COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ferrari, 2012 ONCA 399
DATE: 20120612
DOCKET: C50463 & C50374

Doherty, Rosenberg and Lang JJ.A.

BETWEEN

Her Majesty The Queen

Respondent

and

Pasquale Ferrari

Appellant

AND BETWEEN

Her Majesty The Queen

Respondent

and

Salvatore Zingariello

Appellant

Delmar Doucette, for the appellant Pasquale Ferrari

David E. Harris, for the appellant Salvatore Zingariello

Michael Bernstein, for the respondent

Heard: December 19, 2011

On appeal from the conviction entered by Justice Alan W. Bryant of the Superior Court of Justice, sitting with a jury, on January 30, 2009.

Rosenberg J.A.:

[1] The appellants appeal their conviction for first degree murder. The appellants, who were jointly tried by Bryant J. and a jury, proffered the so-called cut-throat defence. Although the appellants agreed that they broke into the deceased's home, they accused each other of having shot the deceased. The principal grounds of appeal concern the charge to the jury and in particular whether the trial judge carried out his duty to relate the facts to the crucial issues in the case. For the following reasons, I would dismiss the appeals, substitute convictions for second degree murder, and remit the matter of parole ineligibility to the trial judge.

THE FACTS

[2] The appellants were both addicted to OxyContin. While they each had had stable careers and families, their addictions eventually took over their lives. Ferrari became addicted to OxyContin in 2003 to ease serious back pain. Zingariello became addicted some time before that to relieve the pain from a serious burn to his arm. By 2002, Zingariello had closed the hair salon that he had owned; selling OxyContin became his primary source of income. Ferrari was Zingariello's best customer, buying up to 100 pills at a time for use by him and his girlfriend Tammy Valiente, who was also an OxyContin addict. Because of his

addiction, Ferrari was not paying attention to his stonemason business. By 2005, Ferrari was in desperate financial straits. He owed money to Zingariello for drugs and owed money to a loan shark.

[3] Paul Carginari was employed by Ferrari but was also a sometime drug dealer. He owed money to the same loan shark as Ferrari. Around April 2005, Carginari suggested to Ferrari that they rob Carlo Dimatteo, who was an auto worker and a bookie. Carginari told Ferrari that Dimatteo had a safe in his home in Woodbridge and that periodically the safe contained large sums of money. By May, Ferrari had agreed to participate in the robbery. Ferrari and Zingariello gave very different versions of what transpired after that.

Ferrari's Version

[4] According to Ferrari, Zingariello was involved in the planning virtually from the start, even at one point involving another man, a break and enter expert. There were two meetings among the three men, Zingariello, Ferrari and Carginari. At the last meeting they decided on Friday, June 24, 2005 for the robbery because, according to Carginari, the deceased would have a large amount of money in the safe to pay off debts from the NBA playoffs. Carginari said that he could not participate directly because the deceased would recognize him, but he would ensure that the deceased was home alone during the robbery. The night before the robbery Carginari met with Ferrari at Valiente's home.

Carginari confirmed the robbery was on for the next day. At this time, it was decided that Valiente would act as the lookout.

[5] The morning of the robbery, Ferrari met Zingariello at a mall and then drove to Ferrari's parents' home where they picked up his parents' vehicle. They also picked up duct tape and a pair of walkie-talkies. Zingariello took a blue backpack. They then drove to Valiente's house and she got into the back of the car. They drove to the street where the deceased lived and saw there were two cars in the driveway, which made them think the deceased was not alone. They then drove to a mall where they were to meet Carginari. He was not there and calls to his telephone were not answered. They decided to do the robbery nonetheless.

[6] When they returned to the deceased's home, there was only one vehicle in the driveway. Ferrari left the car and went to the passenger side to speak to Zingariello. At this time he saw that Zingariello had a semi-automatic handgun in the blue knapsack. When Ferrari asked about it, Zingariello said it was "nothing". The appellants then entered the house through the garage. The deceased heard them and called out. The appellants ran up to the second floor and confronted the deceased in the master bedroom. Zingariello hit the deceased in the head with the gun. The deceased said, "I'll give you anything you want." The appellants forced the deceased face down on the bed and tied his wrists and ankles with the duct tape, while Zingariello kneeled on his back. Carginari had

told them the safe was in a bedroom closet and Ferrari found it and dragged it out. The original plan had been to take the safe with them, but the safe was heavier than they expected. Zingariello hit the deceased on the back of the head and demanded the safe's combination. The deceased refused. The appellants put the deceased on the floor and then dragged the safe out of the bedroom to the top of the stairs. However, it was too heavy to drag any further.

[7] The appellants began to ransack the bedroom looking for the combination but without success. Zingariello called Valiente on the walkie-talkie to bring the car to the driveway. Then, while standing by the bedroom doors, Zingariello fired a shot into the floor beside the deceased and demanded the combination. The deceased refused. Five to ten seconds later, Zingariello fired a second shot that hit the deceased in the back hip area. Ferrari, who had been standing behind Zingariello at the head of the stairs by the safe, looked at Zingariello. Zingariello looked surprised and then ran from the house. The deceased said, "help me". Ferrari dialled 911 on the portable telephone that was on the bedside table and placed it by the deceased's ear. Then he too fled. He did not think that the deceased was mortally wounded.

[8] Ferrari entered the car in the driver's seat and drove off. He asked Zingariello, "What the fuck did you do that for?" Zingariello responded, "I don't know. I fucked up. It just went off."

[9] Ferrari conceded that on his version of the events, he was guilty of manslaughter.

Zingariello's Version

[10] Zingariello denied being involved in the planning of the robbery. He testified that the morning of the robbery he had gone to Woodbridge to sell some OxyContin to Ferrari. When he arrived at the meeting place, a mall, Ferrari was there with Valiente but they did not have any money. It was at this time that Ferrari for the first time raised the question of a robbery. He said he had already looked at the house, which was near the mall, and had seen the deceased gardening. Ferrari said they could carry the safe out and split the cash. Zingariello did not want to participate. Ferrari went to a bank to withdraw some money to pay for the drugs, but returned empty-handed, claiming that his account was frozen. He kept talking about the safe and finally Zingariello agreed to participate.

[11] They drove to the deceased's street and all three got out of the car. Zingariello brought an empty blue knapsack with him to use to carry loot. Valiente rang the doorbell but nobody answered. According to Zingariello there was no car in the driveway. Zingariello walked down both sides of the house but could not see anyone. When he returned, Ferrari said, "Come on. Let's do this." Valiente went back to the car and the appellants entered the house through the

garage, which was unlocked. They went up to the bedroom. Once in the bedroom, they heard the doorbell chime and at this point the deceased called out. At this point, Ferrari pulled down a balaclava from under his ball cap and pulled a gun out. This was the first Zingariello had seen of the gun. Ferrari went to the second floor landing and pointed the gun at the deceased, who was near the foot of the stairs. Ferrari forced the deceased at gunpoint to come up the stairs. Half way up the stairs, the deceased pulled out his cell phone. Ferrari grabbed the phone and threw it into the bedroom. At the second floor landing, the deceased punched Ferrari in the head. The two began to fight and the gun went off. Zingariello dropped the blue knapsack and fled.

[12] When Zingariello reached the garage he waved to Valiente to bring up the car. As she did, Zingariello heard a second shot. He told Valiente to get Ferrari. She went into the house and three to five minutes later came back with Ferrari. In the car, Ferrari asked him, “What the fuck did you do that for?” Zingariello replied, “I had to fuck off.”

Valiente’s Version

[13] Valiente had given a number of different conflicting accounts of the robbery/homicide and Crown counsel did not rely upon her evidence. However, the appellants relied on some parts of her story. It was her evidence that Zingariello and Ferrari had been planning the robbery for at least a week. The

day before the robbery, Ferrari told her that she might be needed as a lookout. The morning of the robbery, the appellants came to her house. Zingariello changed his clothes and she saw that one of the appellants had a handgun. They drove to a mall and then drove to the deceased's home. Valiente rang the doorbell but there was no answer. The appellants entered the house and she went back to the car to act as a lookout. She heard two shots while the appellants were still in the house. Zingariello called on the walkie-talkie and said to bring the car around to the driveway. As she pulled into the driveway, Zingariello came running out of the house. He had blood on his hands and arms. When Ferrari did not come out she went to the front door and rang the bell and then ran to the garage and yelled, "What's happening?" She heard Ferrari inside swearing. She returned to the car and a few seconds later Ferrari came out, got in the driver's seat, and they drove away. In the car, the appellants were arguing. The gist of the conversation was that Ferrari had fired the gun and Zingariello had also fired the gun but said he couldn't handle the gun; that it just went off. They went to Valiente's house where they divided up some money and jewellery.

The Independent Evidence

[14] One of the houses on the deceased's street was equipped with a surveillance system. The system showed the appellants and Valiente arriving at the deceased's street at 8:50 a.m. and leaving at 9:06 a.m. The car returned at 9:37 a.m. Ferrari left the vehicle at 9:39 a.m. and two minutes later the other two

left and walked towards the deceased's home. At 9:45 a.m. Valiente ran back to the car as the appellants entered the house. Eleven minutes later, at 9:56 a.m., Valiente drove the car to the deceased's driveway. At 10:05 a.m. a 911 call came in from the deceased. He gave his address, said there was a break-in, and then apparently passed out. Police arrived at 10:09 a.m. He was still alive but died from the bullet wound minutes later.

[15] The evidence at the scene showed that the deceased had been pistol whipped about the head and face. His hands were also bruised, perhaps from defensive wounds and punching someone. There were bruises on his back, consistent with someone kneeling on his back. His wrists and ankles were bound with duct tape. The police recovered one bullet from the floor beside where the deceased was found. The angle of this shot showed that it could have been fired at shoulder height from the entrance to the bedroom, about 12 feet from the deceased.

[16] The bullet that killed the deceased entered at the rear of the left lower flank just above the pelvis and struck an artery. There was no gunpowder residue on the deceased's clothing or body. The injury to the artery led to rapid internal bleeding and death. The deceased would have lost consciousness within minutes of the shot.

[17] The safe was found on its back just outside the entrance to the master bedroom. Scuff marks showed that it had been dragged from the closet. It weighed almost 250 pounds and was difficult to lift and carry. Some of the deceased's blood and Ferrari's fingerprints were found on the safe. The safe was unopened. It did not appear that any money had been taken from the house. A small amount of jewellery may have been taken from the bedroom dresser.

THE GROUNDS OF APPEAL

[18] Ferrari relies on the following grounds of appeal:

1. The trial judge failed to relate the facts to the issues in the case, especially liability for second degree murder.

2. The trial judge misdirected the jury on the elements of constructive first degree murder.

3. The trial judge erred in leaving constructive first degree murder on the basis of party liability under s. 21(2) of the *Criminal Code*.

4. The trial judge erred in instructing the jury to use their common sense in assessing the evidence.

[19] Zingariello relies on the following grounds of appeal:

1. The trial judge reviewed Zingariello's evidence in a way that deprived him of a fair trial and reversed the burden of proof.

2. The trial judge misdirected the jury on the elements of constructive first degree murder.

3. The trial judge erred in leaving constructive first degree murder on the basis of party liability under s. 21(2) of the *Criminal Code*.

4. There was no evidence upon which Zingariello could be found guilty of first degree murder.

ANALYSIS

Introduction: The Structure of the Jury Charge

[20] A somewhat unusual feature of this case is the delay between the conclusion of the evidence and the trial judge's charge to the jury.[1] The five weeks of evidence concluded on December 18, 2008. The jury was released for the holiday break. In the meantime, counsel made extensive submissions to the trial judge about the content of the jury charge. In the course of those submissions, the trial judge concluded that there was no basis for leaving first degree murder on the basis of planning and deliberation. Thus, first degree murder was limited to murder in the course of an unlawful confinement: see *Criminal Code*, R.S.C. 1985, c. C-46, s. 231(5)(e). The trial judge produced a number of drafts of his final instructions, which were the subject of comments from counsel. The charge to the jury did not begin until January 26, 2009 and concluded on January 27, when the jury began deliberations. Counsel made their objections to the charge on January 28 and 29. The afternoon of January 29, the jury had a question, which related to one of the elements of first degree murder. The trial judge recharged the jury a short time later. The recharge responded to counsel's objections and the trial judge indicated that he expected the recharge would answer the jury's question.

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[1] The appellants did not submit that this delay on its own was a reversible error. Rather, it was part of the context for their submission and emphasized the necessity that the trial judge's instructions be accurate and fairly and fully set out the factual and legal basis for liability.

[21] The charge to the jury proceeded in the following manner. After reviewing the basic principles that apply to any criminal case and the special problems of credibility in this case, for example, the credibility of Valiente and Carginari, the trial judge turned to the question of modes of participation and the elements of first degree murder. He began with the elements of manslaughter and, since Ferrari conceded he was guilty of manslaughter, Zingariello's potential liability for manslaughter. After accurately setting out party liability for manslaughter, the trial judge reviewed the evidence that would be relevant to Zingariello's liability as a party to manslaughter. As part of this review, the trial judge dealt extensively with Zingariello's testimony. After this review, the trial judge summarized Zingariello's position on the key issues for manslaughter, namely, whether Zingariello knew that Ferrari had a gun and whether he knew anyone would be home during the break-in. The trial judge then reviewed the evidence that Zingariello's counsel submitted supported his client's position. The trial judge instructed the jury that they had to consider all the evidence and he referred to evidence that could support a finding of liability for manslaughter, such as Ferrari's evidence that they saw the deceased enter the house and his other evidence concerning Zingariello's actions inside the house.

[22] After this summary of the evidence, the trial judge told the jury: "Sometimes you may ask yourself a simple question to determine an issue." The trial judge then raised several questions the jury would need to consider, such as

whether it was possible for one person to have subdued and duct-taped the deceased. The trial judge also reviewed what he called “irreconcilable contradictions between the evidence of Mr. Ferrari and Mr. Zingariello”. The appellant Zingariello submits that this part of the charge was unfair as it undermined his defence and had the effect of shifting the burden of proof. The trial judge concluded this part of the charge with a brief summary of the elements of manslaughter.

[23] The trial judge then turned to his instructions on murder, beginning with liability for second degree murder. He focused on the mental element for murder and party liability through aiding and abetting (s. 21(1)(b) and (c) of the *Code*) and common purpose (s. 21(2) of the *Code*). The trial judge then reviewed more of the evidence as it might be relevant to murder. The trial judge gave particular attention to the evidence of the pathologist concerning the various injuries inflicted on the deceased. He did not, at this point, deal with the cause of death, telling the jury that he would review that evidence when he came to deal with first degree murder. During this review, the trial judge summarized the testimony of Valiente and of Ferrari. The trial judge did not review Zingariello’s testimony at length in this part of the charge. He did, however, point out that it was Zingariello’s evidence that he did not participate in the assault, confinement or robbery because he fled the residence when Ferrari fired the gun during the scuffle with the deceased. He again reminded the jury that they must consider all

of the evidence. He concluded this part of the charge with a brief summary of liability for second degree murder. The appellant Ferrari submits that this part of the charge was inadequate and failed to relate the evidence to the elements of liability for murder.

[24] The trial judge then turned to liability for first degree murder. After outlining the elements of first degree murder under s. 231(5)(e), the trial judge dealt with liability of the principal offender. He first dealt with the requirement that the principal did something that was “an essential, substantial and integral part” of the killing. At this point, the trial judge reviewed the evidence of the pathologist as to the cause of death. He then briefly referred to the evidence of the appellants, that is, each claimed the other had shot the deceased.

[25] The trial judge then turned to the requirement of proof of unlawful confinement. He briefly reviewed the evidence related to that element, particularly the evidence concerning the use of the duct tape and the evidence that would support the theory that two people would have been involved in the confinement.

[26] The trial judge then turned to the question of whether the unlawful confinement and the murder were part of the same series of events. The trial judge reminded the jury that they had to consider all of the evidence, and he briefly referred to evidence that the robbery was planned and that the deceased

was confined within minutes of the initial assault and remained confined until the police arrived.

[27] The trial judge concluded this part of the charge by instructing the jury that if they could not find the principal committed first degree murder, they could only find the appellants guilty of second degree murder. However, if they found the principal committed first degree murder, they had to consider the potential liability of the party that the trial judge referred to as the "participant". The trial judge again referred to the three elements of first degree murder, beginning with the requirement that the participant did something that was an essential, substantial and integral part of the killing. The trial judge defined this element as meaning that the participant "actively participated in the killing". He reminded the jury that they must consider all the evidence, not just the evidence of the pathologist. He referred to evidence from which the jury could find that "this was a joint venture where each accused assisted each other in the course of a robbery". He reminded the jury of the positions of the two appellants. Both appellants submit that these instructions were inadequate.

[28] The trial judge then turned to the two additional elements of unlawful confinement and whether the unlawful confinement and murder were part of the same series of events. He again reminded the jury of each appellant's position on these issues. I did not understand the appellants to submit that these instructions were erroneous or inadequate.

[29] The trial judge then turned to the positions of the parties. It is apparent that the trial judge reviewed the positions as they had been given to him in writing by counsel. This review was detailed and extensive. The trial judge concluded with a repetition of his earlier instructions on reasonable doubt and the "*W.D*." instruction: see *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The trial judge concluded the charge with standard directions about deliberations, including the importance of using common sense to assess the evidence. Ferrari submits that this direction was erroneous.

[30] The trial judge then heard extensive submissions from counsel objecting to the charge to the jury. Those submissions occupied January 28. In summary, counsel submitted as follows:

(1) It was not helpful to focus on whether the shooter actively participated in the killing, since by shooting the deceased he obviously actively participated. The real issue was the identity of the shooter.

(2) The charge did not adequately deal with whether there was an "intervening act" so that the shooting and the unlawful confinement were not part of the same series of events.

(3) The charge did not make it clear that the participant had to be part of "the killing, not the murder" for liability for first degree murder; in

other words, that party liability for second degree murder did not alone make the participant liable for first degree murder. The charge needed to focus on what the participant did that was an essential, substantial and integral part of the killing.

(4) The charge failed to relate the evidence to the elements of murder for the principal and party.

[31] In the course of these submissions, the trial judge attempted to have Crown counsel identify the acts by the participant that were essential, substantial and integral to the killing. Crown counsel replied: “And my position is there is one transaction that includes a killing and it’s all one package parcelled up.” In other words, the participant actively participated in the killing by actively participating in the robbery, assault and domination of the deceased.

[32] The evening of January 28, the trial judge prepared a recharge, which he provided to counsel. On January 29, he heard submissions from counsel on the recharge. Those submissions particularly centred on the non-shooter’s liability for first degree murder and the Crown’s theory of liability for the non-shooter. After those submissions, the trial judge adjourned to redraft the recharge in accordance with counsel’s submissions. During this period, the jury sent the judge a question asking him to clarify the meaning of the “essential, substantial and integral part of the killing” element for first degree murder. Counsel then

made submissions on the redrafted recharge. Counsel for the appellants took the position that the trial judge should tell the jury that his earlier instructions on first degree murder were erroneous. Crown counsel disagreed with this submission and the trial judge did not accept it. Thus, he began the recharge by stating that:

> Unless I tell you otherwise, do not consider any further instructions I may give you to be any more or less important than anything else I have said about the law. All the instructions, whenever they may be given, are part of the same package.

[33] The trial judge first addressed the objection from counsel for Zingariello that the charge was unbalanced and unfair to Zingariello. He stated that his intention was not to be more critical of one accused than the other and he reminded the jury of their duty to find the facts. The trial judge then turned to the intent for murder and, as requested by counsel, related the pathologist's evidence about the cause of death to the issue of intent. It will be recalled that in the original charge, the trial judge only reviewed this evidence in relation to first degree murder. The trial judge then began an extensive recharge on first degree murder. In accordance with submissions from appellants' trial counsel, he told the jury that determination of liability for first degree murder is the same for the principal and the participant. He stated: "The focus is on the killing and the participation of the accused in the killing."

[34] The trial judge then focused on the issue of "essential, substantial or integral part of the killing" or active participation. As requested by appellants'

counsel, the trial judge instructed the jury that there was no question that the shooter actively participated in the killing. Thus, the first issue was to identify the shooter. The second issue was whether the participant did anything that was an essential, substantial or integral part of the killing. The trial judge reminded the jury that they must consider all the evidence, not just the evidence of the pathologist. He then briefly summarized the testimony of the appellants and Valiente. The trial judge referred to the other two elements: unlawful confinement and that the killing and unlawful confinement must be part of the same series of events. Again, the trial judge briefly reviewed the evidence of Valiente and the appellants on these issues. The trial judge concluded with a brief review of the positions of the appellants and the Crown. The trial judge summarized Crown counsel's theory of liability of the non-shooter on the question of active participation as follows:

> It is further the Crown's position that the non-shooter actively participated in the killing of Mr. Dimatteo by restraining the deceased and depriving him of his ability to move from place to place. Mr. Ferrari testified that both accused participated in the confinement and there is circumstantial evidence from which to infer that each of the accused actively participated in the unlawful confinement. Both accused physically restrained the deceased by assaulting him and by taping his hands and ankles together with duct tape. The Crown submits that the non-shooter actively participated in the killing by physically confining the deceased which confinement was an essential, substantial and integral part of the killing.

[35] The trial judge concluded by instructing the jury that if the recharge did not answer their question, the jury were free to come back and he would make a further attempt to answer the question. The jury did not have any further questions and brought in their verdicts the afternoon of the following day.

Grounds of Appeal Relating to Review of the Evidence

1. The Appellant Ferrari

[36] The appellant Ferrari submits that the trial judge did not adequately relate the facts to the elements of second degree murder. He submits that, particularly given the length of time between the end of the testimony and the charge to the jury, it was important that the trial judge not simply “regurgitate” the evidence, but relate the evidence to the factual findings the jury had to make. Subject to what I say below about first degree murder and the issue of active participation, it is my view that the charge sufficiently dealt with the evidence and the facts.

[37] First, it is not accurate to say that the trial judge merely regurgitated the evidence. He reviewed those parts of the evidence that particularly related to the issue of manslaughter for Zingariello and murder for both appellants. The one deficiency in that review was the failure to expressly relate the cause of death evidence to the intent for murder. That evidence was referred to during the review of evidence on first degree murder and referred to in relation to second degree murder in the recharge. Second, the trial judge set out the positions of the

defence in considerable detail, with extensive reference to evidence in support of the positions. Combined with the extensive review of each appellant's testimony, it is my view that the jury would understand the defence positions and how the evidence applied to those positions. The trial judge fulfilled the duty imposed by cases such as *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at pp. 497-98:

> The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

[38] I would not give effect to this ground of appeal.

[39] Ferrari also submits that the trial judge erred in instructing the jury as follows:

> This is not a case that turns on complex legal terminology. This is a case that turns on your common sense assessment of the evidence.

[40] The appellant submits that the case did turn on complex factual and legal issues and it was misleading to suggest that the case depended on common sense. I would not give effect to this submission. The common sense assessment of the evidence was central to the jury's task.

2. The Appellant Zingariello

[41] The appellant Zingariello submits that the trial judge did not deal fairly with his testimony and in the course of reviewing his evidence improperly reversed the burden of proof. The principal subject of the appellant's submissions was the use of rhetorical questions. The main review of Zingariello's evidence was in reference to liability for manslaughter. The first part of that review was a fair and accurate summary, at considerable length, of Zingariello's testimony. During this review, the trial judge pointed out some of the disputes between his evidence and the evidence of Ferrari and Valiente on the same subject. These references were brief and presented from Zingariello's point of view. After he had finished this review, the trial judge said this:

> It is my duty to review the evidence for you. I provided you with a detailed review of the evidence to refresh your memory of what the witnesses said. The law permits me to comment or express opinions about issues of fact to you but it is your duty to find the facts not mine. If my memory differs from yours it is your recollection of the facts that count.

[42] The trial judge then referred to the independent evidence that, according to counsel, supported Zingariello's position. The trial judge then referred to other evidence that was relevant to Zingariello's liability for manslaughter. Finally, the trial judge suggested several ways to approach the assessment of evidence. He suggested that one way was to ask a simple question and pointed out that a basic question that was posed during Zingariello's cross-examination was

whether one person could do all the tasks and, in particular, whether Ferrari could subdue the deceased, strike him about the head and bind his wrists and ankles, without help.

[43] The trial judge then suggested that another way to assess the evidence was to weigh the witness's evidence in the context of the other facts. He gave as an example the issue of the first shot, which, according to Zingariello, occurred during the deceased's struggle with Ferrari. The trial judge pointed out that the independent evidence showed that this shot ended up in close proximity to where the deceased was later found by the police. The jury was invited to ask what the likelihood was that this first shot would end up in that location, if it occurred during the struggle. The trial judge then reviewed the many irreconcilable contradictions between the evidence of the two appellants. He concluded with a reference to some more of the independent evidence, such as the cell phone records, which could support either Ferrari's evidence or Zingariello's.

[44] In my view, the manner in which the trial judge dealt with Zingariello's evidence and his defence was appropriate and did not deprive the appellant of a fair trial. In *R. v. Lawes* (2006), 80 O.R. (3d) 192, this court considered at length the propriety of the trial judge making comments on the evidence. At para. 35, Rouleau J.A. set out the rule that applies to the judge's role:

> By allowing the trial judge to express views and opinions on the evidence "as strongly as the

> circumstances permit" provided that they do not have the effect of usurping the role of the jury by taking a contested issue away from them or by subverting their independence, the common law recognizes that comments are both a necessary and desirable part of the trial judge's role. The limit is set at the point where the comments interfere with the exercise of the jury's role. Although I firmly believe that judges should avoid unnecessary comments or opinions, the focus of the analysis on appeal is not whether an appellate court views the opinion given by the trial judge as having been necessary or even desirable, but rather whether it interfered with the jury's function or so undermined the defence position that it deprived the accused of a fair trial.

[45] Justice Rouleau also discussed at some length the use of rhetorical questions, concluding his discussion with this comment at para. 64:

> Clearly rhetorical questions and comments that might be taken to unfairly denigrate the defence position ought to be avoided. They make a trial judge's charge vulnerable and may result in the charge not being fair and balanced.

[46] Thus, the danger of a trial judge using rhetorical questions in relation to an accused's evidence is that they become simply a device to denigrate the defence; questions with obvious answers suggest that the trial judge does not believe the accused's evidence: see *R. v. Dunham* (1986), 11 O.A.C. 374 (C.A.); *R. v. Baltovich* (2004), 73 O.R. (3d) 481 (C.A.), at paras. 146-47. However, rhetorical questions are to be distinguished from simply posing questions that naturally arise on the evidence and are a way to analyze and understand the evidence: see *R. v. Wristen* (1999), 47 O.R. (3d) 66 (C.A.), at para. 29. In my

view, for the most part, the trial judge's comments on the evidence fell in the latter category. He asked several questions that inevitably arose from the evidence; if they sounded like rhetorical questions, this was only because the appellant Zingariello's testimony, when considered with the other objective evidence, was extremely fragile. Zingariello was entitled to have his position put fairly but he was not entitled to have it considered divorced from all the other evidence in the case: see *Lawes*, at paras. 62-63.

[47] The question about whether Ferrari could have done all the things without help that the independent evidence showed had been done to the deceased was an obvious example. The resolution of that question was important to Zingariello's defence and to Ferrari's defence. The question had been put to Zingariello in cross-examination. It was a fair question that arose on the evidence. Asking the jury to consider this obvious issue did not unfairly denigrate Zingariello's defence. The same may be said about the other questions. The trial judge made it clear that he was not attempting to impose his view of the facts on the jury both in the charge and the recharge.

[48] I am also satisfied that the manner in which the trial judge dealt with the evidence did not improperly shift the burden of proof to Zingariello. As the trial judge said, there were irreconcilable contradictions between the evidence of the two appellants. Pointing out these contradictions did not shift the burden of proof

to Zingariello. The trial judge presented the contradictions in a neutral manner. He then said:

> When you review the various contradictions consider whether there were reasons, such as a mistaken memory, to explain any or all contradictions. You may prefer one version of a fact over another if it makes sense to you. You may accept some, all or none of a witness's evidence. It is up to you.

[49] Later, the trial judge told the jury to use "common sense to sift through each accused's evidence to determine if Mr. Zingariello participated in the assault, confinement or robbery which eventually lead to Mr. Dimatteo's death". I see no error in this approach to the evidence. The trial judge did not throw any burden of proof on Zingariello; he simply attempted to give the jury some assistance in assessing the evidence. Comparing the various accounts of what happened in the lead-up to the robbery, in the home, and afterwards was an inevitable part of the jury's task in making findings of fact. In this part of the charge, the trial judge on several occasions reminded the jury that the Crown had to prove guilt beyond a reasonable doubt.

[50] I would not give effect to this ground of appeal.

Grounds of Appeal Relating to First Degree Murder

[51] Between them, the appellants raise several grounds of appeal concerning first degree murder:

1. First degree murder under s. 231(5)(e) cannot be founded upon party liability for murder under s. 21(2).

2. The trial judge misdirected the jury as to liability for first degree murder under s. 231(5)(e).

3. The trial judge failed to relate the evidence to the elements of first degree murder under s. 231(5)(e).

4. There was no evidence upon which the participant or non-shooter could be found guilty of first degree murder.

1. First degree murder under s. 231(5)(e) and party liability for murder under s. 21(2)

(a) Introduction

[52] Section 231(5) defines so-called constructive first degree murder. The part applicable to this case is s. 231(5)(e):

> 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)

[53] As the courts have repeatedly pointed out, s. 231 does not create a distinct substantive offence but rather an aggravated form of murder. The jury must determine whether the aggravated circumstances exist to warrant the mandatory penalty for first degree murder of life imprisonment without eligibility for parole for 25 years. As Cory J. pointed out in *R. v. Harbottle*, [1993] 3 S.C.R. 306, at p. 323: “The gravity of the crime and the severity of the sentence both indicate that

a *substantial and high* degree of blameworthiness, above and beyond that of murder, must be established in order to convict an accused of first degree murder" (emphasis in original). Where the only question is the liability of the actual killer for first degree murder, the focus is on whether there was an unlawful confinement distinct from the actual killing and whether the killing was in the course of the unlawful confinement. Justice Binnie summarized liability in *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195, at para. 35:

> The jurisprudence therefore establishes that second degree murder will be elevated to first degree murder where the murder and the predicate offence (in this case unlawful confinement) are linked together both causally and temporally in circumstances that make the entire course of conduct a single transaction (*Paré*). The temporal-causal connection is established where the unlawful confinement creates a "continuing illegal domination of the victim" that provides the accused with a position of power which he or she chooses to exploit to murder the victim (*Paré*, at p. 633, and *Johnson,* at para. 39). If this is established the fact that along the way other offences are committed is no bar to the application of s. 231(5).

[54] Where two or more persons are shown to have been involved in the murder, proof of liability for first degree murder will depend on the manner of their participation either as co-perpetrators or s. 21 parties. It is not enough that the killing occurred in the course of the unlawful confinement; the prosecution must prove that the accused caused the death. In *Harbottle*, Cory J. adopted a test of substantial causation, something more than causation that would suffice for

murder or manslaughter, per *R. v. Smithers*, [1978] 1 S.C.R. 506. At pp. 323-24 of *Harbottle,* Cory J. used various terms to describe this test of substantial cause:

> In my view, an accused may only be convicted under the subsection if the Crown establishes that the accused has committed an act or series of acts which are of such a nature that they must be regarded as a substantial and integral cause of the death.
>
> …
>
> The substantial causation test requires that the accused play a very active role -- usually a physical role -- in the killing. *Under s. 214(5) [now s. 231(5)], the actions of the accused must form an essential, substantial and integral part of the killing of the victim*. [Emphasis added.]

[55] I have emphasized the last sentence of this part of *Harbottle*, since it is the source of the instruction commonly used to describe liability of the participant and was the formula used by the trial judge in this case. Justice Cory then set out the series of steps that could be included in the charge to the jury, at p. 325:

> Therefore, an accused may be found guilty of first degree murder pursuant to s. 214(5) if the Crown has established beyond a reasonable doubt that:
>
> (1) the accused was guilty of the underlying crime of domination or of attempting to commit that crime;
>
> (2) the accused was guilty of the murder of the victim;
>
> (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim;

> (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and
>
> (5) the crimes of domination and murder were part of the same transaction; that is to say, the death was caused while committing the offence of domination as part of the same series of events.

[56] In *Harbottle* itself the court had no difficulty finding that the accused's acts met the substantial cause test where the evidence showed that he held down the victim's legs so that his confederate could strangle her. While strangulation was the cause of death, the accused's acts were a substantial and integral cause of the death. There have been many cases since *Harbottle* that have applied the substantial cause test, and I will refer to some of them below when considering the submission that the trial judge failed to adequately relate the evidence to the elements of first degree murder.

[57] In *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, at para. 61, Arbour J. observed that *Harbottle* should not be understood as defining the causation requirement for first degree murder so much as setting the degree of participation required to impose liability under s. 231(5). At para. 62, she described the impact of *Harbottle* in these terms:

> As explained by Cory J. in *Harbottle*, in order to raise culpability to first degree murder under s. 231(5), something more is required. The "something more" is not that the accused *caused more* the death of the victim. What is required is that his participation in the killing be sufficiently immediate, direct and substantial to

> warrant the greater stigma and sentence attached to first degree murder. [Emphasis in original.]

[58] While the word formulation in *Nette* is slightly different -- “sufficiently immediate, direct and substantial” -- the concept is the same as “substantial and integral cause” used in *Harbottle*. Again, as emphasized by Arbour J. at para. 65, the additional causation requirement is a measure of the additional blameworthiness required:

> It is clear from a reading of *Harbottle* that the "substantial cause" test expresses the increased degree of moral culpability, as evidenced by the accused person's degree of participation in the killing, that is required before an accused can be found guilty under s. 231(5) of the *Criminal Code* of first degree murder. The increased degree of participation in the killing, coupled with a finding that the accused had the requisite *mens rea* for murder, justifies a verdict of guilty under s. 231(5) of the *Code.*

[59] Finally, at para. 73, Arbour J. pointed out the importance of the party’s participation in the murder, using the phrase “significant contribution”, in addition to the “essential, substantial and integral” formula from *Harbottle*:

> In light of *Harbottle*, where the jury must be instructed on first degree murder under s. 231(5) of the *Code* in addition to manslaughter or second degree murder, the terminology of "substantial cause" should be used to describe the applicable standard for first degree murder so that the jury understands that something different is being conveyed by the instructions concerning s. 231(5) of the *Code* with respect to the requisite degree of participation of the accused in the offence. *In such cases, it would make sense to instruct the jury that the acts of the accused have to have made a "significant"*

> *contribution to the victim's death* to trigger culpability for the homicide while, to be guilty of first degree murder under s. 231(5), *the accused's actions must have been an essential, substantial and integral part of the killing of the victim*. [Emphasis added.]

(b) Party Liability under s. 21(2)

[60] The appellants submit that a person cannot be found guilty of first degree murder under s. 231(5) where their liability for murder rests on s. 21(2). Section 21(2), the provision imposing party liability for offences arising out of a common intention, provides as follows:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew [or ought to have known] that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence. [Brackets added.]

[61] I have bracketed the phrase “or ought to have known” because the Supreme Court of Canada has held that to comply with the principles of fundamental justice in s. 7 of the *Canadian Charter of Rights and Freedoms*, an individual cannot be found to be a party to murder on the basis of objective foresight of death. As Lamer C.J. held in *R. v. Rodney*, [1990] 2 S.C.R. 687, at p. 692: “A party to a murder, therefore, cannot be convicted upon proof that he ought to have known that the murder was a probable consequence of carrying out the common purpose.” Thus, where, as here, the Crown relied upon s. 21(2)

in a murder prosecution, it first had to prove that the appellants formed a common intention to carry out an unlawful purpose, for example, robbery or unlawful confinement, and that they assisted each other in carrying out the robbery or unlawful confinement. Second, the Crown had to prove that one of the appellants committed murder. Third, it had to prove that the other person (the participant or non-shooter) knew that the principal offender would probably commit murder in carrying out the unlawful purpose. This requirement of subjective foresight is crucial: see *R. v. Laliberty* (1997), 117 C.C.C. (3d) 97 (Ont. C.A), at pp. 107-108. In the context of this case, the non-shooter had to know that the shooter would probably cause the death of the deceased with one of the intents set out in s. 229(a) of the *Code*: either the intent to cause death, or the intent to cause bodily harm that the principal knew would likely cause death, being reckless whether death ensued or not.

[62] The appellants submit that while an individual may be found guilty of second degree murder by resort to s. 21(2), as modified by the Supreme Court of Canada to require subjective foresight, that provision cannot be the basis for liability for first degree murder. The submission is based on the following propositions. First, if the jury has resorted to s. 21(2), they must have rejected liability under s. 21(1), which requires an act, omission or encouragement. Second, s. 21(2) is essentially based upon mental elements—formation of an intention in common, an intention to assist and knowledge that the principal

offender would probably commit murder—that are inconsistent with the kind of active participation required by the causation requirement for s. 231(5): actions that are an "essential, substantial and integral part of the killing of the victim". This latter part of the argument is fortified by this court's decision in *R. v. Jackson* (1991), 68 C.C.C. (3d) 385, at pp. 421 and 424:

> Section 21(2) must be distinguished from s. 21(1). The latter section is aimed at those who participate in the actual offence for which liability is imposed. *Section 21(2) widens the circle of criminal culpability to include those who do not participate in the alleged crime* but who do engage in a different criminal purpose and foresee the commission of the alleged offence by a party to that criminal purpose as a probable consequence of the pursuit of the criminal purpose: see *R. v. Simpson* (1988), 38 C.C.C. (3d) 481 at pp. 488-91, 46 D.L.R. (4th) 466, [1988] 1 S.C.R. 3. [Emphasis added.]
>
> …
>
> Where, however, liability is based on s. 21(2), *there is no participation in the act which caused death but rather foresight that another would commit such an act*. Culpability for the incidental offence flows almost entirely from foresight that that offence would be committed by another. [Emphasis added.]

[63] From the point of view of moral culpability or blameworthiness, an essential aspect of first degree murder, liability can be based upon s. 21(2). Justice Cory made this clear in *Harbottle* at p. 322:

> Many if not all of the concerns expressed by the courts in the earlier cases have been eliminated by recent decisions of this Court. *The concern that first degree*

> *murder should not apply to s. 21(2) parties to a murder who lacked any subjective foresight of death has been resolved* by *R. v. Rodney*, [1990] 2 S.C.R. 687, and *R. v. Logan*, [1990] 2 S.C.R. 731. The unlawful object and felony murder provisions, another source of concern, were struck down or rendered moribund in *R. v. Martineau*, [1990] 2 S.C.R. 633. *Thus the danger of an accused's becoming subject to a first degree murder sentence in the absence of subjective blameworthiness has effectively disappeared.* The earlier cases were primarily concerned with the harshness that would arise from applying a broad causation rule to parties to an offence. In my view, that cause for concern no longer exists. [Emphasis added.]

[64] However, the fact that a s. 21(2) party may have the requisite blameworthy state of mind to warrant a conviction for first degree murder does not answer the question of whether such a party sufficiently participated in the killing. As Arbour J. said in *Nette* at para. 62:

> The degree of participation in the killing by a party whose liability for murder is based on aiding or abetting under s. 21(1)(b) or (c) of the *Criminal Code* or common intention under s. 21(2) of the *Code*, may, under the *Harbottle* formulation, be insufficient to permit a finding that the murder amounts to first degree under s. 231(5), which requires that the murder be committed "by that person" in the course of committing the underlying offence.

[65] The question of s. 21(2) party liability was not squarely before the court in either *Harbottle* or *Nette*. The accused in *Harbottle* was either a co-perpetrator in the killing or a s. 21(1)(b) or (c) party. *Nette* was concerned with causation for

second degree murder.[2] There has been some judicial consideration of s. 21(2) by appellate courts since *Harbottle.* The New Brunswick Court of Appeal briefly dealt with the issue in *R. v. Michaud* (2000), 144 C.C.C. (3d) 62, at para. 14:

> During oral argument, we drew counsel's attention to *R. v. Harbottle*, [1993] 3 S.C.R. 306, 84 C.C.C. (3d) 1, a case which, curiously enough, was cited neither in the appellant's nor in the respondent's written submission. In *Harbottle*, the Supreme Court of Canada adopted the view that the question of causation under s. 214(5) (now s. 231(5)) does not require a determination of who is a party to the commission of a particular offence under s. 21 of the *Code*. Rather, s. 231(5) requires that the Crown prove, beyond a reasonable doubt, that the victim's death was substantially caused by the accused, a burden that is met only where the evidence supports a finding that the accused played a very active role -- usually a physical role -- in the killing. *Section 231(5) imposes criminal liability when the actions of the accused are shown to have formed "an essential, substantial and integral part of the killing of the victim"*. *That being so, s. 21(2) cannot be a source of criminal liability for first degree murder.* [Emphasis added.]

[66] I note that the Crown conceded on the appeal in *Michaud* that s. 21(2) could not be combined with s. 231(5): see para. 15. On the other hand, in *R. v. Richardson* (2003), 174 O.A.C. 390, at paras. 72-75, this court appeared to approve of a charge to the jury that combined liability under s. 21(2) and 231(5):

> The appellants argue that the trial judge failed to adequately instruct the jury as to the degree of participation required for first degree murder pursuant to s. 231(5)(e) of the *Criminal Code*.

---

[2] Cases from this court prior to *Harbottle* suggested s. 21(2) could not be the basis for constructive first degree murder: see, for example, *R. v. McGill* (1986), 15 O.A.C. 266 (C.A.).

> The trial judge's charge carefully tracked the five-step approach to s. 231(5) set out by the Supreme Court of Canada in *R. v. Harbottle* (1993), 157 N.R. 349; 66 O.A.C. 358; 84 C.C.C. (3d) 1, at 14.
>
> In dealing with s. 231(5), the trial judge told the jury that in order to find the accused guilty of first degree murder, it was necessary for the Crown to establish beyond a reasonable doubt the underlying crime of domination, that is forcible confinement. He continued:
>
> > The person must be guilty of the forcible confinement. The accused must also be guilty of murder by being a party, either committing it or aiding or abetting it or being a party by subsection (2) of 21. The accused must have been shown to have participated - and this is the crux of it - in the murder in such a manner that he was the substantial cause of the death of the victim.
>
> In my view, the trial judge's instruction was proper and I see no merit to this ground of appeal.

[67] However, a review of the factums filed in *Richardson* indicates that the argument made here was not raised in that case. In a later case, this court has held that the issue is still an open one: see *R. v. Ceballo,* 2007 ONCA 715, [2007] O.J. No. 3977, at para. 2:

> Counsel on appeal argued that those two sections [ss. 21(2) and 231(5)] cannot be combined to found liability for first degree murder. We regard this as an open question of law. We also conclude that if the trial judge was wrong in combining the two sections as a basis for committal, the error was one of law rather than jurisdiction. Ultimately, the question on this appeal is whether there was a basis in the evidence upon which the justice could commit for trial on first degree murder.

[68] Thus, despite this court's decision in *Richardson*, it is my view that the question of liability for first degree murder under s. 231(5) based upon s. 21(2) is an open one. That said, however, I am satisfied that the two provisions can be combined. While liability for first degree murder under s. 231(5) is premised on active participation in the murder, that liability flows from the participant's acts not any additional mental element. Provided the participant's conduct was a substantial cause of the death and the other elements of s. 231(5) are made out including liability for murder and the underlying crime, such as forcible confinement, the accused can be found guilty of first degree murder.

[69] It is true, as this court pointed out in *Jackson*, that an accused can be convicted of murder under s. 21(2), even though he did not participate in the act which caused death. In such a case, he could not be convicted of first degree murder under s. 231(5), not because the underlying liability for murder was premised on s. 21(2), but because the Crown was unable to prove that the party's participation was a substantial cause of the death of the victim.

[70] An example can make the point more clearly. As I discuss at greater length below, in *Harbottle*, Cory J. gave some examples of where an accused could be convicted of first degree murder under s. 231(5). One example was described in the following terms at p. 324:

> For example, if one accused *with intent to kill* locked the victim in a cupboard while the other set fire to that

> cupboard, then the accused who confined the victim might be found to have caused the death of the victim pursuant to the provisions of s. 214(5) [now s. 231(5)]. [Emphasis added.]

[71] In my view, liability under s. 231(5) would also flow if the one accused (the party), while not intending to kill the victim, knew that the principal offender would probably commit murder in carrying out the unlawful purpose, i.e., had the s. 21(2) *mens rea* for murder.. The participation by the party is the same whether the party intended to kill or merely knew that the principal offender would probably commit murder. Further, these acts of participation were a substantial cause of the death of the victim. I find it difficult to conceive that such a person would not have the requisite moral blameworthiness for first degree murder. Of course, a slight change in the facts might relieve the party of liability for first degree murder. If the victim was able to get out of the cupboard and was then shot by the principal offender, the acts of the party in confining the victim would not be a substantial cause of the death and the party would be guilty, at most, of second degree murder.

[72] When addressing potential liability for first degree murder, regardless of the basis upon which an accused may be guilty of murder, the trial judge must clearly focus on the additional elements of first degree murder as defined in s. 231(5) and relate the evidence to those elements. The jury must clearly

understand in the context of the evidence it heard what it takes to make the accused guilty of first degree murder under s. 231(5).

2. The trial judge misdirected the jury as to liability for first degree murder under s. 231(5)(e).

(a) Liability of the Principal Offender

[73] The appellants submit that the trial judge misdirected the jury with respect to first degree murder. The attack on the charge to the jury (as opposed to the recharge) was mainly directed at the fact that the charge lacked focus; while the charge, with some minor errors, was legally correct, it did not focus the jury on the issues in this case. Thus, the trial judge began his discussion of the elements of first degree murder by an extensive discussion of whether the actions of the shooter were an essential, substantial and integral part of the killing of the victim. As counsel pointed out, that was a non-issue; the real issue as regards the shooter was identity. The trial judge's review of the evidence, especially the evidence as to cause of death, was more relevant to second degree murder and the liability of the participant (i.e., the non-shooter).

[74] The appellants also submit that the trial judge's direction on the second element of first degree murder, where there was an unlawful confinement, was unfocused since this was a non-issue for Ferrari. While Zingariello denied being involved in the unlawful confinement, the evidence was overwhelming that both

appellants were involved in the unlawful confinement. It was further argued that the trial judge unfairly lumped the appellants together because of this direction:

> If Crown counsel has satisfied you beyond a reasonable doubt of this essential element, you must find the accused unlawfully confined Mr. Dimatteo.

[75] I would not give effect to these alleged errors as regards the principal offender. I agree that the directions were somewhat unfocused, but that problem was cured by the recharge where the trial judge told the jury:

> All counsel agree that Mr. Dimatteo's death was caused by a single gunshot to the hip and there was no other cause of death. One or other of the two accused discharged the gun in the master bedroom. The shooter actively participated in the shooting and was an essential, substantial and integral part of the killing of Mr. Dimatteo.

[76] The appellants submit that the errors in the charge cannot be corrected by the recharge because the trial judge did not tell the jury that the initial instructions were erroneous. Rather, he told them to consider all the instructions in the charge and the recharge:

> Unless I tell you otherwise, do not consider any further instructions I may give you to be any more or less important than anything else I have said about the law. All the instructions, whenever they may be given, are part of the same package.

[77] I do not agree with this submission. While the directions related to the principal offender may have been unfocused, they were legally correct. The jury

could not have been in any doubt that a central issue in the case was the identity of the shooter.

[78] As to the objections concerning unlawful confinement, it may be that the direction was unnecessary with respect to Ferrari, but this was a real issue for Zingariello. He was entitled to have the issue placed before the jury, no matter the strength of the evidence showing that both appellants must have been involved in confining the deceased.

(b) Liability of the Participant

[79] The appellants allege several errors by the trial judge in the charge relating to the liability of the participant or non-shooter, in addition to the error concerning founding liability under s. 21(2). In the discussion that follows concerning the liability of the participant, I will use the phrases “essential, substantial and integral element” and “active participation” interchangeably. Most of these alleged errors, such as the use of a double negative in referring to the unlawful confinement element, were minor. One more serious error alleged was that after discussing the essential, substantial and integral element, the trial judge stated:

> You must determine whether either Mr. Ferrari or Mr. Zingariello *did anything* that caused the death of Mr. Dimatteo. [Emphasis added.]

[80] In my view, this misstatement did not prejudice the appellants. The jury would understand that the “anything” related to the issue of active participation

and the “essential, substantial, and integral part” discussed at length only minutes earlier. The misstatement was clarified in the recharge:

> If you are satisfied that either Mr. Ferrari or Mr. Zingariello did anything that was an essential, substantial, and integral part of the killing of Mr. Dimatteo then you must go on to the next question.

[81] The appellant Ferrari submits that the trial judge did not properly relate his defence to first degree murder. The portion of the charge to which Ferrari objects is the following:

> It is Mr. Ferrari’s position that Mr. Zingariello fired the gun which was a discrete act after they decided to take the safe and leave.
>
> Mr. Ferrari submits that he did nothing to assist or participate in the co-accused’s shooting of the gun and he shot the gun without warning. Mr. Ferrari said he did not assist in any way in the killing.

[82] The appellant submits that this direction did not make it clear that the primary position was that the appellant had not actively participated in the killing and that there had been a break in events between his admitted involvement in confining the deceased and his actions at the time of the killing. I do not accept this submission. I can see no material difference between what the trial judge said and what the appellant now claims should have been said.

[83] In my view, when the charge and recharge are considered there were no legal errors concerning legal liability for first degree murder.

3. The trial judge failed to relate the evidence to the elements of first degree murder under s. 231(5)(e).

[84] A more substantial challenge to the charge to the jury on first degree murder was whether the trial judge adequately related the evidence to the elements of first degree murder to determine liability of the non-shooter. This objection focuses almost entirely on the "essential, substantial and integral" element. To understand this objection, it is necessary to set out what the trial judge said in the charge and recharge in relation to this element of liability, as well as what he said about the Crown theory as to the participant's liability.

(1) THE CHARGE ON "ESSENTIAL, SUBSTANTIAL AND INTEGRAL"

> Did either Mr. Ferrari or Mr. Zingariello as the participant do something that was an "essential, substantial and integral part" of the killing of Mr. Dimatteo?
>
> To prove this element, Crown counsel must prove beyond a reasonable doubt that the participant did something that was an "essential, substantial, and integral part" of the killing of Mr. Dimatteo. By an "essential, substantial and integral part", I mean that the participant actively participated in the killing of Mr. Dimatteo. It is not enough to prove that the participant was present, or that he played some minor role in the events.
>
> To convict someone of first degree murder, Crown counsel must prove that the participant is an active participant in the killing.
>
> To decide this issue, you must consider all the evidence. Do not limit your consideration to only the opinion of Dr. Doucet about what caused Mr. Dimatteo's death. Take into account, as well, the testimony of any

witness who described the events that took place around the time that Mr. Dimatteo was shot and died and any surrounding circumstantial evidence. Use your good common sense.

When I instructed you on the liability for the principal, you must consider the same evidence with respect to the participant and any other evidence that assists you to determine the liability of the participant for first degree murder.

There was evidence that this was a joint venture where each accused assisted each other in the course of a robbery. There was evidence of acting in concert to rob Mr. Dimatteo. There was evidence that they assaulted Mr. Dimatteo and used duct tape to confine him. One attempted to obtain the combination while the other found the safe and moved the safe. There was evidence that this was a joint enterprise where each performed a role and assisted each other in furtherance of their common unlawful purpose. According to Mr. Ferrari's evidence, he knew that Mr. Zingariello had a loaded semi-automatic handgun as part of a plan to dominate the victim and obtain the combination to the safe.

It is Mr. Ferrari's position that Mr. Zingariello fired the gun which was a discrete act after they decided to take the safe and leave.

Mr. Ferrari submits that he did nothing to assist or participate in the co-accused's shooting of the gun and he shot the gun without warning. Mr. Ferrari said he did not assist in any way in the killing.

It is Mr. Zingariello's position that he was not present and thus he was not a participant in the confinement or the killing.

You must determine whether either Mr. Ferrari or Mr. Zingariello did anything that caused the death of Mr. Dimatteo.

(2) THE CHARGE SETTING OUT THE CROWN THEORY

> If Mr. Ferrari or Mr. Zingariello had intended to leave Mr. Dimatteo alive at the end of the robbery they would have worn gloves, masks and disguises. Mr. Ferrari would not have worn a hat with his name on it. Further, this robbery took place near to Mr. Ferrari's home and his family and his girlfriend.
>
> The accused had no concerns about being later identified by the victim because he would not be left alive to later identify either of them in a police line-up.
>
> Regardless of which accused fired the fatal shot, both accused knew that Mr. Dimatteo would be shot in this robbery. They both knew a loaded semi-automatic handgun was being brought to the robbery. It was the only weapon they brought and it was a deadly weapon.
>
> The Crown submits that both accused acted together and assaulted and unlawfully confined Mr. Dimatteo and assisted each other as the violence escalated to the point that Mr. Dimatteo was shot and killed.
>
> Both accused actively participated in the intentional killing of Mr. Dimatteo who was unlawfully confined at the time making each of them guilty of first degree murder.

(3) THE RECHARGE ON "ESSENTIAL, SUBSTANTIAL AND INTEGRAL"

> The first issue for your determination is the identification of the shooter. The second issue for your determination is whether the non-shooter did anything that was an essential, substantial or integral part of the killing of Mr. Dimatteo. To decide those issues, you must consider all the evidence. Do not limit your consideration to only the opinions of Dr. Doucet about what caused Mr. Dimatteo's death. Take into account, as well, the testimony of any witness who described the events that took place around the time that Mr. Dimatteo

was shot and died and any other circumstantial evidence.

Mr. Ferrari, Mr. Zingariello, and Ms. Valiente were witnesses who were present at 56 Cipriano Court on the morning of June 24, 2005. Use your good common sense.

Mr. Zingariello testified that Mr. Dimatteo entered the residence while he and Mr. Ferrari were in the master bedroom. The security chimes rang. They went toward the noise and Mr. Ferrari pulled down a balaclava and pulled out a gun. Mr. Ferrari went down the stairs pointing a gun at Mr. Dimatteo who was standing in the foyer. Mr. Ferrari marched the deceased up the stairs and a struggle ensued between Mr. Ferrari and Mr. Dimatteo on the second floor landing. He testified that Mr. Ferrari's gun fired and there was a loud bang. Mr. Zingariello ran down the stairs and out of the residence. It was Mr. Zingariello's evidence that the second shot was fired when he was sitting in the car. It was Mr. Zingariello's position that he was not the shooter and he did nothing that was an essential, substantial and integral part of the killing.

Mr. Ferrari testified that he and Mr. Zingariello were standing on the landing near the safe around the entrance to the bedroom. Mr. Zingariello told Mr. Dimatteo "give me the fucking combination" and a shot was fired. Mr. Ferrari said he did not see where the bullet from the non-fatal shot struck the floor. It was his evidence that Mr. Dimatteo responded "fuck you" and seconds later the second shot went off. Mr. Ferrari said Mr. Zingariello looks surprised. He said he was stunned because he heard a grunt from Mr. Dimatteo. He went to Mr. Dimatteo who said "help me". Mr. Ferrari said he picked up the phone, dialled 911, and put the phone to the deceased's ear and said "help yourself", and then left. It was Mr. Ferrari's position that he was not the shooter and he did nothing that was an essential, substantial, and integral part of the killing of Mr. Dimatteo.

Ms. Valiente testified that she heard two shots while she was sitting in the car. Ms. Valiente said that Mr. Ferrari had a gun that he put in his pocket on the morning of June 24, 2005, before driving to Cipriano Court. She said she had previously seen the gun in April of 2005 when Mr. Ferrari showed it to her. You may consider the evidence of Ms. Valiente concerning the timing of the shots, what she saw and overheard at Mr. Dimatteo's residence, and what she heard and saw at the house and the discussions in the car after the killing. You may also consider Ms. Valiente's evidence concerning her observations of blood in the sink after the robbery at 22 Button Road.

There were conflicting theories of the mechanics of the shooting based on the different hypotheticals put to Dr. Doucet. The deceased was standing upright with his left hand facing the shooter. The bullet travelled from left to right in an upward trajectory, and (2) the deceased was lying on the floor and his body was slightly angled to the shooter and the trajectory of the bullet was from left to right horizontally; (3) Detective Orme provided a different possibility that if the deceased's left side faced the shooter and the shooter was squatting or sitting at the point below the deceased he would be shooting at an upward trajectory.

Dr. Doucet said he did not know the relative positions of the shooter and the victim and he had no ability to gather information to give an opinion. He said that there were a number of different scenarios that could explain the pathway of the bullet. Dr. Doucet was unable to provide an opinion as to the distance between the shooter and the deceased.

Dr. Doucet did not find any evidence of gunshot residue on the deceased's skin. He said the absence of gunshot residue could be explained because Mr. Dimatteo was wearing clothing. Detective Fraser said that the trajectory of the non-fatal bullet was at a 21 degree angle to the floor. If the shooter was standing at the doorway of the bedroom he would be approximately 14

feet from the place Mr. Dimatteo was found. Detective Fraser did not know the angle of the gun when the fatal shot was fired.

Officers McClure and Ferreira drew sketches of the position of Mr. Dimatteo lying on his left hip on the Oriental carpet. There was a small amount of blood on the underside of the Oriental carpet near the bullet hole made by the non-fatal bullet. Dr. Doucet said the wound would produce a small amount of discharge.

Officers McClure and Ferreira found one shell casing after Mr. Dimatteo was moved by the paramedics.

As you may recall, Mr. Ferrari, Mr. Zingariello, and Ms. Valiente gave evidence concerning their conversations in the car. You may consider those conversations to assist you to identify the shooter.

You must consider all the evidence to determine whether Mr. Ferrari or Mr. Zingariello was the shooter or non-shooter.

With regard to the shooter, the shooting of Mr. Dimatteo would be an essential, substantial or integral part of the killing. With regard to the non-shooter, you will need to determine whether Crown counsel has proved beyond a reasonable doubt that the non-shooter did anything that was an essential, integral or substantial part of the killing.

(4) THE RECHARGE SETTING OUT THE CROWN THEORY

It is further the Crown's position that the non-shooter actively participated in the killing of Mr. Dimatteo by restraining the deceased and depriving him of his ability to move from place to place. Mr. Ferrari testified that both accused participated in the confinement and there is circumstantial evidence from which to infer that each of the accused actively participated in the unlawful confinement. Both accused physically restrained the deceased by assaulting him and by taping his hands

> and ankles together with duct tape. The Crown submits that the non-shooter actively participated in the killing by physically confining the deceased which confinement was an essential, substantial and integral part of the killing.
>
> It is also the Crown's position that there was a temporal and causal connection between the unlawful confinement in the killing. The Crown submits that the unlawful confinement in the murder were closely connected to each other and were part of a continuing illegal domination of Mr. Dimatteo culminating in his murder. The unlawful confinement in a murder were part of a continuous series of events that was really a single ongoing transaction.

[85] In my view, the initial charge to the jury (1, above) would not have assisted the jury in determining what facts they would need to find to determine whether the actions of the non-shooter formed an essential, substantial and integral part of the killing of the victim. Those instructions focused on the evidence of participation in the robbery and the unlawful confinement. While this evidence was helpful to provide the necessary context, participation in the robbery and the confinement did not answer the question of the non-shooter's active participation in the killing. The same must be said of the Crown's theory as it is set out in the charge. The first part of the theory, in effect, makes a case for a planned and deliberate murder, a basis for liability that was taken away from the jury. The second part is an assertion that both appellants actively participated in the killing, but it gives no theory grounded in the facts as to how the jury might find that liability.

[86] The recharge contains a fuller review by the trial judge of the evidence but again fails to identify the factual elements that would give rise to a finding of active participation in the killing. The review of the Crown's theory in the recharge focused on participation by the two appellants in the unlawful confinement. I repeat the crucial part of that review:

> It is further the Crown's position that the non-shooter actively participated in the killing of Mr. Dimatteo by restraining the deceased and depriving him of his ability to move from place to place. Mr. Ferrari testified that both accused participated in the confinement and there is circumstantial evidence from which to infer that each of the accused actively participated in the unlawful confinement. Both accused physically restrained the deceased by assaulting him and by taping his hands and ankles together with duct tape. The Crown submits that the non-shooter actively participated in the killing by physically confining the deceased which confinement was an essential, substantial and integral part of the killing.

[87] In my view, this part of the recharge is the most helpful explanation of what could constitute active participation, provided it is correct. This requires a review of some of the authorities. I do not doubt that in some circumstances participation in unlawful confining the victim can also be the foundation for active participation in the killing. *Harbottle* is an example. In that case, as revealed through the accused's confession to police, the principal offender tied up the deceased and sexually assaulted her. The two accused then left the room to talk about what to do next. Harbottle then carried the victim downstairs and put her on the floor. He

held down her legs while the principal offender strangled her. Justice Cory explained at pp. 325-26 why Harbottle's actions were an essential, substantial and integral element of the killing:

> The facts of this case clearly established that Harbottle was a substantial and an integral cause of the death of Elaine Bown. It will be remembered that Ross, who actually strangled the victim, weighed only 130 lb. and was about 5' 7" in height. Elaine Bown, although three inches shorter, was 10 lb. heavier. There was no indication in her blood of any alcohol or drugs so that it can be inferred that she was not impaired. Rather the bruising on her neck indicates she struggled valiantly. Indeed, it is apparent that even when her hands were bound, she successfully resisted the attempts of both Ross and Harbottle to cut her wrists. *There is every reason to believe that, had it not been for Harbottle's holding her legs, she would have been able to resist the attempts to strangle her. In those circumstances, it is difficult to believe that Ross could have strangled her in the absence of the assistance of Harbottle.* [Emphasis added.]

[88] Thus, the finding of substantial causation did not rest on Harbottle's participation in the earlier confinement of the deceased but on his actions in helping overcome her resistance to the killing. Justice Cory gave two other examples of how a participant could be convicted of first degree murder, at pp. 324-25:

> For example, if one accused with intent to kill locked the victim in a cupboard while the other set fire to that cupboard, then the accused who confined the victim might be found to have caused the death of the victim pursuant to the provisions of s. 214(5). Similarly an accused who fought off rescuers in order to allow his

> accomplice to complete the strangulation of the victim might also be found to have been a substantial cause of the death.

[89] Another decision relied upon by the Crown at trial and in this court is *R. v. Ghazzi*, [2006] O.J. No. 4052, 2006 CanLII 34260 (C.A.). As this was an appeal from dismissal of an application to quash an order to stand trial, there is a limited recitation of the facts in the reasons for judgment. It appears that the appellant was a taxi driver and was aware of the plan to assault the deceased after he was placed in the taxi. The evidence supporting the order to stand trial for first degree murder includes an admission to a witness that “we killed him”, as well as the following, at para. 4:

> [W]hen it became apparent during the altercation in the taxicab, to the appellant's knowledge, that the assault on the victim was accelerating to a murderous attack, the appellant initially expressed concern but thereafter continued to drive the taxicab in which the victim was forcibly confined, while the victim pleaded aloud for his life, without stopping the car or otherwise curtailing his companions' actions. Moreover, he continued to do so for at least some time given that the forensic evidence indicated that approximately five minutes were required to inflict the blows sustained by the victim.

[90] Thus, the appellant’s participation in the unlawful confinement did not merely set the stage for the murder. The appellant’s actions in controlling the taxi were essential to the killing; somewhat like the arson example in *Harbottle*, the appellant confined the victim while his confederate inflicted the fatal beating.

[91] Another decision relied upon by the Crown is *R. v. Norouzali* (2003), 177 C.C.C. (3d) 383 (Ont. C.A.). In that case, the appellant and another went on a robbery and killing spree. The first degree murder conviction rested on the unlawful confinement of a victim who was taken from his car into a wooded area and executed. The court, at paras. 52-53, described the facts from which a finding that the appellant was guilty of first degree murder could be made, assuming he was not the shooter. The court wrote at para. 53:

> It took both the appellant and the co-accused to forcibly escort Thomas to his execution site. Assuming that Thomas was shot by a single person and that the appellant was the non-shooter, the appellant prevented Thomas' escape. As such, he committed an act or series of acts of such a nature that they could be regarded as a substantial and integral cause of death. The appellant "caused" Thomas' death because he participated in the murder in such a manner that he was the substantial cause of Thomas' death. His role was as substantial as that of the accused in *Harbottle* itself. The "back up" role that the appellant played was as integral to Thomas' death as that of the shooter.

[92] As the court explained, the facts in *Norouzali* resembled both the facts of *Harbottle* itself and the second example given by Cory J. in that case, of the participant who fought off rescuers. The earlier confinement of the victim was not itself sufficient to render the participant liable for first degree murder; rather, it was the active role played by the appellant right up to the point of execution in ensuring that the victim could not escape. *Norouzali* is different from this case

because no continuing actions by the participant beyond the initial tying up of the deceased were necessary for the killing.

[93] Cases from other provinces provide similar examples. Thus, in *R. v. Corneau,* 2010 QCCA 1603, where two victims were confined and killed, the participation of two people was required in the killings; otherwise, the victims would have been able to assist each other and escape.

[94] In *R. v. Kematch*, 2010 MBCA 18, 252 C.C.C. (3d) 349, the accused common-law couple confined and beat their young daughter over a substantial period of time. The court found that first degree murder had been made out, based on each accused's participation in the confinement and the beating. As the court said at para. 112, the unlawful confinement "was so substantially a part of the whole sequence of events that it could be said to be a substantial and integral cause of death." And at para. 113:

> By their actions and/or omissions, they are both responsible for the fact that death ensued and the matter of the confinement and domination was sufficiently closely linked to what brought about the death that society's condemnation of their actions renders their conduct first degree murder.

[95] The evidence in this case presents several possibilities as to how the killing unfolded. One theory was that the killing was planned and deliberate: the appellants went to the deceased's residence knowing that he would be home because they intended to obtain the combination for the safe from him and then

kill him to cover up their involvement. As indicated, the trial judge held that there was no evidence to support this theory of liability.

[96] A second possibility is that both appellants participated in the unlawful confinement, which immediately preceded the shooting, and which was done to obtain the combination from the deceased. This scenario somewhat resembles *Harbottle* and, to a lesser extent, *Ghazzi.* Liability of the participant turns on the theory that the unlawful confinement was not simply part of the context but the means to extract the combination when the participant knew the principal offender intended to kill the deceased. Such a scenario would constitute first degree murder, somewhat like the facts in *R. v. Brown* (2002), 160 O.A.C. 141 (C.A.), at para. 4, where the participant bound and “delivered up” the deceased to the shooter. The deceased could neither flee nor defend himself.

[97] A third possibility is that both appellants participated in the unlawful confinement to keep the deceased out of the way, especially after, according to Ferrari, the deceased tried to defend himself. Then, while the participant was dragging the safe, the other shot the deceased, with no involvement by the participant. This theory rests, in part, on the fact that the original intention of the appellants was to remove the safe from the residence and open it later. In my view, the participant could not be liable for first degree murder on this scenario, even though he participated in the unlawful confinement by helping to tie up the deceased.

[98] There may be other possibilities. These three examples serve to demonstrate the difficult task faced by the trial judge in attempting to relate the evidence to the elements of first degree murder. The trial judge's review of the evidence (3, above) while helpful, did not clearly set out the factual findings the jury would have to make, in addition to finding joint participation in the unlawful confinement, to render the participant guilty of first degree murder: see *R. v. Almarales*, 2008 ONCA 692, 237 C.C.C. (3d) 148, at paras. 82-84.

[99] This gap in the instructions to the jury means, in my view, that the convictions for first degree murder cannot stand. The jury could well have convicted the participant on the basis of s. 21(2) solely because of his participation in the unlawful confinement and used that same finding to convict of first degree murder, even though they were unsure what the participant did as part of the killing. Since it is not possible to tell with any certainty on this record which of the appellants shot the gun, both of the convictions for first degree murder must be set aside.

[100] Ordinarily, the appropriate disposition would be to order a new trial for both appellants on the charge of first degree murder. However, Crown counsel stated that if the court was of the view that the errors only tainted the convictions for first degree murder, he would be content that the court dismiss the appeals and substitute convictions for second degree murder. In my view, that is the proper result. This disposition makes it unnecessary to consider the appellants' final

ground of appeal that there was no evidence upon which a jury properly instructed could convict of first degree murder.

DISPOSITION

[101] Accordingly, I would dismiss the appeals from conviction for first degree murder and substitute convictions for second degree murder. I would remit the matter of sentence, parole ineligibility, to the trial judge, in accordance with s. 686(3)(b) of the *Code*.

Signed: "M. Rosenberg J.A."

"I agree Doherty J.A."

"I agree S. E. Lang J.A."

RELEASED: "DD" JUNE 12, 2012