Yvan Vaillancourt *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario *Intervener*

INDEXED AS: R. *v.* VAILLANCOURT

File No.: 18963.

1986: December 10; 1987: December 3.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard*, Lamer, Wilson, Le Dain and La Forest JJ.
*Chouinard J. took no part in the judgment.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law -- Charter of Rights -- Fundamental justice -- Presumption of innocence -- Constructive murder -- Death caused by accomplice during robbery -- Proof of intentional dangerous conduct causing death substituted for proof of mens rea with respect to death of victim -- Accused's conviction possible notwithstanding existence of reasonable doubt on essential element -- Whether s. 213(d) of the Criminal Code violates ss. 7 or 11(d) of the Charter -- If so, whether such violation justifiable under s. 1 of the Charter.

Criminal law -- Constructive murder -- Fundamental justice -- Presumption of innocence -- Death caused by accomplice during robbery -- Proof of intentional dangerous conduct causing death substituted for proof of mens rea with respect to death of victim -- Accused's conviction possible notwithstanding existence of reasonable doubt on essential element -- Whether s. 213(d) of the Criminal Code violates ss. 7 or 11(d) of the Charter -- If so, whether such violation justifiable under s. 1 of the Charter.

During an armed robbery in a pool hall, appellant's accomplice shot and killed a client. The accomplice managed to escape but appellant was arrested and convicted of second degree murder as a party to the offence pursuant to ss. 21(2) and 213(*d*) of the *Criminal Code*. Section 213(*d*) provides that "Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit ... robbery ... whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if ... he uses a weapon or has it upon his person during or at the time he commits or attempts to commit the offence ... and the death ensues as a consequence." At his trial before judge and jury, appellant testified that at the time of the robbery, he was certain that the gun in possession of the accomplice was not loaded. He stated that they had agreed to commit the robbery armed only with knives and when, on the night of the crime, the accomplice arrived with a gun he insisted that it be unloaded. The accomplice removed three bullets

from the gun and gave them to the appellant. Appellant's glove containing the three bullets was recovered by the police at the scene of the crime. The Court of Appeal dismissed appellant's appeal from conviction. In this Court, he challenged the constitutional validity of s. 213(*d*) of the *Criminal Code*. This appeal raises two constitutional questions: (1) Is section 213(*d*) of the *Code* inconsistent with either ss. 7 or 11(*d*) of the *Charter* and, therefore, of no force or effect? (2) If not, is the combination of ss. 21 and 213(*d*) of the *Code* inconsistent with either ss. 7 and 11(*d*) of the *Charter* and is s. 21 therefore of no force or effect in the case of a charge under s. 213(*d*)?

Held (McIntyre J. dissenting): The appeal should be allowed and a new trial ordered. The first constitutional question should be answered in the affirmative. No answer was given to the second constitutional question.

Per Dickson C.J. and Estey, Lamer and Wilson JJ.: Prior to the enactment of the *Charter*, Parliament had full legislative powers with respect to criminal law, including the determination of the essential elements of any given crime. But the *Charter* has restricted these powers. Under section 7, if a conviction will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of fundamental justice. One of these principles is that a minimum mental state is an essential element of an offence. However, because of the special nature of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. While the current view of the justices is that such a conviction cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight, for the purpose of this appeal, it is sufficient to say that, as a principle of fundamental justice, there cannot be a conviction in the absence of proof beyond a reasonable doubt of at least objective foreseeability.

The presumption of innocence in s. 11(*d*) of the *Charter* is offended when an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence. Where Parliament substituted proof of a different element for proof of an essential element, such substitution is constitutionally valid if, upon proof beyond reasonable doubt of the substituted element, it would be unreasonable for the trier of fact or a jury not to be satisfied beyond a reasonable doubt of the existence of the essential element. Therefore, an accused cannot be found guilty of murder absent proof beyond a reasonable doubt of at least objective foreseeability, and a murder provision which allows a conviction in the absence of proof beyond reasonable doubt of at least that essential element infringes ss. 7 and 11(*d*) of the *Charter*.

In the present case, s. 213(*d*) of the *Code* is *prima facie* in violation of ss. 7 and 11(*d*) of the *Charter*. The *mens rea* required for s. 213 consists of the *mens rea* for the underlying offence and the intent to commit one of the acts set forth in paras. (*a*) to (*d*). Section 213 does not completely exclude the need to prove any objective foreseeability. Rather, it has substituted for proof beyond a reasonable doubt of objective foreseeability, if that is the essential element, proof beyond a reasonable doubt of certain forms of intentional dangerous conduct causing death. But this substitution is not constitutionally valid because it is still possible that, notwithstanding proof beyond a reasonable doubt of the matters set forth in paras. (*a*) and (*d*), a jury could reasonably be left in doubt as to whether the accused ought to have known that death was likely to ensue.

Section 213(*d*) cannot be saved by s. 1 of the *Charter*. It is clear that Parliament's objective to deter the use or carrying of a weapon in the commission of certain offences, because of the increased risk of death, was of sufficient importance for the purpose of s. 1. However, the measures adopted were not reasonable and demonstrably justifiable. While these measures appear to be rationally connected to the objective, they unduly impair the rights and freedoms in question. Indeed, it is not necessary to convict of murder persons who did not intend or foresee the death and who could not even have foreseen the death in order to deter others from using or carrying weapons. If Parliament wishes to deter the use or carrying of weapons, it should, as in s. 83 of the *Code*, punish the use or carrying of weapons.

Per Beetz and Le Dain JJ.: For the reasons given by Lamer and La Forest JJ., s. 213(*d*) of the *Criminal Code* does not conform to the principles of fundamental justice entrenched in the *Charter* and cannot be saved under s. 1. For the reasons given by Lamer J., s. 213(*d*) also violates s. 11(*d*) of the *Charter* and cannot be justified under s. 1. Given these conclusions, it is not necessary to decide whether there exists a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.

Per La Forest J.: Because of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime, namely one referable to causing death. In addition to the intention to cause death, this can include a closely related intention such as intention to cause bodily harm likely to result in death combined with recklessness as to that result. It is sufficient to say in this case that the mental element required by s. 213(*d*) of the *Criminal Code* is so remote from the intention specific to murder that a conviction under that paragraph violates fundamental justice. The provision is so broad that under it a person may be found guilty of murder even though the death was the result of an accident.

Section 213(*d*) of the *Code* cannot be saved by s. 1 of the *Charter*. The objective of discouraging the use of weapons in the commission of crimes can be achieved by means other than attaching the stigma of a conviction for murder to a person who has caused death in the circumstances like those described in the provision.

Per McIntyre J. (dissenting): The two constitutional questions should be answered in the negative. Parliament has decided that possession and use of weapons in the course of the commission of offences is a gravely aggravating factor and has chosen to term a killing arising in the circumstances described in s. 213(*d*) as murder. While it may be illogical to characterize an unintentional killing as murder, no principle of fundamental justice is offended because serious criminal conduct, involving the commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner.

In this case, the accused was properly convicted of murder under the combined effect of ss. 21(2) and 213(*d*) of the *Code*. The terms of s. 21(2) were fully met as there was evidence of the accused's active participation in the commission of the robbery, the underlying offence. The section gives expression to a principle of joint criminal liability long accepted and applied in the criminal law, and there is no basis upon which one could exempt conduct which attracts criminal liability, under s. 213 of the *Code*, from the application of that principle.

Cases Cited

By Lamer J.

Considered: >*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Corporation of the City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; **disapproved**: *R. v. Bezanson* (1983), 8 C.C.C. (3d) 493; **referred to**: >*R. v. Oakes*, [1986] 1 S.C.R. 103; >*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956; *Reference re Validity of s. 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, aff'd [1951] A.C. 179; > *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Vasil*, [1981] 1 S.C.R. 469; *R. v. Trinneer*, [1970] S.C.R. 638; *R. v. Farrant*, [1983] 1 S.C.R. 124; *R. v. Ancio*, [1984] 1 S.C.R. 225; *People v. Aaron*, 299 N.W.2d 304 (1980); *State v. Doucette*, 470 A.2d 676 (1983); *Sir John Chichester's Case* (1647), Aleyn 12, 82 E.R. 888; *Hull's Case* (1664), Kelyng, J. 40; *R. v. Plummer* (1702), Kelyng, J. 109, 84 E.R. 1103; *R. v. Woodburne and Coke* (1722), 16 St. Tr. 53.

By La Forest J.

Referred to: *Rowe v. The King*, [1951] S.C.R. 713.

By McIntyre J. (dissenting)

R. v. Munro and Munro (1983), 8 C.C.C. (3d) 260; *R. v. Trinneer*, [1970] S.C.R. 638; *R. v. Ancio*, [1984] 1 S.C.R. 225.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*d*).

Constitution Act, 1867, s. 91(27).

Criminal Code, R.S.C. 1970, c. C-34 , ss. 21(2), 83 [rep. & subs. 1976-77, c. 53, s. 3], 205(5)(*a*), 212(*a*)(i), (ii), (*c*), 213 [am. 1974-75-76, c. 93, s. 13; c. 105, s. 29 item 1(4)].

Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 (U.K.)

Authors Cited

Burns, Peter and R. S. Reid. "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977), 55 *Can. Bar Rev.* 75.

Canada. Law Reform Commission. *Homicide* (Working Paper 33). Ottawa, 1984.

Canada. Law Reform Commission. *Recodifying Criminal Law* (Report 30). Ottawa, 1986.

Coke, Sir Edward. *The Third Part of the Institutes of the Laws of England*. London: W. Clarke & Sons, 1817.

Dalton, Michael. *Countrey Justice*. London, 1619.

East, Edward Hyde. *Pleas of the Crown*, vol. 1. London, 1803.

Edwards, J. Ll. J. "Constructive Murder in Canadian and English Law" (1961), 3 *Crim. L.Q.* 481.

Foster, Sir Michael. *Crown Law*. Oxford, 1762.

Grant, Isabel and A. Wayne MacKay. "Constructive Murder and the Charter: In Search of Principle" (1987), 25 *Alta. L. Rev.* 129.

Hale, Sir Matthew. *History of the Pleas of the Crown*, vol. 1, 1736.

Hawkins, William. *Pleas of the Crown*, vol. 1, 1716.

Hooper, Anthony. "Some Anomalies and Developments in the Law of Homicide" (1967), 3 *U.B.C. L. Rev.* 55.

Lanham, David. "Felony Murder--Ancient and Modern" (1983), 7 *Crim. L.J.* 90.

Mewett, Alan W. and Morris Manning. *Criminal Law*, 2nd ed. Toronto: Butterworths, 1985.

Parker, Graham. *An Introduction to Criminal Law*. Toronto: Methuen, 1977.

Perkins, Rollin M. and Ronald N. Boyce. *Criminal Law*, 3rd ed. Mineola, N.Y.: Foundation Press, 1982.

Stephen, Sir James Fitzjames. *A History of the Criminal Law of England*, vol. 3. London: MacMillan & Co., 1883.

Stephen, Sir James Fitzjames. *Stephen's Digest of the Criminal Law*, 9th ed. By Lewis Frederick Sturge. London: Sweet & Maxwell, 1950.

Stuart, Don. *Canadian Criminal Law*. Toronto: Cars- wells, 1982.

Willis, John. "Case and Comment" (1951), 29 *Can. Bar Rev.* 784.

APPEAL from a judgment of the Quebec Court of Appeal (1984), 31 C.C.C. (3d) 75, dismissing the accused's appeal from his conviction on a charge of second degree murder. Appeal allowed and new trial ordered, McIntyre J. dissenting.

Michel Marchand and *Michael Brind'Amour*, for the appellant.

Bernard Laprade and *Jean-François Dionne*, for the respondent.

James K. Stewart, for the intervener.

The judgment of Dickson C.J. and Estey, Lamer and Wilson JJ. was delivered by

LAMER J.--

Introduction

1 Vaillancourt was convicted of second degree murder following a trial before a judge and jury in Montréal. He appealed to the Quebec Court of Appeal, arguing that the judge's charge to the jury on the combined operation of ss. 213(*d*) and 21(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, was incorrect. His appeal was dismissed and the conviction was affirmed: (1984), 31 C.C.C. (3d) 75. Before this Court, he has challenged the constitutional validity of s. 213(*d*) alone and in combination with s. 21(2) under the *Canadian Charter of Rights and Freedoms.*

The Facts

2 For the purposes of this appeal, the Crown does not contest the following statement of the facts.

3 The appellant and his accomplice committed an armed robbery in a pool hall. The appellant was armed with a knife and his accomplice with a gun. During the robbery, the appellant remained near the front of the hall while the accomplice went to the back. There was a struggle between the accomplice and a client. A shot was fired and the client was killed. The accomplice managed to escape and has never been found. The appellant was arrested at the scene.

4 In the course of his testimony, the appellant said that he and his accomplice had agreed to commit this robbery armed only with knives. On the night of the robbery, however, the accomplice arrived at their meeting place with a gun. The appellant said that he objected because, on a previous armed robbery, his gun had discharged accidentally, and he did not want that to happen again. He insisted that the gun be unloaded. The accomplice removed three bullets from the gun and gave them to the appellant. The appellant then went to the bathroom and placed the bullets in his glove. The glove was recovered by the police at the scene of the crime and was found at trial to contain three bullets. The appellant testified that, at the time of the robbery, he was certain that the gun was unloaded.

Constitutional Questions

5 Before this Court, the following constitutional questions were formulated:

1. Is section 213(*d*) of the *Criminal Code* inconsistent with the provisions of either s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, and, therefore, of no force or effect?

2. If not, is the combination of s. 21 and s. 213(*d*) of the *Criminal Code* inconsistent with the provisions of either s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and is s. 21 of the *Criminal Code* therefore of no force or effect in the case of a charge under s. 213(*d*) of the *Criminal Code*?

The Law

Narrowing the Issue

6 The appellant has framed his attack on s. 213(*d*) of the *Code* in very wide terms. He has argued that the principles of fundamental justice require that, before Parliament can impose any criminal liability for causing a particular result, there must be some degree of subjective *mens rea* in respect of that result. This is a fundamental question with far reaching consequences . If this case were decided on that basis, doubt would be cast on the constitutional validity of many provisions throughout our *Criminal Code*, in particular s. 205(5)(*a*), whereby causing death by means of an unlawful act is culpable homicide, and s. 212(*c*) whereby objective foreseeability of the likelihood of death is sufficient for a murder conviction in certain circumstances.

7 However, the appellant was convicted under s. 213(*d*) and the constitutional question is limited to this provision. In my opinion, the validity of s. 213(*d*) can be decided on somewhat narrower grounds. In addition, the Attorney General of Canada has seen fit not to intervene to support the constitutionality of s. 213(*d*), which is clearly in jeopardy in this case, though he may have intervened to support ss. 205(5)(*a*) and 212(*c*) and other similar provisions. I will thus endeavour not to make pronouncements the effect of which will be to predispose in *obiter* of other issues more properly dealt with if and when the constitutionality of the other provisions is in issue. I do, however, find it virtually impossible to make comments as regards s. 213(*d*) that will not have some effect on the validity of the rest of s. 213 or that will not reveal to some extent my views as regards s. 212(*c*). However, the validity of those sections and of paras. (*a*) to (*c*) of s. 213 is not in issue here and I will attempt to limit my comments to s. 213(*d*).

8 The appellant has also challenged the combined operation of ss. 21(2) and 213(*d*). Given my decision on the validity of s. 213(*d*) and in view of the importance of s. 21(2) and the absence of the Attorney General of Canada, I do not find it necessary or advisable to deal with s. 21(2) in this appeal.

Analysis of s. 213(d)

Section 213(*d*) in the Context of the Murder Provisions

9 It is first necessary to analyze s. 213(*d*) in the context of the other murder provisions in the *Code* in order to determine its true nature and scope. Murder is defined as a culpable homicide committed in the circumstances set out at ss. 212 and 213 of the *Code.* There is a very interesting progression through s. 212 to s. 213 with respect to the mental state that must be proven.

10 The starting point is s. 212(*a*)(i), which provides:

212. Culpable homicide is murder

(*a*) where the person who causes the death of a human being

(i) means to cause his death,

This clearly requires that the accused have actual subjective foresight of the likelihood of causing the death coupled with the intention to cause that death. This is the most morally blameworthy state of mind in our system.

11 There is a slight relaxation of this requirement in s. 212(*a*)(ii), which provides:

212. Culpable homicide is murder

(*a*) where the person who causes the death of a human being

...

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

Here again the accused must have actual subjective foresight of the likelihood of death. However, the Crown need no longer prove that he intended to cause the death but only that he was reckless whether death ensued or not. It should also be noted that s. 212(*a*)(ii) is limited to cases where the accused intended to cause bodily harm to the victim.

12 Section 212(*c*) provides:

212. Culpable homicide is murder

...

(*c*) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

In part, this is simply a more general form of recklessness and thus the logical extension of s. 212(*a*)(ii), in that it applies when the accused "does anything that he knows . . . is likely to cause death" (emphasis added). However, there is also a further relaxation of the mental element required for murder in that it is also murder where the accused "does anything that he . . . ought to know is likely to cause death" (emphasis added). This eliminates the requirement of actual subjective foresight and replaces it with objective foreseeability or negligence.

13 The final relaxation in the definition of murder occurs at s. 213:

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the

person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

(*a*) he means to cause bodily harm for the purpose of

(i) facilitating the commission of the offence, or

(ii) facilitating his flight after committing or attempting to commit the offence,

and the death ensues from the bodily harm;

(*b*) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (*a*), and the death ensues therefrom;

(*c*) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (*a*), and the death ensues therefrom; or

(*d*) he uses a weapon or has it upon his person

(i) during or at the time he commits or attempts to commit the offence, or

(ii) during or at the time of his flight after committing or attempting to commit the offence,

and the death ensues as a consequence.

Under this provision, it is murder if the accused causes the victim's death while committing or attempting to commit one of the enumerated offences if he performs one of the acts in paras. (*a*) to (*d*). Proof that the accused performed one of the acts in paras. (*a*) to (*d*) is substituted for proof of any subjective foresight or even objective foreseeability of the likelihood of death.

14 I should add that there appears to be a further relaxation of the mental state when the accused is a party to the murder through s. 21(2) of the *Code* as in this case. However, as I have said, it is sufficient to deal with s. 213(*d*) in order to dispose of this appeal.

The Historical Development of s. 213

15 Although the concept of felony murder has a long history at common law, a brief review of the historical development of s. 213 indicates that its legitimacy is questionable.

16 In the early history of English criminal law, *murdrum* or murder referred to a secret killing or the killing of a Dane or, later, a Norman by an Englishman and to the fine levied on the township where the killing occurred. By the early 14th century, the fines had been abandoned and murder had come to be the name used to describe the worst kind of homicide. The expression "malice aforethought" was subsequently adopted to distinguish murder from manslaughter, which denoted all culpable homicides other than

murder. Malice aforethought was not limited to its natural and obvious sense of premeditation, but would be implied whenever the killing was intentional or reckless. In these instances, the malice was present and it is the premeditation which was implied by law.

17 Coke took this one step further and implied both the malice and the premeditation in cases where the death occurred in the commission of an unlawful act. He wrote in *The Third Part of the Institutes of the Laws of England* (London: W. Clarke & Sons, 1817), at p. 56:

Unlawfull. If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium:* for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.

18 Coke's statement of the unlawful act murder rule has been much criticized. Stephen demonstrated that Coke's statement was not supported by the authorities cited (*A History of the Criminal Law of England* (1883), vol. 3, at pp. 57-58). Further, a recent author has suggested that Coke's statement was just "a slip of the quill" and that Coke intended to say that accidental killing by an unlawful act was manslaughter (see D. Lanham, "Felony Murder--Ancient and Modern" (1983), 7 *Crim. L.J.* 90, at pp. 92-94). Other 17th century writers (Dalton, *Countrey Justice* (1619), at pp. 225-26, and Hale, *History of the Pleas of the Crown* (1736), vol. 1, at p. 475) and cases (*Sir John Chichester's Case* (1647), Aleyn 12, 82 E.R. 888, and *Hull's Case* (1664), Kelyng, J. 40) rejected the unlawful act murder rule as set out by Coke. Despite all of this, Coke's doctrine seems to have been accepted by the writers and the cases in the 18th century, and their only contribution was to limit it to killings in the course of felonies (see *R. v. Plummer* (1702), Kelyng, J. 109, 84 E.R. 1103, at p. 1107; Hawkins, *Pleas of the Crown* (1716), vol. 1, ch. 29, s. 11; *R. v. Woodburne and Coke* (1722), 16 St. Tr. 53; Foster, *Crown Law* (1762), at p. 258; East, *Pleas of the Crown* (1803), vol. 1, at p. 255). Of course, at that time, both the underlying felony and the murder were punishable by death, so the definition of a homicide in the course of a felony as a murder had little practical effect.

19 In the 19th century, the felony murder rule was accepted as part of the common law (see *Stephen's Digest of the Criminal Law* (9th ed. 1950), art. 264(c)). However, the rule was strongly criticized by Stephen, who labelled it "cruel" and "monstrous" (*A History of the Criminal Law of England, supra*, at p. 75).

20 Despite the rule's questionable origins and the subsequent criticisms, s. 175 of the English Draft Code of 1879 included a restricted form of felony murder which was subsequently adopted in the first Canadian *Criminal Code* in 1892. Through subsequent

amendments, this provision has been widened and it is now s. 213. It is more restricted than the common law rule in that it is limited to deaths occurring in the commission of certain enumerated offences and it requires that the accused have committed one of the acts set out in paras. (*a*) to (*d*).

21 Section 213 and its predecessors in the *Code* have long been subject to academic criticism (see J. Willis, "Case and Comment" (1951), 29 *Can. Bar Rev.* 784, at pp. 794-96; J. Ll. J. Edwards, "Constructive Murder in Canadian and English Law" (1961), 3 *Crim. L.Q.* 481, at pp. 506-9; A. Hooper, "Some Anomalies and Developments in the Law of Homicide" (1967), 3 *U.B.C. L. Rev.* 55, at pp. 75-77; P. Burns and R. S. Reid, "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977), 55 *Can. Bar Rev.* 75, at pp. 103-5; G. Parker, *An Introduction to Criminal Law* (1977), at pp. 145-48; D. Stuart, *Canadian Criminal Law* (1982), at pp. 222-25; I. Grant and A. W. MacKay, "Constructive Murder and the Charter: In Search of Principle" (1987), 25 *Alta. L. R*ev. 129; *cf.* A. W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at p. 545). It has also been subject to judicial criticism. In *R. v. Farrant*, [1983] 1 S.C.R. 124, Dickson J., as he then was, wrote that s. 213 seemed harsh (p. 130). In *R. v. Ancio*, [1984] 1 S.C.R. 225, dealing with the *mens rea* of attempted murder, McIntyre J. wrote at pp. 250-51:

> It was argued, and it has been suggested in some of the cases and academic writings on the question, that it is illogical to insist upon a higher degree of *mens rea* for attempted murder, while accepting a lower degree amounting to recklessness for murder. I see no merit in this argument. The intent to kill is the highest intent in murder and there is no reason in logic why an attempt to murder, aimed at the completion of the full crime of murder, should have any lesser intent. If there is any illogic in this matter, it is in the statutory characterization of unintentional killing as murder. [Emphasis added.]

22 Finally, the Law Reform Commission of Canada criticized s. 213 in *Homicide* (1984), Working Paper 33, at pp. 47-51, and excluded the notion of constructive murder from its Draft Criminal Code (*Recodifying Criminal Law* (1986), Report 30, cl. 6(3), at p. 54).

Felony Murder in Other Jurisdictions

23 Felony murder is a peculiarly common law concept which appears to be unknown outside a small circle of common law jurisdictions, and it has not fared well in those jurisdictions. In the United Kingdom, where the rule originated, it was abolished by the *Homicide Act*, 1957, 5 & 6 Eliz. 2, c. 11 (U.K.) The rule is still quite widespread in the United States, though it is said to be in decline (R. M. Perkins and R. N. Boyce, *Criminal Law* (3rd ed. 1982), at p. 70). The rule has been abolished by statute or by the courts in several jurisdictions (see *People v. Aaron*, 299 N.W.2d 304 (Mich. 1980), *State v. Doucette*, 470 A.2d 676 (Vt. 1983)), and it has been downgraded to manslaughter in others. In addition, the courts and the legislatures have limited the scope of the common law rule by limiting the felonies to which it is applicable, requiring some degree of *mens rea* with respect to the death, establishing affirmative defences or limiting the punishments available. The rule also exists in New Zealand and certain Australian states but it is narrower and abolition has been recommended in some jurisdictions.

Section 213(d) and the Charter

24 This appeal calls into play two principles of fundamental justice.

The First Principle: The Essential Elements of Certain Crimes and s. 7 of the *Charter*

25 Prior to the enactment of the *Charter*, Parliament had full legislative power with respect to "The Criminal Law" (*Constitution Act, 1867*, s. 91(27)), including the determination of the essential elements of any given crime. It could prohibit any act and impose any penal consequences for infringing the prohibition, provided only that the prohibition served "a public purpose which can support it as being in relation to criminal law" (*Reference re Validity of s. 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at p. 50; appeal to the Privy Council dismissed, [1951] A.C. 179). Once the legislation was found to have met this test, the courts had very little power to review the substance of the legislation. For example, in *R. v. Corporation of the City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, Dickson J., as he then was, held that, when an offence was criminal in the true sense, there was a presumption that the prosecution must prove the *mens rea.* However, it was always open to Parliament expressly to relieve the prosecution of its obligation to prove any part of the *mens rea*, as it is said to have done in s. 213 of the *Code* with respect to the foreseeability of the death of the victim. It is thus clear that, prior to the enactment of the *Charter*, the validity of s. 213 could not have been successfully challenged.

26 However, federal and provincial legislatures have chosen to restrict through the *Charter* this power with respect to criminal law. Under section 7, if a conviction, given either the stigma attached to the offence or the available penalties, will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of fundamental justice. It has been argued that the principles of fundamental justice in s. 7 are only procedural guarantees. However, in >*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, this Court rejected that argument and used s. 7 to review the substance of the legislation. As a result, while Parliament retains the power to define the elements of a crime, the courts now have the jurisdiction and, more important, the duty, when called upon to do so, to review that definition to ensure that it is in accordance with the principles of fundamental justice.

27 This Court's decision in *Re B.C. Motor Vehicle Act* stands for the proposition that absolute liability infringes the principles of fundamental justice, such that the combination of absolute liability and a deprivation of life, liberty or security of the person is a restriction on one's rights under s. 7 and is *prima facie* a violation thereof. In effect, *Re B.C. Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Re B.C. Motor Vehicle Act*, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. It thus elevated *mens rea* from a presumed element in *Sault Ste. Marie, supra*, to a constitutionally required element. *Re B.C. Motor Vehicle Act* did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction. In *Sault Ste. Marie*, Dickson J. stated at pp. 1309-10:

Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the "morally innocent". It must be remembered, however, that Dickson J. was dealing with the *mens rea* to be presumed in the absence of an express legislative disposition, and not the *mens rea* to be required in all legislation providing for a restriction on the accused's life, liberty or security of the person. In any event, this case involves criminal liability for the result of an intentional criminal act, and it is arguable that different considerations should apply to the mental element required with respect to that result. There are many provisions in the *Code* requiring only objective foreseeability of the result or even only a causal link between the act and the result. As I would prefer not to cast doubt on the validity of such provisions in this case, I will assume, but only for the purposes of this appeal, that something less than subjective foresight of the result may, sometimes, suffice for the imposition of criminal liability for causing that result through intentional criminal conduct.

28 But, whatever the minimum *mens rea* for the act or the result may be, there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence. The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction. I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight. Given the effect of this view on part of s. 212(*c*), for the reasons I have already given for deciding this case more narrowly, I need not and will not rest my finding that s. 213(*d*) violates the *Charter* on this view, because s. 213(*d*) does not, for reasons I will set out hereinafter, even meet the lower threshold test of objective foreseeability. I will therefore, for the sole purpose of this appeal, go no further than say that it is a principle of fundamental justice that, absent proof beyond a reasonable doubt of at least objective foreseeability, there surely cannot be a murder conviction.

The Second Principle: s. 11(*d*) and the Burden of Persuasion

29 The presumption of innocence in s. 11(*d*) of the *Charter* requires at least that an accused be presumed innocent until his guilt has been proven beyond a reasonable doubt: >*Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 357; >*R. v. Oakes*, [1986] 1

S.C.R. 103, at pp. 120-21. This means that, before an accused can be convicted of an offence, the trier of fact must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence. These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the *Charter*. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(*d*).

30 Clearly, this will occur where the provision requires the accused to disprove on a balance of probabilities an essential element of the offence by requiring that he raise more than just a reasonable doubt. It is for this reason that this Court struck down the reverse onus provision in s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, in *Oakes, supra*.

31 Sections 7 and 11(*d*) will also be infringed where the statutory definition of the offence does not include an element which is required under s. 7. As Dickson C.J. wrote for the majority of the Court in *Oakes, supra*, at pp. 132-33:

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue. [Emphasis added.]

It is clear from this passage that what offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element. With respect, the Nova Scotia Court of Appeal was thus clearly incorrect when it stated in *R. v. Bezanson* (1983), 8 C.C.C. (3d) 493, at p. 508:

> In my view, there was no attempt by Parliament to reverse the onus of proof under s. 213, and s. 11(*d*) of the Charter has no application. Parliament has not reversed the burden of proof, it has simply omitted what the appellant argues is an essential element from the definition of the offence so that no evidence is required at all on that issue.
>
> The omission of an essential element does bring s. 11(*d*) into play.

32 Finally, the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(*d*).

33 Given the first principle I have enunciated earlier and my assumption for the sole purpose of disposing of this appeal with respect to objective foreseeability, an accused cannot be found guilty of murder absent proof beyond a reasonable doubt of that element, and a murder provision which allows a conviction in the absence of proof beyond reasonable doubt of at least that essential element infringes ss. 7 and 11(*d*).

Application of the Principles to s. 213

34 The *mens rea* required for s. 213 consists of the *mens rea* for the underlying offence and the intent to commit one of the acts set forth in paras. (*a*) to (*d*) (*Swietlinski v. The Queen*, [1980] 2 S.C.R. 956). Section 213 does not impose on the accused the burden of disproving objective foreseeability. Further, it does not completely exclude the need to prove any objective foreseeability. Rather, s. 213 has substituted for proof beyond a reasonable doubt of objective foreseeability, if that is the essential element, proof beyond a reasonable doubt of certain forms of intentional dangerous conduct causing death.

35 The question is, therefore, can Parliament make this substitution without violating ss. 7 and 11(*d*)? As I have discussed earlier, if Parliament frames the section so that, upon proof of the conduct, it would be unreasonable for a jury not to conclude beyond a reasonable doubt that the accused ought to have known that death was likely to ensue, then I think that Parliament has enacted a crime which is tantamount to one which has objective foreseeability as an essential element, and, if objective foreseeability is sufficient, then it would not be in violation of s. 7 or s. 11(*d*) in doing so in that way. The acid test of the constitutionality of s. 213 is this ultimate question: Would it be possible for a conviction for murder to occur under s. 213 despite the jury having a reasonable doubt as to whether the accused ought to have known that death was likely to ensue? If the answer is yes, then the section is *prima facie* in violation of ss. 7 and 11(*d*). I should add in passing that if the answer is no, then it would be necessary to decide whether objective foreseeability is sufficient for a murder conviction. However, because in my view the answer is yes and because I do not want to pass upon the constitutionality of s. 212(*c*) in this case, I will not address that issue.

36 To varying degrees it can be said that in almost any case a jury satisfied beyond a reasonable doubt that an accused has done one of the prohibited acts described in paras. (*a*) to (*d*) will be satisfied beyond a reasonable doubt that the accused ought to have known that death was likely to be caused. But not always. Indeed, as a first example, drunkenness would under certain circumstances leave the jury in doubt in that regard. The rule as regards the effect of drunkenness on objective foreseeability was unanimously laid down by this Court in *R. v. Vasil*, [1981] 1 S.C.R. 469, a murder prosecution under s. 212(*c*). This Court addressed the issue at some length and then summarized its conclusion as follows, *per* Lamer J. at pp. 500-501:

(5) Whilst the test under 212(*c*) is objective and the behaviour of the accused is to be measured by that of the reasonable man, such a test must nevertheless be applied having regard, not to the knowledge a reasonable man would have had of the surrounding circumstances that allegedly made the accused's conduct dangerous to life, but to the knowledge the accused had of those circumstances;

(6) As a result, drunkenness, though not relevant in the determination of what a reasonable man, with the knowledge the accused had of those circumstances, would have anticipated, is relevant in the determination of the knowledge which the accused had of those circumstances.

It is clear to me that under s. 213 as drafted there will be cases where the effect of drunkenness on an accused's knowledge of the circumstances would leave a jury with a reasonable doubt as to whether the accused ought to have known of the likelihood of death ensuing, even though it has been proven beyond a reasonable doubt that the accused actually did one of the acts described under paras. (*a*) to (*d*).

37 A second example, and this case amply illustrates the point, is the accused who is brought into s. 213 not as a principal but through the operation of s. 21(2) of the *Criminal Code*. In *R. v. Trinneer*, [1970] S.C.R. 638, this Court had the opportunity to consider the combined operation of ss. 21(2) and 213 (s. 202 at the time). Cartwright C.J., delivering the judgment of the Court, stated at pp. 645-46.

At the risk of repetition, it is my opinion that on the true construction of s. 202 and s. 21(2) as applied to the circumstances of this case it was necessary to support a verdict of guilty against the respondent that the Crown should establish (i) that it was in fact a probable consequence of the prosecution of the common purpose of the respondent and Frank to rob Mrs. Vollet that Frank for the purpose of facilitating the commission of the robbery would intentionally cause bodily harm to Mrs. Vollet, (ii) that it was known or ought to have been known to the respondent that such consequence was probable and (iii) that in fact Mrs. Vollet's death ensued from the bodily harm. It was not necessary for the Crown to establish that the respondent knew or ought to have known that it was probable that Mrs. Vollet's death would ensue. [Emphasis added.]

It is clear that an accused can be convicted of murder under the combined operation of ss. 21(2) and 213 in circumstances where the death was not objectively foreseeable. As section 21(2) requires proof of objective foreseeability, the culprit, in my view, must be s. 213.

38 These two examples suffice, in my view, for one to conclude that notwithstanding proof beyond a reasonable doubt of the matters set forth in paras. (*a*) to (*d*) a jury could reasonably be left in doubt as regards objective foreseeability of the likelihood that death be caused. In other words, s. 213 will catch an accused who performs one of the acts in paras. (*a*) to (*d*) and thereby causes a death but who otherwise would have been acquitted of murder because he did not foresee and could not reasonably have foreseen that death would be likely to result. For that reason, s. 213 *prima facie* violates ss. 7 and 11(*d*). It is thus not necessary to decide whether objective foreseeability is sufficient for murder as s. 213 does not even meet that standard. This takes us to s. 1 for the second phase of the constitutional inquiry.

Section 1

39 Finding that s. 213 of the *Criminal Code* infringes ss. 7 and 11(*d*) of the *Charter* does not end the inquiry on the constitutional validity of s. 213. Any or all of paras. (*a*) to (*d*) of s. 213 can still be upheld as a reasonable limit "demonstrably justified in a free and democratic society" under s. 1 of the *Charter.*

40 In this case and at this stage of the inquiry, we need only consider para. (*d*) of s. 213. The criteria to be assessed under s. 1 have been set out by this Court in several cases, particularly >*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and *R. v. Oakes, supra.* First, the objective which the measures are designed to serve must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*Big M Drug Mart, supra*, at p. 352). Through s. 213(*d*) of the *Code*, Parliament intended to deter the use or carrying of a weapon in the commission of certain offences, because of the increased risk of death. In my view, it is clear that this objective is sufficiently important.

41 In addition, the measures adopted must be reasonable and demonstrably justified. The measures adopted appear to be rationally connected to the objective: indiscriminately punishing for murder all those who cause a death by using or carrying a weapon, whether the death was intentional or accidental, might well be thought to discourage the use and the carrying of weapons. I believe, however, that the measures adopted would unduly impair the rights and freedoms in question (see *Big M Drug Mart, supra*, at p. 352). It is not necessary to convict of murder persons who did not intend or foresee the death and who could not even have foreseen the death in order to deter others from using or carrying weapons. If Parliament wishes to deter the use or carrying of weapons, it should punish the use or carrying of weapons. A good example of this is the minimum imprisonment for using a firearm in the commission of an indictable offence under s. 83 of the *Criminal Code.* In any event, the conviction for manslaughter which would result instead of a conviction for murder is punishable by, from a day in jail, to confinement for life in a penitentiary. Very stiff sentences when weapons are involved in the commission of the crime of manslaughter would sufficiently deter the use or carrying of weapons in the commission of crimes. But stigmatizing the crime as murder unnecessarily impairs the *Charter* right.

42 In my view, therefore, s. 213(*d*) of the *Code* is not saved by s. 1.

Conclusion

43 As a result of the foregoing, I would answer the first constitutional question in the affirmative, as s. 213(*d*) violates both s. 7 and s. 11(*d*) of the *Charter*, and I would declare s. 213(*d*) of the *Criminal Code* to be of no force or effect. I would, for the reasons which I have given, decline to answer the second constitutional question. It follows that the appeal must be allowed, the appellant's conviction for murder set aside, and a new trial ordered.

The reasons of Beetz and Le Dain JJ. were delivered by

44BEETZ J.--For the reasons given by Justice Lamer and Justice La Forest, I agree that s. 213(*d*) of the *Criminal Code* does not conform to the principles of fundamental justice entrenched in the *Canadian Charter of Rights and Freedoms* and cannot be saved under s. 1. I also agree with Lamer J. that s. 213(*d*) of the *Code* violates s. 11(*d*) of the *Charter* and cannot be justified under s. 1 of the *Charter*.

45 Given these conclusions, I do not find it necessary to decide whether there exists a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.

46 I would dispose of the appeal in the manner proposed by Lamer J. and answer the first constitutional question as he does. I would also decline to answer the second constitutional question.

The following are the reasons delivered by

47MCINTYRE J. (dissenting)--I have had the advantage of reading the reasons for judgment in this appeal prepared by my colleague, Lamer J. I find myself unable to agree with his disposition of the appeal and, with the greatest respect for his view on the matter, I would dismiss the appeal and answer both constitutional questions in the negative.

48 My colleague has set out the facts of the case. They need not be repeated here. It is evident as well from his reasons that, save for the *Canadian Charter of Rights and Freedoms*, he is in agreement that the appellant would be properly convicted of murder under the combined effect of s. 21(2) and s. 213(*d*) of the *Criminal Code*. He would allow the appeal essentially on the basis that a conviction for murder which will result in the deprivation of liberty or security of the person of the accused can only be upheld if, in accordance with the terms of s. 7 of the *Charter*, it is procured in accordance with the principles of fundamental justice. While Parliament has the power to define the elements of a crime, in his view the courts must now review that definition to insure that it is in accordance with the principles of fundamental justice. These principles would require that there be no murder conviction without proof of a *mens rea* of at least objective foreseeability of death. Such foreseeability is not a necessary requirement under s. 213(*d*) of the *Code*.

49 I am not prepared to accept the proposition that s. 213(*d*) of the *Criminal Code* admits of a conviction for murder without proof of objective foreseeability of death or the likelihood of death, but in the view I take of this case it is not necessary to reach a firm conclusion on that point. The Crown sought the conviction of Vaillancourt on the basis of the interaction of s. 21(2) and s. 213(*d*) of the *Code*. For the Crown to succeed in such a prosecution, it would be required to prove that the accused and another had formed an intention in common to carry out an unlawful purpose and to assist each other therein. In addition, in the circumstances of this case, the Crown would be required to prove that the appellant knew or ought to have known that his associate was armed with a pistol and would, if necessary, use it during the commission of the offence or the attempt to commit the offence, or during his flight after committing or attempting to commit the offence, and that as a consequence a death occurred: see *R. v. Munro and Munro* (1983), 8 C.C.C. (3d) 260 (*per* Martin J.A.), at p. 301, and the pre-*Charter* case in this Court in *R. v. Trinneer*, [1970] S.C.R. 638.

50 It must be recognized at the outset that Parliament has decided that the possession and use of weapons, particularly firearms, in the course of the commission of offences is a gravely aggravating factor. Experience has shown that the presence of firearms leads to personal injury and loss of life. Parliament has chosen to term a killing arising in the circumstances described here as "murder". In *R. v. Munro and Munro, supra*, Martin J.A., speaking for the Ontario Court of Appeal (Arnup, Martin and Houlden JJ.A.), said this, at p. 293:

Under the provisions of s. 213(*d*) liability for murder attaches if death ensues as a consequence of the use of the weapon or as a consequence of the possession of a weapon which he has on his person. Manifestly, s. 213(*d*) is very stringent, but it is equally obvious that Parliament intended to create a stringent basis of liability where death ensued as a consequence of the use or possession of a weapon which the offender has upon his person during the commission or attempted commission of certain offences or the offender's flight after the commission or attempted commission of the offence. It is clear that Parliament intended to provide a strong deterrent to the carrying of weapons in the commission of certain crimes because of the high risk to life which experience has shown attends such conduct.

51 The principal complaint in this case is not that the accused should not have been convicted of a serious crime deserving of severe punishment, but simply that Parliament should not have chosen to call that crime "murder". No objection could be taken if Parliament classified the offence as manslaughter or a killing during the commission of an offence, or in some other manner. As I have observed before (see *R. v. Ancio*, [1984] l S.C.R. 225, at p. 251), while it may be illogical to characterize an unintentional killing as murder, no principle of fundamental justice is offended only because serious criminal conduct, involving the commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner. As Martin J.A. said in *R. v. Munro and Munro, supra*, at p. 301:

This legislation has frequently been criticized as being harsh, but that is a matter for Parliament and not for the courts.

I would refer, as well, to the words found in A. W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at pp. 544-45:

Section 213 and the concept of constructive murder have been much criticized and, in fact, abolished in many jurisdictions. The criticism is that it imposes liability for murder in situations where death was not intended nor even, in some cases, foreseen. But murder is a legal concept; it does not have to be defined in terms of intentional killing, and even under s. 212 the definition is not this narrow. The policy behind s. 213 is to put the risk of killing a victim during the course of the commission of certain offences upon the offender to a higher degree than if it were merely classified as manslaughter. In any case, with the present distinction between murder punishable by death and murder punishable by life imprisonment now abolished, much of the criticism loses its force. It was the thought of someone being executed for a non-intended homicide that led to the feeling that the definition of murder should somehow be limited to the old common law concept of "murder with malice aforethought".

52 As has been noted, the appellant's conviction is based on a combination of s. 21(2) and s. 213(*d*) of the *Criminal Code*. There was in this case evidence of active participation in the commission of the robbery, the underlying offence, and the terms of s. 21(2) were fully met. It must be accepted that the section gives expression to a principle of joint criminal liability long accepted and applied in the criminal law. I am unable to say upon what basis one could exempt conduct which attracts criminal liability, under s. 213 of the *Criminal Code*, from the application of that principle. In *R. v. Munro and Munro, supra*, Martin J.A. said, at p. 301:

Patently, Parliament has decided that the carrying of weapons during the commission of certain crimes, such as robbery, so manifestly endangers the lives of others, that one who joins a common purpose to commit one of the specified offences and who knows or ought to know that his accomplice has upon his person a weapon which he will use if needed, must bear the risk if death, in fact, ensues as a consequence of the use or possession of the weapon during the commission of one of the specified offences or during the flight of the offender after the commission or attempted commission of the underlying offence . . .

In my view, Martin J.A. has stated the policy considerations which have motivated Parliament in this connection and I would not interfere with the Parliamentary decision. I would, therefore, dismiss the appeal and answer the two constitutional questions in the negative.

The following are the reasons delivered by

53LA FOREST J.--I have had the advantage of reading the judgment of Lamer J. and would dispose of the appeal in the manner proposed by him. I am in agreement with him that because of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime, namely one referable to causing death. In addition to the intention to cause death, this can include a closely related intention such as intention to cause bodily harm likely to result in death combined with recklessness as to that result. Whether and how much further the intention can be extended it is not necessary to explore for the purposes of this case. It is sufficient to say that the mental element required by s. 213(*d*) of the *Criminal Code* is so remote from the intention specific to murder (which intention is what gives rise to the stigma attached to a conviction for that crime) that a conviction under that paragraph violates fundamental justice. All the provision requires is an intention to commit another crime and to possess a weapon while carrying out this intention or in fleeing afterwards. The provision is so broad that under it a person may be found guilty of murder even though the death was the result of an accident. This occurred in *Rowe v. The King*, [1951] S.C.R. 713, and more extreme examples can easily be imagined. The section is thus not only remote from the *mens rea* specific to murder, but even removes its *actus reus* as traditionally defined; see I. Grant and A. W. MacKay, "Constructive Murder and the Charter: In Search of Principle" (1987), 25 *Alta. L. Rev.* 129.

54 As my colleague notes, the objective of discouraging the use of weapons in the commission of crimes can be achieved by means other than attaching the stigma of a conviction for murder to a person who has caused death in the circumstances like those described in the provision.

Appeal allowed and new trial ordered, MCINTYRE J. *dissenting.*

Solicitor for the appellant: Michel Marchand, Montréal.

Solicitor for the respondent: Bernard Laprade, Montréal.

Solicitor for the intervener: The Ministry of the Attorney General, Toronto.