

CANADA / JUDGMENT

R. v. Busch

2025 BCCA 118

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 118 R. v. Busch

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Busch,

2025 BCCA 118

Date: 20250411

Docket: CA48812

Between:

Rex

Respondent

And

James Lee Busch

Appellant

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Grauer

The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated
December 14, 2022 (conviction) (R. v. Busch, Victoria Docket 182518).

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Place and Date of Hearing:

Vancouver, British Columbia

October 30, 2024

Place and Date of Judgment:

Vancouver, British Columbia

April 11, 2025

Written Reasons by:

The Honourable Justice Donegan

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Grauer

Summary:

The appellant was charged with first degree murder. The theory of the Crown was that the appellant and another man committed the murder as co-principals, and that the murder was first degree murder in one of two ways: it was either planned and deliberate under s. 231(2) of the Criminal Code, or they killed the victim in the course of unlawfully confining him and were liable under s. 231(5) of the Criminal Code. Alternatively, the Crown argued that the appellant was guilty, through operation of ss. 21(1)(b) and 231(2) of the Criminal Code, as an aider of a planned and deliberate first degree murder. The appellant appeals his conviction for first degree murder on the basis that the trial judge erred by failing to instruct the jury to apply the enhanced participation requirement that applies to constructive murder to the charge of aiding a planned and deliberate murder.

Held: Appeal dismissed. The trial judge did not err in his charge to the jury regarding aiding a planned and deliberate murder. There is no statutory or jurisprudential support for the proposition that the enhanced participation requirement applicable to constructive murder applies also to planned and deliberate murder, and there are clear policy reasons to refuse to expand its application to such circumstances.

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Reasons for Judgment of the Honourable Justice Donegan:

I. Introduction

- [1] The appellant, James Lee Busch, was a federal inmate serving a sentence at William Head Institution on Vancouver Island when he and another inmate, Zachary Armitage, escaped from prison in 2019. The following day, Martin Payne, a man who lived near to the prison, was killed in his home. He died from multiple wounds to his head and neck, and was found with duct tape on his leg and arm. When the appellant was arrested a day later, he was wearing Mr. Payne's ball cap and carrying his backpack.
- [2] The appellant and Mr. Armitage were charged with first degree murder. Mid-way through their trial, Mr. Armitage pleaded guilty. The appellant's trial continued, with its focus on the extent to which he was involved in Mr. Payne's killing, if at all.
- [3] The Crown's central theory was that the appellant and Mr. Armitage murdered Mr. Payne together as co-principals, and that the murder was first degree murder in one of two ways: it was either planned and deliberate under s. 231(2) of the Criminal Code, R.S.C. 1985, c. C-46, or they killed Mr. Payne in the course of unlawfully confining him and were liable under s. 231(5). The Crown's alternative position was that the appellant was guilty, through the operation of ss. 21(1)(b) and 231(2), as an aider of a planned and deliberate first degree murder.
- [4] On December 14, 2022, the jury found the appellant guilty of first degree murder. He appeals the conviction on narrow grounds, contending that the trial judge erred when charging the jury about his potential liability for aiding a planned and deliberate first degree murder under s. 231(2) of the Criminal Code by failing to instruct them to apply the enhanced participation requirement that is applicable to the constructive first degree murder provision in s. 231(5), as articulated in *R. v. Harbottle*, [1993] 3 S.C.R. 306, 1993 CanLII 71.

- [5] For the reasons that follow, I would dismiss the appeal. The enhanced participation requirement applicable to constructive first degree murder does not apply to aiding a planned and deliberate first degree murder. Had such an instruction been given, it would have been inconsistent with the statutory language of the applicable provisions of the Criminal Code, relevant jurisprudence, and the policy considerations underpinning the different routes to first degree murder.

II. Trial Context

A. The Evidence

- [6] Mr. Payne was 60 years old at the time of his death on July 8, 2019. He lived alone in his home, which was located near William Head Institution, the minimum-security federal prison that housed the appellant and Mr. Armitage.
- [7] In the early evening of July 7, 2019, the appellant and Mr. Armitage escaped from prison. During the hours that followed, the two men stole (and then abandoned) a truck that was parked in the area. When the truck was recovered, its owner noticed a number of items missing, including the owner's folding knife, backpack, and jacket. Police later located these items during the course of their investigation of Mr. Payne's death.
- [8] Analysis of Mr. Payne's home computer showed that someone had performed a Google search query for "Victoria news today" shortly after Mr. Payne left for work on the morning of July 8, 2019. Other queries were performed later in the day while Mr. Payne remained at work, including searches for: "csc news"; "William Head Institution"; "private water taxi Victoria bc"; "ctv news"; and "zachary armitage".
- [9] Telephone calls were also made from the landline inside Mr. Payne's home while he was at work that day. The first call was to a water taxi service. The call was recorded and a corrections officer familiar with Mr. Armitage recognized his voice as the caller. The other calls were made to two friends of Mr. Armitage, who both testified they spoke to Mr. Armitage that morning and declined his requests for assistance.
- [10] Mr. Payne left work shortly before 3 p.m. on July 8, 2019. He was killed sometime after he arrived home that day. The appellant and Mr. Armitage were arrested as escapees the following day in downtown Victoria.
- [11] At the time of their arrest, the appellant was wearing Mr. Payne's ball cap and carrying his backpack. He was also wearing the truck owner's stolen jacket. Mr. Armitage was wearing Mr. Payne's hiking boots and hoodie. A witness later found the truck owner's stolen backpack (containing Mr. Payne's camera) discarded a short distance from where the men had been arrested.

- [12] Mr. Payne's body was discovered days later, lying face down on the bathroom floor of his home in a pool of blood, with duct tape on his leg and arm. A forensic pathologist concluded that Mr. Payne died from multiple sharp wounds and opined that the injuries were caused by at least three weapons.
- [13] Police located bloody clothing, including a running shoe and underwear containing the appellant's DNA, inside garbage bags in the primary bedroom. Mr. Armitage's fingerprints were found in the home (no fingerprints were identified to the appellant) and Mr. Armitage's DNA was also found on a number of objects. Police also found: a handwritten note asking, "What is your PINs for cards?" by Mr. Payne's computer desk; a roll and loose pieces of duct tape; two axe handles, cut from their axe heads; two axe heads; two pairs of bloody gloves; two walkie talkies; and two other weapons -- a hatchet and a Bowie knife. Other evidence also suggested that two individuals were involved, including that two different bloody footprints were found next to Mr. Payne's body, one of which had the same class characteristics as the shoe containing the appellant's DNA.
- [14] The appellant and Mr. Armitage were charged with first degree murder and were tried together before Justice Crossin, sitting with a jury. Part way through the trial, Mr. Armitage pleaded guilty to the offence, as charged. It was undisputed that the circumstantial evidence overwhelmingly pointed to the guilt of Mr. Armitage. The focus of the remainder of the trial, and the issue for the jury, was whether -- or to what extent -- the appellant was involved in Mr. Payne's killing, if at all.

B. Closing Addresses of Counsel

- [15] Counsel's closing addresses were generally in accordance with what had been discussed during extensive pre-charge conferences with the judge. The primary theory of the Crown was that the appellant and Mr. Armitage murdered Mr. Payne together as co-principals, and that they either planned and deliberated the murder, or killed Mr. Payne in the course of unlawfully confining him.
- [16] To support its primary position that the men murdered Mr. Payne as co-principals, the Crown highlighted the evidence showing the men working together throughout the chain of events from the time of their escape from prison to the time of their arrest, as well as the evidence showing both were present in Mr. Payne's home. The Crown also pointed to evidence supporting a conclusion that the two of them worked together to murder Mr. Payne.
- [17] In support of the theory that this was a planned and deliberate murder, the Crown emphasized evidence supporting conclusions that the two men waited in Mr. Payne's house all day, cut the axe heads off their handles and placed the axe handles in separate areas of the house, gathered two weapons of deadly force, duct tape, a saw, cable cutters, walkie talkies, and gloves, and then attacked Mr. Payne as soon as he came through his front door.

[18] In support of it being a constructive murder, occurring in the course of unlawfully confining Mr. Payne, the Crown pointed to the presence of the duct tape wrapped around Mr. Payne's forearm and thigh, and the note, containing Mr. Armitage's fingerprints, that said, "What is your PINs for cards?". The Crown argued that this evidence supported a conclusion that the appellant and Mr. Armitage planned to confine Mr. Payne and force him to reveal his personal identification numbers in order to obtain the funds they needed to further their escape, and then killed him during the course of the confinement.

[19] The Crown's alternative position, in the event the jury had a reasonable doubt about the appellant's role as a principal in the killing, was that the appellant was guilty of a planned and deliberate first degree murder as an aider. In this regard, Crown counsel submitted:

CROWN: There is again one more way to first degree murder that I haven't touched on before and that's through aiding. And as I mentioned, it's really the Crown's theory that Mr. Armitage and Mr. Busch worked together this entire time. But it is a circumstantial case and you may not be entirely sure of what you can draw from it. So if you know that Mr. Payne was murdered, but if you have a bit of a doubt as to what exactly Mr. Busch's role was, you can consider that he also must have helped Mr. Armitage in committing the murder. So what -- what would this look like on the evidence? We would have Mr. Armitage doing the planning for first degree murder. Mr. Busch would have to know that Mr. Armitage was planning to murder Mr. Payne. And then Mr. Busch could have done some of the helping in terms of finding the duct tape, sawing off the axe handles, locating the Bowie knife, pulling out the gloves, pulling out the bolt cutters. Those sorts of things to help Mr. Armitage, as long as Mr. Busch knew that Mr. Armitage was planning to kill Mr. Payne. And if Mr. Busch was helping Mr. Armitage, knowing what Mr. Armitage was planning to kill Mr. Payne, then Mr. Busch is guilty too.

[20] The defence argued that the Crown had failed to meet its burden of proof. Characterizing the evidence presented by the Crown as "thin", "weak" and "speculative", defence counsel focused on the contrast between the weaknesses apparent in the case against the appellant (circumstantial and minimal forensic evidence) and the overwhelming evidence against Mr. Armitage. The defence argued that the circumstantial evidence against the appellant allowed for other reasonable inferences, inconsistent with his guilt. He offered three examples: (1) the appellant was never inside Mr. Payne's home; (2) the appellant was inside the home, but played no role in the killing; and (3) the appellant was only inside the home after the killing, and he assisted in a clean up of the crime scene.

[21] In support of the position that the appellant was never inside Mr. Payne's home, the defence emphasized the absence of the appellant's fingerprints and the absence of any evidence suggesting that he (unlike Mr. Armitage) had called anyone from the landline or searched the internet on Mr. Payne's computer.

[22] In support of the alternative scenario that the appellant may have been inside the home, but played no role in the killing, the defence focused on the evidence that he asserted overwhelmingly supported that Mr. Armitage acted alone in killing Mr. Payne.

- [23] Lastly, in support of the inference that the appellant was not inside the home until after Mr. Armitage murdered Mr. Payne and that his participation was limited to cleaning up a crime scene, the defence emphasized: the absence of the appellant's fingerprints in the home; the fact that his DNA was only found on two pairs of underwear and a New Balance shoe found within a garbage bag; and the fact that the New Balance shoes were "virtually bloodless" and therefore more consistent with shoes worn during the cleanup of a crime scene.
- [24] Regarding the appellant's potential liability for first degree murder, the defence emphasized aspects of the evidence inconsistent with planning and deliberation and highlighted frailties with the evidence that might support a finding that Mr. Payne was unlawfully confined.
- [25] Finally, with respect to the Crown's alternative position that the appellant had aided Mr. Armitage in a planned and deliberate murder, the defence focused on the absence of evidence in a number of key areas: placing the appellant in the home prior to Mr. Payne's death; that he assisted Mr. Armitage in the killing; and that he knew Mr. Armitage intended to kill Mr. Payne.

C. The Jury Charge

- [26] Justice Crossin's jury charge was well-structured and organized. It followed extensive pre-charge conferencing with counsel that resulted in consensus. Of note, at no time during any of the pre-charge discussions did the defence object to instructing the jury on aiding a planned and deliberate first degree murder, nor did the defence suggest, as it now does on appeal, that the Harbottle enhanced participation requirement should also be applied to aiding a planned and deliberate first degree murder. To the contrary, the defence agreed that the approach taken by the judge, and how he instructed the jury, was legally correct.
- [27] Justice Crossin took care to streamline and simplify the jury's tasks. He appropriately presented complex legal principles in ways that could be more easily understood. Indeed, the appellant's only criticism of this comprehensive jury charge relates to one narrow area -- what he submits is an omission from the instruction on aiding a planned and deliberate murder. In order to situate this aspect of the charge, it is necessary to summarize some of its other features.
- [28] After detailing the general principles applicable to all criminal cases, specific principles and rules applicable to the appellant's case, and summarizing the evidence, the judge turned to the legal instructions. In an effort to assist the jury in understanding the detailed instructions to come, Crossin J. helpfully prefaced his legal instructions with a general overview. He made it clear the outline was not the legal instruction, but rather was being offered as a way to help the jury "appreciate the instructions, and the alternatives [they] must assess, in considering a verdict" and to help them understand the "legal landscape [they] will be traversing in this case".

[29] The judge began his general overview with what it means to be a "party to an offence" and how the concepts applied, generally, to the case they had to decide:

As a general proposition, in order to assist you in listening to and reading my instructions on the law, a person charged with a criminal offence, including this criminal offence, is alleged to be what's referred to as a party to the offence.

Here, Mr. Busch is alleged to be a party to the offence of first degree murder. An alleged party to an offence may commit the offence in two ways, and you will have to consider this in Mr. Busch's case.

First, a party can be someone who actually personally commits the alleged offence either alone or with others. Here, the Crown alleges Mr. Busch, along with Mr. Armitage, actually committed the first degree murder of Mr. Payne. You have heard the Crown's submissions concerning this point. That is, Mr. Busch, along with Mr. Armitage, actually personally committed the first degree murder of Mr. Payne.

A person who allegedly personally committed the offence is known as a principal. The Crown says, as you have heard, Mr. Busch is a principal, and indeed Mr. Armitage is a principal. The Crown says the two personally perpetrated the crime and are co-principals in the first degree murder of Mr. Payne.

Second, a person can also be a party to an alleged offence if that person does not personally commit the alleged offence but instead helps another person to commit the offence. This is called aiding. I will explain the legal requirements in order to prove someone aided an offence. But as a general comment, in the event the Crown has not proven beyond a reasonable doubt Mr. Busch committed first degree murder as a principal, it is open to the Crown to attempt to prove beyond a reasonable doubt it was Mr. Armitage who actually committed first degree murder as a principal and to prove Mr. Busch aided or helped Mr. Armitage in so committing first degree murder. In that event, Mr. Busch is guilty of first degree murder. In other words, under our law a person who helps or aids another person to commit an offence is equally guilty.

There are the two ways or methods of alleged participation I will be addressing in the legal instructions then, a principal or co-principal with Mr. Armitage, and as an aider to the offence committed by Mr. Armitage.

[30] The judge next alerted the jury to another aspect of the legal instruction to come -- the two ways in which the Crown could prove first degree murder: (1) planned and deliberate; and (2) constructive.

[31] The judge then began his legal instructions with standard instructions about what constitutes culpable homicide, the two degrees of murder, and the two ways in which the Crown sought to prove the appellant was guilty of first degree murder. Next, and consistent with the pre-charge discussions, the judge provided an initial general instruction about party liability, and set out the actus reus and mens rea for aiding as follows:

A person may be found guilty of an offence because he helped someone else commit it. We describe those who help others that commit crimes in this way as aiders. Aiding requires both conduct and a particular state of mind.

An aider may help another person commit an offence by doing something. It is not enough that what the aider does has the effect of or resulted in helping the other person commit the offence. The aider must intend to help the other person commit the offence. Actual assistance is necessary. This is the conduct requirement.

If a person knows that someone intends to commit an offence and does something to advance or help the commission of the offence, that person is an aider of the other's offence and equally guilty of it. Aiding relates to a specific offence. An aider must do something for the purpose of helping the other person commit the offence. The state of mind requirement expressed by the term purpose requires that the Crown prove intent and knowledge.

For intent, the Crown must prove that the accused intended to assist the commission of the offence, although the Crown need not prove that the accused desired the successful commission of the offence.

For knowledge, or state of mind, the Crown must prove that the accused knew that Mr. Armitage intended to commit the offence, although the Crown need not prove that the accused knew precisely how that offence would be committed.

So in this case the Crown alleges Mr. Busch committed the offence of first degree murder in more than one way, either as a co-principal along with Mr. Armitage, or as aiding Mr. Armitage's commission of the offence.

When there is evidence that would permit you to find that Mr. Busch committed an offence in more than one way, you do not all have to agree that guilt has been proven in the same way, that is, on the same basis, in order to find Mr. Busch guilty of that offence. As long as everyone agrees that Mr. Busch committed the offence in one way or the other, then Mr. Busch must be found guilty of that offence.

[32] The judge went on to instruct the jury on the appellant's potential liability as a principal to planned and deliberate first degree murder under s. 231(2) of the Criminal Code. Among other things, he explained to the jury that if they were not satisfied to the requisite standard that the appellant caused Mr. Payne's death, they could not find him guilty as a principal. The judge instructed that this was because, in order to convict the appellant as a principal in the murder, the jury must find that his conduct contributed significantly to Mr. Payne's death. If they were not satisfied of this, the judge explained that "the only route remaining to liability for Mr. Busch for an offence is as an aider".

[33] The judge later instructed the jury on planning and deliberation. He explained that if they were not satisfied beyond a reasonable doubt that the murder was planned and deliberate, they should proceed to consider constructive first degree murder under s. 231(5)(e) of the Criminal Code.

[34] In instructing the jury on constructive first degree murder, the judge correctly set out the elements the Crown was required to prove, including the enhanced participation requirement established in Harbottle. On this element, the judge instructed the jury as follows:

To prove this essential element Crown counsel must satisfy you beyond a reasonable doubt that Mr. Busch's participation in the killing of Mr. Payne was a substantial cause of Mr. Payne's death.

Crown counsel must prove that Mr. Busch played an active role in the events that caused Mr. Payne's death. It is not enough that Mr. Busch was there when Mr. Payne was killed, nor is it enough that Mr. Busch played some minor role in the events. What is required is that Crown counsel prove beyond a reasonable doubt that Mr. Busch was an active participant who played a physical role in the events that brought about Mr. Payne's death.

To decide this issue you must consider all the evidence, use your good common sense, take into account all of the circumstances and weigh the submissions of counsel.

If you are not satisfied beyond a reasonable doubt that Mr. Busch caused Mr. Payne's death by active participation as I have just described in the above section, you cannot find Mr. Busch guilty of first degree murder, but again, Mr. Busch would be guilty of second degree murder. In this event, I direct you that you do not consider whether Mr. Busch committed the offence of attempted unlawful confinement because you have concluded you have a reasonable doubt concerning this final element, and given that reasonable doubt, you cannot convict Mr. Busch of first degree murder under the first degree constructive murder definition.

If, however, you are satisfied beyond a reasonable doubt Mr. Busch caused Mr. Payne's death by active participation as just described and the other essential elements as I have described it to you, you must find Mr. Busch guilty of first degree murder.

[35] After completing his instructions on constructive first degree murder, the judge turned to the portion of the charge at issue on appeal -- his instructions on the appellant's potential liability for aiding a planned and deliberate first degree murder.

[36] The judge began by reminding the jury of his previous instruction that they would only move to consider the appellant's liability as an aider if they had earlier decided they had a reasonable doubt that Mr. Busch's conduct caused the death of Mr. Payne as a principal in the murder. After setting out the essential elements for a finding that Mr. Armitage committed a planned and deliberate murder under s. 231(2), the judge instructed the jury that if they were satisfied to the requisite standard that Mr. Armitage committed a planned and deliberate murder, they should go on to consider whether the appellant aided Mr. Armitage.

[37] In this regard, the judge instructed the jury, in conjunction with his initial instructions on aiding, as follows:

Mr. Busch may be found guilty of first degree murder if he helped Mr. Armitage commit first degree murder. The Crown must prove beyond a reasonable doubt Mr. Busch aided Mr. Armitage, and in order to prove Mr. Busch aided Mr. Armitage it is necessary that the Crown prove beyond a reasonable doubt both the conduct and the particular state of mind that is required.

In the event the Crown proves beyond a reasonable doubt Mr. Busch knew that Mr. Armitage intended to commit first degree murder and was present at the residence when the offence was committed and did something to advance or help Mr. Armitage commit the offence, Mr. Busch is an aider of Mr. Armitage's offence and equally guilty of it.

It is not enough that what Mr. Busch allegedly did to aid Mr. Armitage has the effect of or resulted in the helping Mr. Armitage commit the offence. It must be proven beyond a reasonable doubt Mr. Busch intended to help Mr. Armitage commit first degree murder. Actual assistance is necessary. It is not enough that a person was simply there when a crime was committed by someone else. In other words, just being at the residence does not make a person guilty as an aider of Mr. Armitage. It must be proven beyond a reasonable doubt that Mr. Busch did something or gave assistance or help for the purpose of helping Mr. Armitage commit the offence.

[38] In accordance with the pre-charge discussions, the judge did not instruct the jury on aiding constructive first degree murder.

III. On Appeal

A. The Alleged Error

[39] While he did not take this position in the court below, the appellant contends on appeal that the judge erred by failing to instruct the jury to apply the enhanced participation requirement established in Harbottle for constructive first degree murder under s. 231(5) when considering the appellant's liability for aiding a planned and deliberate murder under s. 231(2).

[40] The parties do not dispute that the allegation here raises a question of law, which attracts a correctness standard of review: *R. v. Illes*, 2008 SCC 57 at para. 21.

[41] Counsel for the appellant candidly acknowledged at the hearing of this appeal that he was unable to identify any authorities in which the enhanced participation standard articulated in Harbottle has been applied to planned and deliberate murder. His position in favour of such an application rests, effectively, on the notion that "first degree murder is first degree murder", and therefore the enhanced participation requirement for constructive first degree murder should apply equally to aiding a planned and deliberate first degree murder (and to all forms of first degree murder). The crux of the appellant's argument is that the Supreme Court of Canada has not conclusively precluded the application of the Harbottle enhanced

participation standard to planned and deliberate murder, and that as the punishment is identical for a conviction pursuant to either s. 231(2) or s. 231(5), there is no principled reason to apply a lower participation standard for planned and deliberate murder.

- [42] The appellant submits that Parliament's intent, reflected in the Criminal Code, is that anyone found guilty of first degree murder must be "fully morally culpable" for the offence. To this effect, he suggests there is a possible scenario, on the facts of this entirely circumstantial case (which allowed for a broad range of inferences to be drawn about the appellant's level of participation), in which the appellant may have had the requisite mens rea as an aider to planned and deliberate murder, but where he did not actually engage in conduct that is sufficient to warrant a first degree murder conviction.
- [43] The appellant acknowledges that his argument that the Harbottle standard applicable to constructive murder should apply to aiding a planned and deliberate murder would require, at least, an evolution of the law -- if not an outright change. He submits, however, that although the Supreme Court of Canada has not stated that an elevated participation threshold does apply to planned and deliberate murder, it also has not explicitly stated that it does not, and that it is open to this Court to make that clarification or change.
- [44] The respondent asks that the appeal be dismissed. Its position is, simply, that the jury instruction on aiding a planned and deliberate murder was correct in law, and that the enhanced participation requirement applicable to constructive murder under s. 231(5) does not apply to s. 231(2).
- [45] The respondent also says the appellant's argument must be rejected as it is inconsistent with the statutory language of s. 231(2), the relevant jurisprudence, leading secondary sources, and the policy considerations underlying the different routes to first degree murder. I agree, in all respects.
- [46] To explain why this appeal should be dismissed, it is helpful to first outline the applicable statutory provisions and governing legal principles.

B. Legal Framework

1. Essential Elements of Murder

- [47] In accordance with s. 229 of the Criminal Code, culpable homicide is murder where the person who caused the death of the victim did so with one of two states of mind:

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;

- [48] With respect to the causation element for murder, the Crown must prove that the accused's unlawful act was a "significant contributing cause" of the victim's death: *R. v. Nette*, 2001 SCC 78 at para. 71.
- [49] As Justice Arbour, writing for the majority, explained in *Nette*, responsibility for causing a result (in this case the death of Mr. Payne) must be determined both in fact and in law. Factual causation is concerned with an inquiry into "how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result": *Nette* at para. 44. The trier of fact usually asks, "But for the action(s) of the accused, would the death have occurred?": *R. v. Maybin*, 2012 SCC 24 at para. 15.
- [50] Legal causation, on the other hand, concerns the accused's responsibility in law for the death that occurred and is "informed by legal considerations such as the wording of the section creating the offence and principles of interpretation": *Nette* at para. 45. Legal causation is based on "concepts of moral responsibility and is not a mechanical or mathematical exercise" (*Nette* at para. 83), and is a normative inquiry directed at the question of whether the accused should be held criminally responsible for the consequences that occurred: *Nette* at para. 45.
- [51] The trier of fact does not consider factual and legal causation separately: *Nette* at para. 46. The ultimate question is whether the accused's actions were a significant contributing cause of the death, such that the accused should be held legally responsible for their actions: *Maybin* at paras. 28-29.
- [52] Once the trier of fact has determined that the accused committed murder, which entails a finding that the accused caused the victim's death in both factual and legal terms, it is then necessary to consider whether the moral culpability of the accused is sufficiently high so as to justify a verdict of first degree murder.
2. Classification of Murder: First or Second Degree
- [53] Section 231 of the Criminal Code classifies, for sentencing purposes, murder as defined in s. 229 as either first or second degree murder. All murder that is not first degree murder is classified as second degree murder: Criminal Code, s. 231(7).
- [54] First degree murder is an aggravated form of murder and not a distinct substantive offence: *R. v. Farrant*, [1983] 1 S.C.R. 124 at 140, 1983 CanLII 118. It is only to be considered after the trier of fact has concluded that the accused has committed murder by causing the death of the victim.
- [55] An accused found guilty of second degree murder will receive a mandatory life sentence, with parole ineligibility to be set between 10 and 25 years. Once the jury concludes that an accused has committed murder, it should then go on to determine whether such aggravating circumstances exist to justify the increased sentence (mandatory parole ineligibility for 25 years) and stigma that comes with a conviction for first degree murder: *Nette* at para. 64. Those aggravating circumstances -- the only circumstances in which murder can be

classified as first degree murder -- are found in ss. 231(2)-(6.2) of the Criminal Code.

- [56] Section 231 is "designed to impose the longest possible term of imprisonment without eligibility for parole upon those who commit the most grievous murders": Harbottle at 314. The circumstances that give rise to a first degree murder conviction include: murders committed after due planning and deliberation (s. 231(2)); contract killings (s. 231(3)); murders of police, sheriffs and correctional officers (s. 231(4)); murders committed while committing or attempting to commit crimes of domination (s. 231(5)); and murders involving: criminal harassment (s. 231(6)); terrorist activity (s. 231(6.01)); criminal organizations (s. 231(6.1)); and intimidation of justice system participants (s. 231(6.2)).
- [57] In this case, we are concerned with only two of these forms of first degree murder: (1) planned and deliberate first degree murder under s. 231(2); and (2) what is known as constructive first degree murder under s. 231(5).
- [58] Section 231(2) provides that "Murder is first degree murder when it is planned and deliberate." Section 231(5)(e), the provision applicable here, states:
- (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

[Emphasis added.]

- [59] I will return to discuss s. 231(5) and the element I have highlighted (the enhanced participation requirement) later in these reasons.

3. Party Liability

- [60] In determining criminal liability, Canadian law does not distinguish between the principal offender and secondary participants to an offence. As codified in s. 21 of the Criminal Code, perpetrators, aiders, and abettors are equally liable: *R. v. Briscoe*, 2010 SCC 13 at para. 13.

- [61] Section 21(1) provides:

Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

- [62] As this Court recently recognized in *R. v. Charlie*, 2020 BCCA 24, this provision has the effect of treating those who actually commit the offence -- the principal(s) -- as indistinguishable from those who aid or abet another in the commission of the offence. All three modes of participation lead to the same consequences: *Charlie* at para. 51, citing *Briscoe* at para. 13.

- [63] Although the consequences are identical, the actus reus and mens rea for aiding and abetting are distinct from those of the principal offender. The actus reus for aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or helps (in the case of aiding) or that encourages or promotes (in the case of abetting) the perpetrator to commit the offence: *Charlie* at para. 55, citing *Briscoe* at para. 14.
- [64] The mens rea for aiding or abetting includes both intent and knowledge. For the intent component, the Crown must prove that the aider intended to assist the principal in the commission of the offence, but need not prove that the aider desired that the offence be successfully committed. For the knowledge component, the Crown must prove that the aider knew that the perpetrator intended to commit the crime, although the aider need not know precisely how the crime was to be committed. The knowledge component may also be proven through the doctrine of wilful blindness: *Briscoe* at paras. 15-17, 21, 23-24.
- [65] While there must be a connection between the alleged act of aiding or abetting and the actual commission of the crime by the principal offender, no causal connection is required: "Any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime" (*R. v. Dooley*, 2009 ONCA 910, leave to appeal to SCC ref'd, [2010] S.C.C.A. Nos. 83, 179; see also *R. v. McRae*, 2016 BCCA 19 at paras. 49-50).
- [66] It is in this way that party liability, as codified in s. 21, allows an accused to be found guilty of causation-based offences such as murder, even if he or she did not actually perform the act that caused the death of the victim. Articulated another way, the law with respect to party liability provides that "individuals may bear criminal responsibility for the acts of another, and in that way speaks conclusively on some issues of causation": *Nette* at para. 63.
- [67] However, as the Crown points out, the general rule that a person can be liable for a crime as a principal or a secondary party is not a universal rule. Statutory language may restrict liability to certain modes of participation: *R. v. Almarales*, 2008 ONCA 692 at para. 64. Section 231(5) of the Criminal Code provides an example of this.
4. The Enhanced Participation Requirement for Constructive First Degree Murder Established in *Harbottle*
- [68] Pursuant to s. 231(5), "[i]rrespective 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 a number of listed provisions of the Criminal Code, including the offence of forcible confinement (emphasis added). The law is settled that, in order to establish liability for first degree murder under this provision, the Crown must prove:
1. the accused is guilty of murder;

2. their actions were "an essential, substantial and integral" part of the killing of the victim (the "enhanced participation requirement");
3. the killing took place while the accused was committing or attempting to commit one of the underlying crimes of domination enumerated in s. 231(5);
4. no intervening act occurred, such that the accused's conduct is no longer substantially connected to the death of the victim; and
5. the crime(s) of domination and murder were part of the same transaction

(Harbottle at 322-326; Nette at paras. 61-65; R. v. Sundman, 2022 SCC 31 at paras. 29-30).

- [69] In Harbottle, Mr. Harbottle and his friend forcibly confined a young woman. After the other man brutally sexually and physically assaulted her while he watched, the two men discussed ways of killing the victim "nicely". When her struggling prevented slashing her wrists, they decided to strangle her. Mr. Harbottle held the victim's legs to prevent her from continuing to kick and struggle (her hands were already tied above her head) while his friend strangled her: Harbottle at 311-312. Mr. Harbottle was convicted of first degree murder.
- [70] On appeal, Mr. Harbottle argued that because the victim died from asphyxia due to strangulation, he could not properly be convicted under s. 231(5) because the language of s. 231(5) required his actions to be the "diagnostic cause" of the victim's death, which they were not: Harbottle at 313. The majority for the Ontario Court of Appeal disagreed and affirmed the conviction, and the Supreme Court of Canada dismissed a further appeal by Mr. Harbottle.
- [71] Justice Cory delivered the unanimous judgment of the Court. After reviewing the object and legislative history of s. 231(5), the homicide provisions as a whole, and the relevant jurisprudence, he concluded that Parliament must have intended the words "when the death is caused by that person" in the provision to have some meaning and to be given some effect. He held that the statutory language of s. 231(5) is broad enough to cover both: (1) perpetrators whose acts were the pathological or diagnostic cause of the death of the deceased; and (2) persons who assisted in the murder and whose acts were a "substantial and integral cause" of the death of the deceased: Harbottle at 316.
- [72] In this way, the Court interpreted "when the death is caused by that person" in the provision to mean that an accused may only be convicted of first degree murder under s. 231(5) if the Crown proves that the accused committed an act or series of acts which are of such a nature that they must be regarded as a "substantial and integral cause of the death": Harbottle at 322-326.
- [73] Applying this standard, the Court concluded that while it was the actions of his friend that were the actual, or diagnostic, cause of the victim's death, Mr. Harbottle's actions in holding her legs to prevent her from struggling were also a "substantial and integral" cause of her death, in that his actions allowed his friend to strangle her to death.

- [74] In drawing these conclusions, the Court noted that the "substantial cause" test under s. 231(5) requires that an accused play a "very active role -- usually a physical role -- in the killing," and that the actions of the accused must "form an essential, substantial and integral part of the killing of the victim": Harbottle at 324-325. The Court observed that this legal standard was a much higher standard of causation than the causal standard required for murder in s. 229 (namely, that the actions of the accused simply be a "contributing cause of death beyond the de minimis range"): Harbottle at 324, citing *Smithers v. The Queen*, [1978] 1 S.C.R. 506, 1977 CanLII 7.
- [75] Justice Cory further held that in most cases it will be necessary for the Crown to establish that it was the actions of the accused that physically caused the death of the victim in order to ground liability for first degree murder under s. 231(5). However, he held that the test would allow for instances where an accused could well be the "substantial cause of the death without physically causing it". The Court noted, for example, that if one accused, with intent to kill, locked a victim in a cupboard, while another accused set fire to that cupboard, then the accused who confined the victim might properly be found guilty of first degree murder on the basis that he caused the death of the victim within the meaning of s. 231(5). Similarly, the Court noted that if one accused "fought off rescuers in order to allow his accomplice to complete the strangulation of the victim," the accused who prevented the rescue efforts might also properly be found to have been a "substantial cause of the death": Harbottle at 324-325.
- [76] In summary, the Court in Harbottle concluded that the use of the phrase "when death is caused by that person" in s. 231(5) imposes an "additional causation requirement", separate from the causation required for the offence of murder, which comes into play once the trier of fact has already concluded that the accused is guilty of murder for having caused the death of the victim: Harbottle at 316-317.
- [77] The Supreme Court of Canada revisited Harbottle in *Nette*.
- [78] Mr. Nette was alleged to have broken into the home of an elderly woman, robbed her, and left her "hog-tied" on her bed, with a garment around her head and neck. After he left the home, and sometime over the next 24 to 48 hours, the victim died from asphyxiation: *Nette* at paras. 17-19. Mr. Nette was charged with first degree murder under s. 231(5), on the basis that he had murdered the victim while committing the offence of unlawful confinement. In distinguishing between the degrees of murder, the trial judge instructed the jury that, for second degree murder, the actions of the accused must have been "more than a trivial cause" of death, while for first degree murder under s. 231(5), the actions of the accused must have been a "substantial cause" of death: *Nette* at paras. 25-28. The accused was convicted of second degree murder.

- [79] On appeal, the accused argued that the "substantial cause" standard articulated in Harbottle should be applied in every type of homicide and each degree of murder, and that the trial judge erred in suggesting that the Harbottle "substantial cause" standard only applied to constructive first degree murder: Nette at para. 40. Both this Court and the Supreme Court of Canada rejected this argument.
- [80] Justice Arbour, for the majority, concluded that the additional causation requirement found in s. 231(5), as described in Harbottle, is essentially an "enhanced participation requirement": Nette at para. 61. Justice Arbour explained that the "substantial cause" standard in Harbottle recognized that the "increased degree of legal causation" is the required "aggravating circumstance" under s. 231(5) that increases the moral blameworthiness of the accused and warrants the increased penalty and stigma associated with first degree murder. This necessary "high degree of blameworthiness" can only be established where, using the language of Harbottle, the actions of the accused were "an essential, substantial and integral part of the killing of the victim": Nette at paras. 64-65.
- [81] As discussed in Harbottle, the enhanced participation requirement for constructive first degree murder under s. 231(5) does not bar conviction of secondary parties: R. v. Tomlinson, 2014 ONCA 158 at para. 145, citing R. v. Ferrari, 2012 ONCA 399 at para. 68. A secondary party, such as an aider or abettor, may be convicted of constructive first degree murder under s. 231(5) if their conduct satisfies the enhanced participation standard articulated in Harbottle: Tomlinson at para. 145, citing Ferrari at para. 85; Harbottle at 316. In some cases, the degree of participation in the killing by an aider or abettor may, under the greater Harbottle participation standard, be insufficient to permit a finding that the murder amounts to first degree under s. 231(5): Nette at para. 62.
- [82] With this overview of the applicable legal framework and governing principles, I turn now to explain why the "substantial and integral cause" participation requirement for constructive murder, as set out in Harbottle, does not apply to planned and deliberate murder.

C. Discussion

- [83] There are three central reasons to not extend the Harbottle enhanced participation standard in the manner suggested by the appellant, which have largely been addressed by the respondent in this appeal:
1. Statutory language: there are clear differences between s. 231(2) and s. 231(5), indicative of parliamentary intent to apply a distinct, enhanced participation standard to s. 231(5) offences.
 2. Jurisprudence: the appellant has provided no authorities in which Harbottle has been applied as he suggests it should be interpreted.

3. Policy considerations: there are policy reasons to reject the application of the elevated participation standard for constructive first degree murder to aiding a planned and deliberate murder.
 1. The Appellant's Position is Inconsistent with the Statutory Language
- [84] Despite the appellant's efforts to minimize the differences between the subsections, s. 231(5) clearly includes language -- "when the death is caused by that person" -- that is not present in s. 231(2). Respectfully, the appellant's position ignores that it is from this additional statutory language in s. 231(5) that the enhanced participation requirement established in Harbottle derives.
- [85] The issue in Harbottle, as I have explained, was the meaning to be given to this additional causal language found in s. 231(5). Finding that Parliament's inclusion of this additional language must be given effect, the Court held that the "restrictive test of substantial cause" to be applied to s. 231(5) takes into account "the consequences of a conviction, the present wording of the section, its history and its aim to protect society from the most heinous murderers. The consequences of a conviction for first degree murder and the wording of the section are such that the test for causation for s. 214(5) [now s. 231(5)] must be a strict one": Harbottle at 313 (emphasis added).
- [86] It is important to remember that this additional causation requirement described in Harbottle is distinct from the causation requirement for the offence of murder. By the time the trier of fact is considering s. 231(5), they have already determined the accused is guilty of murder under s. 229; thus, the factual and legal causation requirements for murder have been met. As set out in Harbottle, for Parliament to include an additional causation requirement in s. 231(5) would serve no purpose, unless it was intended to in some way elevate the participation required by an offender to be convicted of first degree murder under that subsection.
- [87] In contrast, s. 231(2) does not contain any language that would restrict liability to certain degrees of participation. It does not include the words "when the death is caused by that person" found in s. 231(5), or any other language that could attract a similar elevated participation standard.
- [88] It is also notable, as the respondent observes, that the Court in Harbottle considered the evidence was sufficient for Mr. Harbottle to also have been convicted of first degree murder on the basis of planning and deliberation under s. 231(2): Harbottle at 314. However, at no point did the Court suggest that this alternative basis for first degree murder attracted the enhanced participation requirement it had established for s. 231(5).
- [89] Considering the language used in other first degree murder provisions provides further support for the conclusion that the Harbottle enhanced participation requirement does not apply to planned and deliberate first degree murder.

[90] In *Nette*, Arbour J. observed that the Harbottle enhanced participation requirement found in s. 231(5) would also apply to s. 231(6), which also uses the phrase "when the death is caused by that person", to elevate murder to first degree murder where the murder is committed in the course of the offence of criminal harassment: at para. 63. In addition, the Court commented on s. 231(6.1) and suggested that the enhanced participation requirement would not apply to that particular provision because, at the time, it did not use the wording "when the death is caused by that person". Justice Arbour held:

63 As Harbottle, Cribbin and the present case illustrate, causation issues tend to arise in homicides involving multiple parties. Absent s. 21 of the Criminal Code, the attribution of criminal responsibility to an individual who aided or abetted another in the commission of the offence would indeed be problematic. However, the law of parties provides that individuals may bear criminal responsibility for the acts of another, and in that way speaks conclusively on some issues of causation. By virtue of s. 21 of the Code, Cory J. in Harbottle found it unnecessary to engage in fine distinctions as to the degree of participation of the two perpetrators in the killing. Rather, he focused on the meaning of the words "when the death is caused by that person" in s. 214(5) (now s. 231(5)) in deciding whether the appellant could be found guilty of first degree murder. Cory J. concluded that the use of the word "caused" in s. 214(5) imposed an additional causation requirement separate from the causation required for the offence of murder, which comes into play once the jury has already concluded that the accused is guilty of murder for having caused the death of the victim: Harbottle, *supra*, at pp. 316-17. Although not relevant to the present appeal, I note that s. 231(6) of the Code also uses the wording "when the death is caused by that person" found in s. 231(5) to elevate murder to first degree murder where the murder is committed in the course of the offence of criminal harassment under s. 264 of the Code. Such wording is not found in s. 231(6.1) of the Code, which raises murder to first degree where the murder is caused while committing an offence involving the use of explosives under s. 81 of the Code for the benefit of a criminal organization.

[Emphasis added.]

[91] Although obiter, these comments provide additional support for the conclusion that the Harbottle enhanced participation requirement does not apply to planned and deliberate first degree murder. Again, s. 231(2) does not include the phrase "when the death is caused by that person".

[92] It is also notable that in 2009, several years after these obiter comments in *Nette*, Parliament added the language "when the death is caused by that person" to a revised version of s. 231(6.1). In doing so, it is apparent that Parliament intended for the well-established Harbottle "substantial cause" standard governing liability under s. 231(5) to also govern liability under s. 231(6.1): *R. v. Tingle and Dunkley*, 2018 ONSC 7225 at paras. 31-36. That Parliament has not similarly amended s. 231(2) is, in my view, another very strong indication that the Harbottle test is not intended to apply to planned and deliberate first degree murder.

2. The Appellant's Position is Inconsistent with the Jurisprudence

- [93] The appellant has not identified any decisions in which the Harbottle participation standard has been applied to a charge of planned and deliberate murder. He does not assert the case law directly supports his position. Nor does he say that the language of s. 21 of the Criminal Code, which addresses accessorial liability, draws any distinction between liability as an aider to a planned and deliberate murder and liability as an accessory to any other crime. Instead, the appellant's position is grounded in the notion that the required degree of participation should be proportionate to the gravity of the crime and the severity of the sentence. He says that any form of first degree murder is categorically distinct from second degree murder as an aggravated form of murder, and that because the gravity of the crime and severity of the sentence for all forms of first degree murder are the same, there is no justification for applying Harbottle exclusively to s. 231(5) cases. This argument reflects what is commonly referred to as the "fair labelling" principle.
- [94] The fair labelling principle holds that two types of conduct that are both regarded by the community as worthy of a criminal sanction, but are seen as significantly different in terms of culpability, should be identified and treated as different substantive crimes subject to different penalties that reflect the different level of moral culpability: *R. v. L.B.*, 2011 ONCA 153 at para. 71, citing Andrew Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford: Oxford University Press, 2006), at 88-90.
- [95] Justice Doherty, writing for the Court, described the fair labelling principle in the context of a similar submission in *R. v. Maciel*, 2007 ONCA 196, leave to appeal to SCC ref'd, 2007 CanLII 37213. Explaining it as a principle that holds "the offence for which an offender is convicted, and the sentence imposed on that offender, should accurately reflect and be proportional to the offender's actual culpability", Doherty J.A. concluded that "apart from constitutional arguments and as an aid in statutory interpretation, submissions based on the fair labelling principles are properly directed to Parliament and not to the courts": *Maciel* at paras. 80, 83. I agree.
- [96] The appellant does not make any constitutional argument on this appeal, nor does he suggest there are any ambiguities in the relevant sections of the Criminal Code that may require consideration of fair labelling concerns to resolve, or any ambiguities at all.
- [97] In my view, Crossin J.'s instructions to the jury on the appellant's potential liability as an aider to a planned and deliberate first degree murder are consistent with the relevant statutory provisions, and with the case law. As Doherty J.A. stated in *Maciel*, "Parliament has chosen to label perpetrators, aiders and abettors as "parties" to the crime. For the purpose of determining criminal liability, all are equally culpable": at para 85.

- [98] As the respondent emphasizes, it is widely accepted in the jurisprudence that the general principles of party liability apply to planned and deliberate first degree murder. As long as the requisite mens rea is met, an accused may be convicted of first degree murder under s. 231(2) if they do anything to assist or encourage a planned and deliberate first degree murder.
- [99] The respondent points to several authorities that discuss these principles (see e.g.: *Briscoe*; *R. v. Pickton*, 2009 BCCA 299; *R. v. Pickton*, 2010 SCC 32; *Maciel*; *Almarales*; and *R. v. Johnson*, 2017 NSCA 64), and submits they also provide very strong support for a conclusion that the Harbottle test does not apply to a planned and deliberate first degree murder. I agree. It is unnecessary to discuss all of these authorities. A few examples will suffice.
- [100] In *Briscoe*, the offender and four other individuals lured a 13-year old girl into a car. Mr. *Briscoe* drove the group to a secluded golf course, handed another offender a weapon, and held onto the victim while telling her to be quiet at one point. He then stood by and watched others sexually assault and murder the victim: *Briscoe* at paras. 4-6.
- [101] At trial, the primary issue was whether each accused was involved in the killing and, if so, whether criminal liability flowed from this involvement: *Briscoe* at para. 7. The Crown's theory in relation to Mr. *Briscoe* was that he aided or abetted the principal offender in a planned and deliberate first degree murder. Following his acquittal and the Crown's successful appeal, the question before the Supreme Court was whether the trial judge had properly considered the essential elements of aiding and abetting a first degree murder.
- [102] Justice Charron, writing for a unanimous Court, began by clarifying that the actus reus of aiding or abetting is simply doing something that assists or encourages the principal offender to commit the offence: *Briscoe* at para. 14. Regarding the mens rea, the Crown must prove that the accused intended to assist the principal offender in the commission of the offence and that the accused knew the principal offender intended to commit the crime: *Briscoe* at paras. 16-17. In describing how these principles apply in the context of a planned and deliberate first degree murder, the Court adopted *Doherty J.A.*'s explanation in *Maciel*:
- [17] As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense. *Doherty J.A.* in *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516, provides the following useful explanation of the knowledge requirement which is entirely apposite to this case (at paras. 88-89):
- . . . a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* (1990), 1990 CanLII 57 (SCC), 60 C.C.C. (3d) 97 (S.C.C.) at 127.

The same analysis applies where it is alleged that the accused aided a perpetrator in the commission of a first degree murder that was planned and deliberate. The accused is liable as an aider only if the accused did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder. Before the aider could be said to have the requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate. Whether the aider acquired that knowledge through actual involvement in the planning and deliberation or through some other means, is irrelevant to his or her culpability under s. 21(1).

- [103] Importantly, as the respondent highlights, the Court in *Briscoe* did not suggest that the Harbottle enhanced participation requirement found in s. 231(5) applies to aiding a planned and deliberate first degree murder. All that is required is that the accused "did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder": *Briscoe* at para. 17.
- [104] I agree with the respondent's submission that it is notable that Mr. *Briscoe's* involvement in the offence would not have met the Harbottle enhanced participation requirement, as he was not a "substantial and integral cause" of the victim's death. Mr. *Briscoe* did not play an active or physical role in the killing, and yet the Court accepted that his conduct satisfied the actus reus for aiding and abetting a planned and deliberate first degree murder.
- [105] In *Almarales*, the offender was present in an apartment with another man who shot and killed two people. In determining one of the grounds of appeal from his first degree murder conviction -- whether the trial judge had properly instructed the jury on Mr. *Almarales'* potential liability as an aider or abettor of the first degree murders -- Justice Watt expressly distinguished between the conduct requirement for aiding a planned and deliberate first degree murder and that required for constructive first degree murder. His reasons indicate that the Harbottle enhanced participation requirement does not apply to planned and deliberate first degree murder. Justice Watt explained, in part:
- [68] A person may be found guilty of first degree murder as a secondary participant in a planned and deliberate murder. Nothing in s. 231(2), which classifies planned and deliberate murder as first degree murder, eliminates or restricts the secondary participation provisions of ss. 21(1)(b) and 21(1)(c).
- [69] A person may be found guilty of first degree murder as an aider of planned and deliberate murder if that person:
- Did (or, in the case of a legal duty, failed to do) something that helped the (or, a) principal to commit a planned and deliberate murder [the conduct requirement]; and
 - Provided the assistance with the intention of helping the (or, a) principal to commit a planned and deliberate murder [the fault requirement].

- [70] The fault requirement, as in all cases of secondary participation by aiding, consists of two elements: an intention to help the principal and knowledge of the principal's intention. Maciel at para. 87. An aider must know that the principal intends to commit a planned and deliberate murder, and intend to help the principal to commit a planned and deliberate murder. The aider may acquire his or her knowledge that the murder is planned and deliberate through actual participation in the planning and deliberation, or by some other means. The means of acquiring knowledge are as irrelevant to culpability as proof of knowledge is essential to it. Maciel at para. 89.
- [73] Secondary participation in a constructive first degree murder under s. 231(5)(e) of the Criminal Code is more problematic because of the statutory requirement "when the death is caused by that person ". Under *R. v. Harbottle*, 1993 CanLII 71 (SCC), [1993] 3 S.C.R. 306, 84 C.C.C. (3d) 1 at 13-14, the degree of participation in the killing by a secondary participant may be insufficient to permit a finding that the secondary party is guilty of first degree murder under s. 231(5). Nette at para. 62.
- [Emphasis added.]
- [106] In Maciel, the offender was convicted of a planned and deliberate first degree murder in circumstances where the victim was shot multiple times, and the Crown theory was that Mr. Maciel either acted alone, or in concert with his father. Following his conviction, Mr. Maciel argued on appeal that the judge erred by not instructing the jury that a person can only be convicted of planned and deliberate first degree murder as an aider if they were actually involved in the planning and deliberation: Maciel at para. 79.
- [107] Justice Doherty rejected this argument, and confirmed that the general principles of party liability apply to aiding a planned and deliberate first degree murder, with no reference to the Harbottle enhanced participation requirement: Maciel at para. 89. As I discussed earlier, this statement was adopted in *Briscoe*.
- [108] The appellant's position is also not supported -- and is, in some cases, opposed -- by leading secondary sources.
- [109] Justice Ewaschuk, writing extrajudicially, distinguished between the subsections of s. 231 that authorize liability for principal and secondary parties (including s. 231(2)), and those that authorize liability for only principal parties (including s. 231(5)) as a result of the "death is caused" prerequisite:

It is necessary to distinguish between which forms of "first degree murder" authorize liability for both "principal and secondary parties" to the particular offence "and" those which only authorize liability for "principal parties". In particular, s. 231(2) (planned and deliberate murder), s. 231(3) (contract murder), and s. 231(4) (murder of a police officer) each authorize the criminal liability of both "principal and secondary parties" to the particular offence.

On the other hand, s. 231(5) (murder during "underlying offence"), s. 231(6) (murder during "criminal harassment), s. 231(6.01) (murder related to "terrorist activity"), s. 231(6.1)(murder related to "criminal organization") and s. 231(6.2) (murder related to "intimidation of a justice system participant or a journalist") only authorize liability for "principal parties" to the particular offence. These provisions require that "the death is caused by that person", i.e., a person whose actions are a "substantial and integral cause" of the victim's death. The person acts as a "principal party" by being present at "and" directly participating in the murder. The word "caused" is broad enough to include both perpetrators and those who "assist in the murder" and comes within the purview of the "substantial cause" test.

(The Hon. Eugene G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 3rd ed. (Toronto: Thomson Reuters Canada) (loose-leaf updated 2025, release 2), 27:88) [footnotes omitted].

[110] Similarly, Justice Ewaschuk does not reference the Harbottle enhanced participation standard in his discussion of the offence of aiding a planned and deliberate murder (at 27:80) [footnotes omitted]:

While "mere participation" in a planned and deliberate murder does not, standing alone, render a person guilty of first degree murder, each accused need not have planned and deliberated the murder. However, the accused must have "known about, adopted and executed a plan" to commit such a murder even though it was formulated originally by another person. In any event, where more than one accused are involved in a planned and deliberate murder, all accused need not have "participated in the formulation of the plan" to murder so long as the accused, who did not participate in the formulation of the plan, knew of it and adopted it before it was executed.

[111] This approach is echoed by Justice Kenkel, also writing extrajudicially, who describes the requisite participation standard for aiding a planned and deliberate murder as the accused having done "something to assist the perpetrator for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder": The Hon. Joseph F. Kenkel, *Criminal Lawyers' Trial Book*, (Toronto: LexisNexis Canada) (loose-leaf updated 2025, release 182), at 2.477.

[112] Writing shortly after Nette was decided, and prior to his appointment to the Provincial Court of Saskatchewan, Judge Anand wrote that there is a "strong argument" that the subsections of s. 231 that do not include the "death is caused" condition, do not attract the Harbottle substantial cause requirement: The Hon. Sanjeev Anand, "Determining Causal Standards for First Degree Murder in the Wake of Nette: When Does the Substantial Cause Test Apply?", 2002 46 C.L.Q. 282 at 292.

- [113] Lastly, although recognizing that "it may still be open to argument", the seminal Canadian Criminal Jury Instructions also sets out that it is "fairly clear that the special causation requirement in Harbottle does not extend to first degree murder under s. 231(2)": The Hon. John A. Menzies, Gerry A. Ferguson & Michelle Lawrence, Canadian Criminal Jury Instructions (Vancouver: The Continuing Legal Education Society of British Columbia, 2024 Update), at 95.6.
- [114] On balance, these sources reflect a broad consensus among legal scholars that the Harbottle enhanced participation requirement does not apply to aiding a planned and deliberate murder.
3. There is no Policy Reason to Expand Harbottle
- [115] The appellant argues that unless the enhanced participation standard established in Harbottle is extended to planned and deliberate first degree murder, persons will be convicted of first degree murder without possessing the necessary high degree of moral blameworthiness. I respectfully disagree.
- [116] First degree murder is the most serious crime in Canadian law. It carries the most severe punishment under the Criminal Code and requires the highest level of moral blameworthiness -- subjective foresight of death: Sundman at para. 23.
- [117] The purpose of s. 231 is to provide a framework for assessing whether an offender who has already been found guilty of second degree murder has engaged in conduct that is sufficiently morally blameworthy to warrant the increased penalty and stigma of a first degree murder conviction: Nette at para. 64. The section sets out several different forms of first degree murder, each with unique statutory language, and each specifying the additional aggravating elements which will, if proven, elevate second degree murder to first degree murder. Proof of those additional elements ensures that any party convicted under each individual provision has engaged in sufficiently morally blameworthy conduct to warrant the conviction.
- [118] Section 231(2) requires, as the aggravating circumstance increasing moral culpability, proof the murder was committed with due planning and deliberation. The policy rationale behind this provision was explained well in R. v. Pereira, 2019 ONSC 2703:
- [23] The interpretation of the words planned and deliberate is fortified by reflecting on the policy basis behind the provision. As was said by Justice Dickson, as he then was, in the transferred malice case of R. v. Droste, [1984] 1 S.C.R. 208, "there is an added moral culpability to a murder that is planned and deliberate which justifies a harsher sentence." The philosophy is that when a murder is considered and is not hasty or impulsive, an uncompromised, thoroughly volitional choice is made to kill. There is a more fully conscious appreciation of the circumstances and consequences. The luxury of reflection increases the offender's moral blameworthiness.

- [119] This same rationale applies to a secondary party to a planned and deliberate murder. By operation of ss. 21(1)(b) and s. 231(2) of the Criminal Code, a person can only be convicted of aiding a planned and deliberate first degree murder if they knew the murder was planned and deliberate, and intended to assist the perpetrator in the commission of the planned and deliberate murder: *Briscoe* at para. 17. The respondent appropriately characterizes this mens rea requirement as "onerous". It ensures that the accused's moral blameworthiness is commensurate with the gravity of the offence. Like the principal, the secondary participant would possess a "fully conscious appreciation of the circumstances and consequences" and the same heightened degree of moral blameworthiness to warrant the exceptional punishment for first degree murder: *Pereira* at para. 23.
- [120] I agree with the respondent that if the appellant's argument prevailed and the Harbottle enhanced participation requirement extended to planned and deliberate first degree murder, it would have the effect of allowing individuals to escape liability even when they possess the required heightened degree of moral culpability to warrant a conviction under s. 231(2).
- [121] For example, extending the enhanced participation requirement in the manner suggested by the appellant could result in a situation where a person who physically caused the death would be found liable under s. 231(2), but the person who played a key organizational role in the planned and deliberate murder (or supplied the murder weapon) would escape liability under s. 231(2) because they did not substantially participate in the killing itself. This would be entirely inconsistent with the underlying policy rationale for s. 231(2).
- [122] In contrast, requiring an active role in the killing to attract liability for constructive first degree murder under s. 231(5) makes sense. Section 231(5) requires, as its aggravating circumstance increasing moral culpability, an "increased degree of legal causation" that can only be established where the actions of the accused were "an essential, substantial and integral part of the killing of the victim.": *Nette* at paras. 64-65, citing *Harbottle* at 324. It is this increased degree of participation in the killing that constitutes the high degree of moral blameworthiness that justifies the verdict of first degree murder in s. 231(5).
- [123] The organizing principle for the offences listed in s. 231(5) is that they all involve the illegal domination of victims: *Sundman* at para. 27. A murder "committed by someone already abusing his power by illegally dominating another" ought to be "treated as an exceptionally serious crime": *R. v. Paré*, [1987] 2 S.C.R. 618 at 633, 1987 CanLII 1. As the respondent submits, elevating minor assistance -- without an active or physical role in the killing -- to first degree murder would not be consistent with that policy basis, as the organizing principle of "illegal domination" would be absent.
- [124] Constructive murder under s. 231(5) may not be planned and deliberate: it may occur in the heat of the moment, albeit in the course of committing one of the domination offences listed within that subsection. The additional causation language included in s. 231(5) reflects that there must be something more to the offender's conduct that justifies a first

degree murder conviction: Nette at para. 62. While the culpability gap is addressed in part by the inherent egregiousness of the offences listed in s. 231(5), the enhanced participation requirement necessitates that there is more than beyond a de minimis connection between the offender's conduct and the victim's death. The practical need for an enhanced participation requirement for s. 231(5) is clear. Unlike with s. 231(2), without an enhanced participation requirement, a party charged under s. 231(5) could face liability for having played a comparatively limited role in the killing.

[125] Accordingly, it is clear that there are not only differences between s. 231(2) and s. 231(5) on the face of the statute that justify disparate participation standards, but also compelling policy reasons to enforce these standards. In my view, both provisions ensure that any party convicted of first degree murder has engaged in sufficiently morally blameworthy conduct as to warrant such a conviction.

IV. Disposition

[126] The judge made no error in his charge to the jury. The instructions were clear and comprehensive, and properly distinguished between the various routes to liability. The Harbottle enhanced participation requirement applicable to s. 231(5) does not apply to planned and deliberate first degree murder under s. 231(2), and there is no basis in law that would require or permit the judge to have applied it to his charge pursuant to that section. Unlike s. 231(5), no part of s. 231(2) indicates that Parliament intended to limit its application to certain modes or degrees of participation. In the absence of wording "when the death is caused by that person", the general principles of party liability apply.

[127] Accordingly, I would dismiss the appeal.

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Grauer"

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