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R. v. Lalji, 2026 ONCA 255

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lalji, 2026 ONCA 255
DATE: 20260408
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Trotter, Dawe and Wilson JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Ali Lalji

Appellant

Ravin Pillay, for the appellant

Maria Gaspar and Sarah Malik, for the respondent

Heard: January 28, 2026

On appeal from the conviction entered by Justice Russell S. Silverstein of the Ontario Court of Justice, on January 27, 2023, with reasons reported at 2023 ONCJ 45, and from the sentence imposed on November 20, 2023.

Dawe J.A.:

[1] On December 22, 2015, five travellers arrived in Sydney, Australia on a flight from the United States. Each had similar-looking Samsonite suitcases as checked luggage. When the Australian border authorities searched these suitcases they found large quantities of cocaine concealed in them – approximately 40 kilograms

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in total, which was the equivalent of approximately 28 kg of pure cocaine. The five travellers were arrested and their cell phones were seized.

[2] Some years later, in January 2019, Canadian authorities arrested Yaroslav Pastukhov and the appellant, Ali Lalji, and charged them jointly with a single count of conspiring to import cocaine into Australia. Mr. Pastukhov pleaded guilty to this charge and testified for the Crown at Mr. Lalji's trial.

[3] The trial judge found Mr. Pastukhov to be a largely incredible witness, but found Mr. Lalji guilty as charged based mainly on the data that had been extracted from the seized cell phones, which included electronic communications between Mr. Lalji and two of the five couriers. Mr. Lalji was sentenced to nine years' imprisonment. He appeals both his conviction and his sentence.

[4] For the following reasons, I would dismiss Mr. Lalji's conviction appeal. I would grant him leave to appeal his sentence, but would dismiss his sentence appeal.

I. BACKGROUND FACTS

[5] In 2015, Mr. Pastukhov was 23 years old and Mr. Lalji was 27 years old. They were friends and co-workers at the Toronto offices of Vice Media.

[6] Mr. Pastukhov testified at Mr. Lalji's trial that in the fall of 2015 he was paid $10,000 to pick up some suitcases in Las Vegas and deliver them to people in Australia. The trip was arranged through friends of someone he met at a party. Mr.

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Pastukhov denied knowing what was hidden in the suitcases, testifying that it "[c]ould've been nothing, could've been meth, I'm not sure, could've been guns."

[7] After he returned from his trip to Australia, Mr. Pastukhov began telling other people about his experience and they "started volunteering themselves" to make similar trips. He described his role in recruiting couriers as "the middle man": he would share his own story with prospective couriers and introduce them to the trip organizers. Mr. Lalji also became involved in this scheme, but Mr. Pastukhov could not remember "the specifics of what Ali did", testifying:

> All I remember Ali doing was being in the same room when I walked through my story because I had told Ali about what I had done so many times, he was there to kind of provide a backing to what I was saying. … And any details I might have forgotten.

[8] One of the people who agreed to act as a courier was Robert Wang, who had previously worked with Mr. Pastukhov at Vice Media. Mr. Wang and his traveling companion, Porscha Wade, were two of the five couriers who were arrested in Australia on December 22, 2015. Data extracted from their phones included: (i) numerous text messages exchanged in the days leading up to their trip with Mr. Pastukhov and a phone number registered to Mr. Lalji; (ii) WhatsApp messages exchanged in a group chat that included an account in Mr. Lalji's name, which was associated with this same phone number; and (iii) an email from an account in Mr. Lalji's name that Mr. Pastukhov forwarded to Mr. Wang. Mr.

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Pastukhov testified that this email address was one that Mr. Lalji used. The trial judge was evidently satisfied that Mr. Lalji was the person who had sent or received all of these electronic communications.

[9] On November 30, 2015,[1] Mr. Wang exchanged a series of text messages with Mr. Pastukhov. In one text Mr. Wang told Mr. Pastukhov: “I wanna get a full picture of it you know what I mean”, and they arranged to meet that evening.

[10] The data extracted from Mr. Wang’s phone also included two audio recorded conversations. The first digital recording has a date and time stamp indicating that it was created on the evening of November 30, 2015. Mr. Pastukhov identified his own voice and Mr. Wang’s voices on the recording and testified that their conversation “definitely happened at my apartment”, but he claimed to be unable to remember anything else about the conversation, including the identity of a third male speaker who participated in the conversation.

[11] During this recorded conversation, Mr. Pastukhov and the unidentified male explained to Mr. Wang how he would travel to Las Vegas, obtain suitcases from a contact, and fly to Australia and deliver the suitcases to another contact. They also discussed the security measures that would be used when meeting with these contacts, and the steps that would be taken to avoid detection at the border. Mr.

[1] The data extracted from the seized phones shows dates and times in Coordinated Universal Time (UTC). My references to dates and times are converted to Eastern Standard Time, the local time zone in Toronto during the winter months, which is five hours behind UTC.

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Pastukhov told Mr. Wang that the trips were organized by “guys from B.C.” working with “the Mexican cartel in Vegas”, and that he and “Ali” had both recently made similar trips themselves. At trial, Mr. Pastukhov acknowledged that he had made such a trip, but claimed not to remember if Mr. Lalji had also done so.

[12] On December 1, 2015, Mr. Wang exchanged further texts with Mr. Pastukhov in which they discussed the Australia trip and the need for Mr. Wang to find a travelling companion to accompany him. They also discussed arranging a meeting between Mr. Wang and Mr. Pastukhov’s contact. However, the following day, December 2, Mr. Wang sent Mr. Pastukhov a text advising that he had changed his mind and decided not to go on the trip.

[13] Later that evening, Mr. Wang received a text from Mr. Lalji’s phone number in which the sender identified himself as “Ali from yesterday” and stated: “Slava told me you guys talked, but I think I have an opportunity to sweeten this deal for you”. There was then a 15-minute long voice call between the two phone numbers, after which Mr. Lalji’s phone sent a further text stating: “You just made my day fam”.

[14] In further text message exchanges with Mr. Wang over the next few days, Mr. Lalji discussed Mr. Wang’s travel arrangements. They agreed that Mr. Lalji would book Mr. Wang’s trip to leave on December 17, and that he would pay for Mr. Wang’s airline tickets. Mr. Pastukhov informed Mr. Wang by text that he had

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found a woman who would travel to Australia with him. She was later identified as Porscha Wade. On December 14, 2015, Mr. Pastukhov forwarded Mr. Wang an email from Mr. Lalji that attached Mr. Wang's and Ms. Wade's airline tickets.

[15] The second audio recording that was found on Mr. Wang's phone has a date and time stamp indicating that it was created on the evening of December 14, 2015. It captures a second conversation between Mr. Pastukhov and Mr. Wang, which included at least one other man and a woman. Mr. Pastukhov testified that he thought the other male participant might have been a man named "Pope", who had travelled to Australia with Mr. Pastukhov a few weeks earlier.

[16] Early in the recording, Mr. Wang confirmed that he had received "the email". The ensuing conversation included a detailed discussion of Mr. Wang and Ms. Wade's travel itinerary; the process by which they would pick up the suitcases in Las Vegas; and the procedure for delivering the suitcases to the contact in Sydney, Australia. The security arrangements for meeting the couriers included a verification procedure that involved matching the serial number from a small-denomination bill in the local currency. Mr. Pastukhov explained that in Las Vegas Mr. Wang and Ms. Wade would each be given two suitcases to replace the luggage they had brought with them, and that they would need to buy enough clothing in Las Vegas to fill both suitcases. He also instructed Mr. Wang to use cigarettes to mask any smell in the suitcases, and to buy ribbons or stickers "[s]o it looks like you travel with the suitcase all the time".

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[17] During this conversation Mr. Pastukhov told Mr. Wang that there would be "other people doing this" on the same flight, one of whom was Mr. Pastukhov's roommate, but that "if you see anyone on the plane that you recognize, you don't know them." Mr. Pastukhov also told Mr. Wang that they would set up a WhatsApp group chat "with the four of us. You, me, Porscha and Ali", so that they could "be in contact throughout" the trip. Data from Mr. Wang's phone showed that a WhatsApp group chat with these four members was created that same night by an account associated with Mr. Pastukhov's phone number.

[18] Mr. Pastukhov testified at Mr. Lalji's trial that he had also arranged the trips for two of the other five couriers who were arrested entering Australia on December 22, 2015: his roommate, Jordan Gardner, and a friend from New York named Nathanial Carty. However, Mr. Pastukhov denied knowing the fifth arrested courier, Kutiba Senusi.

[19] The data from Mr. Wang and Ms. Wade's phones includes a series of WhatsApp messages that were exchanged between December 17 and December 21, 2015 in a group chat that consisted of Mr. Wang, Ms. Wade, Mr. Pastukhov, and Mr. Lalji, which had been created on the night of December 14, 2015. During an initial message exchange in the group chat on December 17, Mr. Wang and Ms. Wade reported on their trip to the Toronto airport to catch their flight to Las Vegas. Mr. Lalji wished them "smooth sailing ahea[d]" and told them "everything is gravy".

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[20] The next day, December 18, there were additional messages exchanged in the WhatsApp group chat in which Mr. Wang, Ms. Wade and Mr. Pastukhov arranged for Mr. Wang to obtain a “burner” phone with a local phone number, call the Las Vegas contact using a false name, and take delivery of the suitcases. Later in the day, Mr. Wang sent messages to the group chat in which he discussed how to “prepay for the extra bag”, noting: “Flight to Sydney only got 2 checked bags each”. Mr. Wang also advised that he had “called the transfer vehicle from Sydney airport to hotel” and was told that he would have to go through the travel agent to “upgrade vehicle to fit 5 pieces of luggage”. Mr. Lalji replied that he would “email them”.

[21] Later that evening, Mr. Wang sent a message to the WhatsApp group chat stating “Received”. Mr. Pastukhov replied “Good. Smoke them out in bathroom and apply stickers and ribbons”.

[22] Although at trial Mr. Pastukhov denied knowing the fifth courier, Kutiba Senusi, the data from Mr. Wang’s phone showed that on December 19, 2015 there was a message exchange in a different WhatsApp group chat consisting of Mr. Wang, Mr. Pastukhov, and someone with the username “Kutiba”, during which Mr. Wang and Kutiba arranged to meet. Mr. Lalji was not a member of this group chat.

[23] Data extracted from Ms. Wade’s phone showed that later that evening Mr. Wang and Mr. Pastukhov exchanged messages in the WhatsApp group chat that

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included Ms. Wade and Mr. Lalji, in which Mr. Wang asked whether Ali had upgraded the Sydney airport transfer vehicle. Mr. Pastukhov replied that “Ali will email the guy tomorrow”. He added: “Get a lot of sleep and make sure you both wipe ur phones of any suss convos”.

[24] The next morning, Mr. Wang sent further messages to the WhatsApp group reporting that he was having difficulty checking them into their flights because they needed electronic visas. Mr. Lalji replied that the travel agent should have already arranged their visas. After further message exchanges, Ms. Wade advised that they had successfully checked in. Mr. Lalji replied with final messages wishing them a safe flight and advising them: “Just get some rest and stuff yo clean up on the plane. And clean phones everyone”.

[25] Mr. Wang and Ms. Wade were arrested the next day after they landed in Sydney and the Australian border authorities found cocaine hidden in their suitcases. Approximately 6.2 kg of cocaine was found in Mr. Wang’s luggage, and approximately 11.1 kg in Ms. Wade’s bags. More cocaine was found in the luggage of three other people on the same flight: Mr. Gardner (approximately 6.7 kg), Mr. Carty (approximately 6.5 kg), and Mr. Senusi (approximately 9.2 kg). The total amount of cocaine seized from all five travellers was approximately 39.8 kg. Testing revealed that these drugs had been cut with other substances, and that the amount seized was the equivalent of approximately 28.3 kg of pure cocaine.

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[26] All five couriers had Mr. Pastukhov's contact information on their phones. Mr. Carty and Mr. Senusi also both had Mr. Lalji's phone number and email address on their phones, but there was no evidence that they had ever communicated with him.

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II. ANALYSIS

1. The admissibility of the audio recordings found on Mr. Wang's phone

[27] Mr. Lalji's first ground of appeal against his conviction is that the two audio recordings recovered from Mr. Wang's phone should not have been admitted into evidence because the Crown had not met its burden of establishing their authenticity. These recordings had been played during Mr. Pastukhov's testimony and entered as exhibits, subject to argument about their admissibility at the end of the trial.

[28] The expansive definition of "electronic document" in s. 31.8 of the *Canada Evidence Act,* R.S.C. 1985, c. C-5 ("the *CEA*") includes digital audio recordings. Under s. 31.1 of the *CEA,* the Crown had to establish the authenticity of the audio recordings "by evidence capable of supporting a finding that the electronic document is that which it is purported to be".

[29] In *R. v. C.B.,* 2019 ONCA 380, 146 O.R. (3d) 1, at para. 67, Watt J.A. noted that the authenticity threshold under s. 31.1 of the *CEA* is "low". He explained further, at para. 68:

> To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does *not* limit how or by what means the threshold may be met. Its only requirement is that the evidence be *capable* of supporting a finding that the electronic document "is that which it is purported to be." That circumstantial evidence may be relied upon is well established …. This accords with general principles about proof of facts in criminal proceedings, whether the facts sought to be established are preliminary facts on an admissibility inquiry or ultimate facts necessary to prove guilt. [Italics in original].

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[30] "Rank speculation" that an electronic document may not be genuine "is not sufficient" to defeat an otherwise available inference of authenticity: *C.B.,* at para. 72. Rather, concerns that an electronic document may have been altered or falsified should generally be resolved by the trier of fact: *C.B.,* at para. 72; see also D. Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age", (2013) 11 Can. J. L. & Tech. 181, at p. 197.

[31] Mr. Lalji does not dispute that the audio recordings that were adduced at trial were authentic copies of the digital files the RCMP had extracted from Mr. Wang's phone. His argument is that the Crown had not established that they were an authentic record of the conversations that they purported to capture.

[32] Mr. Lalji makes two main arguments. First, he contends that it was never established that the date and time stamps on the digital files were accurate, and that "[w]ithout situating the recordings in time proximate to the alleged charge, the recording itself loses all probative value".

[33] I agree that the digital date and time stamps associated with the two digital audio recording files could not be blindly assumed to be accurate: see Paciocco, at pp. 198, 227. However, this did not automatically make the digital recordings themselves inadmissible. Documents, whether physical or electronic, may be received into evidence even when their creation date is entirely unknown. Whether or how much this affects their probative value in a particular case is for the trier of fact to determine.

[34] In addition, inferences about when a document was created can often be drawn based on the document's contents, either through non-hearsay reasoning, or through hearsay reasoning if the contents of the document are admissible for their truth under a hearsay exception.

[35] In this case, since the trial judge found the conversations on the two audio recordings to be admissible for their truth under the co-conspirators' exception to the hearsay rule, he was entitled to rely on the substance of these conversations to draw inferences about when they took place, by situating the recordings in the context of the electronic communications retrieved from the couriers' seized phones.

[36] In my view, it can readily be inferred from the evidence as a whole that the first conversation must have taken place during the meeting on the evening of November 30, 2015 that Mr. Wang and Mr. Pastukhov had arranged in their text

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message exchanges that day. It can also be inferred that the second conversation was recorded during a further meeting between Mr. Wang, Mr. Pastukhov and other people on or about December 14, 2015, shortly after Mr. Wang was forwarded the email with his and Ms. Wade's airline tickets.

[37] I accordingly see no error in the trial judge's conclusion that "as a result of the match between the dates and delays referred to by the speakers and the extraction evidence that these meetings took place very shortly before the December 2015 trip in question in this trial." He was entitled to find as he did that the recordings therefore had significant probative value.

[38] Mr. Lalji's second argument is that the Crown failed to establish that the recordings had not been manipulated or altered because the Crown did not adduce any direct evidence about how the recordings were made, who made them, or how they ended up on Mr. Wang's phone.

[39] I do not agree that direct evidence was essential, since the "modest threshold for authentication" under s. 31.1 of the *CEA* may be established circumstantially: *C.B.,* at paras. 66, 68. Here, the circumstances in which the recordings were retrieved supported the inference that they were unlikely to have been altered.

[40] Mr. Wang was evidently not expecting to be arrested when he tried to enter Australia, or to have his phone seized and searched. There is no reason to think

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that he was expecting anyone else to listen to the recordings, and neither he nor anyone else had any discernible motive to alter their contents. Other electronic documents found on Mr. Wang's phone confirm the accuracy of at least some aspects of the recordings. For instance, contemporaneous text messages exchanged between Mr. Wang and Mr. Pastukhov discussing plans to meet, apparently to discuss the scheme, align with the time at which the first recording was apparently made. On the second recording, Mr. Pastukhov told Mr. Wang that they would set up a WhatsApp group chat "with the four of us. You, me, Porscha and Ali". A WhatsApp group with these four participants was then created that same night, by an account associated with Mr. Pastukhov's phone number.

[41] Moreover, Mr. Pastukhov identified his own and Mr. Wang's voices on the recordings. It was not plausible to imagine that in 2015 someone would have had the technical tools or ability to create false recordings that accurately mimicked the sounds of Mr. Pastukhov and Mr. Wang's voices. This made the situation here very different from that in *R. v. Aslami,* 2021 ONCA 249, 155 O.R. (3d) 401, where there were cogent reasons to be concerned that inculpatory text messages and emails purportedly sent by the accused to his estranged spouse might not have been genuine. As noted above, "rank speculation" that an electronic document might not be genuine is not enough to make the document inadmissible under the *CEA*.

[42] In any event, in *Aslami* this court treated the concerns about the potential manipulation or falsification of the text messages and emails in that case as going

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to their weight, not to their admissibility: see *R. v. S.M.*, 2025 ONCA 18, at para. 28. This accords with Watt J.A.'s comment in *C.B.,* at para. 72, that:

> [E]ven if there were an air of reality to such a claim [of falsification], the low threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, would seem to assign such a prospect to an assessment of weight.

[43] In summary, while it would have been preferable for the trial judge to have expressly addressed the issue of the admissibility of the two audio recordings under the *CEA* in his reasons, I am satisfied that he made no error in treating the recordings as having been authenticated to a sufficient extent to clear the low bar for admission under s. 31.1.

2. Alleged errors in the trial judge's treatment of Mr. Pastukhov's evidence

[44] Mr. Lalji's second ground of appeal involves several related arguments, all of which contend that the trial judge failed to properly apply the burden of proof to Mr. Pastukhov's trial testimony, which Mr. Lalji characterizes as exculpatory.

[45] Mr. Lalji places particular reliance on Mr. Pastukhov's testimony in cross-examination, where he agreed with the suggestion put to him that he did not have an agreement with Mr. Lalji to import cocaine into Australia. However, Mr. Pastukhov had given contrary evidence about this in chief. As the trial judge noted:

> When responding to defence counsel's extremely leading questions, [Mr. Pastukhov] was more than willing

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> to accept almost every proposition put to him. His testimony was also rife with inconsistencies. In one breath he said that he had indeed conspired with Mr. Lalji to import cocaine into Australia, and in another he denied it, and then professed not to recall.

[46] In my view, the trial judge's reasons make it clear that he entirely rejected Mr. Pastukhov's claim that he and Mr. Lalji had not conspired together. This conclusion was amply supported by the evidence as a whole.

[47] Mr. Lalji argues further that the trial judge failed to properly grapple with Mr. Pastukhov's denial that he had known at the time that the couriers would be transporting cocaine, as opposed to some other illicit substance.

[48] I agree that Mr. Pastukhov's testimony on this point, unlike his testimony about Mr. Lalji's involvement in the conspiracy, remained consistent. I also agree that the trial judge's reasons on this issue disclose an error, in that he relied on Mr. Pastukhov's guilty plea to the conspiracy charge, which was particularized to specify that the conspiracy related to cocaine, as establishing that Mr. Pastukhov had actual knowledge that the couriers would be transporting cocaine.

[49] This was an error for two different reasons. First, Mr. Pastukhov's guilty plea was not evidence that could be used against Mr. Lalji: see e.g., *R. v. Dawkins,* 2021 ONCA 113, 155 O.R. (3d) 111, at paras. 13-15; *R. v. Tsekouras*, 2017 ONCA 290, 353 C.C.C. (3d) 34, at para. 177. Second, his guilty plea cannot properly be interpreted as an admission that he had actual knowledge that the object of the

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conspiracy was to import cocaine, because wilful blindness “can substitute for actual knowledge whenever knowledge is a component of the *mens rea*”: *R. v. Briscoe,* 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21; see also *R. c. Cedeno*, 2010 QCCA 2359, 276 C.C.C. (3d) 238, at paras. 30-38.

[50] I also agree with Mr. Lalji that the record in this case did not support a finding that Mr. Pastukhov had actual knowledge that the importing scheme involved cocaine, specifically. Mr. Pastukhov consistently denied having known this, and while the trial judge was entitled to disbelieve him, doing so would not affirmatively establish that the opposite of what he said was true: see, e.g. *R. v. Davison, DeRosie and MacArthur* (1975), 6 O.R. (2d) 103 (C.A.), at p. 109. While it was abundantly clear from the evidence that Mr. Pastukhov knew that the couriers would be smuggling some type of contraband in the suitcases, it was reasonably possible on the evidence that Mr. Pastukhov deliberately chose not to learn exactly what they would be smuggling because he did not want to know the truth.

[51] The trial judge used his finding that Mr. Pastukhov had actual knowledge that the object of the conspiracy was importing cocaine to support the conclusion that Mr. Lalji had been at least wilfully blind about this, because he could have learned the truth by asking Mr. Pastukhov. I agree that if Mr. Pastukhov himself remained wilfully blind to the specific object of the conspiracy, he would not have been able to fix Mr. Lalji with actual knowledge.

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[52] All that said, I am not persuaded that this error in the trial judge's reasoning process affects the validity of the trial judge's conclusion that Mr. Lalji was, at a minimum, wilfully blind to the nature of the contraband.

[53] A trial judge's misapprehension of the evidence will only rise to the level of a reversible error when it "play[s] an essential part in the reasoning process resulting in a conviction": *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 541; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at paras. 1, 2, 6. Here, the evidence was overwhelming that Mr. Lalji and Mr. Pastukhov both knew that the suitcases would contain some form of contraband. The trial judge was entitled to infer, as he did, that Mr. Lalji "would certainly have suspected that cocaine could well have been the contraband in question". Mr. Lalji would also have understood that there were people higher up in the importation scheme who would know what was in the suitcases, and that he could have made inquiries with these people, either directly or through Mr. Pastukhov. I thus see no error in the trial judge's ultimate conclusion that "if Mr. Lalji chose not to enquire, his failure to enquire was fueled by an intention to remain ignorant".

[54] Mr. Lalji contends further that the trial judge made a discrete legal error when he stated that he would "only accept portions of [Mr. Pastukhov's] evidence where that evidence is independently corroborated". According to Mr. Lalji, by taking this approach the trial judge ran afoul of the rule that a warning pursuant to *R. v. Vetrovec,* [1982] 1 S.C.R. 811 should not be given regarding evidence that favours

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the defence: see e.g. *R. v. Tzimopoulos* (1986), 29 C.C.C. (3d) 304 (Ont. C.A.), at p. 340; *R. v. Yumnu*, 2010 ONCA 637, at para. 165.

[55] I do not agree that the trial judge made this alleged error. He did not give himself a *Vetrovec* self-instruction that he ought not accept any part of Mr. Pastukhov's testimony without independent confirmation. Rather, he simply decided, as the trier of fact, that he did not accept most of Mr. Pastukhov's testimony, and that he would only accept Mr. Pastukhov's evidence on those few points where it was independently confirmed. The trial judge had ample grounds for concluding that Mr. Pastukhov was not a credible or reliable witness, and he was entitled to decide which parts of Mr. Pastukhov's testimony, if any, he chose to accept. His reasons disclose no palpable and overriding errors that would permit appellant interference with this aspect of his factual findings.

3. The trial judge did not fail to treat wilful blindness as a subjective mental state

[56] Mr. Lalji's next argument is that the trial judge failed to properly treat wilful blindness as a subjective form of *mens rea*, under which the accused must "become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth": *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584.

[57] I agree that some of the cases the trial judge cited in his wilful blindness analysis – *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Chehil*, 2013

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SCC 49, [2013] 3 S.C.R. 220; and *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 – were inapposite. These cases address the standard of reasonable suspicion as a precondition for a lawful drug sniffer dog search, which is an objective standard.

[58] In my view, however, the trial judge's reasons as a whole demonstrate that he did not erroneously rely on an objective standard to conclude that Mr. Lalji had, at a minimum, been wilfully blind about the object of the conspiracy.

[59] Mr. Lalji's own text and WhatsApp messages left no doubt that he understood that the suitcases the couriers were picking up in Las Vegas would contain some form of contraband. The trial judge concluded that if Mr. Lalji made no inquiries about the nature of this contraband, "he chose not to do so purposely to avoid actual knowledge". He added:

> He would certainly have suspected that cocaine could well have been the contraband in question. Any reasonable person would.

[60] In my view, this comment does not reveal that the trial judge incorrectly applied an objective standard to the issue of wilful blindness. Rather, it simply reflects his conclusion that since any reasonable person in Mr. Lalji's position would have put cocaine high on the list of likely candidates for the type of contraband being smuggled, he could infer that Mr. Lalji must have realized this

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himself. This was an available inference that the trial judge was entitled to draw: see e.g., *R. v. Magno* (2006), 210 C.C.C. (3d) 500 (Ont. C.A.), at para. 18.

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4. Multiple conspiracies

[61] Mr. Lalji's next ground of appeal requires some elaboration.

[62] As noted above, Mr. Lalji and Mr. Pastukhov were jointly charged in January 2019 with a single count of conspiracy. The charge was drafted to allege that they had conspired together and with others in Toronto to commit an offence under Australian law: namely, importing a "commercial quantity" of cocaine, which Australian law defines to mean 2 kilograms or more.

[63] In September 2019 Mr. Pastukhov pleaded guilty to this charge in the Ontario Court of Justice, and he was sentenced in December 2019: *R. v. Pastukhov,* 2019 ONCJ 876. Mr. Lalji was tried approximately 2½ years later, also in the Ontario Court of Justice but before a different trial judge.

[64] As I have discussed, the evidence at Mr. Lalji's trial incriminated him and Mr. Pastukhov to somewhat different degrees. It showed that they had jointly recruited and organized Mr. Wang and Ms. Wade to act as couriers. However, Mr. Pastukhov admitted that he had also recruited and organized two of the other couriers who were arrested coming off the same flight, Mr. Gardner and Mr. Carty. Moreover, during the second audio-recorded conversation, Mr. Pastukhov told Mr. Wang that there would be five or six other couriers on the same flight to Australia.

There was no evidence that Mr. Lalji was present during this conversation. In addition, Mr. Pastukhov participated in the second WhatsApp group chat during which Mr. Wang arranged to meet in Las Vegas with someone with the username “Kubita”, who it could reasonably be inferred was the fifth courier, Kubita Senusi. This supported the conclusion that Mr. Pastukhov was at least aware of Mr. Senusi’s existence, even if he had not personally recruited him to be a courier.

[65] In contrast, there was only limited direct evidence linking Mr. Lalji to the other three couriers. His contact information was found on both Mr. Carty and Mr. Senusi’s phones, but there was no evidence of any direct contact between them. Mr. Lalji does not appear to have participated in the second group chat that involved Mr. Pastukhov, Mr. Wang, and “Kubita”.

[66] Mr. Lalji makes a threefold argument on this ground of appeal. First, he maintains that this evidence shows that he and Mr. Pastukhov were both members of a conspiracy to arrange for only two couriers, Mr. Wang and Ms. Wade, to import cocaine into Australia. However, he argues that the evidence also implicated Mr. Pastukhov in a larger conspiracy that also included at least two of the other couriers, and possibly all three.

[67] Second, Mr. Lalji contends that when Mr. Pastukhov entered his guilty plea in 2019, he was pleading guilty to being a member of this larger conspiracy.

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[68] Third, since Mr. Lalji and Mr. Pastukhov remained jointly charged on the same single-count information, Mr. Lalji argues that this count must now be understood as charging both him and Mr. Pastukhov with being members of the larger conspiracy. He contends further that since the evidence does not establish his membership in this larger conspiracy beyond a reasonable doubt, he should have been acquitted, even if the evidence also showed that he was part of a different, smaller conspiracy.

[69] I agree that some of the underlying planks Mr. Lalji relies on to construct this argument are sound. He is correct that the rule against duplicity in s. 581 of the *Criminal Code,* R.S.C. 1985, c. C-46 requires the count that jointly charged him and Mr. Pastukhov with conspiracy to be interpreted as charging them with only one conspiracy, not two separate conspiracies: see e.g., *Papalia, v. The Queen; R. v. Cotroni,* [1979] 2 S.C.R. 256, *R. v. Douglas,* [1991] 1 S.C.R. 301, at pp. 315-18. He is also correct that this makes it essential to identify which conspiracy is the one charged. As Dickson J. (as he then was) explained in *Cotroni,* at pp. 286-87:

> Where several conspiracies are shown to have been committed, the problem arises of determining which one of these conspiracies is that envisaged by the charge.
>
> Whether any or all of the conspiracies that have been proven to have been committed are covered by the indictment depends on the construction of the charge.

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[70] However, I am not persuaded either that the law requires the importation scheme in this case to be parsed as finely as Mr. Lalji now suggests, or that it compels the conspiracy jointly charged against him and Mr. Pastukhov to now be interpreted so broadly that Mr. Lalji would be excluded from the reach of the count.

[71] It is well-settled that "[t]he essence of a criminal conspiracy is proof of agreement": *Cotroni,* at p. 276. However, "most schemes (criminal or otherwise) can be viewed as either single or multiple agreements": H. Groberman, "The Multiple Conspiracies Problem in Canada", (1982) 40 U. Tor. Fac. L. Rev. 1, at p. 2. Determining whether the parties to a smaller agreement can also properly be viewed as members of a larger overarching conspiracy depends on the evidence in the particular case.

[72] Indeed, Mr. Lalji does not disagree that the overall scheme to import cocaine into Australia can properly be viewed as a conspiracy. He also does not dispute that any agreements he and Mr. Pastukhov entered into with each other, and with the various couriers, were all directed at objectives that were harmonious with the object of the overarching conspiracy. This was accordingly not a case like *Cotroni*, where the evidence showed that there was no overarching agreement between the four defendants but, rather, separate agreements between different groups of them that had "two competing and mutually exclusive objects": *Cotroni,* at p. 284. It is also not a case like *R. v. Saunders,* [1990] 1 S.C.R. 1020, where the evidence

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revealed that there were two separate agreements between two different groups, each of which was directed at accomplishing an entirely different criminal objective.

[73] Rather, Mr. Lalji's argument is that the overarching conspiracy in this case should be viewed as a "wheel" conspiracy that linked together a number of smaller conspiracies. He contends that he should be seen as situated on the rim of the wheel and as a member of only one of the smaller conspiracies involving two of the couriers, whereas Mr. Pastukhov, who had direct dealings with additional couriers, was closer to the hub and belonged to both the smaller and the larger overarching conspiracy.

[74] In his reasons for judgment, the trial judge found that Mr. Lalji was "highly placed in the conspiracy". He later described Mr. Lalji in his reasons for sentence as "in effect, Mr. Pastukhov's deputy". The trial judge did not expressly address whether Mr. Pastukhov should be viewed as having been a member of two interlocking conspiracies. However, in my view his factual findings about Mr. Pastukhov and Mr. Lalji's respective roles in the importing scheme would have permitted him to conclude that they should both be viewed as members of only a single conspiracy, even if Mr. Pastukhov knew more than Mr. Lalji about the specific details of the importing scheme.

[75] The absence of evidence that Mr. Lalji had any direct contact with three of the five couriers did not automatically mean that they and Mr. Pastukhov could not

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be viewed as members of a common conspiracy. As Martin J.A. explained in *R. v. Longworth, Freeman, Newton and Wolfe* (1982), 38 O.R. (2d) 367 (C.A.), at p. 377:

> [I]t is not necessary to show that parties to a conspiracy were in direct communication with each other, or even that they were aware of the identity of the alleged co-conspirators. Moreover, it is not necessary to show that each conspirator was aware of all the details of the common scheme, but it must be shown that each of the conspirators were aware of the general nature of the common design and intended to adhere to it.

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[76] In my view, the evidence in this case supported the conclusion that Mr. Lalji was aware of the "general nature of the common design", under which multiple couriers would be smuggling contraband into Australia on a regular basis. His December 2, 2015 offer to "sweeten this deal" for Mr. Wang suggested that he was in direct contact with people higher up in the conspiracy. Whether or not he knew specifically that there would be other couriers travelling on the same flight as Mr. Wang and Ms. Wade, he was aware that the importation scheme was an ongoing criminal venture, and he would have known that other couriers would be making the same trip at other times. Indeed, there was evidence that he and Mr. Pastukhov had both previously done this themselves.

[77] Moreover, although there was no evidence that Mr. Carty or Mr. Senusi ever communicated directly with Mr. Lalji, his phone number and email address were found on their phones. This suggests that someone in the conspiracy had given them Mr. Lalji's name as an emergency contact. If so, whoever did this would likely

also have told Mr. Lalji who Mr. Carty and Mr. Senusi were, so that he would not have been taken by surprise if they had contacted him.

[78] In short, this was not a situation where Mr. Lalji entered into an agreement with Mr. Pastukhov, Mr. Wang and Ms. Wade, believing that it was a stand-alone criminal venture that was not part of a broader overarching conspiracy.

[79] In any event, even if Mr. Pastukhov were viewed as having been a member of two distinct conspiracies, only one of which involved Mr. Lalji, I am not persuaded that his guilty plea must necessarily be understood as having been entered in relation to the conspiracy that did not involve Mr. Lalji.

[80] As Martin J.A. noted in *R. v. Paterson, Ackworth and Kovach* (1985), 18 C.C.C. (3d) 137 (Ont. C.A.), *aff'd* [1987] 2 S.C.R. 291, at p. 144:

> 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. [Citations omitted.]

[81] When two conspiracies are proved, the question that must be determined is which one is the conspiracy alleged in the indictment or information. This "depends on the construction of the charge": *Cotroni,* at p. 287.

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[82] In this case, the charge against Mr. Pastukhov and Mr. Lalji was framed to allege that they had both "conspired with one another and with person(s) Known and Unknown". On a plain reading, the count as framed gave notice that the prosecution would be seeking to prove a conspiracy that had both Mr. Pastukhov and Mr. Lalji as members, rather than a different conspiracy between Mr. Pastukhov and other persons. Moreover, the charge was particularized to allege a conspiracy in Toronto, but Mr. Pastukhov's evidence was that he recruited Mr. Carty to act as a courier during a trip he made to New York.

[83] There is also nothing in the record to indicate that Mr. Pastukhov admitted to facts at his guilty plea that necessarily excluded Mr. Lalji from the scope of the conspiracy to which he was pleading guilty. I accept that Mr. Pastukhov was later sentenced on the basis that he had "organized and directed four of [the] front-line couriers": *Pastukhov,* at para. 22. However, this is not determinative, since the sentencing judge was entitled to "consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge": *Criminal Code,* s. 725(1)(c). That is, if Mr. Pastukhov were understood as having entered a plea of guilty to a conspiracy involving Mr. Lalji, and if this conspiracy were conceptualized narrowly as only relating to the recruitment of Mr. Wang and Ms. Wade as couriers, the sentencing judge would still have been entitled to treat Mr. Pastukhov's admission that he had also recruited and organized two other couriers as an aggravating factor when sentencing him.

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[84] For both of these reasons, I would conclude that Mr. Pastukhov's guilty plea, and any factual admissions he may have made when entering it, do not preclude Mr. Lalji from now also being found guilty of committing the conspiracy that was jointly charged against them both in the single-count information.

5. The trial judge did not rely on inadmissible hearsay

[85] Mr. Lalji's final argument on his conviction appeal, which he did not pursue in oral argument but also did not abandon, is that the trial judge improperly placed substantive reliance on statements Mr. Pastukhov made during his audio recorded conversations with Mr. Wang that were not admissible for their truth.

[86] Specifically, Mr. Lalji takes issue with the trial judge's reliance on Mr. Pastukhov having told Mr. Wang during the first recorded meeting that he and Mr. Lalji had both previously made similar trips to Australia. According to Mr. Lalji, Mr. Pastukhov's claim that Mr. Lalji had gone on such a trip was not admissible for its truth under the co-conspirators exception to the hearsay rule because it was merely "narrative about past events", and was thus not made in furtherance of the conspiracy.

[87] In my view, it was open to the trial judge to treat this statement as having been made by Mr. Pastukhov in furtherance of the conspiracy. Mr. Pastukhov was giving Mr. Wang a self-described "sales pitch", in which he was trying to persuade Mr. Wang to agree to smuggle contraband into Australia. He not only told Mr. Wang

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that he and Mr. Lalji had both made the trip themselves and returned safely, but added an anecdote about how Mr. Lalji, who Mr. Pastukhov said made the trip before him, had found a form in his luggage indicating that his bags had been randomly searched by the United States Transport Security Administration. Mr. Pastukhov told Mr. Wang that this was what had convinced him that the smuggling scheme was safe, stating: “once Ali came back and he had that TSA form, it’s a fucking wrap. There’s definitely no way I’m not going to do this”.

[88] At trial, Mr. Pastukhov explained that he told Mr. Wang the TSA story because:

> [I]t just went further in assuaging any doubts that Rob may have had about the trip being unsafe. … [B]ecause the cocaine was in the luggage and the luggage was checked and they didn’t find it, that made it seem like it would be a good thing to bring up to assuage any fears that he might have about getting caught.

[89] I would thus not give effect to this ground of appeal.

6. The sentence appeal

[90] Mr. Lalji also seeks leave to appeal against his nine-year penitentiary sentence. This was the same sentence that Mr. Pastukhov received after his guilty plea.

[91] Mr. Lalji argues that the trial judge’s reasons for sentence disclose two errors in principle.

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[92] First, Mr. Lalji maintains that the evidence did not prove that he had ever acted as a courier himself. He argues that the trial judge thus erred by concluding that Mr. Lalji had begun as a courier "before graduating to a position of greater authority" in the conspiracy, and by treating this as an aggravating factor.

[93] I do not agree that Mr. Lalji's prior involvement as a courier was unproved. As I have already discussed, I am satisfied that Mr. Pastukhov's statements to Mr. Wang about Mr. Lalji's prior trip to Australia were properly admissible for their truth under the co-conspirators' exception to the hearsay rule. The trial judge was thus entitled to rely on these statements to make a factual finding that Mr. Lalji, like Mr. Pastukhov, had first become involved in the importation scheme by acting as a courier.

[94] Second, Mr. Lalji argues that the trial judge erred by treating it as an "extremely aggravating" factor that the Australian authorities had seized almost 40 kg of impure cocaine from the five couriers who they arrested disembarking from the December 22, 2015 flight. The trial judge concluded that:

> Mr. Lalji was involved in facilitating the importation of the entire quantity, even though there was no evidence that he had direct involvement with Kutiba Senusi, Jordan Gardner or Nathaniel Carty.

[95] Mr. Lalji argues that since the evidence only showed that he was directly involved in recruiting and organizing two of the couriers – Mr. Wang and Ms. Wade, who between them had approximately 17.3 kg of impure cocaine in their luggage

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– the trial judge should not have held Mr. Lalji responsible for the entire 40 kg. He argues further that since Mr. Pastukhov admitted to also recruiting and organizing two of the other couriers, it was an error for the trial judge to equate Mr. Lalji's role in the conspiracy to that of Mr. Pastukhov.

[96] I agree that there was no proof that Mr. Lalji specifically knew how much cocaine was being imported into Australia, and that this reduced to some extent the aggravating significance of the quantity of drugs that was actually seized. Mr. Lalji's moral culpability would have been higher if it had been proved that he specifically knew that there would be five couriers transporting nearly 40 kg of drugs between them.

[97] That said, it is important to bear in mind that Mr. Lalji was not being sentenced for the substantive offence of importation, but for conspiring to import cocaine. His guilt on the conspiracy charge crystallized when he agreed to participate in the importation scheme, and his moral culpability would not have been significantly reduced even if the scheme had failed before the couriers reached Australia.

[98] Moreover, as I have already explained, there was evidence supporting the inference that Mr. Lalji knew that he was participating in a very large-scale ongoing importing scheme, even if he did not know exactly how much contraband was being imported on this one occasion. The trial judge was entitled to take into

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account the amount of cocaine seized as indicative of the overall size of the criminal enterprise.

[99] I am also not persuaded that the trial judge committed a reversible error by concluding that Mr. Lalji "was involved in facilitating the importation of the entire quantity". As I have discussed, the evidence that his contact information was found on two of the other couriers' phones supported the inference that he was serving as a backup in case these other couriers needed assistance. While this was a more limited role than him having actively recruited and organized these couriers, it was open to the trial judge to conclude that Mr. Lalji was still "involved in facilitating" the scheme as a whole.

[100] Finally, I am not persuaded that the trial judge made any reversible errors when he compared Mr. Lalji to Mr. Pastukhov and applied the principle of parity. The trial judge expressly found that Mr. Pastukhov played a larger role in the conspiracy than Mr. Lalji, and recognized that if all other things were equal the principle of parity would require Mr. Lalji's sentence to be "roughly equivalent to that of Mr. Pastukhov, but somewhat lighter than Mr. Pastukhov's sentence given the former's less senior role in the conspiracy". However, he also recognized that all other things were not equal, since Mr. Pastukhov, unlike Mr. Lalji, was entitled to claim mitigation on account of his early guilty plea.

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[101] Sentencing judges exercise “a broad discretion … in balancing all the relevant factors in order to meet the objectives being pursued in sentencing”: *R. v. Lacasse,* 2015 SCC 64, [2015] 3 SCR 1089, at para. 1. In my view, the trial judge was entitled to conclude as he did that the aggravating factor of Mr. Pastukhov’s somewhat higher moral culpability, and the mitigating factor of his guilty plea, effectively offset one another, making it fit for Mr. Lalji to receive the same sentence as Mr. Pastukhov. His weighing of these factors is entitled to considerable appellate deference.

III. DISPOSITION

[102] In the result, I would dismiss the conviction appeal. While I would grant leave to appeal the sentence, I would also dismiss the sentence appeal.

Released: April 8, 2026 “G.T.T.”

“J. Dawe J.A.”
“I agree. Gary Trotter J.A.”
“I agree. D.A. Wilson J.A.”

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