CITATION: R. v. Hersi, 2015 ONSC 5378
COURT FILE NO.: 15-0000699-0000
DATE: 20150904

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Catherine Rhinelander, Sophina James*, and *Ryan Wilson*, for the Crown
	)	
– and –	)	
	)	*Alonzo Abbey*, for the Defendant, Mohammed Hersi
MOHAMMED HERSI and GULED MAHADALE	)	
	)	*Mary Bojanowska*, for the Defendant, Guled Mahadale
Defendants	)	
	)	
	)	**HEARD:** June 30, 2015

CLARK J.

REASONS FOR SENTENCE

INTRODUCTION

[1] Mohammed Hersi and Guled Mahadale were tried before this court sitting with a jury on a four count indictment.

[2] On Count 1, both accused were found guilty of having transferred, or offered to transfer, a firearm, contrary to s. 99 of the *Criminal Code,* R.S.C.1985, c. C-46. They were also found guilty of the further offence, charged in the same count, of having committed the s. 99 offence for the benefit of, at the direction of, or in association with, a criminal organization, contrary to s. 467.12 of the *Code*.

[3] On Count 2, both accused were charged that they unlawfully possessed a restricted or prohibited firearm, contrary to s. 92(1) of the *Code* and further charged in the same count that they did so, at the direction of, or in association with, a criminal organization, contrary to s. 467.12. Mr. Hersi was found guilty of both offences; Mr. Mahadale was acquitted of each.

[4] On Count 3, Mr. Hersi was found guilty of having conspired to traffic in a controlled substance, contrary to s. 465 of the *Code*. He was also found guilty of the further offence,

charged in the same count, of having conspired to traffic for the benefit of, at the direction of, or in association with a criminal organization, contrary to s. 467.12.

[5] On Count 4, Mr. Hersi was found guilty of having actually trafficked in a controlled substance, contrary to s. 5 of the *Controlled Drugs and Substances Act*, S.C. c. 19 ("*CDSA*"). He was also found guilty of the further offence, charged in the same count, of having trafficked in a controlled substance for the benefit of, at the direction of, or in association with a criminal organization, contrary to s. 467.12.

[6] On June 30, 2015, I heard submissions on sentence. The offenders are now before the court for the imposition of sentence.

GENERAL BACKGROUND

[7] At trial, both offenders admitted:

(i) the existence of a street gang called the "Young Buck Killas" ("the YBK");

(ii) that the YBK is a criminal organization within the meaning of s. 467.1(1); and

(iii) that the YBK has among its principal aims and objectives the commission of robberies and the production and trafficking of controlled substances, principally crack cocaine.

[8] Although the YBK originated in the area of Jane St. and Finch Ave. W., in Toronto, by the time of the events giving rise to this indictment the organization had extended its illicit activities to Hamilton and London, Ontario, Saskatoon, Saskatchewan, Calgary, Edmonton, and Fort McMurray, Alberta, and Surrey, British Columbia.

[9] The organization was set up in such a way that the principals would rent houses in the aforementioned centres from which, in turn, underlings would sell crack cocaine. Drugs, and sometimes firearms, were transported between these various operational centres by lower echelon members of the YBK, principally *via* inter-city busses because of the low or non-existent level of security for contraband that obtains in that mode of public transport.

FACTS

[10] The evidence adduced by the Crown at trial consisted, in the main, of hundreds of private telephone communications, both voice and text, intercepted between September and December of 2011, pursuant to successive judicial authorizations. Given the broad scope of the illegal activity proven on that evidence and given, further, that juries do not articulate reasons for their findings of guilt, part of this court's function in passing sentence is to make, where required, findings of fact: *Criminal Code*, s. 724 (2) (b); *R. v. Brown*, [1991] 2 S.C.R. 518, at 523; *R. v. Ferguson*, [2008] 1 S.C.R. 96, at para. 18. That said, I will set out, in brief, the specific facts I have found and upon which, in turn, I will pass sentence on each of these offenders.

(a) Mr. Hersi

[11] Respecting Mr. Hersi, I find as a fact that he was not only a member of the YBK, but one of its principal leaders. In one intercept, he was described by another highly placed gang member, Chermar Gardner, as "the CEO of the YBK." Based on the evidence as a whole, I consider that description to be more or less apt.[1]

[12] Dealing first with the s. 99 offence, I find as a fact that Mr. Hersi offered to transfer several firearms within the period covered by the indictment.

[13] On October 9, 2011,[2] Mr. Hersi spoke to Chermar Gardner about getting firearms for "people in the hood" and not wanting to be in Toronto without a firearm.

[14] On November 5, 2011,[3] Mr. Hersi spoke to Gardner about retrieving a particular firearm for him.

[15] On November 29, 2011,[4] Hersi spoke to Gardner three times about securing "a Mr. T with two bellies" for him. I find as a fact that those calls referred to a Mac 10, which is a machine pistol, and two magazines for the weapon.

[16] As for the s. 92 offence, I find as a fact that Mr. Hersi possessed at least two firearms within the period covered by the indictment, namely, the handguns that were confiscated from Glen Danchie in Calgary and Edmonton. Numerous other intercepted conversations strongly suggest that he possessed other firearms as well, but I make no specific findings in that respect.

[17] Turning to the s. 465 offence, the Crown has proven that Mr. Hersi was a member of not one, but two distinct conspiracies.

[18] The first conspiracy consisted of an ongoing agreement to traffic crack cocaine across Canada in the various cities mentioned above. I find as a fact that that conspiracy was extant throughout the entire period covered by the indictment.

[19] The second conspiracy, which existed only briefly, consisted of an agreement among Mr. Hersi, M.M., and others, to smuggle, on one occasion, marijuana into the detention centre where M.M. was then awaiting trial.

[20] In light of the fact that two conspiracies have been proven, I note *en passant* that at one point during the trial, when evidence of the second conspiracy emerged, I specifically directed

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[1] I say "more or less" because, in fairness to Mr. Hersi, Chermar's comment was said in a somewhat jocular fashion and the evidence shows that Gardner was equally highly placed in the YBK.

[2] Tab 109.
[3] Tab 236.
[4] Tabs 276, 278 and 280.

counsel's attention to the fact that the count charging conspiracy was not particularized; Mr. Abbey took no issue with the count as framed.

[21] In *R. v. Paterson* (1985), 18 C.C.C. (3d) 137, (Ont. C.A.), Martin J.A. held the following propositions to be "well established":

> I A single conspiracy may have more than one illegal object and it is proper to allege in one count a conspiracy to commit several crimes. If the prosecution proves a conspiracy to do any one of the prohibited acts alleged in the indictment as the objects of the conspiracy, that is sufficient to support a conviction: *The King v. Elliott* (1905), 9 C.C.C. 505 at 508-509; *Rose v. The King* (1947), 88 C.C.C. 114 at 121.
>
> …..
>
> IV Where the evidence establishes the conspiracy alleged against two or more accused (or against one accused and an unknown person where the indictment alleges that the accused conspired together and with persons unknown), it is immaterial that the evidence also discloses another and wider conspiracy to which the accused or some of them were also parties: *R. v. Greenfield et al.*, *supra*, at 857; *R. v. Coughlan and Young*, *supra*, at p. 35.

[22] "The fundamental requirement that the charge must provide sufficient particulars to reasonably permit the accused to identify the specific transaction may be met in a variety of ways": *R. v. Saunders*, [1990] 1 S.C.R. 1020, at para. 6. I am satisfied that Mr. Hersi had ample notice of the case he had to meet respecting both conspiracies and, on the basis of the authorities, I am satisfied that the lack of particulars did not prejudice him in any way.

[23] Obviously, however, since Mr. Hersi is only charged with one count of conspiracy, he cannot be punished for both. I intend, therefore, to sentence him for what I consider to be the more serious and far more pervasive conspiracy to traffic crack cocaine: *R. v. Provo*, [1989] 2 S.C.R. 3. That said, I am entitled to consider his agreement to smuggle marijuana to M.M. as an aggravating factor in dealing with the conspiracy to traffic in crack cocaine: *Criminal Code*, s. 725.

[24] As for the offence contrary to s. 5 of the *CDSA*, the intercepts clearly reveal that Mr. Hersi was one of the leaders of the YBK. As such, he both aided and abetted his many underlings to traffic crack cocaine, such that he is guilty as a secondary party. Numerous other intercepts make plain that Mr. Hersi personally trafficked in crack cocaine on a frequent basis during the period covered in this indictment, such that he is also guilty of the offence as a principal party.

(b) Mr. Mahadale

[25] Turning to Guled Mahadale, he testified before this court that, although he had earlier been a member of the YBK, he had, during 2011, forsaken the gang in an effort to steer his life in a law-abiding, pro-social direction for the benefit of his girlfriend and his young child. But the

more than 40 hours of intercepted communications and the numerous video clips in evidence[5] show incontrovertibly that Mr. Mahadale was active in YBK activities throughout the period in question. Accordingly, I reject his evidence that he was no longer a member of the YBK. Quite to the contrary, it is abundantly clear to me, and I find as a fact, that, at all material times, Mr. Mahadale belonged to the YBK. Moreover, while not at its pinnacle, perhaps, I further find as a fact that he was a fairly highly placed member. As such, he was, like his co-accused Mr. Hersi, an enthusiastic disciple of the ethos of unbridled greed, lawlessness and violence that is the very essence of the YBK.

[26] In fairness to Mr. Mahadale, it would appear that, during the time frame of the indictment, he was somewhat less involved than he had been earlier, when I find as a fact that, like Mr. Hersi, he was one of the YBK's principal leaders. However, his lesser role was not, as he would have the court believe, the result of an epiphany concerning his theretofore dissolute and criminal lifestyle, but, rather, solely due to his inability to be as active as he had previously been by virtue of a variety of health problems he had at that time.

[27] Respecting the s. 99 offence of which he now stands convicted, I find as a fact that Mr. Mahadale offered to transfer a firearm on October 7, 2011.[6] Not surprisingly, given that the offer was unmistakably clear on the intercept, Mr. Mahadale acknowledged in his evidence that he offered to provide a firearm to one G.L., a young person, but went on to contend that he had no intention of actually providing G.L. with a firearm. Rather, to quote Mr. Mahadale's evidence in examination-in-chief, he was merely "selling him the dream." I do not believe his evidence on this point. It makes no sense to me that he would give such an undertaking if, in fact, he had no intention of carrying through with it. In light of the violent gang strife ongoing at the time, which had already resulted, *inter alia*, in one young man being shot to death, I am firmly convinced that G.L. very much wanted to acquire a firearm and that Mr. Mahadale was equally in earnest when he promised to provide him with one. I further find as a fact that he made the offer both in association with and for the benefit of the YBK.

POSITIONS OF THE PARTIES

[28] The respective positions of the parties set out below are before the pre-sentence custody of the offenders is taken into account.

Position of the Crown

[29] Beginning with Mr. Hersi, Ms. Rhinelander contends that he should be sentenced to six years' imprisonment concurrent on both Count 1 (the s. 99 offence) and Count 2 (the s. 92 offence). Respecting the s. 467.12 convictions arising from those counts, Mr. Hersi should receive three years' imprisonment on each. The s. 467.12 sentences on Counts 1 and 2 ought to

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[5] Extracted from cell phones seized from gang members.
[6] Tab 104.

run concurrently to each other, Ms. Rhinelander asserts, but consecutively to the sentences for the weapons offences.

[30] Respecting both Count 3 (conspiracy to traffic in a controlled substance) and Count 4 (trafficking in a controlled substance), Ms. Rhinelander submits that Mr. Hersi should be sentenced to three years' imprisonment on each, concurrent, but consecutive to the sentences imposed on Counts 1 and 2.

[31] As for the s. 467.12 offences arising from Counts 3 and 4, counsel suggests that each count should attract a sentence of two years, concurrent, but consecutive to both the sentences imposed for the drug offences and the sentences imposed on Counts 1 and 2.

[32] In the aggregate, then, the Crown suggests a global sentence for Mr. Hersi in the range of 12 to 14 years' imprisonment.

[33] Further, in relation to Mr. Hersi, the Crown seeks an order pursuant to s. 743.6 (1.2) of the *Code* that the accused not be released on parole until he has served at least half of his sentence.

[34] Turning to Mr. Mahadale, Ms. Rhinelander suggests that he should be sentenced to a period of five years' imprisonment on the s. 99 offence and three years' consecutive on the s. 467.12 offence, for a total sentence of eight years.

[35] Respecting both offenders, the Crown seeks orders pursuant to sections 109 and 487.051 of the *Criminal Code*.

Position of Mohammed Hersi

[36] Counsel for Mr. Hersi suggests that an appropriate disposition would be a global sentence of between six and eight years' imprisonment.

Position of Guled Mahadale

[37] Counsel for Mr. Mahadale suggests that an appropriate disposition would be three years on the s. 99 charge and two years on the s. 467.12 offence, to run consecutively, for a total of five years' imprisonment.

DISCUSSION

General Principles of Sentencing

[38] In the words of s. 718 of the *Criminal Code*, "[t]he fundamental purpose of sentencing is to contribute… to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender, and other persons, from committing such an offence;

(c) to separate the offender from society, where necessary;

(d) to assist in rehabilitating the offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) promote a sense of responsibility in offenders, and acknowledgment of the harm done to the victims and the community."

[39] A sentence must be proportionate to the gravity of the offence and the degree of the offender's responsibility: *Criminal Code*, s. 718.1.

[40] An accused is entitled to be sentenced in keeping with sanctions imposed on similarly situated offenders in similar circumstances: s. 718.2(b). In that regard, I have considered the cases proffered by the parties, as well as a number of other authorities.

[41] As these sections reflect, in sentencing an offender the court must be mindful of a number of different principles, which are sometimes in conflict in that the length of sentence required to properly serve one is inconsistent with the length of sentence required to serve another. In such a case, an appropriate resolution may require that one or more of those principles predominate: *R. v. Szola*, [1976] O.J. No. 1229, 33 C.C.C. (2d) 572 (Ont. C.A.). In my view, the predominant principles in this case must be deterrence, both general and specific, and denunciation.

[42] With that general statement of principles, I turn now to consider the offenders individually.

MOHAMMED HERSI

[43] I will deal first with Mr. Hersi.

Antecedents

[44] Mr. Hersi was born in Somalia. He came to Canada with his mother and siblings when he was two years of age; his father remained in Somalia. The family settled in the Jane St. and Finch Ave. W. area of Toronto. His counsel asks me to take judicial notice of the fact that this is a high crime area of Toronto. Mr. Hersi's mother remarried, but she and his step-father divorced in 2009. Mr. Hersi is now a Canadian citizen.

[45] Mr. Hersi was 22 at the time of the commission of these offences; he is 26 now.

[46] In terms of his education, counsel advises that the accused is eight credits short of a high school diploma.

[47] By way of his work record, I am told that Mr. Hersi worked as a community worker during 2005-06 at the Sentinel-Finch Community Centre. Other than that, however, it would appear that he has never held lawful employment.

[48] Mr. Hersi accumulated the following criminal history as a youth:

- in 2006, he was found guilty of Robbery and two counts of Use Imitation Firearm during the Commission of an Indictable Offence; having served 157 days of pre-sentence custody he received 18 months' probation, concurrent on all three counts

- in 2008, he was found guilty of Obstruct Peace Officer, four counts of Fail to Comply with Recognizance and one count of Possession of a Schedule I Substance, for which he received two months on each charge concurrent

- later in 2008, he was found guilty of Fail to Comply with Recognizance; in addition to 38 days of pre-sentence custody, he was sentenced to one day and placed on probation for 12 months

- in 2009, he was found guilty of Robbery, Wear Disguise with Intent and Possession of a Weapon; in addition to 407 days of pre-sentence custody, he was placed on probation for 18 months

[49] Mr. Hersi has accumulated the following criminal record as an adult:

- in 2010, he was convicted of Possession of a Prohibited or Restricted Firearm with Ammunition, contrary to s. 95(1), Possession of a Firearm Knowing that its Possession was Unauthorized, contrary to s. 92(1), and Possession of a Firearm while Prohibited, contrary to s. 117.01; in addition to 442 days of pre-sentence custody, he was sentenced to 10 months' imprisonment, concurrent on all counts

- in 2013, he was convicted in Saskatoon of Possession of a Schedule I Substance, contrary to s. 5(2) of the *CDSA*, and Possession of Property Obtained by Crime Over $5,000; in addition to one year's pre-sentence custody, he was sentenced to a further 30 months' imprisonment concurrent;

- on the same occasion in 2013, he was convicted of Assault Causing Bodily Harm, for which he received a sentence of 90 days to be served consecutively to the other sentences imposed

- later in 2013, he was convicted of Fail to Comply Probation, for which he received a sentence of 45 days' imprisonment

[50] The 2013 convictions postdate the offences upon which he is now to be sentenced and I recognize, of course, that he must be sentenced on the basis of his record as it stood at the time he committed the offences on this indictment. That said, in terms of his prospects for

rehabilitation, I am entitled to consider what appears to be the offender's continuing predilection to commit criminal offences: *R. v. Sidwell*, [2015] M.J. No. 147, 2015 MBCA 56.

[51] Many of these dispositions involved the imposition of firearms prohibition orders pursuant to either s. 51 of the *Youth Criminal Justice Act* ("*YCJA*") or s. 109 of the *Code*.

Rehabilitation

[52] As in every sentencing, I must be mindful of the principle of rehabilitation: *R. v. Stein* 15 C.C.C. (2d) 376, (Ont. C.A.), at 377. Rehabilitation is most important, of course, when dealing with youthful first offenders. Mr. Hersi is still relatively youthful, but as opposed to being a first offender, he is a serious recidivist who, it seems, is:

- undeterred by the hefty penal sanctions imposed on him to date for those of his criminal endeavours that have come to the attention of the authorities
- determined to persist in his criminal lifestyle (as reflected by convictions postdating the offences herein)
- unwilling to make any effort to improve his education or acquire any marketable skills
- not interested in pursuing any lawful vocation

Although I do not discount the possibility entirely, all of that leads me to have a very gloomy view of Mr. Hersi's prospects of rehabilitation.

Deterrence

[53] Respecting firearms' offences, it is trite to observe, and the defence does not dispute, that one of the main objectives of sentencing in a case such as this must be deterrence, both general and specific: *R. v. Uniat*, 2015 ONCA 197, [2015] O.J. No. 1436 at para. 7. Also of importance are public safety and denunciation, as noted by Smith J.A. in *R. v. Jarsch*, [2007] B.C.J. No. 738, 2007 BCCA 189, at para. 5 ff.:

> Before sentencing the appellant, the trial judge observed that the minimum sentence for possessing a loaded prohibited firearm is one year and the maximum is 10 years, and that the maximum sentence for occupying a motor vehicle with an unauthorized firearm is also 10 years. She noted that before amendments to the Criminal Code in 1998, there was no minimum sentence for the first offence I have just mentioned and the maximum for the second was five years. Thus, she stated, Parliament intended by its amendments that these offences be treated more seriously than they had been previously.
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> Further, she observed that the paramount sentencing objectives for these offences are public safety, general and specific deterrence, and denunciation, and that rehabilitation, while important, is a secondary concern. She noted as well that the essence of these offences is the

> potential for violence and physical harm and that the degree of readiness of the offender for violent action can be an aggravating factor.

In this case, having listened to the many intercepts in which they discuss firearms and violence, and refer repeatedly to internecine gang violence, there is no doubt whatsoever in my mind that both offenders were ready for violent action.

[54] In *R. v. Danvers*, [2005] O.J. No. 3532, 199 C.C.C. (3d) 490 (C.A.), Armstrong J.A., at para. 77 ff., stated:

> In conclusion, I fully endorse the following comments made by the trial judge in sentencing the appellant:
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> > Death by firearms in public places in Toronto plague this city and must be deterred, denounced and stopped. Only the imposition of exemplary sentences will serve to deter criminals from arming themselves with handguns. In particular, the use of handguns in public places cries out for lengthy increased periods of parole ineligibility. Society must be protected from criminals armed with deadly handguns.'
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> There is no question that our courts have to address the principles of denunciation and deterrence for gun related crimes in the strongest possible terms. The possession and use of illegal handguns in the Greater Toronto Area is a cause for major concern in the community and must be addressed.

[55] In fashioning a fit sentence for Mr. Hersi, I must be further mindful of the need for deterrence in relation to narcotics offences, where, because of the tremendous societal cost of this pernicious activity, it becomes a key factor in sentencing.

[56] In that regard, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, (S.C.C.), at 1039-40, Cory J. spoke of the socioeconomic costs of illicit drug use in Canada:

> The costs to society of drug abuse and trafficking in illicit drugs are at least significant if not staggering. They include direct costs such as health care and law enforcement, and indirect costs of lost productivity.
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> …..
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> These significant and often tragic consequences serve to emphasize that the harm caused by trafficking in illicit drugs is very properly a matter of grave concern in Canada, as it is throughout the world.

[57] The enormous social cost associated with trafficking in cocaine and other drugs was also recognized by Lamer J. in *R. v. Smith,* [1987] 1 S.C.R. 1045, at 1053, where he stated:

> Those who import and market hard drugs for lucre are responsible for the gradual but inexorable degeneration of many of their fellow human beings as a result of their becoming drugs addicts. The direct cause of the hardship cast upon the victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs.

[58] Although the foregoing cases each dealt with importing as opposed to trafficking, they are apropos this case nonetheless since, albeit he was not the importer of the cocaine he eventually trafficked, Mr. Hersi was responsible for the production of some of what he sold, at least in terms of converting powdered cocaine into crack.

The "Jump" Principle

[59] On behalf of Mr. Hersi, counsel suggests, and I acknowledge, that in imposing sentence on an offender a court should be mindful of the so-called "jump" principle. Having said that, in applying this principle, a sentencing court must always take into account the seriousness of the offence upon which an offender is currently being sentenced considered in relation to the character of the offences respecting which the offender has previously been sentenced: *R. v. Catenacci*, 2012 ONCA 187, at para 1; *R. v. Yeck*, 2011, ONCA 768, at para. 6. In this case, given the gravity and scope of Mr. Hersi's criminal activity for which he is now to be sentenced, and given the significant sentences he has previously received, although it is lengthy, I do not consider that the range of sentence proposed by the Crown offends this principle.

Parity

[60] As well as being obliged to consider similar sentences imposed on similarly situated offenders generally, where, as here, multiple offenders committed the offences, I must also be mindful of parity. But the principle is not absolute and should not divert the court's attention from other sentencing criteria, such as the nature and seriousness of the offence, and the individual characteristics of the accused: *R. v. LeBlanc*, [1997] N.B.J. No. 125, (C.A.).

[61] In this case, as the following examples confirm, stiff sentences have been meted out to other members of the YBK for crimes committed in the course of the same general enterprise that gave rise to the charges before this court:

- Mohamed Ali and Abdir Abdirashid were each sentenced to five years' imprisonment for the offences of transferring a firearm and having done so for the benefit of, at the direction of, or in association with, a criminal organization

- Joel Benjamin received eight years' imprisonment for the offences of unlawfully possessing a firearm and having done so for the benefit of, at the direction of, or in association with a criminal organization

- Prince Asante was sentenced to five years' imprisonment for Possession of a Firearm

- David Buckridge received a sentence of 63 months' imprisonment for Possession of a Firearm

- Jenoi Mullings, who had a prior record for firearms offences, received nine and a half years' imprisonment for Possession of a Firearm

- Irshed Ahmed received 10 and a half years' imprisonment for possessing a firearm and having done so for the benefit of, at the direction of, or in association with, a criminal organization

Further, unlike the accused before me, the aforementioned individuals pleaded guilty. As I will discuss, *infra*, that is an important factor distinguishing Messrs. Hersi and Mahadale from most of the other YBK members who have been sentenced in connection with this criminal enterprise.

Mitigating Factors

[62] In terms of mitigation, Mr. Hersi is still relatively youthful and has some family support. It is well established that family support is considered to be a mitigating factor because one can expect an offender who has the benefit of such support to be better able to rehabilitate himself. In this case, unfortunately, one of Mr. Hersi's brothers is also involved in criminal activity. As well, one of the intercepts made plain that his mother was prepared to assist him to transfer a large sum of money that she knew full well was the avails of Mr. Hersi's criminal activities. That said, I give Mr. Hersi's family support little weight as a mitigating factor.

[63] In summary on this issue, regrettably, beyond his relative youth and his dubious family support, I see little else by way of mitigating factors.

Aggravating Factors

[64] To begin, I remind myself that aggravating factors must be proven beyond a reasonable doubt: *R. v. Gardner*, (1982) 68 C.C.C. (2d) 477 (S.C.C.).

[65] In relation to the firearm offences, I find it to be an aggravating factor that at the times Mr. Hersi offered to transfer a firearm, and had actual possession of two firearms, he was bound by numerous orders prohibiting him from possessing firearms.[7]

[66] In relation to the *CDSA* offences, I find the following aggravating factors:

- Mr. Hersi utilized numerous persons who at the time were under the age of 18 to assist him in his nefarious activities: s. 718.2 (a) (ii.1);[8]

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[7] Although there is no direct evidence before the court as to just how many prohibition orders Mr. Hersi is bound by, I take judicial notice of the nature of the numerous convictions on both his youth and adult records that, by operation of law, required the court to impose a prohibition order pursuant to either s. 51 of the *Youth Criminal Justice Act*, S.C. 2002 c. 1 ("*YCJA*"), or s. 109 of the *Code*.

[8] At least eight young persons have previously been found guilty of offences arising out of their activities within the YBK. All of them were subordinate to Mr. Hersi in the organization. Although, doubtless, these youths were willing participants in these illegal activities, by virtue of Mr. Hersi having been an adult at the time, I nonetheless consider his exploitation of their willingness to constitute abuse within the meaning of the subsection.

- as noted above, at the same time as he was pursuing the main conspiracy of trafficking crack cocaine across the country, he conspired on one occasion to traffic marijuana to a person incarcerated in a custodial facility: s.725 (1) (c).[9]

[67] In relation to both the drug and firearms offences, I find it to be further aggravating that Mr. Hersi committed them in association with, and for the benefit of, a criminal organization. While it may seem odd, at first blush, to consider as aggravating something that is the *actus reus* of a separate conviction, this approach has been endorsed by the Court of Appeal for Ontario: *R. v. Beauchamp*, [2015] O.J. No. 1939, 2015 ONCA 260, at paras. 322-29.

Pretrial custody

[68] The parties agree that Mr. Hersi's pre-trial custody should be considered at the maximum rate of 1.5:1: *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575.

[69] At the risk of stating the obvious, one of the main reasons for giving enhanced credit for pre-sentence custody is, of course, the fact that the time a person detained pending his trial spends in custody is not factored into his release date if he is ultimately convicted and sent to prison. Given his appalling criminal record, and the fact that he has been convicted of numerous offences committed during the time he has been detained pending his trial in this matter, I consider Mr. Hersi to be a very poor candidate, indeed, for early release. As such, one of the principal reasons for giving enhanced credit is absent here. Given, however, the parties' joint position on this issue, I will accede to it.

[70] Mr. Hersi's counsel also noted that, because Mr. Hersi pleaded guilty before the Supreme Court of Canada released *Summers*, he did not get the benefit of the holding in that case when he was sentenced in Saskatoon. Counsel suggested that I should temper the sentences I am about to impose to reflect that. I disagree. There is no evidence before me as to what exactly happened in Saskatoon in that regard and no agreement among the parties on that score. Moreover, even if there were agreement, it is not clear to me that it would be appropriate to do so; see *R. v. Wilson*, 2008 ONCA 510, [2008] O.J. No. 2512, at paras. 42-43.

[71] Mr. Hersi has been incarcerated since 2011, but the vast majority of that time has been expended, as it were, in connection with resolving other proceedings. Thus, the parties agree that, for purposes of this sentence, the pre-trial custody should be calculated from January 16 of this year, when, but for being detained on these charges, he would have been released on mandatory supervision from the sentence imposed in Saskatoon. To today's date, that is 221

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[9] Section 725 (1) (c) provides that, in determining sentence, the court "may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge." The young person was a member of the YBK and the evidence concerning the conspiracy to smuggle marijuana into the custodial facility formed part of the overall backdrop to the separate charges of having committed the drug offences for the benefit of, at the direction of, or in association with a criminal organization.

days. Multiplied by 1.5 that equals 332 days. Accordingly, I will credit him with 11 months to be deducted from the total sentence I would otherwise impose.

Totality

[72] Speaking generally, it is trite to observe that, in passing sentence on multiple offences, a court is obliged to consider the totality of the sentences so as not to impose a sentence that is overly long or crushing to the offender.

[73] Mr. Abbey suggests that I should consider the Saskatoon sentences when considering totality. I disagree. Although I gather that the Saskatchewan charges concerned Mr. Hersi dealing drugs under the umbrella, as it were, of the aforementioned YBK enterprise, that was an entirely separate proceeding. Counsel put no specifics before this court concerning exactly what Mr. Hersi pleaded guilty to having done and, in the absence of such specifics, I see no reason to diminish Mr. Hersi's sentence based on the sentence imposed in Saskatoon. To do so would, to borrow Rosenberg J.A.'s turn of phrase in *Wilson*, "distort the sentencing regime": at para. 42.

GULED MAHADALE

[74] I turn now to Mr. Mahadale.

Antecedents

[75] Like Mr. Hersi, Mr. Mahadale was born in Somalia. The family spent some time in Saudi Arabia before immigrating to Canada, when Mr. Mahadale was still a very young child. Mr. Mahadale is not a Canadian citizen.

[76] In terms of his education, Mr. Mahadale has not completed high school, but I am told that he has undertaken a course of studies since being detained on these charges and will soon be in a position to sit an examination to qualify for his high school equivalence.

[77] In terms of employment history, Mr. Mahadale has none to speak of. He suggested in his evidence that he wanted to get work in the Alberta tar sands, but was unable to do so because of his health. While I accept that he had certain health challenges during the relevant period, I find that they were not of such a magnitude as to preclude him from all work. There were, in my view, a great many things he could have done, had he been genuinely interested in working. There is nothing apart from his testimony to verify that he wanted to secure legitimate employment, and I reject his evidence in that regard.

[78] Mr. Mahadale has had no contact with his father for a number of years. Apparently his father disowned him because of his criminal lifestyle. At the time of these events, his father was working in Fort McMurray, Alberta, and the accused, went to Fort McMurray on more than one occasion, apparently anxious to see his father, but I am told no rapprochement ever took place.

[79] In terms of his criminal antecedents, Mr. Mahadale amassed the following findings of guilt as a youth:

- in 2004, he was convicted of Robbery, Carry Concealed Weapon and three counts of Fail to Comply Recognizance; having served 11 days of pre-sentence custody, he was given three months custody and placed on a community supervision order.

- in 2005, he was found guilty of Robbery, Use Imitation Firearm during the Commission of an Offence, Fail to Comply with Disposition, and Fail to Comply Recognizance; in addition to 148 days already served, he received probation for two years on each charge concurrent

- in 2006, he was found guilty of Robbery, Use Imitation Firearm during the Commission of an Offence, Possession of a Firearm Contrary to a Prohibition Order, and Failure to Comply with a Disposition, contrary to s. 137 of the *YCJA*; in addition to 248 days of pre-sentence custody, he was sentenced to 12 months' custody to be followed by six months' community supervision and six months' probation on each count concurrent

- in 2008, he was found guilty of Obstruct Peace Officer, and fined the sum of $1.00 in addition to seven days of pre-sentence custody

[80] Since becoming an adult, Mr. Mahadale has accumulated the following criminal convictions:

- in 2010, he was found guilty of Unauthorized Possession of a Firearm and a further count of Possession of a Firearm Knowing that its Possession was Unauthorized; in addition to 442 days of pre-sentence custody, he received concurrent sentences of 10 months' imprisonment and probation for 18 months

Rehabilitation

[81] In terms of rehabilitation, Mr. Mahadale has few marketable skills. Like Mr. Hersi, he is a serious recidivist and I do not accept that he is now prepared to forsake his criminal ways and live a law-abiding life. I say that because, despite his evidence in this court, when one sees the video evidence and listens to the hundreds of intercepted communications adduced in this trial, Mr. Mahadale's commitment to the YBK and its criminal endeavours is not merely evident, but palpable. Thus, while not quite so dismal, perhaps, as Mr. Hersi's prospects, I see little in Mr. Mahadale's antecedents to suggest that he is likely to be rehabilitated.

Mitigating Factors

[82] As with Mr. Hersi, so, too, with Mr. Mahadale there is very little to be said on his behalf by way of mitigation.

[83] Like Mr. Hersi, Mr. Mahadale is still relatively young and he, too, has family support. In that regard, on the one hand, I have received and considered letters from his sister, Sarah Mahadale, and his girlfriend, Samantha Smith. Each speaks of the accused's many good

qualities. On the other hand, his brother, M.M., is a member of the YBK and heavily involved in the same criminal lifestyle as the accused.

Aggravating Factors

[84] Respecting Mr. Mahadale, I find the following to be aggravating factors:

(i) in a great many of the intercepts, although what he says does not amount to an offer to transfer a firearm, as such, he can be heard repeatedly speaking of the acquisition of firearms;

(ii) he acknowledged in one intercept that he had given approval to an underling to commit an armed robbery;

(iii) he spoke on another intercept about committing an armed robbery himself;

(iv) the person to whom he offered to transfer a firearm, G.L., was a young person: s. 718.2(a)(ii.1);

(vi) he was bound by numerous orders prohibiting him from possessing firearms;[10] and

(vii) respecting the s. 99 offence, he committed it for the benefit of and in association with a criminal organization: *Beauchamp*, at paras. 322-29.

Parity

[85] In terms of parity, as I indicated in relation to Mr. Hersi, the range of sentence suggested by the Crown for Mr. Mahadale is not out of keeping with the sentences imposed on other YBK members, especially when one considers that most of those accused pleaded guilty.

Totality

[86] In light of the gravity of this offence and Mr. Mahadale's criminal antecedents, the sentence sought by the Crown, is not overly long in all the circumstances. Nor is it so long as to

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[10] As was the case with Mr. Hersi, so, too, with Mr. Mahadale there is no direct evidence before the court as to the precise number of prohibition orders by which he is bound. Again, however, I take judicial notice of the nature of the numerous convictions on both his youth and adult records that, by operation of law, would have required the sentencing court to impose a prohibition order. I appreciate, of course, that, by virtue of having been acquitted of the charge that he actually possessed a firearm, Mr. Mahadale is differently situated than Mr. Hersi, who, by possessing a firearm, was in actual breach of the numerous prohibition orders binding him. That said, Mr. Mahadale having offered to transfer a firearm, I find as a fact that, despite knowing that he was prohibited from doing so by multiple orders, Mr. Mahadale was fully intent on acquiring a firearm so that he might, in turn, transfer it, as he undertook to do. In the final analysis, then, although less aggravating than in the case of Mr. Hersi, the fact that Mr. Mahadale was under these prohibition orders still constitutes an aggravating factor.

crush the accused. In saying that I am mindful of one particular intercept in which Mr. Mahadale made a point of saying how easy his time in jail had been when he was with his fellow members of the YBK.[11] While his remarks might seem to some like mere bravado or macho posturing, that was not the conclusion I drew. On the contrary, hearing it firsthand, I was left with the very clear impression that Mr. Mahadale was speaking entirely in earnest.

Pretrial custody

[87] The parties agree that Mr. Mahadale should receive the maximum credit of 1.5:1 respecting his pre-trial custody.

[88] Although less so than Mr. Hersi, Mr. Mahadale, too, is a poor candidate for early release, thereby greatly diminishing, in my view, any concern about time spent in detention not being factored into his release.

[89] Another of the principal reasons for giving enhanced credit for pre-sentence custody is that the conditions an accused must endure in the detention setting are generally considered to be more onerous than those experienced by a prisoner serving sentence. Respecting Mr. Mahadale, however, I feel I would be remiss if I failed to note the intercept in which he made a very definite point of telling M.M., who was then detained pending trial on outstanding criminal charges, to be sure to remain in detention long enough to accumulate enough "dead time" to offset the sentence he would likely receive when he finally resolved his charges. Judging by what he had to say to his brother on the subject, it would appear that the hardships pre-trial custody is generally thought to entail were not evident to Mr. Mahadale.

[90] My misgivings as stated above notwithstanding, in light of the joint position on this issue I will accede to it.

[91] Mr. Mahadale has been in custody since his arrest on December 13, 2011. From that date until today is 1360 days; factored at 1.5:1, that is the equivalent of 2040 days. Accordingly, I will deduct 68 months from the sentence I would otherwise impose.

SENTENCE

(i) Mr. Hersi

(a) Sentences

[92] Respecting Count 1, for offering to transfer a firearm, contrary to s. 99 of the *Code,* I hereby sentence Mr. Hersi to a term of imprisonment of five years.

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[11] Mr. Mahadale was referring to a period of nearly a year when he had been detained awaiting trial with, amongst others, Mr. Hersi.

[93] Respecting Count 2, for possessing two firearms, knowing that he did not have the requisite authorization to possess either, contrary to s. 92 of the *Code,* I hereby sentence Mr. Hersi to five years' imprisonment.

[94] Those sentences will run concurrently to each other.

[95] Respecting the further offence proven in Count 1, in which I find that Mr. Hersi committed the s. 99 offence both for the benefit of, and in association with, a criminal organization, to wit: the YBK, contrary to s. 467.12 of the *Code*, I sentence him to a term of imprisonment of three years.

[96] Respecting the further offence proven in Count 2, concerning which I find that Mr. Hersi committed the s. 92 offence both for the benefit of, and in association with, the YBK, contrary to s. 467.12, I sentence him to a term of imprisonment of three years.

[97] The sentences on the criminal organization charges will run concurrently to each other, but consecutively to Mr. Hersi's sentences on the section 92 and 99 offences, for a total of eight years' imprisonment.

[98] Respecting Count 3, for conspiring to traffic in a controlled substance, contrary to s. 465 of the *Code*, I hereby sentence Mr. Hersi to a term of imprisonment of three years.

[99] Respecting Count 4, for trafficking in a controlled substance, contrary to s. 5 of the *CDSA*, I hereby sentence Mr. Hersi to a term of imprisonment for three years.

[100] The sentences for conspiracy to traffic and trafficking will be served concurrently to each other, but consecutively to all the sentences imposed on Counts 1 and 2.

[101] I hasten to add that, given the nationwide scope of the YBK's drug dealing enterprise and Mr. Hersi's instrumental part in it, but for the application of the principle of totality, the sentences I have just imposed would have been considerably longer.

[102] Respecting the further offence proven in Count 3, concerning which I find that Mr. Hersi conspired to traffic in a controlled substance both for the benefit of, and in association with, the YBK, contrary to s. 467.12, I impose a sentence of two years' imprisonment.

[103] Respecting the further offence proven in Count 4, concerning which I find that Mr. Hersi trafficked in a controlled substance both for the benefit of, and in association with, the YBK, contrary to s. 467.12, I impose a sentence of two years' imprisonment.

[104] The sentences on the criminal organization convictions arising from Counts 3 and 4 will run concurrently to each other, but consecutively to the sentences for conspiracy to traffic and trafficking arising from those same counts, respectively, and consecutively to all sentences arising from Counts 1 and 2.

[105] In summary, then, I have concluded that a fit global sentence, before taking account of Mr. Hersi's pretrial custody, is one of 13 years' imprisonment. Subtracting eleven months' credit

for pre-trial custody, the total sentence that I hereby impose is a term of imprisonment of 12 years and one month, to be served in a federal penitentiary.

(b) Delayed Parole

[106] Respecting the Crown's request pursuant to s. 743.6 of the *Code* that Mr. Hersi's parole be delayed until he has served at least half of his sentence, the general approach to be taken on such an application was set out in *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41, at para. 33:

> As mentioned above, courts must perform a double weighing exercise. First, they must evaluate the facts of the case, in light of the factors set out in s. 718 of the Code, in order to impose an appropriate sentence. Then, they must review the same facts primarily in the perspective of the requirements of deterrence and denunciation, which are given priority at this stage, under s. 743.6(2). The decision to delay parole remains out of the ordinary, but may and should be taken if, after the proper weighing of all factors, it appears to be required in order to impose a form of punishment which is completely appropriate in the circumstances of the case. This decision may be made, for example, if, after due consideration of all the relevant facts, principles and factors at the first stage, it appears at the second stage that the length of the jail term would not satisfy the imperatives of denunciation and deterrence. This two-stage process, however, does not require a special and distinct hearing. It should be viewed as one sentencing process, where issues of procedural fairness will have to be carefully considered.

[107] Generally speaking, the decision to delay parole eligibility is discretionary: s. 743.6 (1.1). Further, "the section should not be an automatic feature of sentencing but should only be invoked in those cases where the Crown has adduced and can point to clear evidence of justification…": *R. v. Goulet* (1995), 97 C.C.C. (3d) 61 (Ont. C.A.), at para. 21, citing its earlier decision in *R. v. Faulds* (1994), 20 O.R. (3d) 13 (C.A.); *R. v. Ferguson* (1995), 64 B.C.A.C. 211, at para. 16.

[108] All of that is reversed, however, where, as here, the offender stands convicted of a s. 467.12 offence. Section 743.6 (1.2) provides that the court shall order that the offender serve half his sentence before being eligible for parole unless the court is satisfied that the expression of society's denunciation and the principles of deterrence would be adequately served within the operation of the normal rules relating to parole eligibility.

[109] In *Beauchamp*, at para. 260, the court endorsed the British Columbia Court of Appeal's analysis in *R. v. Mastop*, 2013 BCCA 494, 303 C.C.C. (3d) 411, at para. 46, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 23, of the overall purpose of s. 467 of the *Code*:

> The overall objective of the criminal organization legislation is to protect society from the wide-ranging effects, violent and otherwise, of criminals who work together as a group, as well as to prevent and deter organized criminal activities. Offenders who regularly commit crimes together are a greater menace to society than an individual offender working alone.

The Court of Appeal for Ontario then immediately went on to say:

> We endorse these comments. Protection of the public, deterrence and denunciation are the primary sentencing objectives for s. 467 offences. We also agree with the Crown's submission that the achievement of these objectives depends on the prospect of significant penal sanctions for organized criminal conduct. [Emphasis added.]

[110] Having considered at the initial sentencing stage the relevant facts[12] and principles as they pertain to Mr. Hersi, upon further consideration at this second stage, I am far from satisfied that, were the ordinary provisions pertaining to parole to apply, the global sentence I have just imposed on Mr. Hersi would adequately serve the imperatives of deterrence and denunciation. Accordingly, the order sought is granted. Mr. Hersi will not be eligible for parole until he has served at least one half of the global sentence I have just imposed.

(ii) Mr. Mahadale

(a) Sentences

[111] Turning to Mr. Mahadale, respecting Count 1, for offering to transfer a firearm, contrary to s. 99 of the *Code,* I hereby sentence him to five years' imprisonment.

[112] Respecting the further offence proven in Count 1, concerning which I find that Mr. Mahadale committed the s. 99 offence both for the benefit of, and in association with, the YBK, contrary to s. 467.12, I sentence him to a term of imprisonment of three years.

[113] Those sentences will run consecutively, for a notional global sentence of eight years' imprisonment. In light of his pre-trial custody, however, I will reduce that sentence by 68 months. In the result, then, I hereby sentence Mr. Mahadale to a total term of imprisonment of 28 months, to be served in a federal penitentiary.

(b) Delayed Parole

[114] In contrast to its position respecting Hersi, respecting Mr. Mahadale, the Crown did not expressly seek a s. 743.6 order. Ms. Rhinelander advised today that this was an oversight and that she had intended to seek an order respecting Mr. Mahadale. Since, on June 30, the Crown did not indicate that it was seeking the order and since defence counsel was suggesting a sentence of less than two years, once pre-trial custody was taken into account, not surprisingly, perhaps, Ms. Bojanowska made no submissions on this issue during the sentencing hearing. When the matter came before the court today for the imposition of sentence, having decided on the sentence I have just imposed, such an order would, of course, be mandatory, unless I were to be satisfied that the sentencing objectives could be achieved under the normal regime. Accordingly, earlier today I gave counsel an opportunity to make submissions on this issue.

[115] Having considered the relevant facts and principles at the initial sentencing stage as they pertain to Mr. Mahadale, upon further consideration at this second stage, I am not satisfied that, were the ordinary provisions pertaining to parole to apply, the sentence I have imposed on him would adequately serve the imperatives of deterrence and denunciation. Accordingly, I order that

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[12] In particular, I take into consideration at this second stage the fact, as earlier noted, that by virtue of application of the principle of totality I have imposed lesser sentences on the counts of conspiring to traffic in a controlled substance and trafficking in a controlled substance than I would otherwise have imposed.

Mr. Mahadale not be eligible for parole until he has served at least one half the global sentence I have just imposed.

ANCILLARY ORDERS

Section 109 Orders

[116] The Crown seeks, and neither accused opposes, an order pursuant to s. 109(1) of the *Criminal Code*. Accordingly, I hereby order, respecting each of the accused, that he be prohibited from possessing any of the things mentioned in s. 109(2) for the rest of his life.

DNA Orders

[117] The Crown also seeks, and neither accused opposes, an order, requiring the authorities to take from the accused such samples of his blood or other bodily substance as are reasonably required for purposes of inclusion of his DNA profile in the national DNA databank: s. 487.051.

[118] Both accused stand convicted of an offence contrary to s. 467.12, which is a primary designated offence: s. 487.04 (a.1) (xv). Since neither accused endeavoured to satisfy the court that the impact of the proposed order on his privacy interest or his security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, the order sought is, in each case, mandatory: s. 487.051(2).

[119] Accordingly, respecting each accused, order to go requiring the authorities to take from him such number of samples of his bodily substances as are reasonably required for the purposes of forensic DNA analysis.

Victim Surcharge

[120] As provided by s. 737(1) of the *Code*, I am obliged to impose a victim surcharge upon each offender. Subsection (7), provides discretion for the Court to waive the surcharge where the offender establishes to the satisfaction of the court that undue hardship to the offender or the dependents of the offender would result from payment of the victim surcharge.

[121] Counsel for both accused submit that it would be a hardship for their clients to pay the surcharge. I appreciate that the accused have been incarcerated for quite some time and will be for some considerable time to come, but that is often the case with offenders. That alone does not make the imposition of the surcharge a hardship, much less the “undue hardship” the statute requires. In summary on this issue, then, I am not satisfied, respecting either offender, that imposition of the surcharge would constitute an undue hardship. Pursuant, then, to s. 737(2), I hereby impose a surcharge of $200.00 against each offender and order him to pay the surcharge within one year of the date of his release from the sentence I have just imposed upon him.

R. A. Clark J.

Released: September 4, 2015

CITATION: R. v. Hersi, 2015 ONSC 5378
COURT FILE NO.: 15-0000699-0000
DATE: 20150904

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MOHAMMED HERSI and GULED MAHADLE

Defendants

REASONS FOR JUDGMENT

R. A. CLARK J.

Released: September 4, 2015