and the abuses of civilians in the Afghanistan conflict.

Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and rights Under International Humanitarian and Human Rights Law, Robert K. Goldman and Brian D. Trittemore, American Society of International Law, December 2002

Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy, Kenneth Watkin, Humanitarian Policy and Conflict Research Occasional Paper Series, Winter 2005

Customary International Humanitarian Law, Volume 1: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross 2005, Cambridge University Press

Afghanistan: All who are not friends, are enemies: Taleban abuses against Civilians, Amnesty International April 2007, AL Index: ASA 11/00112007, and

Afghanistan: Civilians suffer the brunt of rising suicide attacks, Amnesty International Public Statement, 5 June 2008 AL Index: ASA 11/006/2008 (Public)

[111] There are authorities suggesting that through the doctrine of adoption, customary rules of international law are directly incorporated into Canadian domestic law in the absence of conflicting legislation, thus permitting courts to take judicial notice of them. See: *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 39; *Bouzari v. Islamic Republic of Iran*, [2004] O.J. No. 2800 (C.A.) at para. 65. That, however, does not really assist me in finding the facts as pertain to the conduct of hostilities in Afghanistan. Nor do I think I can adopt facts directly from specialist publications such as that last two listed above.

[112] Mr. McKercher argued that I could take judicial notice of the unconventional and unprincipled nature of the conduct of hostilities by the insurgent fighters in Afghanistan because it was ‘notorious.’ Indeed, one reads daily in the news of the deaths of civilians and of military personnel as a result of exploded IEDs, suicide bombs and armed conflict. I don’t

think, however, that I can make findings of fact on that kind of reporting. 'Judicial Notice' is described this way in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, Second Edition (Butterworths, 1999)

§19.13 Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.

In *Watts v. Indiana* 338U.S. 49, (1949) at p. 52 Mr. Justice Frankfurter said "*there comes a point where this court should not be ignorant as judges of what we know as men.*" In *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.), Norris J.A. said at p. 629

The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parc said in *Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches, *Read v. Bishop of Lincoln*, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652-4.

[113] In trying to determine whether, subject to the applicability of the exclusionary 'armed conflict' clause, supporting the insurgency against the coalition forces in Afghanistan constitutes terrorist activity, I think I am entitled to take judicial notice of at least some aspects of the situation by having resort to certain notorious facts and to certain other facts available from official United Nations documentation available to all on the United Nations website {<http://www.un.org/documents/>}; facts which I think are beyond dispute among reasonable people.

[114] It is, I think, notorious that prior to September 11, 2001, the government of Afghanistan, in disarray and largely under the control of the Taliban, was providing support to Osama Bin Laden and his al Qa'eda network that were operating training camps there in some sort of loose alliance with the Taliban. In response to the attack on the twin towers in New York on 9/11, the U.S.A. and the U.K. sent troops and equipment into Afghanistan with the objective of capturing Bin Laden, destroying al Qa'eda and removing the Taliban regime.

[115] A United Nations 'General Backgrounder' on the Afghanistan situation together with a series of Security Council resolutions from the United Nations website document the steps taken to bring stable and peaceful government to Afghanistan.

[116] United Nations Security Council Resolution 1378 (2001) adopted on November 14, 2001 condemned the Taliban for allowing Afghanistan to be used as a base for exporting terrorism by al Qa'eda and other terrorist groups and for providing safe haven to Osama Bin Laden, al Qa'eda and others associated with them. The resolution spoke of an urgent meeting of various Afghan processes to be convened by a U.N. Special Representative and called on all Member States to provide various support and aid to Afghanistan, including supporting efforts to ensure the safety and security of areas no longer under Taliban control, and to civilians, transitional authorities, United Nations and humanitarian organization personnel.

[117] The United Nations General Backgrounder document described the urgent meeting convened by a Special Representative as follows

On the 5th of December 2001 several Afghan factions met under the auspices of the United Nations, in Bonn, Germany, to end the conflict in Afghanistan, promote national reconciliation, and plan a pathway for governing the country...[They] signed in the presence of the UN Special Representative of the Secretary- General (SRSG) the "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institution," which became known as the "Bonn Agreement." The Bonn Agreement was the first of the series of agreements intended to re-create the State of Afghanistan after years of civil wars and foreign interventions.

[118] The Bonn Agreement was endorsed by the United Nations Security Council in Resolution 1383 (2001) adopted on December 6, 2001. The Security Council declared its support for the implementation of the Agreement and called for commitment to assist in the rehabilitation, recovery and reconstruction of Afghanistan.

[119] In its December 20, 2001 Resolution 1386 (2001) the Security Council authorized the establishment of the International Assistance Security Force [ISAF] to assist the Afghan Interim Authority to maintain security to allow its personnel and that of the United Nations to operate in a secure environment. The Resolution called on Member States to contribute

personnel, equipment and resources to the ISAF and authorized Member States participating in the ISAF to take all measures necessary to fulfill its mandate

[120] In Resolution 1390 (2002) adopted on January 16, 2002, the Security Council condemned the Taliban for allowing Afghanistan to be used as a base for terrorists training and activities, including the export of terrorism by the al-Qa'eda network and other terrorist groups as well as for using foreign mercenaries in hostile actions in Afghanistan. It further condemned the al Qa'eda network and other associated terrorist groups, for the multiple criminal, terrorist acts aimed at causing the deaths of numerous innocent civilians, and the destruction of property. The resolution called on Member States to take measures to counter the terrorism by freezing and cutting off of funds and resources, denial of transit and access and cutting off supplies of weapons, materials and other military goods to these terrorist groups and individuals.

[121] By Resolution 1453 (2002) adopted on December 24, 2002 the Security Council recognized the Afghan Transitional Administration [ATA] as the sole legitimate Government of Afghanistan, pending democratic elections in 2004.

[122] On October 13, 2003 by Resolution 1510 (2003) the Security Council extended the mandate of the ISAF and participating Member States to continue working with the ATA in pursuit of the reconstruction and humanitarian efforts envisioned in the Bonn agreement.

[123] The Security Council 'welcomed' the January 4, 2004 adoption of a new Constitution by Afghanistan as well as the development of the new Afghan National Army and Afghan National Police, when it adopted Resolution 1536 (2004) on March 26, 2004. The United Nations 'General Backgrounder' notes that Presidential elections were held on October 9, 2004 and the ATA was thus replaced by the elected President of Afghanistan.

[124] I take judicial notice as well, that Canada, along with other North Atlantic Treaty Organization countries, has contributed personnel and resources to the ISAF and that to date, some 100 of Canada's armed forces personnel have been killed in fighting with insurgent

forces opposing the initial American and British and subsequent United Nations intervention in support of a reconstructed and democratic Afghanistan.

[125] Returning to the definition of terrorist activity, it seems to me beyond debate that, subject to the applicability of the exclusionary ‘armed conflict’ clause, those who support and participate in the insurgent armed hostilities against the civilian population, the government, and government and coalition forces attempting to reconstruct and maintain peace, order and security in Afghanistan, are, by definition, engaging in terrorist activity. Seen through the lens of a court of Canada, a Member State of the United Nations, I do not think it can be viewed otherwise. News reports of insurgent attacks in Afghanistan are characterized daily in the news as ‘terrorist’ and not surprisingly since, subject to the armed conflict clause, they meet the definition of terrorist activity in the *Criminal Code*. It seems self-evident that the armed insurgency in Afghanistan is

- intended in whole or in part to intimidate the population or that segment of it that supports the legitimate government and those assisting it in its reconstruction and establishing of peace and order with regard to their security, and intended to compel the population, the government, NATO, the United Nations and all those agencies supporting the reconstruction and democratization efforts to refrain and desist, and
- that consequential death and destruction is caused and reported throughout the world on a daily basis.

[126] To the extent that Momin Khawaja and the ‘amazing bros’ he met in London, attended training camp with in Pakistan, and associated with in the post-training camp activity in a variety of efforts generally aimed at support for and perhaps eventual participation in the insurgent efforts in Afghanistan, they were facilitating terrorist activity and they qualify as a ‘terrorist group.’ Mr. Greenspon urged against categorizing Khawaja’s ‘militarism’ as terrorist activity. He relied upon the exclusionary ‘armed conflict’ clause in the definition of terrorist activity and argued it took the group’s actions out of the scope of ‘terrorist activity’ as defined. .

[127] In disposing of the motion for directed verdicts of acquittal, I held that the ‘armed conflict’ clause simply had no bearing on the case. I said

I do not accept the argument that Khawaja’s activities, even if all in support of and with the object of participation in Taliban or Mujahideen insurgent combat activity in Afghanistan, cannot fall within the definition of ‘terrorist activity’ because of the ‘armed conflict’ exception within that definition... I do not think that exception has any application to the case. Neither Momin Khawaja nor any of the ‘bros’ he was interacting with in his pursuit of Jihad were soldiers or part of an armed force or involved in any armed conflict or in a place where an armed conflict was underway. The provision is simply irrelevant to their activity. It is intended, in my view, to remove from the ambit of the terrorism provisions of the *Criminal Code*, acts conducted by participants in armed conflicts, acts such as killing enemy combatants, inflicting substantial damage to property or to public facilities and essential services, and with the kind of intimidating intention as found in (i)(B) of the definition, all of which is necessarily a part of war, so long as those war activities are conducted in accordance with the customary or conventional rules of war. The provision applies to those actually engaged in armed combat. In my view, the term ‘during’ has the meaning of ‘in the course of’ and does not just mean ‘contemporaneously with,’ or ‘at the same time as.’ The exception shields those who do acts while engaged in an armed conflict that would otherwise fit the definition of terrorist activity from prosecution as terrorists as long as the acts are within the internationally recognized principles governing warfare. Momin Khawaja was not so engaged. His actions in Canada, in the U.K. and in Pakistan cannot, in my view, be regarded as falling outside the definition of ‘terrorist activity’ by reference to the ‘armed conflict’ exception. There is no burden on the prosecution to negative or establish that the exception is inapplicable. It simply is inapplicable to the facts of this case.

[128] In his final submissions, Mr. Greenspon urged me to revisit that aspect of my ruling and reconsider it, cautioning that he could find no case anywhere that had found military actions to be terrorism. That may be the case, but I have not changed my mind on the point. In my view, combatants, lawful or otherwise, who actually engage in armed conflict in a manner that otherwise meets the definition of ‘terrorist activity’ are protected from prosecution under Canada’s terrorism provisions if their actions are in accordance with the conventional and customary principles governing warfare. If their actions are not so governed, they may possibly be dealt with as war criminals or under the domestic law they may have contravened. In 2005 the Attorney General of Canada prosecuted Nicholas Ribic for hostage-taking under s. 279.1 of the *Criminal Code* on the basis of his actions in Bosnia while actually

engaged in the armed conflict there in 1995, armed and in uniform. But the point here is that Khawaja, Babar, Khyam, Amin, Garcia and the rest were not engaged in armed conflict. There was no such armed conflict in Canada, the United Kingdom or in Pakistan where the acts with which Khawaja is charged, were carried out.

[129] In my view, in supporting the Jihad that brought violence to the citizens, the armed forces and the legitimate Government of Afghanistan, and to the armed forces welcomed by that legitimate Government to help it with the United Nations approved and authorized reconstruction, the group consisting of Khyam, Babar, Garcia Amin, Akbar and others became a terrorist group and their activity in that regard is not excluded by the armed conflict clause. In my opinion, the 'armed conflict' exclusion should not be extended to their non-combatant activity. To extend it to what they were doing would shelter from the reach of our terrorism legislation, the very kind of support of terrorism that Security Council Resolution 1390 (2002) called on Member Nations, including Canada, to interdict.

[130] Should I be wrong, however, in that analysis, and should it be held that the prosecution should have somehow negated or proven on evidence that the exclusionary clause did not apply, that is not the end of the matter. That is because Momin Khawaja, a 'wanna be' front line Mujahideen according to his own words, knew that the group he was training with, supporting, helping to finance, providing a residence in Rawalpindi to, transporting supplies for, offering to train in electronics, offering to buy equipment for, offering to help with other projects, and building triggering devices to enable to remotely detonate IEDs for, was far more than just a support mechanism for front line armed combat in accordance with the international rules of war. His knowledge extended to the broader terrorist activity that the group had, in whole or in part, as its purpose. Babar testified that they all shared an appetite for violent Jihad. Khawaja was aware that the group's activity included guerilla and sniper training and sending 'bros' to different parts of the world to engage in Jihad [see paragraph 16]. He shared its broad vision of economic terror throughout the western world [see paragraph 33, the tenor of which coincides well with that of the 'terrorist manifesto' of Khyam in exhibit 13, tab 6]. He shared its appetite for suicide bombing in countries including Israel. This is apparent from his nonchalant email discussion

with Zeba Khan about the merits of a suicide bomb in a crowded Israeli nightclub [see paragraph 33], and more so from his suggestion to Khyam that Immy be sent on a suicide bombing mission in Israel [see paragraph 40]. He was willing to help in other ways, offering to do so on several occasions and telling Khyam he was ‘...startin to work on a few other much more sophisticated projects that can be of great benefit to the J...’ and would speak to Khyam about them when they met [see: paragraph 42].

[131] In my view, there is ample evidence apart from the support and preparation for violent Jihad with the Mujahideen in Afghanistan or elsewhere, 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.

[132] I have no reasonable doubt in concluding that in doing the things the evidence clearly establishes that he did, Momin Khawaja was knowingly participating in and supporting a terrorist group. That group consisted, apart from himself, of Junaid Babar, Omar Khyam, Anthony Garcia, Salahuddin Amin and others. Khawaja may not, given his mindset, have considered the group’s activity to be terrorist activity, but in Canadian law, that is what it was.

[133] I return then to the individual counts 3 – 7 to relate the facts to them. In many ways, these counts represent different ways in which it is alleged that Khawaja contributed to or participated in a terrorist group for purposes of facilitating its terrorist activity or enhancing its ability to carry out such activity. There is an element of overlap, especially when it comes to the last count.

[134] It is alleged in count 3, that by taking the weapons training at the camp in northern Pakistan, Khawaja participated or contributed to the group for the purpose of

enhancing the ability of the terrorist group to facilitate or carry out terrorist activity. Receiving training is, both in reality and by virtue of ss. 83.18(3), participation and a contribution to the activity of a terrorist group. That Khawaja had as his object in taking the training, at least in part, enhancing the ability of the group to facilitate or carry out terrorist activity is, I think clear, in light of his email to Zeba Khan on September 18, 2003 [see the last 2 quotes in paragraph 32] in which he explains the importance and effect of taking weapons training. In my view the prosecution has proven its case and Momin Khawaja is guilty as charged in count 3.

[135] The prosecution has also proven its case under count 4. The facts show clearly that Khawaja used Ms A as a conduit to pass funds, including a bank card through to Khyam and his group. He dealt with her under a pseudonym, deceived her as to why it was necessary for her to act for him. Whether the money was to finance the actions of Khyam, Amin, Garcia or even his own needs when back in Pakistan, the context in which he was dealing with the group leaves no room but to conclude that the funds were for the purpose of enhancing the ability of the group to facilitate or carry out terrorist activity. On the evidence, there is no basis to find any other purpose. Momin Khawaja is guilty as charged in count 4.

[136] I am not sure just what transaction the prosecution is aiming at in reference to 'financial services' in the particularization in count 5, but for the reasons similar to the previous count, I conclude that Momin Khawaja's role in making available his parents' residence in Rawalpindi for the use of Babar, Amin, Garcia, Q, or any other 'bros' who needed a place to stay while in Pakistan, proves the prosecution's case under this count [see paragraphs 25-27]. He evidently had his parents evict their tenants so he could make the place available for Babar or for any of the people Khyam needed to get housed. Since the entire relationship between Khawaja and Khyam involved the pursuit of their common objective of violent Jihad, the offer of the residence was to facilitate terrorist activity or benefit those named in the count to facilitate or carry out such activity. The fact that circumstances did not actually see the residence so used, and that in the end, tenants unconnected to the terrorist group took up residence, is immaterial in that an offence is complete under s.83.03(a) by

simply making available property for the impugned purposes. Momin Khawaja is guilty as charged in count 5.

[137] Count 6 returns to the development of the hifidigimonster, alleging that Khawaja's talking, meeting and exchanging information about it with Khyam and others was a knowing participation in or contribution to the activity of a terrorist group, and for the purpose of enhancing the group's ability to carry out terrorist activity. In view of the findings I have already made as to the nature and intended use of the hifidigimonster, and the terrorist nature of the Khyam group, the only conclusion possible is that on the evidence, the prosecution has made its case and Momin Khawaja is guilty as charged. Everything he did in relation to the development of the remote detonating device, including his reports to Khyam and meeting with him in February 2004 amounted to participation and for the purpose as charged.

[138] The last count is the most general of all, charging that over the entire period covered by the indictment, in Ottawa, in the U.K. and in Pakistan, Momin Khawaja knowingly facilitated a terrorist activity. It is what might be called a 'basket charge,' and could overlap virtually all the previous 6 counts. It provides no particulars of what act or acts constitute the offence. "Facilitate" means 'to render easier, to promote, help forward, assist,' according to the Shorter Oxford English Dictionary. In closing arguments, I asked Mr. McKercher what the prosecution intended this count to embrace that had not already been more particularly or specifically dealt with in counts 1 through 6. He suggested a number of transactions, including Khawaja transporting money, a medical kit, the SIM cards and invisible ink pens and light from Khyam to Babar and Amin in Lahore; Khawaja's offering to acquire equipment like night vision goggles; his suggestion that Khyam and Shujah Mahmood come to Canada for shooting practice; Khawaja's suggestion that vacant land could be acquired cheap in Canada for training camp purposes; the offer to provide a course in electronics; and the suggestion that Immy be sent on a suicide mission to Israel.

[139] Mr. McKercher also suggested that Khawaja's possession of the three assault rifles, the bayonet, and the ammunition and clips in his house in Ottawa could constitute a

facilitation of a terrorist activity. It would not be difficult to speculate on how it might be so, but criminal culpability is not based on speculation. To Mr. McKercher's list, I would add Khawaja's discussion with Salahuddin Amin in Islamabad in October 2003 about the possibilities of putting his computer skills to work in other ways to assist the 'bros.' I am satisfied that with the exception of the firearms in his residence, the transactions mentioned by Mr. McKercher and the discussion between Khawaja and Amin are all things through which Momin Khawaja knowingly intended to promote, help forward or assist the terrorist purposes of the group. In all the circumstances of the case, there is no doubt that Momin Khawaja did facilitate a terrorist activity. Khyam and his associates were, as I have found, a terrorist group as defined. Momin Khawaja was aware of the groups purposes, and whether he considered them terrorism or not, he assisted the group in a many ways in the pursuit of its terrorist objective. It matters not whether any terrorist activity was actually carried out. Momin Khawaja is guilty as charged in count 7.

Conclusion and Verdicts

[140] For the foregoing reasons and in light of the evidence put forward in this trial, I find Mohammed Momin Khawaja

Not Guilty as charged on count 1, but guilty of the included offence 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, contrary to paragraph 81(1)(a) of the *Criminal Code*;

Not Guilty as charged on count 2, but guilty of the included offence of making or 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 contrary to paragraph 81 (1)(d) of the *Criminal Code*;

Guilty as charged in count 3;

Guilty as charged in count 4;

Guilty as charged in count 5;

Guilty as charged in count 6;

Guilty as charged in count 7.

Original signed by

Mr. Justice Douglas Rutherford

Released: Wednesday October 29, 2008

APPENDIX OF RELEVANT *CRIMINAL CODE* PROVISIONS

2. In this Act,

"explosive substance" includes

(a) anything intended to be used to make an explosive substance,

(b) anything, or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance, and

4. (3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

81. (1) Every one commits an offence who

(a) does anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property;

(d) makes or has in his possession or has under his care or control any explosive substance with intent thereby

(i) to endanger life or to cause serious damage to property, or

(ii) to enable another person to endanger life or to cause serious damage to property.

(2) Every one who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) for an offence under paragraph (1)(a) or (b), to imprisonment for life; or

(b) for an offence under paragraph (1)(c) or (d), to imprisonment for a term not exceeding fourteen years.

Part II.1 Terrorism

83.01 (1) The following definitions apply in this Part.

"terrorist activity" means

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

(i) that is committed

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

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

(ii) that intentionally

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

(B) endangers a person's life,

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

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

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

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

"terrorist group" means

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

(2) For the purposes of this Part, facilitation shall be construed in accordance with subsection 83.19(2).

83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services

(a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

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

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

(a) a terrorist group actually facilitates or carries out a terrorist activity;

(b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or

(c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

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

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

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

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

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

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

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

83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this Part, a terrorist activity is facilitated whether or not

(a) the facilitator knows that a particular terrorist activity is facilitated;

(b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or

(c) any terrorist activity was actually carried out.

83.2 Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

83.21 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence and liable to imprisonment for life.

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

(a) the activity that the accused instructs to be carried out is actually carried out;

(b) the accused instructs a particular person to carry out the activity referred to in paragraph (a);

(c) the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (a);

(d) the person whom the accused instructs to carry out the activity referred to in paragraph (a) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist group;

(e) a terrorist group actually facilitates or carries out a terrorist activity;

(f) the activity referred to in paragraph (a) actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or

(g) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

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DATE: 2008/10/29

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

MOHAMMAD MOMIN KHAWAJA

REASONS FOR JUDGMENT

Mr. Justice Douglas Rutherford

Released: October 29, 2008