**SCC File No.: 36524**

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**APPELLANT**
**(RESPONDENT)**

**AND:**

**MICHAEL BRUCE NEWMAN**

**RESPONDENT**
**(APPELLANT)**

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# APPELLANT'S FACTUM

**(Pursuant to s.693(1)(a) of the *Criminal Code)***

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# I N D E X

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## Part I – Statement of Facts

### A. Overview

1. This appeal concerns the application of s. 231(5)(e) of the *Criminal Code* which provides that anyone who causes death while committing or attempting to commit an offence of illegal domination, in this case unlawful confinement contrary to s. 279(2), is guilty of first, not second, degree murder in recognition of the killer's greater moral culpability. It is beyond contestation that the respondent murdered 38 year old Mark Rozen in January of 2004 at the conclusion of a prolonged and violent confrontation/robbery. What remains to be definitively decided is the degree of his culpability.

2. This decision rests on a narrow issue. Was the trial judge correct in law to find that within what was inarguably one continuous series of events constituting a single transaction, the respondent committed two discrete criminal acts, one contrary to s. 279(2) and a second contrary to the culpable homicide provisions? Even more specifically, at minimum, was the accepted act of actual unlawful confinement where the respondent prevented the already gravely wounded Mr. Rozen from escaping his apartment independent of, or one and the same as, the act of killing him?

3. There is really nothing remaining in dispute with respect to the facts. What is in dispute is the correct legal effect to be given to them and whether they permit the proper invocation of s. 231(5)(e).

4. The majority found that the constructive first degree murder provision was wrongly invoked by the trial judge. The majority so decided not because the Crown failed to prove an offence contrary to s. 279(2). Clearly, on the view of the majority, the Crown did. The respondent attacked Mr. Rozen in his own home, armed with at least one loaded handgun and a knife. He failed to secure his victim's cooperation at the point of these weapons. Instead, Mr. Rozen defended himself resolutely. A prolonged violent, brutal and bloody struggle took place through virtually the entire apartment. A great deal of blood was shed by both men: the respondent from a knife wound to his

neck; Mr. Rozen from multiple knife wounds and a grievous gunshot wound to his neck and head. Expirating blood due to this gunshot wound, Mr. Rozen made a bid to escape to safety by leaving his 11th floor apartment the only way he could, through the front door. The respondent prevented him from doing so, unlawfully confining him. Some minutes later, in another room, with Mr. Rozen in a "severely weakened condition"[1], the respondent committed murder by shooting him at very close range in the back of the head killing him instantly. The respondent did all this to the apparent end of stealing an expensive ring.

5. The majority found instead that the failure of the Crown's first degree murder case was due to the absence of proof of the respondent's commission of two discrete criminal acts. Rather than concluding as the trial judge did that this confinement was distinct from the murder, the majority re-characterized the physical restraint of Mr. Rozen inside his front door by the respondent as being "'consumed' in the overall act of killing" and that "the confinement aspect of the attack" was "coextensive with the acts that caused his death". In the result, the majority substituted a verdict of second degree murder and remitted to the trial judge the imposition of a period of parole ineligibility. This aspect of sentencing has been adjourned pending this Court's disposition of this appeal.

6. Smith JA dissenting agreed with the trial judge. She found that the act of confinement at the apartment door was "distinct and independent from the final act of killing", not "integral to or consumed by the act of shooting Mr. Rozen in the back of the head" (paras. 112 & 113). She would therefore have upheld the first degree murder verdict.

7. The issue of law before this Court is whether the majority was correct in its determination of the proper legal effect of the facts. The Crown/appellant submits that the majority erred in three respects. One, the majority erred by failing to consider whether, in addition to the accepted act of confinement at the door, the Crown had proven an attempt by the respondent to unlawfully confine Mr. Rozen. Two, the majority

[1] The reasons of the majority, at para. 79, Appellant's Record, Pt. I, Vol. 1, 95

wrongly elevated the purpose for which the respondent confined Mr. Rozen from what the law says is an irrelevancy to being, effectively, the determinative factor. Three, the majority erred in its choice of the operative act of killing for the purposes of ascertaining the distinctiveness of the act of confinement from the murder. These errors led the majority into error in its answer to the question of law raised by the dissent of Smith JA – whether the trial judge was correct in finding the respondent guilty of first degree murder on the basis of s. 231(5)(e)?

**B. Statement of Facts**

8. The following is to provide a more detailed context for the resolution of the issue on appeal even though, as stated, there is little dispute about the facts.

9. Marc Rozen lived alone in a two bedroom apartment in Vancouver's West End. In January 2004, he was selling a diamond engagement ring returned by his ex-fiancée. It had an appraised value of $18,000. A private seller could expect to receive around 50% of the appraised value. By prior arrangement, on Tuesday, January 6, 2004, during the noon hour at his apartment, Mr. Rozen met with a man he understood to be a prospective buyer. That man was the respondent.

> Appellant's Record ("AR"), Pt. III, Vol. 1, 124(35) to 125(5) (David Levinson); AR, Pt. III, Vol. 6, 165(13) to 166(25), 170(47) to 171(26) (Wayne Bishop); AR, Pt. III, Vol. 7, 2(22-26), 5(11-32) (Paige Kerr).

10. The trial judge found that the respondent arrived in the company of a woman. He brought with him two loaded handguns and a silencer. At some point, the respondent assaulted Mr. Rozen and a physical confrontation ensued. At times, it was violent and noisy, as neighbours heard persons or objects banging into different walls, furniture being knocked or moved about and raised voices, specifically Mr. Rozen's pleading for help. They also heard a female's voice at one point. At other times, there were periods of quiet, following which the sounds of the fighting would resume. One such period of quiet followed loud sounds the immediate neighbour identified as being located at or near Mr. Rozen's front door. This struggle was a very bloody one. At its conclusion,

Mr. Rozen lay on his back on his living room rug, dead from multiple gunshot and knife wounds. The ring had been stolen.

> AR, Pt. III, Vol. 1, 85(24-26), 85(38) to 86(43) (Barbra Darovski); AR, Pt. III. Vol. 1, 14(16) to 18(24) (Richard Produnak): Ex. 21, 11th floor plan (partial), 1806 Haro St., AR, Pt. IV, Vol. 1, 9; Trial Judge's Reasons for Judgment ("RFJ"), paras. 28-31, AR, Pt. I, Vol. 1, 7-8, paras. 40 – 42, 10-11, paras. 44 – 47, 12-13; 74; AR, Pt. III, Vol. 1, 78(31-35) (Sgt. McMillan); AR, Pt. III, Vol. 5, 101(6-8) (Dr. Lee); Ex.187, autopsy report, AR, Pt. IV, Vol. 1, 176; RFJ, paras. 48 – 50, AR, Pt. I, Vol. 1, 13-14.

11. At approximately 1:15 to 1:20 p.m., through her peephole, a neighbour saw the respondent leaving Mr. Rozen's apartment, closing and locking the door with a set of Mr. Rozen's keys. He was alone. Some period of time had elapsed since the sounds of fighting ceased for the final time. He took the elevator to the lobby and left the building. The building's resident manager, who was waiting for police to attend pursuant to his 9-1-1 call made at 12:59 p.m. at the urging of an 11th floor resident, observed his departure. The respondent was dripping blood and showed signs of being injured. He had a towel wrapped around a wound to his neck. He was wearing a dark coloured toque and winter jacket belonging to Mr. Rozen, having discarded his own heavily blood-stained jacket in the apartment's bathroom.

> AR, Pt. III, Vol. 1, 92(47) to 93(9), 94(44) to 96(2) (B. Darovski); AR, Pt. III, Vol 1, 42(35) to 44(10), 44(18-21), 45(23) to 49(38), 54(22-31) (Srdjan Cosovic); AR., Pt. III, Vol. 2, 9(24-34), 12(29) to 13(32) (Sgt. Hamilton); Ex. 10, 9-1-1 call transcript, AR, Pt. IV, Vol. 1, 4; Ex. 11, 9-1-1 call transcript, AR, Pt. IV. Vol. 1, 5-8; Ex. 34, photos A07 – A09, AR, Pt. IV, Vol. 1, 22-24; RFJ, paras. 43, AR, Pt. I, Vol. 1, 11-12, paras. 32 – 36, 8-10, para. 81, 19.

12. As for the unknown woman who had arrived with him, with or without the "remotely possible" unknown male accomplice[2], she (or they) had left Mr. Rozen's apartment at an earlier point. The building's manager later remembered seeing a couple he did not recognize leaving as he waited in the lobby for the police to arrive. He estimated they could have left some 30 to 45 minutes before the respondent. The

[2] The possibility of there being an unknown male accomplice arises from the testimony of the respondent, summarized at para. 20 herein. The trial judge found the possibility of involvement of this male "remote" (RFJ, para. 301, A R, Pt. I, Vol. 1, 64)

clothing of neither the man nor the woman was bloodstained. Neither person appeared injured in any way. The lack of female foot or additional shoe impressions in blood on the apartment's floors would suggest that she (they) left before those floors were heavily bloodstained.

AR, Pt. III, Vol. 1, 52(14) to 53(24), 62(1-20) (S. Cosovic); RFJ, paras. 37 – 39, AR, Pt. I, Vol. 1, 10.

13. On police attendance, there was blood in the elevator and on the lobby floor. In Mr. Rozen's apartment, opened with a key provided by the building's manager, there was blood on the floors, the walls and doors, in every room except the master bedroom. There were foot impressions in blood – some barefoot, some sock feet, with very few actually made by footwear - throughout the apartment. There were other obvious signs of a physical altercation: a knocked over plant in the living room, an overturned dining room chair, and a hole in the gyproc wall in the entrance hallway. Heavily bloodstained clothing and towels were discarded on the bathroom floor.

AR, Pt. III, Vol. 1 67(35) to 68(10), 69(22) to 71(7) (PC Foster); AR, Pt. III, Vol. 1, 77(43) to 78(4) (Sgt. McMillan); AR, Pt. III, Vol. 2, 24(23-26) (Sgt. Hamilton); Ex. 34, photo B08, AR, Pt. IV, Vol. 1, 46; Ex. 277, plan drawing re: footwear impressions, AR, Pt. IV, Vol. 1, 197; RFJ, paras 48 – 50, AR, Pt I, Vol. 1, 13-14, para. 89, 20.

14. Mr. Rozen's shirt was heavily stained with his own and the respondent's blood. A wad of chewing gum, chewed by the respondent, was stuck to Mr. Rozen's shirt. He was barefoot. There was a knife found on his chest. He had sustained 62 - 63 cuts and stab wounds to his body, the most serious to his head and neck. One stab wound to his neck was potentially fatal in its own right. He had defensive injuries to his hands and one forearm. He also had stab wounds and cuts to the inside of his thighs.

AR, Pt. III, Vol. 1, 79(13-31), 83(36-40) (Sgt. McMillan); AR, Pt. III, Vol. 2, 48(34) to 49(2) (Sgt. Hamilton); Ex. 34, photos D13 and D14, AR, Pt. IV, Vol. 1, 93-94; AR, Pt. III, Vol. 5, 100(34) to 101(1), 111(43) to 112(10), 121(13) to 122(29), 126(18) to 128(11), 130(12-15), 130(20) to 131(15), 137(8-42) (Dr. Lee); AR, Pt. III, Vol. 6, 121(10-16) (Hiron Poon); RFJ, paras. 63 – 70, AR, Pt. I, Vol. 1, 16-17, paras. 168 – 181, 38-39.

15. Mr. Rozen had been shot four times. Two wounds, one to his hand and the other to his right upper back, were not gravely serious. A third was potentially fatal. It entered his lower neck from back to front with the bullet lodging in the left cheek area, causing bleeding in the nasal and oral cavity. This bleeding would have resulted in Mr. Rozen aspirating blood. It was this aspirated blood that stained, in part, the interior surface of the door, the door jamb and adjacent wall (see para. 22 below). All three of these shots, the third most certainly, appeared to have occurred before the confinement at the door. The final gunshot wound truly was the final shot. Using a different gun, the respondent fired this shot from a range of one to three inches into the back of Mr. Rozen's head. It was instantly fatal. This bullet was found on Mr. Rozen's body, near the exit wound. Six shots in total were fired: five from one handgun; only one from the other. Police found only one shell casing, almost camouflaged on the metal track of the dining room's sliding patio door. The respondent took the two handguns and silencer with him.

AR, Pt. III, Vol. 5, 101(29) to 111(34), 142(33) to 143(1) (Dr. Lee); AR, Pt. III, Vol. 2, 50(17-26), 91(46) to 92(35) (Sgt. Hamilton); AR, Pt. III, Vol. 6, 178(15-29) (Coroner Fonseca); RFJ, para. 56, AR, Pt. I, Vol. 1, 15, paras. 58 – 62, 15-16, para. 82, 19, paras. 145 – 165, 34-38.

16. Not for the want of medical coverage, the respondent sought treatment for his injuries privately, at a surgeon's office, later that afternoon. By doing so, he evaded detection by reason of the police advisory issued to local hospital emergency wards and medical clinics to be on the lookout for an individual seeking treatment for apparent knife wounds. The treating surgeon described the injury requiring stitches to the respondent's neck as a knife wound, not a gunshot wound. He described the respondent's other injuries as superficial. An associate of the respondent paid cash for this medical service, an act which stymied attempts at subsequent detection through Medical Services Plan records.

AR, Pt. III, Vol. 7, 46(10-11), 46(44) to 52(47) (Dr. Gentis); RFJ, paras. 53, AR, Pt. I, Vol. 1, 14, paras. 183 – 184, 41-42, paras. 191 – 199, 43-44.

17. A police artist prepared a drawing of the suspect based upon the building manager's description. Although this drawing was prepared in a timely fashion, it was not until June 2006 that investigators released it to local media. A member of the Abbotsford Police Department saw the drawing and thought it looked like the respondent, as he appeared in a photograph in her possession. This officer notified the Vancouver Police Department ("VPD") investigator, providing him with the respondent's full name and an address in Vancouver. Investigators had not previously connected the respondent with Mr. Rozen's murder.

RFJ, paras. 100 – 102, AR. Pt. I, Vol. 1, 24.

18. More than three years following the murder, in late March of 2007, the York Regional Police ("YRP") arrested the respondent in Vaughan, Ontario on drug charges. He was using a false name. YRP detectives notified their VPD counterparts. A search of the respondent's residence by the YRP located two handguns and a silencer. These handguns were used in the killing of Mr. Rozen. One, a Beretta equipped with the silencer, was carelessly fired, either by the respondent or his female accomplice, a total of five times: three striking Mr. Rozen, as noted above, a fourth lodging behind a front closet wall and a fifth bullet being found lying on the stove top in the kitchen. The second gun, a Ruger, was used only once, by the respondent, to deliver the execution-style shot to the back of Mr. Rozen's head.

AR, Pt. III, Vol. 3, 137(8-40), Vol. 4, 23(12-23) (PC Deighton); RFJ, paras. 78 – 79, AR, Pt. I, Vol. 1, 18, paras. 123 – 138, 28-33, paras. 308 – 313, 66, paras. 325 & 327, 69, para. 338, 72-73.

19. This trial was lengthy. The Crown called over 65 witnesses. More than 280 exhibits were filed. The Crown adduced extensive forensic evidence from a variety of disciplines. Foremost amongst these disciplines were the serology (DNA) evidence, the blood stain pattern analysis ("BSPA") evidence, the footprint impressions evidence and the ballistics evidence. About the footprint evidence, the trial judge noted that it "clearly does not show everywhere that each of the participants walked during the encounter." Thus, it "only tells a limited part of the story" (RFJ, para. 303). Taken cumulatively, while unable to answer each and every question as to why, how and in exactly what order events transpired, the evidence was more than sufficient for the trial judge, upon a

consideration of the evidence in its entirety, to conclude, *inter alia*, that: (all references are to AR, Pt. I, Vol. 1 with page number following paragraph number)

a. the respondent was never unlawfully assaulted by Mr. Rozen (RFJ, para. 268, 56);

b. if there was a man and a woman inside apartment #1106 for some period of time, they were associates of the respondent who arrived with, and left before, him (para. 269, 56) and who joined with the respondent in the attack on Mr. Rozen (para. 338, 72-73);

c. the respondent had a physical confrontation with Mr. Rozen inside the apartment (para. 292, 61);

d. the respondent supplied the guns and silencer that were used in the assault on Mr. Rozen (para. 296, 62);

e. whoever else may have been in the apartment, the respondent was the one most thoroughly and actively engaged in the physical struggle with Mr. Rozen (para. 292, 61 );

f. the physical struggle moved from place to place in the apartment (para. 304, 65);

g. the blood and the DNA of Mr. Rozen and the respondent are found in virtually every room of the apartment but one (para. 304, 65);

h. whoever killed Mr. Rozen also stole the ring (para. 290, 60);

i. the struggle involving a knife or knives was a struggle between Mr. Rozen and the respondent, and not others, and that the respondent caused most, if not all, of the 62 to 63 cuts and stab wounds to Mr. Rozen (para. 331, 70-71);

j. whatever injuries the respondent sustained at the hands of Mr. Rozen were the result of Mr. Rozen trying to defend himself from the respondent's attack upon him, and not the other way around (para. 340, 73);

k. the respondent fired the Ruger at close range to the back of Mr. Rozen's head and thereby caused his death (para. 327, 69); and

l. the respondent took both guns and the silencer with him and kept them in his possession until their recovery by the YRP in March, 2007 (para. 268, 56; 325, 69).

20. The evidence from which the above conclusions were drawn included the testimony of the respondent. He admitted that he attended Mr. Rozen's apartment. He testified he was intent upon buying the ring, bringing $7,000 in cash with which to do so. He claimed that he, like Mr. Rozen, became an innocent victim of the attack mounted by the unknown man and woman. He sustained injuries and was ultimately rendered

unconscious when he sought to intervene and come to Mr. Rozen's defence. He denied bringing the guns. He denied knowing the man and woman. He denied taking the ring. He admitted taking the guns with him when he left the apartment, explaining that with his connections, he thought he would be able to use them to identify the perpetrators. He admitted keeping the guns in his possession until their seizure by the YRP. The trial judge rejected the exculpatory aspects of the respondent's testimony, finding them to be deliberately concocted with intent to mislead the court (RFJ, paras. 269-285, 56-60).

**(a) The Trial Judge's Findings re: Murderous Intent and Cause of Death**

21. Drawing in part on the pathologist's evidence, the trial judge made these findings:

a. the respondent caused Mr. Rozen's death by inflicting multiple gunshot and stab wounds, principally those wounds to the head and neck (para. 289, 60);

b. the respondent fired the shot at close range "to the back of Mr. Rozen's head and thereby caused his death" (paras. 314, 67; 327, 69);

c. the Mr. Rozen was virtually exsanguinated at the time this final shot was fired (para. 317, 67);

d. the act of firing this final shot was accompanied by both intents *per* s. 229(a)((i) and (ii) (para. 330, 70);

e. the respondent caused most, it not all, of the 62 to 63 cuts and stab wounds to Mr. Rozen (para. 331, 70-71);

f. the knife wounds were a substantial and contributing cause of death and the respondent's culpability for murder was established under s. 229(a)(ii) independently of the gunshot wounds (para. 332, 71).

The trial judge made no finding specific to the earlier potentially fatal gunshot wound where the bullet lodged in Mr. Rozen's sinus/cheek.

**(b) The Trial Judge's Specific Findings Triggering s. 231(5)(e)**

22. The trial judge expressly found that during the course of the confrontation, the respondent unlawfully confined Mr. Rozen on three, discrete occasions. The first occurred inside the closed front door of the apartment. Due to the presence of expirated blood on the door's surface, the trial judge concluded that, by this point, Mr.

Rozen had sustained, at least, the potentially fatal shot through the back of his neck. This injury caused him to aspirate blood. The respondent's commission of the offence of unlawful confinement was complete when he prevented Mr. Rozen from escaping the apartment (RFJ, paras. 307, 65-66; 347, 75). The majority agreed, at paras. 67-71 (92-93) (all references to the judgments of the Court of Appeal are to AR, Pt. I, Vol. 1, with page numbers in brackets following the paragraph numbers), stating at para. 71 (93): "it was open to the trial judge to draw the inference that Mr. Rozen, who had been shot and stabbed, and was being attacked, attempted to flee to safety through the apartment's door." At para. 109 (105) Smith JA wrote: "I agree with my colleague that, based on the totality of the evidence, it was open for the trial judge to infer that Mr. Rozen was confined by [the respondent] when Mr. Rozen attempted to escape through the front door of his suite before he was fatally shot in the back of the head."

23. The second occurred at an uncertain point in time. It consisted of Mr. Rozen sitting in the dining room chair, bleeding into its cushion from, *inter alia*, stab wounds and cuts to the inner thighs of both his legs. (RFJ, paras. 306, 65; 348, 75). The majority disagreed at paras. 72-75 (93-94), stating at para. 75 (94): "While the established facts support the inference that at some point Mr. Rozen was in a seated position in the chair, those facts are not logically and reasonably capable of supporting the inference that he was 'forced' to sit." The majority felt that there were "simply too many unknowns with respect to what transpired during the struggle and how Mr. Rozen came to be in the chair." Smith JA did not specifically address this second instance.

24. The third took place in the living room where the respondent shot Mr. Rozen in the back of his head with the Ruger. This shooting was the final unlawful act and the one which immediately caused death. (RFJ para. 349, 75-76) The majority disagreed at paras. 76-79 (94-95), concluding that the trial judge must have meant that the respondent "forced" Mr. Rozen to kneel in front of him. At para. 79 (95), Frankel JA for the majority wrote: "In my view, the evidence as to the manner in which the final shot was fired is not logically and reasonably capable of supporting the inference that Mr. Rozen was 'forced' to assume a submissive position. Once again, there are too many

unknowns." Smith JA did not specifically address the trial judge's finding of a third discrete occasion of unlawful confinement.

25. The trial judge found that the acts causing Mr. Rozen's death and the acts constituting the offence of unlawful confinement formed a single transaction. He also found that "the acts of confinement go beyond those acts that are simply inherent in the killing itself" (para. 350, 76).

**Part II – Issue on Appeal**

26. This Crown appeal as of right pursuant to s. 693(1)(a) is based on the question of law arising from the dissenting judgment below of Smith JA. The Order of the Court of Appeal for British Columbia sets out this question of law as follows: "was the trial judge correct in finding the [respondent] guilty of first degree murder on the basis of s. 231(5)(e) of the *Criminal* Code?" By answering this question negatively, the majority failed to give the correct legal effect to the facts as found by the trial judge and as confirmed in the appellate court. This failure is sourced in: (i) the majority's erroneous assessment of the distinctiveness of the respondent's act of unlawful confinement from his act of killing; and (ii) the majority's erroneous determination of what constituted the act of killing for the purposes of that assessment.

## Part III – Argument

### (a) Constructive First Degree Murder *per* s. 231(5)(e)

27. Section 231(5) does not create a distinct offence but rather an aggravated from of murder: ***R. v. White***, 2014 ONCA 64, at para. 43.

28. There are five essential elements which must be proven to invoke the constructive first degree murder provisions. The fifth comprises two parts. At issue on this appeal is the second part of the fifth element. The five elements are:

a. the commission of the predicate offence or underlying offence of illegal domination (in this case, unlawful confinement) or an attempt to commit this crime (the unlawful confinement requirement);

b. the commission of the offence of murder (the murder requirement);

c. Participation on the murder so as to be a substantial cause of the death of the victim;

d. the absence of an intervening act resulting in the accused no longer being substantially connected to the death of the victim; and

e. the crimes of unlawful confinement and murder were part of the same series of events so as to constitute a single transaction (the necessary temporal and causal connection) and the crimes of domination and murder must be discrete or independent criminal acts. They cannot be one and the same.

   ***R. v. Harbottle***, [1993] 3 S.C.R. 306 at p 325[b-g]***; R. v. Parris***, 2013 ONCA 515 at paras 44 & 45; ***R. v. Pritchard***, [2008] 3 S.C.R. 195 at paras. 3 & 27.

29. Where "there is a confinement and then in the course of the same series of events, the victim is murdered while under the unlawful domination of the killer, the rationale underlying s. 231(5)(e) is fully engaged: ***R. v. Kimberley*** (2001), 56 O.R. (3d) 18 (Ont. C.A.), at para. 108. The added punishment is justified in these circumstances. This justification is missing when the confinement is inherent in the very act of murder

30. It is not necessary that the offence of unlawful confinement be a completed act. "The provision is invoked equally when an accused attempts to unlawfully confine the victim or another person": *per* Watt JA in ***Parris*** at para. 47

**(b) Preliminary Observations**

31. Proceeding on the basis that the majority found an act of unlawful confinement contrary to s. 279(2) makes it unnecessary to devote argument herein to whether or not the respondent committed that offence. All four judges in the courts below agree that he did. The unlawful confinement requirement is satisfied. It was not the absence of this requirement that led the majority to find s. 231(5)(e) inapplicable.

32. Proceeding in this manner also makes it unnecessary for the appellant to take issue with the majority's intervention in the inferences drawn by the trial judge with respect to a second and third instance of completed acts of confinement, something the denial of the application for leave to appeal[3] would most likely dictate in any event. The appellant is not, however, prevented in either of these circumstances from putting forward what it says is the legal effect of the facts as found by the trial judge and as confirmed by the Court of Appeal.

33. During the period of time from the commencement of his attack through to the events at the front door of the apartment, the respondent was attempting to unlawfully confine Mr. Rozen. At the front door, by physically preventing him from escaping in order to seek assistance thus inherently restraining his liberty to move about according to his wishes, the respondent unlawfully confined Mr. Rozen. As the struggle then took the two men through the adjacent kitchen into the dining room (where the degree of disturbance to furniture was minimal) and living room (where there was a knocked over chair and large house plant), the respondent acquired physical domination over his increasingly weakened victim. The confinement which began at the front door persisted throughout this critical period of time. Unlawful confinement is a continuing offence: ***R. v. Vu***, 2012 SCC 40, [2012] 2 S.C.R. 411, at paras. 33, 40; ***R. v. Parris***, at para. 47. As Wilson J noted in ***R. v. Paré***, [1987] 2 S.C.R. 618 at p. 633[d], "it is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder."

[3] Application for leave to appeal denied, November 19, 2015.

34. The respondent's domination became complete at the point Mr. Rozen was no longer able to physically resist. It was at this point, in the ultimate act of exploitation of his dominance and control, the respondent fired the execution-style shot immediately causing Mr. Rozen's death. The unlawful confinement at the door was separate from the act of killing in place, time and circumstance. In other words, the unlawful confinement was not consumed in, or coextensive with, the murder which occurred by different means in a different location within the apartment at a different time. The acts were not one and the same. The respondent committed two discrete criminal offences. He was rightfully convicted at trial of first degree murder on this basis. His conduct is on all fours with the rationale behind the elevation of murder from second to first degree.

**(c) The Judgments in the Court of Appeal**

35. For convenient reference, the appellant excerpts what it says are the critical findings in the respective judgments below. First, the majority:

> [97] . . . it is clear that Mr. Rozen was killed during a prolonged and brutal struggle. By the time that struggle reached the front door of the apartment he had been shot and stabbed. <u>There can be no doubt [the respondent] attacked Mr. Rozen throughout the apartment for the purpose of killing him.</u> That [the respondent], while continuing that attack at the front door, prevented Mr. Rozen from leaving the apartment cannot be said to constitute an independent act of confinement or attempted confinement. Put otherwise, what occurred at the front door was "consumed" <u>in the overall act of killing</u>.
>
> [98] As the confinement aspect of the attack on Mr. Rozen was coextensive with <u>the acts that caused his death</u>, [the respondent] is guilty of second degree murder, not first degree. (emphasis added)

36. Second, Smith JA dissenting:

> [109] . . . I agree with my colleague that, based on the totality of the evidence, it was open for the trial judge to infer that Mr. Rozen was confined by [the respondent] when Mr. Rozen attempted to escape through the front door of his suite before he was fatally shot in the back of the head. Where my colleague and I respectfully differ is on the issue of whether that confinement was integral to or consumed by the final act of killing Mr. Rozen . . .

* * * * *

> [112] . . . In a final attempt to stop the brutal assaults, Mr. Rozen tried to escape through the front door, however, as found by the trial judge based on the evidence as a whole, which finding is upheld on appeal, [the respondent] prevented him from doing so. This act of confinement of Mr. Rozen at the door to his apartment, while temporally and causally connected to the series of events that occurred inside his apartment that day, was in my respectful view distinct and independent from the final act of killing; it was not integral to or consumed by the act of shooting Mr. Rozen in the back of the head.
>
> [113] More broadly, the threatening of Mr. Rozen with a gun and knife and multiple assaults with those weapons throughout various rooms in the apartment also constituted confinement as those acts were unlawful restraints of Mr. Rozen's liberty in which [the respondent] maintained a position of dominance over Mr. Rozen. . . . [T]hese additional instances of confinement . . . were not in my respectful view integral to or consumed in the act of shooting Mr. Rozen in the back of the head. (emphasis added)

**(d) An Attempt Suffices**

37. Other than tracking the language of s. 231(5), in his reasons for judgment, the trial judge did not make a specific finding that the respondent attempted to unlawfully confine Mr. Rozen. On his findings of fact, it was not necessary for the trial judge to do so. Neither judgment in the Court of Appeal expressly addresses this point. However, in her dissenting judgment, at paras. 109 and 113, Smith JA twice referenced the "broader context". The first such reference is limited to events "that transpired before [Mr. Rozen] was prevented from escaping the apartment".

38. The appellant submits that during this period of time, the respondent was attempting to unlawfully confine Mr. Rozen by means of threats and assaults. In the face of Mr. Rozen's resistance, the evidence supports a finding that the respondent persisted in his efforts to physically restrain Mr. Rozen contrary to his wishes (the *actus reus* of an attempt to unlawfully confine). The respondent's persistence in this respect reinforces the presence of an intention to dominate and confine him (the *mens rea*) *per* ***White***, at para. 97. This is sufficient to invoke the constructive first degree provision, provided the attempt is distinct from the act of killing as the appellant contends it was.

**(e) The Operative Act of Killing for s. 231(5) Purposes**

39. It is readily apparent from the excerpts quoted above that a critical distinction between the two judgments in the Court of Appeal pertains to the identification of the operative act of killing for the purposes of assessing its independence from the accepted act of confinement. The majority refers to "the overall act of killing" (para. 97) and to "the acts that caused [Mr. Rozen's] death" (para. 98) whereas Smith JA speaks of "the final act of killing" (paras. 109 & 113), understood to be the immediately fatal, execution-style shot to the back of the head. With respect, the majority's approach is incorrect, in law and in fact. Further, as addressed in subsection (f) below, the majority's inclusive or all-encompassing approach is inseparable from its conclusion regarding the respondent's purpose, also contained in para. 97.

40. Factually, it is not disputed that the respondent's attack upon Mr. Rozen, from its commencement through to its conclusion, constituted a connected series of events or a single transaction. The trial judge so found at para. 350 of his reasons. This transaction was brought to an end by the execution-style shooting. Within this single transaction, there was also, at a minimum, a single completed act of unlawful confinement. Some period of time, perhaps as much as a few minutes, separated these two acts which occurred in different locations in the apartment. At the door, Mr. Rozen was still resisting the respondent; in the living room, he was no longer able to do so. The confinement at the door clearly preceded the final act of killing in the living room. Unlawful confinement being a continuing offence, Mr. Rozen remained confined, physically and coercively restrained and unable to move about according to his wishes and desire until he lay helpless and vulnerable, about to be shot to death.

41. The statement of Justice Wilson in ***R. v. Paré*** warrants repeating: "It is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder". It is the act of killing which brings the illegal domination to an end.

42. In essence, the majority has found that there was a very prolonged act of killing. It may be that it was influenced by certain findings the trial judge made (see para. 21

above). If Ehrcke J's findings contributed to the majority's assessment of the respondent's ultimate purpose and/or the distinctiveness of the two offences, they ought not to have had this effect. There is a significant distinction between a trial judge determining the basis or bases upon which an accused is guilty of murder (a liability or culpability determination pursuant in part to s. 229(a)(i) and (ii)) and a trial judge assessing the independence of the criminal acts said to attract the application of the constructive first degree murder provision (a determination of the degree of culpability).

43. The confinement of Mr. Rozen at the front door and its continuation as the two men moved through the kitchen into the dining room and ultimately into the living room were "not limited to what was 'integral to' the particular act of killing disclosed by the evidence": ***Pritchard***, at para. 27. The "particular act of killing" in the instant case, in fact, was the shot to the back of Mr. Rozen's head as Smith JA found.

44. In law, the same holds true – the act of killing that matters is the final act, the one which the law considers to have caused the death and which therefore brings the continuing sequence of events to a close. Notwithstanding the evidence of the pathologist concerning the infliction of potentially fatal injuries before the final, execution-style shot, Mr. Rozen was still alive, if only barely, at the time that shooting in the living room occurred. The resulting gunshot wound immediately caused, or accelerated, his death.

45. As noted by Martin JA in ***R. v. Munroe and Munro*** (1983), 8 C.C.C. (3d) 260 (Ont. C.A.) at p. 289:

> It is an elementary principle of the law of homicide that one who shortens the life of a person suffering from a mortal injury, that is, one which will in all probability result in death in the absence of medical attention has caused the death of that person. To put the matter in another way, one who accelerates the death of another who has sustained mortal injury causes the death of that other.
>
> This principle is stated in s. 209 [now s. 226] of the *Code*:
>
> > 209. Where a person causes bodily injury to a human being that results in death, he causes the death of that human being notwithstanding that the

> effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.
>
> Section 209 is applicable to an accused who causes bodily injury to another which accelerates his death from injuries previously inflicted by the accused.

In the end, the Court of Appeal upheld the trial judge's instruction to the jury premising in part liability for first degree murder on the basis of what is now s. 231(5)(e).

46. A similar and more recent application of this principle is found in ***R. v. Mullings***, 2014 ONCA 895. This was an appeal from a constructive first degree murder conviction. The appellant, in an attempt to steal the victim's car, became involved in a physical altercation with the victim outside the garage. The appellant produced a gun and during the struggle managed to shoot both himself and the victim in the arm. The bullet penetrated the victim's arm and heart, mortally wounding him. The infuriated appellant then dragged the victim inside the rear of the garage, brought him to his knees and shot the victim point blank in the chest. He then stole the car.

47. In challenging his conviction, the appellant raised two arguments, the first of which – whether the victim's death was caused while committing unlawful confinement or whether the confinement was subsequent to the causing of the death – itself raised the s. 226 issue. Strathy CJO held:

> [101] Whether the first bullet was a sufficient cause of the victim's death was unimportant in this case . . . s. 226 of the *Criminal Code* makes clear that accelerating death is still murder. In this case, regardless of whether the victim was mortally wounded by the first shot, he was still alive when he was shot a second time while confined in the garage. Therefore, it was open for the jury to conclude that the second shot's acceleration of death was an act of killing in itself, which occurred while the appellant was confining the victim.

48. The operative act of killing for the purposes of assessing the independence of the act of confinement from the act of killing therefore was the final, execution-style shot to the back of Mr. Rozen's head, and this act alone. Smith JA dissenting was correct in this respect and the all-encompassing approach of the majority was wrong in fact and in law.

49. Interestingly, the appellant in ***Mullings*** also argued that the confinement was inherent in the killing. The Court of Appeal disagreed, holding at para. 105 that "[i]t was open to the jury to find that in forcibly removing the victim from the driveway to the garage and restraining him there, the appellant committed the crime of unlawful confinement" and, at para. 106, that confinement "was not inherent in the killing . . ." In the instant case, the same conclusion is supported by the evidence of the distinct act of confinement at the door, the acquisition by the respondent of a position of power and domination over the increasingly weakened Mr. Rozen, culminating in the respondent's exploitation of this position of dominance by taking not only the ring, but Mr. Rozen's life as well by the independent act of murder. There was evidence in the instant case to make this statement from ***Mullings*** applicable: "there was evidence from which the [finder of fact] could have concluded that the murder of [Mark Rozen] was an execution, carried out while he was being restrained against his will." (para. 108).

**(f) The Purpose of the Confinement is Irrelevant**

50. As noted, at para. 97 of its reasons, the majority states, "There can be no doubt [the respondent] attacked Mr. Rozen throughout the apartment for the purpose of killing him". This finding was not expressly made by the trial judge. His finding set out at para. 21(f) above arguably does not support the majority's characterization. This characterization is critical to the majority's assessment of the independence of the two criminal acts. With respect, there is considerable authority rendering the purpose for which the confinement was carried out – be it to commit a robbery or to commit a murder - irrelevant.

51. This line of authorities begins in B.C. with ***R. v. Gourgon*** (1979), 19 C.R. (3d) 272, at p. 279 where the Court of Appeal rejected a defence argument that any unlawful confinement which is merely incidental to the commission of a robbery was insufficient to invoke s. 231(5). The same court confirmed this principle in ***R. v. Pitre*** (1991), 2 B.C.A.C. 186 at para. 29. The position represented by ***Gourgon*** was followed in Ontario in ***R. v. Dollan and Newstead*** (1982), 35 O.R. (2d) 283 (Ont. C.A.). The Court of Appeal held that it is of no consequence that the unlawful confinement may be

incidental to the commission of some other crime as long as there has been an unlawful confinement.

52. The same court reaffirmed this principle in ***R. v. Kimberley*** (2001), 56 O.R. (3d) 10 (C.A.), at para. 103: "There is nothing in s. 231(5)(e) which suggests that unlawful confinements that are incidental to or in furtherance of other crimes are not encompassed by the section." And at para. 107,

> *R. v. Luxton*, *supra*, makes it clear that if in the course of a continuous sequence of events an accused commits the crime of unlawful confinement and chooses to exploit the position of dominance over the victim resulting from that confinement to murder the victim, then the accused has committed first degree murder as defined in s. 231(5)(e). The purpose of the confinement is not relevant. (emphasis added)
>
> See also, ***R. v. Parris***, at para. 47.

53. So, too, has this Court confirmed this principle *per* Binnie J: "I agree with the logic in the foregoing line of cases that the fact the accused confined the victim for the purposes of committing a non-enumerated offence does not alter the operation of s. 231(5)(e)": ***Pritchard***, at para. 32.

54. The respondent's intention throughout was to physically restrain and control Mr. Rozen and render him defenceless and subject to the respondent's domination over him. His perseverance in overcoming Mr. Rozen's determined resistance admits of no other inference. That the respondent did so to commit a robbery is irrelevant. Even if the respondent's ulterior purpose was, as the majority found, to kill, this is no less an irrelevancy. The majority erred in its consideration of such a purpose. It compounded this error by treating the respondent's purpose not only as relevant to the question of the independence of the act of confinement from the murder, but as dispositive of the question as well.

55. The Ontario Court of Appeal has recently found to the contrary. In ***R. v. Johnstone***, 2014 ONCA 504, the defence argued that any unlawful confinement was "part of and for the purpose of murder**"** (at para. 40**)** and that s. 231(5)(e) was

inapplicable as a result. The relevant facts in ***Johnstone*** were set out by Smith JA dissenting below:

> [111] . . . [T]he appellant was known to the victim and appears to have been invited into her home. He severely assaulted her in the bedroom and then dragged her into the bathroom, where he left her while he went onto the kitchen for a knife. The victim locked the door of the bathroom but the appellant broke down the door and killed her with the knife.

56. The Ontario Court of Appeal disagreed with the defence submission:

> 44] On the facts of this case, all of the elements to establish murder are made out in the period of time commencing when the appellant forced his entry into the locked bathroom. Everything that had occurred before the appellant broke into the bathroom is sufficiently distinct from the killing so as to constitute a different offence or several different offences. This would include the initial assault by the appellant in the bedroom, his dragging . . . [the V] to the bathroom, confining her by blocking any possible escape while he equipped himself with a knife, and his illegal domination of her throughout.
>
> 45] Whether the appellant intended to confine [the deceased] <u>solely for the purpose of killing her or for some other purpose is of no moment. . . .</u>
>
> 46] Therefore the question here is simply whether the appellant intended to confine the victim, and whether the confinement was a distinct criminal act. <u>The appellant's ultimate purpose in confining the victim is not relevant to assessing the distinctiveness of the confinement from the act of murder</u>. (emphasis added)

**(g) Comparisons with Other Cases**

57. A case to consider at this juncture is ***R. v. Smith***, 2015 ONCA 831. In this case, the appellant was intent on committing a robbery of a store. As he approached the clerk/victim, she began to scream. To quiet her, he placed her in a sleeper or choke hold to render her unconscious. While holding her in this manner, he started to drag her to the store's basement. On the stairs, she stumbled and fell to basement floor. She tried to get up but the appellant prevented her from doing so. He then started strangling the victim with her head scarf. Because she was still making noise, he also punched and kicked four to five times in the head, shattering her upper and lower jaw bones, breaking her nose and partially tearing off an ear. The victim died two days later.

58. In submissions very similar to the finding of the majority below, the defence submitted that s. 231(5)(e) was not engaged arguing (at para. 12):

> that applying pressure to the victim's neck with the sleeper hold in the store and strangling, punching and kicking her in the basement were all one event amounting to the killing. Therefore, . . . there was no unlawful confinement over and above the acts that resulted in the victim's death.

59. The Court of Appeal disagreed finding it was open for the jury to conclude that there were two discrete offences (at paras. 13 & 14). Putting the victim in a sleeper hold in the store and dragging her down the stairs could amount, in the jury's view, to an unlawful confinement, distinct from the strangulation, punching and kicking which occurred in the basement. The offender's ensuing conduct in strangling her with a scarf and punching and kicking her could reasonably be seen as acts distinct from putting her in, and maintaining her in, a sleeper hold and dragging her part way down the basement stairs.

60. In the instant case, parallels can be drawn between: (i) the confinement of Mr. Rozen at the door with the confinement of the store clerk in ***Smith*** by means of the sleeper hold; (ii) the movement from the front door to the living room floor with the movement of the victim in ***Smith*** downstairs: and (iii) the separation in time and place between the act of confinement and the act of killing in both cases.[4]

61. For illustrative purposes, the appellant canvasses, in a far from exhaustive way, the facts of cases in which courts have found that the act of confinement was consumed within the act of killing and that the basis for the invocation of s. 231(5)(e) was therefore lacking. This exercise points to how different the facts of the instant case are from these sample cases. Further, this exercise demonstrates that courts have declined to adopt the type of expansive view of what is "inherent in the killing" adopted by the majority in the instant case. Such a view can, as it has in the instant case, undermine

[4] For an example of a case where a conviction for first degree murder was upheld on appeal in circumstances where the deceased victim was able to escape from her attacker by jumping from a second floor window before being pursued and recaptured whereupon the appellant murdered her, see ***R. v. Chase***, 2013 QCCA 271, at paras. 9, 17-20, & 23-25.

the intention of Parliament by unduly restricting the availability of the constructive first degree murder provision.

62. ***R. v. Menard***, 2009 BCCA 462, is perhaps the most often cited case where the act of confinement was found on appeal to be "indistinguishable" from the act of killing (para. 32). This conclusion is not surprising where the facts established that the act of confinement on which the prosecution relied to invoke s. 231(5)(e) was an act of prolonged strangulation. This strangulation was the same act as the act of killing. In the view of the Court of Appeal, "there was no evidence on which a jury could reasonably find that there were two distinct and independent acts". In the instant case, the appellant points to the markedly different facts where the act of confinement was separated in time, place and circumstance from the act of killing. The confinement of Mr. Rozen was based on far more than the restraint produced the blows, or act, that caused his death.

63. Another potential example can be found in an older case, ***R. v. Larcenaire*** (1987), 34 C.C.C. (3d) 548 (Ont. C.A.), where the appellant killed a convenience store clerk. The deceased sustained 19 stab wounds and died from the loss of blood. Martin JA for the court (at p. 552) rejected the Crown's theory that the appellant confined the deceased by placing a knife to his neck and marched him down a corridor in the store where the accused committed the murder:

> . . . we are left with nothing more than a brutal killing that occurred in a confined space during the commission of a robbery. In our view, the evidence fell short of establishing with the requisite degree of certainty that the appellant murdered the deceased while committing, or attempting to commit, the offence of forcible confinement.

The judgment does not expressly hold that the error in leaving a route to first degree murder via the constructive first degree murder provision was based on the absence of the confinement requirement or a lack of independence between the two criminal acts. Nevertheless, one might reasonably ask whether the result would have been different if the facts of ***Larcenaire*** were altered slightly to include, before the murder, the appellant physically preventing the deceased from attempting to escape his grasp and run out of the store to safety.

64. Altering the facts in this manner is not without precedent for the purposes of illustrating a point. Doherty JA did as much in ***Kimberley*** at paragraph 108. Instead of the deceased in that case being knocked unconscious and then dragged some distance away where further blows resulting in death were administered, Doherty JA posited this situation:

> Thus, for example, if, with the requisite intent for murder, the appellants had struck and killed Dr. Warrick as she left the elevator and then took her purse, there would be no basis upon which the appellants could be convicted of first degree murder under s. 231(5)(e). On this example, the act of confinement and the act of killing are one and the same.

The same cannot be said of the instant case where the confinement and the killing are distinct acts.

65. The last example the appellant offers is found in a ruling by the trial judge on a directed verdict motion in ***R. v. Sandhu***, cited within this Court's judgment in ***Pritchard*** at para. 29. As Binnie J described, in ***Sandhu***:

> A number of individuals surrounded and killed the victim in a sudden attack, lasting between 30 and 45 seconds. . . . Although the accused individuals did confine the victim, they did so only as an incident of the attack which caused his death. . . . Only one act of domination existed, created by the act of killing, which at the same time confined the victim. In such a case, the rationale of s. 231(5)(e) is absent.

66. Again, the facts of the instant case cannot be viewed as analogous. The confinement Mr. Rozen underwent at the hands of the respondent was a far cry from the swarming/beating death suffered by the deceased in ***Sandhu***. On the facts as found and as confirmed by the court below, there was an act of confinement. It was separate and distinct from the execution-style shooting that caused Mr. Rozen's death.

67. The respondent's confinement of Mr. Rozen is based on far more than the restraint caused by that act of killing. Relative to these factual comparators, the majority's interpretation of the circumstances wherein an unlawful confinement is one

and the same as the act of killing represents an unwarranted expansion of the exception to the application of s. 231(5)(e), an expansion which cannot be justified on these facts.

68. The respondent's conduct properly fell within the ambit of the provision. He confined Mr. Rozen and then in the same series of events, while Mr. Rozen was under his unlawful domination, he murdered him. The rationale of s. 231(5)(e) was fully engaged. There was not only a murder, but the murder of a person under the domination of his attacker. Over an extended period of time while Mr. Rozen was still able to resist, the respondent literally stood between him and his avenue of escape. As the confinement that began at the front door continued through to the living room, Mr. Rozen grew less and less capable of defending himself, let alone escaping. In other words, he fell more and more under the domination and control of the respondent. This domination was not merely an incident of the final act that caused Mr. Rozen's death. The confinement at the door facilitated the later act of killing but it was not one and the same as the murder.

69. On the evidence, there was "ample evidence to support the requisite elements of a confinement within the meaning of s. 279(2) quite independent of the killing": ***Pritchard***, at para. 37. The respondent's moral culpability for this brutal murder is not attenuated in any way. The majority was wrong to substitute a second degree murder conviction.

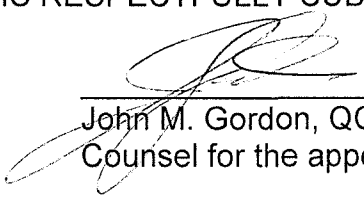
## Part IV – Submissions on Costs

70. The appellant makes no submissions concerning costs.

**Part V –Nature of Order Sought**

71. That the majority judgment of the Court of Appeal for British Columbia be set aside and the conviction for first degree murder restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



John M. Gordon, QC
Counsel for the appellant

December 29, 2015
Vancouver, BC

## Part VI – LIST OF AUTHORITIES

**PAGE**

## Part VII –Statutory Provisions

Acceleration of death

**226.** Where a person causes to a human being a bodily injury that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

R.S., c. C-34, s. 209.

Hâter la mort

**226.** Lorsqu'une personne cause à un être humain une blessure corporelle qui entraîne la mort, elle cause la mort de cet être humain, même si cette blessure n'a pour effet que de hâter sa mort par suite d'une maladie ou d'un désordre provenant de quelque autre cause.

S.R., ch. C-34, art. 209.

Murder

**229.** Culpable homicide is murder

(*a*) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

Meurtre

**229.** L'homicide coupable est un meurtre dans l'un ou l'autre des cas suivants :

*a*) la personne qui cause la mort d'un être humain :

(i) ou bien a l'intention de causer sa mort,

(ii) ou bien a l'intention de lui causer des lésions corporelles qu'elle sait être de nature à causer sa mort, et qu'il lui est indifférent que la mort s'ensuive ou non;

Hijacking, sexual assault or kidnapping

**231.** (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:

(*e*) section 279 (kidnapping and forcible confinement); or

Détournement, enlèvement, infraction sexuelle ou prise d'otage

**231.** (5) Indépendamment de toute préméditation, le meurtre que commet une personne est assimilé à un meurtre au premier degré lorsque la mort est causée par cette personne, en commettant ou tentant de commettre une infraction prévue à l'un des articles suivants :

*e*) l'article 279 (enlèvement et séquestration);

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 and liable to imprisonment for a term not exceeding eighteen months.

Séquestration

**279.** (2) Quiconque, sans autorisation légitime, séquestre, emprisonne ou saisit de force une autre personne est coupable :

*a*) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

*b*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.

Robbery

**343.** Every one commits robbery who

(*a*) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;

(*b*) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;

(*c*) assaults any person with intent to steal from him; or

(*d*) steals from any person while armed with an offensive weapon or imitation thereof.

R.S., c. C-34, s. 302.

Vol qualifié

**343.** Commet un vol qualifié quiconque, selon le cas :

*a*) vole et, pour extorquer la chose volée ou empêcher ou maîtriser toute résistance au vol, emploie la violence ou des menaces de violence contre une personne ou des biens;

*b*) vole quelqu’un et, au moment où il vole, ou immédiatement avant ou après, blesse, bat ou frappe cette personne ou se porte à des actes de violence contre elle;

*c*) se livre à des voies de fait sur une personne avec l’intention de la voler;

*d*) vole une personne alors qu’il est muni d’une arme offensive ou d’une imitation d’une telle arme.

S.R., ch. C-34, art. 302.

693. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 or dismisses an appeal taken pursuant to paragraph 676(1)(a), (b) or (c) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents; or

693. (1) Lorsqu'un jugement d'une cour d'appel annule une déclaration de culpabilité par suite d'un appel interjeté aux termes de l'article 675 ou rejette un appel interjeté aux termes de l'alinéa 676(1)a), b) ou c) ou du paragraphe 676(3), le procureur général peut interjeter appel devant la Cour suprême du Canada :

*(a*) sur toute question de droit au sujet de laquelle un juge de la cour d'appel est dissident;