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R. v. Agil

Her Majesty the Queen against Khumane Agil, Orane Brown, Kevin Chambers, Leonard Fullerton, Abadir Jimale

Ontario Court of Justice

R. Khawly J.

Heard: July 14, 2011

Judgment: July 14, 2011

Docket: None given.

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Counsel: D. Sgouromitis, for Crown

J. Razaqpur, for Mr. Agil

Ms B. Saad, for Mr. Brown

Ms J. Stewart, for Mr. Chambers

S. Pieters, for Mr. Fullerton

Ms M. Wyszomierska, for Mr. Jimale

Subject: Criminal; Evidence

Criminal law

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Evidence

Cases considered by *R. Khawly J.*:

R. v. Trac ([2004](#)), [2004 ONCJ 370](#), [2004 CarswellOnt 9850](#) (Ont. C.J.) — considered

Statutes considered:

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

s. 2 "firearm" — considered

s. 91 — considered

s. 109 — referred to

s. 467.11 [en. 2001, c. 32, s. 27] — considered

s. 540(7) — considered

s. 540(9) — considered

***R. Khawly J.*, (Orally):**

1

THE COURT: All right. This is a decision on committal at a preliminary inquiry where five individuals face multiple counts, either as a group, or individually. The individuals are Khumane Agil, Orane Brown, Kevin Chambers, Leonard Fullerton and Abadir Jimale. Before I go on, Count 26, Mr. Pieters, it sounds like you are conceding your client was found with a cell phone. Beyond that, you take the position that the Crown must lead some evidence that he did not heed one of the exceptions.

MR. PIETERS: Correct.

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THE COURT: All right. Thank you. Count One ensnares all of the five individuals, and alleges that they participated, or contributed, to activities of a criminal organization known as the 5 Point Generalz or variations thereof, such as the 5PGz, all for the purpose of enhancing that organization's ability to traffic in controlled substances, contrary to s. 467.11 of the *Criminal Code*.

2 Count 2, initially charged three of them, namely Mr. Brown, Mr. Jimale and Mr. Chambers, with assisting the same organization for the purpose of possession of unauthorized firearm. Following the calling of some evidence, the Crown asked and obtained discharges of Mr. Brown and Mr. Jimale, leaving Mr. Chambers alone facing that count.

3 Mr. Agil alone is involved in the bulk of the 28-count information. They are all but one related to firearms and ammunition charges. However, some of these counts also led to discharges leaving the following, Counts 3, 8, 13, 22 and 23. I appreciate that the Crown is asking for Committal on some additional charges in relation to Mr. Agil and others, but I will deal with that later. Count 22 is a conspiracy to traffic in cocaine with an unknown person.

4 Of the remaining nine counts, one was further discharged at the request of the Crown, which leaves the remaining four defendants facing eight counts as follows.

5 Mr. Brown faces only one more count, Count 18, which is a conspiracy to traffic in cocaine with Shane Evans.

6 Mr. Jimale is facing Counts 19, 27 and 28. Count 19 is a mirror image of Count 18, except that here, Mr. Jimale is the involved party with Evans, rather than Mr. Brown. Count 27 is a breach of recognizance count, not to possess narcotics, while Count 28 is a breach of s. 109.

7 Mr. Chambers is facing Count 21, and is charged with conspiring with Shane Evans to traffic in a 357 handgun.

8 Mr. Fullerton faces the remaining three counts, namely, Counts 24, 25 and 26. Count 24 involves the possession of cocaine, the remaining two counts are breaches of recognizances.

9 I am told that these individuals form part of a larger group of persons that were charged following the completion of a Drug and Gang Task Force project called Corral. True to the name of the task force, these five individuals were in essence, alleged associates with a criminal or-

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ganization that deals in drugs and firearms. There are intercepted telephone communications authorized for the five defendants' alleged cell phones and/or land lines. This then led to search warrants being executed at some of their alleged residences.

10 As I said earlier, beyond requesting committal on all the remaining counts, the Crown also seeks committal on various other counts as apparently revealed in the evidence, which I will deal with as I review the evidence against each individual defendant.

11 The Crown taking rather expensive liberties with what they perceived s. 540(7) of the *Criminal Code* entitles them to do, proceeded to unload on the Court, nine or more binders of voluminous material, and added even more as the preliminary hearing progressed. The defence understandably overwhelmed by this disclosure, attempted to try to object piecemeal to at least some of it. However, it became clear to this Court that the three weeks set aside for this inquiry would require three months, were I to put the Crown to the strict proof of satisfying this Court that each document met the definition of 'credible and trustworthy', as required by s. 540 (7).

12 I ruled, over defence objection, that all the documents were admissible, subject to two caveats. Mindful of s. 540(9), I advised defence counsel that if they wished to hear from any particular witnesses, to advise me as the hearing progressed. Requests were made by two counsel, and three witnesses were in fact made available by the Crown. The second caveat was the following: if during the course of submissions, counsel put forward an argument that a particular document on its face, was unreliable, then the court would either excise the document, or would simply not consider it.

13 Miss Saad, during her argument, cited one specific example. An officer following a search warrant, wrote in his notes that he found and seized a cell-phone statement belonging to her client. Yet according to Miss Saad, that statement has not been disclosed. Query therefore, what weight the jury can place on such a bald, unsupported comment in the police officer's notes. It is precisely this type of example that confirms the danger of turning s. 540(7) into a "paper preliminary inquiry", as Shaw J. stated in *R. v. Trac* [2004 CarswellOnt 9850 (Ont. C.J.)]. Nor is the answer necessarily putting on the stand an officer with direct knowledge of the case.

14 In our case, the documents are so extensive that it would be inconceivable for any officer, any witness, to have such hands-on knowledge. In fact, that is precisely the conclusion that I came to regarding Detective Constable Clarke. His information was of very limited use considering the titanic proportion of the evidence before us. It is equally perplexing that the Crown took the po-

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sition that it was not relying on the bulk of the documentation. Query therefore, why most of it was even filed.

15 A more cynical observer might suggest that it could be viewed as at least an unconscious attempt to overwhelm both the defence and the Court, and to simply make them surrender to this inevitable steamroller.

16 Yet surprisingly, the Crown tells us that it was selective in the evidence it presented, and that at trial, there would be a more complete presentation of evidence. I trust, and hope, that the Crown did not mean to say that it was sitting on relevant evidence because this is only a preliminary inquiry. I underline that aspect of the Crown's remarks during the course of his submissions because I do not find that the evidence proffered that damaging or compelling. Nonetheless, some of it may meet the admittedly low threshold test of the *United States v. Sheppard* on a number of the counts.

17 In fact, this case is illustrative of the elixir of suspicion, convincing rational human beings that what looks, acts and talks like suspicion is somehow magically transformed into evidence. Let us look at an example of what I am speaking of, namely, voice identification. The Crown at several points, suggested that in the case of Mr. Agil, that it is the same voice on two different telephone lines. He makes a similar claim with respect to Mr. Brown and Mr. Chambers. That, to me, is a confirmation of the trap of placing undue reliance on the benefits of s. 540(7). Such a short-cut procedure does not take away the requirement of some evidence reasonably supporting the existence of each element of the offence.

18 As Miss Saad correctly points out, although I argued otherwise with her, a jury is not capable of reaching the conclusion the Crown urges, in a void. This is one of those narrow instances where someone who has extensive experience, academically, and practically, can be called upon to provide opinion evidence of similarity in voices to aid a jury in evaluating said voices. No question the voices can sound similar. In fact, I reached the same conclusion as the Crown, despite the less than pristine audio quality on some of these wires. However, such similarity is not supportable evidence in the absence of the aid of expert opinion. With that caution, it doesn't mean that the Crown cannot prove voice identification by other means.

Voice Identification

19 Beyond what I just said, let us evaluate what the Crown does have on voice identification in

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relation to each defendant.

20 First, Mr. Khumane Agil. I come to no difficulty that the Crown has ample and supportable evidence that Mr. Agil is connected to both phone numbers 416-278-6696 and 416-897-0765. The first cell phone was seized from 218 Duncanwoods Drive where he was also arrested. The subscriber is G. Host. LCN 85 which is one of the wiretap calls, supports that same inference in the call that is made to Rogers Communication. As for the second line, ending 2190, there the caller identifies himself as G. Host, the guy with the Escalade. There is also surveillance putting Mr. Agil in the Escalade at Duncanwoods Drive. While Mr. Razaqpur contested those reports, logic suggests that one would not begin on a costly venture of a surveillance without, at the very least, a description of the person you are asked to surveil. This is a preliminary inquiry. The kind of objections Mr. Razaqpur is making on that point, belongs at a trial, not here.

21 Moving on then to Mr. Orane Brown. Again, here, there are two lines that the Crown is attempting to tie to Mr. Brown, 416-795-6627 and 416-822-9752. The evidence is thin, except that apparently, in the documents there is a G1 driver's licence issued to an Orane Brown, matching Mr. Brown's date of birth, and listing an address at 622A Trethewey Drive. Miss Saad objects to this on the basis that while on its face it appears to be a Minister of Transportation of Ontario's search, the fact that it is not a certified copy amounts to, according to Miss Saad, no evidence. I disagree. This is one of those instances where at a preliminary inquiry, search evidence can be viewed as credible and trustworthy. It would have been preferable to have a certified copy, but for our purposes it is not necessary.

22 Let us read call 2517, in part. We do have Sheldon Evans' number, and then we have that number 956-6627, and during that call, the unknown male says following a question by Evans saying,

You got your licence?,

Unknown male,

Yeah, everybody thinking I'm moving to the city, right?

Evans,

How did you get your licence so quick? You still, your one from the States, your one from the

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States is still good?

Unknown male,

No, I went down to do my own, my G1 licence. I gotta be driving with a G, G licence, a G driver, and shit like that,

et cetera, et cetera. In my view, that speaks for itself- He is clearly connected with that phone line based on that conversation, and based on that MTO search.

23 Before we move on, the same cell phone with that same line was seized in a bedroom at 622A Trethewey during the search warrant, which again anchors that this line can be tied to Mr. Brown. In my view, it is sufficient, therefore, for a jury to make a reasonable inference that Mr. Brown is associated with a line ending in 6627.

24 Now, it is totally different when it comes to the line ending in 9752. I find no evidence that Mr. Brown uses line 9752. I say this because it is dependent on two aspects: one, that a Bell Mobility statement for line 6627, the one I said he is already tied to, lists Orane Brown with an address of 77 Ravens Road, as a subscriber. Apparently, that statement was found during a search warrant. The problem is that this is a highly relevant document, and Miss Saad was quick to jump on that one. It was not disclosed. The reason it is highly relevant is because it could tie him to line ending 9752. It is not good enough under s. 540(7) for the Crown to lead evidence that an Officer Campoli, badge #7379, found the item without then having to disclose the document. A preliminary inquiry is not a free-for-all. There is some evidentiary burden on the prosecution. There is nothing here for the jury to weigh in connection with that line, or in connection with Mr. Brown being at 77 Ravens Road.

25 Two, the Crown makes a bald statement that he uses the name 'O.G.' with nothing else to support it. Therefore, while call, LCN call 2098, which is on line ending 9752, would be instructive if we could tie Mr. Brown to 77 Ravens Road, we cannot. Nor can we tie him to call, LCN call 2096 without some confirmation of the name 'O.G.' Constable Leermakers who was narrowly limited in the areas in which he could provide opinion evidence cannot assist in this regard without anything more. For him to simply say he's known as 'O.G.' without providing a basis for saying that, is no evidence. Moreover, he was not even qualified in this area. Finally, in desperation, I looked for a subscriber search, and sure enough there was one for that line, except it registered to a Jason Brown. Not good enough.

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26 Moving on to Mr. Kevin Chambers. Here as well, there are two lines the Crown says are connected to Mr. Chambers, 416-769-6604 and 416-341-9053. Regarding line ending 6604, the Crown tells us that Officer Leermakers confirmed that Mr. Chambers is known by the name 'Sizzle' and 'K.C.'. There are indeed two calls, LCN 1974 and 1987, tied to line 6604 where the caller is referred to as 'Sizzle' and 'K.C.', but as I said earlier, a simple, bald assertion that he is known by these names is not evidence. It requires further details to support that comment, and we have none. As an aside, the subscriber search for 6604 lists A. Willams as a subscriber.

27 Regarding line ending 9053, the Crown tells us that Chambers is a listed subscriber. In fairness, that's what the documents apparently indicate, and while at a trial, I would have real issues with this, this is where s. 540(7) comes in to help. For our purposes, I accept what the Crown tells me which is that searches were made to the service providers who then provided subscriber information. That is sufficient for our purposes. In that limited context, we can tie Mr. Chambers to line ending 9053.

28 Moving on to Leonard Fullerton. The line attempted to be associated with Mr. Fullerton is 647-342-9008. Based on my earlier comments, it is not evidence when Leermakers tells us that Mr. Fullerton is known as 'Curls' unless he provides support for it, and he does not. However, a number of calls here are instructive. Look at, for instance, LCN 2074, which I did not bring with me, but basically, it shows Evans with an unknown person who identifies himself as 'Curls', and tells him that his phone number/his land line is 647-342-9008. Match that up with LCN 2360 which again has someone referring to himself as 'Curls', and the incoming call is coming from line ending 9008. At line 371, he's asked when he's leaving his mother's home, he's asked at line 1414,

Don't you want a place for yourself?.

29 We also know, in the same fashion as with Mr. Brown, that line 9008 is subscribed to 40 Craydon Avenue. When a search warrant was executed at that address, Mr. Fullerton was found there. That is enough to tie him to that line. In fact, Mr. Pieters in his submissions, concedes that Mr. Fullerton is known as 'Curls', and that line 9008 is indeed a land line to 40 Craydon Avenue where he resides with his mother. However, despite that admission, I purposely went through the exercise to show the manner voice identification can be reasonably inferred through other means, when an expert on voice identification is not available.

30 Let's move on then to Abadir Jimale. Here, the Crown concedes that the voice identifica-

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tion is the thinnest of the five. I think the Crown is being generous with his assessment. The Crown says that it is more than a coincidence that a person referred to as A.J. on a number of the calls interestingly represents the initials of Abadir Jimale. There are FIR and CIPS reports which suggest that punching the initials A.J. brings up Abadir Jimale, and his date of birth. That is similarly interesting, but it is not evidence, and it would be a jurisdictional error to view it as such.

31 Clearly, LCN call 81 suggests that the "Somalian nigga", is A.J.. It is also evident in the call, that A.J. speaks with a faint accent, or a lilt, that one might suggest comes from the Gulf of Aden, Indian Ocean area of East Africa, and that accent has more to do with Middle Eastern accents. It is also obvious that this A.J. is a good businessman who knows how to market himself in the turf in which he deals. He is a drug dealer, unfortunately, not a legitimate businessman.

32 Apparently, his constituency, the people he sells to are young, black males in the Weston area, so he adapts. He obviously either has spent much time learning, or being immersed, in the mannerism, the intonation, the slang of that group of individuals. In fact, at points in the wires, he is simply over the top. He reminds me of a white guy like me trying too hard to sound hip and black. This may go a long way to explain why Shane Evans calls him "my Somalian nigga". In fact, I venture to say that as opposed to Constable Leermakers whose so-called expertise was demolished by Mr. Pieters, he would be a good source of information to provide opinion evidence on street slang/the jargon within the milieu we are dealing with.

33 Something else that separates this A.J. from the rest of this group is that the Crown has provided strong and ample evidence that he is a supplier. Yet, despite knowing this, and acknowledging that the voice identification is thin, I found it surprising that no attempt was made to qualify someone as an expert not just in the area of voice identification, but one focused on the intonation and particularities of accents stemming from that part of East Africa. Had the Crown done so, and had the Crown played, for instance, for the expert, responses made by Mr. Jimale at his parade at the police station after his arrest, then the expert could have made a comparison between the voices on the wires, and the comments made by Mr. Jimale at the parade. He could then have given his opinion on the similarities in the voices. That opinion certainly could have been used, and would have been available to the jury to determine voice identification. Finally, combining that with the "Somalian nigga" comment, the Crown would have had sufficient evidence upon which a jury could make a reasonable inference that A.J. is indeed Abadir Jimale, that they are one and the same. Instead, all we have is the fact that A.J. is reflective of Abadir Jimale's initials. Even the subscriber information does not help. The name there is someone named Mohamed. There is unfortunately, and I do underline the word unfortunately, nothing there for the

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jury to weigh. Whoever A.J. is, he is not only knee-deep into drug trafficking, but likely, assisting a criminal organization. There is extensive contact between him and various individuals that the Crown has targeted as being members of the 5PGz. But at this point, to say to a jury, look at the initials A.J., and look at Mr. Abadir Jimale's name, that is enough. I am sorry, no, that is not enough, and never will be. That is all my comments on the voice identification.

Evidence of a Criminal Organization

34 Let us move on then to whether in fact there is a criminal organization called the 5 Point Generalz. I will spend very little time on this segment. Despite some eye-raising comments made by Constable Leermakers such as: "in the past ten years, the 5 Point Generalz have been in the top ten criminal gangs in Ontario," without providing any support or basis for his comments, I find that the Crown has enough meat on the bones here, to amount to some evidence. There is some evidence that there is a criminal organization called the 5 Point Generalz and variations thereof. Similarly, the Crown has some documentary evidence through videos, images, tattoos, and most importantly, wiretaps that spread a fairly large net over individuals that may be in some manner connected with the so-called 5PGz. That is not to say it is overwhelming evidence, and far from it. All defence counsel had a field day pointing that out. Mr. Krueger, to his credit, in summarizing this area, said the following,

In sum, although some of it is thin, it is enough to put to a jury.

35 That is not a clarion call of the strength of this aspect of this case. Finally, I tend to agree with much of Mr. Pieters' thoughtful analysis of the proof required to confirm the existence of a criminal organization, and of the shortcomings of the evidence here. Moreover, I place very little weight on Constable Leermakers' opinion. However, it is there for a jury to weight, along with some of the calls and videos in that area. Similarly, it is open to the jury to determine if any of the individuals identified, such as the Dawkins, the Brammalls, the Evans, et cetera, are somehow related to the 5 Point Generalz. Whether that ensnares anyone in our matter I will discuss as we go along. Having made that determination, let us, now move on to the actual counts as they relate to each defendant.

Khumane Agil

36 First, Mr. Khumane Agil. Due to what I accept, without hesitation, was inadvertence on the prosecution's part, they failed to provide the necessary documentation to confirm that Mr. Agil did

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not have a registration certificate, nor that he was not a holder of a licence for firearms. As I said earlier, that led to discharges on a number of firearms counts. There is, however, a request for committal on three additional counts under s. 91. of the *Criminal Code*, for the following: a Colt .45 calibre, a snub nose .38 Special, and a semi-automatic handgun of unknown make. I will deal, however, first, with Count One which is the criminal organization one under s. 467.11. Did Mr. Agil, in some fashion, contribute or assist one of the purposes of that organization namely to commit the indictable offence of trafficking in controlled substances?

37 Mr. Krueger, candidly, concedes as follows, "Not much on him." Calls LCN 208, 1212 and 1223 comes closest to suggest that while in all three instances he is looking to purchase marijuana, during those calls he mentioned certain things that could be connected to the 5PGz. It is sheer speculation however, to suggest that the word 'fort' that he uses, and that he seems to know where the 'fort' is, refers to the headquarters of the 5PGz. In call 1223, he makes a reference to 'C Low', in the context of, "I'm C Low's people, G." We know that Leermakers tells us that 'C Low' is Carl Brammall who the Crown says is a member of the 5PGz, or heavily involved with them. Similarly, in call 1212, while again looking for marijuana, he says,

'C Low's' people, man, Ghost, the dude with the Escalade.

38 Moreover, Mr. Agil sports a teardrop which, according to Leermakers, ties him to the 5PGz. In essence, is this some evidence of someone assisting the organization? Hardly. There are no competing inferences here. All they show is someone trying to buy marijuana from various sources. The most that could be said about the 'C Low' usage is that he is trying to show he is trustworthy, or seeking a better deal for himself. Either way, that does not contribute to the activity of the 5PGz. In an effort to force the evidence, the Crown states that by attempting to buy marijuana from Evans, he is assisting the organization, as he should have known that Shane Evans is widely known as connected to the 5PGz. I know speculation when I see it, and no more will be said of this. In sum, there is no evidence a jury could weigh on Count One against Mr. Agil. He will be discharged accordingly, on that count.

THE ACCUSED, MR. AGIL: Thank you, Your Honour.

THE COURT: I will now move to the gun counts, namely, Counts 3, 8, 13. Both of Mr. Agil's cell phone lines, 6696 and 0765, are loaded with images of firearms. What is disturbing to me beyond those images is of the individual talking to the firearms. It reminds of me talking to my cars. I mean there is a loving relationship with those firearms that is not necessarily healthy.

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39 These images were interpreted by Constable Press who was qualified as an expert in the area of firearm examination, identification, comparison and operations. He viewed the following weapons, a Colt, a Hi-Point handgun, a .38 Special, a Beretta, a semi-automatic of unknown make, and a Smith & Wesson Sigma model. To sum up his opinion, he found that all six guns were operational. After providing his perception of the images, he makes the following comments in conclusion, on p. 406:

In order to determine if the items displayed or the material provided can meet the required definition of a firearm under s. 2 of the *Criminal Code*, a physical examination and practical testing of each firearm is required. This is not possible as I am advised that the actual firearms have not been recovered. However,

he continues:

based on my review of video provided, paying particular attention to the following points, I believe the items displayed in the various videos are in fact operational firearms. 1, how the male or males handled the item displayed. Finger off the trigger, only pulls trigger when the magazine is removed. 2, how the items work. When the detachable box cartridge, magazines are removed, and the associated sound it makes when removed. 3, the way the item works. When the trigger is pulled and the sound it makes while being operated. 4, the physical attributes of the items when displayed. Barrel length, frame design, firearm markings, including grip medallion, et cetera. 5, the ammunition displayed, various types of bullet configurations. 6, comments made during the video using various firearm ammunition terms, Hi-Point, also hollow point. 7, comment by the male on video describing the revolver as a snub nose. 8, the male's comments in a number of the videos about the bullets doing damage to a person's head.

40 Mr. Razaqpur spent a considerable amount of time arguing that because the firearms could not be tested, there is no evidence that they were capable of causing serious injury or death, and hence, failed the requirements of s. 2 of the *Criminal Code*. I sympathize with this position. However, this is not the forum where this submission should be made. The officer's opinion is that despite his inability to test the weapon, it remains his opinion that they are all operational. It is not just a bald statement as we have seen made by others during the course of this preliminary inquiry. He details and provides a basis on how he arrived at that conclusion. I may disagree with it, and I may well find that it is a denial of natural justice to convict someone of a firearms offence based on video images, but that is not my function here. It is for the jury to weigh the opinion of Constable

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Press, not mine. Accordingly, Mr. Agil will be committed on Counts 3, 8, 13, and three new counts under s. 91, involving the three other firearms that I previously mentioned.

41 Count 22, is a conspiracy offence to commit the indictable offence of trafficking in cocaine. The key evidence here is LCN call 1478. I will not go through it, I will simply say this. If a jury were to accept some of the comments of Sergeant Press on the meaning of certain words such as 'pack', and so forth, and the range of prices for one ounce of crack cocaine, then the jury could very well find a conviction on this count. Regardless, there is some evidence here for committal. Accordingly, Mr. Agil will also be committed on Count 22.

42 Count 23, this is a mirror image of Count 22, except that the conspiracy here is to traffic in a firearm. The count is dependent on mainly, call 1804. This call is symptomatic of tunnel vision spurred by images of guns in Agil's cell phones. The most that a jury could take from this call is that the woman who calls is, "ticked off", and wants Agil to find her a gun. About 45 minutes later, they talk again, and at one point she says, "after we do a shooting". There are some further comments by the woman that, "I have business to deal with.". Any attempt by a jury to suggest that Agil is involved in a conspiracy to traffic in a firearm is sheer conjecture, and nothing more than that. Nowhere in these calls is there any indication by Mr. Agil that he will find her a gun. Rather, he keeps trying to turn the conversation around, and trying to say, hey, I'll do anything for you, just be my girlfriend, or just be with me. At no point is he suggesting, 'okay, I will get you a 'burner', but then will you be my girlfriend'. We have none of that. Accordingly, Mr. Agil will be discharged on that count.

Orane Brown

43 Mr. Orane Brown faces two counts, Count One and Count 18. On Count One, the Crown relies on three calls, 2095, 2109, 1249. I accept that what call 2095 shows is that a jury could find that the Evans boys are talking about Mr. Brown. They mention his first name Orane. I mean it is not everybody who is named Orane. They also discuss that he did some time in the States, which is confirmed by some of the documents, then they say, 'okay, we're going to go and meet Orane at a bar'. We know that there is some evidence by Constable. Leermakers stating that the 5PGz use a bar as a place to hang out. To suggest that the jury could even contemplate that that is where they are going to go meet would be sheer speculation on their part.

44 Call 2109 is of no consequence, and the reason I say this is because it deals with phone line ending 9757. I have already ruled we cannot tie Mr. Brown to it. Call 1249, that call can be viewed

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by a jury, as Mr. Brown is asking Shane Evans to come armed to keep watch, while he takes care of some 'issues'. What the 'issue' is, we do not know. It does not sound that kosher, or safe, if he needs the protection of someone with a gun. However, to extrapolate that Brown is dealing with that issue in order to benefit the criminal organization the 5PGz in trafficking offences is simply not there. The fact that Evans knows Brown, that they seem to communicate, perhaps regularly, and that Brown knows him well enough to ask him to be his armed backup is all the Crown has. It is nothing more than that. There is nothing here for the jury to weigh in relation to Count One. The Crown can choose to charge him with something else, but not for Count One. Mr. Brown will be discharged accordingly on Count One.

45 Count 18, this one is a conspiracy between Mr. Brown and Mr. Shane Evans to traffic in cocaine, and it is dependent on call 1011. However, call 1011, is dependent on line ending 9752. Given that I ruled earlier that nothing ties Mr. Brown to this line, there is no evidence here for the jury to weigh. Mr. Brown will be discharged on Count 18.

Kevin Chambers

46 Let us move on then to Kevin Chambers. Mr. Chambers faces Counts 1, 2, and 21. Regarding Count One, the Crown states that he is likely the only one of the five who could be considered a constituent of the 5PGz. The Crown calls him the video man. The Crown notes that Leermakers testified that gangs make videos as a tool of intimidation, and to demonstrate the power and authority of the organization. According to the Crown, therefore, Mr. Chambers is directly implicated in advancing the image of the 5PGz to carry out the business of drug trafficking by making those videos. That is hardly evidence, without anything more than this bald assertion. Moreover, there is evidence that Chambers is an aspiring rap artist. Queried on that in cross-examination, Leermakers does not dispute that. Leermakers' comments about the video without any supporting details, is simply left in a void, or to steal Mr. Pieters' line, is a 'factual vacuum'.

47 The Crown adds, however, that Chambers possesses a 'Crip' marking with a three-pointed star on his left knuckle. Mr. Javed makes short shrift of that last argument pointing out that rather, it reads 'L I L', and along with the markings on his other knuckles, of Nate, represent his son, and therefore means 'Little Nate'. When Mr. Leermakers was confronted with that, he did not necessarily dispute it.

48 Let us look at call 980 which was preferred by the Crown, Which is a call between Shane

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Evans and Chambers. 980 is a very long call. It is 27 pages, and I will not go through much of it, but I will highlight certain things. We know he is talking to 'Sizzle Dog', aka Evans. Chambers is asking if he is going out tonight, and Evans starts talking about,

having to fuck up that little Menace youth, just now, Menace from up Church,

(Menace is apparently, according to Leermakers, a street name of the individual),

he was getting rude, he tried to pull some who are you looking at shit, and he was with that formula youth. I just made some calls,

Evans adds,

and that little nigger's crushed him, you know what I mean?

Chambers, "Yeah.",

49 Evans,

You know what it is, yo,

and then he's talking in the background something about his blunt, and then returns to the conversation involving that youth that had to be straightened out, and Chambers says,

Yo, fuck, that's how it goes. I guess they just need to know who runs it over there, bro.

Evans says, "Ah.",

50 Chambers say,

Yeah, they need to know who runs it over there.

51 Evans,

Yeah, well, I know, eh. The minute after he got his beat down, he's still going on stop dog.

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52 Later on, Chambers says,

Yeah, those guys are babies, dog.

53 Interestingly, I do not know if they are still talking about disciplining those youths, or if they are now talking about rival rappers. I am not sure.

54 In any event, taking it at its worst, what is happening here? At its worst, and in fairness, at a preliminary inquiry, I must look at the Crown's evidence at its highest, what do we have? The most that could be said here is that Chambers is sympathizing with Evans. He is sympathizing with Evans' views that they have got to keep those kids in line.

55 Mr. Pieters wants me to put a different interpretation on it, but let us look at it from the Crown's point of view. The Crown says that beyond sympathizing, Chambers is implyingly acquiescing to the 5PGz protecting and maintaining their turf by keeping out rival gang members. There is no possible way that a jury could reach that conclusion on this call. There is no such inference, much less a reasonable inference. With these comments, Mr. Chambers will be discharged on Count One.

56 Count 2 is a mirror image of Count One, except that here Chambers is allegedly assisting the 5PGz in their ability to possess unauthorized firearms. Let us look at call 1974. That call is not available for the jury to weigh as I ruled that line ending 604 is not linked to Chambers. Let us then move on to call 1283 where Chambers and Shane Evans are in a conversation. Let us look at line 108. Chambers:

Yeah. I got a fuckin' brand-new 357, eh.

Evans,

Oh, yeah. Hold that down, son.

57 "Yo," Chambers says,

this shit is fucking sick.

58 Then Evans changes the subject,

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"Yo, so what you up for tonight?

59 Chambers,

Yo, just let me show you something, that's for me and you, eh.

60 Evans,

Okay, okay, okay.

And then he changes the subject again,

So what you up for tonight, though?

Chambers,

You know I'm not even out there like that, but you already know, if you want ... if you want, you know what I mean, you can get to have it.

Later on, at p. 263, Chambers says,

All right. Well, basically, if anything happens, you can hit this number, whatever bro, I'll fucking roll through, yo, I'll have that, eh, I'll fucking blam anything in sight, eh, my nig?

Evans,

Yeah. All right, my brother.

Now, at its highest, what do we have? Perhaps a jury could find that a 357 is indeed a handgun. Perhaps they could also find that if Evans needs help that Chambers would be right there blasting anything in sight with his handgun. What the jury cannot do, however, is take the extra step of inferring it is to assist Evans in his activities with the 5PGz. It is just not there. Accordingly, Mr. Chambers will be discharged on that count.

61 Moving on to Count 21. Here we have a conspiracy with Shane Evans to traffic in a .357

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handgun. Given what I just said the jury could find on Count 2, it would be open to the jury to say, particularly looking at lines 120 to 128, that this is a confirmation that Chambers is offering his handgun, and that Evans acknowledges that he understands that. Sitting as a trial judge, I would find making this inference dangerous. However, I cannot say that it is not a reasonable inference for a jury to make. Accordingly, he will be committed on that count.

Leonard Fullerton

62 Moving on to Leonard Fullerton. He is facing Counts One, 24, 25 and 26. Dealing with Count One. The Crown say's he could be a member, he hangs out with them, he buys drugs from them. Well, let us look at the calls, 752, 753 and 1366, and 1764. All they show is that he is a purchaser of drugs from Evans, and perhaps even serves as a front end, on occasion, for Evans. If so, however, Evans, at times, has difficulty recalling who 'Curls' is, as evidenced by one of the calls. There is not much here. The jury would be guessing that he is assisting the 5PGz. Accordingly, Mr. Fullerton will be discharged on Count One.

63 Count 24, in my view, here, there is some evidence of knowledge and control. It is a house that he shares with his mother. It is found in the basement, in plain view. The Crown claims it has documentation to show that he is connected with the basement, in some fashion. Even the defence concedes his mother would have nothing to do with this. There is enough there. He will accordingly be committed on that count.

64 Count 25. As for the wiretaps themselves and Count 24 upon which I have just said he will be committed, provide evidence for this count. There will be a committal, accordingly.

65 On Count 26, I disagree with Mr. Pieters' position that it is for the Crown to provide some evidence that Fullerton's possession of the cell phone did not meet the requirements of the exceptions. Having made those comments, there will be a committal on that count as well.

Abidir Jamale

66 Let us move on now, to Mr. Abadir Jimale. There is no doubt given some of the wiretaps, that someone named A.J. is involved in a continuous pattern of drug trafficking. However, given my findings on the lack of voice identification, I must say, regrettably, that I am discharging him on all counts.

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