COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Singh, 2022 ONCA 584
DATE: 20220815
DOCKET: C68135

Gillese, Lauwers and Brown JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Iqbal Singh

Appellant

Dirk Derstine, for the appellant

Jennifer Trehearne and Jennifer Epstein, for the respondent

Heard: March 31, 2022 by video conference

On appeal from the convictions entered by Justice J. Michal Fairburn of the Superior Court of Justice, sitting with a jury, on May 30, 2016.

Brown J.A.:

I. OVERVIEW

[1] On the evening of January 21, 2014, the appellant, Iqbal Singh, stabbed his wife, Anita Summan, and her business partner, Gurcharan Doal, with a large knife in the kitchen of their residence in Brampton, Ontario (the “Residence”). Singh then went down to the basement of the house, where he attempted to enter a bedroom

in which a young relative of Doal, Mayank Sandhu, had locked himself. Sandhu had previously witnessed the attacks on Anita and Doal in the kitchen.[1]

[2] Singh testified at trial. He admitted to stabbing his wife and Doal. The main issues at trial were: (i) whether the killing of his wife amounted to first degree murder, either because Singh caused her death "while committing or attempting to commit" the offence of forcible confinement of Sandhu, under s. 231(5)(e) of the *Criminal Code*, R.S.C. 1985, c. C-46, or because the murder was planned and deliberate under s. 231(2) of the *Criminal Code*; and (ii) whether provocation was available as a defence.

[3] The trial judge ruled that there was no air of reality to the partial defence of provocation: *R. v. Singh*, 2016 ONSC 3739 (the "Provocation Reasons"). The trial judge also dismissed Singh's application for a directed verdict on the first degree murder count, holding that there was evidence of planning and deliberation for the jury to consider under s. 231(2), and that a sufficient temporal and causal connection existed between the killing of Anita and the unlawful confinement of Sandhu to satisfy the requirements for constructive murder in s. 231(5)(e): *R. v. Singh*, 2016 ONSC 3136 (the "Directed Verdict Reasons").

[4] The jury found Singh guilty on all five counts on the indictment:

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[1] For the most part, I have adopted the stylistic convention of referring to persons by their last name. In doing so, I intend no disrespect to any person. As Anita Summan and her daughter, Sonali, share the same last name, I will refer to them by their first names to avoid confusion.

- Count 1: The first degree murder of his wife, Anita, contrary to s. 235(1) of the *Criminal Code*;
- Counts 2 and 3: The attempted murder and aggravated assault[2] of Doal, contrary to ss. 239(1) and 268 of the *Criminal Code*; and
- Counts 4 and 5: The attempted murder and unlawful confinement of Sandhu, contrary to ss. 239(1) and 279(2) of the *Criminal Code*.

[5] The trial judge entered convictions on the first degree murder count and the two attempted murder counts; she stayed the convictions on the other two counts pursuant to *Kienapple v. R.*, [1975] 1 S.C.R. 729.

[6] The trial judge imposed: a life sentence with no eligibility for parole for 25 years on the first degree murder conviction; a sentence of 10 years concurrent for the attempted murder of Doal; and a sentence of 8 years for the attempted murder of Sandhu, concurrent to the life sentence but consecutive to the 10-year sentence.

[7] Singh now appeals his conviction on Count 1 for the first degree murder of his wife and seeks a retrial. He advances three grounds of appeal, submitting that the trial judge erred:

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[2] Singh pleaded guilty to the aggravated assault of Doal.

(i) in failing to leave the partial defence of provocation for the jury when an air of reality existed for that defence;

(ii) in leaving first degree murder based on planning and deliberation under s. 231(2) for the jury when there was no evidence of planning and deliberation; and

(iii) in leaving first degree murder based on constructive murder under s. 231(5)(e) for the jury by inappropriately expanding the definition of "while committing" in that section to include the committal of unlawful confinement of Sandhu after Singh killed his wife.

[8] For the reasons I will set out below, I conclude the trial judge did not err in leaving first degree murder based on planning and deliberation for the jury to consider and in not leaving the partial defence of provocation for the jury. However, I conclude, with respect, that the trial judge erred in leaving first degree murder based on constructive murder under s. 231(5)(e) for the jury. Since it is impossible to know which of the two paths to first degree murder the jurors might have followed (planning and deliberation or constructive murder), I would direct a new trial on Count 1, that Singh committed the first degree murder of his wife, Anita Summan.

II. THE EVIDENCE

A. SINGH'S IMMIGRATION HISTORY

[9] Singh came to Canada from India in 2003 when he was 36 years old. He arrived without travel documents and claimed refugee status. His refugee application was denied. Over the next ten years, Singh made six applications for permanent resident status in Canada, all of which were refused. His first application in 2005 was made on humanitarian and compassionate grounds. From 2007 to 2011 he filed four more applications with a spousal sponsorship ground, based on Anita as his wife.

[10] In November 2012, Singh attended at the offices of the Canada Border Services Agency ("CBSA") for a pre-removal interview. The CBSA was awaiting the travel documents necessary to deport Singh. Following the interview, Singh was released on immigration conditions, including that he reside at the Residence and that he report in person to the CBSA every month.

[11] A year later, in November 2013, Singh filed his sixth and final application for permanent resident status. The application was made only on humanitarian and compassionate grounds; Anita did not provide any spousal sponsorship.

[12] Singh's final in-person reporting to the CBSA was on January 21, 2014, the day he attacked Anita, Doal, and Sandhu.

B. SINGH'S RELATIONSHIP WITH ANITA, DOAL, AND SANDHU

[13] The Residence was the family home for Anita, her first husband (who passed away in 2004), and their daughter, Sonali Summan. Sonali was 22 years old at the time of the attacks.

[14] Singh met Anita after her previous husband's death. They married in December 2007 and lived at the Residence, together with Sonali.

[15] The house had three floors, including the basement which Anita rented out to students. Anita and Singh had a room on the top floor, as did Sonali.

[16] In November 2013, Singh was charged with assaulting Anita in a domestic dispute. The charge was later withdrawn and Singh entered into a peace bond with conditions, one of which prohibited him from attending at the Residence without Anita's prior written approval. That peace bond was still in effect at the time of the attacks. Singh continued to visit the house on a regular basis, even when Anita was out of the country, although Anita had not provided prior written consent.

[17] Doal testified that he met Anita in 2008 when she purchased goods from his warehouse for resale at her own store. They eventually went into business together, selling clothing from a space in Doal's warehouse. They called each other "brother and sister". Doal testified that he knew nothing of Anita's relationship with Singh, whom he had met only twice. The first time was when Anita brought Singh to Doal's store and introduced him as someone who "used to be [her] driver".

According to Doal, the second time he saw Singh was when he was stabbed with a knife.

[18] By contrast, Singh testified that he and Doal were friendly, having met at least 10 or 15 times, including at Doal's store. Singh stated he had introduced Doal to Anita.

[19] Doal's cousin's son, Sandhu, a student whom Doal referred to as his "nephew", was renting one of the basement rooms at the Residence at the time of the attacks.

[20] Prior to the attacks, Sandhu had only one brief interaction with Singh, when Anita was away on a trip to India. Sandhu had come up to the main floor to do laundry. According to Sandhu, when he opened the door from the basement, he was met by Singh who admonished him for coming up to the main floor at such a late time. Sandhu did not perceive the interaction to be a friendly one.

[21] Sonali testified that Singh had screamed at Sandhu, "Why are you up so late? Why are you upstairs? It's after nine and if I ever see you upstairs again I'll cut you into pieces." Sonali stated that she angrily confronted Singh the next day, telling him, "You cannot make the rules in my mother's house. My mom's not here,

so grandma's here, and grandma makes the rules when mom's not here."[3] Sonali told Singh to get out and did not see him again until the day of the attack.

[22] Singh testified he simply told Sandhu not to come upstairs so late and to knock first. Singh said he was not angry and was not yelling. While Singh denied threatening Sandhu, he admitted that the next morning Sonali approached him in anger, but he denied that she told him to leave.

C. THE EVENTS ON THE NIGHT OF JANUARY 21, 2014

[23] On the evening of January 21, 2014, Singh was at the Residence with Anita and Sonali. The evidence at trial given by Singh, Sonali, Doal, Sandhu, and Puneet Sharma, who was also renting a room in the Residence basement, about what occurred is generally consistent regarding the sequence of events, but differs with respect to the amount of time that elapsed between them. Accordingly, I shall provide brief summaries of each of their evidence.

Singh's evidence

[24] Singh testified that, on the morning of January 21, 2014, he reported to the CBSA. He called Anita afterwards to tell her that "everything is okay"; she told him to come home. They then went together to buy a new front door lock for the Residence, which Singh installed that afternoon while Anita and Sonali were

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[3] Sonali's grandmother lived in the Residence while Anita was away in India.

working at Doal's store. Anita told Singh to make butter chicken for dinner and said that she would make rotis. Singh testified that the knife he used to cut the chicken was the knife he ultimately used to stab Anita. After he was done cooking, Singh left the knife in the sink.

[25] Singh recalled that Anita and Sonali returned to the Residence around 8:15 p.m. Anita made pasta for Sonali, but Singh ate butter chicken and rotis in the living room at around 9:30 p.m. or 10:00 p.m.

[26] The locations of various rooms on the ground floor of the Residence were depicted on a diagram marked as an exhibit at trial. The kitchen, with its eatery, was located in the southeast corner of the house. Exiting the kitchen through its west door, one would enter the office/bedroom and then the living room. Moving through the north door of the kitchen, one would enter a hallway, which had access to the family room.

[27] Around 9:45 p.m., Singh heard Doal arrive and go into the kitchen with Anita.

[28] Sandhu arrived about five minutes later. Singh did not acknowledge the arrival of Doal and Sandhu.

[29] Singh remained in the living room and rested on the couch.

[30] Approximately five minutes later, Singh got up from the couch, picked up his dishes, and made his way toward the kitchen. He testified that Doal and Anita had been in the kitchen for about 15 minutes before he walked in. Singh stated that,

when he got to the door between the office/bedroom and the kitchen, he saw Doal and Anita standing side by side in front of the island, watching something on Doal's phone. Singh testified that he saw his wife attempt to move away from Doal, who had his right arm around Anita's waist and was grabbing her buttock. Anita moved her right hip a "little bit to the side" away from Doal, and Doal moved his fingers, repositioning his hand more to the right side of Anita's right hip, pulling her back toward him. Singh demonstrated these movements multiple times for the court.

[31] According to Singh, Doal was holding up a phone in front of them in his left hand, as if he was showing Anita something on his phone. Singh testified:

> When I got to that office door … that enters the kitchen, I saw that Doal's hand was placed on my wife's buttocks. I noticed his fingers moving like this. My wife tried to move to the side from him, but by doing his hand like this he moved her closer to him again.
>
> From there I started getting angry. I placed my dishes into the sink and I got my eyes on the knife in the next sink there. I picked up the knife from there. I … turned my face back towards Gurcharan Doal, that "sister fucker, what are you doing?" My wife suddenly moved forward towards me. She said, "No, Sodhi,[4] no." But I was very angry at the time. I placed the hand like this in the front towards my wife. In the second hand I was holding the knife like this.

[32] Singh stated that his intention in grabbing the knife was to threaten Doal and scare him out of the house, not to kill him. He described moving his wife out of the

[4] Anita and Sonali often referred to Singh as "Sodhi".

way with "full force"[5] and then proceeding to stab Doal in the stomach. In cross-examination, the Crown asked Singh the following:

> Q. Well, … what caused you to become angry?
>
> A. The hand … that he had kept on my wife here that's why I got angry.
>
> Q. And … what does it mean when someone puts their hand to pull them close so they can see something on a phone?
>
> A. He called her his sister. In our culture, no brother would put his hand here on his sister. Absolutely not. If a brother is hugging her – his sister, he would put his hand on the shoulder here. And nor does anybody hug from the front. If it's the elder brother, he would put his hand over the head and … show her affection. So from that I got angry. He's calling her sister and what is he doing.
>
> Q. Well, let's imagine that he's actually pulling her close and saying – look at this.
>
> A. No, nobody pulls a sister grabbing from there.

[33] Singh went on to describe a brief physical altercation with Doal:

> Q. What happened after … you stabbed Mr. Doal?
>
> A. He took the arm away … from my neck. I was really out of breath. It took about a minute, a minute and a half to catch my breath. I heard the sound of my wife from behind. She was saying, "Sodhi, what are you doing? Have you gone mad?" I turned towards her. I said to her, "Why did you not slap this sister fucker when he was touching you in an improper manner?"

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[5] Singh testified that he did not realise he had stabbed Anita until the following morning when he watched the news.

> Q. And … where's Mr. Doal at this point?
>
> A. I don't know. When I said to my wife, why did you not slap [him] when he was touching you in an improper … manner, at the same time, my thinking went that where did he go.

[34] Singh testified that, after losing track of Doal, he walked into the living room and saw that the front door was wide open. Singh went out the door onto the driveway of the house and saw that Doal's van was still parked out front, but Doal was not inside.

[35] Singh decided to check the basement of the Residence. He went to the basement door on the side of the house and entered. Once inside, Singh heard "panic voices" coming from one of the rooms occupied by the basement tenants. Singh approached the door and yelled, "[S]end him out", after which the voices got "faster". Singh then kicked the door "forcefully" and also stabbed the door with the kitchen knife twice. The knife penetrated the door both times.

[36] Singh stated that he heard the occupants in the basement room speaking with 911. At that point, he felt that Doal was not actually in the room, so he disposed of the knife in the adjacent hallway closet and went back up to the main floor. Once upstairs, he saw Anita sitting on the floor in the foyer with Sonali next to her. Singh picked up his jacket and his keys, and then left the house.

[37] Singh went to his nephew's apartment and stayed there that night. In the morning, Singh learned that Anita had died, Doal had been injured, and the police

were looking for him. He asked his nephew to drive him to the police station, where he turned himself in.

Sonali's evidence

[38] Sonali testified that, on the morning of the attack, Anita came home with a new lock for the front door and changed the lock herself. Anita and Sonali then went to work at Doal's store. When they returned home at 8:00 p.m., Singh was sitting on a couch in the living room. Sonali was not expecting to see him. A little later, Sonali was in the kitchen while Anita was making pasta. Sonali asked Anita, "Why is he here?" Anita replied, "He'll leave."

[39] When the pasta was ready, Sonali ate it in the family room. After a while, Anita joined Sonali in the family room to eat and watch television. Singh was not with them. When Sonali was done eating, she put her dishes in the kitchen sink, in which she saw a large kitchen knife.

[40] Later, Sonali, Anita, and Singh were in the kitchen at the same time. Singh told Anita he wanted an original key for the new lock. Sonali asked, "Why?" meaning, "Why does he need a key?" She did not receive an answer and thought it was left that Singh would not receive a key. After this "argument", as Sonali referred to it, Sonali went back into the family room with Anita and watched television for about half an hour before going upstairs to bed. Around 10:00 p.m., she heard the doorbell ring and then heard the voices of Doal and Sandhu.

[41] About half an hour after going upstairs, Sonali heard a thud and a scream; she got out of bed and went downstairs. She saw Doal in the doorway to the family room, drenched in blood and moaning. Anita was standing bent over by the front hall closet. Sonali thought her mother was having a heart attack and went to the kitchen to call 911.

[42] Sonali could hear sounds coming from the basement of "[s]omeone being chased" and then banging on a door. She called 911 at 10:03 p.m.

[43] While she was on the line, Sonali looked in the kitchen sink for the knife she had seen earlier; it was not there.

[44] Sonali tried to enter the basement from the main floor to look for Sandhu, but the door to his side of the basement was closed. Sonali heard banging on a door.

[45] Sonali went back upstairs to be with her mother, who was lying down but still conscious. Anita told her to call the police, tell them it was "Sodhi" who did it, and get him deported.

[46] Singh came up from the basement using the interior stairs. He looked at Sonali, picked up his jacket, put on his shoes, and left. The police arrived at 10:09 p.m.

Doal's evidence

[47] Doal testified that he was driving Sandhu home to the Residence when Anita phoned Sandhu and invited him over to eat pasta.

[48] Doal and Sandhu arrived at the Residence around 9:50 p.m. Sandhu went around to the side door to the basement. Before Doal drove away from the Residence, Anita called Doal and invited him in to discuss business matters. Doal parked his car and entered the Residence through the front door.

[49] When Doal got to the kitchen, Sandhu was already sitting at the table. Doal was standing beside the door and Anita was beside the stove.

[50] While Doal was still standing there, Singh came running into the kitchen from the office/bedroom. According to Doal, as soon as Singh got there, he started stabbing Anita, who screamed. Doal saw a 14-inch knife in Singh's hand. Doal did not see where the knife came from but testified that Singh "may have had it on him before." In cross-examination, it was put to Doal that he did not see Singh enter the kitchen with the knife. Doal clarified, "So the speed that he came, he was quick and it was just two steps and when he was striking, that's when I saw it. This may have been his planning from before."

[51] Doal said that, after stabbing Anita, Singh came for him at speed. Doal moved back and Singh moved toward him. Singh's first stab was to Doal's abdomen. Doal became dizzy and disoriented. He did not remember the rest of

the night, or anything else, until he woke up in the hospital from a coma five days later. He did not remember how he suffered additional wounds.

[52] In cross-examination, it was suggested to Doal that he was not standing near the doorway but instead was “standing right in front of the door between the office bedroom and the kitchen” with his arm around Anita’s waist. Doal responded, “How can you say that? I have proof of her being a sister.” When defence counsel again suggested that Doal had his arm around Anita’s waist, Doal replied, “You are lying. ... How can you say those things to me, things that aren’t true? ... How can you ask me that? You can’t ask me – can you do that to your sister?”

[53] When he left the hospital, Doal gave an audio-recorded statement to the police. He told the police that he did not actually see Singh stab Anita. However, at trial, he denied saying that to the police despite the statement having been recorded.

Sandhu’s evidence

[54] According to Sandhu, when he arrived at the Residence with Doal that night, he dropped off his things in his basement apartment and then went upstairs to the kitchen. Doal was already standing in the kitchen, next to the chest freezer.

[55] Sandhu walked to the stove to spoon himself some pasta and noticed Singh sitting on a couch in the living room. Sandhu received a call, answered his phone,

and started talking as he sat down at the kitchen table with his plate of pasta. Anita and Doal were talking to each other, standing at least three or four feet apart.

[56] As Sandhu was eating, Singh came into the kitchen "normally" through the office/bedroom door. Sandhu went back to his food and looked up about five minutes later when he heard Anita scream. Singh was holding a knife that was 10 to 12 inches long, and he was looking toward Anita like he was "in the action", about to stab somebody.

[57] Anita screamed something like "[o]h why you doing this?" After a minute or so, Singh moved toward Anita and stabbed her in the stomach twice. Although Sandhu did not recall exactly, he thought Singh swore aggressively before he stabbed Anita twice.

[58] Singh then immediately moved toward Doal. Sandhu started to run. The last thing he saw in the kitchen was Doal trying to save himself by putting his arms together in front of his chest and Singh was in front of Doal about to stab him.

[59] Sandhu testified that he ran outside through the front door, then around to the side basement door. There was snow on the ground, he was not wearing any shoes, and he had left his phone behind on the kitchen table.

[60] Sandhu ran down the stairs to the portion of the basement rented by other students. He wanted to get some help and warn them. Sandhu saw Puneet

Sharma, a student who rented what was known as the “blue bedroom” in the basement, and told him there had been a stabbing upstairs.

[61] The two then went into Sharma’s bedroom. Sandhu locked the door, held his body against it, and kept two hands on the doorknob to hold the door closed. He was terrified. Sandhu thought Singh would come after him and stab him because he was “the only witness left”. He told Sharma to call 911.

[62] As Sandhu was telling Sharma to call 911, which he thought was five to eight minutes after they went into the blue bedroom, he heard “[r]eally bad”, aggressive banging on the bedroom door. Sandhu said the person was banging and yelling, “Come out”. As he was holding the door, Sandhu saw 2.5 or 3 inches of the blade of a knife come through the door twice. At some point he took over the phone and started speaking to the 911 operator. The banging stopped while he was on the phone.

[63] Sandhu and Sharma stayed in the bedroom until the police arrived. As per an Agreed Statement of Fact, their 911 call started at 10:04 p.m. and ended at 10:09 p.m.

Sharma’s evidence

[64] Sharma was in his room on the evening of January 21, 2014 when he heard shouting and screaming, and then the sound of someone running. Less than a

minute later he saw Sandhu running through the basement common room saying, “Open the door, open the door.”

[65] Sandhu came into Sharma’s bedroom, they locked the door, and Sandhu held it closed. Sandhu told Sharma to call 911. About 10 to 15 seconds later, Sharma heard pounding on the door. A male voice said something like, “[S]end the guy out.” Sharma called 911, Sandhu spoke to the operator, and then a knife came through the door. The pounding stopped but they stayed in the room until the police came.

III. FIRST ISSUE: DID THE TRIAL JUDGE ERR IN FAILING TO LEAVE THE PARTIAL DEFENCE OF PROVOCATION FOR THE JURY?

A. THE TRIAL JUDGE’S REASONS

[66] The partial defence of provocation contained in s. 232 of the *Criminal Code* provides that “[c]ulpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation”: s. 232(1).

[67] Section 232(2) of the *Criminal Code* describes what conduct may constitute provocation. The subsection was amended in 2015[6] to limit the reach of the

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[6] *Zero Tolerance for Barbaric Cultural Practices Act*, S.C. 2015, c. 29, proclaimed into force on July 17, 2015.

provocation defence.[7] However, at trial the parties agreed, and the trial judge accepted, that the pre-2015 version of s. 232(2) applied to the case.[8] At the time Singh killed Anita, ss. 232(2) and (3) read as follows:

> 232(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> (3) For the purposes of this section, the questions
>
> > (a) whether a particular wrongful act or insult amounted to provocation, and
> >
> > (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
>
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

[68] At trial, Singh submitted that the trial judge should leave the partial defence of provocation with the jury for consideration. As summarized by the trial judge, Singh argued that:

> While he acknowledged that he caused Anita Summan's death by stabbing her twice in the stomach, Mr. Singh testified that his actions resulted from extreme anger and a loss of self-control. Mr. Singh testified that his anger

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[7] As a result of the 2015 amendment, s. 232(2) currently states, "Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool."
[8] Provocation Reasons, at para. 44.

> stemmed from seeing Mr. Doal and Ms. Summan standing beside each other, looking at Mr. Doal's iPhone, with Mr. Doal's right hand placed on Ms. Summan's upper right buttocks area just below her waist. Ms. Summan and Mr. Doal were fully clothed and in the kitchen of the family home. Mr. Singh testified that Ms. Summan and Mr. Doal were in a brother-sister like relationship and that in his "culture" no brother would place his hand on a sister in this manner.[9]

[69] In his testimony at trial, Singh demonstrated for the court the interaction between his wife and Doal that he observed when he entered the kitchen, which he said provoked his anger. The trial judge described Singh's demonstration as follows:

> [Singh] … placed his right hand just below and horizontal to the right side of the back of his waist, so that the thumb side of his hand was at waist level and the rest of his hand, remaining horizontal to the waist, was just below the waist. His fingertips were close to the side of his right hip. He then mimicked the motion that he testified Anita Summan made, moving his right hip slightly to the right. He then mimicked the movement of Mr. Doal's hand, suggesting that it moved more to the side of Ms. Summan's right hip.[10]

[70] Singh explained that, when he saw where Doal's hand was located on his wife, he became extremely angry. He picked up the knife from the sink and moved his wife away with "full force" in order to get at Doal. Singh stabbed Anita twice in

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[9] Provocation Reasons, at para. 2.
[10] Provocation Reasons, at para. 20.

the process, moved toward Doal, and stabbed him several times. The trial judge continued the narrative of events:

> When he was asked whether the only possible way of addressing his anger was “with a knife”, Mr. Singh testified that he got angry and did “what seemed right” to him. He did not think he had to give Mr. Doal a chance because he was doing something wrong.
>
> After stabbing Mr. Doal, Mr. Singh testified that it took him a minute to a minute and a half to catch his breath. When he turned around to face Anita Summan, she asked him if he had “gone mad”? Mr. Singh testified that he responded to her as follows: “Why did you not slap this sister fucker when he was touching you in an improper manner?”
>
> At this point Mr. Singh had lost track of where Mr. Doal had gone. He went to look for him and ended up in the basement, pounding at the bedroom door. He thought that Mr. Doal was in there.
>
> He testified that he did not realize that he had stabbed Anita Summan until the next morning when he watched the news. He did not intend to kill Anita Summan. He did not intend to harm her in any way.[11]

[71] The trial judge rejected Singh’s submission that provocation should be left for the jury. She ruled that, while the evidence about Singh’s extreme anger was clearly linked to the *mens rea* for murder (and the other offences), and that the jury must receive instructions to this effect, there was no air of reality to the partial defence of provocation.[12]

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[11] Provocation Reasons, at paras. 27-30.
[12] Provocation Reasons, at paras. 3 and 83-86.

[72] There is no dispute that the trial judge properly articulated the applicable legal tests for determining the elements of the partial defence of provocation and whether there was an air of reality to that defence in the circumstances of this particular case. The trial judge summarized the objective and subjective tests constituting the provocation defence:

> As for the objective test, the questions are whether (1) there was a wrongful act or insult and (2) whether the wrongful act or insult was sufficient to deprive an ordinary person of the power of self-control? As for the subjective test, the questions are whether the accused acted (1) in response to the provocation and (2) on the sudden before there was time for his or her passion to cool? See: [*R. v. Tran,* 2010 SCC 58, [2010] 3 S.C.R. 350], at paras. 10-11, 25, 36; *R. v. Hill,* [1986] 1 S.C.R. 313, at p. 324[.][13]

[73] As to the subjective element of the test, the trial judge held that "there is evidence that Mr. Singh acted in response to what he perceived as a provoking act and on the sudden before there was time for his passion to cool."[14]

[74] In her view, the contested issue centred on the content of the objective test: "[T]he real question is whether there is evidence of a wrongful act or insult that was sufficient to deprive an ordinary person of self-control", specifically "whether there is some evidence upon which a properly instructed jury acting reasonably could

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[13] Provocation Reasons, at para. 48.
[14] Provocation Reasons, at para. 49; see also para. 73.

have a reasonable doubt that an ordinary person would be deprived of the power of self-control by virtue of seeing Mr. Doal's hand where it was said to be."[15]

[75] The trial judge concluded there was "insufficient evidence to support a wrongful act or insult that would deprive an ordinary person of the power of self-control."[16] She explained:

> Standing and watching something with someone else on a small iPhone, fully clothed, in a kitchen, with another present, is an entirely benign activity. Even accepting the evidence about the cultural significance of the act of the purported touching in this case, it is important to note that Ms. Summan did not show any signs of objecting.
>
> Taking Mr. Singh's evidence at its highest, the touch he saw simply cannot qualify under the objective test as a wrongful act or insult that could be sufficient to deprive an ordinary person of the power of self-control. To find otherwise would be to destabilize the balance that the objective test seeks to achieve between human frailty and discouraging acts of homicidal violence.
>
> Quite simply, an ordinary person, even one infused with Mr. Singh's cultural background, has to conduct himself in accordance with contemporary values and norms of behaviour. Such a person would not and could not be deprived of the power of self-control in the face of seeing Mr. Doal's hand.[17]

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[15] Provocation Reasons, at paras. 49-50.
[16] Provocation Reasons, at para. 74.
[17] Provocation Reasons, at paras. 76-78.

B. THE ISSUES STATED

[76] Singh submits that, in concluding the partial defence of provocation had no air of reality, the trial judge committed two errors:

- First, she misapprehended Singh's evidence by proceeding on the basis that Singh's anger was provoked by seeing his wife and Doal together looking at something on Doal's iPhone when, according to Singh, his anger was provoked by seeing Doal put his arm around Anita's waist, place his hand on her buttocks, and pull her closer to him when she shifted away. The trial judge also misapprehended Singh's evidence in concluding that his wife did not show any signs of objecting to Doal's touching. According to Singh, his evidence that his wife attempted to move away from Doal, when taken at its highest, showed that Doal was sexually assaulting Anita; and,
- Second, the trial judge erred by rejecting the cultural significance of Doal's actions toward Anita, which were provocative.

C. ANALYSIS

[77] The interpretation of the elements of the partial defence of provocation and the determination of whether there is an air of reality to the defence in the particular circumstances constitute questions of law reviewable on a standard of correctness: *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 40.

Misapprehension of evidence

[78] I do not accept Singh's submission that the trial judge misapprehended his evidence about what provoked his anger, as it is based on an unfair reading of the trial judge's reasons. When the reasons are read as a whole, it is crystal clear that the trial judge understood Singh was taking the position that Doal's placement of his hand on Anita was the wrongful act or insult which provoked his anger, as can be seen from the trial judge's reasons when she stated:

> The question the court must answer is whether there is some evidence upon which a properly instructed jury acting reasonably could have a reasonable doubt that an ordinary person would be deprived of the power of self-control <u>by virtue of seeing Mr. Doal's hand where it was said to be</u>.[18] [Emphasis added.]

[79] Nor did the trial judge misapprehend Singh's evidence about his wife's reaction to Doal's touching or fail to appreciate that Singh was reacting to a sexual assault of his wife by Doal. According to Singh, when he entered the kitchen, he saw Doal's arm around Anita's waist/hip area, Anita moved her hip "a little bit", and Doal continued with his arm touching her hip. Singh gave no evidence that his wife voiced any objection to Doal's contact. Singh did not testify that his anger was provoked because Anita's reaction – moving her hip a little bit – indicated that she was objecting to a sexual assault by Doal. Instead, Singh's anger stemmed from

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[18] Provocation Reasons, at para. 50.

seeing Doal touch Anita in a location where a “brother” should not touch a “sister”, in accordance with his articulation of the social norms of behaviour in Punjabi culture. During the argument before the trial judge about leaving the partial defence of provocation for the jury, Crown counsel submitted there was no evidence on the record that there was a sexualized component to the touching, and defence counsel did not suggest that Doal’s conduct observed by Singh amounted to a sexual assault.

[80] Accordingly, I see no misapprehension of the evidence by the trial judge.

The use of cultural factors in applying the objective branch of the test for provocation

[81] Singh submits that his evidence, buttressed by Doal taking offence to questions put to him at trial that he had placed his arm around Anita, a “sister”, combined to provide an evidentiary basis that Doal’s conduct transgressed specific behavioural expectations and would be regarded as a wrongful act or insult by an ordinary person who possessed Singh’s cultural background. Singh contends the trial judge erred by not taking that unambiguous cultural evidence into account.

[82] I see no error by the trial judge. She correctly stated the governing legal principles. The trial judge recognized that:[19]

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[19] See Provocation Reasons, at paras. 56-71.

- the use of the term “ordinary person” in s. 232(2) reflects the normative dimensions of the partial defence of provocation, ensuring the behaviour that can attract the law’s compassion through the provocation defence “comports with contemporary society’s norms and values”: *Tran*, at para. 30;
- the concept of the “ordinary person” takes into account some, but not all, of the individual characteristics of the accused: *Tran*, at para. 32;
- in applying this more flexible approach, the court must not “subvert … the logic of the objective test” and end up transforming the “ordinary person” into the very accused before the court: *Tran*, at para. 33;
- from this it follows that the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*: *Tran*, at para. 34;
- the consideration of background circumstances that contribute to the significance an ordinary person would attribute to an act or insult does not change the fact that a certain threshold level of self-control is always expected of the “ordinary person”: *R. v. Cairney*, 2013 SCC 55, [2013] 3 S.C.R. 420, at para. 40; and
- There is no place in the objective standard for any form of killing based on inappropriate conceptualizations of “honour”: *Tran*, at para. 34.

[83] In applying these principles, the trial judge did not ignore the cultural factors raised by Singh and Doal in their testimonies. Her reasons demonstrate she considered that evidence. In applying the legal principles to that evidence, the trial judge concluded that:

> Fundamental values related to autonomy of the person and equality of all individuals must inform how the ordinary person would respond to such acts. Regardless of their origin, under the objective test, beliefs about appropriate and inappropriate touching and reactions to that touching must be informed by these fundamental values. Even if an ordinary person was infused by what Mr. Singh testified was the cultural significance of the purported touch, behaving in accordance with contemporary values and societal norms, he would not be deprived of self-control in the circumstances described. To find otherwise would be to eliminate the minimum standard that the objective element of provocation exists to protect.[20] [Emphasis added.]

[84] In so concluding, the trial judge did not usurp the jury's task of determining whether "a particular wrongful act or insult amounted to provocation", in the language of the former s. 232(3)(a) of the *Criminal Code*. Instead, the trial judge quite properly undertook an interpretation of the elements of the partial defence of provocation, which includes ascertaining the appropriate characteristics to ascribe to the ordinary person: *Tran*, at paras. 34, 40.

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[20] Provocation Reasons, at para. 80.

D. CONCLUSION

[85] For these reasons, I see no error in the trial judge refusing to leave the partial defence of provocation for the consideration of the jury.

IV. PLANNING AND DELIBERATION

A. THE APPLICATION FOR DIRECTED VERDICTS ON THE FIRST DEGREE MURDER AND UNLAWFUL CONFINEMENT COUNTS

[86] Count 1 on the indictment charged Singh with the first degree murder of his wife, Anita; Count 5 charged him with the unlawful confinement of Sandhu in the Residence's basement. At trial, Singh applied for a directed verdict of acquittal on both counts. His application rested on two grounds.

[87] First, while Singh acknowledged there was evidence upon which a properly instructed jury, acting reasonably, could convict him of second degree murder, there was no evidence of planning and deliberation.

[88] Second, there was no evidence of the *mens rea* for unlawful confinement. Singh argued that even if there was sufficient evidence of an unlawful confinement, there was still an insufficient temporal and causal connection between his killing of Anita and any confinement of Sandhu to permit a jury to find that the distinct criminal acts were part of a single transaction for the purposes of s. 231(5)(e) of the *Criminal Code*.

[89] I will examine the first ground of appeal in this part of my reasons and the second one concerning s. 231(5)(e) in Part V below.

B. STANDARD OF REVIEW

[90] A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction: see *R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 1-4; *R. v. Bigras*, 2004 CanLII 21267 (Ont. C.A.), at paras. 10-17. Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge: *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at para. 48.

C. THE ISSUE STATED

[91] Section 231(2) of the *Criminal Code* provides that "[m]urder is first degree murder when it is planned and deliberate." The trial judge concluded there was some evidence upon which a properly instructed jury, acting judicially, could find that Singh committed a planned and deliberate murder.

[92] There is no suggestion that the trial judge misstated the standard to be applied on a directed verdict application.[21] Nor is there any dispute that the trial judge correctly stated the meaning of the phrase "planned and deliberate": a

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[21] Directed Verdict Reasons, at paras. 9, 11.

planned murder is one that occurs as a result of a calculated scheme or design which has been carefully thought out, with its nature and consequences considered; while the additional element of "deliberate" means "considered", "not impulsive", "slow in deciding", and "cautious", a process in which the accused takes the time to weigh the advantages and disadvantages of his intended action.[22]

[93] Singh submits none of the evidence adduced at trial could lead to an inference that the killing of Anita was "planned" and "deliberate". He contends the trial judge erred by relying on the circumstantial evidence of *animus*, and certain gaps in the evidence, to support the inference that Singh had planned and deliberated the murder. Singh contends the trial judge erred by conflating evidence of opportunity to kill his wife with evidence of planning and deliberation. In his view, such evidence, or lack thereof, was only probative of intent but not of the elements of planning and deliberation.

D. THE TRIAL JUDGE'S REASONS

[94] The trial judge commented that the circumstantial evidence of planning and deliberation was "far from strong".[23] Nevertheless, she concluded there was sufficient evidence upon which a jury could find planning and deliberation. She

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[22] Directed Verdict Reasons, at paras. 77-79.
[23] Directed Verdict Reasons, at para. 80.

identified two sets of such evidence: that regarding *animus* and motive; and "other facts".[24]

[95] The trial judge listed circumstantial evidence from which the jury could infer that Singh held an *animus* toward Anita and a motive to do her harm: his alleged assault of Anita in January 2013; his repeated applications for landed immigration status, which could support an inference that he would be displeased with anything that might interfere with his chances of success; learning on the day of the attacks that the CBSA was awaiting travel papers for his deportation; and Anita's failure to provide spousal sponsorship to support his last immigration application, together with her failure to provide the written consent required by the peace bond to authorize his attendance at the Residence, both of which put his immigration status at risk.

[96] The "other facts" largely comprised evidence about Singh's movements in the Residence before he attacked his wife:

- he was sitting in the living room when Anita and Sonali returned home;
- he entered the kitchen after Sonali had put her dinner plate into the sink and had seen a knife. During a discussion in the kitchen with Anita and her daughter, Singh was questioned by Sonali about why he would need a key to the new front door lock of the Residence. Singh then left the kitchen and

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[24] Directed Verdict Reasons, at paras. 82-84.

returned to the living room, where he sat by himself. The trial judge viewed this as evidence from which the jury could infer that Singh retrieved the knife from the kitchen sink before going back to the living room;

- he then spent further time in the living room, with his back to the kitchen door, which could provide evidence of an opportunity to plan and deliberate Anita's killing; and
- Doal's evidence that Singh came into the kitchen and stabbed Anita, but that Doal had not seen Singh pick up a knife. The trial judge stated the jury could infer that Singh already had a knife when he was sitting in the living room with his back to the kitchen and, therefore, he already had a knife in his hands when he entered the kitchen to attack Anita.

[97] The trial judge acknowledged Sandhu's evidence stood in stark contrast to Doal's, with Sandhu testifying that Singh was in the kitchen for up to five minutes before the stabbings. In her view, that was a matter for the jury to determine. The trial judge concluded that "[t]he fact is that there is some evidence upon which a properly instructed jury, acting judicially, could find that Mr. Singh committed a planned and deliberate first degree murder."[25]

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[25] Directed Verdict Reasons, at para. 92.

E. ANALYSIS

[98] Singh submits that in her directed verdict ruling the trial judge did not address the distinct elements of planning and deliberation but, instead, improperly relied solely on evidence of *animus*, motive, and opportunity to conclude there was some evidence that could justify a conviction for first degree murder along this pathway to liability.

[99] I do not read the trial judge's reasons in that way.

[100] First, while the trial judge certainly treated circumstantial evidence of *animus*, motive, and opportunity as available to support an inference that Singh planned and deliberated his killing of his wife, it was open to her to do so.

[101] Singh points to a single judge decision of the Nunavut Court of Appeal that stated evidence of motive, standing alone, cannot support an inference of planning and deliberation: *R. v. Evaloakjuk*, 2001 NUCA 1, at para. 18, cited with approval by *R. v. McKenzie*, 2018 ONSC 2006, at paras. 32-34. However, the weight of authority is that evidence of motive and *animus* can relate to and help establish intent, as well as planning and deliberation: see e.g., *R. v. Bottineau*, [2007] O.J. No. 1495 (S.C.), at para. 28, *per* Watt J. (as he then was); *R. v. Bablitz*, 1996 ABCA 105, at para. 5, aff'd [1997] 3 S.C.R. 1005; and *R. v. Riley*, [2009] O.J. No. 1374 (S.C.), at para. 95.

[102] Further, whether an accused had the opportunity for a sufficient amount of time to plan and deliberate upon a murder is a relevant factor for the analysis.

[103] Ultimately, the task for the trial judge is to consider the evidence regarding the relevant factors and then determine whether there is any evidence from which a jury could reasonably infer that the appellant's attack was the product "of a calculated scheme", arrived at after weighing "the nature and consequences" of that scheme; and, having made the plan, the accused "deliberated", that is weighed the pros and cons of putting the plan into action: *R. v. Robinson*, 2017 ONCA 645, 352 C.C.C. (3d) 503, at para. 40.

[104] In my view, the trial judge committed no error by including circumstantial evidence of *animus*, motive, and opportunity as part of her analysis.

[105] Second, the trial judge's consideration of the evidence went beyond that relating to *animus*, motive, or opportunity. That formed only part of her analysis, which recognized that applying the test for a directed verdict required assessing the evidence as a whole. The trial judge considered "other facts" that supported the inference that Anita's killing was planned and deliberate. These "other facts" included:

- Not only the possible causes of an *animus* that Singh held toward his wife – her lack of support of his immigration application and his inability to obtain

a key to the new Residence locks – but also the timing of those events on the very day of his attacks;

- Not only Singh's presence in the Residence prior to the attacks but also the pace of his conduct in regard to the opportunity to plan and deliberate: namely, sitting alone in the living room; having a discussion with Anita and Sonali in the kitchen about his access to a new door key; then returning to the living room for a period of time before ultimately entering the kitchen and conducting his attacks; and
- Finally, the trial judge reviewed the evidence that led her to conclude that a possible inference was open to the jury that, on his first return into the kitchen when the argument about a key to the new lock took place, Singh took the knife he had earlier placed in the sink, returned to the living room, and then returned with it to the kitchen. Singh then either deliberated further before attacking Anita (on Sandhu's recollection of events) or immediately attacked Anita upon his re-entry into the kitchen (on Doal's recollection of events).

[106] While I share the trial judge's view that the circumstantial evidence of planning and deliberation was "far from strong", I see no error in the factors she considered nor in her conclusion, following a careful review of the evidence, that there was some evidence upon which a properly instructed jury, acting judicially, could find that Singh committed a planned and deliberate murder. The trial judge's

consideration of the circumstantial evidence regarding the elements of planning and deliberation properly involved a limited weighing of the evidence to determine whether the evidence, considered as a whole, was reasonably capable of supporting the inference the Crown sought to have the trier of fact draw about those essential elements: *R. v. Bains*, 2015 ONCA 677, 127 O.R. (3d) 545, at para. 159, leave to appeal refused, [2015] S.C.C.A. No. 478 (*Bains*), and [2015] S.C.C.A. No. 498 (*Pannu*).

[107] For those reasons, I conclude the trial judge did not err in dismissing the application for a directed verdict in respect of the issue of planned and deliberate first degree murder.

V. CONSTRUCTIVE FIRST DEGREE MURDER: s. 231(5)(e)

A. THE ISSUE STATED

[108] The final ground of appeal arises from the trial judge's dismissal of the directed verdict application regarding constructive first degree murder. At trial, Singh argued there was no basis to leave with the jury a path to a first degree murder conviction under s. 231(5)(e) of the *Criminal Code*, which provides:

> 231(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)[.]

[109] Singh argued there was no temporal or causal connection between the killing of Anita and the confinement of Sandhu that could make them part of a single transaction sufficient to satisfy the "while committing" requirement of s. 231(5)(e) for first degree murder.

[110] The trial judge disagreed. Drawing on some Supreme Court and provincial appellate decisions, she stated:

> As the defence have acknowledged, quite properly in my view, that an unlawful confinement can occur following the act of killing, and two different victims can be involved, I will not address the issue further.[26] As long as

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[26] As I read the trial transcripts, the exchanges between defence counsel and the trial judge did not result in a clear acknowledgement by the defence about the scope of s. 231(5)(e). At one point, the trial judge asked defence counsel about the legal significance of the sequencing of the murder and the unlawful confinement. Defence counsel advised that constructive murder was going to be a legal issue and sought to defer the discussion until after Sandhu had testified. Upon further questioning by the trial judge, defence counsel did state:

> And then, you know, I agree that obviously the law is clear, it doesn't have to be in relation to the same victim and the sequence of events, it doesn't necessarily have to be one, two, or two, one. But, you know, this case is sort of a combination of both of those issues and the factual matrix, I think, sort of frames the whole discussion. So I think it is best that we wait.

However, in the course of his later submissions on the directed verdict application, defence counsel took the position that:

> I think it's very important to keep in mind the legislative intent behind the section and the court's continuing recognition of that legislative intent, all the way … up until [*R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195], right? It's an issue of these crimes are more heinous and expose the accused to more severe punishment because it is [an] exploitation of domination that they've created and then chosen to exploit in order to facilitate a murder.

Defence counsel went on to state:

> So, yes, is that one way to look at it? But for the murder of Ms. Summan, Mayank Sandhu would not have been forcibly confined, if it was a forcible confinement? Yes. But it's inconsistent with some of the other language

> there is some evidence from which the jury can reasonably infer that the killing of Anita Summan and the confinement of Mayank Sandhu were "linked together both causally and temporally in circumstances that make the entire course of conduct a single transaction", then the directed verdict application must fail on this front as well[.][27]

[111] The trial judge ruled that such evidence was present in the record.

[112] As to a temporal connection, the trial judge's review of the evidence of the movements of Singh and Sandhu following the attack on Anita led her to conclude that the jury could infer that: (i) Singh knew Sandhu was in the kitchen when he wounded Anita mortally; (ii) blood on the front walkway, moving in the direction Sandhu would have taken when he left the house, indicated that Singh went after Sandhu immediately after stabbing Doal; (iii) blood in the basement suggested Singh pursued Sandhu; and (iv) the evidence of Sharma and the timing of the 911 call by Sonali placed Singh in the basement within a very short time after the stabbing of Anita. In the trial judge's view, this body of evidence could provide some evidence of a single transaction where the events were temporally connected.

> that continues to be used in the cases. Because it's not the … mischief that was meant to be more harshly punished as a result of the section.

Taken as a whole, I do not regard defence counsel's submissions as constituting an admission that s. 231(5)(e) could apply to circumstances where the murder of one victim preceded the unlawful confinement of another. Defence counsel regarded that as a live issue in dispute.

[27] Directed Verdict Reasons, at para. 103.

[113] As to any evidence supportive of a causal connection between the enumerated offence and killing, the trial judge stated:

> As for being causally connected, at a minimum, the jury could arrive upon reasonable inferences that Mr. Singh was at the door, confining Mr. Sandhu and yelling at him to come out, because he wanted to kill the person who he thought was the last surviving witness to his murder of Anita Summan. This is a direct causal link back to the murder.[28]

[114] On appeal, Singh renews his submission that the evidence did not permit the conclusion that there was some evidence from which a jury could find that the killing of Anita and the unlawful confinement of Sandhu constituted a single transaction. He contends these were two separate transactions that were not linked causally or temporally as the murder was completed prior to any possible unlawful confinement. Singh argues the trial judge improperly expanded the definition of "while committing" in s. 231(5)(e) beyond the established scope of the term and, in so doing, fell into legal error.[29]

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[28] Directed Verdict Reasons, at para. 110.

[29] On this appeal, Singh did not seek to set aside his conviction on Count 5, the charge of unlawfully confining Sandhu. However, in his submissions on the issue of constructive murder, Singh argued that in her directed verdict ruling the trial judge erred in holding there was some evidence of *mens rea* that could support a finding of guilt with respect to Singh's unlawful confinement of Sandhu in the basement bedroom. I see no error in the trial judge's finding there was evidence from which a properly instructed jury, acting reasonably, could find that the essential elements of unlawful confinement had been met: Directed Verdict Reasons, at paras. 67-73. There was ample evidence before the jury from which it could infer that Singh intended to restrain the occupants of the basement bedroom by violence, fear, intimidation, and psychological means, contrary to their wishes, so they could not move about according to their own inclination and desire: see *R. v. Sundman*, 2022 SCC 31, at para. 21; *R. v. Johnstone*, 2014 ONCA 504, 313 C.C.C. (3d) 34, at para. 39, citing *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195, at para. 24. The court in *Sundman* specifically held that a person can be unlawfully confined if an accused's violent acts lead the person to lock themselves in a room to avoid being attacked or if the person is prevented from escaping from an apartment through the front door: at para. 22. Accordingly, the trial judge did not err when

[115] In response, the Crown argues that the trial judge's interpretation of the scope of s. 231(5)(e) was consistent with the case law. As well, the trial judge correctly concluded there was evidence from which the jury could find that the murder of Anita and unlawful confinement of Sandhu formed a single transaction.

[116] My analysis of these submissions will start with a review of the Supreme Court cases that have interpreted s. 231(5)(e)'s language of "while committing", to ascertain whether that court has applied the provision to circumstances, such as those in the present case, where the killing of a victim preceded the commission or attempted commission of an enumerated offence. Next, I shall examine some of the leading provincial appellate decisions on that issue. Finally, I will consider whether, in dismissing Singh's directed verdict application with respect to first degree murder based on constructive murder, the trial judge improperly expanded the definition of "while committing" beyond the established case law and statutory language.

B. THE SUPREME COURT JURISPRUDENCE

[117] The interpretation of s. 231(5)(e)'s language that "murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit" one of the enumerated offences has largely

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she stated, at para. 73, "By staying at the door [of the basement bedroom] and doing what he was doing, in the circumstances he was doing it, there is evidence upon which a jury could reasonably infer that [Singh] intended to deprive Mr. Sandhu of movement and did deprive[] Mr. Sandhu of movement."

been shaped by seven decisions of the Supreme Court: *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Arkell*, [1990] 2 S.C.R. 695; *R. v. Luxton*, [1990] 2 S.C.R. 711; *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804; *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195; *R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R 309; and the court's recent decision in *R. v. Sundman*, 2022 SCC 31.[30]

***Paré* (1987)**

[118] The sequence of events in *Paré* saw the commission of the enumerated offence, a short pause, and then the killing of the victim of the enumerated offence. Specifically, the accused, a 17-year-old male, sexually assaulted a 7-year-old boy and then waited several minutes before killing the young victim, who had said he would tell his mother what the accused had done.

[119] The jury convicted the accused of first degree murder; the Court of Appeal of Quebec substituted a conviction for second degree murder. One member of that court interpreted the words "while committing" as requiring the murder and enumerated offence to take place simultaneously.

[120] The Supreme Court restored the first degree murder conviction. The court concluded that the interpretative doctrine of strict construction[31] did not require an

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[30] Following the hearing of the appeal, the panel called for and received supplementary submissions from the parties on the impact of the *Sundman* decision.
[31] In *Paré*, the court articulated the doctrine of strict construction of criminal statutes as follows, at p. 630: "[I]f real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the

exact coincidence between the killing and the underlying offence, as such an interpretation could not reasonably be attributed to Parliament. Instead, the court adopted the “single transaction” interpretation of s. 231(5) voiced by Martin J.A. in *R. v. Stevens* (1984), 11 C.C.C. (3d) 518 (Ont. C.A.): namely, where the act causing death and the act causing the enumerated offence 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. 231(5).

[121] The Supreme Court thought such an interpretation best expressed the policy considerations underlying the section, which it identified in the organizing principle 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” and should be classified as first degree murder: at p. 633. As applied to the concept of a “single transaction”, the organizing principle resulted in the Supreme Court adopting following approach to s. 231(5), at p. 633:

> [I]t 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

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person against whom it is sought to be enforced.” In its 2001 decision in *Russell*, the court re-affirmed the need to consider the doctrine of strict construction, stating, at para. 46:

> The appellant rightly points out that s. 231(5) imposes a severe penalty – indeed, the most severe penalty imposed under our *Criminal Code* – and accordingly it is particularly important that the provision be strictly construed. While this principle is unimpeachable, it cannot in itself justify restricting the ordinary meaning of the provision’s words.

> position of power created by the underlying crime and makes the entire course of conduct a "single transaction".

***Arkell* (1990)**

[122] The sequence of events in *Arkell* saw the commission of the enumerated offence (an attempted sexual assault) followed by the killing of the victim of that offence (by running the victim down with a car and then smashing her head with a rock).

[123] The court relied upon the organizing principle articulated in *Paré* as one reason to support its conclusion that what is now s. 231(5) of the *Criminal Code* did not infringe s. 7 of the *Canadian Charter of Rights and Freedoms*. As stated by Lamer C.J. in his majority reasons, at p. 704, s. 231(5) is "based on an organizing principle that treats murders committed while the perpetrator is illegally dominating another person as more serious than other murders."

***Luxton* (1990)**

[124] In *Luxton* – a decision released concurrently with *Arkell* – the victim, a cab driver, was held at knifepoint, robbed, and then stabbed to death. In the course of its reasons, the court used language that suggested s. 231(5) applied to circumstances where the victim of the enumerated offence and the killing were the same person, stating, at pp. 720-21:

> Section [231(5)] of the *Criminal Code* isolates a particular group of murderers, namely those who have murdered

> while committing certain offences involving the illegal domination of the victim, and classifies them for sentencing purposes as murderers in the first degree.
>
> …
>
> Murders that are done while committing offences which involve the illegal domination of the victim by the offender have been classified as first degree murder.

Russell **(2001)**

[125] In *Russell*, the court faced a fact situation where the victim of the enumerated offences was not the victim of the murder. At issue was the reviewability of the accused's committal for trial on a charge of first degree murder for the death of John Whittaker, who lived in the basement of a house owned by Janet Seccombe, the accused's girlfriend. The evidence at the preliminary inquiry disclosed the following series of events: the accused went to Seccombe's house, tied her up on her bed, and sexually assaulted her; and then went to the basement, where he engaged in a violent struggle with Whittaker, who was found stabbed to death. When the police arrived at the house, they found Seccombe still tied to her bed. While the accused did not contest his committal for trial on the enumerated offences committed against Seccombe, he argued that his committal for first degree murder was legally flawed as s. 231(5) requires the victim of the murder and the victim of the enumerated offence to be the same person.

[126] The Supreme Court disagreed, reasoning that the statutory language of s. 231(5) did not restrict the provision's application to cases in which the victim of

the murder and the victim of the enumerated offence were the same: at para. 33. Pointing to other sections of the *Criminal Code* that contained limiting language,[32] the court held that, if Parliament intended to restrict the application of s. 231(5) to single-victim cases, it could have done so explicitly. That "Parliament did not incorporate such a restriction suggests that it intended 'while committing or attempting to commit' to apply even where the victim of the murder and the victim of the enumerated offence are not the same": at para. 36.

[127] The court did not see any inconsistency between this multiple-victim interpretation of s. 231(5) and the language previously used in its *Arkell* and *Luxton* decisions, which had suggested the section required the victim of the enumerated offence to be the same person as the victim of the killing. Writing for the court, McLachlin C.J. stated, at paras. 42-43:

> I am not persuaded, however, that this Court intended in *Paré*, *supra*, *Arkell*, *supra*, or *Luxton*, *supra*, to foreclose the application of s. 231(5) to multiple-victim scenarios. None of those cases involved multiple-victim scenarios, and the issue was simply not addressed by the Court. In my view, the references to the "victim" simply reflect the facts of those cases. The essential thrust of Wilson J.'s reasoning in *Paré* was that the offences enumerated in s. 231(5) are singled out because they are crimes involving the domination of one person by another. The essence of the reasoning was that s. 231(5) reflects Parliament's determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. In many cases,

[32] Sections 231(6) and 231(6.1).

> such murders will be committed as the culmination of the accused's domination of the victim of the enumerated offence. This was the case in *Paré*, *Arkell* and *Luxton.* In other cases, however, the accused will have murdered one person in connection with the domination of another. I cannot conclude that Wilson J.'s judgment in *Paré* or Lamer C.J.'s judgments in *Arkell* or *Luxton* foreclose the application of s. 231(5) in such cases.
>
> In my view the appellant states the organizing principle of s. 231(5) too narrowly. The provision reflects Parliament's determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. "[W]hile committing or attempting to commit" requires the killing to be closely connected, temporally and causally, with an enumerated offence. As long as that connection exists, however, it is immaterial that the victim of the killing and the victim of the enumerated offence are not the same. [Emphasis added.]

[128] As this passage discloses, the court repeated the requirement that the murder be closely connected, temporally and causally, with the enumerated offence. On the facts of *Russell*, the killing flowed from – that is to say, followed in time after and as an effect of – the domination of another person.[33]

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[33] The existence of a temporal connection between the alleged sexual assault of Seccombe and the killing of Whittaker was conceded. As the case involved the committal of the accused for trial, the court offered no definitive view on the existence of a causal connection between the two acts, simply noting that the jury would be entitled to find that the killing was independent of the acts against Seccombe, or that the accused murdered Whittaker to facilitate his forcible confinement of Seccombe or confined Seccombe to facilitate his murder of Whittaker: at para. 48.

***Pritchard* (2008)**

[129] In the subsequent case of *Pritchard*, the victim of the enumerated offence was the person who was killed, and the evidence suggested the act of unlawful confinement preceded the killing of the victim.

[130] Two members of the panel that decided *Pritchard* – McLachlin C.J. and Binnie J. – were also members of the panel in *Russell*. The decision of the court in *Pritchard* was authored by Binnie J. Portions of his reasons strongly suggest he operated on the understanding that s. 231(5) typically requires the enumerated offence to temporally precede or coincide with the murder. At para. 20, he wrote:

> The "high degree of blameworthiness" is found in a situation "where a murder is committed by someone already abusing his power by illegally dominating another . . . . Parliament has chosen to treat these murders as murders in the first degree" (*Paré*, at p. 633).

[131] In his summary of the proper interpretation of s. 231(5)(e), Binnie J. wrote, at para. 35:

> 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).

[132] By way of conclusion, Binnie J. stated, at para. 38:

> It was open to the jury to conclude that the appellant, having got his hands on the marijuana, chose to exploit the position of dominance over Mrs. Skolos that resulted from her confinement at gunpoint, by killing her, thereby eliminating a potential witness. This provided a sufficient temporal and causal connection to make these sordid events a “single transaction” within the meaning of *Paré*. [Emphasis added.]

***Magoon* (2018)**

[133] The victim in *Magoon* was six years old. During a weekend spent with the two accused – her father and stepmother – the victim was burned, forced for hours to run up and down stairs as a form of punishment, and beaten. The accused did not seek medical assistance for the victim until she lost consciousness at the end of the weekend. She died in hospital the following day. The accused were convicted of second degree murder. The Court of Appeal of Alberta dismissed their appeals from conviction but granted the Crown’s appeal, substituting convictions for first degree murder. The Supreme Court dismissed the accused’s appeals.

[134] The Supreme Court held that, on the evidence, the child’s unlawful confinement and her murder constituted two distinct criminal acts that formed part of a single transaction. As the court stated, at para. 73:

> The course of unlawful confinement leading up to [the child’s] death was, in the words of Wilson J. in *Paré*, the “continuing illegal domination” of [the child], representing an “exploitation of the position of power created by the underlying crime” (p. 633). And the unlawful confinement persisted right up to the moment [the child] lost consciousness.

***Sundman* (2022)**

[135] Finally, the court's recent decision in *Sundman* involved a situation where the victim, Jordan McLeod, was confined in a moving pickup truck by the accused and other accomplices. McLeod jumped out of the moving truck but was pursued and shot dead by the accused and the others.

[136] The trial judge held that, since McLeod had escaped from his unlawful confinement by jumping from the truck, the accused's subsequent murder of McLeod as he tried to flee did not occur while the accused was committing the enumerated offence of unlawful confinement. The British Columbia Court of Appeal allowed the Crown's appeal and substituted a conviction for first degree murder, concluding that McLeod was still unlawfully confined when he jumped from the truck and was chased before being killed. The Supreme Court dismissed the accused's appeal.

[137] In its reasons, the court took the opportunity to restate the key principles regarding the interpretation and application of s. 231(5):

- First, the court reaffirmed that the common feature of the offences enumerated in s. 231(5) is that they are all crimes involving the illegal domination of victims. Parliament has treated murder committed in connection with these crimes of domination as especially serious, warranting the exceptional punishment for first degree murder. Illegal

domination is not an essential element to be proven under s. 231(5) but an organizing principle that helps courts apply the provision purposively, so that the law develops in a principled manner: at para. 27;

- Second, the court re-affirmed that it has not interpreted the words “while committing” in s. 231(5) as requiring the underlying offence and the murder to take place simultaneously. Instead, its jurisprudence has phrased the “while committing” inquiry in two ways: some cases talk in terms of an inquiry into whether the listed offence of domination and the killing form part of “one continuous sequence of events forming a single transaction”; other cases talk in terms of whether the underlying offence of domination and the murder have a close “temporal and causal” connection. However, the court stressed that these are not different inquiries: they are simply different ways of addressing the “same transaction” element, and are used interchangeably in the jurisprudence. When properly applied, they involve the same inquiry and will result in the same conclusion: at paras. 31-32, 35, and 39;
- Next, the court summarized its jurisprudence on the “causal connection” element of the inquiry, at para. 34:

> [A] causal connection has been found under s. 231(5) where *the offender’s reason or motivation* for the killing arises from, or is linked to, the offender’s unlawful domination of a victim. In *Paré*, Wilson J. found a causal connection between the underlying offence and the killing

> because the accused strangled the victim to death after indecently assaulting him to prevent him from telling his mother about the assault … The indecent assault was not the factual or legal cause of the murder; it was the reason or motivation for it, marking the beginning of a continuing process of illegal domination culminating in the murder, thus making the entire course of conduct a single transaction … Likewise, a causal connection has been found under s. 231(5) when the murder was committed *to facilitate* the crime of domination, such as by eliminating a potential witness to the crime … In all cases, a "causal connection" under s. 231(5) concerns whether there is a *unifying relationship*, beyond mere closeness in time, between the act of illegal domination and the act of murder, so as to constitute a single transaction…. [Italics in original; underlining added; citations omitted.]

- Finally, the court recalled that the underlying offence of domination and the killing must involve two distinct criminal acts; the underlying offence cannot be consumed in the very act of killing: at para. 40.

[138] In dismissing the appeal from the conviction for first degree murder, the court held that the appellant was guilty of first degree murder under s. 231(5)(e) because the two distinct criminal acts of murdering McLeod and unlawfully confining McLeod were part of a continuous sequence of events forming a single transaction, were close in time, and "involved an ongoing domination of Mr. McLeod that began in the truck, continued when he escaped from the truck and ran for his life, and ended with his murder": at para. 5.

Summary

[139] Given the Supreme Court's approach to interpreting s. 231(5), it is not surprising that the cases in which the court has found that the relationship between the acts of the enumerated offence and the murder satisfy the statutory language of s. 231(5) have involved circumstances where the commission of the enumerated offence – the act of illegal domination – has preceded or continued during the act of murder. As acknowledged by the parties to this appeal, what is absent from the Supreme Court's jurisprudence is the application of s. 231(5) to a situation where the accused murdered a victim before engaging in the acts which constitute the enumerated offence against another.

[140] In view of the absence of any such Supreme Court authority, I propose to review the provincial appellate jurisprudence to see whether it provides support for the trial judge's interpretation and application of s. 231(5) to circumstances where the murder of one victim was committed before the accused committed or attempted to commit an enumerated offence against another victim.

C. THE PROVINCIAL APPELLATE JURISPRUDENCE

Cases where sexual assault was the enumerated offence

[141] There is a body of case law involving s. 231(5) where the enumerated offence charged was sexual assault but the evidence was unclear as to whether the sexual assault preceded or followed the murder. The decision of this court in

R. v. Westergard (2004), 70 O.R. (3d) 382 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 521, to which the trial judge referred, is typical of such cases.

[142] In *Westergard*, it was alleged that the accused had beaten, sexually assaulted, and then strangled the victim to death in her bedroom. The accused was convicted of first degree murder.

[143] The cause of death was strangulation associated with blunt force injury to the head. The accused did not testify. There were no witnesses to the event. The forensic pathologist who opined on the relative timing of the sexual assault and the murder was unable to state whether the injuries to the victim's anus, which were consistent with an act of anal intercourse, happened before or after death.

[144] The trial judge charged the jury in accordance with the "single transaction" principle. On appeal, the accused submitted the trial judge erred by failing to instruct the jury that s. 231(5) did not apply if the sexual assault took place after the murder. This court did not accept that submission for several reasons.

[145] First, noting that the defence had challenged whether there had been any sexual assault at all, this court stated that in any event there was no air of reality to the theory that after being murdered the victim's body was sexually violated in a separate transaction unrelated to her murder: at para. 30.

[146] The court then went on to agree with the approach adopted by the Court of Appeal of Alberta in another case involving sexual assault as the enumerated

offence – *R. v. Richer* (1993), 82 C.C.C. (3d) 385 (Alta. C.A.), aff'd [1994] 2 S.C.R. 486 – that where the "required linkage" exists between the sexual assault and murder, "it is the two crimes … committed together, regardless of the order, which represent the ultimate exploitation of the position of power over a victim and arguably mandate a conviction for first degree murder": *Westergard*, at para. 33, citing *Richer*, at p. 394 (emphasis added).[34] The court in *Westergard* sought to avoid debates over the "precise second of the victim's death", which could bring the law into disrepute: at para. 34, citing *R. v. Muchikekwanape*, 2002 MBCA 78, 166 C.C.C. (3d) 144, at para. 91.

[147] Other provincial appellate courts have applied a similar approach in cases that involved sexual assault as the enumerated offence and where uncertainty existed about the relative timing of the sexual assault and murder.[35]

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[34] These comments in *Richer* were made in the majority reasons of Fraser C.J.A. Notwithstanding the breadth of these comments, the evidentiary background against which they were made was much narrower. At p. 396, Fraser C.J.A. wrote:

> The reason that the trial judge did not even raise with the jury the possibility that anal intercourse followed death — whether connected with it or not — is perfectly straightforward: this was never a live issue at trial. This theory was not advanced at trial much less mentioned by any of the witnesses, including Dr. Urbanski. Not only was this not a live issue at trial; it was not raised as a ground of appeal; it was not raised in the defence factum, and it was not raised in argument or from the bench. [Emphasis added.]

In other words, the comments in *Richer* to the effect the order of the two crimes did not matter did not apply to the actual fact situation raised by the evidence in the case, as was also the case in *Westergard*. The Supreme Court dismissed Richer's appeal by way of a short endorsement that did not comment on the remarks of Fraser C.J.A: *R. v. Richer*, [1994] 2 S.C.R. 486.

[35] See e.g., *R. v. Salomonie*, 2020 NUCA 1, at paras. 45-47; *R. v. Squires*, 2005 NLCA 51, 199 C.C.C. (3d) 509, at para. 57, leave to appeal refused, [2005] S.C.C.A. No. 561; and *R. v. Ganton* (1992), 105 Sask.R. 126 (C.A.). In *Ganton*, the court held, at para. 14, that it would be impossible to apply the directions in *Paré* regarding the single transaction principle "if the time of death must be so clearly identified

[148] However, the more recent decision of this court in *R. v. Niemi*, 2017 ONCA 720, leave to appeal refused, [2019] S.C.C.A. No. 117[36] (of which the trial judge did not have the benefit) revisited this body of case law. In *Niemi*, the court was not prepared to accept the blunt position advanced by the Crown that the order of the murder and sexual assault did not matter for the purposes of s. 231(5), as the Crown suggested had been established by the *Westergard*/*Richer* body of cases: at para. 46. In response to that submission, Paciocco J.A. cautioned, at para. 73:

> Unqualified statements found in this body of case law that are capable of suggesting that it does not matter the order in which the two offences occur should therefore not be read to mean that the order of offences never matters. These passages, understood in context, simply communicate that where the killing and sexual activity are so inextricably intertwined that they form a single continuous transaction, the order does not matter.

[149] In considering the application of s. 231(5) to cases involving the enumerated offence of sexual assault where sexual activity might have followed the murder of the victim, Paciocco J.A. proposed a nuanced approach, stating, at paras. 74-77:

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as to show it occurred after the assault and not merely as part of the overall sequence of events." The application of s. 231(5) was taken even further in *R. v. Plewes*, 2000 BCCA 278, 144 C.C.C. (3d) 426, at paras. 33-34, where the accused testified at one point that he had sexually assaulted the victim after she was dead.

[36] The Supreme Court refused the appellant's motion for an extension of time to serve and file his materials but, in the alternative, had the motion been granted, the court would have refused the application for leave to appeal.

> With this foundation, the two questions that Mr. Niemi's contentions raise about the reach of liability under s. 231(5)(b) can be answered.
>
> In response to the first question, "Can one commit a sexual assault on a dead person," the answer is "no." One cannot commit a sexual assault on a dead person.[37]
>
> In response to the second question, "If death precedes the sexual assault, when, if ever, can it be said that the death was caused while the accused was committing a sexual assault?", the answer is more nuanced. If the actions prior to the victim's death do not amount to a sexual assault as defined in s. 271 the answer is "never."
>
> The more elaborate answer, the one of significance in this case, is that a sexual assault has been committed (although not necessarily completed) when an accused uses force against a victim with the intention of committing sexualized misconduct even if the overtly sexualized conduct has yet to commence. It follows that even if the victim dies from that force before the sexualized misconduct begins, death will have been caused by the accused while the accused was committing a sexual assault. Such a finding will be appropriate where the murder and [sexual] assault are so inextricably intertwined that they form a single continuous transaction. [Emphasis added.]

Cases where unlawful confinement was the enumerated offence

[150] In *R. v. Mullings*, 2014 ONCA 895, 319 C.C.C. (3d) 1, leave to appeal refused, [2015] S.C.C.A. No. 253, another case referred to by the trial judge, this court held it was not necessary to determine whether the proposition emanating from the *Westergard*/*Richer* group of sexual assault cases – that it did not matter

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[37] See also: *R. v. Lee* (2005), 205 O.A.C. 155 (C.A.), at para. 14.

whether the enumerated offence occurred before or after the victim's death – also applied to cases of unlawful confinement under s. 231(5)(e): at para. 102.

Summary

[151] As this court recognized in *Niemi*, there is a potential tension in in sexual assault constructive murder cases because murder requires the death of the victim while sexual assault requires a live victim. In *Niemi*, this court observed that tension had spawned something of a "modest controversy" in the *Westergard*/*Richer* body of cases about whether a first degree murder conviction can occur where the sexualized conduct commences after the victim has died or where there is uncertainty on that point: *Niemi*, at paras. 41, 66. In *Niemi*, this court attempted to resolve that controversy by describing avenues to a first degree murder conviction under s. 231(5) in which the sexualized conduct occurs after death that are consistent with the organizing principle identified by *Paré* and its progeny, as well as the causal connection required by the single transaction principle.

[152] In *Niemi*, this court did not understand the single transaction principle to hold that s. 231(5)(b) was always met where the accused committed a murder followed by sexual acts: at para. 72. Nor did the court suggest that the analysis found in the *Westergard*/*Richer* type of cases had any application outside of situations where uncertainty existed about the relative timing of the enumerated offence of sexual

assault and the murder. Indeed, in *Mullings*, this court specifically declined to opine on whether such an analysis could apply to cases in which the enumerated offence was unlawful confinement: at para. 102.

D. APPLICATION TO THE PRESENT CASE

[153] In her directed verdict ruling, the trial judge quite properly cited the controlling interpretation of the words "while committing" in s. 231(5) that was formulated in *Paré* and applied in subsequent Supreme Court cases. However, in my respectful view, the trial judge erred in her application of *Paré*'s single transaction/close temporal and causal link interpretative paradigm.

[154] The trial judge's error lies in her application of the causal connection dimension of the single transaction principle.[38] She wrote that, "[w]hile the underlying policy rationale for constructive first degree murder is often articulated as being when a murder is committed by someone who is already abusing his or her power by dominating another, <u>this does not have to be case</u>" (emphasis added), citing the *Westergard*/*Richer* line of cases and the *obiter* comments of this court in *Mullings*.[39]

[155] Section 231(5) states that "murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to

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[38] No issue is taken on this appeal with the trial judge's instructions to the jury on constructive murder.
[39] Directed Verdict Reasons, at para. 101.

commit an offence" enumerated in ss. 231(5)(a)-(f). While the enumerated offence and murder need not occur simultaneously in order to meet the "while committing" requirement, since *Paré* the Supreme Court has consistently interpreted "while committing" against: (i) the backdrop of an organizing principle that the enumerated offences are all crimes that involve the illegal domination of the victim, and (ii) as requiring the demonstration of a causal connection between the enumerated offence and the murder in the sense that "the offender's *reason or motivation* for the killing arises from, or is linked to, the offender's unlawful domination of a victim": *Sundman*, at para. 34 (italics in original; underlining added).

[156] The jurisprudence has overwhelmingly treated the required causal connection for the single transaction principle as one in which the act of committing or attempting to commit the enumerated offence prompts a further criminal act that culminates in the murder – the "*reason or motivation* for the killing" (emphasis in original), in *Sundman*'s language, at para. 34 – or, in a small number of cases, such as *Russell*, where the murder was committed to facilitate the crime of domination. However, the trial judge misapplied the "single transaction" principle by reversing the causal connection between the two acts, contrary to the requirements of s. 231(5)'s "while committing" language and the weight of the jurisprudence.

[157] By dismissing Singh's application for a directed verdict in respect of constructive murder, the trial judge, in effect, afforded the Crown the opportunity to use Singh's act of causing Anita's death before pursuing Sandhu as satisfying the causal connection requirement of s. 231(5)'s single transaction principle. This can be seen from the trial judge's directed verdict ruling, where she stated:

> As for being causally connected, at a minimum, the jury could arrive upon reasonable inferences that Mr. Singh was at the door, confining Mr. Sandhu and yelling at him to come out, because he wanted to kill the person who he thought was the last surviving witness to his murder of Anita Summan. This is a direct causal link back to the murder.[40]

[158] With respect, this analysis reversed the causal connection required by the "while committing" language of s. 231(5).[41] The Supreme Court's jurisprudence on s. 231(5) usually makes available the more serious classification of a murder as first degree murder where the act of committing or attempting to commit the enumerated offence plays a role in or prompts the act that causes the death of a person. On the current phrasing of s. 231(5) – "death is caused … while committing or attempting to commit" an enumerated offence – the exceptional punishment for first degree murder cannot flow from the opposite relationship, where the act of causing the death of a person plays a role in or prompts the subsequent

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[40] Directed Verdict Reasons, at para. 110.

[41] The jurisprudence's single transaction test assists courts in applying the statutory language of "while committing" to specific fact situations. As a practical interpretative aid, the test operates within the parameters of the statutory "while committing" language.

commission of the enumerated offence. While a murder that facilitates a crime of domination may attract the classification of first degree murder – as in the multiple-victim circumstances of *Russell*, where the murder took place after the ongoing crime of domination had begun and, arguably, was still continuing – the sequence of events in the present appeal do not resemble those in *Russell*. Here, the offender admittedly caused a death and then pursued another person.[42] Consequently, the trial judge's reversal of the connective relationship between the enumerated offence and the murder would not satisfy the jurisprudence's requirement of demonstrating that the offender's reason or motivation for the killing arises from, or is linked to, the offender's unlawful domination of a victim: see *Sundman*, at para. 34.

[159] The facts of the present case do not resemble the circumstances in the *Westergard*/*Richer* body of case law where uncertainty existed as to the precise timing of the murder relative to the enumerated offence. Here, on any view of the evidence, Singh's act of causing Anita's death had been completed before he moved out of the kitchen and into other parts of the house and, ultimately, ended up in the basement banging on the door behind which Sandhu was hiding.

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[42] The trial judge held that there was no evidence from which to infer that Singh set out from the kitchen to confine Sandhu. Instead, she took the view that the inference available on the evidence was that Singh chased Sandhu to kill him: Directed Verdict Reasons, at paras. 65-66. However, the evidence of Singh's conduct outside the basement bedroom made available the inference that, at that time, Singh intended to deprive Sandhu of his freedom of movement: Direct Verdict Reasons, at para. 70.

[160] Nor are the circumstances of the present case analogous to the situation in *Russell*. True, in both cases the victims of the enumerated offence and murder were different. But in *Russell*, the murder of the tenant in the basement took place after the unlawful confinement of the other victim in her bedroom was underway. In *Russell*, a causal connection was found under s. 231(5) as the murder of the tenant was committed to facilitate the ongoing crime of domination by eliminating the tenant as a potential witness to the crime: see *Sundman*, at para. 34. Here, the death of the first victim was caused before Singh embarked upon his acts that had the effect of unlawfully confining Sandhu.

[161] The murder of Anita and the unlawful confinement of Sandhu occurred within a few minutes of each other. There was evidence that could satisfy the single transaction's temporal connection between the two criminal acts. However, there was no evidence that the relationship between the two criminal acts could satisfy the causal connection aspect of a single transaction. That is because the evidence showed that Singh's reason or motivation for killing Anita did not arise from, and was not linked to, his later unlawful domination and confinement of Sandhu: see *Sundman*, at para. 34; *Paré*, at pp. 633-34. Nor was there any suggestion in the evidence that Singh's pursuit and unlawful confinement of Sandhu contributed to Anita's death by preventing her from receiving medical aid that could have saved

her life.[43] The trial judge therefore erred in leaving for the jury's consideration a pathway to conviction for first degree murder through s. 231(5)(e).

[162] The trial judge instructed the jury that it was open to them to use the alternative avenues of planned and deliberate murder or constructive murder to convict Singh of first degree murder. Those alternative routes to conviction were set out in the decision tree provided to the jury. The trial judge also instructed the jury that they did not have to be unanimous on the route to first degree murder. In light of those instructions, it is possible that some jurors convicted Singh of first degree murder by using the erroneous pathway of constructive murder. Consequently, the trial judge's error in leaving constructive murder for the jury's consideration requires that Singh's conviction for the first degree murder of Anita be set aside.

VI. DISPOSITION

[163] Given my conclusion that the trial judge erred in leaving for the jury a pathway to conviction on Count 1 by way of constructive first degree murder under s. 231(5)(e) of the *Criminal Code*, I would set aside the conviction for the first degree murder of Anita Sunnam. Both Singh and the Crown agree that in such a

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[43] Sonali placed her 911 call at approximately 10:03:53. In the call, she sought medical assistance for Anita and Doal. Her call lasted about seven minutes. Sharma placed his 911 call from the basement bedroom at approximately 10:04:30 p.m. It lasted about five minutes. Sharma also sought medical assistance for Anita and Doal. The first officers to respond testified that they arrived at the Residence at around 10:09 p.m.: Directed Verdict Reasons, at paras. 51-52.

circumstance a new trial should be ordered on the charge of the first degree murder of Anita Sunnam. Accordingly, I would order a new trial on that charge.

Released: August 15, 2022

J.A.

I agree. J.A.

I agree. P. Lauwers J.A.