



SUPREME COURT OF CANADA

CITATION: R. v. Sundman, 2022
SCC 31

APPEAL HEARD: December 9,
2021

JUDGMENT RENDERED: July
21, 2022

DOCKET: 39569

BETWEEN:

Darren Caley Daniel Sundman
Appellant

and

Her Majesty The Queen
Respondent

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: Jamal J. (Wagner C.J. and Moldaver, Karakatsanis, Côté,
Brown, Rowe, Martin and Kasirer JJ. concurring)
(paras. 1 to 55)

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Darren Caley Daniel Sundman

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Sundman

2022 SCC 31

File No.: 39569.

2021: December 9; 2022: July 21.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — First degree murder — Unlawful confinement — Elements of offence — Accused convicted of second degree murder in death of victim shot during chase after escaping from moving truck where he was confined — Trial judge finding that victim no longer unlawfully confined at time of murder — Court of Appeal holding that death caused while victim still unlawfully confined and substituting first degree murder conviction — Whether victim unlawfully confined after escape from truck —

Whether unlawful confinement and murder formed part of same transaction justifying conviction for first degree murder — Criminal Code, R.S.C. 1985, c. C-46, s. 231(5).

The accused and the victim were drug dealers with a mutual animosity. On the day of the victim's murder, the accused unlawfully confined him in a moving pickup truck and repeatedly assaulted him by hitting him with a handgun. The victim jumped from the truck when it slowed to make a turn, but was then chased on foot by the accused and two accomplices. When the victim ran for his life, the accused shot him at least three times, but did not manage to kill him. As he lay wounded, the victim was shot and killed at close range by one of the accomplices.

The accused was charged with first degree murder. The Crown argued that the accused was guilty of first degree murder because the murder was planned and deliberate. Alternatively, the Crown argued that, because he murdered the victim while committing the offence of unlawful confinement, the accused was guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*. The trial judge was not satisfied that the murder was planned and deliberate. He also found that although the victim was unlawfully confined in the truck, he had managed to escape his confinement by jumping from the truck; accordingly, because of the brief gap in time between when the victim was confined in the truck and when he was killed, the accused did not murder him while committing the offence of unlawful confinement. The accused was therefore acquitted of first degree murder but convicted of second degree murder. The Court of Appeal unanimously allowed the Crown's appeal, set aside the conviction of second

degree murder, and substituted a conviction of first degree murder. It held that the victim was still unlawfully confined when he jumped from the truck and was chased before being killed, and accordingly, the accused murdered the victim while committing the offence of unlawful confinement. It also held that the victim's unlawful confinement in the truck was temporally and causally connected to his murder, making the entire course of conduct a single transaction.

Held: The appeal should be dismissed.

The accused is guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*. The victim was still unlawfully confined when he escaped from the truck and ran for his life. Even though the victim was not physically restrained outside the truck, he continued to be coercively restrained through violence, fear, and intimidation. The accused then murdered him while unlawfully confining him. These two distinct criminal acts were part of a continuous sequence of events forming a single transaction. They were close in time and involved an ongoing domination of the victim that began in the truck, continued when he escaped from the truck and ran for his life, and ended with his murder.

Section 231(5) of the *Criminal Code* provides that murder is first degree murder, irrespective of whether the murder is planned and deliberate, when the victim's death is caused "while committing or attempting to commit" any of several listed crimes of domination. Section 231(5) does not create a substantive offence; rather, it is essentially a sentencing provision reflecting Parliament's decision to treat murder in

connection with the listed offences as involving a heightened degree of moral blameworthiness or an aggravating circumstance warranting a more severe punishment. It applies only when the offender has been found guilty of murder beyond a reasonable doubt. The organizing principle for the offences listed in s. 231(5) is that they are all crimes involving the illegal domination of victims. Parliament has treated murder committed in relation to these crimes of domination as especially serious and as warranting the exceptional punishment for first degree murder. Illegal domination is not an essential element to be proved under s. 231(5) but a principle that helps courts apply the provision purposively, so that the law develops in a principled manner.

For a murder to be committed “while committing or attempting to commit” an underlying offence listed in s. 231(5), the following elements are required: (1) an underlying crime of domination; (2) murder; (3) substantial cause; (4) no intervening act; and (5) the same transaction. The Court’s decisions have adopted two approaches to the “same transaction” element, which have been used interchangeably: the “single transaction” test and the temporal-causal connection approach. These approaches do not involve different inquiries; they are simply different ways of addressing the “same transaction” element. The “single transaction” approach asks if the listed offence of domination and the killing all form part of one continuous sequence of events forming a single transaction. It is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder. The murder represents an exploitation of the position of power created by the underlying crime and makes the entire course of conduct a single transaction. The temporal and causal connection

approach asks whether the underlying offence of domination and the murder have a close temporal and causal connection. There is a temporal connection between an underlying offence of domination and a murder when the two criminal acts are committed close together in time. There is a causal connection when there is a unifying relationship, beyond mere closeness in time, between the act of illegal domination and the act of murder, such as when the offender's reason or motivation for the killing arises from, or is linked to, the offender's unlawful domination of a victim. The application of either of these two approaches involves the same inquiry and will result in the same conclusion: when a single transaction is found, there will necessarily be a temporal-causal connection, and when a temporal-causal connection is found, there will necessarily be a single transaction.

The underlying offence of domination and the killing must involve two distinct criminal acts. The underlying offence cannot be consumed in the very act of killing. If there is only one criminal act, it cannot be said that the offender exploited the domination inherent in the underlying offence with the act of killing. In such cases, the heightened moral blameworthiness required for first degree murder is absent.

Unlawful confinement occurs if, for any significant time period, a person is coercively restrained or directed contrary to their wishes so that they cannot move about according to their own inclination and desire. The person need not be restricted to a particular place or physically restrained. The restraint can be through violence,

fear, intimidation or psychological or other means, and the purpose of the confinement is not relevant.

In the present case, the victim's unlawful confinement continued when he escaped from the truck. He was coercively restrained, deprived of his liberty, and unable to move about according to his own inclination and desire. In fact, the victim was still unlawfully confined at the time of his death. The accused thus murdered him while committing the offence of unlawful confinement. The unlawful confinement and the murder were close in time, and involved an ongoing course of domination. In addition, the unlawful confinement was distinct from and not consumed by the shooting. As a result, the accused's first degree murder conviction is justified.

Cases Cited

Referred to: *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309; *R. v. Bottineau*, [2006] O.J. No. 1864 (QL), 2006 CarswellOnt 8510 (WL), aff'd 2011 ONCA 194, 269 C.C.C. (3d) 227; *R. v. Luxton*, [1990] 2 S.C.R. 711; *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195; *R. v. Gratton* (1985), 18 C.C.C. (3d) 462; *R. v. Lemaigre* (1987), 56 Sask. R. 300; *R. v. Kimberley* (2001), 56 O.R. (3d) 18; *R. v. Johnstone*, 2014 ONCA 504, 313 C.C.C. (3d) 34; *R. v. Parris*, 2013 ONCA 515, 300 C.C.C. (3d) 41; *R. v. Newman*, 2016 SCC 7, [2016] 1 S.C.R. 27; *R. v. Arkell*, [1990] 2 S.C.R. 695; *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804; *R. v. Harbottle*, [1993] 3 S.C.R. 306; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; *R. v. Niemi*, 2017 ONCA 720, 355 C.C.C. (3d) 344; *R. v. Imona-Russell*, 2018 ONCA 590;

R. v. McGregor, 2019 ONCA 307, 145 O.R. (3d) 641; *R. v. Stevens* (1984), 11 C.C.C. (3d) 518; *R. v. Ganton* (1992), 77 C.C.C. (3d) 259; *R. v. Johnson and Jensen* (1993), 141 A.R. 184; *R. v. Plewes*, 2000 BCCA 278, 144 C.C.C. (3d) 426; *R. v. Westergard* (2004), 24 C.R. (6th) 375; *R. v. Mullings*, 2014 ONCA 895, 319 C.C.C. (3d) 1; *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30; *Grayson v. Wellington Insurance Co.* (1997), 37 B.C.L.R. (3d) 49; *R. v. Alexis*, 2020 ONCA 334, 388 C.C.C. (3d) 226; *R. v. Chung*, 2020 SCC 8; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 9, 12.

Criminal Code, R.S.C. 1985, c. C-46, ss. 231, 279(2), 676(1)(a), 745(a), (c), 745.4.

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APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J. and Fitch and Grauer JJ.A.), 2021 BCCA 53, 402 C.C.C. (3d) 463, [2021] B.C.J. No. 209 (QL), 2021 CarswellBC 309 (WL), substituting a conviction for first degree murder to the conviction for second degree murder entered by Williams J., 2018 BCSC 602, [2018] B.C.J. No. 673 (QL), 2018 CarswellBC 895 (WL). Appeal dismissed.

Daniel J. Song and Elliot Holzman, for the appellant.

Megan A. Street, for the respondent.

The judgment of the Court was delivered by

JAMAL J. —

I. Overview

[1] Section 231(5) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that murder is first degree murder, irrespective of whether the murder is planned and deliberate, when the victim's death is caused "while committing or attempting to commit" any of several listed crimes of domination, including hijacking an aircraft, any form of sexual assault, kidnapping, hostage taking, or unlawful confinement. At

issue in this appeal is whether the appellant, Darren Sundman, murdered Jordan McLeod “while committing” the offence of unlawful confinement.

[2] The appellant and Mr. McLeod were drug dealers with a mutual animosity. On the day of Mr. McLeod’s murder, the appellant unlawfully confined him in a moving pickup truck and repeatedly assaulted him by hitting him with a handgun. Mr. McLeod jumped from the truck when it slowed to make a turn but was then chased on foot by the appellant and two accomplices. When Mr. McLeod ran for his life, the appellant shot him at least three times but did not manage to kill him. As he lay wounded, Mr. McLeod was shot and killed at close range by one of the accomplices.

[3] The appellant was acquitted of first degree murder but convicted of second degree murder. The trial judge accepted that although Mr. McLeod was unlawfully confined in the truck, he had managed to escape his confinement by jumping from the truck. The trial judge held that the appellant murdered Mr. McLeod but ruled that because of the brief gap in time between when Mr. McLeod was confined in the truck and when he was killed, the appellant did not murder him “while committing” the offence of unlawful confinement. The murder was thus in the second degree.

[4] The Court of Appeal for British Columbia unanimously allowed the Crown’s appeal and substituted a conviction for first degree murder under s. 231(5)(e) of the *Criminal Code*. The court held that Mr. McLeod was still unlawfully confined when he jumped from the truck and was chased before being killed. The unlawful confinement

and the murder were temporally and causally connected, making the entire series of events a single transaction. The appellant now appeals to this Court as of right.

[5] I would dismiss the appeal. In my view, Mr. McLeod was still unlawfully confined when he escaped from the truck and ran for his life. Even though Mr. McLeod was not *physically restrained* outside the truck, he continued to be *coercively restrained* through violence, fear, and intimidation. He was deprived of his liberty and was not free to move about according to his inclination and desire. The appellant then murdered him while unlawfully confining him. These two distinct criminal acts were part of a continuous sequence of events forming a single transaction. They were close in time and involved an ongoing domination of Mr. McLeod that began in the truck, continued when he escaped from the truck and ran for his life, and ended with his murder. The appellant is therefore guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*.

II. Facts

[6] On January 16, 2015, Mr. McLeod was shot and killed near Prince George, British Columbia, soon after he had been assaulted and unlawfully confined in a pickup truck. Five people had been in the truck: Mr. McLeod; the appellant; the appellant's girlfriend, Staci Stevenson; the appellant's brother, Kurtis Sundman; and Sebastian Martin. All five were drug dealers in and around Vanderhoof, British Columbia.

[7] The truck had been travelling from Vanderhoof to Prince George. Mr. Kurtis Sundman was driving and Mr. McLeod was in the front passenger seat, while the appellant, Ms. Stevenson, and Mr. Martin were in the back. The appellant and Mr. Kurtis Sundman were each carrying a handgun; Mr. Martin was carrying a shotgun. Mr. McLeod was unarmed.

[8] During the trip, a conflict arose between the Sundman brothers and Mr. McLeod. The appellant was angry with Mr. McLeod for many reasons: he suspected that Mr. McLeod was having a relationship with Ms. Stevenson; Mr. McLeod was encroaching on the Sundman brothers' turf by supplying drugs to the Vanderhoof market; the Sundman brothers owed a drug debt to Mr. McLeod and he was pressuring them to repay the debt; and the appellant had seen messages on Mr. McLeod's phone that had upset him. At one point, the appellant started hitting Mr. McLeod in the head with his handgun. Mr. McLeod tried to avoid the blows and promised to forgive the Sundmans' drug debt if they left him alone. Mr. Kurtis Sundman, who shared the appellant's anger, encouraged the ongoing assault and drove the truck so fast that Mr. McLeod could not jump out. He also taunted Mr. McLeod by telling him to jump out, even though realistically this was impossible.

[9] When the truck slowed to make a turn, Mr. McLeod jumped out of the truck and tried to escape. Mr. Kurtis Sundman immediately stopped the truck, and the appellant yelled "get him, get him". The three men quickly left the truck, each carrying their respective firearms, and chased Mr. McLeod.

[10] Mr. McLeod tried desperately to escape. He waded through deep snow, across a shallow ditch and barbed wire fence, towards the bush. The appellant then shot at Mr. McLeod at least four times, hitting him at least three times. Although these shots did not kill Mr. McLeod, they slowed him down and stopped him from escaping. Mr. Martin said to the appellant something to the effect of, “I got him, boss”, and shot Mr. McLeod twice, once in the torso and once in the face at close range, killing him almost instantly.

[11] The three men loaded Mr. McLeod’s body into the truck and drove to an isolated location where they hid his body under foliage. The police found the body about a month later with Ms. Stevenson’s help.

[12] The appellant and his two accomplices, Mr. Martin and Mr. Kurtis Sundman, were each charged with first degree murder. The accomplices were convicted of second degree murder and manslaughter, respectively. Only the appellant’s case remains before this Court.

III. Judgments Below

A. *Supreme Court of British Columbia, 2018 BCSC 602 (Williams J.)*

[13] The Crown argued that the appellant was guilty of first degree murder because the murder was planned and deliberate. Alternatively, the Crown argued that, because the appellant murdered Mr. McLeod “while committing” the offence of

unlawful confinement, he was guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*. The trial judge rejected both arguments and acquitted the appellant of first degree murder but convicted him of second degree murder.

[14] The trial judge held that to prove first degree murder under s. 231(5)(e), the Crown had to prove that the appellant murdered Mr. McLeod while he was under “continuing confinement” at the time of his death (para. 289 (CanLII)). The appellant repeatedly assaulted and unlawfully confined Mr. McLeod in the truck, and Mr. McLeod was still “in a situation of vulnerability” when he escaped from the truck as a “consequence of the manner in which he had been dealt with in the truck” (para. 289). However, because Mr. McLeod “managed to escape his confinement” by jumping from the truck, when “Mr. McLeod was shot, his confinement had ended” (para. 288). The brief “gap in time” between the end of Mr. McLeod’s unlawful confinement in the truck and the firing of the fatal shots meant that he was not under “continuing confinement” when he was killed (para. 289). The appellant was thus not guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*.

B. *Court of Appeal for British Columbia, 2021 BCCA 53, 402 C.C.C. (3d) 463 (Bauman C.J. and Fitch and Grauer J.J.A.)*

[15] The Court of Appeal unanimously allowed the Crown’s appeal on the acquittal of first degree murder under s. 231(5)(e), set aside the conviction of second degree murder, and substituted a conviction of first degree murder.

[16] The Court of Appeal identified two legal errors in the trial decision. First, the trial judge erred in law on the scope of unlawful confinement by requiring that “the victim be physically restrained in an enclosed space” (para. 156). Unlawful confinement only requires “the intentional deprivation of another person’s liberty or the restriction of that person’s movement in the absence of lawful authority and contrary to the person’s wishes” (para. 153). Even after Mr. McLeod had jumped from the truck he was “in no sense free to move about according to his own inclination and desire” (para. 159). “His confinement did not, as a matter of law, end as soon as he bailed from the truck” (para. 159). Applying the trial judge’s undisputed factual findings to the correct legal test for unlawful confinement, the appellant “was committing the offence of unlawful confinement when he shot [Mr.] McLeod” (para. 159).

[17] Second, according to the Court of Appeal, the trial judge’s “more fundamental legal error” was in concluding that “the momentary gap in time” between when Mr. McLeod jumped from the truck and when the appellant shot him meant that he could not have murdered Mr. McLeod “while committing” the offence of unlawful confinement (para. 163). Such a “narrow approach” to s. 231(5)(e) diverges from this Court’s interpretation in *R. v. Paré*, [1987] 2 S.C.R. 618, which asks whether the unlawful confinement and murder were part of a single transaction or were temporally and causally connected. The trial judge erred in law by failing to give legal effect to his factual findings. On the facts found by the trial judge, there was a temporal and causal connection between the unlawful confinement and the murder, making the entire course

of conduct a single transaction. The temporal connection was established because the gap in time between the unlawful confinement and the murder was “brief” or “momentary” (para. 171). The causal connection was established because Mr. McLeod was still in a situation of vulnerability after he jumped from the truck and tried to escape from his attackers (para. 172). Based on these factual findings, the appellant was guilty of first degree murder.

IV. Relevant Statutory Provisions

[18] The relevant portions of ss. 231 and 279 of the *Criminal Code* read as follows:

Classification of murder

231 (1) Murder is first degree murder or second degree murder.

Planned and deliberate murder

(2) Murder is first degree murder when it is planned and deliberate.

...

Hijacking, sexual assault or kidnapping

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

(c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);

- (d) section 273 (aggravated sexual assault);
- (e) section 279 (kidnapping and forcible confinement); or
- (f) section 279.1 (hostage taking).

...

Second degree murder

(7) All murder that is not first degree murder is second degree murder.

...

Forcible confinement

279 . . .

(2) 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.

V. Issues

[19] The appellant raises two main issues:

- A. The Court of Appeal had no basis to interfere with the trial judge's conclusion that Mr. McLeod's unlawful confinement ended when he escaped from the truck, and thus the appellant did not murder Mr. McLeod "while committing" the offence of unlawful confinement and is not guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*; and

- B. The Court of Appeal erred in concluding that Mr. McLeod’s unlawful confinement in the truck and his murder formed part of a “single transaction” justifying a conviction for first degree murder under s. 231(5)(e).

VI. Analysis

[20] I will first review the legal principles for unlawful confinement under s. 279(2) of the *Criminal Code* and first degree murder under s. 231(5). I will then apply those principles to this case.

A. *Unlawful Confinement*

[21] To establish unlawful or forcible confinement under s. 279(2) of the *Criminal Code*, the Crown must prove that (1) the accused confined another person; and (2) the confinement was unlawful (*R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309, at para. 64). At its core, unlawful confinement involves a deprivation of a person’s liberty (*R. v. Bottineau*, [2006] O.J. No. 1864 (QL), 2006 CarswellOnt 8510 (WL) (S.C.J.), at para. 117, per Watt J. (as he then was), aff’d 2011 ONCA 194, 269 C.C.C. (3d) 227). Unlawful confinement occurs if, for any significant time period, a person is coercively restrained or directed contrary to their wishes, so that they cannot move about according to their own inclination and desire (*R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 723; *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195, at para. 24; *Magoon*, at

para. 64). The person need not be restricted to a particular place or physically restrained (*Magoon*, at para. 64; *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont. C.A.), at pp. 473 and 475, per Cory J.A. (as he then was); *R. v. Lemaigre* (1987), 56 Sask. R. 300 (C.A.), at para. 3; M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 1037). The restraint can be through violence, fear, intimidation or psychological or other means (*Magoon*, at para. 64). The purpose of the confinement is not relevant (*Pritchard*, at para. 31; *R. v. Kimberley* (2001), 56 O.R. (3d) 18 (C.A.), at para. 107; *R. v. Johnstone*, 2014 ONCA 504, 313 C.C.C. (3d) 34, at para. 45; *R. v. Parris*, 2013 ONCA 515, 300 C.C.C. (3d) 41, at para. 47).

[22] For example, a person can be unlawfully confined if an accused's violent acts lead the person to lock themselves in a room to avoid being attacked (*Johnstone*, at para. 47; K. Roach, *Criminal Law* (7th ed. 2018), at p. 442, fn. 83), or if the person is prevented from escaping from an apartment through the front door (*R. v. Newman*, 2016 SCC 7, [2016] 1 S.C.R. 27, at para. 1; Roach, at p. 442, fn. 81).

B. *First Degree Murder Under Section 231(5)*

(1) First Degree Murder

[23] First degree murder is the most serious crime in Canadian law and requires the highest level of moral blameworthiness, namely subjective foresight of death (*R. v. Arkell*, [1990] 2 S.C.R. 695, at p. 703; *Luxton*, at p. 724). It carries the most severe punishment under the *Criminal Code*, a sentence of life imprisonment without

eligibility for parole for 25 years (s. 745(a); *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804, at para. 46). Any murder that is not first degree murder is second degree murder (s. 231(7)), which carries a punishment of life imprisonment without eligibility for parole of between 10 and 25 years, at the discretion of the sentencing judge (ss. 745(c) and 745.4).

[24] First degree murder is murder that is “planned and deliberate” (s. 231(2) and (3)). Murder is also deemed to be in the first degree, even if not planned and deliberate, if it is committed in connection with specific victims, specific situations, or any of several enumerated offences (s. 231(4) to (6.2)). Section 231(5) lists one such group of underlying offences. It provides that murder is first degree murder when the death of a person is caused “while committing or attempting to commit” any of the offences of hijacking an aircraft, any form of sexual assault, kidnapping, hostage taking, or unlawful confinement. Section 231(5) can apply even if the murder victim and the victim of the enumerated offence are different persons (*Russell*, at paras. 33 and 43; Manning and Sankoff, at p. 961).

(2) Section 231(5): A Sentencing Provision

[25] Section 231(5) does not create a substantive offence. It is essentially a sentencing provision reflecting Parliament’s decision to treat murder in connection with the listed offences as involving a heightened degree of moral blameworthiness or an aggravating circumstance warranting a more severe punishment. Section 231(5) applies only when the offender has been found guilty of murder beyond a reasonable

doubt (*R. v. Harbottle*, [1993] 3 S.C.R. 306, at p. 323; *Arkell*, at pp. 702-3; *Luxton*, at p. 720; *Paré*, at p. 625; *Russell*, at para. 24; *Pritchard*, at para. 19).

[26] This Court has held that s. 231(5) is neither arbitrary nor irrational and does not infringe ss. 7, 9, or 12 of the *Canadian Charter of Rights and Freedoms* (*Arkell*, at p. 704; *Luxton*, at pp. 719-25; D. Stuart, *Canadian Criminal Law: A Treatise* (8th ed. 2020), at p. 234; Manning and Sankoff, at p. 958).

(3) The Organizing Principle of Illegal Domination

[27] The organizing principle for the offences listed in s. 231(5) — what they have in common — is that they are all crimes involving the illegal domination of victims. Parliament has treated murder committed in connection with these crimes of domination as especially serious and as warranting the exceptional punishment for first degree murder (*Paré*, at p. 633; *Luxton*, at p. 722; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, at para. 62; *Pritchard*, at paras. 19-20; *Magoon*, at para. 61). Illegal domination is not an essential element to be proved under s. 231(5) but a principle that helps courts apply the provision purposively, so that the law develops in a principled manner (*Russell*, at para. 43; *Kimberley*, at para. 104; *R. v. Niemi*, 2017 ONCA 720, 355 C.C.C. (3d) 344, at para. 62; *R. v. Imona-Russell*, 2018 ONCA 590, at para. 13 (CanLII); *R. v. McGregor*, 2019 ONCA 307, 145 O.R. (3d) 641, at paras. 58, 67 and 69-74).

(4) “While Committing”: The Single Transaction Test

[28] This Court has provided guidance on what it means to commit murder “while committing or attempting to commit” an underlying offence listed in s. 231(5). In *Paré*, this Court’s leading interpretation of s. 231(5), the offender indecently assaulted a young boy, held him down for two minutes, and then strangled him to death when the boy said that he would tell his mother of the assault. Wilson J. for the Court rejected a narrow and literal interpretation of “while committing” under s. 231(5) that would require the underlying offence and the murder to be committed simultaneously. Such an interpretation would lead to irrational and arbitrary distinctions — in *Paré*, for example, applying the “simultaneous” interpretation would mean that whether the murder was in the first or second degree would turn on whether the offender was viewed as still indecently assaulting the victim when he held him down and strangled him. Instead of a “simultaneous” approach to s. 231(5), Wilson J. adopted the broad and purposive “single transaction” approach proposed by Martin J.A. in *R. v. Stevens* (1984), 11 C.C.C. (3d) 518 (Ont. C.A.), at p. 541, which asks if the listed offence of domination and the killing “all form part of one continuous sequence of events forming a single transaction”. Wilson J. held that “it is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder. The murder represents an exploitation of the position of power created by the underlying crime and makes the entire course of conduct a ‘single transaction’” (p. 633). Applying this test, the offender in *Paré* was guilty of first degree murder because the indecent assault and the killing formed “part of one continuous sequence of events” constituting “the same transaction” (p. 634).

[29] A few years after deciding *Paré*, this Court in *Harbottle*, at p. 325, distilled s. 231(5) (then s. 214(5) of the *Criminal Code*) into five elements:

- (1) [T]he accused was guilty of the underlying crime of domination or of attempting to commit that crime;
- (2) the accused was guilty of the murder of the victim;
- (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim;
- (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and
- (5) the crimes of domination and murder were part of the same transaction; that is to say, the death was caused while committing the offence of domination as part of the same series of events.

(See also *Magoon*, at paras. 17 and 63.)

[30] Section 231(5) thus requires (1) an underlying crime of domination; (2) murder; (3) substantial cause; (4) no intervening act; and (5) the same transaction (*Parris*, at para. 45; *McGregor*, at para. 61).

(5) “While Committing”: The Temporal and Causal Connection Approach

[31] In some cases, this Court has applied the “single transaction” test under s. 231(5) by asking whether the underlying offence of domination and the murder have a close “temporal and causal” connection (see *Paré*, at pp. 629 and 634; *Pritchard*, at paras. 19, 25, 33-35 and 38; *Russell*, at paras. 43 and 46-47).

[32] In other cases, this Court has simply applied the “single transaction” test as enunciated by Martin J.A. in *Stevens*, without expressly inquiring into the presence of a temporal-causal connection (*Harbottle*, at p. 326; *Magoon*, at paras. 73-75; see also *R. v. Ganton* (1992), 77 C.C.C. (3d) 259 (Sask. C.A.), at p. 263; *R. v. Johnson and Jensen* (1993), 141 A.R. 184 (C.A.), at para. 53; *R. v. Plewes*, 2000 BCCA 278, 144 C.C.C. (3d) 426, at para. 34; *R. v. Westergard* (2004), 24 C.R. (6th) 375 (Ont. C.A.), at para. 30; *R. v. Mullings*, 2014 ONCA 895, 319 C.C.C. (3d) 1, at para. 102). Similarly, the Canadian Judicial Council’s *Model Jury Instructions* on s. 231(5) focus solely on whether the underlying offence and the killing form “a continuous series of events that was a single ongoing transaction” (“Offence 231(5): First Degree Murder in the Commission of Another Offence”, May 2019 (online); see also D. Watt, *Watt’s Manual of Criminal Jury Instructions* (2nd ed. 2015), at pp. 716 and 719).

[33] It is usually easy to identify a “temporal connection” between an underlying offence of domination and a murder: it is when the two criminal acts are committed close together in time. But it can be harder to articulate the “causal connection” between an underlying offence and a murder. The difficulty is largely terminological. Causation in homicide cases has two aspects: factual causation and legal causation. Factual causation asks how the victim died and the role of the accused in effecting that result — whether the victim’s death would have occurred “but for” the actions of the accused. When factual causation is established, legal causation asks whether the accused should be held responsible for the victim’s death, based on principles of moral responsibility in criminal law (*Nette*, at paras. 44-45; *R. v. Maybin*,

2012 SCC 24, [2012] 2 S.C.R. 30, at paras. 15-16). Under s. 231(5), however, a “causal connection” involves neither factual nor legal causation. As the Court of Appeal for British Columbia remarked in another context, “[o]ne can murder someone ‘in the course of’ committing a robbery, but the robbery is only the context of the murder, not its ‘cause’” (*Grayson v. Wellington Insurance Co.* (1997), 37 B.C.L.R. (3d) 49, at para. 26, per Newbury J.A.).

[34] Instead, a causal connection has been found under s. 231(5) where *the offender’s reason or motivation* for the killing arises from, or is linked to, the offender’s unlawful domination of a victim. In *Paré*, Wilson J. found a causal connection between the underlying offence and the killing because the accused strangled the victim to death after indecently assaulting him to prevent him from telling his mother about the assault (p. 634; see also *Pritchard*, at para. 34). The indecent assault was not the factual or legal cause of the murder; it was the reason or motivation for it, marking the beginning of a continuing process of illegal domination culminating in the murder, thus making the entire course of conduct a single transaction (*Paré*, at p. 633). Likewise, a causal connection has been found under s. 231(5) when the murder was committed *to facilitate* the crime of domination, such as by eliminating a potential witness to the crime (*Pritchard*, at para. 38; *Russell*, at paras. 47-48; *R. v. Alexis*, 2020 ONCA 334, 388 C.C.C. (3d) 226, at para. 18). In all cases, a “causal connection” under s. 231(5) concerns whether there is a *unifying relationship*, beyond mere closeness in time, between the act of illegal domination and the act of murder, so as to constitute a single transaction (see *Alexis*, at para. 24).

(6) The Single Transaction Test and the Temporal-Causal Connection Approach Involve the Same Inquiry

[35] I do not read this Court's decisions as suggesting that the "single transaction" test articulated in *Stevens* and the temporal-causal connection approach involve different inquiries. They are simply different ways of addressing the "same transaction" element. These two approaches have been used interchangeably in our jurisprudence.

[36] For example, in *Paré*, at p. 634, Wilson J. concluded that "[t]he murder was temporally and causally connected to the underlying offence. It formed part of one continuous sequence of events. It was part of the same transaction."

[37] Similarly, in *Russell*, at para. 46, McLachlin C.J. referred to the single transaction test and the temporal-causal connection approach interchangeably:

The cases of this Court dealing with s. 231(5) make clear that an accused commits a murder "while committing or attempting to commit" an enumerated offence only if there is a close temporal and causal connection between the murder and the enumerated offence: see, e.g., *Paré, supra*, at p. 632 (stating that a murder is committed "while committing" an enumerated offence only "where the act causing death and the acts constituting [the enumerated offence] all form part of one continuous sequence of events forming a single transaction"); *R. v. Kirkness*, [1990] 3 S.C.R. 74, at p. 86. [Emphasis added.]

[38] Lastly, in *Pritchard*, Binnie J. stated that there must be a "close temporal and causative link" for s. 231(5) to apply (para. 33, quoting *Paré*, at p. 629). In the

same paragraph, he explained that the murder will occur “while committing” a listed offence when the two crimes occur together in the course of a “single transaction”.

[39] Accordingly, properly applied, the single transaction test and temporal-causal connection approach involve the same inquiry and will result in the same conclusion. When a single transaction is found, there will necessarily be a temporal-causal connection. Likewise, when a temporal-causal connection is found, there will necessarily be a single transaction.

(7) Distinct Criminal Acts

[40] Finally, this Court has ruled that the underlying offence of domination and the killing must involve two distinct criminal acts (*Pritchard*, at para. 27, citing *Kimberley*, at para. 108, per Doherty J.A.; *Magoon*, at para. 74; see also Manning and Sankoff, at pp. 961-62). The underlying offence cannot be “consumed in the very act of killing”; in other words, the underlying offence and the killing must not be one and the same (*Pritchard*, at para. 27). If there is only one criminal act, it cannot be said that the offender exploited the domination inherent in the underlying offence with the act of killing (para. 29). In such cases, the heightened moral blameworthiness required for first degree murder is absent.

C. *Application*

[41] There is no issue before this Court that the appellant was guilty of murdering Mr. McLeod even though he did not fire the fatal shot. The trial judge found that the appellant shot at Mr. McLeod with lethal intent and hit him at least three times. The parties do not dispute that these shots were a substantial cause of Mr. McLeod's death because they prevented him from escaping his captors, before he was shot and killed at close range. The only dispute before this Court is whether the murder was in the first or the second degree. This turns on (1) whether Mr. McLeod was still unlawfully confined after he escaped from the truck; and (2) whether the unlawful confinement (inside or outside the truck, or both) and the murder were part of the same transaction.

(1) Mr. McLeod Was Still Unlawfully Confined When He Escaped From the Truck and Ran for His Life

[42] The trial judge correctly concluded that the appellant unlawfully confined Mr. McLeod inside the truck because he was “coercively restrained and unable to move about according to his own inclination and desire” (para. 287). He erred in law, however, in concluding that Mr. McLeod “managed to escape his confinement” by jumping from the truck, and that “at the time Mr. McLeod was shot, his confinement had ended” (para. 288). The trial judge appears to have concluded that because Mr. McLeod was no longer *physically restrained* outside the truck, he was no longer unlawfully confined. However, physical restraint in a particular place is sufficient but not necessary to establish unlawful confinement. Even if Mr. McLeod were no longer physically restrained outside the truck, he remained *coercively restrained* through acts

of violence, fear, and intimidation as he ran for his life. He continued to be deprived of his liberty and could not move about according to his inclination and desire. Crown counsel made this point vividly during oral argument before this Court:

If Mr. McLeod was free to move about according to his own inclination and desire, the [Crown] would hazard to guess that instead of running through deep snow, cutting across fences, poorly dressed in the dead of night in rural Prince George, he would have instead sought out the nearest house, sought some shelter and tried to arrange transport back to his rental car in Vanderhoof.

(transcript, at p. 23)

[43] The trial judge himself recognized Mr. McLeod's continuing loss of liberty, finding that "Mr. McLeod was still in a situation of vulnerability, and that vulnerability was the consequence of the manner in which he had been dealt with in the truck" (para. 289).

[44] The appellant claims that this line of analysis was precluded before the Court of Appeal and this Court, because it (1) does not involve a question of law alone and (2) is a new theory of liability on appeal. I would reject both claims.

[45] First, I do not accept that the trial judge's conclusion that Mr. McLeod was no longer unlawfully confined outside the truck is a question of mixed fact and law, falling outside the Crown's right of appeal to the Court of Appeal on "a question of law alone" under s. 676(1)(a) of the *Criminal Code*. The Crown's appeal did not challenge the trial judge's findings of fact or raise a question of how to weigh the evidence and

assess whether it meets the standard of proof. Rather, it challenged the legal effect of the trial judge's findings of fact and his misapprehension of the law relating to unlawful confinement, both of which involve "a question of law alone" falling within the Crown's right of appeal (*R. v. Chung*, 2020 SCC 8, at paras. 10-11; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 28-30). The trial judge erred in law by viewing unlawful confinement as requiring (1) physical restraint and (2) that the physical restraint be in an enclosed space. As a matter of law, neither element is required.

[46] Second, I reject the appellant's assertion that whether Mr. McLeod remained unlawfully confined after he escaped from the truck was a new theory of liability that was not advanced at trial. Like the Court of Appeal (at paras. 134-38), I accept that the Crown's closing submission urged that "the murder was committed in the course of an unlawful conf[inement]" (A.R., vol. III, at p. 60; see also p. 61 ("a murder in the course of an unlawful confinement")). The theory of unlawful confinement outside the truck was thus properly raised at trial.

[47] As a result, the Court of Appeal correctly held that Mr. McLeod remained unlawfully confined after he escaped from the truck.

[48] The remaining issue is whether the appellant murdered Mr. McLeod "while committing" the offence of unlawful confinement; that is, whether these two criminal acts were part of the same transaction.

(2) The Appellant Murdered Mr. McLeod “While Committing” the Offence of Unlawful Confinement

[49] Like the Court of Appeal (at paras. 173-74), I have no difficulty concluding that the appellant murdered Mr. McLeod “while committing” the offence of unlawful confinement. The unlawful confinement and the murder were part of one continuous sequence of events forming a single transaction. The unlawful confinement and the murder were close in time — in fact, Mr. McLeod was still unlawfully confined at the time of his death. The unlawful confinement and the murder also involved an ongoing course of domination consisting of intimidation, fear, and violence. The course of domination started in the truck, continued when Mr. McLeod jumped from the moving truck and was chased by the appellant and his accomplices, and ended with his murder. The two criminal acts were also distinct: the unlawful confinement — including the restriction of Mr. McLeod’s freedom of movement inside and outside the truck and the ongoing acts of violence, fear, and intimidation — was distinct from and not consumed by the shooting. These conclusions amply justified a verdict of first degree murder.

[50] In view of this conclusion, it is not necessary to also apply the temporal-causal connection approach, as the finding of a single transaction necessarily means that a temporal-causal connection is established. In any event, the temporal-causal connection inquiry yields the same conclusion. The unlawful confinement and the murder were connected temporally because Mr. McLeod was unlawfully confined shortly before and at the time of his death. They were also connected causally, by sharing a unifying relationship, because the appellant murdered

Mr. McLeod as he was trying to escape from his unlawful confinement. The first degree murder verdict was thus justified on the basis of the close temporal-causal connection between the unlawful confinement and the murder.

[51] I would reject the appellant's contention that whether the unlawful confinement and the murder of Mr. McLeod were temporally and causally connected is a question of fact from which the Crown had no right of appeal to the Court of Appeal. Like the Court of Appeal (at paras. 169-75), I conclude that the trial judge erred in law by concluding that the "brief . . . gap in time" between the unlawful confinement in the truck and the murder precluded these criminal acts being part of the same transaction. The trial judge erroneously insisted that the unlawful confinement and the murder must be simultaneous, a view that this Court has consistently rejected since *Paré*.

[52] Further, as the Court of Appeal held (at para. 169), even had the trial judge been correct that the unlawful confinement ended once Mr. McLeod jumped from the truck, the trial judge should have considered whether that unlawful confinement and the murder formed a single transaction. For the reasons already stated, they undoubtedly did.

[53] In conclusion — and to state the obvious — if the appellant had shot and killed Mr. McLeod when he was unlawfully confined in the truck, the appellant would unquestionably be found to have murdered Mr. McLeod "while committing" the offence of unlawful confinement. As a matter of law and common sense, Mr. McLeod's

brief escape from the truck cannot mitigate the appellant's crime. On any sensible view, the appellant's moral blameworthiness cannot be considered to be lower simply because Mr. McLeod managed to jump from a moving truck and was running for his life when he was executed just moments later. In both cases, the appellant's moral blameworthiness is exceptionally high; in both cases, it is equally deserving of "a societal denunciation of those offenders who choose to exploit their position of dominance and power to the point of murder" (*Luxton*, at p. 723).

[54] The Court of Appeal was thus correct in finding the appellant guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*.

VII. Disposition

[55] I would dismiss the appeal.

Appeal dismissed.

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