SCC File No. 36524

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

MICHAEL BRUCE NEWMAN

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. A continuous violent struggle almost throughout the confined space of Mr. Rozen's apartment left Mr. Rozen dead and Mr. Newman injured. A large quantity of blood from both men was found in nearly every part of the apartment. A piece of Mr. Newman's flesh was found just inside the door of what was known as the "purple room", the second room of the two bedroom apartment. At least one other person, an unidentified female, was responsible for causing serious gunshot injuries to Mr. Rozen. There was also some evidence of another man being present during at least part of the violent struggle.

2. During this violent struggle Mr. Newman confined Mr. Rozen for an unknown period of time at the doorway of the apartment by preventing him from leaving. By this point in the ongoing struggle Mr. Rozen was undoubtedly already gravely injured. Within a very small period of time the struggle moved a short distance to another room where Mr. Newman shot Mr. Rozen in the back of the head at close range.

3. So much remains unknown about the circumstances of the violent struggle between the people present in Mr. Rozen's apartment on the day he died. Most findings of fact can only be made by drawing inferences from the interpretation of blood spatter, a process fraught with difficulty. It is indisputable, as the majority of the Court of Appeal repeatedly stated, that there are many unknowns with respect to precisely what transpired during the struggle.

4. The narrow issue raised on this Crown appeal is whether or not the majority of the Court of Appeal was correct in concluding that the confinement at the door of the apartment was coextensive with the acts that caused Mr. Newman's death, such that he should have been convicted of second degree and not first degree murder.

5. The respondent submits that the majority of the Court of Appeal correctly applied the established legal principles to the facts that could be properly ascertained. Whatever period of confinement occurred at the doorway, albeit enough to establish the broadly defined offence of unlawful confinement, was neither distinct nor independent from the acts of killing. What occurred at the doorway was inextricably tied up with the acts of killing.

Statement of Facts

6. The murder of Mr. Rozen occurred in the course of a violent struggle with Mr. Newman, and at least one other, in the confined space of Mr. Rozen's apartment. The struggle lasted about 10-15 minutes. Much is unknown about how the violent events unfolded within Mr. Rozen's apartment. For example, the trial judge found that a female fired one or more of the shots that hit Mr. Rozen. She has never been identified. The many uncertainties also relate to precisely how the conflict started, how it unfolded, how it ended, and who precisely was responsible for what. [*Trial Judge's Reasons,* Appellant's Record ("A.R."), vol.1, p.64, at para.303]

Evidence of a violent struggle in the apartment and the presence of unknown parties

7. When police officers first entered Mr. Rozen's apartment on January 6, 2004, they noticed blood throughout the apartment. It was later determined that the blood belonged to both Mr. Rozen and Mr. Newman. The trial judge found, based on all the evidence, that Mr. Newman had a violent physical confrontation with Mr. Rozen inside the apartment [*Trial Judge's Reasons,* Appellant's Record A.R., vol.1, p.61, at para.292]

8. Three tenants in the apartment building, who lived near Mr. Rozen, described what sounded like a struggle or a fight in the early afternoon of January 6, 2004. One nearby tenant, Barbara Darovski, testified that she heard a loud banging coming from Mr. Rozen's apartment. She also testified that she heard Mr. Rozen's voice and a

female's voice coming from the apartment. [*Trial Judge's Reasons,* A.R., vol.1, pp.10-11, at para.41]

9. Dick Snater similarly described hearing male voices, a loud female voice, and what sounded like a fight. [*Trial Judge's Reasons,* A.R., vol.1, p.12, at para.44]

10. Based on all the evidence, the trial judge accepted that it was possible three other people were present in Mr. Rozen's apartment during the violent struggle: an unknown man, an unknown woman and Mr. Newman. The trial judge further accepted that the man and the woman might have participated in the attack on Mr. Rozen by either shooting or assaulting him. [*Trial Judge's Reasons,* A.R., vol.1, p.64, at para.303]

Continuous violent struggle throughout the apartment

11. Police officers conducted an exhaustive forensic investigation of Mr. Rozen's apartment. The blood of Mr. Newman and Mr. Rozen was present throughout the apartment with the exception of one room. John Mellis, a blood spatter expert, concluded that the violent struggle was continuous, occurring throughout almost the whole apartment.

12. According to Mr. Mellis, there was an "initial major bloodletting" in the "purple room". It was his opinion that this was where the violent struggle likely began. The bloodstains in the purple room consisted of pools of blood on the floor, on a futon (in the form of a "soak stain"), and on the curtains. DNA analysis determined that these stains were consistent with being Mr. Newman's blood. [*Trial Judge's Reasons,* A.R., vol.1, p.22, at para.95; *Transcript,* A.R., Part III, vol.4, p.27, ll.1-4]

13. A piece of Mr. Newman's flesh was also found on the ground at the entrance of the purple room. Mr. Mellis testified that the flesh was indicative of a "significant wound". [*Trial Judge's Reasons,* A.R., vol.1, p.40, at para.173; *Transcript,* A.R., Part III, vol.4, p.38, ll.33-38]

14. Based on his assessment of the bloodstaining, Mr. Mellis testified that the struggle continued from the "purple room" into the entrance hallway. There was a large hole in the drywall of the hallway. The struggle in the hallway most likely then reached the front door area. There was a significant amount of bloodstaining on the inside of the front door. This blood predominantly belonged to Mr. Newman. [*Trial Judge's Reasons,* A.R., vol.1, p.22, at para.95; *Transcript,* A.R., Part III, vol.6, p.49, ll.17-29]

15. There was also a small pattern of expirated blood on the light switch near the front door belonging to Mr. Rozen. Mr. Mellis estimated that Mr. Rozen was about two feet away from the door when he expirated this blood. [*Transcript,* A.R., Part III, vol.4, p.150]

16. It was evident that Mr. Rozen had already been stabbed and shot and was seriously, if not fatally injured, by the time the struggle reached the front door of the apartment. For example, the expirated blood belonging to Mr. Rozen near the front door was most likely caused by the potentially fatal gunshot wound to Mr. Rozen's sinus cavity. [*Trial Judge's Reasons,* A.R., vol.1, p.22, at para.92; pp.65-66, at para.307]

17. Mr. Mellis testified that the struggle continued from the front door back into the apartment toward the kitchen and dining room, then finally to the living room. [*Trial Judge's Reasons,* A.R., vol.1, p.22, at para.95]

18. Mr. Rozen's blood was found in the living and dining room areas. Mr. Newman's DNA, within a mixed profile, was also found in the form of a fabric swipe stain on the couch in the living room. [*Trial Judge's Reasons,* A.R., vol.1, p.65, at para. 306]

19. Mr. Mellis testified that Mr. Rozen's last movements occurred on the living room rug where his body was ultimately located. He reached this conclusion by relying on: (a) the large blood "soak stain" on the rug; (b) the bloodstaining on top of an overturned plant and spilled soil lying on top of Mr. Rozen's leg; and (c) blood "swipe stains" on the

couch, belonging to Mr. Rozen, which indicated a downward motion towards the rug where he was found dead. [*Trial Judge's Reasons,* A.R., vol.1, p.22, at para.94]

Fatal injuries to Mr. Rozen

20. Dr. Charles Lee, a forensic pathologist, conducted the autopsy of Mr. Rozen at Vancouver General Hospital from January 7th to 8th, 2004. Dr. Lee found knife and gunshot wounds all over Mr. Rozen's body. Many of these injuries were life threatening and may have resulted in death. Dr. Lee was unable to specify which injuries actually did cause Mr. Rozen's death. He was only able to say that Mr. Rozen died as a result of knife and gunshot wounds. [*Transcript,* A.R., Part III, vol.5, p.101, ll.6-15]

21. There were four gunshot wounds to Mr. Rozen's body. One shot was to the back of the head at close range, approximately two or three inches from the skin. This shot could have been immediately fatal. However, Dr. Lee was unable to say if Mr. Rozen was alive or dead at the time that shot was fired. If he was alive, he would have been immediately incapacitated. [*Transcript,* A.R., Part III, vol.5, pp.102, 104-105;, p.144]

22. There was a second gunshot wound to the neck and face. According to Dr. Lee this gunshot wound was a potential cause of death and would have resulted in significant bleeding. The third and fourth gunshots to Mr. Rozen's upper back and left hand were described as "fairly minor" wounds. These three gunshot wounds, unlike the one fired to the back of the head, were not considered close range and likely were fired from a distance. [*Transcript,* A.R., Part III, vol.5, p.100, ll.17-45; p.109, ll.29-43]

23. Dr. Lee was unable to determine the firing order of the four gunshots.

24. Dr. Lee also found 62 or 63 cuts or stab wounds to Mr. Rozen's head, neck, shoulders, stomach, thigh and legs. The majority of these injuries were to the head and neck area. There were some stab wounds to the right side of Mr. Rozen's neck, injuring the airway and carotid artery. Dr. Lee described the stab wounds to the neck as

"serious, if not fatal injuries". All the stab wounds to Mr. Rozen's body were likely caused by something like a knife. [*Transcript,* A.R., Part III, vol.5, p.100, ll.34-45; p.121]

25. Dr. Lee testified that he found about seven stab wounds to Mr. Rozen's hands. Dr. Lee testified that these wounds were "defensive injuries". The stab wounds to Mr. Rozen's thighs were also likely defensive injuries. Dr. Lee concluded that there were eleven defensive wounds in total, all consistent with a violent struggle and an attempt by Mr. Rozen to ward off blows. [*Transcript,* A.R., Part III, vol.5, p.137, ll.27-35, p.1595, p.143, ll.4-9]

26. Dr. Lee also noted blunt force injuries and abrasions all around Mr. Rozen's body. [*Transcript,* A.R., Part III, vol.5, p.140]

27. Expert evidence established from the bullets recovered from Mr. Rozen's body and shell casings found in the apartment that two different guns were used: a .380 Beretta handgun with a silencer and a .9 mm Ruger handgun.

28. Evelyn Pederson, a firearm and tool mark specialist, testified that five recovered bullets, three from Mr. Rozen's body and two from the apartment, were fired from the .380 Beretta firearm found in Mr. Newman's residence. One of these bullets was the potentially fatal shot to Mr. Rozen's neck and face. Later analysis of the Beretta found DNA belonging to a female. As noted above, the trial judge accepted that an unknown woman was in the apartment and that she repeatedly fired the Beretta at Mr. Rozen, striking him three times. [*Trial Judge's Reasons,* A.R., vol.1, pp.37, at paras.156-158]

29. According to Dr. Lee, the bullet fired to the back of Mr. Rozen's head was fired by the .9 mm Ruger. [*Trial Judge's Reasons,* A.R., vol.1, p.66, at para. 313]

Trial judge's findings as to unlawful confinement in the course of the murder

30. The trial judge found that Mr. Newman had a violent confrontation with Mr. Rozen in his apartment. The trial judge accepted that there was a woman in the apartment at the time and she must have been the one who fired the bullets from the Beretta handgun. The trial judge accepted that there may have also been a third man in the apartment and that he may have also participated in the assault on Mr. Rozen. [*Trial Judge's Reasons,* A.R., vol.1, p.64, at para. 301; p.68, at para. 320; pp.72-73, para.338]

31. The trial judge found that it was Mr. Newman who delivered the shot to the back of Mr. Rozen's head with the Ruger handgun. He found that this shot was fired on the living room rug where Mr. Rozen was found dead. [*Trial Judge's Reasons,* A.R., vol.1, p.68, at para.321; p.69, at para. 327]

32. The trial judge found Mr. Newman guilty of constructive first degree murder, pursuant to section 231(5)(e) of the *Code*, on the basis that Mr. Rozen was confined "by his attackers" at three points:

(1) Mr. Newman prevented Mr. Rozen from leaving the apartment during a struggle at the front door;

(2) when Mr. Newman "forced" Mr. Rozen to sit in a chair in the apartment; and

(3) when Mr. Newman forced Mr. Rozen into a submissive position before the fatal gunshot was delivered.

Trial Judge's Reasons, A.R., vol.1, pp.74-76, at paras.345-351

Decision of the Court of Appeal for British Columbia

33. Mr. Newman appealed his conviction to the Court of Appeal, in part, on the basis that the trial judge erred in convicting him of first degree murder. Mr. Newman argued that there was insufficient evidence to establish that any of three instances of confinement amounted to an independent act of forcible confinement for the purposes of s. 231(5)(e) of the *Code*.

34. Further, Mr. Newman argued that even if any of these instances amounted to acts of confinement, any such confinement was co-extensive or consumed within the act of killing and therefore did not amount to unlawful confinement for the purposes of s.231(5)(e).

35. The majority of the Court of Appeal (*per* Lowry, Frankel JJ.A.) agreed that two of the three instances of confinement fell short of establishing that Mr. Newman forcibly confined Mr. Rozen.

(a) Being "forced" to sit in the chair

36. The trial judge found that Mr. Newman confined Mr. Rozen in the course of the murder by <u>forcing</u> Mr. Rozen to sit in the chair in the living room (*Trial Judge's Reasons,* at para.348). The Court of Appeal found that while some of the evidence supported the fact that Mr. Rozen may have been seated in the chair at one unknown point in time, the evidence was not "logically and reasonably capable" of supporting the inference that Mr. Rozen was "forced" to sit in the chair by Mr. Newman. [B.C. Court of Appeal Reasons for Judgment ("*BCCA Reasons*"), A.R., vol.1, p.94, at para.75]

37. Consistent with the totality of the evidence, and the overall uncertainty of what was in fact proven to have occurred in the apartment, the majority held that "there are simply too many unknowns with respect to what transpired during the struggle and how Mr. Rozen came to be in the chair". [*BCCA Reasons*, A.R., vol.1, p.94, at para.75]

(b) Being forced into a submissive position before the final shot

38. The trial judge found that Mr. Newman confined Mr. Rozen by placing him "in a submissive and helpless position" just prior to the final, fatal shot. The trial judge found the manner in which the final shot was delivered "brought to mind an execution" [*Trial Judge's Reasons,* A.R., vol.1, p.71, at para. 301]

39. The majority of the Court of Appeal found that there was insufficient evidence to establish that Mr. Rozen was forced into a submissive position before the final shot was fired, and that there was, in effect, no "execution-style" shooting of Mr. Rozen. The majority again pointed to the "many unknowns" arising from the evidence:

> Prior to the final shot being fired, Mr. Rozen and Mr. Newman had been involved in a fierce struggle for 10 or perhaps 15 minutes. During that struggle, Mr. Rozen was stabbed multiple times, shot three times, and had lost a significant amount of blood; he was indisputably in a severely weakened condition. 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. (emphasis added)
>
> *BCCA Reasons,* A.R., vol.1, p.95, at para.79

(c) Being prevented from leaving at the front door

40. Mr. Newman also challenged the third instance of confinement found by the trial judge, namely, that Mr. Rozen was prevented from leaving the apartment when the struggle reached the front door. The trial judge based his finding of confinement on the nature of the blood spatter on the inside of the front door and on the wall next to the door. [*Trial Judge's Reasons,* A.R., vol.1, pp.74-76, at paras.345-351]

41. The majority of the Court of Appeal found it was reasonable to infer from the totality of the evidence that Mr. Rozen was prevented from leaving the apartment when

the violent struggle reached the front door. [*BCCA Reasons,* A.R., vol.1, p.93, at paras. 70, 71]

42. The majority then considered whether this finding met the test for constructive first degree murder in s. 231(5(e) of the *Code*. The majority focussed on the requirement in s. 231(5)(e) that the act of confinement not be co-extensive or consumed within the killing itself, but must instead be a separate and independent act. [*BCCA Reasons,* A.R., vol.1, p.97, at paras.85-88]

43. The majority concluded that Mr. Rozen was prevented from leaving the apartment in the course of Mr. Newman's **"continuing attack"** throughout the apartment. Because the act of preventing Mr. Rozen from leaving was part of the **"overall act of killing",** it was held to be co-extensive or consumed within the act of killing and thus did not meet the test for constructive first degree murder:

> 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. There can be no doubt Mr. Newman attacked Mr. Rozen throughout the apartment for the purpose of killing him. That Mr. Newman, 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" in the overall act of killing.
>
> *BCCA Reasons,* A.R., vol.1, p.100, at para.97

44. In dissent Smith J.A. found that what occurred at the front door was not co-extensive, but a separate and independent act of confinement. As she stated:

> This act of confinement [preventing him from leaving] 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.
>
> *BCCA Reasons,* A.R., vol.1, p.106, at para.112

45. Smith J.A. held that Mr. Rozen tried to escape through the front door but was "prevented from doing so" by Mr. Newman because he and others were assaulting him. She found that this, in law, amounted to a separate and independent act of unlawful confinement not co-extensive with the murder. [*BCCA Reasons,* A.R., vol.1, p.106, at para.112]

46. Although it is not entirely clear, it appears that Smith J.A. further found that all the threats and assaults upon Mr. Rozen amounted to separate and discrete acts of confinement for the purposes of s.231(5)(e) of the *Code*:

> 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 Mr. Newman maintained a position of dominance over Mr. Rozen. While those additional instances of confinement during the prolonged struggle were temporally and causally connected with the final act of killing, they were not in my respectful view integral to or consumed in the act of shooting Mr. Rozen in the back of the head.
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> *BCCA Reasons,* A.R., vol.1, p.107, at para.113

PART II - POINTS IN ISSUE

47. This as of right appeal comes to this Court by virtue of s.693(1)(a) of the *Code*. The issue dividing the Court of Appeal, and thus the question arising on this appeal, is whether the trial judge erred in finding Mr. Newman guilty of first degree murder on the basis of s.231(5)(e) of the *Code*.

48. The respondent submits that the majority of the Court of Appeal was correct to find that there was no basis in which to find Mr. Newman guilty of first degree murder. The majority properly allowed the appeal and substituted a conviction for second degree murder.

PART III - ARGUMENT

49. The majority's decision rests on the unquestioned legal proposition that in order to constitute an act of forcible confinement for the purposes s. 231(5)(e), the act of confinement must be separate and distinct from the act of killing itself.

50. The majority correctly identified and applied this principle. While Mr. Rozen had been prevented from leaving the front door of the apartment and was thereby unlawfully confined, this act of confinement occurred during a continuous and violent struggle which ultimately became fatal. In these circumstances, the acts of killing and confinement were one and the same.

51. By contrast, Smith J.A. wrongly determined that Mr. Rozen's death arose **singularly** from his being shot in the back of the head (i.e. "the final act of killing"), and that this shot occurred after a separate and independent act of confinement at the door.

52. Smith J.A.'s dissenting judgment cannot be correct in law as it would effectively annihilate the "separate and distinct" requirement in s.231(5)(e) of the *Code*. This requirement is critical to ensuring that the constructive first degree murder provisions in the *Criminal Code* continue to punish those guilty of the most reprehensible conduct.

53. Given the nature of the evidence in this case, what was known and unknown, and the reasonable inferences that could lawfully be drawn, the majority correctly allowed the appeal by substituting a conviction for second degree murder.

Constructive first degree murder provisions in the Code

54. Irrespective of whether a murder is planned or deliberate, murder is classified in section 231(5) as first degree when a person causes death "while committing or attempting to commit" one of eight enumerated offences.

55. These constructive first degree murder provisions are an acknowledgement by Parliament that murders committed in the course of specified offences should attract the highest level of moral blameworthiness.

56. The enumerated offences in s.231(5) consist of the following:

> (*a*) section 76 (hijacking an aircraft);
>
> (*b*) section 271 (sexual assault);
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> (*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
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> (*f*) section 279.1 (hostage taking).

Importance of the "separate and distinct requirement" for cases of unlawful confinement murder in s.231(5)(e)

57. This appeal concerns s.231(5)(e) – whether the respondent committed, or attempted to commit, the offence of unlawful confinement under s.279(2) of the *Code* in the course of the murder. Section 279(2) of the *Code* provides:

> **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.
>
> (3) In proceedings under this section, the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force.

58. The *actus reus* of the offence of unlawful confinement is very broadly defined. It captures any deprivation of an individual's liberty to move from point to point. Being a general intent offence, the *mens rea* is limited to the mere intent to effect a deprivation of freedom of movement. An attempt to commit unlawful confinement requires no deprivation of movement, but merely an intent to effect a deprivation of freedom of movement encompassing some minimal act in furtherance of that intent. [*R. v. B.(S.J.),* 2002 ABCA 143, at para.41; *R. v. Tatton,* 2015 SCC 33, at para.34]

59. Every intentional killing arising during a struggle involves, at some point, a deprivation of the deceased's freedom of movement. In this sense, strictly construed, an act of unlawful confinement is present in very many murders. For example, a deceased

is deprived of their freedom of movement from the moment a gun is produced and pointed at the deceased, seconds or even minutes before the fatal shot is fired.

60. Recognizing the potential that very many murders inherently involve an unlawful confinement, this Court has held that the act of confinement under s.231(5)(e) cannot be "co-extensive" or "consumed" within the act of killing itself, but must be a separate and distinct criminal act. [see, *R. v. Harbottle,* [1993] 3 S.C.R. 306, at 325 and *R. v. Kimberley,* (2001), C.C.C. 157 (3d) 129 (Ont. C.A.)]

61. In *R. v. Pritchard,* 2008 SCC 59, Binnie J., writing for the Court, emphasized the degree of distinctiveness or independence required to establish first degree murder where the killing occurred in the course of an unlawful confinement. As he stated (at para.27):

> Even a confinement which satisfies s. 279(2) will not trigger s. 231(5)(*e*) if it is consumed in the very act of killing. In order to trigger s. 231(5)(*e*), the confinement and the murder must constitute distinct criminal acts: *R. v. Kimberley* (2001), 157 C.C.C. (3d) 129 (Ont. C.A.), *per* Doherty J.A., at para. 108. Thus, the issue under s. 231(5)(*e*) is not whether there was confinement independent of the act of *robbery* but whether there was unlawful confinement distinct and independent from the act of *killing*...For example, an incompetent murderer could take a significant amount of time to kill the victim by strangulation, but the time would be inextricably tied up with the act of killing. However, where the jury is satisfied that there was confinement *not* limited to what was "integral to" the particular act of killing disclosed by the evidence, the Crown has established a distinct criminal act under s. 279(2). If the jury is satisfied that the murder was committed in the course of that confinement such that the series of events may be characterized as a "single transaction" the requirements of s. 231(5)(*e*) are met. See *R. v. Kirkness*, [1990] 3 S.C.R. 74, at p. 86.

62. In *R. v. Paré* [1987] 2 S.C.R. 618, Wilson J. found that the central organizing principle of the constructive first degree murder provisions in the *Code* is a murder committed while "already abusing his power by illegally dominating another" (at p.633 – emphasis added). For example, a murderer binds the victim and orders them to lie face

down, then shoots them in the back of the head.[1] The separate act of confinement is clearly demarcated from the murder itself. In addition, the abuse of power through the illegal act of dominance exercised over the victim is readily apparent.

63. The "separate and distinct" requirement in s.231(5)(e) ensures that the highest level of moral blameworthiness attaches to those murderers who have exploited or abused a position of dominance over the victim by killing in the course of a separate or independent act of confinement.

The majority correctly identified and applied the "separate and distinct" requirement

64. In this case, the majority of the Court of Appeal concluded that Mr. Rozen was confined in the sense that he tried to leave the apartment at the front door, but was prevented from doing so by the continuing assault from Mr. Newman. Further, the majority correctly concluded that this confinement was not in law a separate and independent act of confinement as preventing Mr. Rozen from leaving at the front door and the fatal attack on Mr. Rozen were one and the same. Essentially, it was a continuing violent struggle during which Mr. Rozen suffered very serious injuries that ultimately caused his death. During this continuous struggle, there was a moment of confinement at the door, an act of confinement that was contextually and temporally indistinct from the ongoing struggle that led ultimately to Mr. Rozen's death.

65. In arriving at their conclusion, the majority relied on the following facts, none of which are contested on this appeal:

(1) Mr. Rozen was killed during a brutal and fierce struggle that lasted about 10-15 minutes (*BCCA Reasons,* at para.79);

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[1] This is what occurred in *R. v. Peer (A.R.) et al.* (1995), 63 B.C.A.C. 161.

(2) Mr. Newman attacked Mr. Rozen throughout the apartment for the purpose of killing him (*BCCA Reasons,* at para.97);

(3) Mr. Rozen sustained significant injuries which were suggestive of a struggle. There were 62 to 63 stab wounds, 11 of these wounds were described as defensive. There were also stab wounds to Mr. Rozen head, neck, chest and inner thighs. According to Dr. Lee, the stab wounds were potentially fatal and would have caused significant blood loss. Mr. Rozen suffered these injuries in the 10-15 minute struggle <u>before</u> the final shot was delivered in the living room (*BCCA Reasons,* at paras. 25, 76).

(4) The stab wounds, which the trial judge found were mostly delivered by Mr. Newman, were a substantial contributing cause of death (*BCCA Reasons,* at para.48);

(5) The struggle continued throughout the apartment, at one point reaching the front door. There was DNA and blood belonging to Mr. Rozen and Mr. Newman on or by the front door, and "in virtually every room in the apartment" (*BCCA Reasons,* at para.48)

(6) By the time the struggle reached the front door, Mr. Rozen had sustained gunshot wounds and potentially fatal stab wounds. He had lost a significant amount of blood prior to reaching the front door of the apartment (*BCCA Reasons,* at para.97); and

(7) Mr. Newman continued to attack Mr. Rozen when the struggle reached the front door. That attack had the effect of preventing Mr. Rozen from leaving the apartment (*BCCA Reasons,* at para.97).

66. This incontrovertible evidence, taken as a whole, established that the act of preventing Mr. Rozen from leaving the front door was part of an ongoing struggle

between him and Mr. Newman. It was the numerous violent acts during this struggle that resulted in Mr. Rozen's death. In other words, by the time he was briefly confined at the front door, Mr. Rozen had already sustained potentially fatal wounds and it is likely he was already in the process of dying.

67. It cannot reasonably be said that the confinement at the front door amounted to a separate and distinct act for the purposes of s.231(5)(e). Rather, the act of confinement was consumed within the **acts** of killing; or stated differently, the confinement and overall violent struggle were one and the same.

68. It cannot be properly said that Mr. Newman ever exploited or abused a position of power of dominance over Mr. Rozen by confining him prior to killing him. The evidence was mostly consistent with both Mr. Rozen and Mr. Newman being seriously wounded in the course of a violent struggle before the final shot was fired in the living room.

69. With respect, Smith J.A. was incorrect in finding that what occurred at the front door amounted to a separate and distinct act of confinement. Unlike the majority, her decision does not take into account that what occurred in the apartment can only be described as a continuous violent struggle between Mr. Newman and Mr. Rozen, and others. Although it is reasonable to infer that Mr. Rozen was prevented from leaving the front door at some point during a continuing violent struggle, this act of confinement was inescapably integral to the multiple acts that led to his death. [*Pritchard, supra,* at para.27]

70. Smith J.A.'s dissent greatly expands the reach of the constructive first degree murder provisions by effectively erasing the requirement that the confinement and the murder be separate and distinct. This would mean that any time a person is chased around a confined space then killed, unlawful confinement for the purposes of s.231(5)(e), and first degree murder would be proven.

Evidence of the final shot

71. The appellant places great emphasis on the trial judge's finding that Mr. Newman delivered the fatal shot to Mr. Rozen in the living room. The appellant further suggests that Mr. Newman must have achieved a position of dominance or power when he fired the final shot because he delivered an "execution-style" shot to the back of Mr. Rozen's head, which, in law and fact, amounted to a separate act of confinement. [*Appellant's Factum,* at para.48]

72. Neither the respondent, nor the majority, dispute the fact that Mr. Newman fired the final shot in the living room. However, the appellant's insistence on classifying the final shot as "execution-style", with all that that implies, is simply speculation. Labelling a murder as "execution-style" presumes a level of dominance and control that could never have been established by the evidence available in this case.

73. The proven circumstances of the final shot are extremely limited. The only clear evidence about the final shot is that it was fired with a downward trajectory at close range, one to two inches from the back of head. The trial judge relied on the downward trajectory of this shot to infer that Mr. Rozen was **placed** in a "submissive or helpless position" at the time the final shot was fired.

74. The majority of Court of Appeal correctly concluded that what was known about the circumstances of the final shot did not support the inference that Mr. Rozen was placed in or forced to assume a "submissive or helpless position":

> ...Prior to the final shot being fired, Mr. Rozen and Mr. Newman had been involved in a fierce struggle for 10 or perhaps 15 minutes. During that struggle, Mr. Rozen was stabbed multiple times, shot three times, and had lost a significant amount of blood; he was indisputably in a severely weakened condition. 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.
>
> *BCCA Reasons*, A.R., vol.1, p.95, at para.79

75. The downward trajectory of the shot was simply a description of the angle of entry of the bullet relative to the skull. This evidence was not capable of identifying the relative positions of two people at the time the shot was fired. The final shot could have been delivered in a downward trajectory for a number of different reasons. If anything, it is most likely that, given the nature of the struggle between the two throughout the apartment, the downward trajectory of the shot occurred during a struggle between Mr. Rozen and Mr. Newman in the living room. There was no evidence of the relative positions of Mr. Rozen and Mr. Newman at the time the fatal shot was fired on the living room rug.

76. The appellant relies on *R. v. Mullings,* 2014 ONCA 895. However, this case hardly helps the appellant. If anything, *Mullings* supports the majority's decision on why a separate and distinct act of confinement was not established for the purposes of s.231(5)(e).

77. In *Mullings,* after a struggle on the driveway of the victim's home, the victim was then forcibly removed by the accused from his driveway and taken into the garage. The accused then held the victim on his knees and shot him "point blank in the chest" (at para.105). The Ontario Court of Appeal upheld the conviction for unlawful confinement murder.

78. In *Mullings,* evidence of the deceased's position when the final shot was delivered "point blank" in the chest clearly established an independent act of confinement. In the case before this Court we simply have no evidence of the relative positions of Mr. Rozen and Mr. Newman at the time the shot was fired, and no knowledge of what was occurring when it was fired.

79. Finally, with respect to what can be inferred from the downward trajectory of the final shot, the respondent relies on the Ontario Court of Appeal's decision in *R. v. Biscombe,* 2001 CanLII 3114 (Ont. C.A.). In that case, the deceased was tied up and forced to lie face down on the ground. After the deceased resisted, the accused shot the deceased in a downward direction in the back of the head. In instructing the jury on the accused's potential culpability for committing an act of unlawful confinement in the course of the killing, the trial judge suggested to the jury that, based on the downward trajectory of the shot, the deceased may well have been on his knees when the shot was fired. The Ontario Court of Appeal found that the trial judge erred in inviting the jury to draw such an inference as there was no "direct evidence" that the deceased was actually on his knees. [*Biscombe,* at para.30]

Comparison with other murder cases reinforces why the majority was correct

80. Both Smith J.A. and the appellant rely on the Ontario Court of Appeal's decision in *R. v. Johnstone,* 2014 ONCA 504 to support the conclusion that the respondent was correctly convicted of first degree murder by the trial judge. However, both Smith J.A. and the appellant overlook some important facts that are not present in the case before this Court.

81. In *Johnstone,* the victim was assaulted by the accused in her bedroom as she lay in bed. After that assault, the accused then <u>dragged</u> her from the bedroom and placed her in the bathroom. The accused then left her in the bathroom while he went to the kitchen to get a knife so he could stab her. While the accused left to get the knife, the victim locked the bathroom door. The accused then broke down the door and stabbed her to death.

82. The separate and independent act of confinement in *Johnstone* was clearly established when the accused dragged the victim into the bathroom while she was still alive. The accused in *Johnstone* had clearly acquired a position of dominance over the

victim and abused that position when dragging her to the bathroom before going to the kitchen to obtain a knife so he could stab her to death.

83. Dragging a victim's live body prior to the act of killing is a most compelling example of a deprivation of the victim's freedom of movement clearly amounting to a separate and independent act of confinement. In this respect, what occurred in *Johnstone* is similar to the facts in *Kimberley* where the Ontario Court of Appeal also upheld a jury's decision to convict the offender of unlawful confinement murder. In *Kimberley,* the accused struck the victim as she was coming out of the elevator. Having thus assaulted her, the accused then dragged the victim (who was still alive) 27 feet across a building to the parking garage, where she was killed by the accused. [*Kimberley,* at paras.10, 120]

84. The appellant's reliance on *R. v. Smith,* 2015 ONCA 831 is similarly misconceived. There, an unlawful confinement was found to have occurred when the accused put the victim in a sleeper hold and then dragged the victim's body down the stairs before the victim was killed (at para.12). In *Smith,* the Court relied on its previous decision in *R. v. Parris,* 2013 ONCA 515 where the victim was also "forcibly removed to a basement before being killed" [see, *Smith,* at para.14 (emphasis added); *Parris,* at para.57]

85. Again, the separate and independent act of confinement, similar to *Johnstone* and *Kimberley,* is clearly demarcated by the act of dragging a live body or forcibly removing them to the place where they are ultimately killed by the accused. The act of dominance and control in such circumstances is manifest. In this case, there was no evidence that Mr. Rozen was ever dragged or moved around by the apartment at the power, will or direction of his attackers.

86. Consider the facts of this Court's decision in *Pritchard,* where "ample evidence" of unlawful confinement was found. The accused forced the deceased at gunpoint to locate a marijuana stash and then carry the stash some 250-300 meters to the

accused's waiting pick-up truck. Sometime after that, the accused then shot the deceased to death. The Court found, in this context, that the accused's use of the gun "played a role in the appellant achieving a position of dominance over her to locate and transfer the marijuana to his truck". [*Pritchard,* at para.37]

87. The separate act of confinement was made out in *Pritchard* when the accused had the victim at gunpoint as she located and brought the marijuana stash to the pick-up truck. She walked 250 – 300 metres at gunpoint for what this Court described as a "significant duration" of time. To paraphrase what Wilson J. said in *Paré,* Mr. Pritchard had acquired a level of dominance and control over the victim and *abused* that position by committing an unlawful confinement of the deceased. [*Pritchard, supra,* at paras. 4, 37]

88. By very significant contrast, there were very many uncertainties in respect of what actually took place in Mr. Rozen's apartment. In all of the above cases where unlawful confinement was established, the courts were able to clearly point to evidence in the precise unfolding of events that established the "separate and distinct" act of confinement and the position of power the accused held over the deceased prior to the actual act of killing. It is simply not possible for this Court to draw the same type of inferences or conclusions from the evidence, and conclude, as the appellant submits, that there was a distinct act of confinement that was independent from the acts of killing.

89. In *R. v. Larcenaire,* (1987) 34 C.C.C. (3d) 548, the Ontario Court of Appeal held that there was insufficient evidence to sustain a conviction for unlawful confinement murder. Martin J.A. commented that, in end, the court was left "with nothing more than a brutal killing that occurred in a confined space in the course of a robbery" (at p.552). This is an equally apt description of what occurred in Mr. Rozen's apartment.

90. The evidence clearly established that during a very violent struggle between Mr. Rozen and Mr. Newman, Mr. Rozen was fatally wounded. If at some point Mr. Newman got the "upper hand" in the violent struggle with Mr. Rozen, it is completely unclear how,

when or after how long that occurred. There was no evidence Mr. Newman ever acquired a level of dominance or control such that he was in a position to commit a separate and independent act of confinement prior to any so called final act of killing.

91. The majority of the Court of Appeal correctly determined that the struggle at the front door was consumed within the overall violent struggle and acts of killing and that constructive first degree murder under s.231(5)(e) could not established. The majority properly substituted a conviction for second degree murder in these circumstances. The availability of a mandatory life sentence with the discretion to order a parole ineligibility period of between 10 and 25 years for second degree murder appropriately captures the moral blameworthiness of Mr. Newman's conduct.

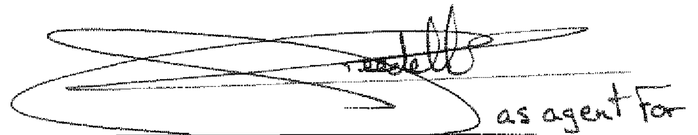
PART IV - SUBMISSIONS ON COSTS

92. The respondent does not seek any order as to costs.

PART V - NATURE OF ORDER SOUGHT

93. The respondent seeks an order dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Richard Fowler Q.C.
Eric Purtzki
Counsel for the respondent

February 11th, 2016
Vancouver, British Columbia

PART VI – LIST OF AUTHORITIES

PARA(S)

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PART VII - STATUTORY PROVISIONS

***Sections of Criminal Code*, R.S.C., 1985, c. C-46:**

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.

Contracted murder
(3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.

Murder of peace officer, etc.
(4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;

(b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or

(c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

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).

Classification

231 (1) Il existe deux catégories de meurtres : ceux du premier degré et ceux du deuxième degré.

Meurtre au premier degré

(2) Le meurtre au premier degré est le meurtre commis avec préméditation et de propos délibéré.

Entente

(3) Sans que soit limitée la portée générale du paragraphe (2), est assimilé au meurtre au premier degré quant aux parties intéressées, le meurtre commis à la suite d'une entente dont la contrepartie matérielle, notamment financière, était proposée ou promise en vue d'en encourager la perpétration ou la complicité par assistance ou fourniture de conseils.

Meurtre d'un officier de police, etc.

(4) Est assimilé au meurtre au premier degré le meurtre, dans l'exercice de ses fonctions :

a) d'un officier ou d'un agent de police, d'un shérif, d'un shérif adjoint, d'un officier de shérif ou d'une autre personne employée à la préservation et au maintien de la paix publique;

b) d'un directeur, d'un sous-directeur, d'un instructeur, d'un gardien, d'un geôlier, d'un garde ou d'un autre fonctionnaire ou employé permanent d'une prison;

c) d'une personne travaillant dans une prison avec la permission des autorités de la prison.

Détournement, enlèvement, infraction sexuelle ou prise d'otage

(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 :

a) l'article 76 (détournement d'aéronef);

b) l'article 271 (agression sexuelle);

c) l'article 272 (agression sexuelle armée, menaces à une tierce personne ou infliction de lésions corporelles);

d) l'article 273 (agression sexuelle grave);

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

f) l'article 279.1 (prise d'otage).

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.

(3) In proceedings under this section, the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force

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.

□(3) Dans les poursuites engagées en vertu du présent article, le fait que la personne à l'égard de laquelle il est allégué que l'infraction a été commise n'a pas offert de résistance, ne constitue une défense que si le prévenu prouve que l'absence de résistance n'a pas été causée par des menaces, la contrainte, la violence ou une manifestation de force.