
CANADA / JUDGMENT

R. v. Russell

2001 SCC 53

COURT

Supreme Court of Canada

DECIDED

14 September 2001

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

R. v. Russell

Collection

Supreme Court Judgments

Date

2001-09-14

Neutral citation

2001 SCC 53

Report

[2001] 2 SCR 804

Case number

27732

Judges

McLachlin, Beverley; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty; Iacobucci, Frank; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil; Arbour, Louise; LeBel, Louis

On appeal from

Ontario

Subjects

Criminal law

Notes

SCC Case Information: 27732

Decision Content

R. v. Russell, [2001] 2 S.C.R. 804, 2001 SCC 53

Donald Bruce Russell Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Russell

Neutral citation: 2001 SCC 53.

File No.: 27732.

2001: April 19; 2001: September 14.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Criminal law -- Preliminary inquiry -- Certiorari -- Whether preliminary inquiry judge's committal of accused to trial reviewable on certiorari where it is alleged that judge erred in setting out elements of offence.

Criminal law -- Elements of offence -- Constructive first degree murder -- Whether s. 231(5) of Criminal Code requires that victim of murder and victim of enumerated offence be same person -- Criminal Code, R.S.C. 1985, c. C-46, s. 231(5) .

The accused was committed to stand trial for several offences, including forcible confinement and first degree murder. The events took place at the home of S with whom the accused was romantically involved. The accused threatened her with a knife, allegedly sexually assaulted her and tied her up in the bedroom. He then left S and went to the basement where, a few minutes later, he stabbed S's tenant to death. The preliminary inquiry judge held that the accused could be committed to trial for first degree murder, rather than second degree murder, on the basis of s. 231(5) of the Criminal Code , which states that murder is first degree if the accused caused the death of another person while committing an offence enumerated under that provision -- in this case, forcible confinement. The committal was quashed on certiorari, and a committal for second degree murder was substituted on the theory that s. 231(5) requires the victim of the murder and the victim of the enumerated offence to be the same person. The Court of Appeal restored the preliminary inquiry judge's order committing the accused to trial for first degree murder. The court held that, even if the preliminary inquiry judge had erred in his interpretation of s. 231(5) , the error constituted an error within his jurisdiction and accordingly was not reviewable on certiorari.

Held: The appeal should be dismissed.

If the preliminary inquiry judge erred in holding that s. 231(5) of the Criminal Code may apply even where the victim of the murder and the victim of the enumerated offence are not the same person, such an error is reviewable on certiorari. The scope of certiorari is very limited, permitting review only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction. It is jurisdictional error for a preliminary inquiry judge to commit an accused to trial where there is no evidence on an essential element of the offence or, as here, in the absence of evidence as to an essential condition of a sentence-classification provision like s. 231 . The “while committing” requirement is an essential condition to the application of s. 231(5) .

.

The preliminary inquiry judge did not err in finding that s. 231(5) may apply even where the victim of the murder and the victim of the enumerated offence are not the same. If the ordinary meaning of the words is consistent with the context in which the words are used and with the object of the Act, then that is the interpretation that should govern. The language of s. 231(5) is clear. The provision does not state that the victim of the murder and the victim of the enumerated offence must be one and the same. It requires only that the accused have killed while committing or attempting to commit one of the enumerated offences. If Parliament had intended to restrict the scope of s. 231(5) , it could have done so explicitly. Judgments from this Court dealing with s. 231(5) never intended to foreclose its application to multiple-victim scenarios. None of those previous cases involved multiple-victim scenarios, and the issue was simply not addressed by the Court. Section 231(5) reflects Parliament’s determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. The expression “while committing or attempting to commit” requires the killing to be closely connected, temporally and causally, with an enumerated offence. As long as that connection exists, it is immaterial that the victim of the killing and the victim of the enumerated offence are not the same.

In this case, there was sufficient evidence to warrant committing the accused to trial for first degree murder. The existence of a temporal link was conceded, and the preliminary inquiry judge found that the Crown had adduced sufficient evidence to allow a jury to find the requisite causal connection. A preliminary inquiry judge’s determination of sufficiency is entitled to the greatest deference; only if there is no evidence on an element of the offence, or on an essential condition of s. 231(5) , can a reviewing court vacate the committal. While the jury would be entitled to find that the accused’s intention in confronting the tenant was entirely independent of the forcible confinement of S, it would also be entitled to conclude that the accused murdered the tenant to facilitate his forcible confinement of S, or that he forcibly confined S to facilitate his murder of the tenant.

Cases Cited

Applied: *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Charemski*, [1998] 1 S.C.R. 679; *Skogman v. The Queen*, [1984] 2 S.C.R. 93; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268; *Quebec (Attorney General) v. Girouard*, [1988] 2 S.C.R. 254; referred to: *R. v. Green* (1987), 36 C.C.C. (3d) 137; *Dubois v. The Queen*, [1986] 1 S.C.R. 366; *Hawkshaw v. The Queen*, [1986] 1 S.C.R. 668; *R. v. Luxton*, [1990] 2 S.C.R. 711; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Hasselwander*, [1993] 2 S.C.R. 398; *R. v. Arkell*, [1990] 2 S.C.R. 695; *R. v. Kirkness*, [1990] 3 S.C.R. 74.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7 .

Criminal Code, R.S.C. 1985, c. C-46, ss. 81 , 81(1) (c), 231(2) , (5) [am. c. 27 (1st Supp.), s. 40(2) (Sch. I, item 3)], (6) [ad. 1997, c. 16, s. 3], (6.1) [ad. 1997, c. 23, s. 8], 279, 548(1) [rep. & sub. c. 27 (1st Supp.), s. 101(1)], 577.

APPEAL from a judgment of the Ontario Court of Appeal (1999), 141 C.C.C. (3d) 556, [1999] O.J. No. 4862 (QL), setting aside an order of the Superior Court of Justice (1999), 138 C.C.C. (3d) 533, [1999] O.J. No. 3248 (QL), and restoring an order of the Ontario Court (Provincial Division) committing the accused to stand trial for first degree murder. Appeal dismissed.

P. Andras Schreck and Mara B. Greene, for the appellant.

David Finley, for the respondent.

The judgment of the Court was delivered by

1 The Chief Justice – This case raises two important issues, one jurisdictional and the other substantive. The jurisdictional question, stated broadly, is whether a preliminary inquiry judge's committal of an accused to trial is reviewable on certiorari where it is alleged that the judge erred in setting out the elements of the offence. The substantive question is whether s. 231(5) of the Criminal Code, R.S.C. 1985, c. C-46 , which states that murder is first degree if the accused caused the death of another person "while committing or attempting to commit" an offence enumerated under that provision, requires that the victim of the murder and the victim of the enumerated offence be the same person. For the following reasons, I conclude that the kind of error alleged by the appellant here is reviewable on certiorari, but that the preliminary inquiry judge did not err in finding that s. 231(5) may apply even where the victim of the murder and the victim of the enumerated offence are not the same.

I. Facts

2 The appellant was charged with the first degree murder of John Whittaker. He was also charged with the sexual assault, sexual assault with a weapon, forcible confinement, and robbery of the complainant, Janet Seccombe. The appellant did not contest his committal to trial for all charges listed in the information except for the charge of first degree murder. The only issue at the preliminary inquiry was whether he could be committed to trial for first degree murder rather than second.

3 Seccombe's testimony at the preliminary inquiry was to the following effect. Seccombe met the appellant in 1992, while he was serving a jail term, and began a romantic relationship with him that continued after his release from jail in March of 1997. When Seccombe first met the appellant, Whittaker had been a tenant in her home for approximately 18 years and was "like a brother" to her. Whittaker and the appellant did not get along and were openly hostile toward one another. Whenever the appellant visited Seccombe, Whittaker avoided him by going downstairs to the basement to work on his computer. Whittaker indicated to Seccombe that he would move out if the appellant moved in. Accordingly, the appellant did not move in with Seccombe after his release from jail. Seccombe attributed the hostility between the appellant and Whittaker to the fact that the appellant is black and Whittaker was racist.

4 The relationship between Seccombe and the appellant deteriorated, apparently because the appellant refused to make payments on a car that Seccombe had purchased on his behalf. They had a disagreement on December 24, 1997. On December 28, the appellant called Seccombe and she agreed to go to dinner and exchange Christmas gifts.

5 The appellant arrived at Seccombe's home at around 4:30 p.m. on December 28. Whittaker was at home and in the basement. There is no evidence that the appellant knew Whittaker was in the house. After sharing a bottle of beer with Seccombe, drinking a shot of rum, and giving Seccombe two Christmas gifts, the appellant told Seccombe that he had also purchased a dress for her. He asked her to go upstairs and put it on to wear to dinner. Seccombe went upstairs, sat on her bed and started to undress.

6 The appellant followed her into the bedroom, put his arm around her neck, and threatened her with a knife. The appellant told her that he was in an "awful lot of trouble" and needed her car keys, credit card, and personal identification number (PIN). The appellant tied her up on the bed with an extension cord and shoelaces and gagged her. He then went downstairs, returned with a bottle of rum, undressed, untied Seccombe's feet, and allegedly sexually assaulted her. Afterward, he released Seccombe so that she could go to the bathroom. The appellant then tied her up again, this time using a telephone cord. He drank more rum, brought her a beer (removing the gag but threatening Seccombe with the knife), inserted a pornographic movie into the VCR, masturbated, and then again asked for Seccombe's PIN and her daily withdrawal limit. After Seccombe gave him the information, the appellant left the room.

7 For five to ten minutes the house seemed “really quiet” before Seccombe suddenly heard Whittaker screaming “Oh, my God, oh, no, oh no”. After ten to fifteen minutes, the appellant returned to the bedroom, out of breath, with water or sweat pouring down his face. He wiped his knife on Seccombe’s night dress, which was on the bed. The doorbell then began to ring continuously. The appellant asked Seccombe if the neighbours were home; she indicated that she did not know. The appellant left the bedroom. Three to four minutes later, a female police officer entered Seccombe’s room and untied her.

8 Seccombe’s neighbours testified that they heard a violent struggle taking place in the basement of Seccombe’s home. After hearing Whittaker saying, “Stop, you’re going to kill me” or “You’re going to kill me”, they called the police, and an officer was dispatched at 7:14 p.m. Officers arrived at 7:18 p.m.

9 The appellant met police at the door with a large bump on his forehead. Police found Whittaker in the basement beaten and stabbed to death. He had approximately forty stab wounds from the chest upward on the front and back and had been beaten with a blunt instrument. A wooden mallet was found on the floor near Whittaker’s body. The knife was found upstairs in the hall. Seccombe was found tied to the bed. Upon his arrest at the scene, the appellant told the officers, “You guys better call an ambulance . . . because I stabbed him . . . he hit me with a hammer, so I stabbed him.”

II. Judgments

1. Ontario Court (Provincial Division)

10 The only issue at the preliminary inquiry was whether the accused could be committed to trial for first, rather than second, degree murder. The Crown advanced two arguments. First, it argued that the appellant could be committed on the basis of s. 231(5) (e) of the Criminal Code , which provides that murder is first degree if the accused murdered “while committing” an offence under s. 279 of the Criminal Code . Section 279 covers offences of kidnapping and forcible confinement. Second, the Crown argued that the appellant could be committed on the basis of s. 231(2) , which states that murder is first degree “when it is planned and deliberate”.

11 With regard to the s. 231(5) (e) argument, the central question was whether the application of that provision requires that the victim of the murder and the victim of the enumerated offence – in this case, forcible confinement – be the same person. Following the decision of the Alberta Court of Appeal in *R. v. Green* (1987), 36 C.C.C. (3d) 137, Wake Prov. J., answered the question in the negative. Wake Prov. J. conceded that certain language in this Court’s decision in *R. v. Paré*, [1987] 2 S.C.R. 618, suggests that the victim of the murder and the victim of the enumerated offence must be the same. He reasoned, however, that Paré’s language merely reflects that in Paré itself the victim of the murder and the victim of the enumerated crime were the same. In Wake Prov. J.’s view, “the essence of both Paré and Green is that [in order to warrant application of s. 231(5)] the underlying offence and the killing must be entwined sufficiently close[ly] in a temporal and causative way”. He noted that in this case the accused had conceded that the forcible confinement and the killing had taken place contemporaneously, and he reasoned that a

jury could reasonably infer a causal link between the murder and the forcible confinement.

12 Applying *R. v. Charemski*, [1998] 1 S.C.R. 679, Wake Prov. J. held that there was sufficient evidence to commit the appellant on first degree murder, and that “the question of whether or not there is a rational explanation for that evidence, other than the guilt of the accused, is a question for the jury”. Having found that the accused could be committed to trial for first degree murder on the basis of s. 231(5) (e), he found it unnecessary to address the Crown’s argument under s. 231(2) .

2. Ontario Superior Court of Justice (1999), 138 C.C.C. (3d) 533

13 On certiorari to the Ontario Superior Court of Justice, Durno J. quashed the committal for first degree murder and substituted a committal for second degree murder, on the theory that s. 231(5) requires the victim of the murder and the victim of the enumerated offence to be the same person. Durno J. noted that in each of the cases in which this Court has examined s. 231(5) since the Alberta Court of Appeal’s judgment in *Green*, supra, it has employed a “single transaction” concept to determine whether the “while committing” requirement has been satisfied. Durno J. understood *Paré*, supra, to stand for the proposition that a murder and another offence could be part of a single transaction only if the murder constitutes the “continuing illegal domination of the victim and the exploitation of the position of power created by the underlying offence” (p. 545 (emphasis added)). He reasoned that the “single transaction” concept “requires the continuing domination of the victim with the murder representing the ultimate exploitation of the position of power created by the underlying offence” (p. 546). He concluded that s. 231(5) requires that the victim of the murder and the enumerated offence be the same person.

14 Durno J. then considered whether the committal could be upheld if, on review, it was found that s. 231(5) did not require the victim of the murder and the victim of the enumerated offence to be the same person. He found that, if s. 231(5) could in fact be applied to two-victim scenarios, there was circumstantial evidence which could support an inference of a close causal connection between the murder and the forcible confinement. Citing *Charemski*, supra, he noted that “whether there is another rational explanation is a factual determination arising from an evaluation of the evidence which is properly left to the jury” (p. 549). He concluded that, if s. 231(5) could in fact be applied to two-victim scenarios, the preliminary inquiry judge had not erred in committing the accused to trial for first degree murder.

3. Court of Appeal for Ontario (1999), 141 C.C.C. (3d) 556

15 Before the Court of Appeal for Ontario, the Crown argued that, even if the preliminary inquiry judge had erred in finding that s. 231(5) could apply where the victim of the murder and the victim of the enumerated offence are not the same, the error constituted an error within jurisdiction and accordingly was not reviewable on certiorari. Finlayson J.A., writing for a unanimous panel, agreed. In his view, the question was answered by this Court’s decision in *Quebec (Attorney General) v. Girouard*, [1988] 2 S.C.R. 254 (hereinafter “*Tremblay*”), which he took to stand for the proposition that a preliminary inquiry judge’s error in interpreting the Criminal Code is an error within jurisdiction and therefore unreviewable on certiorari. Applying

Tremblay, supra, Finlayson J.A. restored the order of Wake Prov. J. committing the accused to trial for first degree murder.

III. Legislation

16 Criminal Code, R.S.C. 1985, c. C-46

231. (1) . . .

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

. . .

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

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

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

(d) section 273 (aggravated sexual assault);

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

(f) section 279.1 (hostage taking).

548. (1) When all the evidence has been taken by the justice, he shall

(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

IV. Issues

17 1. If the preliminary inquiry judge erred in holding that s. 231(5) of the Criminal Code may apply even where the victim of the murder and the victim of the enumerated offence are not the same person, was the error subject to review on certiorari?

2. Does s. 231(5) require that the victim of the murder and the victim of the enumerated offence be the same person?

V. Analysis

1. Jurisdiction

18 The appellant contends that the preliminary inquiry judge erred in holding that s. 231(5) of the Criminal Code may apply even where the victim of the murder and the victim of the enumerated offence are not the same person. A threshold question on this appeal is whether such an error, if committed, is reviewable on certiorari.

19 The scope of review on certiorari is very limited. While at certain times in its history the writ of certiorari afforded more extensive review, today certiorari “runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term ‘jurisdiction’ being given its narrow or technical sense”: *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 99. Thus, review on certiorari does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather certiorari permits review “only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction”: *Skogman*, supra, at p. 100 (citing *Forsythe v. The Queen*, [1980] 2 S.C.R. 268).

20 With respect to preliminary inquiries held under s. 548 of the Criminal Code, the reasons for limiting the scope of supervisory remedies is clear. While the preliminary inquiry also affords defence counsel the opportunity to assess the nature and strength of the case against his or her client, its primary purpose is to ascertain whether there is sufficient evidence to warrant committing the accused to trial: *Skogman*, supra, at p. 106 (citing G. Arthur Martin, Q.C.: “Preliminary Hearings”, Special Lectures of the Law Society of Upper Canada (1955), p. 1); *Dubois v. The Queen*, [1986] 1 S.C.R. 366, at pp. 373-74. Critically, the preliminary inquiry is not meant to determine the accused’s guilt or innocence. That determination is made at trial. The preliminary inquiry serves a screening purpose, and it is not meant to provide a forum for litigating the merits of the case against the accused. The limited scope of supervisory remedies reflects the limited purpose of the preliminary inquiry.

21 In my view, the appellant here alleges a jurisdictional error reviewable on certiorari. The result follows directly from our decision in *Skogman*, supra, which raised the question of whether it is jurisdictional error for a preliminary inquiry judge to commit an accused to trial where there is no evidence on an essential element of the offence. Estey J. answered that question in the affirmative. “‘No evidence’ on an essential element of the charge”, he held, “cannot amount to ‘sufficient evidence’”, and s. 548 of the Criminal Code authorizes the committal of an accused to trial only if there is “sufficient evidence”: *Skogman*, at p. 104. Thus, “[w]here the record . . . does not include evidence relating to each essential element of the charge brought against the accused, a committal of the accused to stand trial can be brought forward by way of a writ of certiorari to a superior court and can be quashed”: *Skogman*, at p. 106.

22 The appellant argues that, contrary to the holding of the preliminary inquiry judge, s. 231(5) requires that the victim of the murder and the victim of the enumerated offence be the same person. In this case the victim of the murder and the victim of the forcible confinement were not the same. If the appellant’s interpretation of s. 231(5) is correct, he has been committed to trial

for first degree murder even though there is “no evidence on an essential element” of s. 231(5) . Accordingly, if the appellant is correct that the preliminary inquiry judge misinterpreted s. 231(5) , the error was jurisdictional and is reviewable on certiorari.

23 This was essentially the reasoning of this Court in *Hawkshaw v. The Queen*, [1986] 1 S.C.R. 668. In that case the accused had been committed to trial for unlawfully making an obscene publication even though no evidence had been introduced suggesting that the accused had published or had intended to publish the photograph. McIntyre J. held that the committal must be quashed, writing: “[o]n the indictment as framed, evidence was required of publication or an intent to publish. The committal without such evidence cannot be sustained on the basis of the majority decision of this Court in *Skogman*”: *Hawkshaw*, *supra*, at p. 676.

24 One difference between this case and *Hawkshaw* is that, whereas *Hawkshaw* involved the absence of evidence on an essential element of the offence, the allegation here is of an absence of evidence as to an essential condition of s. 231(5) , which is not an offence-creating provision but a sentence-classification provision: see *Paré*, *supra*, at p. 625; *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 720. However, the logic that applies to the absence of evidence on an element of the offence also applies to the absence of evidence as to an essential condition of a sentence-classification provision like s. 231. The “while committing” requirement is an essential condition to the application of s. 231(5) . If the central purpose of the preliminary inquiry here was to ensure that there was sufficient evidence to warrant a trial for first degree murder, the absence of evidence that the accused murdered “while committing” an enumerated offence would be as determinative as would be an absence of evidence on an essential element of the offence.

25 In disputing that the alleged error was jurisdictional, the Crown relies principally on this Court’s two-paragraph judgment in *Tremblay*, *supra*. In that case the accused was alleged to have disguised himself as a guard in order to deceive a bank employee into giving him money. The accused was charged with robbery, and he conceded that he had been armed. However, the preliminary inquiry justice reasoned that the mere fact that the accused had been armed, without evidence that he had threatened the victim or that the victim was intimidated, was not sufficient to warrant a committal for robbery. The magistrate therefore committed the accused to trial on charges of theft and conspiracy to commit theft, rather than robbery and conspiracy to commit robbery. The Crown’s application for judicial review was allowed, and that decision was upheld by the Quebec Court of Appeal. This Court, however, restored the order of the magistrate, stating: “[a]ssuming, without deciding the point, that the magistrate erred in the manner suggested, the error was made within the scope of his jurisdiction and as such cannot be a basis for the remedy of certiorari”: *Tremblay*, at p. 254.

26 In my view, the Crown’s reliance on *Tremblay* is misplaced. In *Tremblay*, there was no danger that the accused had been committed to trial on the basis of no evidence. On the contrary, the allegation in *Tremblay* was that there was sufficient evidence to commit the accused to trial for a more serious offence than the one for which he had been committed. It is well-settled law that errors as to the sufficiency of the evidence are within the jurisdiction of the preliminary inquiry judge, as long as there is some evidence supporting the committal: *Dubois*, *supra*. Thus,

Tremblay did not engage the jurisdictional concerns that were engaged in Skogman, *supra*. In this case, however, the challenge to the preliminary inquiry judge's determination raises the possibility that the committal may have been made though there was no evidence on an essential condition of s. 231(5), on the authority of which provision stands the charge of first degree murder. In these circumstances, it is Skogman, not Tremblay, that governs.

27 Contrary to the Crown's assertions, there is nothing in Dubois to suggest a different result. In Dubois all agreed that, on an accused's challenge of a committal order, certiorari is available only to correct jurisdictional errors. The question was whether the same rule applies to the Crown's challenge of a discharge. Estey J. held that the restriction on supervisory remedies applies to the Crown as to the accused. "The questioning of errors of law", he wrote, "is . . . as inappropriate in proceedings to quash a discharge as it is in proceedings to quash a committal": Dubois, at p. 374.

28 The Crown's argument here is that under the "parity" principle of Dubois, if a preliminary judge's error as to the elements of a crime is unreviewable when challenged by the Crown (as the Crown contends is the law under Tremblay), that kind of error must also be unreviewable when challenged by the accused. The Crown argues that "the availability of certiorari does not turn on the identity of the party seeking that relief, but rather on the nature of the alleged error". I find nothing objectionable in that assertion, but I cannot see how it warrants the conclusion that the alleged error in this case is unreviewable on certiorari. The fault lies in the Crown's characterization of the error as "an alleged misinterpretation of the elements of the offence". When characterized this way, it is indeed difficult to see how it can be that the accused can challenge such an error though the Crown cannot. The logic becomes clear, however, once the rule is framed, as it should be, in terms of the jurisdiction of the preliminary inquiry judge: whether the error is challenged by the Crown or by the accused, an error is reviewable on certiorari only if it is jurisdictional. If it is not jurisdictional, no recourse to certiorari may be had. It is not the fact that it is the accused seeking certiorari here that makes the error reviewable. It is the fact that the error is jurisdictional.

29 The discrepancy that troubles the Crown is not, in my view, disturbing. As I note above, the governing principle is the same whether an error is challenged by the Crown or by the accused. While it is true that the effect of this principle is that errors as to the essential elements of the crime will, as a general rule, be reviewable when challenged by the accused but not when challenged by the Crown, this disparity reflects the balance of harms: a wrongful discharge does not raise the possibility of a violation of s. 7 of the Canadian Charter of Rights and Freedoms; by contrast, I think it clear that committing an individual to stand trial on a charge for which there is no evidence on one of the essential elements would violate the principles of fundamental justice. I note, moreover, that in circumstances such as were at issue in Tremblay, the Crown is free, subject to the requirements of s. 577 of the Criminal Code, to lay a new information or prefer an indictment. There is no analogous remedy available to the accused.

30 I conclude that the appellant alleges a jurisdictional error that would be susceptible to review on certiorari.

2. Section 231(5)

31 I turn now to the question of whether the preliminary inquiry judge erred in holding that s. 231(5) may apply even if the victim of the murder and the victim of the enumerated offence are not the same.

32 The question is first and foremost one of statutory interpretation. As such, the governing principles are well settled: the words in question should be considered in the context in which they are used, and read in a manner consistent with the purpose of the provision and the intention of the legislature: see *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 784 (citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *R. v. Hasselwander*, [1993] 2 S.C.R. 398). “If the ordinary meaning of the words is consistent with the context in which the words are used and with the object of the act, then that is the interpretation which should govern”: *Heywood*, supra, at p. 784.

33 The language of s. 231(5) is clear. The provision does not state that the victim of the murder and the victim of the enumerated offence must be one and the same. It requires only that the accused have killed “while committing or attempting to commit” one of the enumerated offences. Nothing in that phrase suggests that the provision’s application is limited to cases in which the victim of the murder and the victim of the enumerated offence are the same. An interpretation of the provision that recognized such a limitation would effectively read into the provision a restriction that is not stated.

34 Other provisions of the Criminal Code indicate that, where Parliament intends to limit the phrase “while committing or attempting to commit”, it does so in express language. Section 231(6) , for example, provides that:

Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 264 [Criminal Harassment] and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered. [Emphasis added.]

Without the limitation, s. 231(6) would apply to a person who had murdered one person while criminally harassing another. The limitation restricts the application of the provision to those who murder the person they are criminally harassing. No analogous limitation is stated in s. 231(5) .

35 Still other provisions of the Criminal Code suggest that Parliament’s use of the phrase “while committing or attempting to commit” does not in itself reflect an intention to create a same-victim requirement. Section 231(6.1) , for example, provides that:

[M]urder is first degree when the death is caused while committing or attempting to commit an offence under section 81 [using explosives] for the benefit of . . . a criminal organization. [Emphasis added.]

Section 81 proscribes conduct that includes using explosives against property: see s. 81(1) (c) (“Every one commits an offence who . . . with intent to destroy or damage property without lawful excuse, places or throws an explosive substance anywhere . . .”). Parliament must have contemplated, therefore, that s. 231(6.1) might be applied even where there is no “victim” at all to the underlying crime. It would be senseless to say that the victim of the murder and the explosives offence must be one and the same where the latter crime might have no victim at all. Section 231(6.1) suggests that the use of the phrase “while committing or attempting to commit” does not itself create a same-victim requirement.

36 If Parliament had intended to restrict the scope of s. 231(5) , it could have done so explicitly, as it did in s. 231(6). That Parliament did not incorporate such a restriction suggests that it intended “while committing or attempting to commit” to apply even where the victim of the murder and the victim of the enumerated offence are not the same. Indeed, several of the offences enumerated in s. 231(5) quite clearly raise the possibility that the person murdered will not be the same as the victim of the enumerated crime, and it would be difficult to conclude that this possibility did not occur to the drafters of the provision. A hijacker might kill a person on the runway; a kidnapper might kill the parent of the child he means to kidnap; a hostage-taker might kill an innocent bystander or a would-be rescuer. It is difficult to conclude that Parliament did not envision such possibilities.

37 The fact that s. 231(5) reaches not only successfully executed offences but also attempts raises similar concerns. Many attempt charges stem from crimes that were thwarted or aborted, often because of the intervention of a third party. Parliament surely envisioned such scenarios when it drafted the provision. Had Parliament not wanted the provision to reach these circumstances, it could easily have attached an explicit restriction to the provision’s language.

38 In arguing that s. 231(5) applies only where the victim of the murder and the victim of the enumerated offence are the same, the appellant relies principally on this Court’s judgment in *Paré*, *supra*. In *Paré*, the accused had murdered a boy two minutes after indecently assaulting him. The question was whether the accused had committed the murder “while committing” the indecent assault. Wilson J. quoting Martin J.A. answered the question in the affirmative, holding that a death is caused “while committing” an offence enumerated under s. 231(5) “where the act causing death and the acts constituting the [enumerated offence] all form part of one continuous sequence of events forming a single transaction”: *Paré*, at p. 632. Wilson J. reasoned that this understanding of the provision best reflects the underlying policy concerns, which she characterized as follows at p. 633:

The offences listed in s. 214(5) [now s. 231(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.

39 While that passage does not in itself suggest that s. 231(5) applies only where the victim of the murder and the enumerated offence are the same, Wilson J. went on to write: “it is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder. The murder represents an exploitation of the position of power created by the underlying crime and makes the entire course of conduct a ‘single transaction’”: Paré, *supra*, at p. 633 (emphasis added). The appellant’s argument is that Parliament “never intended that the existence of unlawful domination, in and of itself, [would be] sufficient to warrant classifying a murder as first degree murder”. Rather, as Wilson J. recognized, “it is the unlawful domination of the victim that justifies this classification” (appellant’s factum, at p. 20 (emphasis in original)).

40 There is some support for the appellant’s interpretation of s. 231(5) in this Court’s other judgments dealing with s. 231(5). In *R. v. Arkell*, [1990] 2 S.C.R. 695, we considered whether s. 214(5) (now s. 231(5)) violates s. 7 of the Charter because it results in punishment that is not proportionate to the seriousness of the offences. In rejecting that contention, Lamer C.J. wrote: “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 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”: *Arkell*, *supra*, at p. 704 (emphasis added).

41 In *Luxton*, *supra*, we addressed the related question of whether the combined effect of s. 214(5) and s. 669(a) infringes s. 7 of the Charter by foreclosing individualized sentences and thereby violating the principle that the severity of a sentence should reflect the degree of moral blameworthiness associated with the crime. Section 669 (a) (now s. 745 (a)) provides that an accused convicted of first degree murder must be sentenced to life in prison without the possibility of parole until he has served 25 years of his sentence. In finding that the impugned provisions did not infringe s. 7, Lamer C.J. wrote: “Murders that are done while committing offences which involve the illegal domination of the victim by the offender have been classified as first degree murder”: *Luxton*, at p. 721 (emphasis added).

42 I am not persuaded, however, that this Court intended in Paré, *supra*, Arkell, *supra*, or Luxton, *supra*, to foreclose the application of s. 231(5) to multiple-victim scenarios. None of those cases involved multiple-victim scenarios, and the issue was simply not addressed by the Court. In my view, the references to the “victim” simply reflect the facts of those cases. The essential thrust of Wilson J.’s reasoning in Paré was that the offences enumerated in s. 231(5) are singled out because they are crimes involving the domination of one person by another. The essence of the reasoning was that s. 231(5) reflects Parliament’s determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. In many cases, such murders will be committed as the culmination of the accused’s domination of the victim of the enumerated offence. This was the case in Paré, Arkell and Luxton. In other cases, however, the accused will have murdered one person in connection with the domination of another. I cannot conclude that Wilson J.’s judgment in Paré or Lamer

C.J.'s judgments in *Arnell* or *Luxton* foreclose the application of s. 231(5) in such cases.

43 In my view the appellant states the organizing principle of s. 231(5) too narrowly. The provision reflects Parliament's determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. "[W]hile committing or attempting to commit" requires the killing to be closely connected, temporally and causally, with an enumerated offence. As long as that connection exists, however, it is immaterial that the victim of the killing and the victim of the enumerated offence are not the same.

44 In oral argument, the appellant relied heavily on the fact that murder is not itself an offence enumerated under s. 231(5). On the appellant's theory, if Parliament had contemplated that the provision might be applied to multiple-victim scenarios, it would surely have included murder on the list of offences, because murder committed to facilitate another, or other, murder is obviously as morally blameworthy as murder committed to facilitate any of the enumerated offences. In the appellant's view, the absence of murder from the list of offences can only be explained by the fact that Parliament did not contemplate that the provision might be applied to situations in which the victim of the murder and the victim of the enumerated offence are not the same.

45 I think the more likely explanation for the exclusion of murder from the list of enumerated offences under s. 231(5) is simply that, in most situations in which an accused has killed two or more people and there is a temporal and causal nexus between the killings, s. 231(2) will apply. That provision states that "[m]urder is first degree murder when it is planned and deliberate". While one can imagine situations in which an accused might have killed two or more people spontaneously, without planning or deliberation, such scenarios are surely the exception rather than the rule. In all likelihood, the reason that Parliament did not include murder as an enumerated offence under s. 231(5) is that it concluded that most multiple murders would engage s. 231(2).

46 The appellant rightly points out that s. 231(5) imposes a severe penalty – indeed, the most severe penalty imposed under our Criminal Code – and accordingly it is particularly important that the provision be strictly construed. While this principle is unimpeachable, it cannot in itself justify restricting the ordinary meaning of the provision's words. The cases of this Court dealing with s. 231(5) make clear that an accused commits a murder "while committing or attempting to commit" an enumerated offence only if there is a close temporal and causal connection between the murder and the enumerated offence: see, e.g., *Paré*, *supra*, at p. 632 (stating that a murder is committed "while committing" an enumerated offence only "where the act causing death and the acts constituting [the enumerated offence] all form part of one continuous sequence of events forming a single transaction"); *R. v. Kirkness*, [1990] 3 S.C.R. 74, at p. 86. In my view this requirement appropriately restricts the application of s. 231(5) to contexts within the intended scope of the provision.

47 This brings me to the question of whether there was sufficient evidence in this case to warrant committing the appellant to trial for first degree murder. The existence of a temporal link having been conceded, the only issue is whether a sufficient causal link existed between the murder and the forcible confinement. In finding that the Crown had presented sufficient evidence to allow a jury to find the requisite causal connection, Wake Prov. J. focused on the fact that the appellant went to the basement to confront Whittaker even though the two normally avoided one another, and on the fact that Seccombe was still bound and gagged when the appellant went downstairs to confront Whittaker. Wake Prov. J. found that “[t]he jury would be entitled to infer from the evidence that the accused on becoming aware of Mr. Whittaker’s presence in the house would be concerned that Mr. Whittaker might readily discover his house-mate bound and gagged upstairs and raise an alarm which might thwart the accused’s efforts to make use of her credit card and her car”.

48 As we discussed in Skogman, supra, a preliminary inquiry judge’s determination of sufficiency is entitled to the greatest deference; only if there is no evidence on an element of the offence, or on an essential condition of s. 231(5), can a reviewing court vacate the committal: see Skogman, at pp. 100 and 106. With this in mind, I cannot conclude that the committal of the accused was unwarranted. While the jury would be entitled to find that the appellant’s intention in confronting Whittaker was entirely independent of the forcible confinement of Seccombe – indeed, the apparent animosity between the appellant and Whittaker might support such a conclusion – the jury would equally be entitled to conclude that the appellant murdered Whittaker to facilitate his forcible confinement of Seccombe, or that the appellant forcibly confined Seccombe to facilitate his murder of Whittaker.

VI. Conclusion

49 For the foregoing reasons, I find that the error alleged by the appellant would have been reviewable on certiorari but that the preliminary inquiry judge did not err.

50 The appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Pinkofsky Lockyer, Toronto.

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

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1892/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-russell-2001>

Prepared on 26 October 2026 · Esheria