

CANADA / JUDGMENT

R. v. Sundman

2021 BCCA 53

COURT

British Columbia Court of Appeal

DECIDED

9 February 2021

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

2021 BCCA 53 R. v. Sundman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sundman,

2021 BCCA 53

Date: 20210209

Dockets: CA45275; CA45276; CA45488

Docket: CA45275

Between:

Regina

Appellant

And

Darren Caley Daniel Sundman

Respondent

- and -

Docket: CA45276

Between:

Regina

Appellant

And

Sebastian Blake Martin

also known as Sebastian Blake Thomas

Respondent

- and -

Docket: CA45488

Between:

Regina

Respondent

And

Darren Caley Daniel Sundman

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated
April 13, 2018 (R. v. Sundman, 2018 BCSC 602, Prince George Docket 42212).

Counsel for the Crown:

M.A. Street

Counsel for Darren Caley Daniel Sundman:

D.J. Song

Counsel for Sebastian Blake Martin also known as Sebastian Blake Thomas:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

October 5-6, 2020

Written Submissions Received:

December 18, 2020

January 6, 2021

January 12, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 9, 2021

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Grauer

Summary:

Following a judge alone trial, Darren Sundman ("Sundman") and Sebastian Martin ("Martin") were acquitted of first degree murder but convicted of the included offence of second degree murder. The Crown appeals the acquittals. Sundman appeals his conviction. Martin has not appealed.

Sundman, his brother Kurtis, and the victim, Jordan McLeod ("McLeod"), were rival drug traffickers in the Vanderhoof area. The judge found that the Sundman brothers confined McLeod in a moving vehicle. Martin was present in the vehicle when the confinement occurred, but the judge made no finding that he was a party to the offence. McLeod jumped from the vehicle in a rural area. He attempted to flee in deep snow. He was shot moments later by Sundman, and then by Martin. The judge found Sundman and Martin guilty of murder, but concluded that neither of them could be convicted of first degree murder pursuant to s. 231(5)(e) of the Criminal Code because, at the time of the shooting, McLeod's confinement had come to an end.

On his appeal, Sundman says the judge misapprehended evidence relating to intoxication. Relying on *R. v. Teskey*, 2007 SCC 25, he also argues that delay in the issuance of written reasons for judgment on certain pre-trial rulings displaces the presumption of judicial integrity and frustrates meaningful appellate review. In addition, he asserts that the delay gave rise to a miscarriage of justice in fact and in appearance.

On its appeal, the Crown argues that the judge erred in law in his understanding and application of the elements of the offence of unlawful confinement. Relying on *R. v. Paré*, [1987] 2 S.C.R. 618, the Crown also argues that the judge erred in law by requiring proof that the confinement and murder occurred simultaneously. On the facts found by the trial judge, the Crown argues that Sundman and Martin should have been convicted of first degree murder.

Held: Sundman's appeal is dismissed. The judge did not misapprehend the evidence relevant to intoxication. Teskey has no direct application, as Sundman did not appeal any of the pre-trial rulings subject to the delay. There was no unfairness, or appearance of unfairness, resulting from delay in the release of written reasons for judgment on those rulings. The Crown appeal from Sundman's acquittal of first degree murder is allowed, the conviction for second degree murder is set aside, and a guilty verdict is entered on the offence charged. On the facts he found, the judge erred in law in concluding McLeod was not confined at the time of the shooting. In addition, he erred in law by assigning legal significance to the brief gap in time between when McLeod jumped from the vehicle and the shooting. On the factual findings made by the judge, Sundman was guilty of first degree murder and the judge erred in law by failing to come to this conclusion. The Crown appeal from Martin's acquittal of first degree murder is dismissed. As the judge found that Martin was not a party to the confinement, the errors in law had no bearing on Martin's acquittal.

Table of Contents

Paragraph

I. Introduction

[1]

II. Background

[11]

III. Darren Sundman's Appeal from Conviction for Second Degree Murder (CA45488)

[50]

1. Delay in the Release of Written Rulings on the Pre-Trial Applications

[50]

(a) Background

[50]

(b) The Appellant's Position

[69]

(c) Analysis

[74]

2. Misapprehension of the Evidence of Intoxication

[88]

(a) Background

[88]

(b) Sundman's Position

[99]

(c) Analysis

[100]

IV. The Crown Appeals (CA45275 and CA45276)

[115]

1. The Position of the Crown

[115]

2. The Positions of Sundman and Martin

[116]

V. Analysis

[118]

1. The Legislative Framework

[118]

2. The Factual Findings of the Trial Judge

[119]

3. The Respondents' Complaint that the Crown is Advancing New Arguments and Theories of Liability for the First Time on Appeal

[122]

(a) That chasing and shooting at someone necessarily constitutes the offence of unlawful confinement

[123]

(b) That the respondents caused McLeod's death while committing the offence of attempted unlawful confinement

[126]

(c) That McLeod was unlawfully confined after he jumped from the moving vehicle

[132]

4. The Remaining Grounds of Appeal

[139]

5. Error in Law Respecting the Scope of the Offence of Unlawful Confinement

[148]

6. Error of Law in the Application of the Requirements for First Degree Murder Pursuant to Section 231(5)(e) of the Code

[164]

7. Remedy

[177]

(a) Martin

[178]

(b) Sundman

[184]

VI. Dispositions

[189]

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] Darren Sundman, his brother, Kurtis Sundman, and Sebastian Martin were jointly charged with committing the first degree murder of Jordan McLeod. The offence was alleged to have been committed on or about the 16th day of January, 2015, on the outskirts of Prince George, British Columbia.
- [2] It was the theory of the Crown that the murder was planned and deliberate. Alternatively, the Crown sought convictions on the basis that the murder occurred while the three accused were committing the offence of unlawful confinement. Section 231(5) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] provides that, irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder if the death is caused while that person is committing or attempting to commit a number of enumerated offences, including forcible confinement. The offence of forcible confinement is committed when a person unlawfully confines another person.
- [3] Following a judge alone trial, Darren Sundman and Sebastian Martin were acquitted of first degree murder but convicted of the included offence of second degree murder. Kurtis Sundman was acquitted of first degree murder but convicted of the included offence of manslaughter.

- [4] The Crown appeals the acquittals of Darren Sundman and Sebastian Martin on the charge of first degree murder, arguing, among other things, that the trial judge erred in law in his application of *R. v. Paré*, [1987] 2 S.C.R. 618 to the facts he found. Specifically, the Crown submits that the acquittals flowed from the judge's erroneous assignment of legal significance to his finding that there was a brief gap in time between the end of the confinement and the commission of the murder. The Crown seeks orders pursuant to s. 686(4)(b)(ii) of the Code that its appeals be allowed, the convictions for second degree murder set aside, and convictions for first degree murder entered against both offenders.
- [5] The Crown has not appealed Kurtis Sundman's acquittal on the charge of first degree murder, and Kurtis Sundman has not appealed his conviction on the included offence of manslaughter.
- [6] Darren Sundman ("Sundman" or "Darren") appeals his conviction for second degree murder on two grounds. First, he submits that the trial judge misapprehended critical evidence relevant to the defence of intoxication and to the determination of whether he acted with the requisite intent for murder. Second, relying on *R. v. Teskey*, 2007 SCC 25, he submits that delay in the issuance of written reasons for judgment on certain pre-trial applications until well after the verdicts were rendered displaces the presumption of integrity that the rulings reflect the reasoning that led to those decisions. He submits that the written rulings on the pre-trial applications should be disregarded and a conclusion reached that the bare pronouncement of judgment on those pre-trial applications before the trial commenced is insufficient to permit meaningful appellate review. In oral argument, a further argument was advanced in support of this ground--that delayed delivery of the reasons for judgment on the pre-trial applications so fatally compromises the appearance of justice that appellate intervention is required under s. 686(1)(a)(iii) of the Code to address the miscarriage of justice thereby occasioned. On both of these grounds, Sundman seeks a new trial on a charge of second degree murder.
- [7] Sebastian Martin ("Martin") has not appealed his conviction for second degree murder.
- [8] For the reasons that follow, I would dismiss Sundman's appeal from conviction.
- [9] I would allow the Crown appeal from the acquittal of Sundman, set aside his conviction for second degree murder and enter a conviction for first degree murder. I would remit the imposition of sentence on Sundman to the trial court. I do so because both offenders gave notice of their intention to challenge the mandatory minimum sentence of life imprisonment without eligibility for parole for 25 years if they were convicted of first degree murder. Having acquitted the offenders of first degree murder, it was unnecessary for the trial judge to address this constitutional question. In light of the disposition I am proposing, it is necessary to address the question now.

- [10] I would dismiss the Crown appeal from Martin's acquittal on the charge of first degree murder. The judge made no factual finding that Martin was a party to the unlawful confinement of Jordan McLeod that was committed by the Sundman brothers. Absent this finding, and despite the errors in law committed by the trial judge, Martin cannot be found liable for first degree murder under s. 231(5)(e) of the Code. Unlike Sundman, and for reasons I will explain, the errors had no material bearing on Martin's acquittal.

II. Background

- [11] I will summarize only so much of the background as is necessary to explain my proposed disposition of these appeals. The summary that follows is based largely on factual findings made by the trial judge. Additional facts relevant to each of the grounds of appeal will be addressed in my discussion of those grounds.
- [12] The Sundman brothers trafficked drugs in the Vanderhoof area. Both of them were heavy drug users. Martin was on friendly terms with the Sundman brothers and occasionally sold drugs for Darren. Staci Stevenson ("Stevenson") was Darren's girlfriend. She assisted Darren in the drug trade and was also a heavy user of drugs.
- [13] The victim, Jordan McLeod ("McLeod"), lived in Prince George. He, too, was involved in the drug trade. In the latter part of 2014, he supplied drugs to the Sundman brothers. In the early part of 2015, McLeod began supplying drugs to Tanner James ("James") who was also selling drugs in the Vanderhoof area in competition with the Sundman brothers.
- [14] Stevenson and Sundman had a tumultuous relationship and matters came to a head in late December 2014. Ms. Stevenson began spending time with McLeod. This angered Sundman who sent Stevenson a text that reads, "You fucking him now?" McLeod taunted Sundman about having sex with Stevenson in a telephone call on January 10, 2015, five days before the killing.
- [15] On the evening of January 13, 2015, or in the early morning hours of January 14, 2015, Kurtis Sundman stole a black 2000 Chevrolet Silverado pickup truck. The vehicle had an extended cab with rear seating capacity. This is the vehicle that was used in the commission of the murder.
- [16] On January 16, 2015, McLeod travelled from Prince George to Vanderhoof in a rented vehicle.
- [17] At about 8:00 p.m. that evening, the Sundman brothers, Martin and McLeod drove in the Silverado to a residence located on the Stoney Creek Reserve near Vanderhoof to collect money on a drug debt owed to McLeod by James. McLeod's rental vehicle was parked and left on a road that leads to Sundman's mobile home and the Stoney Creek Reserve.
- [18] When James came out of the residence, he was pushed into the front seat of the Silverado between Kurtis, who was driving, and McLeod. Darren and Martin were backseat passengers. The Sundman brothers told James they were angry with him for purchasing

drugs from McLeod. They proceeded to assault James in the vehicle before driving him back to the Stoney Creek Reserve on the understanding that he would give them some drugs and money. When they arrived back at the residence, James darted inside. Others who were inside the house intervened in the ensuing fracas. The Sundman brothers threatened the occupants of the residence and said they would be back. James testified it was apparent to him that the Sundman brothers were on drugs when this confrontation occurred.

- [19] The Sundmans, Martin and McLeod drove back to Darren's mobile home in Vanderhoof. Darren and Kurtis armed themselves with handguns--a 40-calibre Glock and a 9 mm Jericho or Taurus. Martin took possession of a 12-gauge shotgun. Darren told Stevenson to join them in the truck. Stevenson had been smoking methamphetamine.
- [20] The Sundman brothers, Martin, McLeod and Stevenson left in the Silverado. Kurtis, who had possession of one of the handguns, drove. McLeod sat in the front passenger seat. Martin, who was holding the shotgun, sat in the rear seat behind Kurtis. Darren, who was in possession of the other handgun, sat in the passenger side rear seat, immediately behind McLeod. Stevenson sat in the middle of the rear seat between Darren and Martin. Darren and Stevenson smoked crystal methamphetamine as Kurtis drove.
- [21] None of the accused testified at trial. The only direct evidence about what occurred in the vehicle came from Stevenson, although a substantial body of circumstantial evidence was found to confirm her account.
- [22] The truck travelled east toward Prince George. The judge found it likely that two stops were made in or near Prince George, the first so Darren could buy beer, and the second to enable Kurtis to purchase heroin. The truck continued to travel east through Prince George before it turned left and headed north on Upper Fraser Road.
- [23] Predictably, there was conflict in the vehicle. Darren was unhappy that McLeod was supplying drugs to the Vanderhoof market through James, a rival drug dealer, and thereby encroaching on the Sundmans' "turf". The Sundmans owed a substantial sum of drug-related money to McLeod and he was exerting pressure on the Sundmans to pay the debt. Darren knew or, at the very least, suspected that McLeod and Stevenson had begun an intimate relationship. Finally, in the course of the trip, Darren gained access to McLeod's telephone and accessed messages that were insulting to the Sundmans and suggested that McLeod was the source of threats that had recently been directed towards them.
- [24] The judge made these factual findings about what occurred next:
- [87] Suffice to say, Darren Sundman was angry at Jordan McLeod. At some point, Darren Sundman, from his position behind Jordan McLeod, struck him in the head with a handgun, repeatedly. Mr. McLeod, for his part, was doing what he could to extricate himself from this predicament, including saying that the debt would be forgiven and imploring the Sundmans to let him go. There is no basis to find that Kurtis Sundman inflicted any physical violence on Mr. McLeod, although I am satisfied that he was verbally encouraging his brother and the

fact that he continued to drive the vehicle fast had the effect of preventing Mr. McLeod from being able to get away from the assault. As well, I am satisfied that Kurtis Sundman taunted Jordan McLeod to jump out.

- [88] It appears that Sebastian Martin was not any active part of the acrimony or violence. He remained in the rear seat, although he did have possession of the shotgun.
- [90] Just shortly after the point that the truck slowed and turned left off of Highway 16 and onto Upper Fraser Road, Jordan McLeod opened his door and jumped out. As he did that, Kurtis Sundman brought the vehicle to a stop.
- [91] The evidence does not permit firm conclusions as to where exactly that occurred or whether the vehicle was actually moving quickly when Mr. McLeod jumped out or was coming to a stop. I do not find the answers to those questions critical to the analysis. The physical evidence of activity found by police investigators at the scene establishes where the shooting occurred, and that was approximately 300-400 meters north of Highway 16.
- [92] What is clear is that matters in the vehicle had flared up in quite a fierce and aggressive way. Specifically, the violence that Darren Sundman had inflicted upon Jordan McLeod, repeatedly striking him with his handgun, and the tenor of what was happening in the vehicle were the reasons that Jordan McLeod took the risky step of leaping out of a moving vehicle on a dark and cold night in an isolated area. He was escaping the assault that was being inflicted on him and the threat he perceived to his safety.
- [93] At the point the vehicle stopped, someone, I find it likely to have been Darren Sundman, and possibly others, called out "Get him, get him". The three defendants quickly got out. Staci Stevenson said she attempted to restrain Darren Sundman, but to no effect. She remained inside the cab of the truck
- [94] A short time after the men got out of the vehicle, shots rang out. Then, after a brief pause, Ms. Stevenson heard Sebastian Martin speak the words "I've got it, boss" and then she heard a sound she took to be the discharge of a shotgun.
- [95] I note that the evidence at trial establishes that Mr. Martin sometimes referred to Darren Sundman as "boss". There is testimony in that regard from Staci Stevenson, which I accept. There is, as well, the contents of a Facebook message sent by Mr. Martin to Darren Sundman on January 7, 2015, stating, "Happy Birthday Darren how's it going boss man LOL have a great day Hope to see you soon."
- [96] It is clear beyond any argument that Jordan McLeod was shot and killed in those moments after the three defendants left the vehicle.
- [97] Ms. Stevenson does not claim she saw who shot Jordan McLeod. She deliberately chose not to look: she only glanced over after the shooting had stopped. She saw three men in the ditch area, off to the right hand side of the vehicle, near a fence. She then saw them load Mr. McLeod's body into the box of the truck.

[Emphasis added.]

- [25] I would add to the foregoing narrative the following facts found by the trial judge.
- [26] First, the judge said it was unclear when the physical assault of McLeod occurred after the Silverado left Vanderhoof and before it arrived at the intersection of Highway 16 and Upper Fraser Road. He concluded, largely as a consequence of the two stops made in Prince George, that it was "most likely that the hostility and attack upon Jordan McLeod intensified once the vehicle had left Prince George, travelling eastbound", and that when the truck turned left to proceed north on Highway 16, "matters in the vehicle had flared up in quite a fierce and aggressive way." The Crown accepts that the assault on McLeod occurred after the Silverado left Prince George, noting in its factum that "[a]t some point after Kurtis left Prince George, [the] conflict turned physical."
- [27] Second, as Sundman repeatedly struck McLeod with the handgun, McLeod leaned forward in the seat in an effort to avoid the blows.
- [28] Third, as the truck approached Upper Fraser Road, it was moving fast and the Sundman brothers "were focusing on Jordan McLeod". Mr. McLeod was being viciously assaulted by Darren and taunted by Kurtis to jump from the fast moving vehicle.
- [29] Fourth, up to the point in time at which McLeod jumped from the vehicle, "there is no reason to believe that Sebastian Martin had taken any part in the assault upon Jordan McLeod."
- [30] The judge found that after bailing out of the moving vehicle, McLeod moved east of the roadway in deep snow through a shallow ditch and across a barbed wire fence. The judge found that he did so while "endeavouring" or "attempting to flee from these men". As McLeod fled from his pursuers, Darren fired at least four rounds from the 40-calibre Glock pistol. At least three of the bullets struck McLeod in the centre mass of his body, including on the left arm, upper thigh and hip areas.
- [31] Almost immediately after Darren fired his rounds, Martin said to him, "I've got it boss", and shot Mr. McLeod twice with a shotgun, once in the chest from intermediate range and once on the right side of the head from close range. McLeod's blood was found on the side of the road and just east of the road, including in the ditch and on the other side of the fence. His body came to rest near the foot of a tree east of the fence. There was no evidence that Kurtis discharged his handgun at McLeod.
- [32] The cause of death was multiple gunshot wounds. The pathologist who conducted the autopsy testified that there were multiple contusions and lacerations to the right and left side of McLeod's face. In addition, abrasions were found on McLeod's back, from his shoulder to his waist.

- [33] The Sundman brothers and Martin dragged McLeod's body back to the truck. They loaded the body into the box of the truck and covered it with a sheet of plywood. The truck then proceeded west back through Prince George and north on Highway 97. At some point, McLeod's clothing was removed. The vehicle was driven to an isolated forest service road. McLeod's body was carried on a piece of plywood to an area some distance from the road where it was concealed under some foliage. Acting on information provided by Stevenson, McLeod's body was found by a police service dog handler on February 22, 2015.
- [34] After disposing of McLeod's body, the four remaining occupants of the Silverado travelled to the nearby home of Rick Belcher ("Belcher") and Crystal Taylor, who were friends of the Sundmans. Kurtis asked for a mop and bucket to clean out the truck and told Belcher he wanted to burn something. Stevenson smoked more crystal methamphetamine inside the house. Darren and Belcher smoked crack cocaine. Belcher testified that Darren looked rough that evening.
- [35] While inside the house, Darren pulled out a handgun and started playing with it. He said to Belcher, "I did something really bad and I may be going away for a really long time."
- [36] After leaving the residence, the Silverado was driven to a nearby service station where the three men used a car wash to clean out the truck.
- [37] Darren and Stevenson were dropped off at Darren's mobile home. The next morning, Kurtis picked up Darren and Stevenson. They retrieved McLeod's rental car, drove it to a remote area and set it on fire.
- [38] Following a series of further criminal misadventures later in the day, the Sundman brothers and Stevenson were apprehended.
- [39] The judge was satisfied that the gunshots Darren fired were a material contributing cause of the death of McLeod. He concluded that the effect of those gunshot wounds "would have been, at a minimum, to render Mr. McLeod less mobile and able to escape his plight as he attempted to move in the deep snow " The shotgun wounds subsequently administered by Mr. Martin were lethal and would almost immediately have caused McLeod's death.
- [40] The judge was satisfied that Darren aimed and discharged what he described as a powerful handgun at McLeod's body at least four times. He found that "the only reasonable inference" is that when Darren shot McLeod he meant to cause McLeod's death [s. 229(a)(i)] or meant to cause him bodily harm he knew was likely to cause death and was reckless as to whether death ensued or not [s. 229(a)(ii)]. The judge did not have a reasonable doubt that Darren acted with the requisite intent for murder despite his consumption of intoxicants that evening. I will return to this issue, and the judge's assessment of the evidence in support of the defence of intoxication, in addressing Sundman's appeal from his conviction for second degree murder.

- [41] Martin conceded that if he were found to have shot Mr. McLeod twice with the shotgun, it would necessarily follow that he did so with the requisite intent for murder. The judge made that finding.
- [42] The judge was not persuaded beyond a reasonable doubt that the murder was planned and deliberate or, as he put it, "that the Sundmans set out from Vanderhoof with a deliberate plan to murder Mr. McLeod."
- [43] The judge then turned to the issue of whether the offenders caused Mr. McLeod's death while committing the offence of unlawful confinement. Before doing so, he set out in summary form the requirements of s. 231(5)(e) of the Code. I do not understand the Crown to take issue with the judge's articulation of the governing legal principles. Rather, the Crown takes issue with the way in which the judge applied those principles to the facts he found. The salient portion of the judge's discussion of constructive first degree murder is reproduced below:

Death Caused While Committing the Offence of Unlawful Confinement

[184] Section 231(5)(e) of the Code provides,

231

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree 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);

[185] Section 279(2), in turn, states,

279

(2) Everyone who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence

[186] Section 231(5) reflects Parliament's intent to treat murders committed in connection with crimes of domination as particularly blameworthy and deserving of more severe punishment. This high degree of blameworthiness is found in a situation "where a murder is committed by someone already abusing his power by illegally dominating another". *R. v. Pritchard*, 2008 SCC 59 at paras. 19-20, citing *R. v. Paré*, [1987] 2 S.C.R. 618 at 633.

- [187] An unlawful confinement for the purpose of s. 279(2) does not require an application of actual force or physical restraint. In Pritchard at para. 24, Binnie J. cited numerous authorities in concluding that if, for any significant period of time, the victim was coercively restrained or directed contrary to his wishes, so that he could not move about according to his own inclination and desire, there was an unlawful confinement within the meaning of the Code section.
- [188] An unlawful confinement will not trigger s. 231(5)(e) if it is "consumed in the very act of killing": (Pritchard at para. 27). Rather, to trigger the section, the confinement and the murder must constitute distinct criminal acts. Binnie J. offered the following by way of example (at para. 27):
- [27] For example, an incompetent murderer could take a significant amount of time to kill the victim by strangulation, but the time would be inextricably tied up with the act of killing. However, where the jury is satisfied that there was confinement not limited to what was "integral to" the particular act of killing disclosed by the evidence, the Crown has established a distinct criminal act under s. 279(2). If the jury is satisfied that the murder was committed in the course of that confinement such that the series of events may be characterized as a "single transaction" the requirements of s. 231(5)(e) are met. See *R. v. Kirkness*, [1990] 3 S.C.R. 74, at p. 86.
- [189] The consequences of a conviction for first degree murder together with the wording of s. 231(5)(e) require a demanding test of causation. An accused may only be convicted under this section if the Crown establishes that he has 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: *R. v. Harbottle*, [1993] 3 S.C.R. 306 at 323-24. This test requires that the accused play a very active role - usually a physical role - in the killing: at para. 35. As Arbour J. noted in *Nette* at para. 62, in reference to *Harbottle*, "What is required is that [the accused's] participation in the killing be sufficiently immediate, direct and substantial to warrant the greater stigma and sentence attached to first degree murder".
- [190] Further, the Crown must establish a temporal and causal connection between the killing and the unlawful confinement. Binnie J. explained the necessary connection as follows in Pritchard at para. 33:
- [33] It must also be established, of course, that the murderer did the killing "while committing or attempting to commit" the enumerated offence. As pointed out in *Paré*, this does not require "an exact coincidence" in timing of the murder and the predicate offence, although there must be a "close temporal and causative link" (*Paré*, at p. 629). As Wilson J. expressed the point in *Paré*, at p. 633:

... 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". This approach, in my view, best gives effect to the philosophy underlying [s. 231(5)].

[191] He subsequently reiterated the requisite connection as follows at para. 35:

- [35] The jurisprudence therefore establishes that second degree murder will be elevated to first degree murder where the murder and the predicate offence (in this case unlawful confinement) are linked together both causally and temporally in circumstances that make the entire course of conduct a single transaction (Paré). The temporal-causal connection is established where the unlawful confinement creates a "continuing illegal domination of the victim" that provides the accused with a position of power which he or she chooses to exploit to murder the victim (Paré, at p. 633, and Johnson, at para. 39). If this is established the fact that along the way other offences are committed is no bar to the application of s. 231(5).
- [44] The judge noted Sundman's position that the evidence was insufficient to prove beyond a reasonable doubt McLeod was unlawfully confined when he was shot. He recounted Sundman's argument that the evidence did not rule out the possibility an argument had taken place at the side of the road after McLeod bailed from the vehicle and that an unknown period of time elapsed between that event and the shooting. It is apparent from his reasons that the judge rejected this argument, finding there was only a brief or momentary gap in time between McLeod's decision to jump from the vehicle and the shooting.
- [45] Martin's position at trial on his liability for constructive first degree murder was that even if the court concluded McLeod was being unlawfully confined when the shooting occurred, there was insufficient evidence to prove he was a party to the confinement. As Martin's counsel put it, "[h]e was for all intents and purposes himself stuck in this truck careening dangerously down the highway and, if Stevenson is to be believed, too scared to say anything." In the result, Martin's position was that if the court was satisfied beyond a reasonable doubt he used the shotgun to shoot McLeod, the appropriate verdict was guilty of second degree murder.
- [46] The judge concluded McLeod was being assaulted by Darren Sundman immediately before he jumped from the Silverado. He found that Kurtis Sundman was a party to the assault by encouraging it and by driving fast to prevent McLeod from avoiding the infliction of further injury.

- [47] The judge found that while McLeod may initially have entered the vehicle voluntarily, "he came to be coercively restrained and unable to move about according to his inclination and desire, such that he was unlawfully confined in the Silverado by Darren and Kurtis Sundman within the meaning of s. 279 of the Code" (emphasis added). I take from the judge's reasons a further finding that the confinement began sometime after the last stop made by the group in Prince George.
- [48] The judge concluded, however, that by jumping out of the vehicle McLeod had managed to escape his confinement before he was shot. The judge acknowledged that the time between the end of the confinement and the shooting was "brief", and that McLeod "was shot and killed in those moments after the three defendants left the vehicle" (emphasis added). He also acknowledged that McLeod was still in a situation of vulnerability when he bailed out of the vehicle and that his vulnerability was attributable to the manner in which he had been treated in the truck, the dark and isolated area in which he found himself, and his inability to move quickly in the deep snow. Nevertheless, there was "a gap in time." The judge ascribed legal significance to this momentary gap in time, finding that when McLeod was shot, his confinement had come to an end. The finding was characterized as being "important" because it could not, therefore, be said that McLeod was under the coercive dominion of others when he was killed. In the result, the judge concluded that neither Sundman nor Sebastian Martin could be convicted of constructive first degree murder under s. 231(5)(e) of the Code.
- [49] For convenience, the judge's entire analysis of this issue is reproduced below:
- [286] I turn now to forcible confinement.
- [287] Based upon my findings set out earlier, I conclude that Jordan McLeod was being assaulted by Darren Sundman immediately before he jumped from the truck. I also conclude that Kurtis Sundman was participating in that assault, both by encouraging it and by enabling it to continue as he persisted in driving the truck at a significant rate of speed such that Mr. McLeod was, as a practical matter, not able to get out of the vehicle to escape the assault. Notwithstanding that Mr. McLeod may have initially entered the vehicle voluntarily, I find that he came to be coercively restrained and unable to move about according to his own inclination and desire, such that he was unlawfully confined in the truck by Darren and Kurtis Sundman within the meaning of s. 279 of the Code.
- [288] However, it is important that when the vehicle slowed, Mr. McLeod jumped out and thereby managed to escape his confinement. The authorities that address s. 231(5)(e) make clear that the factor warranting the additionally severe punishment of a first degree murder conviction is the enhanced moral blameworthiness of a perpetrator who has achieved domination of another and exploits that dominance to inflict death. Here, at the time Mr. McLeod was shot, his confinement had ended.

[289] I recognize that the time between the end of the confinement and the firing of the shots was brief. Certainly, Mr. McLeod was still in a situation of vulnerability, and that vulnerability was the consequence of the manner in which he had been dealt with in the truck. There was, nevertheless, a gap in time. The onus of proving a continuing confinement is, of course, on the Crown, and I am not satisfied that it has done so in this case. Accordingly, I conclude that the Crown has not established first degree murder under s. 231(5)(e).)

[Emphasis added.]

III. Darren Sundman's Appeal from Conviction for Second Degree Murder (CA45488)

1. Delay in the Release of Written Rulings on the Pre-Trial Applications

(a) Background

[50] Sundman seeks to adduce fresh evidence on appeal fleshing out some relevant post-trial chronology as it relates to this ground of appeal. The application is unopposed and I would admit the fresh evidence.

[51] The evidence establishes that between March 20 and May 19, 2017, the judge heard six pre-trial applications. The Crown sought voluntariness rulings in relation to statements given by Sundman and Martin to the police. Martin alleged that his ss. 8 and 9 Charter rights had been breached and sought an order under s. 24(2) excluding evidence seized from his residence during the execution of a search warrant. Sundman also alleged that his s. 8 rights had been breached and sought an order excluding evidence seized from his residence and vehicle following the execution of search warrants. All three accused applied for the production of records in the custody of the Ministry of Family and Community Services relating to the removal of children from Stevenson's care. Finally, the Sundman brothers applied for an order severing the first degree murder count from four other charges set out in the indictment. The four other counts alleged offences said to have been committed by them before the homicide.

[52] On May 19, 2017, the judge ruled on the third-party records application. He reserved judgment on the other five pre-trial applications. He had indicated, on an earlier occasion, that he would provide written reasons for judgment on these applications and said to counsel, "I will endeavour to get rulings into your hands in a timely way".

[53] At a pre-trial conference on September 7, 2017, the judge said this:

I am in the process of putting together my rulings for you. I've been out of commission a bit of time, this summer. I've had a medical issue that is, now, I believe, resolved, but it's slowed my progress. I will have a memorandum issued and in your hands by 10 a.m. Tuesday [September 12, 2017]. In that memo, I will provide you with the outcome of each of the applications which are before me. In terms of providing reasons, that's going to take a little bit longer, but it's important, I believe, that you have those outcomes, so that you can use those to inform your planning.

- [54] On September 12, 2017, the judge sent a memorandum to counsel in which he advised of the outcome of the five reserved pre-trial applications. With respect to the statement of Darren Sundman, the judge ruled only a portion of it to be voluntary and admissible. He alerted counsel to the portions of the statement found to be inadmissible. With respect to the searches involving Darren Sundman, the judge ruled that the evidence thereby obtained was admissible. The severance of counts application was granted. The count charging first degree murder was severed from the remaining counts on the indictment without prejudice to the Crown to adduce evidence relating to the other counts if it was determined to be admissible on the first degree murder prosecution.
- [55] The judge advised that written reasons for judgment in respect of each of the five pre-trial rulings would be issued in due course.
- [56] Significantly, Sundman has not appealed any of the pre-trial rulings affecting his interests.
- [57] The trial began on October 16, 2017. On October 20, 2017, Martin's counsel asked when reasons for judgment on the pre-trial rulings would be released. The judge responded, optimistically as it turned out, that reasons would probably be released in three to four weeks. The trial concluded on February 23, 2018. The judge heard 63 days of evidence and submissions.
- [58] On April 13, 2018, the judge released lengthy written reasons for judgment convicting Darren Sundman and Martin of second degree murder. The reasons are indexed as 2018 BCSC 602.
- [59] On May 9, 2018, the Crown filed its notice of appeal from the acquittals of Darren Sundman and Martin on the charge of first degree murder.
- [60] On June 18 and 19, 2018, the judge presided over the sentencing hearing.
- [61] On July 5, 2018, the judge delivered reasons for sentence.
- [62] On August 3, 2018, Sundman filed a notice of appeal against conviction and a notice of application for leave to appeal sentence. The grounds enumerated in support of the conviction appeal did not challenge any of the pre-trial rulings.
- [63] By the end of August 2018, the Legal Services Society of British Columbia [LSS] had not decided whether to fund Sundman's conviction appeal.
- [64] On September 24, 2018, LSS extended limited funding to Sundman for his conviction appeal.
- [65] Following a number of case management appearances in this Court in the fall of 2018, counsel acting on the appeal made inquiries concerning the status of the outstanding reasons for judgment on the pre-trial applications.
- [66] In an email dated October 1, 2018, Crown counsel confirmed with the lawyer who was then assisting Sundman that written reasons had not yet been released.

[67] On October 29, 2018, counsel was formally retained to act for Mr. Sundman on appeal.

[68] On November 19, 2018, written reasons for judgment were released on the five reserved pre-trial applications. The reasons were published approximately 14 months after judgment on the applications had been pronounced, seven months after Sundman's conviction for second degree murder had been entered, and three weeks after counsel had been appointed for Sundman on his appeal.

(b) The Appellant's Position

[69] Relying on Teskey, Sundman argued in his factum that the lengthy and unexplained delay in the issuance of written reasons for judgment on the pre-trial applications rebutted the presumption of judicial integrity, including the presumption that the reasons accurately reflect the basis upon which the issues were decided. He argued that the culture of complacency with respect to delay that was addressed in *R. v. Jordan*, 2016 SCC 27 should inform the application of the principles developed in Teskey. He submitted that a reasonable person would consider that the reasons reflect an after-the-fact justification for decisions made 14 months earlier. In the result, he submitted that the written reasons should be disregarded. As the judge's memorandum to counsel advising of the disposition of the pre-trial applications--which amounts to a bare declaration of the outcome of the applications--does not satisfy the requirement in *R. v. Sheppard*, 2002 SCC 26 that reasons for judgment be sufficient to permit meaningful appellate review, Sundman submitted that a new trial is required.

[70] As noted earlier, Sundman does not appeal on grounds relating to the substantive disposition of any of the pre-trial rulings affecting his interests. Further, he concedes, as he must, that the written reasons for judgment released in November 2018 explaining the disposition of the pre-trial applications meet the Sheppard standard.

[71] In oral argument, Sundman's counsel was asked to explain how the principles in Teskey apply in this case and, specifically, how meaningful appellate review is foreclosed to the prejudice of an appellant in circumstances where the correctness of the rulings have not been put in issue on appeal. In response, I understood the argument to be recast or an alternative submission made that delay in the delivery of written reasons for judgment gave rise to a miscarriage of justice in fact or in appearance, warranting appellate intervention pursuant to s. 686(1)(a)(iii) of the Code.

[72] With respect to his assertion of actual prejudice, I do not understand Sundman to complain that the timing of the release of the written reasons for judgment prejudiced his counsel's ability to prepare for the trial or conduct the defence. He does, however, argue that the delay caused actual prejudice to the proper functioning of the appellate process.

[73] In support of his argument that the delay undermined the appearance of trial fairness, Sundman advanced a number of inferences that, he asserts, the record reasonably supports: (1) the judge may have been struggling with the reasons; (2) the reasons appear to have been

entirely crafted after inquiries were made beginning in September 2018 about when they would be made available to counsel; and (3) the reasons for dismissing his application to exclude evidence obtained in warranted searches of his residence and vehicle "appear rushed" and offer no analysis on how the balance of the Information to Obtain the search warrant, after excision, satisfied the standard of review in *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

(c) Analysis

[74] In *Teskey*, the Court provided an analytical framework for determining the circumstances in which delay in the delivery of written reasons for judgment may be found to rebut the presumption of integrity that those reasons accurately reflect the basis upon which the result was reached. Where the delay breaks the necessary link between the result and the reasoning that led to it, the reasons provide no opportunity for meaningful appellate review and should not be considered. As the mere pronouncement of judgment will not pass the sufficiency of reasons test set out in *Sheppard*, a new trial will be required in these circumstances. The framework to be applied was set out by Justice Charron, writing for the majority (at paras. 18-21):

Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. It is most important in a criminal case to guard against any result-driven consideration of the evidence because the accused is presumed innocent and entitled to the benefit of any reasonable doubt. A reasonable doubt is not always obvious. Its presence may be far more subtle and only discernible through the eyes of the person who keeps an open mind. It is in this sense that the trial judge who appears to have already committed to a verdict of guilt before completing the necessary analysis of the evidence may cause a reasonable person to apprehend that he or she has not kept an open mind. Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.

I am not suggesting that the necessary link between the verdict and the reasons that led to it will be broken whenever there is a delay in rendering reasons after the announcement of the verdict. Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality. (I take it from reading their reasons as a whole that this is what the majority of the Court of Appeal had in mind when they referred to the presumption of "regularity", the latter applying rather to procedural or administrative matters.) Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.

The notion of judicial integrity was discussed at length by this Court in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. It encompasses the expectation that judges will strive to overcome personal bias and partiality and carry out the oath of their office to the best of their ability. Impartiality was described as follows by Cory J. (at paras. 104-5):

... impartiality can be described -- perhaps somewhat inexactly -- as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

The judge's impartiality is essential to achieve trial fairness.

As reiterated in *S. (R.D.)*, fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer. Even though there is a presumption that judges will carry out the duties they have sworn to uphold, the presumption can be displaced. The onus is therefore on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to it.

[75] Teskey was an unusual case. The evidence was complex, entirely circumstantial, and contained contradictions on the crucial issue of identity. The delay between the announcement of the verdicts and the issuance of reasons for judgment was 11 months. As noted by Charron J., among the factors that combined to rebut the presumption of integrity were that the judge: acknowledged having difficulty reaching a verdict in the months following the completion of the evidence; expressed a willingness to reconsider the verdicts immediately after they were pronounced, leaving an impression that the deliberative process was ongoing; delivered written reasons for judgment after the notice of appeal had been filed and addressed in the reasons issues relating to the grounds of appeal; and, referred in the reasons to events that occurred after the pronouncement of the verdicts. All of these factors contributed to an apprehension that the written reasons reflected after-the-fact justification for the verdicts rather than an articulation of the reasoning that led to those verdicts. In ordering a new trial, Charron J. was clear, however, that if delay in the delivery of post-verdict reasons was the only factor at play, appellate intervention would not have been shown to be justified.

[76] Importantly, for present purposes, Mr. Teskey sought to challenge on appeal the judge's conclusion in the delayed reasons for judgment that the evidence established his guilt beyond a reasonable doubt. That is not this case. Sundman does not challenge, as part of his appeal, the dismissal of his application to have evidence excluded on constitutional grounds, nor does he challenge any other pre-trial ruling that affected his interests.

- [77] Teskey was applied in *R. v. Port Chevrolet Oldsmobile Ltd.*, 2009 BCCA 357 and in *R. v. Cunningham*, 2011 ONCA 543. In both cases, the appellants complained about the trial judge's failure to provide reasons for judgment on pre-trial Charter rulings until long after the verdicts were rendered. In both cases, the manner in which the pre-trial applications had been resolved were put in issue on appeal. In both cases, displacement of the presumption of integrity would preclude meaningful appellate review of rulings challenged on appeal.
- [78] In my view, the framework developed in *Teskey* has no direct application here because the complaint about delay in the issuance of reasons is not connected to any ruling challenged on appeal. For these reasons, I would not give effect to the ground of appeal as expressed by Sundman in his factum.
- [79] I turn next to Sundman's oral submission that post-verdict delay in the issuance of reasons for judgment on the pre-trial applications caused delay in the appellate process. I see no merit in this argument. While unacceptable delay in the issuance of reasons for judgment is, for obvious reasons, capable of impairing the goal of timely appellate review, there is no evidence that this occurred in the case at bar. LSS did not agree to fund Sundman's conviction appeal until late September 2018. Inquiries concerning the availability of the reasons were not initiated until then. Counsel for Sundman was not retained until October 29, 2018. The reasons were delivered and published less than three weeks later. Against this background, there is no evidence that the regrettable delay in issuing reasons for judgment in this case caused any delay in the hearing of Sundman's appeal.
- [80] Similarly, I see no merit in Sundman's oral submission that the delay so compromised the appearance of justice that the intervention of this Court is required under s. 686(1)(a)(iii). As Justice LeBeI noted in his concurring judgment in *R. v. Khan*, 2001 SCC 86 at paras. 73-76, 87, appellate intervention under s. 686(1)(a)(iii) of the Code reaches all errors or events that result in a miscarriage of justice. It encompasses events that lead not only to actual unfairness, but also to situations in which a well-informed, reasonable person considering all of the circumstances would conclude that the trial fundamentally lacked the appearance of fairness. In assessing whether a miscarriage of justice has occurred, including at the level of appearance, appellate courts must consider a number of non-determinative factors, including whether the irregularity is properly characterized as being central to the case against an accused, the gravity of the irregularity, and its impact on the verdict.
- [81] I understand Sundman's submission on this issue to consist of two branches. First, he argues that a number of inferences can properly be drawn in this case which, taken together, undermine the appearance of justice. Second, he submits that even if the Court is not prepared to draw the inferences urged upon us, the appearance of justice has been compromised by a delay of this magnitude standing alone.

- [82] In support of the first branch of his submission, Sundman invoked many of the considerations that would inform a Teskey analysis. Assuming those considerations are also capable of informing whether there has been a failure of the appearance of justice, there is no evidence in this case to support the inference Sundman invites us to draw that the judge was struggling with the voir dire reasons. Likewise, there is no evidence to support the further inference urged upon us that the reasons were prepared in their entirety only after the appellate process was engaged and inquiries had been made about when the reasons for judgment would be released. The appellant's position on this point is not only speculative, it is contrary to the judge's statement at the pre-trial conference on September 7, 2017, that he was in the process of preparing the reasons but that his progress had been slowed by a medical issue. There is nothing that puts in doubt this statement and no evidence that would displace the presumption of judicial integrity that attaches to it. To the contrary, the voir dire reasons do read as if substantial portions of them were prepared before the trial commenced. For example, the severance ruling was drafted in anticipation of the trial taking place before a jury. Similarly, the ruling on the admissibility of Sundman's statement was shaped by concerns respecting the prejudicial impact portions of the statement could have on the jury. The re-election to judge alone did not occur until the first day of the trial. These examples suggest to me that the judge resolved the applications before him on the basis of the circumstances that prevailed when the applications were argued.
- [83] The suggestion that the reasons for judgment appear to have been rushed is also unsupported by any objective evidence. Indeed, it is apparent to me that the rulings reflect an in-depth and thoughtful consideration of the issues that were litigated. It is telling that the appellant has not challenged any of these rulings on appeal, some of which were, in any event, resolved wholly or partly in his favour.
- [84] Finally, the appellant submits the reasons reflect after-the-fact justification for the disposition of the pre-trial applications at a time when the judge knew an appeal from conviction had been filed on Sundman's behalf. While it is reasonable to suppose that the judge knew an appeal from conviction had been launched when the reasons were released, there is nothing to suggest the judge knew his pre-trial rulings were being challenged on appeal. Indeed, when the pre-trial rulings were released, the appellant's notice of appeal, filed on August 3, 2018, contained four grounds of appeal, none of which related to the pre-trial rulings. The appellant's amended notice of appeal was not filed until July 5, 2019, months after the release of written reasons for judgment on the pre-trial applications. Absent knowledge that the grounds of appeal involved attacks on the pre-trial rulings, it is difficult to understand how the judge could have, consciously or otherwise, tailored his reasons to fend off an asserted ground of appeal. It is equally difficult to see how an informed and reasonable observer could come to this conclusion.

- [85] I turn next to consider the second branch of Sundman's oral submission that the delay in this case, standing alone, gives rise to a failure of justice at the level of appearance. Given that the pre-trial rulings have not been put in issue on appeal, the irregularity at issue--delay in the release of written reasons for judgment on those rulings--cannot be characterized as something that touched on a central feature of the case or had any material impact on its outcome.
- [86] Sundman's submission that the delay alone gives rise to a failure of the justice of the level of appearance is also difficult to square with the conclusion in Teskey that a similar period of delay would not, in and of itself, give rise to an apprehension that the reasons were tailored to respond to some of the points raised on appeal. Further, the appellant advances no authority in support of the proposition that a miscarriage of justice may be occasioned by the delayed delivery of reasons for judgment not challenged on appeal.
- [87] At the end of the day, the second branch of the appellant's oral submission invites us to conclude that an informed and reasonable observer would conclude that Sundman's trial is tainted by an appearance of unfairness as a consequence of delay in the delivery of reasons that are not challenged on appeal. I am unable to accede to this argument.

2. Misapprehension of the Evidence of Intoxication

(a) Background

- [88] On the evidence adduced at trial, there could be little doubt that Sundman was a regular user of illicit drugs, particularly methamphetamine and cocaine, and that he was heavily abusing these substances in late 2014. Not surprisingly, the judge made those factual findings.
- [89] The judge also found as a fact that Sundman and Stevenson were smoking crystal methamphetamine in the Silverado shortly before the shooting. This finding is supported by the evidence of Stevenson. Stevenson also testified that the group consumed some beer before and during the trip between Vanderhoof and Prince George, and stopped on the outskirts of Prince George to buy more beer. The judge was unable to make any finding about whether Sundman consumed intoxicants other than methamphetamine or beer before the shooting.
- [90] Belcher testified that Darren "looked rough" when he unexpectedly arrived at his residence that evening. He agreed thinking at the time that it was possible Darren's appearance was attributable to his ingestion of crystal methamphetamine.
- [91] Michael Rosland ("Rosland") was called by the Crown at trial. He was qualified to give opinion evidence in the area of forensic toxicology, including on the topics of the pharmacokinetics and pharmacodynamics of methamphetamine and cocaine, alone or in combination with alcohol. Pharmacokinetics is the study of what happens to a drug when a person ingests it. Pharmacodynamics relates to the effect drugs have on the human body.

[92] Rosland testified that methamphetamine is a potent central nervous system stimulant. Its effects, which last longer than those associated with cocaine use, include euphoria, elevated self-confidence with associated grandiose thoughts, increased energy, increased alertness, the rapid flight of ideas, decreased inhibition, impulsive behaviour and a loss of fatigue. The effects of methamphetamine are much higher if it is smoked. Methamphetamine causes an adrenaline rush and a corresponding increase in heart rate and blood pressure. Heavy users can stay up for days. Some may begin to display toxicities relating to methamphetamine use including aggression or violence, delusions, paranoia and hallucinations. Chronic methamphetamine use is associated with cognitive deficits, such as increased difficulty processing information or following instructions. In rare cases, a user may experience a psychotic break.

[93] Rosland was unable to speak to the effects of combining unknown quantities of alcohol and crystal methamphetamine, but agreed that consuming both would not improve an individual's ability to exercise sound judgment as both substances have judgment-impairing effects.

[94] Significantly, Rosland was asked in cross-examination about whether methamphetamine use would impair a person's ability to perceive the consequences of his or her actions:

Q. Sir, with impulsivity increasing and perhaps rapidly-shifting thoughts, overall, a person's giving less consideration or is able to give less consideration to the consequences of their actions, fair?

A. I don't know that that's a -- I don't know that that's -- would be -- I don't know that I could describe that it would change their understanding of the consequences of the situation. Certainly, their reactions to a situation might not be appropriate for that particular instance so they might be more impulsive and because methamphetamine also can lead to aggression or agitation, that they might be prone to -- to that type of a reaction as opposed to a more -- a more considered reaction. So because of the impulsiveness of the -- or the impulsivity that those individuals present and the other characteristics of the drug, the reactions to certain scenarios might be tended to more violent or -- or aggressive behaviour as opposed to, again, a more considered approach.

[Emphasis added.]

[95] In his closing submissions, Sundman's trial counsel (not counsel on appeal) made brief submissions on intoxication. Those submissions are excerpted in their entirety below:

There is, in my submission, evidence before the court to suggest that certainly Ms. Stevenson and possibly Darren Sundman were intoxicated.

[Indiscernible/coughing] just a few moments on this.

Ms. Stevenson, frankly, leaves little doubt that she was heavily under the influence of methamphetamine and I suppose marihuana as well to some extent, although for our purposes here the methamphetamine's probably the greater concern. Once in the truck, essentially she continued to smoke meth from the pipe most of the way to Upper Fraser Road and then after. This must've had some impact on her ability to perceive and accurately recall events and ought to give the court some pause in accepting her evidence, especially in terms of detail as reliable.

Of note, Ms. Stevenson in both her direct and at points of my cross-examination seemed to indicate that Darren Sundman was doing a significant if not similar amount of methamphetamine to her during the drive. She has the pipe being passed around and most particularly to Darren. The evidence should also be considered of the fact that Ms. Stevenson as well as other witnesses, and in particular Brad Fowler, Byron Riopel and Rick Belcher all seemed to agree that Darren Sundman's use of methamphetamine had been accelerating.

There's no direct evidence of his level of intoxication, but it is submitted that the court can infer that he was at least under the influence, if not highly under the influence. That is, in my submission, relevant for two reasons.

One, it would've interfered with his ability to foresee the consequences of his own actions or even the actions of others which is, in my submission, important for a parties scenario. A person may be less able to see what their associates may do as a result of changes in circumstances.

And I suppose related to that, it would've interfered with his ability to perceive and understand a situation such that it could -- he could have an intention in common with his co-accused. I'll simply say, though, that evidence of intoxication is not critical to the defence position. It's something I simply needed to address.

[Emphasis added.]

[96] Crown counsel at trial (not counsel on appeal) submitted there was nothing in the evidence to suggest Sundman lacked capacity to form the intent for murder. He emphasized Sundman's physical capabilities at the time of the shooting and his goal-directed behaviour after the killing, evidenced by his participation in concerted acts of concealment.

[97] The judge summarized Sundman's position on the defence of intoxication in his reasons for judgment:

[275] Finally, Darren Sundman raises the defence of intoxication. He says there is some evidence that his state of intoxication could have interfered with his ability to foresee the consequences of his or others' actions and could have interfered with his ability to perceive and understand the situation with respect to common intention.

[98] After concluding that Sundman caused the victim's death with the intent for murder, the judge discussed whether the evidence of intoxication raised a reasonable doubt on the issue of mens rea:

[293] The issue of intoxication has also been raised.

[294] In the context of an offence of specific intent, as this is, the Crown must prove beyond a reasonable doubt that Darren Sundman had the requisite state of mind for murder; that is, that when he shot Jordan McLeod, Darren Sundman either meant to kill Mr. McLeod or else he meant to cause him bodily harm that he knew was so serious and dangerous that it would likely cause his death, and was reckless whether or not death ensued.

[295] It is accepted that the intoxicating effect of alcohol and drugs can affect a defendant's state of mind, such that the Court is left with a reasonable doubt that the defendant had the necessary intention and foresight of consequences. In that case, that necessary element of the offence is not proven and the Crown cannot secure a conviction for murder. State of mind is an essential element of the offence of murder, the onus of proof of which lies with the Crown. There is no obligation on Mr. Sundman to establish intoxication as a defence. Rather, it is for the Court to examine all of the evidence in deciding whether that element has been proven or, as Darren Sundman submits, whether there is a reasonable doubt on account of intoxication. In this case, I am not satisfied that intoxication had any effect upon Darren Sundman's state of mind in relation to the death of Mr. McLeod. There is evidence that Darren Sundman was using crystal methamphetamine heavily in the general time frame of these events, and that he smoked crystal methamphetamine in the time shortly preceding the killing of Jordan McLeod. There is also reason to believe he had consumed some beer, though not a large amount, that evening. Nevertheless, I find no basis to believe that the effect of those substances was to interfere with his ability to form the intention for, and foresee the consequences of, his actions. The evidence, considered as a whole, satisfies me that Darren Sundman was in control of his actions, and that he acted purposefully and deliberately in what he did. Even taking into account that he consumed drugs and alcohol, the evidence leaves me with no doubt that Darren Sundman knew what he was doing, knew what the probable consequences of his actions would be, and meant to bring them about.

[296] In the result, I find that the Crown has proven that Darren Sundman committed the second degree murder of Jordan McLeod.

(b) Sundman's Position

[99] Sundman says the judge misapprehended evidence relevant to the defence of intoxication by failing to consider the evidence of Rosland. He submits the failure to do so had a material bearing on the judge's conclusion that he shot McLeod with the intent required for murder. He observes that the judge made no mention of Rosland's evidence anywhere in his 320-paragraph decision. He notes that the judge addressed intoxication as a defence to murder in his reasons only after concluding that he was guilty of murder. As I understand the appellant's position on this latter point, the manner in which the judge sequenced his reasons is said to support the proposition that he failed to consider the evidence of intoxication in determining whether he caused the victim's death with one of the two intents for murder.

(c) Analysis

[100] Three legal principles frame my approach to this ground of appeal.

[101] First, a judge may misapprehend evidence by failing to consider relevant evidence, by erring as to its substance, or by failing to appreciate its effect: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, [1995] O.J. No. 639 at para. 83 (C.A.). The standard for appellate intervention on this ground is stringent. The misapprehension must be readily apparent, go to matters of substance rather than to detail, and be material in the sense that it has been shown to play an essential part in the reasoning process resulting in a conviction: *R. v. Sinclair*, 2011 SCC 40 at para. 53; *R. v. Lohrer*, 2004 SCC 80 at para. 2.

[102] Second, under s. 229(a)(i) and (ii) of the Code, culpable homicide is murder where the person who causes the death of a human being means to cause his death, or means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not. Intoxication as a defence to murder recognizes that the consumption of drugs and/or alcohol may impair the ability of an accused to form the specific intent required for the offence, including the ability to foresee the consequences of his or her actions. The defence may operate to negate proof of the specific intent required for murder and thereby reduce the culpability of an accused to manslaughter.

[103] As noted in *R. v. Daley*, 2007 SCC 53 at para. 41, intoxication as a defence to murder will arise where there is evidence of "advanced intoxication." In most murder cases, the focus will be on the foreseeability prong of s. 229(a)(ii) and whether the accused knew that the bodily harm he inflicted was likely to cause the victim's death. The degree of intoxication required to advance a successful intoxication defence may vary depending on the manner in which death was caused. For certain types of homicides, where death is the obvious consequence of the unlawful act, the accused might, as a practical matter, have to establish a particularly advanced degree of intoxication to successfully avail himself of the defence: *Daley* at paras. 42-43; *R. v. Robinson*, [1996] 1 S.C.R. 683 at para. 52; *R. v. Florence*, 2014 BCCA 288 at para. 22. Evidence that an accused engaged in purposive conduct immediately before and after causing the death of the victim is relevant in determining whether the Crown has proved beyond a reasonable doubt that the accused caused the death with the intent for murder: *R. v. Lemky*, [1996] 1 S.C.R. 757 at para. 22.

[104] Third, appellate review of reasons for judgment is informed by the purpose for which reasons are given--to explain why a case was decided the way it was. Jury charges are designed to facilitate a step-by-step reasoning process that is best achieved through a logical sequencing of issues. The same cannot be said of reasons for judgment. As Justice Doherty pointed out in *Morrissey* (at para. 30), in a passage cited with approval by the Supreme Court of Canada, including in *R. v. C.L.Y.*, 2008 SCC 2 at para. 11; *R. v. R.E.M.*, 2008 SCC 51 at para. 18; and *R. v. Laboucan*, 2010 SCC 12 at para. 17:

A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury.

Instructions provide a roadmap to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion.

For these reasons, appellate scrutiny of jury charges and of reasons for judgment will not take the same form.

- [105] Further, reasons for judgment should not be reviewed by appellate courts as a verbalization of the entire reasoning process engaged in by the judge in coming to a verdict, nor should they be expected to reflect either a dissertation on the applicable law or a comprehensive catalogue of all of the evidence adduced at trial: *Morrissey* at paras. 30-31. As noted in *R. v. Gill*, 2018 BCCA 275 at para. 104, "the necessarily linear process of expressing reasons for judgment in written form is not determinative of the thinking and analytical processes leading to a verdict."
- [106] In my view, Sundman has not shown that the judge's failure to mention Rosland's evidence in his reasons reflects either a failure to appreciate the potential significance of that evidence or take it into account in determining whether he caused McLeod's death with the intent for murder.
- [107] The judge accepted that Sundman was using crystal methamphetamine heavily in the weeks leading up to the killing, and that he smoked crystal methamphetamine in the Silverado shortly before the shooting. Although he did not specifically refer to Rosland's evidence, he concluded that, "[t]he evidence, considered as a whole" established beyond a reasonable doubt that Sundman "knew what he was doing, knew what the probable consequences of his actions would be, and meant to bring them about" (emphasis added). It is reasonable to suppose that the evidence as a whole included the evidence of Rosland.
- [108] Additionally, the circumstances of the killing presented obvious obstacles to the successful advancement of an intoxication defence. I say this for three reasons. First, the manner in which the killing was committed was such that it would be difficult to argue that anything short of incapacity or, at minimum, a particularly advanced state of intoxication would interfere with Sundman's ability to foresee that "aiming" a "powerful handgun" at the centre mass of McLeod's body and discharging it from fairly close range on at least four occasions would cause bodily harm likely to cause death. Second, there was very little evidence about the quantity of crystal methamphetamine consumed by Sundman prior to the shooting, and no evidence regarding the purity of the drug consumed. Third, there was no evidence that Sundman was, at the relevant time, displaying indicia of impairment by drugs of the kind that might reasonably be considered to impair his ability to foresee the consequences of his actions. His conduct at the time of the shooting, and in its aftermath, was marked by purposive behaviour, including a complex series of actions designed to conceal the commission of the offence and his participation in it. Finally, while Rosland testified that the ingestion of crystal methamphetamine might lead to aggression and impulsivity, he was

unable to say whether it would impair an individual's appreciation of the consequences of their actions. As a result, the usual evidentiary foundation upon which the defence of intoxication rests was largely absent in this case.

- [109] I do not raise these points to suggest there was no air of reality to the defence of intoxication. The Crown did not advance that position at trial and has not advanced it on appeal. I make these observations because they highlight two features of this case relevant to the disposition of this ground of appeal: (1) the difficulties associated with successful advancement of an intoxication defence in this case given Sundman's conduct before, at the time of, and immediately after the shooting; and (2) the limited probative value of Rosland's evidence on the issue of whether the consumption of crystal methamphetamine impaired Sundman's ability to foresee the consequences of his actions. In addition, I have provided this background to put in context the way in which Sundman's trial counsel and the judge dealt with this issue.
- [110] It is noteworthy that, in his closing submission, counsel for Sundman made no mention of Rosland's evidence when he addressed the defence of intoxication, conceded that there was no direct evidence that Sundman was intoxicated at the time of the shooting, and acknowledged that the evidence of intoxication was not critical to his defence. Trial counsel's submission that the consumption of crystal methamphetamine would have interfered with Sundman's ability to appreciate the consequences of his actions does not appear to me to be supported by the evidence of Rosland.
- [111] In these circumstances, I am not persuaded that the judge misapprehended the evidence by failing to consider Rosland's testimony. The failure to mention evidence does not necessarily mean it was not considered. Further, Rosland's evidence provided no support for the claim that Sundman did not foresee the consequences of his actions. Finally, if Rosland's evidence was so important to the resolution of this issue, it stands to reason that some mention of it would have been made by Sundman's counsel in his closing submissions.
- [112] I am not persuaded by Sundman's related submission that misapprehension of the evidence of intoxication may be inferred from the fact that the judge found him guilty of murder before addressing the substance of the defence in his reasons. Before determining whether Sundman acted with one of the two intents for murder, the judge noted he had raised the defence of intoxication and had argued there was some evidence that his state of intoxication could have interfered with his ability to foresee the consequences of his actions. The judge clearly understood the potential significance of this evidence and the defence position in relation to it. He was not satisfied that intoxication had "any effect" on Sundman's ability to perceive the consequences of his actions. That he explained his conclusion on the defence of intoxication after determining that Sundman meant to cause McLeod's death or meant to cause him bodily harm he knew was likely to cause death is in no way fatal. As noted earlier, reasons for judgment explain why a decision has been made. They are not a roadmap for deliberation and need not reflect the logical sequencing judges

strive to achieve in instructing juries.

[113] For the foregoing reasons, I would not give effect to this ground of appeal.

[114] I would, therefore, dismiss Sundman's appeal from conviction.

IV. The Crown Appeals (CA45275 and CA45276)

1. The Position of the Crown

[115] The Crown submits that the judge erred in law by acquitting Sundman and Martin of first degree murder. The grounds of appeal advanced by the Crown have been stated in various and, in some respects, overlapping ways. Slightly restated, I understand the Crown to assert that the judge erred in law by:

- a) failing to appreciate that chasing and shooting at someone necessarily constitutes the offence of unlawful confinement;
- b) failing to give proper scope to the offence of unlawful confinement, as set out in s. 279(2) of the Code, including by effectively holding that the offence may only occur in an enclosed space where one's freedom of movement is physically restricted;
- c) failing to give legal effect to the facts he found and thereby conclude that McLeod continued to be confined after he jumped from the vehicle;
- d) assigning legal significance to the brief temporal gap between the time at which McLeod jumped from the truck and the shooting, contrary to the holding in *Paré* that s. 231(5) of the Code does not require that the murder and the underlying offence occur simultaneously but, rather, that there be a close temporal and causative link between the two events. On this point, the Crown says the acquittal of Sundman and Martin is not rooted in the judge's assessment of the sufficiency of the evidence, but in material misdirection as to the applicable law;
- e) failing to conclude, on the facts he found, that the confinement and murder of Mr. McLeod were part of the same transaction and, therefore, met the requirements of s. 231(5)(e) of the Code; and
- f) failing to consider (and conclude) that Sundman and Martin murdered McLeod while attempting to commit the offence of unlawful confinement.

2. The Positions of Sundman and Martin

[116] Sundman and Martin advance two virtually identical positions in response. They submit that:

- a) Section 676(1)(a) of the Code restricts the Crown's right of appeal from an acquittal of an indictable offence to a "question of law alone", and that none of the grounds of appeal advanced by the Crown can be so characterized. The respondents say the judge correctly stated the law, but concluded the gap in time was such that the Crown failed to prove the

necessary temporal and causal connection between the unlawful confinement and the murder: *Paré* at 629; *R. v. Pritchard*, 2008 SCC 59 at paras. 33, 35. They submit this was a fact-based determination, not traceable to any error in law, that turned on the judge's assessment of the sufficiency of the evidence on the essential elements of the offence of constructive first degree murder under s. 231(5)(e) of the Code. They say that the sufficiency of evidence is not a question of law alone: *R. v. Sunbeam Corp. (Canada)*, [1969] S.C.R. 221 at 228, 230, 233. Even assuming, without conceding, that the judge's conclusion on this point is unreasonable, the respondents submit that the Crown has no right to appeal an unreasonable verdict: *R. v. B.(G.)*, [1990] 2 S.C.R. 57 at 70-71; *R. v. Biniaris*, 2000 SCC 15 at paras. 32-33. As a consequence, they argue that this Court has no jurisdiction to entertain the Crown appeals; and

- b) The Crown should not be permitted to advance on appeal alternative routes to liability and new arguments it did not advance at trial: *R. v. Varga* (1994), 18 O.R. (3d) 784, [1994] O.J. No. 1111 at para. 25 (C.A.), citing *R. v. Wexler*, [1939] S.C.R. 350 at 353-356; *R. v. Penno*, [1990] 2 S.C.R. 865 at 895; *R. v. Egger*, [1993] 2 S.C.R. 451 at 480-481. Specifically, the respondents say the Crown did not seek convictions at trial premised on the propositions that: (i) McLeod continued to be confined after jumping out of the Silverado; (ii) Sundman and Martin committed the murder while attempting to commit the offence of unlawful confinement; or (iii) that chasing and shooting at someone inevitably involves a type of confinement. Relying on well-established authority, the respondents submit that it offends double jeopardy principles to subject an accused, who has been acquitted, to new arguments raised by the Crown for the first time on appeal: *R. v. Barton*, 2019 SCC 33 at para. 47.

[117] In addition, Martin submits that even if the judge erred in law in any one or more of the ways set out in paragraphs 115(b)-(e) herein, the Crown's appeal from his acquittal of first degree murder must fail because the judge made no factual finding that he was shown to be a party to the underlying offence of unlawful confinement--an essential element of the offence of constructive first degree murder pursuant to s. 231(5)(e) of the Code.

V. Analysis

1. The Legislative Framework

[118] The provisions of the Code set out below are of particular relevance to the disposition of the Crown appeals:

Murder

229 Culpable homicide is murder

- (a) where the person who causes the death of a human being
- (i) means to cause his death, or

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

Classification of murder

231

Hijacking, sexual assault or kidnapping

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

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

Kidnapping

279

Forcible confinement

(2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

Right of Attorney General to appeal

676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

Acquittal

(2) For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 730 of any other offence.

Powers of the Court of Appeal

686

Appeal from acquittal

- (4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
- (a) dismiss the appeal; or
 - (b) allow the appeal, set aside the verdict and
 - (i) order a new trial, or
 - (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

2. The Factual Findings of the Trial Judge

[119] To succeed on its appeals, the Crown must persuade us that: (1) the errors alleged are traceable to questions of law alone that do not involve trespassing on the fact-finding function of the trial judge: *R. v. Morin*, [1992] 3 S.C.R. 286 at 294 [*Morin* (1992)]; *R. v. J.M.H.*, 2011 SCC 45 at para. 28; (2) it can be concluded with a reasonable degree of certainty that the error(s) had material bearing on the acquittal(s) such that the verdict(s) would not necessarily have been the same had the error(s) not occurred: *Vézéau v. The Queen* (1976), [1977] 2 S.C.R. 277 at 292; *R. v. Morin*, [1988] 2 S.C.R. 345 at 374; *R. v. Graveline*, 2006 SCC 16 at paras. 14-16; and (3) the judge made all the factual findings necessary to ground liability for constructive first degree murder under s. 231(5)(e) and, but for the errors in law, would have convicted the respondents of the offence charged: *R. v. Cassidy*, [1989] 2 S.C.R. 345 at 354-355; *R. v. Lutoslawski*, 2010 SCC 49 at para. 1.

[120] To put the Crown appeals in context, and to frame consideration of those appeals within the jurisdictional limits of s. 676(1)(a), I will summarize the essential factual findings made by the judge in considering the liability of the respondents for first degree murder:

- a) When the group left Vanderhoof in the Silverado, the Sundman brothers were armed with handguns while Martin was in possession of the shotgun;
- b) Given the stops made in Prince George, it is likely that the confrontation flared up in a fierce and aggressive way after the vehicle had left Prince George heading east, and that Darren Sundman's attack upon McLeod intensified at that time;
- c) From his rear seat position immediately behind McLeod, Darren Sundman struck McLeod repeatedly on the head with the handgun he was holding. Kurtis Sundman verbally encouraged his brother in the assault, drove the vehicle fast to prevent McLeod from getting out safely, and taunted him to jump from the vehicle while it was moving;

- d) Even though McLeod may have entered the vehicle voluntarily, he came to be coercively restrained and unable to move about according to his inclination and desire, such that he was unlawfully confined in the truck by Darren and Kurtis Sundman within the meaning of s. 279 of the Code;
 - e) McLeod opened the passenger door and jumped out of the vehicle after it turned left to proceed north on Upper Fraser Road. The truck had slowed and was not moving as fast as it had been when McLeod made this decision;
 - f) Up to this point, Martin had not taken any part in the assault upon McLeod. As the judge put it, "[i]t appears that Sebastian Martin was not any active part of the acrimony or violence. He remained in the rear seat, although he did have possession of the shotgun";
 - g) McLeod "endeavoured to flee" in deep snow across a shallow ditch at the side of the road and over a fence into the bush. The depth of the snow restricted his mobility and hampered his efforts to escape from "his plight";
 - h) After McLeod jumped from the vehicle, he was still in a situation of vulnerability stemming from the manner in which he had been dealt with in the truck and his inability to move quickly in the deep snow;
 - i) As McLeod jumped from the Silverado, Kurtis Sundman brought it to a stop. Darren Sundman, and possibly others, called out, "Get him, Get him";
 - j) The Sundman brothers, immediately followed by Martin, quickly got out of the Silverado;
 - k) "Moments" later, shots rang out. Those shots--at least four in number--were fired by Darren Sundman;
 - l) After a brief pause, Martin said, "I've got it boss", and shot McLeod twice with the shotgun from intermediate and close range. As the judge put it, "upon getting out of the truck with the shotgun and being aware that Darren Sundman was shooting at Jordan McLeod, Mr. Martin stepped up to assist his friend"; and
 - m) The time between McLeod's departure from the vehicle and the shooting was described by the judge as "short" and "brief." As the judge put it, "[i]t is clear beyond any argument that Jordan McLeod was shot and killed in those moments after the three defendants left the vehicle" (emphasis added).
- [121] Against the background of these factual findings, the judge concluded McLeod had escaped his confinement when he jumped out of the vehicle, and the momentary gap in time between the end of his confinement and the shooting was such that the Crown had failed to prove that Sundman and Martin murdered McLeod while committing the offence of unlawful confinement.
3. The Respondents' Complaint that the Crown is Advancing New Arguments and Theories of Liability for the First Time on Appeal

[122] It is necessary to deal first with the respondents' contention that the Crown is attempting to advance additional arguments and routes to liability not relied on at trial. The respondents submit the Crown should be prohibited from doing so. They isolate three arguments in particular and I address each of them below.

(a) That chasing and shooting at someone necessarily constitutes the offence of unlawful confinement

[123] The Crown advances on appeal the broad and general proposition that chasing and shooting at another person necessarily involves an unlawful confinement because it restricts that person's ability to move about according to his or her own inclination and desire: Pritchard, at para. 24. The Crown submits the judge erred in law by failing to give effect to this legal proposition. I am satisfied that this argument was not made at trial and should not be entertained for the first time on appeal. As explained in Varga (at paras. 25-26):

there are situations in which an appellate court should not address the merits of a ground of appeal advanced by the Crown even though that ground alleges an error in law that is germane to the acquittal. For example, the Crown cannot advance a new theory of liability on appeal: *R. v. Wexler*, [1939] S.C.R. 350 at pp. 353-56, 72 C.C.C. 1 at pp. 4-5, 8; *R. v. Savard and Lizotte*, [1946] S.C.R. 20 at pp. 33-34, 37, 49, 85 C.C.C. 254 at pp. 266, 270, 282-83; *R. v. Merson* (1983), 4 C.C.C. (3d) 251 (B.C.C.A.) at pp. 272-73, 273-74. Nor can the Crown raise arguments on appeal that it chose not to advance at trial: *R. v. Penno*, [1990] 2 S.C.R. 865 at p. 895, 59 C.C.C. (3d) 344 at p. 365, per McLachlin J. (concurring in result); *R. v. Egger*, [1993] 2 S.C.R. 451 at pp. 480-81, 82 C.C.C. (3d) 193 at p. 214.

These examples share a common feature. A Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial. It offends double jeopardy principles, even as modified by the Crown's right of appeal, to subject an accused, who has been acquitted, to a second trial based on arguments raised by the Crown for the first time on appeal. Double jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial.

[124] The existence of strategic reasons for not advancing this position at trial fortifies my conclusion on this point. Putting this argument in play at trial may well have undermined what I understand to have been the Crown's principal position--that the shooting of McLeod either occurred in the course of an ongoing confinement or was temporally and causally connected to the confinement--by admitting of the possibility that the confinement had come to an end when McLeod jumped from the vehicle and was only re-engaged by the ensuing chase. As noted in Varga, appellate courts should, as a general rule, be particularly vigilant in not countenancing the making of arguments on appeal that contradict positions taken by the Crown in the trial court.

[125] While this disposes of the Crown's first ground of appeal, I would add that the authorities relied on by the Crown in support of the broad proposition it advances may more appropriately be viewed as case-specific illustrations of the circumstances in which a pursuit (culminating in the offence of murder) can be said to have given rise to an unlawful confinement or an attempt to commit the offence of unlawful confinement giving rise to liability under s. 231(5)(e): see *R. v. White*, 2014 ONCA 64; *R. v. Johnstone*, 2014 ONCA 504; *R. v. Chase*, 2013 QCCA 271. Nothing I have said should be taken as endorsing the Crown's proposition that chasing and shooting at someone necessarily entails commission of the offence of unlawful confinement.

(b) That the respondents caused McLeod's death while committing the offence of attempted unlawful confinement

[126] I am also satisfied that we should not entertain the Crown's argument, set out herein at paragraph 115(f), that the judge erred in law by failing to consider (and conclude) that the respondents murdered McLeod while attempting to commit the offence of unlawful confinement.

[127] Once again, this argument was not advanced at trial. I do not accept the position of the Crown that this argument does not put in play a theory of liability advanced for the first time on appeal. The Crown never once suggested this route to liability for constructive first degree murder at trial. In addition to offending double jeopardy principles, it would, in my view, be unfair to the respondents to require them to respond on appeal to a theory of liability that is distinct from the theory of liability relied on by the Crown in the trial court--that McLeod was subject to an ongoing confinement when the shooting occurred or, at minimum, that the confinement and the murder were part of a single transaction.

[128] Once again, it is reasonable to suppose that the Crown had strategic reasons for not advancing the theory that McLeod was killed while the respondents were attempting to confine or re-confine him after he jumped out of the vehicle. Advancing this theory of liability would undermine the Crown's principal position at trial that the shooting of McLeod either occurred in the course of an ongoing confinement or was temporally and causally connected to the confinement.

[129] Second, the evidentiary foundation upon which a conclusion could reasonably be reached that the respondents were engaged in an attempt to confine or re-confine McLeod at the side of the road is lacking. Given the speed with which the respondents reacted and the actions they took, I think it obvious that they were not attempting to confine or re-confine McLeod; rather, as the judge found, they intended to kill him or to cause him bodily harm they knew was likely to cause death.

[130] Third, the theory of liability premised on death having been caused in the course of an attempted unlawful confinement would, in my view, run afoul of the requirement that the underlying unlawful act relied on by the Crown not be so closely connected with the murder as to be coextensive with and consumed by the killing itself: *Pritchard* at para. 27.

Put differently, it is most unlikely in the circumstances of this case that the pursuit now alleged to constitute the underlying offence of attempted unlawful confinement and the killing could reasonably be viewed as two distinct acts. As the judge found, the shooting occurred moments after McLeod jumped from the vehicle.

[131] In summary, I would not entertain what I consider to be a distinct theory of liability for the first time on appeal. Doing so, would not, in any event, assist the Crown on its appeals for the reasons I have given.

(c) That McLeod was unlawfully confined after he jumped from the moving vehicle

[132] The respondents submit that the Crown also raises for the first time on appeal that McLeod continued to be confined even after he jumped from the Silverado. They submit that the theory of the Crown at trial was restricted to the notion that McLeod had been unlawfully confined while inside the Silverado. In support of this submission, the respondents selectively isolate certain oral and written submissions made by the Crown in closing that McLeod came to be confined in the Silverado before he "escape[d] from the truck."

[133] The respondents rely on the following oral submission by Crown counsel at trial to support their contention that the theory of the Crown was limited to the notion that there was a temporal and causal link between the unlawful confinement that occurred in the truck and the killing that occurred after McLeod escaped from the unlawful confinement he had been subjected to:

... the fact that the murder ensues so quickly after Jordan [McLeod] escapes temporarily from the unlawful confinement makes the shooting of Jordan McLeod a shooting -- or a murder in the course of an unlawful confinement. It's a single transaction in the Crown's submission.

[Emphasis added.]

[134] I do not accept the respondents' submission that the Crown restricted its unlawful confinement allegation to the time at which McLeod was inside the truck. While the Crown's closing submissions are not a model of clarity, I understand the Crown to make these two closely-related submissions: (1) that the murder was committed in the course of an unlawful confinement; and (2) alternatively, even if it could be said that the confinement had come to an end when McLeod jumped from the vehicle, there was such a close temporal and causal link between the confinement and the shooting that the two events formed part of the same transaction or series of events, thus making out the requirements of s. 231(5)(e).

[135] To illustrate the point, I provide the following two examples, the first taken from the Crown's closing oral submissions and the second taken from the Crown's written submissions:

it's certainly clear that [McLeod's] death ensued, in the Crown's submission, from the unlawful act of unlawful confinement. The Crown's theory of first degree murder is that the murder was committed in the course of an unlawful confinement.

* * *

The only reason for opening fire upon [McLeod] was to prevent [his] escape.

[136] Although the Crown did refer on a number of occasions to McLeod's "escape" from the vehicle, I think it is clear that the Crown was not, on the occasions highlighted by the respondents, using the word "escape" in its legal sense to suggest that the unlawful confinement had come to an end immediately upon McLeod jumping from the vehicle. Rather, the word was used by the Crown to reflect the reality that McLeod escaped the immediate clutches of his captors by throwing himself out of the moving vehicle in an effort to avoid the infliction of further harm.

[137] The Crown's alternative theory that, even if the confinement had come to an end when McLeod bailed from the vehicle, the close temporal and causal link between the confinement and shooting established that the two events were part of the same transaction, was expressed in the passage excerpted herein at paragraph 133.

[138] Against this background, I am not persuaded that the Crown is advancing a new theory of liability on appeal--that the confinement was ongoing even after McLeod jumped out of the vehicle, or at least temporally and causally connected to the shooting--or that the respondents have in any way been prejudiced by the assertion of the two grounds of appeal set out herein at paragraphs 115(b) and (c).

4. The Remaining Grounds of Appeal

[139] I turn now to consider the grounds of appeal advanced by the Crown other than those set out herein at paragraphs 115(a) and (f).

[140] To obtain convictions for first degree murder under s. 231(5)(e) of the Code, the Crown was obliged to establish beyond a reasonable doubt that: (1) both of the respondents were guilty of the underlying offence of unlawful confinement; (2) the respondents were guilty of murdering McLeod; (3) the respondents participated in the murder in such a manner that each of them was a substantial cause of the death of the victim; (4) there was no intervening act by another person which resulted in the respondents no longer being substantially connected to McLeod's death; and (5) the unlawful confinement and murder were part of the same transaction, even if not committed simultaneously: *Paré* at 631-633; *R. v. Harbottle*, [1993] 3 S.C.R. 306 at 325.

[141] The Crown's remaining grounds of appeal concern whether the judge erred in law in applying the first and fifth elements of the offence of constructive first degree murder under s. 231(5)(e).

- [142] On the first element--whether on the factual findings made by the judge both respondents were shown to have committed the offence of unlawful confinement--the Crown submits that the judge erred in law by improperly limiting the scope of the offence of unlawful confinement and applying that unduly restrictive understanding of that offence to the factual findings he made. The Crown submits that this issue raises a question of law alone: see *R. v. Gervais*, 2020 ABCA 221 at para. 25; *R. v. Radita*, 2019 ABCA 77 at para. 36; *R. v. Magoon*, 2016 ABCA 412 at paras. 106, 117-118, 128 [*Magoon (Alta. C.A.)*], *aff'd* 2018 SCC 14 at paras. 3, 69-71. Further, the Crown submits that the judge erred by failing to give legal effect to the factual findings he made, which is also a question of law: *Morin* (1992) at 294; *J.M.H.* at para. 28.
- [143] On the fifth element, the Crown submits that, even assuming it was open to the judge to conclude that the unlawful confinement had ended the moment McLeod bailed from the vehicle, he nevertheless erred in his application of the legal test for constructive first degree murder set out in *Paré*. The Crown says this ground also raises a question of law alone because it constitutes legal error in the application of the test for liability pursuant to s. 231(5)(e). The Crown submits that the judge erred in law by failing to conclude on the facts he found that the required temporal and causal nexus between the confinement and the killing had been established beyond a reasonable doubt. In essence, the Crown submits that, by acquitting the respondents of first degree murder, the judge failed to give legal effect to his factual findings that McLeod had been confined in the vehicle, jumped out of it to avoid the infliction of further injury, did so in an isolated area, was hampered in his movement by the deep snow at the side of the road, and remained "in a situation of vulnerability" when he was shot moments later. The Crown submits that these factual findings established beyond a reasonable doubt that the unlawful confinement created a continuing illegal domination of McLeod (and a corresponding vulnerability) which the respondents chose to exploit by murdering him: *Pritchard* at para. 35.
- [144] The Crown submits that its appeal should be allowed, the convictions for second degree murder set aside, and that this Court should substitute convictions in respect of both respondents for first degree murder.
- [145] I do not propose engaging in a broad-ranging discussion of the vexing question of the various types of errors that give rise to questions of law for jurisdictional purposes. Suffice it to say that the Crown has no right to appeal an acquittal arising from an unreasonable application of the correct test. The Crown can, however, appeal an acquittal that flows from the application of the wrong test, or the failure to give legal effect to facts that are found or undisputed. Put differently, it is, for jurisdictional purposes, one thing to apply the wrong legal test and another to apply the right legal test in an unreasonable way. The first gives rise to a question of law; the second does not.

- [146] The Crown says that its remaining grounds of appeal raise questions of law because they involve failure by the trial judge to recognize and correctly apply the law. The respondents submit that the appeals of the Crown do not raise questions of law, but complaints that the judge applied settled legal principles to reach fact-laden conclusions the Crown disagrees with.
- [147] I will address the jurisdictional limits of this Court in entertaining a Crown appeal from acquittal more fully in addressing the grounds of appeal. For now, it may be helpful to frame the analysis that follows by reference to the recent discussion of this issue in *R. v. Chung*, 2020 SCC 8:
- [10] Under s. 676(1)(a), the Crown can only appeal an acquittal on a "question of law alone". An appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 25-27; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at paras. 15-17). Therefore, the Crown cannot appeal merely because an acquittal is unreasonable (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33).
- [11] Errors of law arise, for example, where "the legal effect of findings of fact or of undisputed facts raises a question of law" and where there is "an assessment of the evidence based on a wrong legal principle" (*J.M.H.*, at paras. 28-30). These two types of errors are somewhat similar; they both address errors where the trial judge's application of the legal principles to the evidence demonstrates an erroneous understanding of the law, either because the trial judge finds all the facts necessary to meet the test but errs in law in its application, or assesses the evidence in a way that otherwise indicates a misapprehension of the law.
5. Error in Law Respecting the Scope of the Offence of Unlawful Confinement
- [148] I will address first the grounds of appeal set out herein at paragraphs 115(b) and (c).
- [149] The Crown argues that the judge erred in law when he "effectively concluded" that the offence of unlawful confinement may only occur in an enclosed space where one's physical movement is physically restricted." The Crown submits that the acquittals flowed from this implicit misdirection concerning the scope of the offence.
- [150] It will be recalled that in his general discussion of liability for constructive first degree murder pursuant to s. 231(5)(e), the judge specifically noted that the underlying offence of unlawful confinement does not require the application of actual force or physical restraint. Citing *Pritchard* at para. 24, the judge explained that the offence of unlawful confinement is committed if, in the absence of lawful authority, a person is coercively restrained or directed contrary to his wishes, so that they cannot move about according to their own inclination and desire.

- [151] The judge's brief discussion of the scope of the offence of unlawful confinement is, so far as it goes, a correct statement of the law and I do not understand the Crown to suggest otherwise. Rather, I understand the Crown to argue the judge erred in law by applying an unduly narrow test for the offence of unlawful confinement, and that the error manifested itself in his conclusion that McLeod's confinement had come to an end as soon as he jumped from the vehicle.
- [152] The essential elements of the offence of unlawful confinement were recently addressed in *R. v. Magoon*, 2018 SCC 14:
- [64] Under s. 279(2) of the Criminal Code, the Crown must establish that (1) the accused confined the victim, and (2) the confinement was unlawful. In *Pritchard*, Binnie J. held that unlawful confinement occurs if "for any significant period of time [the victim] was coercively restrained or directed contrary to her wishes, so that she could not move about according to her own inclination and desire" (para. 24). In *R. v. Bottineau*, [2006] O.J. No. 1864 (QL) (S.C.J.), aff'd 2011 ONCA 194, 269 C.C.C. (3d) 227, leave to appeal refused, [2012] 1 S.C.R. vi, Watt J. held that an "unlawful confinement ... consists of restricting the victim's liberty, but not his or her ability to escape. The restriction need not be to a particular place or involve total physical restraint" (para. 116 (emphasis in original); see also *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont. C.A.)). Restraint of the victim through physical acts of violence is sufficient but not necessary to establish unlawful confinement. Confinement can be effected "by fear, intimidation and psychological and other means" (*R. v. Kematch*, 2010 MBCA 18, 252 C.C.C. (3d) 349, at para. 89).
- [153] At its core, the offence of unlawful confinement involves the intentional deprivation of another person's liberty or the restriction of that person's movement in the absence of lawful authority and contrary to the person's wishes. Although unlawful confinement is a continuing offence, it is an offence that is complete when the victim is restrained against his or her will: *R. v. Parris*, 2013 ONCA 515 at para. 47. The existence of an initial state of liberty when a passenger voluntarily enters a vehicle may, as events unfold, turn into an unlawful confinement if the driver refuses to stop to let the passenger out: *R. v. Tremblay* (1997), 117 C.C.C. (3d) 86, [1997] J.Q. no. 1816 at para. 17, 26 (Que. C.A.).
- [154] Unlawful confinement is one of the offences of domination found in s. 231(5). The provision recognizes the enhanced moral culpability that attaches to an offender who commits murder while abusing his power over the victim by engaging in illegal acts of domination. Parliament has determined to classify these particularly egregious murders as murders in the first degree: *Paré* at 633.

- [155] Whether an unlawful confinement has occurred on a particular set of facts will ordinarily give rise to a question of mixed fact and law, not a question of law alone: *Magoon* (Alta. C.A.) at para. 106; *Gervais* at para. 25; *R. v. Alexis*, 2020 ONCA 334 at para. 29. But whether the legal tests for unlawful confinement (and first degree murder) have been applied correctly is a question of law reviewable on a correctness standard: *Magoon* at paras. 106, 117-118, 128; *Gervais* at para. 25.
- [156] I can only read the trial judge's assessment of whether McLeod was unlawfully confined (see *Reasons for Judgment* excerpted herein at paragraph 49) as erroneously importing into the legal test an element that is not there--specifically, that the victim be physically restrained in an enclosed space. I recognize that, earlier in his reasons, the judge cited *Pritchard* in support of the proposition that the offence of unlawful confinement includes coercively restraining or directing another person against that person's wishes, thereby depriving them of the ability to move freely about. But stating the correct legal test does not insulate a judge from a finding on appellate review that error was made in its application. It simply informs the analysis about whether the judge's application of those principles reveals legal error: *R. v. George* 2017 SCC 38 at para. 16. As Martin J., writing for the majority in *Chung* put it, "even if the trial judge articulates the right test, appellate courts may find an error of law if the judge's reasoning and application demonstrate a failure to properly apprehend the law" (at para. 13).
- [157] Accepting the judge's factual findings and applying those findings to the elements of the offence leads inexorably to the conclusion that the unlawful confinement of McLeod did not end with his desperate act of self-preservation by jumping from the Silverado. In my view, the judge erred in law in concluding otherwise.
- [158] The point may be illustrated by reference to the following hypothetical. Assume A is, in the absence of lawful authority, confined against his will in a cabin in some remote woods. B, a party to the unlawful confinement of A, is tasked with standing guard outside the cabin. In an effort to escape, A breaks a cabin window and makes a run for it. A is promptly shot by B who thereby causes A's death. Assume further that all of these facts are found by the trial judge, including that B shot A with the requisite intent for murder. The elements of the offence of unlawful confinement have been established on these factual findings. A was confined to a place against his will. In no sense was A free to move about according to his own wishes, including when he made a desperate run for it. B is, as a matter of law, guilty of the underlying offence of unlawful confinement on these factual findings.
- [159] Equally, McLeod was in no sense free to move about according to his own inclination and desire, including after he had jumped from the moving Silverado and made a run for it at the side of the road. His confinement did not, as a matter of law, end as soon as he bailed from the truck. On the factual findings of the judge, there can be no doubt, in my respectful view, that Sundman was committing the offence of unlawful confinement when he shot McLeod. My disagreement with the judge on this point requires no interference with his factual findings. My disagreement is in relation to his legal conclusion that the offence of

unlawful confinement was not made out on the facts he found. This disagreement is traceable to a question of law rather than to a question of fact.

[160] Writing for the majority in *R. v. Johnson*, [1975] 2 S.C.R. 160 at 170, Ritchie J. noted:

the question of whether or not certain [undisputed] conduct constitutes an offence under the Criminal Code is a question of law

This proposition is more commonly stated thus: the failure to give legal effect to undisputed findings of fact is a question of law: *Belyea v. The King*, [1932] S.C.R. 279 at 296; *The Queen v. Lemire*, [1965] S.C.R. 174 at 194; *B.(G.)* at 71; *Morin* (1992) at 294; *J.M.H.* at para. 28; *Chung* at para. 11. But there is a symmetry between these two formulations of what amount to the same proposition. To recognize that the failure to give required legal effect to findings of fact is a question of law is also to recognize that whether undisputed conduct constitutes an offence is a question of law. Underlying both formulations is the notion that an appellate court respects its jurisdictional limits if intervention on a Crown appeal from acquittal is limited to and motivated by a judge's failure to recognize the necessary legal implications of factual findings. Indeed, I note on this point that in *Morin* (1992), Sopinka J. cited *Johnson* in support of the proposition that the legal effect of undisputed facts raises a question of law.

[161] For the foregoing reasons, I am of the view that the judge's conclusion McLeod was not confined once he jumped from the vehicle reflects error in law.

[162] I do, however, recognize that the line between an unreasonable application of the right legal test and a failure to apply the right test may be difficult to discern in the concrete realities of a case. And so I prefer not to rest the disposition of the Crown appeals on my consideration of this ground. Indeed, given my assessment of the Crown's second ground of appeal, I would have reached the same result even assuming I am wrong about whether the judge erred in law in concluding that McLeod's confinement had ended when he jumped from the vehicle.

[163] In my view, the more fundamental legal error in the judge's analysis stems from his conclusion that the momentary gap in time between when McLeod jumped from the vehicle and the shooting was dispositive of whether the murder occurred while the respondents were committing the offence of unlawful confinement. The narrow approach taken by the judge to the resolution of this issue is contrary to the interpretation of s. 231(5) (e) adopted in *Paré*. In my view, the judge erred in law by assigning legal significance to this momentary gap. It is to that issue I now turn.

6. Error of Law in the Application of the Requirements for First Degree Murder Pursuant to Section 231(5)(e) of the Code

[164] At issue in *Paré* was whether the words "while committing" in s. 231(5) [then s. 214(5)] require an exact coincidence between murder and the underlying offence. The underlying offence in *Paré* was indecent assault. Approximately two minutes passed between the completion of the indecent assault and murder. The Court interpreted the provision as

requiring proof of a close temporal and causative link between the underlying offence and the murder, not proof that the two offences were committed simultaneously. In rejecting a narrow construction of the provision that would, in the context of this case, require proof that McLeod's death and the underlying offence of unlawful confinement occurred simultaneously, Wilson J., writing for the Court, said this (at 631-633):

In my view, the [strict] construction that counsel for the respondent would have us place on these words is not one that could reasonably be attributed to Parliament. The first problem with the exactly simultaneous approach flows from the difficulty in defining the beginning and end of an indecent assault. In this case, for example, after ejaculation the respondent sat up and put his pants back on. But for the next two minutes he kept his hand on his victim's chest. Was this continued contact part of the assault? It does not seem to me that important issues of criminal law should be allowed to hinge upon this kind of distinction. An approach that depends on this kind of distinction should be avoided if possible.

A second difficulty with the exactly simultaneous approach is that it leads to distinctions that are arbitrary and irrational. In the present case, had the respondent strangled his victim two minutes earlier than he did, his guilt of first degree murder would be beyond dispute. The exactly simultaneous approach would have us conclude that the two minutes he spent contemplating his next move had the effect of reducing his offence to one of second degree murder. This would be a strange result. The crime is no less serious in the latter case than in the former; indeed, if anything, the latter crime is more serious since it involves some element of deliberation. An interpretation of s. 214(5) that runs contrary to common sense is not to be adopted if a reasonable alternative is available.

In my view, such an interpretation has been provided by Martin J.A. in *Stevens*, supra [R. v. *Stevens* (1984), 11 C.C.C. (3d) 518 (Ont. C.A.)]. As noted above, Martin J.A. suggested that "where the act causing death and the acts constituting the rape, attempted rape, indecent assault or an attempt to commit indecent assault, as the case may be, all form part of one continuous sequence of events forming a single transaction" the death was caused "while committing" an offence for the purposes of s. 214(5). This interpretation eliminates the need to draw artificial lines to separate the commission and the aftermath of an indecent assault. Further, it eliminates the arbitrariness inherent in the exactly simultaneous approach. I would, therefore, respectfully adopt Martin J.A.'s single transaction analysis as the proper construction of s. 214(5).

This approach, it seems to me, best expresses the policy considerations that underlie the provision. Section 214, as we have seen, classifies murder as either first or second degree. All murders are serious crimes. Some murders, however, are so threatening to the public that Parliament has chosen to impose exceptional penalties on the perpetrators. One such class of murders is that found in s. 214(5), murders done while committing a hijacking, a kidnapping and forcible confinement, a rape, or an indecent assault. An understanding of why this class of murder is elevated to murder in the first degree is a helpful guide to the interpretation of the language.

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

Refining then on the concept of the "single transaction" referred to by Martin J.A. in Stevens, *supra*, 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". This approach, in my view, best gives effect to the philosophy underlying s. 214(5).

[Emphasis added.]

[165] As subsequently explained in Pritchard, liability for constructive first degree murder under s. 231(5)(e) depends, among other things, on proof that the unlawful confinement and the murder be distinct and independent of one another, while at the same time linked together, both temporally and causally, in the same or a single transaction or series of events. With respect to the second requirement, Binnie J., writing for the Court in Pritchard, said this:

[33] It must also be established, of course, that the murderer did the killing "while committing or attempting to commit" the enumerated offence. As pointed out in Paré, this does not require "an exact coincidence" in timing of the murder and the predicate offence, although there must be a "close temporal and causative link" (Paré, at p. 629). As Wilson J. expressed the point in Paré, at p. 633:

... 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". This approach, in my view, best gives effect to the philosophy underlying s. [231(5)].

[35] The jurisprudence therefore establishes that second degree murder will be elevated to first degree murder where the murder and the predicate offence (in this case unlawful confinement) are linked together both causally and temporally in circumstances that make the entire course of conduct a single transaction (Paré). The temporal-causal connection is established where the unlawful confinement creates a "continuing illegal domination of the victim" that provides the accused with a position of power which he or she chooses to exploit to murder the victim (Paré, at p. 633, and Johnson, at para. 39).

[166] The respondents say we should treat the judge's apparent conclusion on this central issue as a fact-based determination that there was insufficient evidence to satisfy the temporal and causal connection requirement between the confinement and the murder. They emphasize that whether the required connection is present is a question reserved to the trier of fact. They submit the judge simply had a reasonable doubt about whether the Crown proved the required nexus between the unlawful confinement and the killing. They say these Crown

appeals are nothing more than complaints that the judge did not resolve this question reasonably. They assert that the Crown has not identified any question of law underlying its appeals. I do not agree.

- [167] Whether the necessary temporal and causal link between the confinement and murder has been established will generally involve a question of mixed fact and law for the trier of fact to resolve: Pritchard at para. 27; Alexis at para. 29; Radita at para. 36: R. v. Morningstar, 2017 NBCA 39 at para. 31. But it is, as a matter of law, necessary for that question to be informed by and answered through the application of the correct legal principles. Just as it would be error in law for a judge to fail to instruct a jury that the murder and unlawful confinement need not happen at precisely the same moment (see R. v. Squires, 2005 NLCA 51 at paras. 47, 53-60; leave to appeal ref'd (2006) [2005] S.C.C.A. No. 561) so, too, was it error in law for the judge in this case to fail to correctly apply the test set out in *Paré* to the resolution of this critical issue.
- [168] I recognize that the judge referred to Pritchard and to the "single transaction" requirement in his general review of the legal principles applicable to the case. But again, correctly stating the test does not insulate the judge from a finding of legal error in its application: George at para. 16; Chung at para. 13.
- [169] Nowhere in his discussion of the application of s. 231(5)(e) to the facts he found did the judge apply the principles underlying the *Paré* decision. Rather, he treated his finding that McLeod's confinement had come to an end as soon as he jumped from the vehicle as dispositive of the respondents' liability for first degree murder. The judge said that because the Crown failed to prove "a continuing confinement" at the time of the shooting, the respondents could not be convicted of constructive first degree murder. As I have explained, it is my view that the judge erred in law in coming to the conclusion that McLeod was not confined when the shooting occurred. But even if the confinement had ended, it did not necessarily follow that the temporal and causal link between the confinement and the murder was severed. The judge was required to apply the test in *Paré* to the facts as he found them to be. He was required, as a matter of law, to consider whether the murder represented the exploitation of a position of power sourced in McLeod's unlawful confinement such as to make the entire course of conduct a single transaction: *Paré* at 633; R. v. McGregor, 2019 ONCA 307 at para. 57. By failing to do so, he erred in the application of the law.
- [170] Moreover, I am satisfied that the judge erred in law by failing to give legal effect to the facts he found. As explained in *Morin* (1992) p. 294:

If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute. In this situation, the

court can arrive at the correct conclusion in law without ordering a new trial because factual issues have been settled. Examples of this type of error of law can be found in *Belyea v. The King*, [1932] S.C.R. 279, *Ciglen v. The Queen*, [1970] S.C.R. 804, *Poitras v. The Queen*, [1974] S.C.R. 649, *Johnson v. The Queen*, [1975] 2 S.C.R. 160, and *Fotti v. The Queen*, [1980] 1 S.C.R. 589.

- [171] To reiterate, the judge found a close temporal nexus between the confinement and the murder. The gap in time was found to be "brief" or "momentary". Implicit in this finding is a rejection of Sundman's position at trial, based on evidence given by Stevenson in cross-examination, that it could not be known how much time elapsed between the Sundman brothers and Martin getting out of the vehicle and the first shots being fired. Also implicit in this finding is a rejection of the speculative argument advanced on Sundman's behalf at trial that an argument may have taken place at the side of the road involving McLeod and the Sundman brothers and Martin that ultimately led to the shooting. In my view, the judge's factual findings established the required temporal nexus.
- [172] The judge found that when the shooting occurred, McLeod was still in a situation of vulnerability. This finding, in my view, is tantamount to finding that there was a close causal connection between the confinement and the shooting. In essence, the judge found that those who had confined McLeod exploited his vulnerability and their position of power to effect his murder. Nothing more was required. For all those who were a party to the confinement, the judge's factual findings should, as a matter of law, have led him to the conclusion that the offence of first degree murder pursuant to s. 231(5)(e) had been made out.
- [173] To further illustrate the point, I return to the hypothetical set out herein at paragraph 158. B is, on the facts found by judge in the hypothetical, guilty of constructive first degree murder under s. 231(5)(e) of the Code. The shooting of A reflects an exploitation of power by B created by the underlying offence of unlawful confinement. There is a close temporal and causal connection between the two offences. This makes B's entire course of conduct a single transaction. The murder and the unlawful confinement committed by B are, however, two distinct acts. The test in *Pritchard* has been met. The essential elements of constructive first degree murder set out in *Harbottle* have been established.
- [174] And so it is here. On the factual findings made by the judge, Sundman was guilty of constructive first degree murder. The judge erred as a matter of law in not giving the required legal effect to those findings.
- [175] I am unable to accept the respondents' invitation to view the judge's apparent conclusion that the required nexus between the two offences was not made out as merely a sufficiency of evidence issue. Where, on the evidence accepted by the judge, the Crown has established the essential ingredients of the offence, it is an error in law to acquit, and it does not cease to be an error in law merely because the judge framed his reasons by stating that the Crown has failed to prove the case beyond a reasonable doubt: *R. v. Davis* (1973), 14 C.C.C. (2d) 517, [1973] O.J. No. 964 at paras. 8-9 (C.A.); *aff'd* [1977] 2 S.C.R. 523.

[176] As I will explain in the discussion of remedy that follows, my conclusion on this ground of appeal is a significant one from a remedial perspective. To say that the error in law rests on the judge's failure to give required legal effect to facts found or undisputed is to say that the offence was proved beyond a reasonable doubt. In these circumstances, the appropriate remedy will generally not be a new trial but an order substituting a guilty verdict on the offence for which the accused should have been convicted but for the legal error: Chung at para. 30.

7. Remedy

[177] I turn next to address that remedy that flows from the legal errors committed in this case. Importantly, the judge made different factual findings concerning the involvement of Sundman and Martin in the confinement of McLeod before the shooting occurred. As a consequence of these disparate findings, the respondents are not identically situated from a remedial perspective. Rather, the impact of the identified legal errors on each respondent must attract discrete analysis.

(a) Martin

[178] The judge did not make a finding that Martin was a party to the confinement of McLeod. On the facts he found, the only evidence linking Martin to the offence of unlawful confinement of McLeod was his presence in the vehicle after the Silverado left Prince George and the beating commenced. At trial, the Crown argued unsuccessfully that McLeod's confinement had begun from the moment he got into the truck, because the Sundman brothers and Martin were armed with guns. The judge made no factual finding about the purpose for which Martin was in possession of the shotgun, implicitly rejecting the theory that Martin was a party to McLeod's confinement.

[179] The judge did find that McLeod was unlawfully confined in the Silverado after it left Prince George, but only by Darren and Kurtis Sundman. If Martin were not a party to the unlawful confinement, he could not be convicted of murder pursuant to s. 231(5)(e). Put differently, the errors in law I have identified could only be material to the disposition of the Crown appeal in relation to Martin if he were shown to be a party to the offence of unlawful confinement. The Crown concedes as much in its supplementary written submission.

[180] Whether Martin might conceivably have been found to be a party to the confinement or attempted confinement of McLeod after he jumped from the Silverado rests on the Crown's alternative positions that the act of chasing and shooting McLeod constitutes the offence of unlawful confinement, or that Martin's participation in the shooting after he left the vehicle made him a party to the offence of attempted unlawful confinement. For the reasons I have explained, these arguments were not made below and, in my view, we should not entertain them for the first time on appeal.

- [181] I emphasize that even if we were to consider these arguments now, it would not, in my view, assist the Crown on its appeal from Martin's acquittal for first degree murder. There is virtually no evidence upon which the judge could reasonably come to the conclusion that by getting out of the Silverado and almost immediately shooting McLeod, Martin became a party to an unlawful confinement or an attempt to commit this offence. First, on the factual findings of the judge, McLeod had already been shot and disabled by Sundman before "Martin stepped up to assist his friend". Second, neither the evidence nor the factual findings made below support a conclusion that once Martin got out of the vehicle he acted for the purposes of assisting Sundman in confining, re-confining or attempting to confine McLeod when he got out of the vehicle. Rather, he acted with dispatch to participate in McLeod's execution.
- [182] Further, under both theories advanced by the Crown on appeal, the alleged unlawful confinement (or attempt to commit that offence) would, insofar as Martin is concerned, be subsumed in the killing itself. On the Crown's alternative theories, Martin could not, in my view, have been found guilty of first degree murder given the judge's finding that only "moments" passed between Martin getting out of the vehicle and his participation in the shooting. The killing and predicate offence could not, on this finding, properly be characterized as two distinct acts. The two acts would be so closely connected as to be coextensive. In these circumstances, the requirements of s. 231(5)(e) could not be established even if I considered it to be appropriate to entertain these new arguments on appeal: Pritchard at para. 27; see also R. v. Kimberley (2001), 56 O.R. (3d) 18, [2001] O.J. No. 3603 at para. 108 (C.A.); R. v. Menard, 2009 BCCA 462 at para. 24.
- [183] As a consequence, the Crown has not met its onus to demonstrate with a reasonable degree of certainty that the verdict would not necessarily have been the same with respect to Martin had the identified errors in law not occurred: Vézeau at 292; Graveline at paras. 14-16. In my view, it has not been shown that the errors in law had any material bearing on Martin's acquittal of first degree murder. The errors would be material only if Martin were found to be a party to the underlying offence. In the absence of that finding, he cannot be convicted of constructive first degree murder under s. 231(5)(e) of the Code. I would, therefore, dismiss the Crown appeal from Martin's acquittal.
- (b) Sundman
- [184] As noted earlier, s. 686(4)(b)(ii) authorizes an appellate court on an appeal from acquittal to allow the appeal, set aside the verdict and, in a judge alone trial, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law.
- [185] The test that has been read into this provision imposes an even higher onus on the Crown than that which is mandated by Vézeau. To obtain the remedy contemplated by s. 686(4)(b)(ii), the Crown must establish that all factual findings necessary to support a verdict of guilty were made by the trial judge, either expressly or implicitly. This common law

explication of the test recognizes the limited jurisdiction of appellate courts to entertain Crown appeals from acquittals, the institutional limits of appellate courts, and the narrow context in which the remedial jurisdiction found in s. 686(4)(b)(ii) should be exercised. The common law test must be strictly applied to respect these limits: Cassidy, at 354-355; R. v. Greyeyes, [1997] 2 S.C.R. 825 at para. 40. It is a remedy that should only be granted in the clearest of cases: R. v. Audet, [1996] 2 S.C.R. 171 at para. 48; R. v. McRae, 2013 SCC 68 at para. 39. Magoon was such a case. In my view, so is this one.

[186] To summarize matters with respect to Sundman, it is my view that the judge erred in law in addressing the scope of the offence of unlawful confinement. But even assuming the judge's conclusion that the act of confinement to which Sundman was a party had ended moments before the killing does not give rise to an appealable error in law, the judge nonetheless erred in law by requiring proof that the confinement and killing occurred simultaneously. By doing so, the judge erred in law in his application of the Paré principle.

[187] On the judge's findings of fact, the elements of the offence of constructive first degree murder set out in Harbottle had been established beyond a reasonable doubt. The judge erred in law by failing to give those findings required legal effect. For these reasons, I would allow the Crown appeal in relation to Sundman, set aside the acquittal and enter a verdict of guilty of first degree murder.

[188] For the reasons aforesaid, I would remit the sentencing proceedings involving Sundman to the trial court.

VI. Dispositions

[189] I would dismiss Sundman's appeal from conviction.

[190] I would allow the Crown's appeal from Sundman's acquittal of first degree murder, set aside that verdict and enter a guilty verdict on the offence charged. I would remit the sentencing of Sundman for first degree murder to the trial court.

[191] I would dismiss the Crown's appeal from Martin's acquittal of first degree murder.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Grauer"

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://www.bccourts.ca/jdb-txt/ca/21/00/2021BCCA0053.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-sundman-2021>

Prepared on 28 October 2026 · Esheria