
CANADA / JUDGMENT

R. v. Arkell

[1990] 2 SCR 695

COURT

Supreme Court of Canada

DECIDED

13 September 1990

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R. v. Arkell

Collection

Supreme Court Judgments

Date

1990-09-13

Report

[1990] 2 SCR 695

Case number

21076

Judges

Dickson, Robert George Brian; Lamer, Antonio; Wilson, Bertha; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret

On appeal from

British Columbia

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 21076

Decision Content

R. v. Arkell, [1990] 2 S.C.R. 695

Kevin James Arkell Appellant

v.

Her Majesty The Queen Respondent

and

The Attorney General of Canada, the

Attorney of Quebec, the Attorney

General of Manitoba and the

Attorney General for Alberta Intervenors

indexed as: r. v. arkell

File No.: 21076.

1990: March 26; 1990: September 13.

Present: Dickson C.J.* and Lamer C.J.** and Wilson, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Fundamental justice -- Constructive murder -- Whether s. 213(a) of the Criminal Code violates ss. 7 or 11 (d) of the Charter -- If so, whether such violation justified under s. 1 of the Charter -- Whether s. 214(5) of the Criminal Code violates s. 7 of the Charter -- If so, whether such violation justified under s. 1 of the Charter -- Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 11 (d) -- Criminal Code, R.S.C. 1970, c. C-34, ss. 213(a), 214(5).

Criminal law -- Constructive murder -- Whether s. 213(a) of the Criminal Code violates ss. 7 or 11 (d) of the Charter -- If so, whether such violation justified under s. 1 of the Charter -- Whether s. 214(5) of the Criminal Code violates s. 7 of the Charter -- If so, whether such violation justified under s. 1 of the Charter .

Appellant was convicted, under s. 214(5) of the Criminal Code , of the first degree murder of a woman who was killed while he attempted to commit a sexual assault. The jury was charged on ss. 212 and 213 in relation to murder. The conviction was upheld on appeal. The constitutional questions before this Court queried: (1) whether s. 213 (a) of the Criminal Code contravened ss. 7 and/or 11(d) of the Charter ; and, (2) if so, whether it was justified by s. 1 ; (3) whether s. 214(5) of the Criminal Code contravened s. 7 of the Charter ; and (4), if so, whether it was justified by s. 1 . A further issue was whether s. 613(1) (b)(iii) should be applied.

Held: The appeal should be dismissed. The first constitutional question should be answered in the affirmative, and the second and third in the negative; the fourth needed not be answered.

Per Dickson C.J. and Lamer C.J. and Wilson, Gonthier and Cory JJ.: For the reasons stated in *R. v. Martineau*, [1990] 2 S.C.R. 000, s. 213 (a) of the Criminal Code is of no force or effect.

Section 214(5) is neither arbitrary nor irrational and therefore does not infringe upon s. 7 of the Charter . It does not result in punishment disproportionate to the seriousness of the offences giving rise to the sentences. Only those who have committed the most serious crime in the Code with the highest level of moral culpability are affected by Parliament's decision in s. 214(5) to impose a more serious punishment on those found guilty of murder while committing certain listed offences. This Court affirmed, in *R. v. Paré*, that s. 214 is a classification section concerned with sentencing and does not create a substantive offence. No principle of fundamental justice prevents Parliament from classifying murders done while committing certain underlying offences as more serious, and thereby attaching more serious penalties to them. This distinction is neither arbitrary nor irrational. The relationship between the classification and the moral blameworthiness of the offender clearly exists.

Section 613(1) (b)(iii) of the Criminal Code should be applied and the verdict of the jury that the appellant was guilty of first degree murder should be upheld notwithstanding the error of leaving s. 213 with the jury. The jury's verdict of murder under s. 212 (a) was inescapable in light of the description of the attack and the nature of the victim's injuries.

Per L'Heureux-Dubé J.: For the reasons stated in *R. v. Martineau*, [1990] 2 S.C.R. 000, the first constitutional question should be answered in the negative. The second, accordingly, needed not be answered. The third should be answered in the negative. Section 214(5) does not offend s. 7 of the Charter . Before s. 214(5) can apply, the accused must first have been found guilty of murder. It thus does not deprive an accused of "life, liberty or security of the person" in a manner which is inconsistent with the principles of fundamental justice. Many factors enter into a determination of an appropriate sentence and the degree of blameworthiness is but one. When all these factors are consolidated, it is certainly appropriate for Parliament to impose its most severe punishment. The question is one of policy, to be determined by Parliament and its choice must be upheld so long as it does not act irrationally or arbitrarily or in a manner otherwise inconsistent with the fundamental principles of justice.

Per Sopinka J.: The appeal must be dismissed pursuant to s. 613(1)(b)(iii). The reasons given in *R. v. Martineau* were applicable to the constitutional questions relating to s. 213 (a). The reasons of Lamer C.J. with respect to s. 214(5) were agreed with, except to the extent that those reasons rely on the view that murder, and hence first degree murder, constitutionally requires subjective foresight of death.

Cases Cited

By Lamer J.

Applied: *R. v. Martineau*, [1990] 2 S.C.R. 000; *R. v. Paré*, [1987] 2 S.C.R. 618; referred to: *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Luxton*, [1990] 2 S.C.R. 000.

By L'Heureux-Dubé J.

Referred to: R. v. Martineau, [1990] 2 S.C.R. 000; R. v. Luxton, [1990] 2 S.C.R. 000; R. v. Paré, [1987] 2 S.C.R. 618; R. v. Vaillancourt, [1987] 2 S.C.R. 636.

By Sopinka J.

Applied: R. v. Martineau, [1990] 2 S.C.R. 000.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 11 (d).

Criminal Code, R.S.C. 1970, c. C-34, ss. 21(2) , 213 (a), 214(5), 613(1)(b)(iii), 669(a).

APPEAL from a judgment of the British Columbia Court of Appeal (1988), 30 B.C.L.R. (2d) 179, 43 C.C.C. (3d) 402, dismissing the appellant's appeal from a conviction on a charge of first degree murder by Paris J. sitting with jury. Appeal dismissed.

Robert Lawler, for the appellant.

James D. Taylor, Q.C., for the respondent.

Bruce MacFarlane, Q.C., and Don Avison, for the intervener the Attorney General of Canada.

Jacques Gauvin, for the intervener the Attorney General of Quebec.

J. G. Dangerfield, Q.C., and Marva J. Smith, for the intervener the Attorney General of Manitoba.

//Lamer C.J.//

The judgment of Dickson C.J. and Lamer C.J. and Wilson, Gonthier and Cory JJ. was delivered by

LAMER C.J. -- In addition to raising the constitutionality of s. 213(a) of the Criminal Code, R.S.C. 1970, c. C-34, a matter dealt with in R. v. Martineau, [1990] 2 S.C.R. 000, released concurrently, this case also raises the issue of whether s. 214(5) of the Code which classifies murder committed in certain circumstances as first degree murder, offends the Canadian Charter of Rights and Freedoms .

Facts

The appellant was convicted of the first degree murder of Lisa Clark, who died of skull injuries and whose body had been burned. The Crown's theory was that the victim's death was caused while the appellant attempted to commit a sexual assault. In support of this theory, the Crown led the evidence of a fellow prisoner who testified that while in prison the appellant told him that he had run down the victim with his car as she was attempting to escape from his sexual advances and then stripped her body and burned it. Another witness testified that the appellant denied making any sexual advances or assault upon the victim, stating that she had fallen accidentally while helping him push-start his car, after which, in a panic, he burned her body.

The trial judge told the jury that in order to find the appellant guilty of first degree murder, they must find that murder was committed while committing a sexual assault or attempting to commit a sexual assault. The trial judge charged the jury on ss. 212 and 213 in relation to murder. The jury returned a verdict of guilty of first degree murder.

Relevant Statutory Provisions

Criminal Code, R.S.C. 1970, c. C-34, s. 214(5) and s. 669(a).

214. . . .

(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 76.1 (hijacking an aircraft);
- (b) section 246.1 (sexual assault);
- (c) section 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm);
- (d) section 246.3 (aggravated sexual assault); or
- (e) section 247 (kidnapping and forcible confinement).

669. The sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be,

- (a) in respect of a person who has been convicted of high treason or first degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentence;

Judgment below

Court of Appeal for British Columbia (1988), 30 B.C.L.R. (2d) 179

The only ground of appeal before the Court was whether the provision in s. 214(5) of the Criminal Code that murder committed in the course of committing or attempting to commit a sexual assault is first degree murder, violates the appellant's rights under ss. 7 and 11 (d) of the Charter . The appellant made two arguments in this respect: first, that the principles established in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, apply to s. 214(5) , rendering it invalid, and second, that the arbitrary nature of the distinction between first and second degree murder in s. 214(5) is inconsistent with ss. 7 and 11 (d) of the Charter .

In respect of the first argument, the Court considered the applicability of this Court's decision in *Vaillancourt*. The Court of Appeal held that *Vaillancourt* is concerned with the elements essential to the creation of an offence, not with sentencing after an offence has been established. It expressed this view, at pp. 187-88, in the following way:

The appellant, if he is to succeed in bringing his challenge to s. 214(5) within the ambit of Vaillancourt, supra, must establish that the classification of first and second degree murder creates an offence lacking the necessary element of mens rea. This he cannot do. First, s. 214(5) does not create an offence. The Supreme Court of Canada has held that the effect of s. 214(5) is to classify offences that have been found to be murder under other provisions of the Code: R. v. Paré, [1987] 2 S.C.R. 618. . . . This decision makes it clear that s. 214(5) is not a substantive provision creating a new offence, but rather merely classifies for purposes of sentencing offences that have already been found to be murder under the Criminal Code

Second, the classification effected by s. 214(5) does not exclude mens rea. Rather, mens rea is presupposed by the existence of a valid conviction for murder under s. 212 or 213 of the Criminal Code , without which s. 214(5) does not come into play.

Since s. 214 is not concerned with defining the elements of an offence and does not exclude mens rea, Vaillancourt has no application.

As regards the appellant's second argument, the Court of Appeal held that the sentencing scheme set up by s. 214(5) and s. 669 of the Criminal Code meets the requirements of fundamental justice. The Court noted that s. 214(5) is calculated to deprive a person convicted of first degree murder of liberty beyond that of a person convicted of second degree murder. The issue is whether this distinction is contrary to the principles of fundamental justice. The Court of Appeal accepted that in a fair and just penal system there should be a general correlation between the imposition of harsh penalties and the seriousness of the offence and that distinctions in sentencing schemes should not be arbitrary or irrational. By the same token, however, the Court of Appeal stated that many factors other than the accused's degree of moral blameworthiness must be considered. General deterrence, the degree of the perceived danger to the public and the prevalence of certain types of offences are a few of the factors that Parliament must consider in developing a sentencing scheme. The Court held, therefore, that the fact that a harsher sentence may be imposed for one offence than for another offence which is arguably more blameworthy, does not mean that the scheme that permits the sentence violates s. 7 of the Charter .

In addition, the Court of Appeal relied on this Court's decision in R. v. Paré, [1987] 2 S.C.R. 618, for the view that there is a rational justification for the distinction between first and second degree murder drawn by s. 214(5) of the Code. The following passage from Paré, at p. 633 was quoted by the Court of Appeal:

The offences listed in s. 214(5) are all offences involving the unlawful domination of people by other people. Thus an organizing principle for s. 214(5) can be found. This principle is that where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime. Parliament has chosen to treat these murders as murders in the first degree.

The Court of Appeal concluded that it could not, therefore, be contended that the distinction is arbitrary and irrational. As a result, as long as Parliament's policy choice was not arbitrary or irrational, it must be respected. The appeal was, accordingly, dismissed.

Issues

The following constitutional questions were stated by Chief Justice Dickson:

- 1.Does s. 213(a) of the Criminal Code (as it read in November 1984) contravene the rights and freedoms guaranteed by s. 7 and/or s. 11 (d) of the Canadian Charter of Rights and Freedoms ?
- 2.If the answer to question 1 is affirmative, is s. 213 (a) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?
- 3.Does s. 214(5) of the Criminal Code (as it read in November 1984) contravene the rights and freedoms guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms ?
- 4.If the answer to question 3 is affirmative, is s. 214(5) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?

Analysis

For the reasons I have stated in *R. v. Martineau*, s. 213(a) of the Criminal Code is of no force or effect, and the first two constitutional questions should, therefore, be answered accordingly. The third and fourth constitutional questions require an analysis of s. 214(5) of the Criminal Code . The main argument of the appellant, as regards his constitutional challenge of the section, is that it is arbitrary and irrational and thereby offends s. 7 of the Charter . In my view, this submission is answered by this Court's judgment in *Paré*, *supra*. In that case a unanimous seven person panel affirmed that s. 214 is a classification section concerned with sentencing and does not create a substantive offence. Wilson J., speaking for the Court, put it this way at p. 625:

It is clear from a reading of these provisions that s. 214 serves a different function from ss. 212 and 213 . Sections 212 and 213 create the substantive offence of murder. Section 214 is simply concerned with classifying for sentencing purposes the offences created by ss. 212 and 213 . It tells us whether the murder is first degree or second degree. This view of s. 214 was expressly adopted by this Court in *R. v. Farrant*, [1983] 1 S.C.R. 124 (per Dickson J. (as he then was) at p. 140) and in *Droste v. The Queen*, [1984] 1 S.C.R. 208 (per Dickson J. (as he then was) at p. 218).

Indeed, the appellant concedes that s. 214(5) is a sentencing classification provision.

The argument of the appellant suggests that the sentencing scheme is flawed and in violation of s. 7 of the Charter because it results in the punishment of individuals that is not proportionate to the seriousness of the offences giving rise to the sentences. First, I must note that as a result of this Court's decision in *Martineau*, released concurrently, it can no longer be said that s. 214(5) has the potential to classify unintentional killings as first degree murder. A conviction for murder

requires proof beyond a reasonable doubt of subjective foresight of death. Therefore, when we reach the stage of classifying murders as either first or second degree, we are dealing with individuals who have committed the most serious crime in our Criminal Code , and who have been proven to have done so with the highest level of moral culpability, that of subjective foresight. Section 214(5) represents a decision by Parliament to impose a more serious punishment on those found guilty of murder while committing certain listed offences.

This leads me to a second point, namely a consideration of the underlying rationale of s. 214(5) . Again, I refer to the decision of this Court in *Paré*, at pp. 632-33:

All murders are serious crimes. Some murders, however, are so threatening to the public that Parliament has chosen to impose exceptional penalties on the perpetrators. One such class of murders is that found in s. 214(5) , murders done while committing a hijacking, a kidnapping and forcible confinement, a rape, or an indecent assault. . . .

The offences listed in s. 214(5) are all offences involving the unlawful domination of people by other people. Thus an organizing principle for s. 214(5) can be found. This principle is that where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime. Parliament has chosen to treat these murders as murders in the first degree.

I can find no principle of fundamental justice that prevents Parliament, guided by the organizing principle identified by this Court in *Paré*, from classifying murders done while committing certain underlying offences as more serious, and thereby attaching more serious penalties to them. In the case of the distinction between first and second degree murder, the difference is a maximum extra fifteen years that must be served before one is eligible for parole. This distinction is neither arbitrary nor irrational. The section is based on an organizing principle that treats murders committed while the perpetrator is illegally dominating another person as more serious than other murders. Further, the relationship between the classification and the moral blameworthiness of the offender clearly exists. Section 214 only comes into play when murder has been proven beyond a reasonable doubt. In light of *Martineau*, this means that the offender has been proven to have had subjective foresight of death. Parliament's decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender. Therefore, I conclude that in so far as s. 214(5) is neither arbitrary nor irrational, it does not infringe upon s. 7 of the Charter . I note that in this appeal there was no argument made as regards s. 12 of the Charter , although that issue was raised in a case heard and disposed of concurrently, *R. v. Luxton*, [1990] 2 S.C.R. 000.

The remaining issue in this case is whether s. 613(1) (b)(iii) of the Criminal Code should be applied. On the facts of this case I would apply s. 613(1) (b)(iii) of the Criminal Code , and uphold the conclusion of the jury that the appellant was guilty of first degree murder. I first note that the

trial judge instructed the jury on s. 212(a) of the Code. Further, in order to convict the appellant of first degree murder, the jury must have found that the appellant caused the death of the victim in the course of a sexual assault. The only evidence before the jury as to a sexual assault was the testimony of the witness Barr to whom the appellant made certain statements. Accordingly, it is clear that the jury must have also accepted the testimony of Barr as to how the appellant killed the victim. According to Barr, the appellant told him that he went with the victim to a cabin where he grabbed her and attempted to force her to perform an act of fellatio. The victim resisted, there was an argument and she ran away. The appellant got in his car and ran over her. He stopped the car, got out and smashed her head with a rock. The appellant further told Barr that he took the body down a trail and hid it. He then went to buy gas and oil from a Canadian Tire store, got a shovel from his father, put the body in a pit and set it ablaze. Therefore, even with the error in leaving s. 213 with the jury, I am convinced that no jury acting reasonably could have returned any verdict other than guilty of murder. It is plain from the jury's verdict that it rejected the possibility that the appellant killed the victim after the commission of the sexual assault, and rather found that the sexual assault and the killing were part of one continuing sequence of events so as to form a single transaction. It is not conceivable that the jury, accepting Barr's evidence to convict the appellant of first degree murder, could have rejected his evidence as to how the appellant caused the victim's death. The nature of the injuries suffered by the victim coupled with the description of the attack by the appellant on the victim leave me with no doubt that a reasonable jury could come to any other conclusion than a verdict of guilty of murder pursuant to s. 212 (a).

I would, accordingly, dismiss the appeal and answer the constitutional questions as follows:

1.Does s. 213(a) of the Criminal Code (as it read in November 1984) contravene the rights and freedoms guaranteed by s. 7 and/or s. 11 (d) of the Canadian Charter of Rights and Freedoms ?

A. Yes.

2.If the answer to question 1 is affirmative, is s. 213 (a) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?

A. No.

3.Does s. 214(5) of the Criminal Code (as it read in November 1984) contravene the rights and freedoms guaranteed by s. 7 of the Charter ?

A. No.

4.If the answer to question 3 is affirmative, is s. 214(5) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?

A.In light of the answer to question 3, this question does not have to be answered.

//L'Heureux-Dubé J.//

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. -- While I agree with Chief Justice Lamer's resolution of this appeal, given my position in *R. v. Martineau*, [1990] 2 S.C.R. 000, released concurrently, I wish to add the following remarks, particularly regarding s. 214(5) of the Criminal Code, R.S.C. 1970, c. C-34.

As the facts and relevant legislation have been recounted by my colleague, I will not restate them. The following constitutional questions were framed by Chief Justice Dickson:

1.Does s. 213(a) [now s. 230(a)] of the Criminal Code (as it read in November 1984) contravene the rights and freedoms guaranteed by ss. 7 and/or 11(d) of the Canadian Charter of Rights and Freedoms ?

2.If the answer to question 1 is affirmative, is s. 213 (a) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?

3.Does s. 214(5) [now s. 231(5)] of the Criminal Code (as it read in November 1984) contravene the rights and freedoms guaranteed by s. 7 of the Charter ?

4.If the answer to question 3 is affirmative, is s. 214(5) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?

For the reasons stated in *Martineau*, I am of the view that the first question must be answered in the negative, and therefore the second question need not be answered. I would also answer question 3 in the negative, relying principally on McLachlin J.A.'s (now of this Court) opinion, writing for the British Columbia Court of Appeal (1988), 30 B.C.L.R. (2d) 179.

In *Martineau*, the sole issue was the constitutionality of s. 213(a). Under s. 213(a), a whole series of requirements must be met before an accused can be convicted for murder. While I disagreed with my colleague's introduction of subjective foresight of death as the exclusive constitutional standard to be applied for the crime of murder, I do agree with his assessment in *R. v. Luxton*, [1990] 2 S.C.R. 000, released concurrently, that "[t]he distinction between first and second degree murder only comes into play when it has first been proven beyond a reasonable doubt that the offender is guilty of murder".

In order to be found guilty of first degree murder under s. 214(5) , the offender must have committed murder while "abusing his power by illegally dominating another": *R. v. Paré*, [1987] 2 S.C.R. 618, at p. 633. This is in addition to the stringent criteria for the crime of murder itself; either subjective foresight of death, and/or the commission of a predicate crime included in a circumscribed list of offences under s. 213, combined with the concomitant intentional infliction of bodily harm resulting in death. When all of these factors are consolidated, it is certainly appropriate for Parliament to impose its most severe punishment.

After citing this Court's decision in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, McLachlin J.A. held, at pp. 187-88 that:

... Parliament cannot, in the absence of moral blameworthiness established by the objective foreseeability of killing, make homicide murder. However, Parliament may, in the same circumstances, impose heavy sentences equivalent to those imposed for murder, where this is necessary to deter particular types of conduct.

The appellant, if he is to succeed in bringing his challenge to s. 214(5) within the ambit of *Vaillancourt*, *supra*, must establish that the classification of first and second degree murder creates an offence lacking the necessary element of *mens rea*. This he cannot do. First, s. 214(5) does not create an offence. . . .

Second, the classification effected by s. 214(5) does not exclude *mens rea*. Rather, *mens rea* is presupposed by the existence of a valid conviction for murder under ss. 212 or 213 of the Criminal Code, without which s. 214(5) does not come into play. [Emphasis added.]

McLachlin J.A. also addressed, at p. 189, the contention that s. 214(5) is inconsistent with ss. 7 and 11 (d) of the Charter because the distinction between first and second degree murder is arbitrary and unrelated to the moral blameworthiness of the accused:

I note initially that it is only s. 7 of the Charter which is of concern in this case. The presumption of innocence enshrined in s. 11 (d) of the Charter can play no role because before s. 214(5) can come into play the accused must first have been found guilty of murder. Thus, the only question is whether s. 214(5) deprives an accused of "life, liberty or security of person" in a manner which is not consistent with the principles of fundamental justice.

With respect to this latter issue of sentencing and its affiliation to moral blameworthiness, McLachlin J.A. concluded at pp. 189-90 that:

... it must be recognized that many factors other than the accused's degree or [sic] moral blameworthiness must be considered by Parliament in establishing a sentencing scheme. General deterrence, the degree of perceived danger to the public and the prevalence of certain types of offences are only some of the other considerations which Parliament may properly consider. It follows that the mere fact that a harsher sentence may be imposed for one offence than for another offence which is arguably more blameworthy does not mean that the scheme that permits the sentence violates s. 7 of the Charter

Many factors entered into the determination of an appropriate penalty for a particular offence; the degree of blameworthiness is only one. The question is one of policy, to be determined by Parliament. So long as Parliament does not act irrationally or arbitrarily or in a manner otherwise inconsistent with the fundamental principles of justice, its choice must be upheld. [Emphasis added.]

I agree with the above characterization of both the legislation and Parliament's prerogative with respect to establishing a sentencing scheme. Therefore, while I concur with Lamer C.J.'s ultimate disposition, I would dismiss the appeal for the reasons of the British Columbia Court of Appeal. I would answer the constitutional questions posed as follows:

1.Does s. 213(a) [now s. 230(a)] of the Criminal Code (as it read in November 1984) contravene the rights and freedoms guaranteed by ss. 7 and/or 11(d) of the Canadian Charter of Rights and Freedoms ?

A.No.

2.If the answer to question 1 is affirmative, is s. 213 (a) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?

A.This question need not be answered.

3.Does s. 214(5) [now s. 231(5)] of the Criminal Code in November 1984) contravene the rights and freedoms guaranteed by s. 7 of the Charter ?

A.No.

4.If the answer to question 3 is affirmative, is s. 214(5) of the Criminal Code (as it read in November 1984) justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ?

A.This question need not be answered.

//Sopinka J.//

The following are the reasons delivered by

SOPINKA J. -- I agree with Chief Justice Lamer that the appeal must be dismissed pursuant to s. 613(1)(b)(iii) of the Criminal Code, R.S.C. 1970, c. C-34. With respect to s. 213 (a), I would answer the constitutional questions in the manner proposed by Lamer C.J. I would do so for the reasons I gave in *R. v. Martineau*, [1990] 2 S.C.R. 000. With respect to s. 214(5) , I agree with Lamer C.J. except to the extent that he relies on the view that murder, and hence first degree murder, constitutionally requires subjective foresight of death.

Appeal dismissed.

Solicitor for the appellant: Robert R. Lawler, Victoria.

Solicitor for the respondent: The Ministry of the Attorney General, Nanaimo.

Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

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Prepared on 29 October 2026 · Esheria