
Part 3

Summary of Findings

1.1 Introduction

We find:

- that the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to - and even beyond - his acquittal by the Supreme Court of Nova Scotia (Appeal Division) in 1983.
- that this miscarriage of justice could have and should have been prevented if persons involved in the criminal justice system had carried out their duties in a professional and/or competent manner.
- that Marshall was not the author of his own misfortune.
- that the miscarriage of justice was real and not simply apparent.
- that the fact that Marshall was a Native was a factor in his wrongful conviction and imprisonment.

1.2 The Incident

We find:

- that Sandy Seale was not killed in the course of a robbery, attempted robbery, mugging or rolling.
- that Donald Marshall, Jr. told the truth about the events surrounding the stabbing when first interviewed by the Sydney City Police on the night of the incident.
- that Seale and Marshall met by chance following the dance.
- that Ebsary and MacNeil initiated the contact with Marshall and Seale.
- that Ebsary, MacNeil, Marshall and Seale engaged in a conversation that lasted for several minutes.
- that the stabbing was the result of Ebsary's violent and unpredictable character.

1.3 The Police Response

We find:

- that the immediate police response to the stabbing was entirely inadequate, incompetent and unprofessional.

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- that the subsequent MacIntyre investigation was inadequate, incompetent and unprofessional.
 - that MacIntyre, without any evidence to support his conclusions and in the face of evidence to the contrary, had identified Marshall as the prime suspect by the morning of May 29, 1971 and concluded that the incident occurred as the result of an argument.
 - that the fact that Marshall was a Native was one of the reasons MacIntyre identified him as the prime suspect.
 - that MacIntyre accepted evidence that supported his conclusion and rejected evidence that discounted that conclusion.
 - that MacIntyre should not have ignored the statements given by George and Sandy MacNeil, which described two men fitting the descriptions given by Marshall in the park at the time of the incident.
 - that MacIntyre failed to pursue efforts to locate the two men Marshall had described as being involved in Seale's killing.
 - that the Sydney City Police Department should have taken advantage of the investigative facilities and services available from the RCMP.
 - that an autopsy should have been performed on Sandy Seale.
 - that the information in John Pratico's statement of June 4, 1971 resulted from suggestions MacIntyre made to Pratico.
 - that MacIntyre's interview with Maynard Chant was conducted in an intimidating and unacceptable manner.
 - that the information in Chant's statement of June 4, 1971 concerning a dark-haired fellow in the bushes, an argument, and Marshall stabbing Seale, resulted from suggestions MacIntyre made to Chant.
 - that Urquhart did not crumple up and throw away Patricia Harriss' partially completed statements.
 - that Harriss used information given to her by someone else in providing the first story she told police.
 - that Urquhart, although a secondary player in the MacIntyre investigation, had a responsibility to speak out when the investigation was being conducted improperly.

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- that Robert Patterson was found by Sydney City Police and questioned but no statement was taken.

1.4 Trial Process

We find:

- that the Crown prosecutor and the defence counsel in Donald Marshall, Jr.'s 1971 trial failed to discharge their obligations, resulting in Marshall's wrongful conviction.
- that the Crown prosecutor, in view of the conflicting statements before him, should have interviewed all of the key witnesses separately prior to trial.
- that the Crown prosecutor should have disclosed the contents of prior inconsistent statements to the defence.
- that defence counsel failed to provide adequate professional representation in that they did not arrange for any independent investigation, interview Crown witnesses or seek disclosure of the Crown case.
- that defence counsel were aware of the existence of prior statements by Chant, Pratico and Harriss but did not request them.
- that the trial judge misinterpreted the *Canada Evidence Act* in refusing to permit a thorough examination of Pratico's comments outside the courtroom.
- that the cumulative effect of incorrect rulings by the trial judge denied Marshall a fair trial.

1.5 1971 RCMP Review

We find:

- that the Crown prosecutor in Sydney, Donald MacNeil, and the Attorney General's office in Halifax failed to discharge their duties because they did not disclose the existence of important new evidence to counsel for Marshall in November 1971.
- that Robert Anderson, the Director (Criminal) in the Department of Attorney General should have instructed his Crown prosecutors to bring the evidence to the attention of Marshall's counsel.
- that the RCMP review failed to uncover Donald Marshall, Jr.'s wrongful conviction because of Inspector E. A. Marshall's incompetent investigation into Jimmy MacNeil's allegations.

1.6

Appeal Process

We find:

- that counsel for Donald Marshall, Jr. failed to put arguments before the Court of Appeal concerning fundamental errors of law during the trial, and that this failure represented a serious breach of the standard of professional conduct expected and required of defence counsel.
- that the Crown's case should not have been handled by a junior lawyer in the Department.
- that Crown counsel should have raised the issue of the trial judge's erroneous rulings when defence counsel failed to do so.
- that there should have been greater cooperation between local Crown prosecutors in Sydney and the lawyers handling the appeal in the Department of Attorney General in Halifax.
- that the Court of Appeal had a duty to review the complete trial record and ensure that all relevant issues were argued.
- that the errors by the trial judge were so fundamental that a new trial should have been the inevitable result of any appeal.

1.7

The 1974 and 1975 Reviews

We find:

- that Constable Gary Green acted properly in providing information regarding Donna Ebsary's evidence to the Sydney City Police Department, and that he cannot be faulted for failing to investigate the matter further.
- that Urquhart was remiss in his duties when he failed to follow up on new evidence indicating that Donna Ebsary had seen her father with a blood-stained knife on the night of Seale's murder.
- that the RCMP did conduct a file review of the Marshall case in 1975 and that while little is known about its purpose or results, it is clear that the Sydney City Police Department cooperated with the RCMP in the 1975 review.

1.8

The 1982 Reinvestigation

We find:

- that Staff Sergeant Wheaton and Corporal Carroll should have been more circumspect in questioning Marshall in Dorchester about what happened on the night of the murder.
- that Chief MacIntyre did not deliberately attempt to hide any

documents from the RCMP investigators.

- that the Department of Attorney General did not interfere with the RCMP investigation.

1.10

Setting up the Reference

We find:

- that it is regrettable that the Attorney General of Canada was influenced by Chief Justice MacKeigan's views in his decision to hold the Reference under Section 617(b) [now Section 690(b)] of the *Criminal Code* rather than Section 617(c) [now Section 690(c)].
- that the decision to proceed under Section 617(b) precluded a complete examination of why the wrongful conviction occurred.

1.11

Reference Decision

We find:

- that the Court of Appeal made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction.
- that the Court selectively used the evidence before it - as well as information that had not been admitted in evidence - in order to reach its conclusions.
- that the Court took it upon itself to "convict" Marshall of a robbery with which he was never charged.
- that the Court was in error when it stated that Marshall "admittedly" committed perjury.
- that the Court did not deal with the significant failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel.
- that the Court's suggestion that Marshall's "untruthfulness ... contributed in large measure to his conviction" was not supported by any available evidence and was contrary to evidence before the Court.
- that the Court did not deal with the errors by the trial judge in limiting the cross-examination of Pratico.
- that Mr. Justice Leonard Pace should not have sat as a member of the panel hearing the Reference.
- that the Court's decision amounted to a defence of the criminal

justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

- that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal.

1.12

Donald Marshall, Jr. and the
Attorney General's Department

We find:

- that Donald Marshall, Jr. was not treated properly by the Attorney General's Department.
- that Gordon Coles should not have attempted to persuade Frank Edwards not to urge the Court of Appeal to acquit Marshall.
- that Edwards is to be commended for refusing to back down in his position in favour of arguing for the Court to acquit Marshall.
- that Edwards acted improperly in arguing before the Court of Appeal that the criminal justice system was not in any way responsible for Marshall's wrongful conviction, a position he knew was not supported by the facts.
- that Coles failed to do any research before advising the Attorney General not to appoint a public inquiry into the Marshall case.
- that Coles' failure to take any positive action to determine why Marshall had been wrongfully convicted is inexcusable.
- that Coles and Martin Herschorn failed to review any of the relevant documents before refusing a *Freedom of Information Act* request for them from Marshall's counsel.
- that Coles' unilateral correspondence with counsel to the Campbell Commission was improper.
- that Coles should have considered whether it was appropriate for the Province to approach the compensation process in the Marshall case simply with an eye to achieving the best possible financial deal for the Province.
- that the Court of Appeal's gratuitous references to Marshall's responsibility for his own conviction were a factor in determining the amount of compensation paid to him.
- that the compensation paid to Donald Marshall, Jr. was only for the period of time Marshall spent in jail.