

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Vu, 2012 SCC 40, [2012] 2 S.C.R. 411 | **Date:** 20120726  **Docket:** 34286 |

**Between:**

**Sam Tuan Vu**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein, Cromwell and Moldaver JJ.

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| **Reasons for Judgment:**  (paras. 1 to 73) | Moldaver J. (McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein and Cromwell JJ. concurring) |

R. *v.* Vu, 2012 SCC 40, [2012] 2 S.C.R. 411

Sam Tuan Vu *Appellant*

v.

Her Majesty The Queen *Respondent*

**Indexed as:** R. ***v.*** Vu

2012 SCC 40

File No.: 34286.

2012:  February 15; 2012:  July 26.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein, Cromwell and Moldaver JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Offences — Kidnapping — Whether kidnapping is a continuing offence encompassing subsequent confinement of victim — Whether persons who willingly or knowingly choose to participate in subsequent confinement become parties to the offence of kidnapping — Criminal Code, R.S.C. 1985, c. C‑46, ss. 21(1), 279(1)*.

M was abducted and held for eight days in three different houses. There was circumstantial evidence which connected the appellant V to all three houses where M was confined, but based on the trial judge’s findings, it is accepted that V neither participated in M’s initial taking nor knew of it at the time it occurred. At trial, the appellant was convicted of unlawful confinement and acquitted of kidnapping. The Court of Appeal held that the appellant was liable as a party to kidnapping under s. 21(1) of the *Criminal Code* and substituted a conviction for that offence.

Held: The appeal should be dismissed.

Kidnapping is a continuing offence that includes the victim’s ensuing confinement. So long as the victim of the kidnapping remains unlawfully confined, the crime of kidnapping continues. Here, M’s unlawful confinement following the taking continued for the next eight days. The kidnapping came to an end only when M was set free by the police. Parliament has never defined the word “kidnapping” in the *Criminal Code*. There is nothing in the legislative history to suggest that Parliament intended to abandon the common law definition of kidnapping which remained an aggravated form of unlawful confinement. It was aggravated by the additional element of movement, which increased the risk of harm to the victim by isolating him or her from a place where detection and rescue were more likely. It is the element of movement that differentiated kidnapping from the lesser included offence of false imprisonment and made kidnapping an aggravated form of false imprisonment. This interpretation is consonant with the intention of Parliament as expressed in the *Code*, the crime’s common law origins and legislative history, modern jurisprudence of Canadian appellate courts, and common sense. Parliament did not intend to restrict the offence of kidnapping to the victim’s initial taking and movement, while leaving the victim’s ensuing captivity to the comparably less serious crime of unlawful confinement. Parliament intended to include the offence of unlawful confinement in the offence of kidnapping so as to capture, under the crime of kidnapping, the victim’s ensuing captivity. The penalty scheme reflects Parliament’s view that kidnapping is a much more serious offence than unlawful confinement.

Where an accused — with knowledge of the principal’s intention to see a continuing offence through to its completion — does (or omits to do) something, with the intention of aiding or abetting the commission of the ongoing offence, party liability is established. The well‑established principles of s. 21(1) of the *Criminal Code* party liability apply with equal force to continuing offences that have been completed in law but not in fact. The crime of kidnapping continues until the victim is freed, and a person who chooses to participate in the victim’s confinement — after having learned that the victim has been kidnapped — may be held responsible for the offence of kidnapping under s. 21(1) of the *Code*. Here, V was a party to the offence of kidnapping under s. 21(1) of the *Code*. V participated in the confinement of M. Accepting that V was initially unaware of and took no part in the taking and carrying away of M, he became aware of it while M remained confined against his will and chose thereafter to take part in the kidnapping enterprise. V joined the kidnapping enterprise with the intent to aid the kidnappers and with the knowledge that M was a victim of kidnapping — or, at a minimum, he was wilfully blind to that fact. V took steps, of his own free will, to assist the kidnappers and further their objectives.

**Cases Cited**

**Referred to:** *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *Click v. The State*, 3 Tex. 282 (1848); *Smith v. The State*, 63 Wis. 453 (1885); *Midgett v. State*, 139 A.2d 209 (1958); *People v. Adams*, 205 N.W.2d 415 (1973); *U.S. v. Garcia*, 854 F.2d 340 (1988); *Davis v. R.*, [2006] NSWCCA 392 (AustLII); *R. v. Tremblay* (1997), 117 C.C.C. (3d) 86; *R. v. Oakley* (1977), 4 A.R. 103; *R. v. Metcalfe* (1983), 10 C.C.C. (3d) 114; *R. v. Reid*, [1972] 2 All E.R. 1350; *Bell v. The Queen*, [1983] 2 S.C.R. 471; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Thatcher*, [1987] 1 S.C.R. 652; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Hijazi* (1974), 20 C.C.C. (2d) 183; *R. v. Whynott* (1975), 12 N.S.R. (2d) 231; *R. v. Tanney* (1976), 31 C.C.C. (2d) 445.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 21(1), 279(1), (2).

*Criminal Code*, S.C. 1953‑54, c. 51, s. 233.

*Criminal Code, 1892*, S.C. 1892, c. 29, s. 264.

*Criminal Code Amendment Act, 1900*, S.C. 1900, c. 46, s. 3.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Prowse and Saunders JJ.A.), 2011 BCCA 112, 302 B.C.A.C. 187, 511 W.A.C. 187, 270 C.C.C. (3d) 546, 83 C.R. (6th) 162, [2011] B.C.J. No. 399 (QL), 2011 CarswellBC 541, setting aside the acquittal entered by Silverman J., 2008 BCSC 1376, [2008] B.C.J. No. 1953 (QL), 2008 CarswellBC 2200, and entering a conviction. Appeal dismissed.

Howard Rubin, Q.C., and Chandra L. Corriveau, for the appellant.

Jennifer Duncan and Kathleen Murphy, for the respondent.

The judgment of the Court was delivered by

Moldaver J. —

I. Introduction

1. In April 2006, Graham McMynn was kidnapped at gunpoint and held in captivity in three different houses in the Lower Mainland area of Vancouver. His ordeal ended when he was rescued by the police eight days later. Five adult persons, including the appellant Sam Tuan Vu, were charged with kidnapping and unlawful confinement of Mr. McMynn under s. 279(1) and (2) of the *Criminal Code*, R.S.C.1985, c. C-46 (“*Code*”).
2. Fingerprint, footprint, and DNA evidence connected the appellant to all three houses where Mr. McMynn was confined, but the trial judge found no evidence to place the appellant at the scene of the initial taking or to prove that the appellant had prior knowledge of the taking. The appellant was convicted of unlawful confinement and acquitted of kidnapping (2008 BCSC 1376 (CanLII)).
3. A majority of the British Columbia Court of Appeal held that kidnapping is a continuing offence that includes both the initial taking and the ensuing confinement. It therefore substituted a conviction for the offence of kidnapping on the basis that all of the facts necessary to convict the appellant as a party to that offence under s. 21(1) of the *Code* had been established (2011 BCCA 112, 302 B.C.A.C. 187). The appellant seeks to have his conviction for kidnapping set aside.
4. This appeal raises two issues. The first relates to the nature of the offence of kidnapping. The appellant submits that kidnapping is not a continuing offence, in other words, that kidnapping ends the moment the victim is seized and carried away, at which point the offence of unlawful confinement begins. Only this ensuing phase of confinement, the appellant argues, is a continuing offence. The Crown maintains that kidnapping is an ongoing offence that continues from the time the victim is apprehended and carried away until the time he or she is freed (or otherwise consents to being detained).
5. The second issue is tied to the first and need only be addressed if kidnapping is found to be a continuing offence. Specifically, it concerns the liability of persons who, while not involved in the victim’s apprehension, decide to participate in the ensuing confinement of the victim with full knowledge that the victim has been kidnapped — in other words, persons who willingly and knowingly choose to join the kidnapping enterprise. Do such latecomers become parties to the offence of kidnapping under s. 21(1) of the *Code*, as the Crown maintains, or are they solely liable for the offence of unlawful confinement, as the appellant contends?
6. For reasons that follow, I am not persuaded that Parliament intended to restrict the offence of kidnapping to the victim’s initial taking and movement, while leaving the victim’s ensuing captivity to the comparably less serious crime of unlawful confinement. On the contrary, I am satisfied that Parliament intended to include the offence of unlawful confinement in the offence of kidnapping so as to capture, under the crime of kidnapping, the victim’s ensuing captivity. Therefore, while the crime of kidnapping may be complete in law when the victim is initially apprehended and moved, the crime will not be complete in fact until the victim is freed.
7. In view of my conclusion that kidnapping is a continuing offence that includes the victim’s ensuing confinement, I am satisfied that latecomers who join the kidnapping enterprise while the victim remains unlawfully confined may be found guilty as parties to the offence of kidnapping if they otherwise meet the requirements for party liability under s. 21(1) of the *Code*.

II. Background

1. The pertinent facts are not in issue. On the morning of April 4, 2006, Mr. McMynn and his passenger were intercepted by two cars. Several men got out, holding what appeared to be handguns, and ordered Mr. McMynn to get into one of the vehicles. Mr. McMynn was driven to a van some 10 minutes away and he was duct-taped so that he could not see his captors. He was then taken to a house in the Lower Mainland area, where he was kept in a closet. On or around April 7, Mr. McMynn was transported to a second house. On April 10 or 11, he was moved to a third house. Mr. McMynn was threatened from time to time by different captors, sometimes using what appeared to be a gun. He was either blindfolded or he covered his eyes so that he could not see his captors. Mr. McMynn was rescued on April 12 in a simultaneous police raid on many Lower Mainland houses, including the three houses he had been confined in. The police also found several persons in the third house, including the appellant, whose citizenship papers were also found on the premises.
2. Upon his arrest, the appellant was charged, along with four others, with the offences of kidnapping and unlawful confinement of Mr. McMynn. The salient portions of the indictment upon which the appellant was tried are reproduced below:

Count 1

[that] Sam Tuan VU . . . between the 3rd day of April, 2006, and the 13th day of April, 2006, at or near Vancouver, in the Province of British Columbia, kidnapped Graham Lee McMYNN, with intent to cause Graham Lee McMYNN to be confined against his will, contrary to Section 279(1) of the Criminal Code of Canada.

Count 2

[that] Sam Tuan VU . . . between the 3rd day of April, 2006, and the 13th day of April, 2006, at or near Vancouver, in the Province of British Columbia, without lawful authority, confined Graham Lee McMYNN, contrary to Section 279(2) of the Criminal Code of Canada.

III. Decision at Trial, 2008 BCSC 1376 (CanLII)

1. The appellant and his co-accused were tried by Justice Silverman of the Supreme Court of British Columbia sitting alone. The appellant was convicted of unlawful confinement and acquitted of kidnapping.
2. In his reasons for judgment, after reviewing the surveillance evidence, cell phone location evidence, intercepted calls, DNA evidence, fingerprint and footprint evidence, and location of various exhibits with respect to the appellant, the trial judge found that

[t]he accidental occurrence of such a combination of events and items would require a confluence of coincidences too fantastic to be reasonably possible.  There is no rational inference that can be drawn from the evidence other than that [the appellant] was involved, with full knowledge, in the wrongdoing against [Mr.] McMynn.  I am satisfied of that beyond a reasonable doubt. [Emphasis added; para. 369.]

While the remark that the appellant “was involved, with full knowledge, in the wrongdoing against [Mr.] McMynn” would seem clear, it is accepted for present purposes that it is not to be taken as a finding that the appellant either participated in Mr. McMynn’s initial taking or knew of it at the time it occurred.

1. The appellant was found to have taken part in Mr. McMynn’s confinement in each of the three houses. The evidence further established that he was involved in the purchase of a tarp and duct tape four days before Mr. McMynn’s rescue. He and a co-accused were also found to have discussed the issue of ransom in Mr. McMynn’s presence and to have threatened to kill Mr. McMynn if the ransom was not paid. Finally, the appellant was arrested in the third house when the police rescued Mr. McMynn from his eight-day ordeal.
2. With respect to the charge of kidnapping, the trial judge observed that movement forms an indispensable element of the offence: it was “the movement of [Mr.] McMynn which separates it from the [charge of] confinement”. In his view, the element of movement was not restricted to the “initial abduction on April 4”, but also included the movement of Mr. McMynn from house to house during the period of confinement. Those movements, the trial judge found, “were part of a continuing offence of kidnapping” (para. 345).
3. However, the trial judge was not satisfied that the appellant had physically assisted in the movement of Mr. McMynn from house to house even though the appellant had knowledge of the transfers:

While there is evidence connecting [the appellant] to all three houses, I am not satisfied that the evidence indicates that he had anything more than knowledge about the movement of [Mr.] McMynn. [para. 375]

In the trial judge’s view, knowledge of these movements alone was not sufficient to find the appellant guilty of kidnapping. Therefore, he acquitted the appellant on that count.

1. As to the unlawful confinement charge, the trial judge was satisfied beyond a reasonable doubt that the appellant had knowledge and was a direct participant in the confinement of Mr. McMynn throughout the entire period of his captivity (para. 375).
2. The Crown appealed the acquittal on the charge of kidnapping. The appellant filed a cross-appeal, seeking to have his conviction for unlawful confinement overturned on the basis that it constituted an unreasonable verdict.

IV. British Columbia Court of Appeal, 2011 BCCA 112, 302 B.C.A.C. 187

A. *Majority Opinion*

1. After reviewing the law of kidnapping, Finch C.J.B.C., writing for himself and Saunders J.A., concluded that kidnapping is a continuing offence that encompasses both the initial abduction and the ensuing confinement of the victim. Chief Justice Finch accepted the trial judge’s findings that the appellant did not actively participate “in the initial taking or subsequent movement of [Mr.] McMynn” (para. 57). Thus, the appellant’s criminal responsibility for kidnapping “would . . . have to rest on a finding that he [was] a party to the offence of kidnapping by the application of s. 21 of the *Criminal Code*” (*ibid.*).
2. On the issue of s. 21(1) criminal responsibility, Finch C.J.B.C. reasoned that “in the context of a continuing offence [kidnapping] where the taking has already occurred, the accused must have knowledge that a kidnapping has occurred, and that the victim’s confinement is the result of that act” (para. 61). In this specific case, as the charge of kidnapping was laid under s. 279(1)(*a*) of the *Code*, the offender “must . . . have knowledge that the principal offender abducted the victim against his will for the purpose of confining him” (para. 62).
3. In line with these criteria, Finch C.J.B.C. was satisfied that the trial judge had found all the facts necessary to convict the appellant as a party to the offence of kidnapping under s. 21(1) (para. 69). Accordingly, he substituted a conviction for kidnapping and stayed the unlawful confinement count pursuant to the principles in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729 (para. 83).

B. *Concurring Opinion*

1. Prowse J.A., concurring in the result, found it unnecessary to decide whether kidnapping, by its nature, is a continuing offence. In this case, the kidnapping count should be viewed as a continuing transaction which covered the period between April 4 and 12, 2006, and “encompassed the initial taking of Mr. McMynn and the subsequent moving of him from house to house” (para. 85).
2. According to Prowse J.A., though the appellant might not have been a party to the initial abduction, his actions in confining Mr. McMynn “aided and abetted those who moved Mr. McMynn” from house to house in circumstances where the appellant “knew and intended that his actions would assist the principals in that regard” (para. 85). Therefore, the appellant should have been found guilty of the offence of kidnapping.
3. All three members of the court dismissed the appellant’s cross-appeal. That matter is not before us.

V. The Issues

1. As indicated, this appeal gives rise to the following two issues:

(1) Is the offence of kidnapping in s. 279(1) of the *Code* a continuing offence?

(2) If kidnapping is a continuing offence, can a person who played no part in the original taking, but who learns of it and chooses thereafter to participate in the kidnapping enterprise, be found liable as a party to the offence of kidnapping under s. 21(1) of the *Code*?

VI. Statutory Provisions

1. The statutory provisions reproduced below reflect the offences of kidnapping and unlawful confinement in place at the time the impugned acts were committed:

279. (1)   [Kidnapping]  Every person commits an offence who kidnaps a person with intent

(a) to cause the person to be confined or imprisoned against the person’s will;

(b) to cause the person to be unlawfully sent or transported out of Canada against the person’s will; or

(c) to hold the person for ransom or to service against the person’s will.

(1.1) [Punishment]  Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

. . .

(2) [Forcible confinement]  Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

VII. Issue 1 — Is the Offence of Kidnapping a Continuing Offence?

A. *Analysis*

1. For reasons that I will expand upon, I am satisfied that kidnapping is simply an aggravated form of unlawful confinement. This interpretation is consonant with the intention of Parliament as expressed in the *Code*, the crime’s common law origins and legislative history, modern jurisprudence of Canadian appellate courts, and common sense. So long as the victim of the kidnapping remains unlawfully confined, the crime of kidnapping continues. To interpret the statutory provisions as they evolved in their historical context, we must first consider how the offence of kidnapping was defined at common law.

(1) Kidnapping at Common Law

1. At common law, the offence of kidnapping was viewed as an aggravated form of false imprisonment: W. Blackstone, *Commentaries on the Laws of England* (1769), Book IV, at p. 219; E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. I, at pp. 429-30; W. Hawkins, *A Treatise of the Pleas of the Crown* (8th ed. 1824), vol. I, at p. 119; H. Roscoe, *A Digest of the Law of Evidence in Criminal Cases* (2nd ed. 1840), at p. 529; W. O. Russell, *A Treatise on Crimes and Misdemeanors* (3rd ed. 1843), vol. I, at p. 716. See also J. P. Bishop, *Bishop on Criminal Law* (9th ed. 1923), vol. II, at § 750; K. A. Aickin, “Kidnapping at Common Law” (1936), 1 *Res Judicatae* 130. The term kidnapping emerged in English case law in the late seventeenth century to describe the forced recruitment of labour for the American colonies: J. L. Diamond, “Kidnapping: A Modern Definition” (1985), 13 *Am. J. Crim. L*. 1, at pp. 2-3. False imprisonment, in turn, was commonly viewed as a lesser and included offence of kidnapping.
2. In 1803, Sir Edward Hyde East described the offence of kidnapping in the following terms: “The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law, punishable by fine, imprisonment, and pillory”: *A Treatise of the Pleas of the Crown*, vol. I, at pp. 429-30. False imprisonment, in turn, was referred to as “every restraint of a man’s liberty . . ., either in a gaol, house, stocks, or in the street, whenever it is done without a proper authority” (p. 428).
3. Other learned authors described the offences of kidnapping and false imprisonment in like terms. William Hawkins referred to the offence of kidnapping in the following terms: “. . . an aggravated species of false imprisonment is the privately carrying off any person, and keeping them secretly confined, which is generally understood by the term *kidnapping*” (p. 119 (emphasis in original)). Likewise, Henry Roscoe wrote that “[k]idnapping, which is an aggravated species of false imprisonment, is the stealing and carrying away or secreting of any person, and is an offence at common law, punishable by fine and imprisonment” (p. 529).
4. In *Bishop on Criminal Law*, the offence of kidnapping is defined as a “false imprisonment aggravated by conveying the imprisoned person to some other place” (§ 750). Bishop, furthermore, described kidnapping as a continuous offence: “It is a continuous crime beginning with the taking and ending with the return of the kidnapped person” (*ibid*.).
5. American jurisprudence confirms the common law meaning of the offences of kidnapping and false imprisonment. (See, e.g., *Click v. The State*, 3 Tex. 282 (1848), at p. 286; *Smith v. The State*, 63 Wis. 453 (1885); *Midgett v. State*, 139 A.2d 209 (Md. 1958); *People v. Adams*, 205 N.W.2d 415 (Mich. 1973), at p. 419; *U.S. v*. *Garcia*, 854 F.2d 340 (9th Cir. 1988), at pp. 343-44.) The same interpretation is found in other common law jurisdictions. (See, e.g., *Davis v. R*., [2006] NSWCCA 392 (AustLII).)
6. As this review demonstrates, it is the element of movement that differentiated kidnapping from the lesser included offence of false imprisonment and made kidnapping an aggravated form of false imprisonment. The underlying concern was that by carrying the victim away, the kidnappers would be taking him or her beyond the protection of the country’s laws: R. A. Anderson, *Wharton’s* *Criminal Law and Procedure* (1957), vol. I, at § 371; L. Hochheimer, *The Law of Crimes and Criminal Procedure* (2nd ed. 1904), at § 317 cited in *Midgett*, at p. 215. As J. L. Diamond explains in his study of the offence:

The initial common law element of carrying a victim out of the country . . . emphasized that the victim would almost inevitably suffer a very lengthy, if not permanent, isolation from his or her normal society. From this perspective, kidnapping was an extreme form of false imprisonment because the isolation was often for the duration of the victim’s life. [Emphasis added; p. 31.]

1. Movement is insidious because it removes the victim from his or her normal surroundings. Locating the victim becomes that much more difficult. The police are deprived of the clues about the victim’s whereabouts that are generally available in straightforward cases of unlawful confinement. When a kidnapping occurs, the range of possible locations where the victim might be held captive increases exponentially and the likelihood that the victim will be found and rescued diminishes accordingly. In that sense, movement is tied to the ensuing confinement and the eventual location where the victim is secreted and held captive. This argues in favour of treating kidnapping as a continuing offence. It supports the time-honoured view that kidnapping, in its essence, is simply an aggravated form of unlawful confinement.
2. Once it is accepted that kidnapping is an aggravated form of unlawful confinement, the conclusion that kidnapping is a continuing offence is virtually axiomatic.

(2) Legislative History

1. Since kidnapping at common law was seen as an aggravated form of false imprisonment, which, by definition, is a continuing crime, we need to determine whether Parliament, by codifying the offence of kidnapping in the *Criminal Code*, intended to abandon this well-established meaning of the offence, as the appellant suggests. In my view, the legislative history provides no support for the appellant’s argument.
2. The first *Criminal Code*, adopted in 1892 (c. 29), included kidnapping and unlawful confinement under the same section and provided for the same punishment. The term “kidnapping” was not defined in the first *Code* — indeed, it remains undefined to this day. The original provision read:

**264.** **[**Kidnapping**]** Every one is guilty of an indictable offence and liable to seven years’ imprisonment who, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent —

(*a.*) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(*b.*) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(*c.*) to cause such other person to be sold or captured as a slave, or in any way held to service against his will.

On a literal reading of the 1892 *Code*,the intent requirement in subss. (*a*) through (*c*) applied both to the offence of kidnapping and to the offence of unlawful confinement.

1. In 1900, Parliament amended the kidnapping section to clarify that the intent requirement applied only to the offence of kidnapping: *The Criminal Code Amendment Act, 1900*, S.C. 1900, c. 46, s. 3. The new section read:

**264.** Every one is guilty of an indictable offence and liable to seven years’ imprisonment who, without lawful authority —

(*a*.) kidnaps any other person with intent —

(i.) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(ii.) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(iii.) to cause such other person to be sold or captured as a slave, or in any way held to service against his will; or

(*b*.) forcibly seizes and confines or imprisons any other person within Canada.

1. The appellant argues that Parliament, by separating the two offences in 1900, restricted kidnapping to the act of seizing and taking away and made only unlawful confinement a continuing offence. There is no basis for this interpretation.
2. In amending the *Criminal Code* in 1900, Parliament did not intend to reduce kidnapping to the moment of taking: it merely sought to clarify that no specific intent was required to prove unlawful confinement. In his treatise published two years after the amendments,JamesCrankshaw described kidnapping as an “aggravated” form of false imprisonment: *The Criminal Code of Canada and the Canada Evidence Act* (2nd ed. 1902), at pp. 269-70. As he explained:

The difference between a criminal false imprisonment and kidnapping appears to be this that the latter is not only an unlawful and forcible detention of a person against his will, but a removal of him or an intention to remove him beyond the reach of his country’s laws, by secretlyconfining him within his own country or by sending him away into foreign parts. [Emphasis deleted; p. 270.]

1. Kidnapping in the *Criminal Code* after 1900, as before, remained an aggravated form of false imprisonment. It was aggravated because the additional element of movement increased the risk of harm to the victim by isolating him or her from a place where rescue was more likely.
2. In 1954, the kidnapping section was re-enacted: *Criminal Code*, S.C. 1953-54, c. 51, s. 233. Parliament again did not see fit to define the term “kidnapping”. Importantly, however, the 1954 amendments altered the sentencing scheme for kidnapping and unlawful confinement. Instead of the same seven-year sentence, kidnapping now carried a maximum penalty of life imprisonment, whereas unlawful confinement carried a maximum term of five years. Subsequent amendments to the *Code* have reinforced this distinction. At present, kidnapping is punishable by a maximum term of life imprisonment and, where aggravating circumstances exist, severe minimum sentences are imposed. Unlawful confinement, on the other hand, is treated as a hybrid offence, punishable by a maximum term of 18 months or 10 years, depending on whether the Crown proceeds by summary conviction or indictment. I find the 1954 sentencing amendments and the follow-up amendments to be instructive. The penalty scheme reflects Parliament’s view that kidnapping is a much more serious offence than unlawful confinement. This makes sense in law and logic if kidnapping is viewed as an aggravated form of unlawful confinement — and hence a continuing offence. Surely, Parliament could not have intended that the victim’s initial apprehension and movement, which will often occur in a matter of seconds, be treated more seriously than the victim’s ensuing captivity, which may last for days, months, or even years. And yet, this is where the appellant’s submission leads. With respect, I find it unconvincing.
3. In sum, while Parliament has never defined the word “kidnapping” in the *Code*,nothing in the legislative history suggests that Parliament intended to abandon the common law definition, much less replace it with a new meaning that would dramatically alter the nature and character of the offence of kidnapping as it had come to be understood. Kidnapping remains an aggravated form of false imprisonment and, as such, a continuing offence.

(3) Modern Jurisprudence

1. Modern Canadian jurisprudence on the statutory offence of kidnapping in s. 279(1) of the *Code* and unlawful confinement (also referred to as “forcible confinement”) in s. 279(2) of the *Code* tracks the understanding of these two offencesat common law.
2. In *R. v. Tremblay* (1997), 117 C.C.C. (3d) 86 (Que. C.A.), LeBel J.A. (as he then was) stated:

[translation] Forcible confinement deprives the individual of his liberty to move from point A to point B. As for kidnapping, it consists of the taking of control over a person and carrying him away from point A to point B. The distinction between the offences sometimes becomes rather subtle because to carry away a person from one point A to one point B prevents, at the same time, the person from moving from another point A to another point B. This is the reason why kidnapping necessarily entails forcible confinement*.* However, there can be forcible confinement without there being a kidnapping at the outset. [Emphasis added; p. 95.]

1. *Tremblay* is significant in two respects: it adopts the view that unlawful confinement forms an essential component of the crime of kidnapping, as at common law, and it accepts the fundamental distinction, drawn at common law, that kidnapping involves movement, whereas unlawful confinement does not (pp. 94-95). In this respect, *Tremblay*’s interpretation of the statutory offence of kidnappingis consistent with the common law definition of kidnapping as an aggravated form of false imprisonment — or, as Bishop described it, “a false imprisonment aggravated by conveying the imprisoned person to some other place” (§ 750).
2. In *R. v. Oakley* (1977), 4 A.R. 103, the Alberta Supreme Court, Appellate Division, engaged in a comprehensive review of the origins and evolution of the offence of kidnapping at common law and its modern-day characteristics. Notably, the court observed that kidnapping has been described as “an aggravated species of false imprisonment”, a description that “would fit in with the manner in which the legislature has come to treat this type of offence” (para. 37). In the next paragraph, the court endorsed the common law understanding of the offence of kidnapping and the features that distinguish it from the offence of unlawful confinement:

One of the best statements is by Coffey, J., of the Supreme Court of Indiana in an 1894 case, *Eberling v. State*, 35-36 N.E.R. 1023, where at page 1023 he says:

Mr. Bishop, in his work on Criminal Law, (volume 1, S. 553) says: “Kidnapping and false imprisonment, two offences against the individual, of which ordinarily the latter is included in the former, are punishable by the common law. False imprisonment is any unlawful restraint of one’s liberty, whether in a place set apart for imprisonment generally, or used only on the particular occasion, and whether between walls or not, effected either by physical force, actually applied, or by words and an array of such forces. Kidnapping is a false imprisonment aggravated by conveying the imprisoned person to some other place.” Taking this definition as correct, kidnapping, then, as known to the common law, was false imprisonment aggravated by carrying the imprisoned person to some other place. 2 Bish. Crim. Law, S. 750. [para. 38]

1. Likewise, in *R. v. Metcalfe* (1983), 10 C.C.C. (3d) 114, Nemetz C.J.B.C., writing for a unanimous B.C. Court of Appeal, adopted the Supreme Court of Indiana’s observation in *Eberling v. State*,cited in *Oakley*, that “[k]idnapping is a false imprisonment aggravated by conveying the imprisoned person to some other place” (p. 119).
2. In my view, the Canadian courts’ interpretation of the *Code* lends considerable support to the argument that in enacting the offence of kidnapping, Parliament did not intend to abandon the meaning of the offence as it had evolved and come to be understood at common law. Based on this jurisprudence, Finch C.J.B.C. accurately summarized the basic elements of the offence of kidnapping in his reasons. For the *actus reus*, there has to be an abduction of a person and moving him or her to a place (“carrying away” or “asportation”), against the victim’s will, which can be accomplished either by force or by fraud. The *mens rea* will be established if the accused has one of the intents described in s. 279(1) of the *Code*.
3. The appellant, however, points to one statement from *Metcalfe*, which he says supports his argument that kidnapping is not a continuing offence. At p. 118, Nemetz C.J.B.C. observed that “[t]he crime [of kidnapping] is complete when the person is picked up and then transported . . . to his place of confinement.” The appellant also relies on a similar comment in *R. v. Reid*, [1972] 2 All E.R. 1350, where the English Court of Appeal said:

We can find no reason in authority or in principle why the crime [of kidnapping] should not be complete when the person is seized and carried away, or why kidnapping should be regarded, as was urged by counsel, as a continuing offence involving the concealment of the person seized. [pp. 1351-52]

1. In my view, *Metcalfe* and *Reid* do not advance the appellant’s position. These cases stand for the proposition that the crime of kidnapping is complete in law at the point of the taking, irrespective of whether the victim is subsequently “secreted” or held in confinement. The converse inference — that a subsequent confinement is *not* a part of the offence of kidnapping — does not follow. Chief Justice Finch recognized this distinction in the instant case. He stated, correctly in my view, that

the comment [in *Reid*] that kidnapping need not be regarded as a “continuing offence” was made in the context of deciding whether there was a completed offence without the secreting or concealment of the victim. I do not think it can be regarded as authority for saying that a subsequent confinement may not form part of the offence. [Emphasis added; para. 45.]

1. Faced with a similar question, the Supreme Court of New South Wales unanimously held in *Davis* that the victim’s subsequent confinement did form part of the offence of kidnapping:

Neither *Reid* nor [other case law] supports the proposition that a taking ceases to be a taking at the moment that the kidnapper becomes criminally liable for the offence. The offence might at that moment be complete in law, because the taking has been completed for the purposes of proving the offence, but it is not necessarily complete in fact. Once it has been established that a person has been “taken”, in the sense that he or she has been compelled to go where he or she did not want to go, the “taking” continues until the compulsion ceases. It does not cease merely because the person has been taken for a certain distance or for a certain time or even because the kidnapper has ceased to physically move the victim and has commenced detaining that person in the one place. In a real sense, the kidnapper is taking the victim, that is causing the victim to accompany him or her, for the entire duration of the time, however long it is, that the victim is, as a result of the kidnapper’s conduct, involuntarily detained in a place that is not the place where the victim was first detained. The taking begins with the detention and asportation of the victim, and only ends when the victim is released or ceases to withhold consent to the detention. [Emphasis added; para. 64.]

1. The reasoning in *Davis* is persuasive on this point, even though it relies in part on the specific wording of the kidnapping section in the New South Wales *Crimes Act 1900*. The decision is instructive for another reason. As Howie J. observed, drawing a line between seizure and detention is difficult and artificial, “particularly in cases where the victim is transported repeatedly from one place to another rather than simply held in one place” (para. 57).
2. Finally, the appellant argues that this Court’s decision in *Bell v. The Queen*, [1983] 2 S.C.R. 471, supports his position that kidnapping is not a continuing offence. With respect, I do not agree.
3. The central issue in *Bell* was whether the crime of importing narcotics into Canada under s. 5 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, is complete once the narcotic has crossed the border or whether the crime continues until the narcotic has reached its intended final destination in Canada. McIntyre J., writing for a majority of the Court, concluded that the word “import” in s. 5 should be given its ordinary meaning, which “is simply to bring into the country or to cause to be brought into the country” (p. 489). It followed, in his view, that the offence of importing was “complete when the goods enter the country” (*ibid.*).
4. Justice McIntyre offered some examples of offences that he considered to be “continuing” offences. After observing that murder was not a continuing offence but that conspiracy to commit murder could be, he stated the following:

Theft is not a continuing offence. It is terminated when the wrongful taking has occurred with the requisite intention. On the other hand, possession of goods knowing them to have been obtained by the commission of theft is a continuing offence. The offence of kidnapping would not be a continuing offence, but that of wrongful detention of the victim following the kidnapping would be. [Emphasis added; p. 488.]

1. In my view, *Bell* does not assist the appellant. Much as the appellant seeks to rely on McIntyre J.’s observation that kidnapping is not a continuing offence, that observation is not authoritative. The offence of kidnapping was not before the Court. McIntyre J. did not discuss the essential features of kidnapping, nor did he cite any supporting case law. McIntyre J. merely used the offence of kidnapping as an example. As such, this observation is *obiter*. (See *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57).
2. In *Bell*, Dickson J., concurring, concluded that the offence of importing a narcotic into Canada is not “over and done with” until the goods have reached their final destination in Canada (p. 481). While his view in that respect was not shared by the majority, Dickson J.’s analysis helps to shed light on the second issue in this appeal: party liability. It is to that issue that I now turn.

VIII. Issue 2 ― Party Liability

1. Section 21(1) of the *Code* reads:

**21.** (1)  [Parties to offence] Every one is a party to an offence who

(*a*) actually commits it;

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

(*c*) abets any person in committing it.

1. Under s. 21(1), a person is criminally liable, as a party to an offence, if that person, having the requisite intent, plays one of the three enumerated roles in the offence — principal, aider or abettor. An individual will bear the same responsibility for the offence regardless of which particular role he or she played: *R. v. Thatcher*, [1987] 1 S.C.R. 652, at pp. 689-90. As this Court recently explained in *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, a person becomes a party to an offence when that person — armed with knowledge of the principal’s intention to commit the crime and with the intention of assisting the principal in its commission — does (or, in some circumstances, omits to do) something that assists or encourages the principal in the commission of the offence (paras. 14-18).
2. In my view, the well-established principles of s. 21(1) criminal liability apply with equal force to continuing offences that have been completed in law but not in fact. In particular, where an accused — with knowledge of the principal’s intention to see a continuing offence through to its completion — does (or omits to do) something, with the intention of aiding or abetting the commission of the ongoing offence, party liability is established.
3. Applying that principle to this case, once it is understood that kidnapping is an aggravated form of unlawful confinement, which continues until the victim is freed, there is no reason in law or logic why a person who learns that the victim has been kidnapped and nonetheless chooses to participate in the kidnapping enterprise, should not be found liable as a party to the offence of kidnapping under s. 21(1) of the *Code*.
4. A series of appellate decisions are instructive in this regard. The Ontario and Nova Scotia Courts of Appeal, having found that narcotics importation was a continuing offence, held that a person could be charged as a party to the offence under s. 21(1) at any point from the time the goods entered Canada until they reached the final destination, even though the offence could be considered complete in law at the moment the goods had crossed the border: *R. v. Hijazi* (1974), 20 C.C.C. (2d) 183 (Ont. C.A.); *R. v. Whynott* (1975), 12 N.S.R. (2d) 231 (S.C. (App. Div.));*R. v. Tanney* (1976), 31 C.C.C. (2d) 445 (Ont. C.A.). In *Bell*, the majority cast doubt on these decisions by adopting a narrow construction of the term “import” in s. 5 of the *Narcotic Control Act*. But the majority decision in *Bell* does not detract from the general principle articulated in the case law that a person who chooses to engage in a continuing offence with full knowledge of the offence can be held responsible as party to that offence under s. 21(1) of the *Code*.
5. In his concurring opinion in *Bell*, Dickson J. relied on these appellate decisions in finding that the importation offence was not “over and done with” and that criminal liability could be incurred as long as the offence was ongoing in fact. As Dickson J. held:

To “actually commit” importing, an accused must bring in, or cause to be brought in, to Canada, goods from a foreign country; this, by definition, necessitates crossing the Canadian border. Someone who becomes involved only after the border crossing, however, may be aiding and abetting a person bringing the goods from outside Canada to a given destination inside Canada. [Emphasis added; pp. 478-79.]

Therefore, although not a party at the time the offence was initiated (by the principal(s)), a person may become a party to the offence as long as the offence is not “over and done with”.

1. Applying this principle to the present context, once it is accepted that the crime of kidnapping continues until the victim is freed, a person who chooses to participate in the victim’s confinement — after having learned that the victim has been kidnapped — may be held responsible for the offence of kidnapping under s. 21(1).

IX. Application

1. On the appellant’s thesis, once Mr. McMynn had been forcibly apprehended and taken away, the offence of kidnapping was spent and his abductors faced a possible life sentence. In contrast, Mr. McMynn’s ensuing eight-day ordeal in captivity would not be considered as part of the kidnapping charge. It would, instead, be governed by the lesser offence of unlawful confinement for which a maximum penalty of 10-years’ imprisonment could be imposed if the Crown proceeded by way of indictment.
2. This case illustrates why it would be incongruous to view the worst part of Mr. McMynn’s ordeal (his eight days in captivity) as a separate and less serious offence than the ordeal he underwent in the few moments it took for his captors to apprehend and remove him from his usual surroundings.
3. Parliament intended no such thing. Under s. 279(1) of the *Code*, the offence of kidnapping was complete in law as soon as Mr. McMynn’s abductors had forcibly apprehended and taken him away — assuming that in doing so it was their intention to keep him confined against his will.
4. But, as I have mentioned before, just because the offence was complete in law at the moment of the taking does not mean that it was also complete in fact. Mr. McMynn’s unlawful confinement following the taking continued for the next eight days. The kidnapping came to an end when he was set free by the police. Put differently, Mr. McMynn’s status as a victim of a kidnapping did not change during his eight days of captivity.
5. I agree with Finch C.J.B.C. that for purposes of s. 21(1), the appellant’s participation in the confinement of Mr. McMynn satisfied the *actus reus* component of the offence of kidnapping (para. 65). In this case, accepting that the appellant was initially unaware of and took no part in the taking and carrying away of Mr. McMynn, he became aware of it while Mr. McMynn remained confined against his will and chose thereafter to take part in the kidnapping enterprise.
6. The evidence in this regard, as found by the trial judge, is overwhelming. First, the appellant was present in all three houses in which Mr. McMynn was held captive. Second, the appellant was one of Mr. McMynn’s captors and was aware that Mr. McMynn was being held with a view to obtaining a ransom. Indeed, the trial judge was satisfied that the appellant and one of his co-accused had threatened to kill Mr. McMynn if the ransom was not paid. Third, the appellant had purchased duct tape and a tarp four days before the police rescued Mr. McMynn. Fourth, the appellant was arrested in the third confinement house when the police eventually freed Mr. McMynn. Finally, while the trial judge was not satisfied that the appellant had physically moved Mr. McMynn from house to house during the period of confinement, he did find that the appellant had full knowledge of those movements.
7. Given the trial judge’s findings, I agree with Finch C.J.B.C. that the appellant “would have had to be wilfully blind not to know that [Mr.] McMynn had been taken and was being held against his will in all three houses” (para. 67). The trial judge’s findings in that regard can give rise to no other rational conclusion. The requisite *mens rea* element under s. 21(1) was met.
8. The trial judge nevertheless acquitted the appellant of kidnapping because he considered movement to be an essential element of kidnapping and was not satisfied that the appellant had physically participated in moving Mr. McMynn from house to house to justify a guilty verdict for kidnapping (paras. 3, 345 and 375). With respect, I cannot agree. Movement, of course, is what distinguishes kidnapping from unlawful confinement and makes kidnapping an aggravated form of unlawful confinement. But kidnapping, as discussed above, is a continuing offence. It began when Mr. McMynn was abducted by force from his car and ended when he was freed. Mr. McMynn was not kidnapped and confined at house 1, then kidnapped again upon being moved to house 2 and then kidnapped a third time upon being moved to house 3. To treat what occurred here as three separate kidnappings and three separate cases of unlawful confinement is, in my respectful view, illogical and further underscores why kidnapping should be treated as a continuing offence.
9. In short, the appellant joined the kidnapping enterprise while the confinement of the victim was still underway. He did so with the intent to aid the kidnappers and with the knowledge that Mr. McMynn was a victim of kidnapping — or, at a minimum, he was wilfully blind to that fact. The appellant took steps, of his own free will, to assist the kidnappers and further their objectives. By doing so, he made himself a party to the offence of kidnapping under s. 21(1) of the *Code*.
10. For those reasons, I would dismiss the appeal.

*Appeal dismissed.*

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