Citation: *R. v. C.M.*, 2024 YKTC 7

Date: 20240209
Docket: 22-03532
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Walker

REX

v.

C.M.

Publication of information identifying the young person(s) charged under the *Youth Criminal Justice Act* is prohibited by s. 110(1) of that *Act*.

Publication of information that could identify the complainant or a witness is prohibited by s. 111(1) of the *Youth Criminal Justice Act*.

Publication, broadcast or transmission of evidence taken at the preliminary inquiry is prohibited by court order pursuant to s. 539(1) of the *Criminal Code*.

Appearances:
Kimberly Eldred and Jaidan Merry — Counsel for the Crown
Malcolm E.J. Campbell and Mark Chandler — Counsel for the Defence

REASONS FOR JUDGMENT

[1] WALKER T.C.J. (Oral): This is the Court's decision as the result of a preliminary inquiry, which was held before me on February 5, 2024, in the matter of C.M.

[2] At the beginning of the events, pursuant to s. 539(1), there was a ban on publication issued under the provisions of the *Criminal Code* and there was a statutory

ban by virtue of the provisions of *Youth Criminal Justice Act*, S.C. 2002, c. 1, which are in effect.

[3] The file indicates that this young person, C.M., appeared at various times and elected the jurisdiction. The Crown elected to proceed by way of indictment, which is obvious, and that the accused made his election to be tried ultimately by a Supreme Court judge and requested a preliminary hearing, which, as I say, proceeded before myself.

[4] Ms. Eldred and Ms. Merry appeared for the Crown. Mr. Chandler and Mr. Campbell appeared for the accused. Obviously, the accused was present throughout the proceedings.

[5] I want to, at the outset, express my appreciation to both sets of counsel and their helpful submissions. I also want to express to the family and acquaintances of the unfortunate victim and express the appreciation and the respect which was shown by these proceedings by members of both families.

[6] Having said that, at various times during these proceedings, it was necessary to give notice to the family and acquaintances that there would be difficult evidence, difficult things said, and, to some regret, that will occur during my reasonings and so I would ask that the families be ready for that.

[7] While the time that the preliminary inquiry was set, there were no admissions or concessions with respect to the narrowing of issues or what they would be. It was conceded by the accused that the victim, in fact, did die on February 2, 2023, from

multiple stab wounds, that there is no issue as to date, time, or jurisdiction, and prior — this is after the evidence but prior to submissions — it was conceded that the identification of the accused youth has been established for the purposes of this preliminary inquiry.

[8] Section 548(1) of the *Criminal Code* of Canada provides that:

> When all the evidence has been taken by the justice, he shall
>
> > (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
> >
> > (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction

[9] The role of the hearing judge in a preliminary inquiry was well canvassed by Chief Justice McLachlan in the decision of *R. v. Arcuri*, 2001 SCC 54, and, in particular, Madam Justice McLachlan reviewed the issues of direct and circumstantial evidence at preliminary inquiry and provided the following:

> 21 The question to be asked by a preliminary inquiry judge under s. 548(1) of the Criminal Code is the same as that asked by a trial judge considering a defence motion for a directed verdict, namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty": Shephard, supra, at p. 1080; see also R. v. Monteleone, [1987] 2 S.C.R. 154, at p. 160. Under this test, a preliminary inquiry judge must commit the accused to trial "in any case in which

there is admissible evidence which could, if it were believed, result in a conviction": Shephard, at p. 1080.

22 The test is the same whether the evidence is direct or circumstantial…

23 The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence – that is, those elements as to which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap beyond the question of whether the evidence should be believed. … The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.

…

30 In performing the task of limited weighing, the preliminary inquiry judge does not draw inferences from facts. Nor does she assess credibility. Rather, the judge's task is to determine whether, if the Crown's evidence is believed, it would be reasonable for a properly instructed jury to infer guilt. Thus, this task of "limited weighing" never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

…

> 33 … Under the traditional common law rule, which I affirmed in Charemski, the preliminary inquiry justice's role is limited to determining whether a reasonable jury properly instructed could return a verdict of guilty. If the evidence could result in a conviction, the accused must be committed. Otherwise, he must be discharged. The preliminary inquiry justice does not herself draw inferences from the evidence, and she does not assess the credibility of witnesses. Thus it overstates the case to say that a preliminary inquiry justice is entitled to discharge an accused simply on the grounds that the Crown's evidence is "weak".

[10] I will now review the evidence presented, state the applicable law, and in determining the result return to the particular relevant portions of the evidence.

[11] Given the concessions or admissions by the accused, I will not dwell unnecessarily upon those aspects. Ms. T., a friend of the accused, testified with the assistance of a support person behind a screen. I would categorize her as a somewhat reluctant witness and her memory was, at one point, refreshed with a previous statement. She was at an address known as [redacted] in Whitehorse late in the evening of February 1, 2023, and early morning of the February 2, 2023, with a group of relatively young people.

[12] Briefly, Ms. T. described that the three males, including the accused, N.K., and a third individual who I refer to as L., left the residence to get munchies. They returned and left again around 5:00 a.m. on February 2, 2023. It is the events that followed that result in this offence.

[13] Given the admissions, I need not canvass her evidence but do note that she testified that when the three males returned after these events — this was somewhat

after 5:00 a.m. — they were acting goofy and laughing. The s. 547 evidence consisted primarily of a series of videos captured from the various security cameras in the area and taxi video cameras. From these videos, the Court is able to determine the events to the *Shephard/Arcuri* standard.

[14] In addition, there is an autopsy report of the deceased noting that the victim died from multiple (22) stab wounds to the body, including to the right ventricle of the head, pericardium, the diaphragm, chest muscles, anterior neck muscles, thyroid, and thyroid cartilage. These include, and were verified by photo, 10 stab wounds to the neck and five to the heart area. It is not in dispute that all the stab wounds were inflicted by N.K. All the video had some form of time shown upon them. These times were not consistent and some differed by a few minutes, other by at least one hour because of change in time zones or seasons, and for these purposes the accuracy of times are not relevant, but I will use approximations.

[15] Shortly after 5:00 a.m., on February 2, 2023, the victim, was dropped off by a taxi at or near the Tag Convenience store/Petro Canada station on 4th Avenue here in Whitehorse. He crosses to the west side of 4th Avenue and walks purposely to the south. His movements are hidden from the camera by a snowbank and, while hidden from view, three individuals now known to be the accused, N.K., and the person known as “L”, appear from an alley and enter on to 4th Avenue and move south towards the victim’s direction.

[16] I can reasonably infer that the four interacted — and not happily. The victim is then seen coming out from behind the snowbank and continuing to the south, he

appears to turn to the other three and walk backwards in that direction. The three individuals are variously described as assailant 1, who is the accused; assailant 2, who is N.K.; and assailant 3, the one who I know as "L."

[17] The accused is seen moving quickly towards the victim, who then moves quickly away. On two occasions, the accused reaches the victim, who escapes from him. On the third occasion, the accused reaches the victim, gets behind him, and holding him from behind, as N.K. approaches from the left, he can be seen to hold a knife in his right hand. The victim raises his hands as if in a surrender and the accused pulls him backwards onto the ground and restrains him. N.K. approaches, holding what is now obviously a knife, and he turns it into his right hand so that the blade is pointing downward, and while holding the victim with his left hand, he stabs him forcefully and stamps downward with his boots.

[18] The accused then manoeuvres himself out from under the victim and stands over him. And while N.K. delivers more stab wounds, the accused punches the victim and N.K. continues to stab the victim.

[19] The accused then, obviously injured in his foot, moves away. Eventually, it is determined by medical reports, that the accused suffered a broken left foot. It would be conjecture to determine if he broke his foot while he pulled the victim down upon the ground or, in fact, it was broken by N.K. stomping down with his foot.

[20] The accused is now essentially separated from what happens next, but he is in the immediate area. However, there is no sound on the videos but the Court can reasonably infer that there are conversations going on and the accused is clearly aware

of what is happening. There is certainly no indication that the accused is in any way wanting the events to stop or if he interferes in any way preventing any further interaction between N.K. and the victim.

[21] At one point, the accused does get up from the ground and appears to move towards N.K. and the victim. However, I cannot conclude that he is intending to rejoin the fray or the assaultive behaviour at that time.

[22] What then follows is graphic and violent. While the accused remains on the ground, or seated in a parking barrier or block, N.K. continues to pursue the victim, assaulting him continuously. The victim is obviously in distress and attempts to flee.

[23] In the end, he is brought down on the east lane — that is to say the north facing lane — of 4th Avenue and N.K. stabs him at least 15 times and the victim likely dies at that point.

[24] From Cst. Bigelow's evidence, an off-duty police officer who arrives on the scene, and attempts to administer first aid, he is unable to find a pulse.

[25] It is unclear if the accused or the third individual are no longer present in the immediate area when N.K. delivers the final stab wounds.

[26] All these events occurred within a relatively brief period of time. The Court has some difficulty in determining an exact timeframe between the various timestamps portrayed, but it is likely it all occurred between five and 10 minutes, albeit that the elapsed time when the accused takes the victim to the ground and is holding him and he hobbles away could be as little as five to 10 seconds.

[27] The *Criminal Code* provides that:

> 229 Culpable homicide is murder
>
> (a) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
>
> …
>
> 231 (1) Murder is first degree murder or second degree murder.
>
> (2) Murder is first degree murder when it is planned and deliberate.
>
> …
>
> (5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:
>
> …
>
> (e) section 279 (kidnapping and forcible confinement) …

— which is the section that we find ourselves.

> …
>
> (7) All murder that is not first degree murder is second degree murder.

— that is to say that the accused may be committed to trial on first degree murder, second degree murder or, in fact, manslaughter.

[28] The victim was murdered, but for the accused's participation, it is unknown if this would have resulted. The accused repeatedly pursued him, caught him, held him, and

brought him to the ground when the stabbing of N.K. began. He then continued to participate by standing over the victim while he was being stabbed and punched.

[29] I take this as a further act of confinement or restraint.

[30] The test for manslaughter was succinctly referred to in the *R. v. Harbottle*, [1993] 3 S.C.R. 306, at para. 35, as follows:

> The substantial causation test requires that the accused play a very active role -- usually a physical role -- in the killing. Under s. 214(5) …

— this is the precursor to the current s. 231(5) —

> … the actions of the accused must form an essential, substantial and integral part of the killing of the victim. Obviously, this requirement is much higher than that described in Smithers v. The Queen, [1978] 1 S.C.R. 506, which dealt with the offence of manslaughter. There it was held at p. 519 that sufficient causation existed where the actions of the accused were "a contributing cause of death, outside the de minimis range". That case demonstrates the distinctions in the degree of causation required for the different homicide offences.

[31] Mr. Chandler posits that there is no proof of communication between the accused and N.K. at the crucial time, albeit a brief period. One can reasonably infer, however, that the accused knew there was a dispute, knew N.K. wanted the victim subdued, saw him approach with a knife, knew that the victim was surrendering, and constrained him by falling to the ground. This is beyond *de minimus* and commitment for trial just for manslaughter is not appropriate. Thus, commitment will be for either first or second degree murder.

[32] To return to the decision of *Harbottle*, Justice Cory provides, at paras. 36 and 37, as follows:

> 36 The majority of the Court of Appeal below expressed the view that the acts of the accused must physically result in death. In most cases, to cause physically the death of the victim will undoubtedly be required to obtain a conviction under s. 214(5). However, while the intervening act of another will often mean that the accused is no longer the substantial cause of the death under s. 214(5), there will be instances where an accused could well be the substantial cause of the death without physically causing it. 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.
>
> 37 Therefore, an accused may be found guilty of first degree murder pursuant to s. 214(5) …

— as we now know as s. 231(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.
>
> …

[33] In a subsequent decision in the Ontario Court of Appeal of *R. v. Parris*, 2013 ONCA 515, Justice Watt provided the following under the heading "The Governing Principles" as follows:

> 43 An assessment of this ground of appeal requires a brief refresher about the essential elements of constructive first degree murder arising out of unlawful confinement or attempted unlawful confinement under s. 231(5)(e).
>
> 44 First, to establish first degree murder under s. 231(5)(e), the Crown must prove each of five essential elements beyond a reasonable doubt…

— he goes on to quote the five elements as set out in *Harbottle*.

> 45 For discussion purposes, the essential elements of constructive first degree murder under s. 231(5)(e) may be summarized as the
>
> i. predicate offence;
>
> ii. murder;
>
> iii. substantial cause;
>
> iv. no intervening act; and
>
> v. same transaction …
>
> 46 Second, the predicate offence requirement under s. 231(5)(e) involves the offence of unlawful confinement or the preliminary crime of attempted unlawful confinement. Unlawful confinement requires the use of physical restraint, contrary to the wishes of the person restrained, but to which that person submits unwillingly, thereby depriving that person of his or her liberty to move from one place to

> another... The authorities establish that if for any significant period of time, the victim was coercively restrained or directed contrary to his or her wishes, so that she or he could not move about according to his or her own inclination and desire, the victim has been unlawfully confined: *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195, at para. 24. (citations omitted)
>
> 47 Unlawful confinement, like its aggravated form, kidnapping, is a continuing offence, but one that is complete when the victim is restrained against his or her will. … Further, for the purposes of invoking, s. 231(5)(e) through satisfaction of the "predicate offence" requirement, it is immaterial that the unlawful confinement of the victim has not been completed. The provision is invoked equally where an accused attempts to unlawfully confine the victim or another person. (citations omitted)
>
> 48 Third, the "substantial cause" requirement in s. 231(5)(e) requires the Crown to prove that the accused played a very active role – usually a physical role – in the killing. The accused's actions must form an essential, substantial, and integral part of the killing of the victim. This requirement might be better described as reflecting an enhanced or more demanding degree of participation in the killing than a requirement of a causation. (citations omitted)
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> 49 As *Harbottle* itself illustrates, the "substantial cause" requirement may be met where the conduct of an individual accused does not constitute the factual cause of the victim's death, provided what the accused does falls fairly within the requirement of "an essential, substantial and integral part of the killing". (citations omitted)
>
> 50 Fourth, the "same transaction" requirement refers to the relationship between the predicate offence and the killing of the deceased that amounts to murder. This requirement is not met where the predicate offence has been completed and the deceased killed to facilitate the offender's flight. (citations omitted)
>
> 51 The "same transaction" requirement insists that the Crown prove that the killing occurred as part of a continuing series of events constituting a single transaction that establishes not only the killing but also the distinct offence of unlawful confinement. The "same transaction" requirement does not demand that the killing (murder) and predicate

> offence occur simultaneously, only that they be part of one continuous sequence of events forming a single transaction. (citations omitted)
>
> 52 The phrase "while committing or attempting to commit" in s. 231(5) requires that the killing be closely connected, temporally and causally, with the enumerated offence. …
>
> 53 To satisfy s. 231(5)(e), the confinement and the murder must constitute distinct criminal acts, that is to say, the act of confinement and the act of killing must not be one and the same. The "same transaction" requirement may be met even where the person killed and the person confined are not the same, provided the killing is closely connected, temporally and causally, with an enumerated offence. (citations omitted)
>
> 54 Finally, where two or more persons are alleged to be involved in a murder that is said to warrant classification as first degree murder under s. 231(5)(e), proof of their liability will depend on the manner of their participation, whether as co-perpetrators or s. 21 parties: …

[34] These principles have been consistently applied and both counsel provided helpful books of authority, including *R. v. Sundman*, 2022 SCC 31, and the Court's attention was also directed to the decisions of *R. v. White*, 2014 ONCA 64, and *R. v. Palmer-Coke*, 2019 ONCA 106.

[35] In an Ontario Court of Justice decision on a preliminary inquiry, Justice Borenstein of *R. v. Lee*, 2019 ONCJ 183, provided as follows at paras. 47 to 50:

> [47] In my view, a reasonable jury properly instructed could not reasonably find sufficient evidence of forcible confinement distinct from the confinement that momentarily occurred during the stabbing and which is necessary to elevate this charge from second- to first-degree murder.
>
> [48] This entire incident took about one minute, or less. It began with aggressive threats to a group of young people and then the focus turned to Isaiah when he tried to calm things down. Once the knives came out, Isiah ran up the hill. There are conflicting accounts of what specifically then

> occurred; Isaiah either ran and was chased, tackled by Lee and stabbed by Lee; ran, was chased, tackled by Lee and stabbed by MacIsaac; ran and turned around and was stabbed, or ran or was pushed and tripped and was then stabbed; one witnessed described Isiah either fall or tackled when Lee jumped on top of him and seemed to punch but, in reality, stabbed him.
>
> [49] Whichever version the jury is able to accept, there is no basis to find that there was the separate or distinct offence of forcible confinement or attempted forcible confinement. This is not because there was no confinement at the moment Isaiah was stabbed, but because any confinement that occurred was instantaneous and momentary and inextricably linked and integral to the stabbing. The video reveals that only 20 to 25 seconds passed from the time Isaiah began to run until the accused fled the scene.
>
> [50] For murder to be elevated to first-degree murder based on forcible confinement, the forcible confinement or attempted forcible confinement must be a distinct crime from the act of murder.

[36] That is consistent with *Harbottle* and *Parris*.

[37] The Courts in *White*, *Sundman*, *Parris*, and *Pritchard*, amongst others, all found differently.

[38] In summations, Crown counsel took the Court through the issues of manslaughter, second and first degree murder, and carefully reviewed the video evidence, and addressed the issue of aiding and abetting and relies upon *R. v. Biniaris*, 2000 SCC 15, to establish the required intent of the accused sufficient to be committed for second degree murder and further relying upon *Harbottle*, *Parris*, *Sundman*, and *White* has met its onus for commitment on the first degree murder.

[39] Mr. Chandler, on behalf of the accused, focussed the Court's attention on the video, disputes that his client had knowledge of N.K.'s intentions, and, while acknowledging that the accused confined and restrained the victim, this is without knowledge of the presence of a knife, that there was a brief moment of time, and the *mens rea* for party liability is not made out, and the committal should be limited to manslaughter or, if not manslaughter, rely upon *Lee* to find, at the most, second-degree murder.

[40] I apply the various principles, which I do not believe are in dispute, as follows.

[41] If the victim had been murdered at the point that the accused caught him and wrestled him to the ground and N.K. stabbed him, then it would be similar to *Lee* and it would be unlikely a jury or a trial judge would find reasonably sufficient evidence of forcible confinement distinct from the confinement that occurred contemporaneously to the stabbing.

[42] However, for the purpose of preliminary inquiry, this was not the case. Instead, the stabbing continued and crucially the accused got on his feet and punched the victim before he hobbled off. This act of punching continued the confinement and restraint. There is every indication that he left simply because he was injured and by his presence he continued to be involved if not to a lesser extent. However, the killing inextricably resulted directly from the confinement. This was all part of the same transaction but two distinct acts. See again para. 51 of *Parris*:

> 51 The "same transaction" requirement insists that the Crown prove that the killing occurred as part of a continuing series of events constituting a single transaction that

> establishes not only the killing but also the distinct offence of unlawful confinement: …

[43] Furthermore, even if the exact events where the accused was on the ground holding the victim and then stood and punched and left, it was only five or 10 seconds, to my mind, this is not an insignificant amount of time. To categorize it, it is significant enough. For the purpose of a preliminary inquiry in the *Shephard/Arcuri* standard, I am satisfied the Crown has met its onus upon it and there is sufficient evidence to justify committal for first degree murder by virtue of s. 231(5)(e), having met all the five components as set out in *Harbottle.*

[44] The accused is therefore committed for trial on the first-degree murder. Whether these components can be established beyond a reasonable doubt is left, of course, to the trial court.

[45] The accused remains in remand.

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WALKER, T.C.J.