Unofficial English Translation of the Judgment of the Court

|  |  |
| --- | --- |
| Picard c. R. | 2023 QCCA 1424 |
| COURT OF APPEAL |
|  |
| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | QUÉBEC |
| No.: | 200-10-003855-215 |
| (250-01-030378-185) |
|  |
| DATE: |  November 10, 2023 |
|  |
|  |
| CORAM: | THE HONOURABLE | JACQUES J. LEVESQUE, J.A.JOCELYN F. RANCOURT, J.A.GENEVIÈVE COTNAM, J.A. |
|  |
|  |
| DENIS PICARD |
| APPELANT – accused  |
| v. |
|  |
| HIS MAJESTY THE KING |
| RESPONDENT – Prosecutor  |
|  |
|  |
| JUDGMENT |
|  |
|  |

1. The appellant appeals from a first degree murder conviction entered on March 30, 2021, by a jury of the Superior Court, District of Kamouraska, following a trial presided by the Honourable Manon Lavoie.
2. He submits that the judge shifted the burden of proof by presenting the jury with an inappropriate decision tree. He argues that the instructions she gave regarding the essential elements of sexual assault (s. 271 *Cr. C*.) were unfair to him. In his view, the verdict should therefore be quashed and a new trial ordered.
3. For the reasons of Levesque J.A., with which Rancourt and Cotnam JJ.A. agree, **THE COURT**:
4. **GRANTS** the application for leave to appeal from a conviction that includes questions of fact;
5. **DISMISSES** the appeal.

|  |
| --- |
|  |
|  |  |
|  | JACQUES J. LEVESQUE, J.A. |
|  |  |
|  |  |
|  | JOCELYN F. RANCOURT, J.A. |
|  |  |
|  |  |
|  | GENEVIÈVE COTNAM, J.A. |
|  |
| Mtre Félix-Antoine T. DoyonMtre Kamy Pelletier-Khamphinith |
| LABRECQUE DOYON AVOCATS |
| For the appellant |
|  |
| Mtre Simon Blanchette |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS |
| For the respondent |
|  |
| Dates of hearing: | October 4, 2023 |

|  |
| --- |
|  |
|  |
| REASONS OF LEVESQUE, J.A. |
|  |
|  |

1. The appellant appeals from a first degree murder conviction entered on March 30, 2021, by a jury of the Superior Court, District of Kamouraska, following a trial presided by the Honourable Manon Lavoie.
2. He submits that the judge shifted the burden of proof by presenting the jury with an inappropriate decision tree. He also argues that the instructions she gave regarding the essential elements of sexual assault (s. 271 *Cr. C*.) were unfair to him. In his view, the verdict should therefore be quashed and a new trial ordered.
3. For the following reasons, I am of the view that the first degree murder conviction should be maintained and that the appeal must fail.

# Circumstances of the case

1. The appellant operated a residential painting business in La Pocatière from 2014 to 2016. In 2015, the victim solicited his services to paint the living room, kitchen, ceiling and cabinets of her apartment,[[1]](#footnote-1) where she still lived when she was murdered in her home on June 5, 2017. The appellant says that, on that day, around 3:40 p.m., he went to the apartment to obtain payment for work performed in 2015. He stayed there until about 4 p.m.
2. At around 4:05 p.m., when he returned to his home not far from the apartment, he was pressed with questions by his spouse, Sonia Castonguay. She reported that the appellant recounted the events to her as follows:

[translation]

And then, that’s when he told me, “Listen, I went to Metro and I saw a woman”.  He didn’t tell me the woman’s name, nothing. He said, “I saw a woman who owed me money for a painting contract”. He said, “She told me to come back in the afternoon, that she would pay me”. – So, I said, “O.K. Then what?” – “So”, he said, “I went to her place”. He said, “And, the woman didn’t have any money to pay me, and she told me, “Look, I don’t have money, but I’ll pay you with sex”. Then, I said, “What!” – Then he told me, “Listen, I said, ‘No, no, out of the question, I have a wife and...’” – Then he said, “She grabbed me, and I pushed her like this”. – You know, really around the throat. – He said, “I pushed her”. He said, “She insisted, and I took ... there was a flowerpot next to the door, the bedroom door, and”, he said, “I hit her with it”. He didn’t say how many times he hit her, and he, ... you know... he just said, “Look”, he said, “I don’t know what condition she’s in”.[[2]](#footnote-2)

1. Ms. Castonguay then called the police and Officer Martin Gagnon arrived at the residence around 5 p.m., accompanied by two police officers. Officer Gagnon was trying to find out what happened, while the appellant appeared to be in a panic and was saying he was in a major depression. Officer Gagnon recounted what happened as follows:

[translation]

So, Mr. Picard told us a bit about the sequence of events. He said that he had run into a woman at Metro who owed him money for a paint job and that the woman had asked him to come to her place. He said that he never does this, but he went this time. He told us that, once they got to her home, the woman started to undress, that she wanted to pay him with sex, and that he said he wasn’t interested and had a wife at home. Then after that, he said that it ended badly and that the woman was not all right. I wrote in my notes that he stated during this conversation that he had hit her in the head, but I can’t tell you exactly when.[[3]](#footnote-3)

1. The appellant then said he believed that [translation] “She is definitely not all right”.[[4]](#footnote-4)
2. When they arrived at the victim’s apartment, the police officers saw her body in the bedroom, lying spread-eagle on her back, bleeding profusely from her head. Her arms and legs were spread out, her face was toward the ceiling, and her lower body was bare. She was wearing only white socks, a short-sleeved cardigan, and a bra.
3. The evidence revealed that no signs of a break-in were apparent on the locks and doors of the apartment, which was clean and tidy. There were no signs of violence except in the bedroom.[[5]](#footnote-5)
4. On the right, there was a bloodstained wooden vase, and the dried flowers it had contained were dumped on the floor. Left of the door sat a small chair on which jeans had been placed inside out, and with a shoe in them.[[6]](#footnote-6) Further away, near the wall, stood a dresser with a vase holder and scattered potpourri, while the vase in question, which was made of thick glass and covered in blood, was near the victim’s left hand. There was also blood spatter on the wall.[[7]](#footnote-7) The victim’s left hand was bloody, but her right hand was clean.[[8]](#footnote-8) The bedspread was on the bed, folded in half, and had tissue papers and women’s underwear on it. Three pillows were near the back wall of the room.[[9]](#footnote-9)
5. The forensic biologist[[10]](#footnote-10) revealed that no blood was detected in the apartment except in the victim’s bedroom.[[11]](#footnote-11) The bamboo pot to the victim’s right was used to hit her at least once. It bore projected blood spatter that indicated high speed and violent impact, like the glass potpourri vase, based on the projected spatter on it from contact.[[12]](#footnote-12) There were at least four impact sites, including at least one at a height of about 50 cm from the floor. Another pattern showed another slightly higher site. A third site was located at an approximate height of 1.2 m and, finally, the last site was located where the victim was found on the floor, in her final position.[[13]](#footnote-13)
6. The appellant’s DNA was detected on the victim’s breasts and there was male DNA in the vaginal vestibule, but too little to perform a comparison, with none in the area of the vagina and the anus.[[14]](#footnote-14) Fine blood spatter on the victim’s lower stomach shows that she was struck at least once after she was undressed.[[15]](#footnote-15) There was no blood on the bedspread or the pillows.[[16]](#footnote-16)
7. The appellant was arrested for the victim’s murder at 5:19 p.m. by Officer Gagnon. While at the police station, the appellant allegedly stated, [translation] “I’m going to get 25 years!”[[17]](#footnote-17)
8. The police officers then observed a luminescent reaction on the appellant’s hands and tibias, suggesting the presence of blood.
9. The forensic biology analysis[[18]](#footnote-18) established the presence of the victim’s blood under and on the appellant’s grey socks, as well as in a stain soaked into her white socks.[[19]](#footnote-19) The victim’s profile mixed with the appellant’s was found on the front of his boxer shorts. The swabs of the blood traces inside his pants collected at his home showed that the blood was the victim’s.[[20]](#footnote-20) The swabs taken from the appellant’s knees and tibias revealed a mix of his profile and the victim’s.[[21]](#footnote-21) The appellant’s polo shirt was stained with 12 fine droplets of the victim’s blood.[[22]](#footnote-22)
10. It was admitted at trial that the verbal statements given by the appellant to Officer Gagnon were free and voluntary.

# The theories at issue at trial

1. The parties set out their respective theories and sent them to the trial judge. When she gave her instructions to the jurors, the trial judge presented them as follows:

[translation]

The prosecution’s position is that in June two thousand seventeen (2017), Colette Émond was living alone at 402 5th Avenue Mailloux, apartment 3, in La Pocatière. She was seventy-five (75) years old. On June fifth (5) two thousand seventeen (2017), in the afternoon, Denis Picard entered Colette Émond’s residence under false pretences. Denis Picard sexually assaulted Colette Émond in addition to hitting her several times in the head and causing her death. Colette Émond was found lifeless in her bedroom by Sûreté du Québec police officers later that afternoon.

The defence’s position is that on June fifth (5) two thousand seventeen (2017), Denis Picard committed unlawful acts against Ms. Émond, namely, hitting her with one or more blunt objects, causing her death. However, there is a reasonable doubt regarding whether, yes or no, Denis Picard formed the intention applicable to the crime of murder. The defence therefore asks that he be found guilty of manslaughter.

If, and only if, it must be concluded that there is no reasonable doubt as to the intention applicable to the crime of murder, the defence submits that Denis Picard cannot be found guilty of the first degree murder of Ms. Émond. This flows from the fact that, given the insufficiency of the evidence, the commission of the crime of sexual assault is not proved. Thus, only a verdict of second degree murder may be rendered.[[23]](#footnote-23)

#  Issues

1. The issues raised by the appellant are the following:
* Did the judge err by shifting the burden of proof in the decision tree by inviting the jury to ask, [translation] “Did Colette Émond consent to the sexual activity in question”?
* Did the judge err by summarizing the evidence unfairly when she instructed the jurors on the evidence of the essential elements of sexual assault?

# First ground

1. **Did the judge err by shifting the burden of proof in the decision tree by inviting the jury to ask, [translation] “Did Colette Émond consent to the sexual activity in question”?**
2. The appellant recalls that the central argument of his defence was rooted in the failure of the prosecution’s evidence to establish beyond a reasonable doubt that the victim did not consent to the sexual activity, which should have justified a verdict of second degree murder only.
3. While conceding that a decision tree cannot be considered to be as significant as the judge’s instructions to the jury, the appellant is of the opinion that the issues it sets out must clearly reflect the elements of the offence to be established, which must be proved beyond a reasonable doubt. Thus, the divergence observed between the judge’s verbal instructions and the fourth question suggested in the sexual assault decision tree shifted the burden of proof and created significant confusion in the minds of the jurors, necessarily causing him a serious prejudice.
4. Last, he notes that, at the pre-instruction conference, he had clearly explained the problem to the trial judge, who quickly dismissed his application for correction, even though counsel for the prosecution had expressed his agreement with the proposed measure.
5. The respondent submits that, on the contrary, the fourth question in the impugned decision tree is correctly formulated and must be assessed globally, while considering the instructions on the subject as a whole and their general message.
6. The respondent recalls that the words used and their sequence fall within the pure discretion of the judge. The fairness of the instructions is determined based on their applicable criteria. The decision tree must therefore be analyzed using a functional approach, based on the evidence as a whole and the judge’s instructions on the subject as a whole.
7. In the respondent’s view, there were no errors in the judge’s instructions concerning the sexual assault. The judge asked the jury several times to consider whether the prosecution had proved beyond a reasonable doubt that the victim did not consent to the sexual activity. The burden of proof therefore was not shifted.

# Preliminary observations

1. The appellant was indicted on the charge of having caused the death of the victim, thereby committing first degree murder, the indictable offence set out in s. 235 of the *Cr. C*.
2. It does not mention the underlying offence set out in s. 231(5)(b) *Cr. C.*
3. Nevertheless, the prosecution’s theory and the evidence it presented at trial sought to establish that, even without any premeditation, the murder should be considered first degree murder because the death was caused while the appellant was sexually assaulting the victim, contrary to the provisions of s. 271 *Cr. C*.
4. The appellant does not contest the reasonableness of the verdict rendered by the jury or the judge’s instructions concerning second degree murder. Moreover, for the purposes of the appeal, he assumes that the intent with respect to such a murder is proved beyond a reasonable doubt,[[24]](#footnote-24) it being admitted that the appellant’s act was an unlawful act that caused the victim's death.
5. I believe that it is helpful to reproduce as a schedule the decision trees prepared by the trial judge and provided to the jurors concerning the charges of first degree murder and sexual assault.
6. In Schedule B, the fourth question with respect to sexual assault is phrased in the positive: [translation] “Did the complainant consent to the sexual assault?” In the appellant’s view, this phrasing means that he has the onus of establishing on a balance of probabilities that the victim did not consent to the sexual activity. On the contrary, it is the prosecution that has the burden of proving beyond a reasonable doubt that the victim did not consent to such activity.
7. It should also be recalled that the evidence of sexual activity was almost completely circumstantial and that the appellant’s statements to his spouse, Sonia Castonguay, and Officer Gagnon could properly be considered by the jury, given the judge’s instructions on the subject and on the circumstantial evidence and how it could be used.

# Discussion

1. One of the primary functions of a trial judge presiding over a jury trial is to give appropriate instructions. Instructions are appropriate when the trial judge fulfils this obligation by helping the jurors understand the issues and explaining, as simply but also as effectively as possible, the legal principles to be applied to the facts that they choose to accept or reject.[[25]](#footnote-25)
2. At the instigation of the Honourable David Watt of the Ontario Superior Court of Justice, as he then was, the practice of providing juries with a decision tree for the essential elements of the offence was implemented by the Ontario Superior Court of Justice and later by the Quebec Superior Court.
3. As early as 2007, discussing the use of the decision tree and its content, Watt J. wrote:[[26]](#footnote-26)

Jurors must understand the factual issues that require decision, the legal principles that apply to those issues, and the evidence introduced at trial on those issues. Some of those legal principles relate to the essential elements of the offence charged and other offences that may be included in it.

1. He suggested the following approach:[[27]](#footnote-27)

The developmental approach can be applied to final instructions by taking advantage of the basic structure of any crime charged.

Every criminal offence consists of at least two essential elements. Each essential element requires a factual determination by the jury about whether that essential element has been proven beyond a reasonable doubt. The jury’s decision about each essential element has implications for further decisions and, in time, the final verdict.

Applying the developmental approach in organizing and composing final jury instructions involves several steps.

The first step is to divide the crime charged into its essential elements, then to reduce those essential elements into point-form statements that reflect their substance. After that, these point-form statements of the essential elements should be converted into a series of factual questions for the jurors to consider.

The next step involves the composition of the relevant legal instructions that govern the jurors’ response to each question. These instructions should include directions on what is required in law to establish the essential element to which the question relates, and explanations of any defence, justification or excuse relating to that essential element that has an air of reality to it.

After composition of the relevant legal principles that control the jurors’ response to a question, the trial judge should proceed to a fair, balanced and accurate review of the significant parts of the evidence relevant to the issues framed by the question, and relate that evidence to the issue and the positions of the parties, so that the jurors can appreciate the value and effect of the evidence.

Once the evidentiary review has been completed and the relationship of the evidence to the issue framed by the question made clear, the trial judge should move to instructions about the findings available to jurors in response to the question and the consequences of those findings for further deliberations and final verdicts. The jurors’ response to each question determines their next step in the deliberation process.

The questions, along with the available responses and their verdict consequences can be incorporated into a decision tree for jurors to use during their deliberations. A decision tree is a deliberation aid, a forensic flow chart that repeats each question posed in final instructions, shows the available responses, and displays the consequences of the available answers for further deliberations and final verdict.

1. It should be noted that the sexual assault decision tree (Schedule B) is consistent with the instructions set out in Watt J.’s manual[[28]](#footnote-28) and with the instructions provided by the National Judicial Institute, as the appellant in fact recognizes. It is a tested deliberation aid.[[29]](#footnote-29)
2. When she provided her instructions to the jurors, the judge first addressed the offence of murder and its constituent elements. She repeated that it was up to the prosecution to prove each element of the offence beyond a reasonable doubt.
3. After referring to the required intent to commit murder, the judge said the following:

[translation]

If you are not satisfied beyond a reasonable doubt that Denis Picard had one of the states of mind required for murder, either the intent to cause the death of Colette Émond or to cause her bodily harm which he knew was likely to cause death and was reckless as to whether death ensued or not, you must find Denis Picard not guilty of first degree murder, but guilty of manslaughter. Your deliberations will then be at an end.

See question 3, if you find that he did not have the intent, the verdict is there next to the “no”.

You then enter your decision on the count in the verdict form you have been given.

But if you are satisfied beyond a reasonable doubt that Denis Picard had one of the required intents to characterize Colette Émond’s death as murder, either the intent to cause her death or to cause her bodily harm which he knew was likely to cause her death and was reckless as to whether death ensued or not, you must continue your deliberations by asking yourselves the next question.

So, we move to the fourth question: Did Denis Picard sexually assault Colette Émond?

To answer this question, I’ve prepared another tree for you. So, with respect to sexual assault, I’ve prepared another tree for you because there are five (5) questions that must be answered for sexual assault.

Denis Picard is charged with having murdered Colette Émond while sexually assaulting her. As stated, murder is first degree murder when the death is caused while committing one of the specific offences designated in the *Criminal Code*. This offence is called the underlying offence to the murder.

In this case, the prosecution argues that it is first degree murder because the murder was committed during the commission of a sexual assault.[[30]](#footnote-30)

1. She continued as follows:

[translation]

You must examine the evidence with an open mind and without preconceived notions. You must render a decision based solely on the evidence, in accordance with my instructions on the applicable law. As with any offence, you must be satisfied beyond a reasonable doubt of the existence of each of the essential elements of the underlying offence.

If you have a doubt as to one of the essential elements of the underlying offence, then you cannot conclude that the murder was committed during the commission of an underlying offence, specifically, sexual assault.

To establish that Denis Picard committed the offence of sexual assault, the prosecution must prove beyond a reasonable doubt each of the following essential elements:

1. that Denis Picard touched Colette Émond directly or indirectly;

2. that Denis Picard intentionally touched Colette Émond;

3. that Denis Picard touched Colette Émond in circumstances of a sexual nature;

4. that Colette Émond did not consent to the sexual activity in question;

4. that Denis Picard knew that Colette Émond did not consent to the sexual activity in question;

A sufficient temporal connection and causal connection between the murder and the sexual assault must be established.[[31]](#footnote-31)

1. After discussing the first three elements of the offence of sexual assault and linking them to the evidence adduced, the judge addressed the fourth question as follows:

[translation]

... this leads to the fourth question:

Did Colette Émond consent to the sexual activity in question?

The prosecution must prove beyond a reasonable doubt that Colette Émond did not consent to the sexual activity in question. Consent means the voluntary agreement of the complainant to engage in the sexual activity in question. Consent must be given with respect to each of the acts that took place.

A complainant does not have to express his or her lack of consent by words or conduct. There is no consent unless Colette Émond consented in her mind to the sexual activity when it took place.[[32]](#footnote-32)

...

You have heard evidence that Colette Émond did not consent to the sexual activity in question. You must decide whether this evidence satisfies you beyond a reasonable doubt that Colette Émond did not consent. Examine all the evidence, including the circumstances surrounding the physical contact between Denis Picard and Colette Émond, to decide whether Colette Émond did not consent.

Take into account everything said and everything done, including evidence of ambiguous or contradictory conduct, as well as any other clue indicating Colette Émond’s state of mind at that time.

Here is the list of elements you can consider:

Colette Émond was found on the floor, spread eagle and lifeless;

Colette Émond was found undressed from the waist down, wearing only white socks, which were intact; her pants were inside out with the other beige sneaker, inside her bedroom;

you have the testimony of the expert Jacinthe Prévost, who adduced in evidence four (4) types of impact with blood splatter in the victim’s room;

you have the testimony of the pathologist Caroline Tanguay regarding at least five (5) blows the victim received;

you have Denis Picard’s DNA on Colette Émond’s breasts, on both breasts, specifically, under the sweater and the bra she was wearing at the time of the events;

you have the fine drop of blood on the victim’s skin, on her lower stomach, which proves, according to expert Jacinthe Prévost, that Colette Émond was hit at least once while she was undressed;

Alain St-Onge’s testimony regarding Denis Picard’s presence at his mother’s home in connection with payment for the paint job; and you have the crime scene photos, P-3 and P-8.

I repeat that this list is not an exhaustive list of the evidence that is potentially relevant. In addition, this evidence is removed from its context, and you must base your decision on your own analysis of the evidence.

It is up to you to decide to accept the evidence that you consider relevant and to reject irrelevant evidence, even if it is on this list.

If you are not satisfied beyond a reasonable doubt that Colette Émond did not consent to the sexual activity in question, you must conclude that Denis Picard did not commit sexual assault and you must find Denis Picard not guilty of first degree murder, but guilty of second degree murder, and then your deliberation will be over.

But, if you are satisfied beyond a reasonable doubt that Colette Émond did not consent to the sexual activity in question, then you must continue your deliberations by asking the following question, and here, I move to the fifth question:[[33]](#footnote-33)

...

You must determine whether or not the evidence establishes that Colette Émond's death and the offence of sexual assault are related to each other and were part of a continuous sequence of events.[[34]](#footnote-34)

...

If you are not satisfied beyond a reasonable doubt that the sexual assault and the murder of Colette Émond were part of a continuous sequence of events, you must find Denis Picard not guilty of first degree murder but guilty of second degree murder.[[35]](#footnote-35)

1. In *Hay*, the Supreme Court identified the principle applicable when reviewing a jury charge:

[47] When reviewing a jury charge, “[a]n appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole”: *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32. Where an impugned reference in a jury charge in isolation could be understood to be an incorrect statement of the law, an appeal court will not interfere if it is evident that, considering the charge as a whole, the jury would have been properly instructed: *ibid*., at paras. 3 and 24.

[48] Furthermore, although appeal courts will interfere when a jury has not been adequately instructed, a trial judge must be afforded a certain degree of flexibility in instructing the jury; see *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745 at para. 9 ...[[36]](#footnote-36)

1. This Court has also reviewed certain principles relating to the assessment of instructions given by a judge presiding over a jury trial:

[translation]

[35] It is common ground that the assessment of instructions requires a functional approach rather than a literal one. In other words, the appellate court must take “a functional approach to the instructions that were given, not an idealized approach to those instructions that might have been given”. An appellate court must approach the charge as a whole, considering the context of the trial, to determine not whether the instructions were perfect but whether they were proper in that they enabled the jury to judge the facts according to the applicable principles of law...[[37]](#footnote-37)

[References omitted.]

1. In *Daley*, the Supreme Court sets out the rule for assessing the adequacy of a trial judge’s charge to the jury:

[30] When considering the adequacy of a trial judge’s charge on these elements, it is important for appellate courts to keep in mind the following. The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.

[31] In determining the general sense which the words used have likely conveyed to the jury, the appellate tribunal will consider the charge as a whole. The standard that a trial judge’s instructions are to be held to is not perfection. The accused is entitled to a properly instructed jury, not a perfectly instructed jury: see *Jacquard*, at para. 2. It is the overall effect of the charge that matters.[[38]](#footnote-38)

[Emphasis added.]

1. Accordingly, I find that trial judge’s instructions, viewed from a functional approach and as a whole, were sufficient and allowed the jurors to properly decide the questions. In view of the verbal instructions that were given, the fourth question of the sexual assault decision tree, considered in light of the judge’s instructions as a whole, did not shift the burden of proof.
2. This ground of appeal raised by the appellant must therefore fail.

# Second ground

1. **Did the judge err by summarizing the evidence unfairly when she instructed the jurors on the evidence of the essential elements of sexual assault?**
2. The appellant is of the view that the judge implicitly and erroneously led the jury to reject the defence by essentially giving an opinion on the verdict.
3. Without impugning the judge’s impartiality, the appellant’s argument is based to some extent on the idea that the judge harboured a theory of the case that was different from the one held by the prosecution, yet consistent in terms of his guilt with respect to the offence of first degree murder. He alleges this way of seeing things influenced her instructions and may have had a direct influence on the jury and made the trial unfair to the appellant.
4. In support of his claim, he refers to four incidents that occurred during the trial: during the pre-hearing conference, during the pre-charge conference, during discussions after counsel’s submissions, and when the judge corrected the instructions following the prosecution’s remark regarding the sexual nature of the contact constituting the third element of the offence of sexual assault.
5. I do not believe it is necessary to discuss the incidents that occurred during the pre-hearing conference on March 11, 2021, or at the pre-charge conference, because each of these problems was resolved to the parties’ satisfaction after the discussions that took place and the remarks of counsel.
6. Thus, the appellant suffered no prejudice.
7. As for the incident that occurred after counsel’s submissions, it concerns the question put to the prosecution regarding whether it intended to [translation] “enhance” the statement already provided of its theory of the case. I see nothing improper about this question, which was no doubt justified by the appellant’s lateness in submitting the statement of his theory of the case, despite the judge’s earlier requests. Moreover, the appellant’s brief does not focus much on this aspect of the case; consequently, it may be deduced that he suffered no actual prejudice from it.
8. The appellant makes much of the fourth incident he raises to argue that the judge’s charge to the jury was unfair and, in his view, had an irremediable impact on trial fairness.
9. The appellant’s criticism concerns the part of the instructions dealing with the third element of the offence of sexual assault, that is, the sexual nature of the contact. The appellant sets out his argument as follows:

[translation]

[45] ... During jury instructions, the judge stated that to determine whether the prosecution had proved beyond a reasonable doubt that the victim was touched in a sexual context, the jurors could consider [translation] “the fact that the victim was **found** undressed from the waist down, wearing only white socks, which were intact; her sweater was also **lifted above her breasts**”. After the instructions, the parties discussed. The prosecution stated that [translation] “I thought I heard you say at some point in the summary that Ms. Émond was wearing a short-sleeved cardigan pushed up/over her breasts. I would like to point out to you that this was not my understanding of the evidence”. The judge replied as follows:

[translation]

I will tell you, listen, in reading it, **I drew an inference from the fact that there was touching under the bra and the sweater**, however, I agree with you. And the only place where I mentioned it is in question 4.3, second item. So, I agree to correct it. I will ask the jury not to consider this element, that her sweater was also lifted above her breasts

Although an inference can be drawn from this, although the Supreme Court allows it, **a judge can give an opinion on the facts** or on the credibility of the witnesses, **based heavily on the circumstances, if required by the circumstances**. A judge may also draw inferences, but I agree that we, I agree to correct it. O.K.? [Emphasis added.]

[46] The defence stated that he agreed with the Crown. The judge had the jury come back and told them the following:

[translation]

Second, I told you that her shirt was also lifted above her breasts. **This is an inference I drew**, I ask you not to consider it, but to continue to consider that Denis Picard’s DNA on both of Colette Émond’s breasts was under her sweater and the bra she was wearing at the time of the events.

In other words, what must not be considered, is that her sweater was also lifted above her breasts. Everything else is fine. I am only asking you not to consider the sweater that was also lifted above the breasts, because it is an inference, and it is better to avoid it. All right?

-----

[47] In retrospect, the above discussions support the notion that, from the start of the trial, the judge’s perspective on the case was different from the Crown’s. On the offence of sexual assault, the judge did not agree with the prosecution’s theory of the case.

[References omitted.]

1. The appellant faults the judge for failing to tell the jurors that they were not bound by her comments, which [translation] “objectively establishes that she gave her opinion in a veiled manner, that is, by failing to do so in a fully transparent and fair manner”.
2. It is important to recall the circumstances of the case. The appellant was facing a first degree murder charge that had to be made out under s. 231(5)(b) *Cr. C*. The appellant admitted that he had committed an unlawful act causing the death of the victim and, for the purposes of the appeal, he conceded that a verdict of second degree murder was not unreasonable.
3. The evidence on the sexual assault adduced by the prosecution was circumstantial, and the real issue in this regard centred on the fourth element of the offence, specifically, the victim’s lack of consent to the sexual activity.
4. The prosecution had the burden of proving beyond a reasonable doubt each of the elements of the offence appearing in the decision trees prepared by the judge (Schedules A and B) and sent to the jury. The appellant chose not to testify and called no witnesses. His contestation, and the theory he put forward, was that the prosecution had not discharged its burden and that, given the lack of proof beyond a reasonable doubt of the victim’s lack of consent, a reasonable doubt was created by the fact that the version the appellant gave to his spouse and to Officer Gagnon may be what actually happened. In other words, the accused’s guilt with respect to the sexual assault was not the only reasonable conclusion that the jurors could have drawn from the evidence as a whole.
5. The appellant insistently argues that the correction the judge made to her instructions following counsel’s remarks was not enough and therefore the error could have remained embedded in the jurors’ minds.
6. I am of the view that the appellant exaggerates the nature and scope of the incident by isolating it from its actual context, the evidence as a whole, and the judge’s instructions as a whole, which must be assessed in a comprehensive and functional manner.[[39]](#footnote-39) This is confirmed by referring to certain extracts from the judge's oral instructions:

[translation]

After the witnesses’ testimony, the filing of the evidence, and the arguments, it is also my job to explain to you the legal rules that you must follow and apply during your deliberations. As triers of fact, your first obligation is to examine the evidence and determine(?) the facts you consider credible. To do so, always examine the evidence as a whole.[[40]](#footnote-40)

...

As a matter of law, the judge can comment or express an opinion on the facts. However, if I choose to do so, you are not required to agree with me. It is up to you, not me, to determine what really happened in this case.[[41]](#footnote-41)

...

In summary, it is your obligation to apply to the facts you consider credible and the rules of law I explained to you.[[42]](#footnote-42)

...

It is also possible that my summary of a witness’s testimony contains errors. My references to the evidence have no purpose other than to refresh your memory and show you how certain pieces of evidence are related to the issues in dispute.

If my memory of the evidence is different from yours, you must rely on your own memory. It is your responsibility to determine which facts in evidence are credible by relying on your own memory, not mine and not that of counsel.

The law also allows me to comment or share my opinion with you regarding issues of fact. However, you are not required to share my conclusions; it is up to you, not me, to determine what really happened in this case.[[43]](#footnote-43)

...

The accused is not required to prove anything. More particularly, he is not required to prove that he is innocent of the offence he is charged with. It is always up to the prosecution to prove beyond a reasonable doubt that the accused is guilty. The prosecution must therefore prove Denis Picard’s guilt beyond a reasonable doubt and Denis Picard does not have to prove his innocence. You must find Denis Picard not guilty of the charge laid against him unless the prosecution has satisfied you beyond a reasonable doubt that he did indeed commit this offence.[[44]](#footnote-44)

...

You are the sole triers of fact, and to determine the facts you will base your verdict on, you must consider only the pieces of evidence that you have seen and heard here in the courtroom. You must also consider all these pieces of evidence as a whole. The purpose of these instructions is not to tell you what to decide, but how to decide.[[45]](#footnote-45)

...

You cannot arrive at a guilty verdict based on circumstantial evidence, unless you are satisfied beyond a reasonable doubt that the only reasonable conclusion that can be drawn from the evidence is that Denis Picard is guilty. The circumstantial evidence must exclude every other reasonable conclusion.

The question you must answer is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting a reasonable conclusion other than that Denis Picard is guilty.

Another reasonable conclusion must be based on the evidence or the absence of evidence, not on speculation. It must be reasonable, not merely possible. The prosecution need not negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of Denis Picard.[[46]](#footnote-46)

...

If, after having considered the evidence as a whole, you are satisfied beyond a reasonable doubt that Denis Picard’s guilt with respect to the offence he is charged with is the only logical conclusion that may be drawn, you must find Denis Picard guilty.

If, after having considered the evidence as a whole, you are not satisfied beyond a reasonable doubt that Denis Picard’s guilt with respect to the offence he is charged with is the only reasonable conclusion that may be drawn, you must find Denis Picard not guilty.[[47]](#footnote-47)

...

Denis Picard did not testify, and it is his most fundamental right to remain silent. Every accused has the right to remain silent at trial and is not required to testify.

At this stage, I remind you that the accused is not required to prove anything. More particularly, he is not required to prove that he is innocent of the offence he is charged with, because it is up to the prosecution to prove that Denis Picard is guilty beyond a reasonable doubt. The prosecution has the burden from the beginning to the end.

You cannot find Denis Picard guilty of an offence unless you are satisfied, after having examined the evidence as a whole, that his guilt has been proved beyond a reasonable doubt. To arrive at a verdict, you must not use Denis Picard’s silence as proof of his guilt.[[48]](#footnote-48)

...

In addition, to establish Denis Picard’s guilt on this count, the prosecution must prove each of the following essential elements, of which there are five (5), beyond a reasonable doubt:

1. Denis Picard committed an unlawful act;

2. Denis Picard’s unlawful act caused Colette Émond’s death;

3. Denis Picard formed the requisite intent for murder;

4. Denis Picard sexually assaulted Colette Émond;

5. The sexual assault and the murder of Colette Émond were part of a continuous sequence of events;

If you are not satisfied beyond a reasonable doubt that the prosecution has proved all the essential elements of the offence he is charged with, you must find Denis Picard not guilty of first degree murder. And, if you are satisfied beyond a reasonable doubt that the prosecution has proved all the essential elements of the offence he is charged with, you must [find] Denis Picard guilty of first degree murder.[[49]](#footnote-49)

...

I will now analyze each essential element that the prosecution must prove beyond a reasonable doubt. I will also link the pieces of evidence that relate to each of them for the sole purpose of helping you properly understand my explanations.

I remind you, however, that the probative value of the evidence is in your domain and yours alone. In mentioning this or that evidence, I am merely reminding you of what was said or filed during the trial without in any way whatsoever ruling on the value to assign it. It will be up to you to decide the probative value of these elements.[[50]](#footnote-50)

...

You must examine the evidence with an open mind and without preconceived notions. You must render a decision based solely on the evidence, in accordance with my instructions on the applicable law. As with any offence, you must be satisfied beyond a reasonable doubt of the existence of each of the essential elements of the underlying offence.

If you have a doubt as to one of the essential elements of the underlying offence, then you cannot conclude that the murder was committed during the commission of an underlying offence, specifically, sexual assault.

To establish that Denis Picard committed the offence of sexual assault, the prosecution must prove beyond a reasonable doubt each of the following essential elements:

1. that Denis Picard touched Colette Émond directly or indirectly;

2. that Denis Picard intentionally touched Colette Émond;

3. that Denis Picard touched Colette Émond in circumstances of a sexual nature;

4. that Colette Émond did not consent to the sexual activity in question;

5. that Denis Picard knew that Colette Émond did not consent to the sexual activity in question;

A sufficient temporal connection and causal connection between the murder and the sexual assault must be established. In addition, although the murder and sexual assault must be connected to each other and be part of the same continuous sequence of events, what is important is that it is a chain of independent events and not an offence of sexual assault that ended in murder.[[51]](#footnote-51)

...

Did Denis Picard touch Colette Émond in circumstances of a sexual nature?

The prosecution must prove beyond a reasonable doubt that Denis Picard touched Colette Émond in circumstances of a sexual nature and Colette Émond’s sexual integrity was violated.

To answer this question, you must ask yourself whether the sexual nature of the contact would be obvious to a reasonable observer.

To decide whether the physical contact took place in circumstances of a sexual nature and that Colette Émond’s physical integrity was violated, you must examine the evidence as a whole. For example, take into consideration the part of the body Denis Picard touched, the nature of the contact, and the situation in which it occurred. Take into account the words and gestures accompanying the contact or all other circumstances.

To decide whether Denis Picard touched Colette Émond in circumstances of a sexual nature, you must examine the evidence as a whole, including all the words and gestures in the circumstances.

The purpose for which Denis Picard touched Colette Émond can also help you decide if the contact was of a sexual nature. Here is the list of elements you can consider:

the fact that the victim was found undressed from the waist down, wearing only white socks, which were intact;

her sweater was also lifted above her breasts;

Denis Picard’s DNA on both of Colette Émond’s breasts, under her sweater or under the bra she was wearing at the time of the events;

Colette Émond’s DNA was found inside the front of Denis Picard’s boxer shorts, which he was wearing at the time of the events;

the biological substance may be Colette Émond’s vaginal secretions or saliva;

also, after analyzing Denis Picard’s boxer shorts at the time of the events, the expert Jacinthe Prévost confirmed that there was no sperm, but she found Denis Picard’s blood inside on the right buttock;

the trace of Colette Émond’s blood inside the jeans seized from Denis Picard’s home that confirm, according to the expert Jacinthe Prévost, that the blood was placed there from the inside, like when someone pulls up their pants with a bit of the victim’s blood on their hands or body;

You also have the fine drop of blood on the victim’s skin, on her lower stomach, which proves, according to expert Jacinthe Prévost, that Colette Émond was hit at least once while she was undressed;

in the vestibule, there is a small amount of male DNA, the genetic profile of which could not be identified;

you have Sonia Castonguay’s testimony on Denis Picard’s remarks;

you have the testimony of officers Martin Gagnon and Marjorie Drapeau on the arrest and on Denis Picard’s remarks;

there is no male DNA in the victim’s mouth, nor any sperm or blood;

no male DNA in the victim’s vagina;

no male DNA under the clothing found on the bed;

no sample from Denis Picard’s penis;

no male DNA on Colette Émond’s pants, in particular on the waist button, the zipper pull, or the buttonhole.

and you still have the crime scene photos P-3 and P-8.[[52]](#footnote-52)

...

... this leads to the fourth question:

Did Colette Émond consent to the sexual activity in question?[[53]](#footnote-53)

...

You have heard evidence that Colette Émond did not consent to the sexual activity in question. You must decide whether this evidence satisfies you beyond a reasonable doubt that Colette Émond did not consent. Examine all the evidence, including the circumstances surrounding the physical contact between Denis Picard and Colette Émond, to decide whether Colette Émond did not consent.

Take into account everything said and everything done, including evidence of ambiguous or contradictory conduct, as well as any other clue indicating Colette Émond’s state of mind at that time.

Here is the list of elements you can consider:

Colette Émond was found on the floor, spread eagle and lifeless;

Colette Émond was found undressed from the waist down, wearing only white socks, which were intact;

her pants were inside out with the other beige sneaker, inside her bedroom;

you have the testimony of the expert Jacinthe Prévost, who adduced in evidence four (4) types of impact with blood splatter in the victim’s room;

you have the testimony of the pathologist Caroline Tanguay regarding at least five (5) blows the victim received;

you have Denis Picard’s DNA on Colette Émond’s breasts, on both breasts, specifically, under the sweater and the bra she was wearing at the time of the events;

you have the fine drop of blood on the victim’s skin, on her lower stomach, which proves, according to expert Jacinthe Prévost, that Colette Émond was hit at least once while she was undressed;

Alain St-Onge’s testimony regarding Denis Picard’s presence at his mother’s home in connection with payment for the paint job;

and you have the crime scene photos P-3 and P-8.

I repeat that this list is not an exhaustive list of the evidence that is potentially relevant. In addition, this evidence is removed from its context, and you must base your decision on your own analysis of the evidence.

It is up to you to decide to accept the evidence that you consider relevant and to reject irrelevant evidence, even if it is on this list.

If you are not satisfied beyond a reasonable doubt that Colette Émond did not consent to the sexual activity in question, you must conclude that Denis Picard did not commit sexual assault and you must find Denis Picard not guilty of first degree murder, but guilty of second degree murder, and then your deliberation will be over.

But, if you are satisfied beyond a reasonable doubt that Colette Émond did not consent to the sexual activity in question, then you must continue your deliberations by asking the following question, and here, I move to the fifth question:[[54]](#footnote-54)

...

But, the accused need not formally present any defence whatsoever for there to be a defence. You must not approach your deliberations by telling yourself that there is no defence. The defence to the charge as laid may emerge even from the prosecution’s evidence or lack of evidence.

Now, I am going to talk to you about the parties’ positions. The prosecution’s position is that in June two thousand seventeen (2017), Colette Émond was living alone at 402 5th Avenue Mailloux, apartment 3, in La Pocatière. She was seventy-five (75).

On June fifth (5) two thousand seventeen (2017), in the afternoon, Denis Picard entered Colette Émond’s residence under false pretences. Denis Picard sexually assaulted Colette Émond in addition to hitting her several times in the head and causing her death. Colette Émond was found lifeless in her bedroom by Sûreté du Québec police officers later that afternoon.

The defence’s position is that on June fifth (5) two thousand seventeen (2017), Denis Picard committed unlawful acts against Ms. Émond, namely, hitting her with one or more blunt objects, causing her death.

However, there is a reasonable doubt regarding whether, yes or no, Denis Picard formed the intention applicable to the crime of murder. The defence therefore asks that he be found guilty of manslaughter.

If, and only if, it must be concluded that there is no reasonable doubt as to the intention applicable to the crime of murder, the defence submits that Denis Picard cannot be found guilty of the first degree murder of Ms. Émond. This flows from the fact that, given the insufficiency of the evidence, the commission of the crime of sexual assault is not proved. Thus, only a verdict of second degree murder may be rendered. There you have the two (2) parties’ positions, from what they submitted before you.[[55]](#footnote-55)

1. In *Thatcher*,[[56]](#footnote-56) Dickson J. recalled that “It is ... inappropriate to try to measure the fairness of the charge by reference to quantity”.
2. The trial judge properly fulfilled her role by giving appropriate instructions that decanted and simplified the jurors’ task.[[57]](#footnote-57) They were objective instructions that ensured the accused was given a fair trial, because the judge addressed all the issues actually at issue.[[58]](#footnote-58) As such, they were “accurate and sufficient” instructions.[[59]](#footnote-59)
3. The Court notes that, at the post-instructions conference, the appellant’s counsel made no comments regarding the instructions given except concerning the phrasing of the fourth question of the sexual assault decision tree. Although this is not determinative, the fact remains that it is an important factor in the assessment of the quality of the grounds raised.
4. I therefore conclude, on the second ground, that the appellant is wrong in claiming that the judge’s charge to the jury was unfair, and that the incidents to which he refers, even when assessed together, do not establish unfair treatment that could have caused him any prejudice.
5. Therefore, I would grant the application for leave to appeal and dismiss the appeal.

|  |
| --- |
|  |
|  |  |
| JACQUES J. LEVESQUE, J.A. |

SCHEDULE A



***Her Majesty the Queen v. Denis Picard***

**DECISION TREE**

**1st DEGREE MURDER (s. 231(5) *Cr. C*.)**

|  |  |  |
| --- | --- | --- |
| (1) Did Denis Picard commit an unlawful act? |  |  |
| **Yes** |  |  |
| (2) Did Denis Picard’s unlawful act cause Colette Émond’s death? |  |  |
| **Yes** |  |  |
| (3) Did Denis Picard form the requisite intent for murder? | **No** | **Verdict: Not guilty of first degree murder, but guilty of manslaughter** |
| **Yes** |  |  |
| (4) Did Denis Picard sexually assault Colette Émond? (See Schedule) | **No** | **Verdict: Not guilty of first degree murder, but guilty of second degree murder** |
| **Yes** |  |  |
| (5) Was the sexual assault and murder of Colette Émond part of a continuous sequence of events? | **No** | **Verdict: Not guilty of first degree murder, but guilty of second degree murder** |
| **Yes** |  |  |
| **Verdict: Guilty of first degree murder** |  |  |

SCHEDULE B

***Her Majesty the Queen v. Denis Picard***

**SCHEDULE**

**SEXUAL ASSAULT (s. 271 *Cr. C*.)**

|  |  |  |
| --- | --- | --- |
| (1) Did Denis Picard touch Colette Émond directly or indirectly? | **No** | No sexual assault.**Verdict: Not guilty of first degree murder, but guilty of second degree murder** |
| **Yes** |  |  |
| (2) Did Denis Picard intentionally touch Colette Émond? | **No** | No sexual assault.**Verdict: Not guilty of first degree murder, but guilty of second degree murder** |
| **Yes** |  |  |
| (3) Did Denis Picard touch Colette Émond in circumstances of a sexual nature? | **No** | No sexual assault.**Verdict: Not guilty of first degree murder, but guilty of second degree murder** |
| **Yes** |  |  |
| (4) Did Colette Émond consent to the sexual activity in question? | **Yes** | No sexual assault.**Verdict: Not guilty of first degree murder, but guilty of second degree murder** |
| **No** |  |  |
| (5) Did Denis Picard know that Colette Émond did not consent to the sexual activity in question? | **No** | No sexual assault.**Verdict: Not guilty of first degree murder, but guilty of second degree murder** |
| **Yes** |  |  |
| Sexual assault is proved.Return to Question 5 of the Decision Tree. |  |  |

1. In August 2015, the victim had paid the appellant a total of $697. [↑](#footnote-ref-1)
2. Examination of Sonia Castonguay (18 March 2021) at 176, line 14, to 177, line 10. The handwritten notes she took at the time (exhibit P-6) are to the same effect. [↑](#footnote-ref-2)
3. Testimony of Martin Gagnon (16 March 2021) at 29, line 11, to 30, line 2. [↑](#footnote-ref-3)
4. *Ibid.* at 32, line 17*.* [↑](#footnote-ref-4)
5. Testimony of Philippe Martin (16 March 2021) at 125-127, 133 and 143. [↑](#footnote-ref-5)
6. *Ibid*. at 150–153; testimony of Léna Isabelle (18 March 2021) at 141; Exhibit P-8, Album photos #2 (6 June 2017). [↑](#footnote-ref-6)
7. Testimony of Léna Isabelle (18 March 2021) at 141; testimony of Sébastien Lord (19 March 2021) at 12; testimony of Frédéric Gourde (19 March 2021) at 37; Exhibit P-8, Album photos #2 (6 June 2017). [↑](#footnote-ref-7)
8. Testimony of Caroline Tanguay (18 March 2021) at 22. [↑](#footnote-ref-8)
9. Testimony of Léna Isabelle (18 March 2021) at 141–142; Exhibit P-3, Album photos #1 (6 June 2017). [↑](#footnote-ref-9)
10. Exhibit I-1B, Biologist's report (10 November 2017). [↑](#footnote-ref-10)
11. Testimony of Jacinthe Prévost (22 March 2021) at 52–55. [↑](#footnote-ref-11)
12. *Ibid*. at 56–59. [↑](#footnote-ref-12)
13. *Ibid*. at 90–91 and 104. [↑](#footnote-ref-13)
14. *Ibid*. at 113–116. [↑](#footnote-ref-14)
15. *Ibid*. at 70–72. [↑](#footnote-ref-15)
16. *Ibid*. at 99. [↑](#footnote-ref-16)
17. Testimony of Martin Gagnon (16 March 2021) at 46. [↑](#footnote-ref-17)
18. Exhibit I-1B, Biologist's report (10 November 2017). [↑](#footnote-ref-18)
19. Testimony of Jacinthe Prévost (22 March 2021) at 48. [↑](#footnote-ref-19)
20. *Ibid*. at 118–121. [↑](#footnote-ref-20)
21. *Ibid*. at 140. [↑](#footnote-ref-21)
22. *Ibid*. at 134–135. [↑](#footnote-ref-22)
23. Final instructions (29 March 2021) at 123, line 7, to 124, line 18. [↑](#footnote-ref-23)
24. Arguments of the appellant at para. 27, footnote 40. [↑](#footnote-ref-24)
25. *Latortue c. R*., 2014 QCCA 198 at para. 38, leave to appeal to SCC refused, 35805 (14 August 2014) citing *R. v. Hay*, 2013 SCC 61 at paras. 47–48. See also *R. v. Pickton*, 2010 SCC 32 at para. 10. [↑](#footnote-ref-25)
26. David Watt, *Helping Jurors Understand*, 1st ed. (Toronto: Thomson Carswell, 2007) at 204. [↑](#footnote-ref-26)
27. *Ibid*. at 205 and 206. [↑](#footnote-ref-27)
28. David Watt, *Watt’s Manual of Criminal Jury Instructions*, 2nd ed. (Carswell, 2015) at 598–602. [↑](#footnote-ref-28)
29. *Gabriel c. R*., 2020 QCCA 1210 at para. 163, leave to appeal to SCC refused, 39443 (18 March 2021) and 39658 (29 September 2021), citing *R. v. Dyce*, 2016 ONCA 397 at para. 4. See also Martin Vauclair & Tristan Desjardins, *Traité général de preuve et de procédure pénales*, 30th ed. (Yvon Blais, 2023) at no. 33.8, 891–892; David Watt, *Watt’s Manual of Criminal Jury Instructions*, *supra* note 28 at 1264. [↑](#footnote-ref-29)
30. Final instructions (29 March 2021) at 98, line 4, to 100, line 2. [↑](#footnote-ref-30)
31. *Ibid*. at 100, line 17, to 101, line 21. [↑](#footnote-ref-31)
32. *Ibid*. at 111, line 16, to 112, line 7. [↑](#footnote-ref-32)
33. *Ibid*. at 113, line 2, to 115, line 18. [↑](#footnote-ref-33)
34. *Ibid.* at 119, lines 11–16*.* [↑](#footnote-ref-34)
35. *Ibid.* at 121, lines 3–9. [↑](#footnote-ref-35)
36. *R. v. Hay*, 2013 SCC 61 at paras. 47–48. [↑](#footnote-ref-36)
37. *Delisle c. R.*, 2013 QCCA 952 at para. 35, leave to appeal to SCC refused, 35491 (12 December 2013). [↑](#footnote-ref-37)
38. *R. v. Daley*, 2007 SCC 53 at paras. 30–31, citing *R. v. Jacquard*, [1997] 1 SCR 314. [↑](#footnote-ref-38)
39. *Morin c. R.*, 2009 QCCA 1131. [↑](#footnote-ref-39)
40. Final instructions, 29 March 2021 at 7, line 20, to 8, line 3. [↑](#footnote-ref-40)
41. *Ibid*. at 8, line 22, to 9, line 2. [↑](#footnote-ref-41)
42. *Ibid*. at 10, lines 19–21. [↑](#footnote-ref-42)
43. *Ibid*. at 15, line 15 to 16, line 8. [↑](#footnote-ref-43)
44. *Ibid*. at 20, line 20, to 21, line 4. [↑](#footnote-ref-44)
45. *Ibid*. at 27, lines 10–18. [↑](#footnote-ref-45)
46. *Ibid*. at 31, line 17, to 32, line 1. [↑](#footnote-ref-46)
47. *Ibid*. at 32, lines 10–21. [↑](#footnote-ref-47)
48. *Ibid*. at 39, lines 3–22. [↑](#footnote-ref-48)
49. *Ibid*. at 89, line 21, to 90, line 19. [↑](#footnote-ref-49)
50. *Ibid*. at 91, lines 2–15. [↑](#footnote-ref-50)
51. *Ibid*. at 100, line 17 to 102, line 3. [↑](#footnote-ref-51)
52. *Ibid.* at 107, line 13 to 110, line 19. [↑](#footnote-ref-52)
53. *Ibid.* at 111, line 16–19. [↑](#footnote-ref-53)
54. *Ibid*. at 113, line 2 to 115, line 18. [↑](#footnote-ref-54)
55. *Ibid*. at 122, line 23, to 124, line 20. [↑](#footnote-ref-55)
56. *R. v. Thatcher*, [1987] 1 SCR 652 at para. 86. [↑](#footnote-ref-56)
57. *R. v. Jacquard*, [1997] 1 SCR 314. [↑](#footnote-ref-57)
58. *R. v. Goforth*, 2022 SCC 25 at para. 52. See also *Thandapanithesigar c. R*., 2021 QCCA 171 at para. 79. [↑](#footnote-ref-58)
59. *R. v. Abdullahi*, 2023 SCC 19. [↑](#footnote-ref-59)