

PART I – STATEMENT OF FACTS

A. Overview

1. In 2015 the respondents Chiheb Esseghaier (“Esseghaier”) and Raed Jaser (“Jaser”) were convicted by a jury of terrorism offences arising primarily from a plan, inspired by Al Qaeda, to derail a VIA Rail passenger train. Both were sentenced to life in prison. On August 27, 2019 the Court of Appeal for Ontario overturned those convictions on the basis of a highly technical error in the jury selection process—conducting the challenge for cause using static triers with full exclusion of sworn and unsworn panel members rather than rotating triers with exclusion of unsworn members only—which did not cause any apparent prejudice to the fair trial rights of either offender.

2. The applicant Her Majesty the Queen seeks leave to appeal that decision on the basis of errors of law that raise the following issues of public importance: whether the jury selection process in this case necessarily resulted in an improperly constituted jury; whether factors rendering a jury improperly constituted for one accused necessarily render it improperly constituted for co-accused to whom those factors do not apply; whether the public importance of verdicts on profoundly serious terrorism offences can satisfy the public importance requirement for leave to appeal where the underlying legal issues on their own might not; and whether appellate courts are prevented from applying the curative proviso in respect of procedural errors in jury selections which cause no demonstrable prejudice to the fairness of the trial. The respondents were convicted of the most serious terrorism offences known to Canadian law after nearly 9 months of pre-trial motions and a 3 month jury trial. Overturning these convictions on the basis of a technical error that had no appreciable effect on the conduct of the trial is a triumph of form over substance. In the wake of Bill C-75 and the different temporal interpretations of the new jury provisions being applied across the country, a re-examination of the procedural proviso is both timely and of pressing national importance.

B. The Facts

3. Esseghaier and Jaser were convicted by a jury of the following offences:

- Count One: conspiracy to damage transportation infrastructure with intent to endanger safety (derailing a VIA passenger train) for the benefit of a terrorist group, contrary to ss. 83.2, 248 and 465(1)(c) of the *Criminal Code* (Esseghaier only¹).
- Count Two: conspiracy to commit murder for the benefit of a terrorist group, contrary to ss. 83.2 and 465(1)(c) of the *Criminal Code* (Esseghaier and Jaser).
- Counts Three and Four: participating in or contributing to the activity of a terrorist group, contrary to s. 83.18(1) of the *Criminal Code* (Esseghaier and Jaser).
- Count Five: participating in or contributing to the activity of a terrorist group, contrary to s. 83.18(1) of the *Criminal Code* (Esseghaier only).²

4. Much of the evidence at trial consisted of the *viva voce* testimony of an undercover FBI agent under the pseudonym Tamer El Noury (“El Noury”) and authorized interceptions of his conversations with Esseghaier and Jaser. Most of the evidence related to the “train plot” to derail a VIA Rail passenger train and kill its passengers, which was Esseghaier’s preferred plan. Jaser’s preferred plan was a “sniper plot” to assassinate prominent persons, and in particular wealthy Jews. Both men went on “reconnaissance missions” to examine the railway station in St. Catharines, Ontario and railway bridges at Jordan Harbour, Ontario and East Point Park/Highland Creek in Scarborough, Ontario.³ The intercepted conversations between Esseghaier, Jaser and El Noury included the following:

¹ Jaser was also charged with this count, but the jury was unable to reach a verdict on it against him.

² *Reasons for Sentence*, para. 2 [Applicant’s Record (“AR”), Tab 11, p. 175-176].

³ *Reasons for Sentence*, paras. 14 and 17-26 [AR, Tab 11, pp. 178-198]. Although the jury ultimately did not reach a unanimous verdict with respect to Jaser on Count One (the train plot), the trial judge found that his participation in these reconnaissance missions was still relevant to his role in the general Count Two conspiracy to commit murder.

- a. On September 9, 2012, Esseghaier told El Noury that because the armies of America and Canada were spreading “corruption” and “evil” in places like Afghanistan, Somalia and Pakistan, it was their mission “to fight these countries” and “make trouble in their homes.” He told El Noury he and Jaser were planning “to make a hole in the bridge of the train” so the train “will go through that hole ... and of course the train is full of people, at least two hundred or three hundred people.” The objective was “to make sure that they understand that as long as they’re over there, their people will not feel safe on this side.”⁴
- b. In that same conversation, Jaser described his plan to get a “sniper rifle” in order to “fight the leaders of this people.” He said this can be done “[e]asily in Canada” because “[t]hey do public speech”, “they come to the gay parade”, and the Mayor of Toronto takes the subway. He said “Canada is not the U.S. ... But they feel safe. We’re gonna change all that.”⁵
- c. Esseghaier said they would create and post a video after the train derailment: “You can even hold up a Canadian newspaper or something ... We are in the neighbourhood ... Get out, get out before we kill you all. Because we want this whole city, the whole country to burn. I could care less who dies. Everyone is a target. They pay taxes, they vote. They’re enemies.”⁶
- d. On September 23, 2012 Esseghaier and Jaser discussed how difficult damaging a railway bridge was, and considered various ways to accomplish it. They agreed that they would go to the Highland Creek bridge the following day to “check all the technical details in the bridge.” They invited El Noury to join them.⁷ After this discussion, when Jaser and El Noury were alone, Jaser disparaged the train plot: “[T]he whole set up is too much man ... very small ... twenty thirty people, forty people. And who are they? Slaves. Really, just like you and me, workers. You

⁴ *Reasons for Sentence*, para. 22, bullet points 1-3 [AR, Tab 11, pp. 181-182].

⁵ *Reasons for Sentence*, para. 22, bullet point 6 [AR, Tab 11, p. 183].

⁶ *Reasons for Sentence*, para. 22, bullet point 7 [AR, Tab 11, pp. 183-184].

⁷ *Reasons for Sentence*, para. 23, bullet points 1-2 [AR, Tab 11, p. 184].

know? Sheep. We don't want sheep. We want the wolf. We can get the wolf, brother, we can get the wolf. The G eight summits are here ...”⁸

- e. During the reconnaissance of the Highland Creek bridge the next day, Jaser became frustrated with Esseghaier for being indiscreet in front of members of the public. After uniformed police officers later approached them in the parking lot, cautioned them about walking on the bridge, and took down their names and addresses, Jaser argued that the train plot was now compromised because the police would connect it to them. He advocated for the sniper plot: “You think they care about the life of 50 people on a train? ... But the expensive Jew, the rich Jew, the Jew that is Zionist ... when you take 50 of them out, what happens? You will drive them crazy.” Esseghaier wanted to proceed with both plots, but with a different location for the train plot. Jaser said, “Trains man, the problem is ... I have to think about it. Me, I don't work like you.” After this point Jaser did not participate further.⁹

5. Because of the importance of preserving juror impartiality—especially given the extensive pre-trial publicity the offences had received—the jury selection process included challenges for cause. Counsel for Jaser wanted those challenges to proceed with rotating triers with the unsworn members of the jury panel excluded. Esseghaier, who was unrepresented, took no position on jury selection: he declined to rely in any way on the *Criminal Code* or the criminal justice system because of his position that he could only be judged pursuant to the Holy Qur'an.¹⁰

6. The trial judge's overarching priority throughout the challenge for cause process was to ensure jury impartiality, especially “in the current climate where public concerns about terrorism offences and Islamic extremism have become pronounced” and where “some of the more recent media coverage has been unusual and, arguably, improper.”¹¹ He emphasised that this was “a case dealing with volatile issues of great public concern, where an unknown number of prospective jurors are likely to hold strong views that could taint other jurors, whether sworn or unsworn.”¹²

⁸ *Reasons for Sentence*, para. 23, bullet point 3 [AR, Tab 11, pp. 184-185].

⁹ *Reasons for Sentence*, paras. 24-26 [AR, Tab 11, pp. 185-189].

¹⁰ *Reasons of the Court of Appeal*, paras. 7, 35 and 50 [AR, Tab 14, p. 253].

¹¹ *Reasons for Judgment* (jury selection issues), para. 8 [AR, Tab 8, p. 120].

¹² *Reasons for Judgment* (jury selection issues), para. 42 [AR, Tab 8, p. 134].

