WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5 or 486.6 of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2.1) The offences for the purposes of subsection (2) are
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> > (a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
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> > (b) a terrorism offence;
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> > (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
> >
> > (d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).
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> (3) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(3.1) An order made under this section does not apply in respect of the disclosure of information by the victim, witness or justice system participant when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim, or witness or justice system participant.

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(5.1) If the prosecutor makes an application for an order under subsection (1) or (2), the judge or justice shall

(a) if the victim, witness or justice system participant is present, inquire of them if they wish to be the subject of the order;

(b) if the victim, witness or justice system participant is not present, inquire of the prosecutor if, before the application was made, they determined whether the victim, witness or justice system participant wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (8.2).

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(8.1) If an order is made, the judge or justice shall, as soon as feasible, inform the victims, witnesses and justice system participants who are

the subject of that order of its existence and of their right to apply to revoke or vary it.

(8.2) If the prosecutor makes the application, they shall, as soon as feasible after the judge or justice makes the order, inform the judge or justice that they have

(a) informed the victims, witnesses and justice system participants who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(c) informed them of their right to apply to revoke or vary the order.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

486.6 (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bush, 2024 ONCA 469
DATE: 20240613
DOCKET: C66670

Nordheimer, Coroza and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Ian Bush

Appellant

Mark Halfyard and Samantha Bondoux, for the appellant

Gregory J. Tweney, for the respondent

Heard: March 5, 2024

On appeal from the conviction entered on May 17, 2017 by Justice C. McKinnon of the Superior Court of Justice, sitting with a jury.

George J.A.:

[1] On June 30, 2007, Alban Garon, a former Chief Justice of the Tax Court of Canada, his wife Raymonde Garon, and their neighbour, Marie-Claire Beniskos, were found dead in the Garons' Ottawa-area apartment with plastic bags affixed over their heads. Twine was tied around each of their necks which was also attached to their ankles. They all died from asphyxiation. Mr. Garon's neck had a "hangman's noose" around it, his arms were bound behind his back, and he had

injuries to his head that were consistent with being struck with a blunt instrument. The Garons' credit cards were missing.

[2] Several years later, in 2015, the appellant was charged with three counts of first-degree murder. He was convicted of all three counts and now appeals on two grounds: 1) the trial judge erred by admitting evidence that suggested the appellant was planning other murders over the period between the Garon murders and his arrest, and 2) the trial judge erred by instructing the jury to convict the appellant of all three counts of first-degree murder if they found he committed a planned and deliberate murder of any one victim.

[3] For the reasons that follow, I find that the trial judge erred by admitting into evidence the contents of a bag seized from the appellant's residence without analyzing the probative value and prejudicial effect of each item in the bag individually. This was essential given the risk that the jury would misuse this evidence by concluding the appellant was the type of person who would commit the Garon murders. The trial judge also erred by instructing the jury that if they found the appellant committed a planned and deliberate murder of any one of the victims, they then had to find him guilty on all three counts.

[4] However, despite these errors, the evidence against the appellant was so overwhelming that I would apply the curative proviso and dismiss the appeal.

BACKGROUND FACTS

(1) Appellant's Views on the Canada Revenue Agency ("CRA") and Tax Court of Canada

[5] The appellant had a combative relationship with the CRA dating back to the early 1990's. He did not file returns for several of those years. For those years in which he did file returns, he was reassessed for business expenses claimed without supporting documentation. By November 1995 the appellant owed nearly $18,000 arising from various reassessments. This caused the appellant to write many angry and profanity laced letters to the CRA, some of which referred to it as "Extortion Canada, Shakedown Division".

[6] The appellant, after filing formal objections to his 1992 and 1993 tax assessments, appealed to the Tax Court of Canada. The appellant did not attend his appeal hearing on January 16, 2001, which led to his appeal being dismissed.

[7] On July 30, 2001, the appellant faxed a letter to the Tax Court of Canada, addressed to then Chief Justice Garon. The letterhead included a scales of justice symbol and the words "High Court of Humanitarian Justice". The letter, purporting to be a court summons, requested Chief Justice Garon's attendance at the appellant's residence, noting that the failure to do so would result in the Tax Court's prior decisions made with respect to the appellant being nullified.

[8] Then, in 2006, the appellant was informed by the CRA that his company was being audited due to inadequate business records which led to him owing nearly $9,500 in federal taxes.

[9] The appellant's disdain for the taxation system was known to many, including his family. The appellant's views were also evident in entries in notebooks seized from his residence, which included the following passages: "When government lays taxes on the people not required by the urgent, public necessity, and sound public policy it is an instrument of tyranny"; "The state is your enemy"; "The government has no right to tax"; and, "Must hold government accountable … it's your money. Take it back by force". Similar slogans appeared on business cards found in the appellant's home.

(2) Evidence at Trial

[10] At trial, the Crown presented a significant amount of circumstantial evidence. This included a video from the transit station near the victims' apartment showing a man – identified as the appellant by his son – carrying items later found in the appellant's home, walking towards the Garons' apartment complex on the day of the murders.

[11] The trial judge admitted several hearsay statements made by Mrs. Garon in the days leading up to the murders. For instance, the jury was told that Mrs. Garon heard a knock at her apartment door on Wednesday, June 27, 2007, and that when

she opened the door she was met by a man who identified himself as a courier. The would-be-courier said he had a package for her, and asked if she was Mrs. Garon. When she stated that she was, the man asked if her husband, former Chief Justice Garon, was home. When Mrs. Garon advised the man that her husband was not home, he told her that he had left the package in his truck and that he was too busy to retrieve it and return to her unit. While Mrs. Garon offered to go downstairs and receive the package at his truck, the man refused saying that he was rushed for time and would return the following day.

[12] Julio Santa Marta, employed to perform general maintenance at the Garon's apartment complex, testified that he encountered an individual matching the appellant's description in the elevator on the day of the murders. According to Mr. Santa Marta, the individual was carrying a bag which matched the appearance of a bag later seized at the appellant's home.

[13] During the initial investigation of the crime scene, police collected 16 swabs of blood from three separate areas of the apartment and submitted them to the Center of Forensic Sciences ("CFS") for DNA testing. Most of the samples matched former Chief Justice Garon, but a diluted red drip stain near the coffee table had a mixture of DNA from at least two people. Former Chief Justice Garon was identified as the major DNA profile in the sample, while Mrs. Garon and Ms. Beniskos were each excluded as the source of the second minor DNA in the sample. After the execution of a DNA warrant in February 2015, the appellant's

blood was collected and submitted to the CFS for comparison against the results obtained in the initial investigation. The appellant could not be excluded as the minor contributor in the diluted red drip stain sample, with the probability of a coincidental match being 1 in 13,000.[1]

[14] The officers investigating the initial crime scene used Swiffer pads to collect hair and fiber from the apartment floor. They recovered a body hair root in the living room, near the bodies, which had sufficient DNA to determine a profile. The appellant was identified as the source of the hair. A forensic biologist, Brian Peck, testified that there was nothing distinguishing the DNA profile from the body hair from the DNA profile in the diluted red stain. In other words, the DNA in both samples came from the same person.

[15] There was also evidence that the appellant owned a pair of New Balance running shoes and that, at the crime scene, there were shoe impressions in blood that appeared to correspond with this brand and style of shoe.

[16] The police executed two search warrants at the appellant's home. The first took place in December 2014 when the police discovered and seized a black leather bag in the appellant's basement, which was referred to at trial as a "murder

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[1] The minor profile in the diluted red drip stain sample also matched a second person, Mr. Antony Thavaratnam, although Mr. Thavaratnam testified that he had only visited Ottawa in 2009. The jury heard from Mr. Thavaratnam and the jury instructions included reference to the fact that the DNA sample could not exclude both the appellant and Mr. Thavaratnam.

bag" (the "Murder Bag"). This bag contained a number of items, including a sawed off .22 calibre rifle with a magazine and bullets, an imitation firearm made of wood, a large hunting knife, a folding knife, a pellet gun, a heavy metal bar with a grip at one end made of tape, blue latex gloves, yellow dish gloves, several types of rope including yellow nylon rope, duct tape, two plastic bags with warning labels, and the appellant's black fanny pack (which was visible in the surveillance on the day of the murders, and which his family identified as belonging to the appellant). The police also found several "calling cards" with a "Cangeld" logo on one side and on the other slogans such as "Democracy in Action", and "Tyranny of the Bureaucrats can only be overcome by the people, not by political hacks". The police also located a number of other items in the appellant's home, including a spool of twine. Forensic analysis determined that the twine used to bind the victims either originated from the spool found in the appellant's home or was indistinguishable in construction.

[17] The second search warrant was executed at the appellant's home in January 2015 when the police located and seized several fake business cards purporting to be from Ottawa Hydro, the RCMP and DHL Courier Services. Some of the business cards included pictures of the appellant. All appeared to be homemade.

[18] The police also found a notebook which included an entry titled "The Process" (the "Process List") which purportedly listed the steps required to commit

a home invasion robbery and a four-page novel outline describing the appellant's hatred of government.

[19] The jury heard that the appellant was under considerable financial stress, which was alleged to be a trigger and motive for the murders. There was also evidence that the appellant was very strong and had a working knowledge of ropes and knots.

ANALYSIS

(1) Admissibility of Items Seized from the Appellant's Home

[20] The appellant argues that the trial judge erred by admitting evidence suggesting the appellant was planning other murders over the period since the Garon murders, or, in the alternative, erred by failing to give a sufficiently robust limiting instruction.

[21] At trial, the appellant's counsel sought to exclude all of the evidence seized by the police at the appellant's home, including the Murder Bag, the appellant's notebooks, and the Process List. Defence counsel argued that there was no factual or legal nexus, given the passage of time, between the property seized in 2014 and 2015 and the murders in 2007. The trial judge, who admitted the evidence, explained his decision as follows:

> In my view, the items found are highly relevant and probative to the Crown theory that the accused had a particular animus directed against the tax system, as well

> as the enforcement and payment of taxes. The deceased Alban Garon was situated at the apex of the tax system, as Chief Justice of the Tax Court of Canada. The accused's writings are highly relevant to motive.
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> Respecting the items found in the black briefcase, the item that links the accused to the homicides is the "fanny pack" found inside the briefcase. The fanny pack found in 2014 is identified to be the fanny pack seen in the OC Transpo video footage, which depicts an individual walking from the Hurdman station at approximately 10:18 a.m. on June 29, 2007 towards the Riviera apartments where the Garons resided, and returning at 11:19 a.m. That individual has been identified by the accused's own son as being the accused. He also identified the "fanny pack" as belonging to his father.
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> The other contents of the briefcase are highly probative of the Crown theory that the assailant had the means to ensure the silence and obedience of the victims, the binding of the victims, and the severe bludgeoning of the victims, particularly Alban Garon. The rubber gloves are consistent with evidence at the scene which indicated that blood in the carpet near the body of the victims had been washed. The twine used to bind the victims was determined to either have originated from one of the spools found in the basement of the accused's residence or from another twine "with indistinguishable construction". Found in a computer laptop bag is a notebook with the "Process" list, which is consistent with the method of the execution of the crimes committed on June 29, 2007.

[22] On appeal, the appellant challenges the admission of: (1) the Murder Bag, including the items contained in it; (2) the appellant's notebook containing the Process List; and, (3) the appellant's novel outline ("Novel Outline") in which he expresses hostility towards taxation and government. The appellant concedes that much of this evidence had some probative value, and that it may have been

possible to parse it so as to avoid unduly prejudicing him, but argues that their combined effect made it certain that the jury would believe he was planning, or had committed, similar crimes since the Garon murders. In other words, this evidence would have led the jury to infer that the appellant was a dangerous person with a propensity to commit the Garon murders, thereby ensuring his conviction. The appellant highlights the fact that that no mid-trial instruction was given, and that the trial judge's "terse" instruction in his jury charge was insufficient. It is worth noting that the appellant's trial counsel did not object to, and in fact agreed with, the trial judge's instruction on this point, which was:

> [The Crown] commented that [the appellant] was "improving on his arsenal" by the inclusion of duct tape in the black bag. I instruct you that the only use you may make of the contents of the bag is to relate them, as you may see fit, to the specific charges in this case. You are not permitted to speculate as to any other purpose the contents of the bag might have.

[23] In my view, the trial judge should not have conducted what amounted to an "all or nothing" approach to the admissibility of the bag and its contents. While the trial judge did consider the probative value of some individual pieces of evidence, specifically the rubber gloves and the twine, he did not consider others which could have had a highly prejudicial effect. He should have, therefore, isolated the individual items seized and analyzed the probative value and prejudicial effect for each one individually.

[24] This, in my view, was necessary because the Murder Bag was not the bag the appellant was carrying when he was seen on the transit video near the Garons' apartment on the day of the murders (a different bag, also found in the appellant's home, is what is seen on the video). And, while there was a clear connection between the leather bag and the appellant, many of the items found in the bag were not shown to have any forensic connection to the Garons' apartment or the murders.

[25] The danger in admitting the entire contents of the bag, together with the Process List and Novel Outline, was exacerbated by Crown counsel's closing in which he repeatedly referred to the Murder Bag as evidence of the appellant's guilt

[26] There was a significant risk that the jury would misuse this evidence by concluding that the appellant was the type of person who would commit the Garon murders. In fact, the Crown's closing came perilously close to specifically asking the jury to use it for just that purpose. Without a sufficient limiting instruction, the impugned evidence also risked distracting the jurors by placing their focus on other, uncharged, criminal conduct.

[27] Even when evidence has a permissible use, if it also incidentally exposes the general bad character of an accused – which it did here – a trial judge must balance the probative value of the evidence against its prejudicial effect: *R. v.*

G.(S.G.), [1997] 2 S.C.R. 716, at paras. 65, 69; *R. v. O.R.,* 2015 ONCA 814, 333 C.C.C. (3d) 367, at paras. 15, 24-26.

[28] And even if a proper analysis were undertaken, resulting in the leather bag and all of its contents being admitted, it was incumbent on the trial judge to provide a sufficiently pointed limiting instruction in the final charge; one that described the evidence to which the instruction applied and clearly delineated the permissible and impermissible uses of that evidence: *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 691, 693-694. Such an instruction would necessarily direct the jury to not: (1) punish the accused for past misconduct, or (2) reason from general disposition to guilt.

[29] The trial judge's instruction did not achieve these two objectives and therefore did not go far enough to abate the risks present here.

(2) Sufficiency of the Trial Judge's instruction on First-Degree Murder

[30] The appellant argues that the trial judge erred by telling the jury that if they found the appellant committed a planned and deliberate murder of any one of the victims, they had to then find him guilty on all three counts:

> Dealing with planning and deliberation, as a matter of law, I instruct you that if an individual plans and deliberates upon the crime of murder involving one individual and in the course of carrying out that crime, kills two bystanders, the individual is guilty of first degree murder relating to all three individuals.
>
> In other words, if you find that Ian Bush planned and deliberated upon the murder of Alban Garon, but did not

> plan and deliberate on the murder of Raymonde Garon and Marie-Claire Beniskos, it matters not. The perpetrator needs only plan and deliberate upon the murder of one. If three are murdered, the perpetrator is guilty of first degree murder involving all three.
>
> …
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> Bear in mind that there need only be planning and deliberation in relation to one victim, not all three. If there is planning and deliberation in relation to one, then the individual is responsible for all three, as I explained earlier.

[31] I agree with the appellant that the trial judge erred in providing this instruction. First of all, this was not a case of transferred intent. As Watt J.A. explained in *R. v. Gordon*, 2009 ONCA 170, 241 C.C.C. (3d) 388, the doctrine of transferred intent "applies when an injury intended for one falls on another by accident" or where "the harm that follows is of the same legal kind as that intended"*: Gordon*, at para. 42. The Supreme Court considered this issue in the context of first-degree murder in *R. v. Droste*, [1984] 1 S.C.R. 208, holding that where a planned and deliberate act carried out to kill an intended target actually kills an unintended target, the act is still premeditated and would be first degree murder: at para. 28. This applies only where the act leading to the death of the third party was intended to be directed against the target.

[32] As the evidence here could not have supported such a conclusion, the doctrine of transferred intent did not apply.

[33] The trial judge needed to instruct the jury in accordance with the principles set out in *R. v. Ching*, 2019 ONCA 619, 378 C.C.C. (3d) 284. In *Ching*, the accused, who planned and deliberated the murder of his ex-wife, killed the victim's uncle who intervened to stop him. This court ultimately concluded that in circumstances like these an accused will be guilty of second-degree murder as the "actual killing may well have been impulsive" rather than planned and deliberate: *Ching*, at para. 31, and that one can only be found guilty of first degree murder if they planned and deliberated to kill both a specific victim and anyone who gets in their way.

[34] In this case, taking into account his prior communications and attempts to scout the apartment building, it is clear that the appellant's focus was on killing Mr. Garon (and his wife should she happen to be home when he attended there to carry out his plan[2]). There is no evidence, however, that Ms. Beniskos' murder was the result of the same planned and deliberate assault, or that she was the intended victim of the murder.

[35] The trial judge therefore erred by not explaining to the jury that, if the appellant planned and deliberated to kill both a specific victim (i.e., Mr. Garon) and anyone who got in his way (i.e., Mrs. Garon and/or Ms. Beniskos), he would be

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[2] While not the primary intended target, there is some evidence to suggest that Mrs. Garon was a part of the appellant's planning and deliberation: (1) the appellant knew Mrs. Garon's name and that she lived with Mr. Garon, and (2) the appellant confirmed Mrs. Garon's presence at the apartment, where the murders were ultimately carried out, when he attended there to purportedly deliver a package just days before.

guilty of first degree murder, but that absent such a plan, a spontaneous killing committed while carrying out the planned and deliberate murder of another victim is second degree murder: *Ching*, at para. 32; *R. v. Dipchand*, [1991] O.J. No. 1775 (C.A.), leave to appeal abandoned, [1991] S.C.C.A. No. 47.

[36] The jury's verdict implies that they found the appellant planned and deliberated the murder of Alban Garon, and possibly Mrs. Garon, but they were never instructed, as they should have been, on whether the murder of Ms. Beniskos was planned and deliberate or whether the appellant planned to kill anyone who was present and got in the way of what he intended to do to Mr. Garon.

(3) Curative Proviso

[37] Section 686(1)(b)(iii) of the *Criminal Code* permits an appellate court to dismiss an appeal, even when errors were committed in the court below, if the court is "of the opinion that no substantial wrong or miscarriage of justice has occurred".

[38] There are two categories of error that will be subject to the proviso: (1) where the error is so harmless or minor that it could not have had an impact on the trial, or (2) where there are serious errors that would justify a new trial but for the fact that the evidence was so overwhelming that any other verdict would have been impossible to obtain: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34. On the second category, depriving the accused of another trial is "justified on the ground that the deprivation is minimal when the invariable result would be another

conviction": *R. v. S.(P.L.),* [1991] 1 S.C.R. 909, at p. 916; see also *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 31.

[39] As discussed, the trial judge committed two serious errors. With respect to the first error, admitting evidence without weighing its probative value against its prejudicial effect, even if the trial judge had determined that the leather Murder Bag, Process List, and Novel Outline, were inadmissible, the remaining extensive body of evidence overwhelmingly established the identity of the appellant as the person who attended the Garon apartment and killed all three victims. This evidence included the transit surveillance video, the presence of the appellant's DNA at the scene, his *animus* towards tax authorities, Mrs. Garon's encounter with a delivery-man impersonator, the observations of Mr. Santa Marta in the elevator, the appellant's prior involvement with the Tax Court of Canada and former Chief Justice Garon, and the several items seized from the appellant's residence that linked him to the Garon murders (i.e., black fanny pack, duct tape, spool of twine).

[40] I turn now to the trial judge's second error, his insufficient instruction on first-degree murder. The Crown argued that, in the event the jury instruction was deficient, the error caused no miscarriage of justice because 1) the evidence that the appellant intended to kill all three victims was overwhelming, and 2) the murders took place while all three victims were forcibly confined.

[41] Pursuant to s. 231(5)(e) of the *Criminal Code*, and irrespective of whether it is planned and deliberate, murder is first degree murder when the death is caused

while committing forcible confinement. In this case, the evidence that the victims were killed while forcibly confined was overwhelming. Recall that, when found, all three victims had plastic bags affixed over their heads with twine tied around each of their necks, which was attached to their ankles. Forcible confinement occurs if, for any significant amount of time, a person is coercively restrained so that they cannot move according to their own desire: *R. v. Sundman*, 2022 SCC 31, 416 C.C.C. (3d) 371, at para. 21. In my view, the fact that the murders took place while all three victims were confined is irrefutable. And, unlike planning and deliberation, the trial judge provided a complete and legally correct instruction on unlawful confinement and murder.

[42] The evidence clearly established that all three victims were forcibly confined when they were killed. As such, there is no realistic possibility that a new trial would generate an outcome other than a conviction for first-degree murder.

CONCLUSION

[43] For these reasons, I would dismiss the appeal.

Released: June 13, 2024 “I.N.”

“J. George J.A.”
“I agree. I.V.B. Nordheimer J.A”
“I agree. Coroza J.A.”