I N D E X

VOLUME 4

MARSHALL REFERENCE CONT'D

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August, 1983

1982 S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

IN THE MATTER OF A Reference Pursuant to Section 617 of The Criminal Code By the Honourable Jean Chretien, Minister Of Justice, To The Appeal Division Of The Supreme Court of Nova Scotia Upon An Application For The Mercy Of The Crown On Behalf of Donald Marshall, Jr.

FACTUM OF THE RESPONDENT

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PART 1

STATEMENT OF FACTS

For the reasons subsequently outlined, the Respondent has chosen to extensively review and analyze the facts of this case. A recitation of the facts at this point would therefore be premature and the court's indulgence for this departure from the usual format would be appreciated. The crucial facts are set out in summary form in Part lV, Conclusions.

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LIST OF ISSUES

2. The admissibility of the fresh evidence heard by this Honourable Court on December 1 and 2, 1982, is not in issue.

3. The powers of the Appeal Division pursuant to s. 613 of the Criminal Code are likewise not in issue.

4. It is respectfully submitted that the only live issue before this Honourable Court is the conclusiveness (or inconclusiveness) of the evidence heard on December 1 and 2, 1982. If that is so, then it would seem to follow that the evidence must be reviewed and analyzed in considerable detail. Only then, it is submitted, will the Court be in a position to decide upon an appropriate disposition.

PART III

A. The Appellant

5. The Appellant's evidence appears to be that on the evening of May 28, 1971, he had returned to Sydney from Halifax at approximately 9:30 p.m. He and some friends then got a drive from the Membertou Reservation in Sydney to a liquor store and from there they walked to the residence of one Terry Tobin on Intercolonial Street. After remaining there for approximately one and one-half hours, the Appellant in company with Terry Tobin and Frankie French went to the Keltic Tavern on Dorchester Street where the Appellant says he remained for only five minutes.

6. The Appellant says that when he left the Keltic Tavern, apparently alone, "...I was going to the St. Joe's dance and I ended up in Wentworth Park right after St. Joe's dance." (p. 7 line 25) It would appear, however, that he never did get to the dance but went directly to the park. This assumption is consistent with the Appellant's evidence at trial in 1971 (p. 187 line 12) and also with the fact that there is no evidence from any other source before the Court that the Appellant was at the dance.

7. In any event, sometime between 11:30 p.m. and midnight, the Appellant entered Wentworth Park at a point he marked with an "M" on a Plan of Wentworth Park which is Exhibit R-2. He says that when he entered the park he saw four people talking and he just walked past them. (p. 10 line 20) He stated that two of these four people were the men who later called he and Sandy Seale up to Crescent Street. (p. 34 line 14 et seq.)

8. It may be worth noting that his evidence on this point appears to contradict what he said at his trial in 1971. At that time, he was asked whether there were people in the park and his answer was no. (Trial transcript p. 187 line 15)

9. It is also interesting that in 1971, he denied that he had been drinking (p. 187 line 9) while now he allows that he had had one drink of rum (p. 7 line 23 and p. 25 line 27) on the night in question. Furthermore his evidence in 1971 was that he had gone directly from Intercolonial Street to the Park (p. 187 line 12) while, as noted above, he now mentions a brief visit to the Keltic Tavern. (supra paragraph #5) These factors combined with his admission that he was a heavy drinker at the time (p. 26 line 4) make it likely that his evidence respecting the amount consumed is less than accurate.

10. There is no question but that shortly after entering Wentworth Park the Appellant met Sandy Seale, whom he says he had known for approximately three years. (p. 26 line 30) He says he asked Seale if he would like to make some money and apparently both agreed they could do so by "rolling" somebody. The Appellant attempted to deny any such specific agreement. He maintained that he did not have a plan but cited "bumming it, breaking in a store probably, take it off somebody" as examples of what he had in mind. (p. 11 lines 20-30)

11. In cross-examination the Appellant was confronted with the contents of a statement (Exhibit R-1) which he had given to the R.C.M.P. at Dorchester Penitentiary on March 9, 1982. He was reminded of the circumstances under which the statement had been taken (pp. 66-69). He agreed that R-1 had been taken on the second of two visits by the R.C.M.P. and conceded that the intervening two weeks between the visits had given him time to think about what he was going to say. He said the investigators told him to tell everything and not to hide anything (p. 67 line 22). He agreed that they told him they wanted the truth. (p. 67 line 23) He agreed that he tried to tell the truth and that the statement was truthful (p. 69 lines 10-20).

12. With reference to the alleged agreement between he and Seale, the Appellant was confronted with the following portion of R-1: "We agreed to roll someone so we started to look for someone to roll." (p. 73 line 28) Their subsequent conduct make it clear that the agreement between he and Seale was exactly as quoted.

13. The Appellant described how he and Seale had then met one Robert Patterson who was under the influence of alcohol or drugs. After a brief conversation, they sat Patterson down by a tree and went on their way (p. 12 line 18 et seq.) to the footbridge which was marked B on Exhibit R-2. It was then that someone called to them from Crescent Street asking for a cigarette and a light (p. 13 line 8). About half way between the footbridge and Crescent Street, the Appellant says he was called by Patricia Harris and Terrance Gushue. He says he alone went to Harris and Gushue and believes that Seale continued on to talk to the two men who had first called them. (p. 13 lines 10-30)

14. After conversing with Harris and Gushue for about five minutes, the Appellant says he then proceeded to where Seale was talking to the two men. (p. 13 line 35). He described one of these as about fifty-five years of age, shorter than the other, white hair, black rimmed glasses,

navy blue top coat, and a sweater or scarf under his coat. He described the other fellow as approximately thirty years of age, five-nine to five-ten in height, and wearing a brown corduroy coat. He said he had never seen either man before that night. (p. 14 lines 10-30)

15. The Appellant says that he and Seale talked to the two men for about fifteen to twenty minutes. Introductions were made and they shook hands (p. 14 line 32) but he doesn't recall whether any names were given. (p. 36 line 25) He said he now believes the older fellow was Roy Ebsary and the younger, James MacNeil (bottom p. 37 top p. 38). The conversation ranged from questions about bootleggers, to women in the park, to whether the older fellow was a priest. (p. 15 lines 1-10) The Appellant denies that there was any conversation about money or even any hints about money (p. 39 lines 10-35). He maintained this position even when confronted with that part of R-1 wherein he specifically said that he and Seale had "...hinted around about money." (p. 74 lines 10-30).

16. Toward the end of the conversation, Marshall and Seale declined an invitation from the older fellow to come to their house for a drink. Ebsary and MacNeil then walked away and they almost got to the end of the street (p. 15 line 35), a distance the Appellant estimates of approximately seventy-five feet. (p. 42 line 9)

17. At that point, he says that either he or Seale called them back. Again in R-1 the Appellant had said that he had called them back but on cross-examination he said "...I now say I didn't." (p. 75 lines 10-25) According to the Appellant, when Ebsary and MacNeil returned, MacNeil slipped and Marshall grabbed him, he says, to prevent MacNeil from falling. (p. 16 line 26 and p. 76 lines 1-10)

18. This account appears both unlikely and quite different from that in Exhibit R-1 which said in part "...They then knew we meant business about robbing them. I got in a shoving match with the tall guy..." (p. 74 lines 14-16) The Appellant continued:

> "...at the same time I heard the older guy, the shorter guy, telling Sandy Seale if he wanted everything he had. And at the same time, he had him hoist up with his arm and this within five seconds of the whole thing..." (p. 16 lines 27-31)
>
> "...he had him hoist up and he said, 'I got something here.' He called him a nigger... I had the taller guy,...and when I turned around the older guy let go of Sandy Seale and he come after me and I let go of the other guy. I blocked his arm with my arm ...He came at me with his arm coming towards me. I don't know what he had in his hand but he hit me and that's when I started running." (p. 17 lines 21-33)

19. Exhibit R-1 perhaps makes the alleged attack by Ebsary on Marshall slightly clearer: "...I let go of the guy I had and Ebsary came at me. He swung the knife at me

9.

and I held the knife off with my left hand..." (p. 77 lines 1-10) This is a plausible explanation for the wound to the Appellant's left arm. It is also consistent with what the Appellant said at his trial in 1971. (Trial transcript p. 191 lines 1-10)

20. After the Appellant had fled from Crescent Street, he ran down Bentinck Street where he met a fellow he now knows to be Maynard Chant, though he did not know him at the time. (p. 20 line 4) He apparently displayed his left arm to Chant and said: "Look what they did to me... my friend is down the road there...He's got a knife in his stomach" (p. 19 lines 10-14). He says he stopped a car on Byng Avenue (which intersects Bentinck Street) and he and Chant went back to the Crescent Street scene (p. 20 line 20). Sandy Seale was laying on the road and the Appellant went to a house and called an ambulance (p. 21 line 10). The police arrived shortly thereafter and the Appellant was taken to the hospital.

21. The Appellant says that in 1971, he told no one, including his lawyers, about the attempted robbery (p. 20 lines 8-28).

B. JAMES WILLIAM MACNEIL

2. In 1971, Mr. MacNeil would have been approximately twenty-six years old. He said that he had known one Roy Ebsary for approximately three months prior to the 28th of May, 1971. On that evening he and Ebsary had been at the State Tavern on George Street, Sydney, where they each consumed about seven or eight glasses of beer. (pp. 81 and 82)

3. "...(B)etween ten-thirty and eleven o'clock or something like that..." (p. 83 lines 2-3), MacNeil says that he and Ebsary left the tavern, cut through the ?ark, and walked along Crescent Street. (p. 84 line 14). At that time he says they were approached by a colored youth and Mr. Marshall, whom he identified in Court. (p. 84 line 30 et seq.) He says that Marshall grabbed him and put his arm up behind his back, while the colored fellow asked Ebsary for money. According to MacNeil, the colored youth, Seale, said "Dig, man, dig" and apparently Ebsary replied, "I got something for you." (p. 85 lines 1-3). At that point he says he heard the colored fellow screaming and saw him "...running and flopping..."

24. He says that Marshall made a gesture toward Ebsary but then Marshall ran himself and "...disappeared out of the picture..." (p. 89 lines 15-20) His evidence is silent on whether or not Ebsary slashed Marshall's arm.

11.

5. Ebsary and MacNeil then ran to Ebsary's home on Rear Argyle Street (p. 91 line 7) where they arrived a couple of minutes later. (p. 100 line 20) He estimated their arrival time at between eleven thirty and twelve o'clock (p. 92 line 23). Ebsary then began to wipe blood off a knife in the kitchen sink and MacNeil went home a short time later. (p. 92 line 28; p. 101 line 20; p. 102 line 8; p. 106 line 24; p. 107 line 30). He says that Ebsary's daughter, whom he guessed to have been between thirteen and sixteen years of age, was present while the knife was being washed. (p. 92 line 26; p. 100 line 28) He described Ebsary's knife and that description will be considered below with the laboratory evidence.

26. It is apparent, therefore, that if believed, the evidence of James William MacNeil supports that of the Appellant on the crucial issue; that it was Ebsary and not Marshall who stabbed Seale.

27. But MacNeil's evidence also differs from that of the Appellant in several material respects. According to MacNeil there was no conversation before the stabbing about women, or bootleggers, or anything else. (p. 85 line 30; p. 97 line 34; p. 98 lines 1-10). MacNeil says he was

12.

not staggering and that he did not stumble or trip (p. 96 line 17). His evidence is that Marshall did not grab him to keep him from falling (p. 96 line 35). In fact, his evidence strongly suggests that he and Ebsary were approached suddenly from behind by Seale and Marshall (p. 85 lines 18 and 19 and 27 and 28).

8. On the other hand, his description of Roy Ebsary is very close to the description given by the Appellant. He says Ebsary was approximately sixty years old at the time, "...kind of stocky...", about five foot seven in height, and wearing a black shawl over his shoulders. (pp. 83-84) This description also closely resembles the description of their father provided to the Court by Donna and Greg Ebsary.

29. The difficulty with MacNeil is that he is a person of limited intellectual capacity trying to recall an eleven year old incident at the time of which he had consumed a large quantity of beer. Furthermore, he was in a state of shock or panic (p. 84 line 36), and these factors undoubtedly could have clouded his recollection of exactly what had happened.

30. Conversely, it might be argued that such a traumatic experience would have been indelibly imprinted upon anyone's memory. More importantly, MacNeil did go

to the Sydney Police about one week after Marshall was sentenced and told them the same story. (p. 95 lines 15-18 and 32-36) Although it did not come out clearly in evidence before this Honourable Court, the Crown acknowledges that MacNeil did tell the Sydney Police that Roy Ebsary had stabbed Seale and gave a written statement to that effect on November 15, 1971.

31. Moreover, MacNeil gave a plausible explanation as to why he did not come forward prior to November, 1971. Though Gregory Ebsary's recall is vague on the point (p. 204 lines 13-30), MacNeil says that Gregory persuaded him not to go to the police. If believed, it is apparent from MacNeil's testimony that he was deeply disturbed by Seale's death. He went to Ebsary's house the next day and told him Seale had died. He continued: "...you didn't have to kill him ... you should have give him the money..." (p. 94 lines 2-3). Then, ten days after Marshall's conviction, MacNeil went to the Sydney Police because "...it bothered me because I wouldn't like to be in gaol for something I didn't do." (p. 95 lines 16 and 17).

32. Finally, it may be useful to recall James MacNeil as a witness on December 1, 1982. It is respectfully submitted that by his general demeanour and way of answering questions, MacNeil displayed an almost child-like

candour. When one considers his evidence in its entirety, the fact that a material portion of it is corroborated by Donna Ebsary, it is submitted that MacNeil was a believable witness.

C. DONNA ELAINE EBSARY

3. On May 28th, 1971, Donna Ebsary would have been about three weeks away from her fourteenth birthday. She was home with her mother that night and her father, Roy Newman Ebsary, was out. Late that night her father arrived home with a friend, James MacNeil, whom she had seen on previous occasions. (p. 114 line 36 et seq.) She says MacNeil "...was kind of excited..." (p. 114 line 14) "...like a kid with a new toy..." (p. 122 line 33) and her father was trying to get him to quiet down. When they first came in, she says MacNeil turned to her father and said: "You did a good job back there." My father turned around and said: "Shut up, be quiet, don't say anything." (p. 122 lines 27-29)

4. From there she says they proceeded to the kitchen where her father put a knife in the sink (p. 115 line 10) and washed blood off it. (p. 116 line 12) Her father then took the knife upstairs (p. 116 line 22) and, despite her efforts to find it, (p. 116 line 25) she never saw it again.

5. She described her father as a small man, "... maybe five-two..." with a slight build (p. 117 lines 8-9). He had grey or white hair and a little chin whisker. She

says he wore glasses but didn't have them on when he went out. He would carry the glasses in his pocket and put them on if he had to read. (p. 133 lines 19-25) On the night in question, he wore a long blue coat draped over his shoulders. He never put his arms in that long coat. (p. 115 lines 18 and 19; p. 133 lines 1-10) According to Donna, her father liked to play with knives a lot (p. 117 line 19) and had a great potential for physical violence (p. 120 line 3).

36. There is no question but that Donna Ebsary is extremely bitter toward her father. She says, for example, that she grew up afraid and wanted a stop put to him (p. 124 line 32). No doubt she would still welcome the opportunity to put a stop to him: "I thought then and I think now that I deserved a life I never got." (p. 125 lines 1-4)

37. But there are some factors which do lend credence to Donna Ebsary's story. First, her evidence is not a recent concoction. She states that in 1974, she told her story to her teacher, David Ratchford, and, on a separate occasion, to her English Professor, Elizabeth Boardmore. The Crown is prepared to acknowledge the fact that Ratchford did, as Donna says, bring the matter to the attention of the police. (p. 125 line 12)

38. Second, her story so precisely compliments that of James MacNeil that, if it is not true, the Court has fallen prey to an elaborate conspiracy.

39. Third, the witness appears to be an intelligent person who has no difficulty articulating her memories. Notwithstanding her age at the time and her longstanding bitterness, it is respectfully submitted that she impresses as a believable witness.

18.

D. PATRICIA ANN HARRISS

40. At the time of the stabbing, Patricia Harriss would have been fourteen years of age. She says that on the night of May 28, 1971, she was at a dance at St. Joseph's Parish Hall with her boyfriend, Terry Gushue. She and Gushue left the dance before it was over and proceeded to Wentworth Park where they sat on a bench and smoked a cigarette. (p. 137 line 14) She remembers seeing Robert Patterson who was sick and vomiting in the grass. (p. 138 line 3)

41. They then began walking down Crescent Street toward her home when they met the Appellant whom they asked for a light. (p. 138 line 14) She says there were two men there at the time she and Gushue met Marshall (p. 138 line 35 et seq.), "...one was on each side of Donald..." (p. 139 line 5).

42. Harriss says she had seen Sandy Seale at the dance and believes she saw Marshall there too but "... I can't really say I'm positive that he was there." (p. 140 line 22). She says she did not see Sandy Seale in the park that night. (p. 143 line 25)

43. On cross-examination, however, it is submitted that it became apparent that Harriss was relying very

heavily on her 1971 statements to reconstruct the events which took place on the night in question. When queried about whether or not she had any independent recollection of the evening, she replied: "...from reading my statement it helps me remember. That's what I'm saying." (p. 144 line 29-30). In answer to the previous question she had replied:

> "The reason I mainly remember is from reading my statements and going over it so much with the police at that time. At this time, I really--I don't remember." (Emphasis Added)

44. The affidavit of Patricia Harriss was marked Exhibit R-5 in these proceedings. In fairness to Miss Harriss, the Court should be aware that her statement dated March 1, 1982, marked Exhibit C in R-5 was given to the R.C.M.P. before they became aware of her first statement marked Exhibit A in R-5. (The Crown is prepared to admit this as an agreed fact.) In other words, she recalled having told the Sydney Police that there were other people in the area where she had met Marshall before she had had an opportunity of reviewing her earlier statement.

45. Notwithstanding the preceding paragraph, it is the Crown's submission that the likelihood is that Miss Harriss actually recalls what she had told the Sydney Police and not what she remembers of the night in question.

16. When Harriss' 1971 testimony is considered in light of her present evidence, the earlier testimony becomes very fragile. Indeed, it is submitted that her evidence was not unequivocal even as it stood in 1971. (see excerpts pp. 148-150 incl.) The result is that now it does not really matter whether she is believed about the number of persons she saw in the park on May 28, 1971. The point is that there does not now exist anyone who can put the Appellant in the park at the crucial time with just one other person. It is respectfully submitted therefore that the inference of exclusive opportunity that existed in 1971 against the Appellant has now disappeared.

E. MAYNARD CHANT

47. This witness was fourteen years old at the time in question. In December, 1982, he testified that during the evening of May 28, 1971, he had been at the Pentecostal Church in Sydney until approximately 9:30 p.m. He said he then went to Whitney Pier where he remained for about an hour. From there he hitch-hiked to the bus station on Bentinck Street to see if he could get a bus to his home in Louisbourg. When he arrived at the bus station "...roughly about half past eleven...", he discovered he had missed the bus. He then decided to hitch-hike to Louisbourg and so he began to walk down Bentinck Street toward Wentworth Park. (pp. 172-173)

48. As he approached the park, he says he met the Appellant Donald Marshall who told him his friend had been stabbed and who requested help. (p. 174 lines 7-10) Mr. Chant marked Exhibit R-2 with the letters MC near the intersection of Byng Avenue and Bentinck Street to designate the place where he had met the Appellant. He noted that the Appellant had "...a rather large gash..." on the inside of his forearm (p. 175 line 8) though he didn't see any blood at the time (p. 175 line 19). He said they proceeded down the road and "...that's I guess when his arm started to bleed because a young girl had given him a handkerchief for his arm." (p. 175 lines 26-38) (Both Chant and he Appellant describe

meeting four people, two girls and two boys, immediately after their initial meeting.) He says they then flagged down a car which took them over to where Mr. Seale was laying. (p. 176 lines 1-3)

49. Once there he says he believes the Appellant ran to call an ambulance at a nearby house and then returned (p. 176 line 8-10). After the ambulance arrived and Seale was placed inside, Chant says he made his way onto George Street in order to continue to hitch-hike to Louisbourg. The police came along, noticed blood on his shirt and asked him if he had seen anything. He replied "...yes, I'd seen everything" (p. 177 line 1). On cross examination, he explained that when he said he had seen everything, "...I was referring to the wound on Sandy Seale's stomach..." (p. 185 line 7) He says "...I did not witness the murder." (p. 178 line 18)

50. This assertion is diametrically opposed to the evidence given by Chant in 1971. At that time, specifically at the Preliminary Inquiry on July 5, 1971, and again at the trial in November, 1971, Chant said he had seen the Appellant take a knife out of his pocket and drive it into the stomach of the other fellow. (p. 182 lines 10-20 and trial transcript pp. 103-105)

51. Is there any explanation for Chant's divergent testimony? It is conceivable that he was in fact trapped by the lie he told when he gave the police his first written statement on May 30, 1971. There he said that he had witnessed someone other than Marshall stab Seale. (p. 188 lines 1-10). He said he had been given this story by Donald Marshall and, because he was afraid, he relayed this version to the police. (p. 185 lines 12-14 and p. 188 lines 33-36). It is possible that he was motivated in part by a prior acquaintanceship with the Appellant. (p. 90 lines 30 et seq.) or by a mere reluctance to implicate anyone in particular. In any event, if it is accepted that the May 30, 1971, statement was a lie, Chant's subsequent actions become understandable if not condonable.

52. He was then confronted on June 4, 1971, by the police who, with good reason, believed Chant had lied to them. They confronted him with the fact that they had another witness who had witnessed the murder (apparently John Pratico) and told Chant: "...you had to see something..." (p. 186 line 3). Chant says the police had said the other witness had seen Chant at the scene and "...that he said I had seen everything he had seen..." (p. 185 line 25). It is more likely the police had merely

told him about John Pratico's evidence because during the trial Pratico did not say that he had seen Chant.

53. Chant was thus a fourteen year old youth who was on probation and who was caught in a lie in a very serious matter. He was in the Louisbourg Town Hall with his mother, (p. 185 line 18), his probation officer, and the police who were demanding to know the truth (p. 186 line 36). Believing that Marshall was guilty anyway (p. 184 lines 22-23), Chant then proceeded to tell the police the story he no doubt felt they wanted to hear. He told them Marshall had stabbed Seale (p. 189 lines 16-19). He repeated that story again at the Preliminary Inquiry and at the trial, though his hesitation to directly implicate Marshall at trial, led to his cross-examination under Section 9 of the Canada Evidence Act.

54. Aside from a possible nagging conscience, there does not appear to be an ulterior motive for Chant's changing his story yet again. Indeed, the easiest route for Chant to have taken would have been to maintain that he had told his story in 1971 and had nothing further to add. Instead he chose to tell the police he had not witnessed the stabbing. He must have known this story would ultimately bring him face to face in a courtroom with the man he had helped put in jail. Yet his testimony on the witness stand appeared forthright and his demeanour belied no form of contrivance.

55. Against that background, it is respectfully submitted that Chant's recent evidence is capable of belief.

F. GREGORY ALLAN EBSARY

56. Gregory Ebsary was approximately eighteen years of age at the time of the Seale stabbing. His evidence is of value mainly to connect the knives, which were subjected to laboratory examination, with his father, Roy Newman Ebsary.

57. Gregory also provided a description of his father which is similar to that given by the Appellant, James MacNeil, and Donna Ebsary. He says his father was about five foot three, had white hair, and wore a little goatee beard. He confirmed that his father had a special interest in sharp instruments, especially knives, (p. 195 line 31) and that his father was a very violent person (p. 202 line 30 et seq.). He noted that in 1971 his father carried knives constantly. (p. 203 line 26)

58. He says that he was not home during the day on May 28, 1971. Nor was he home when his father came in that night. (p. 203 line 33 et seq.) He confirmed that James MacNeil was a friend of his father's at the time and was at their home a few times before the stabbing. (p. 204 lines 8-9) He says MacNeil was there the day after the stabbing and he doesn't really recall after that. (p. 204 lines 19-20)

27.

59. It is apparent that Gregory Ebsary has no great love for his father. Nevertheless, to the extent that his evidence is useful, it appears to be truthful.

G. THE EXPERT EVIDENCE

(i) A review of the Evidence of Adlophus James Evers

60. This gentleman testified both before this Honourable Court and at the trial in 1971 as an expert in hair and fiber examination and comparison.

61. On June 16, 1971, the yellow jacket worn by the Appellant and the brown jacket worn by Sanford Seale on May 28, 1971, came into Mr. Evers' possession. He retained a small swatch of material from the yellow jacket which is marked Exhibit R-6. He placed a small amount of this material on a slide and it is Exhibit R-7c. Exhibit R7-a is a small sample of the interfacing or pellon of Seale's coat, and R7-b is a small sample of the brown wool from Seale's coat. (p. 216 and 217) Since the jackets themselves are no longer available, Mr. Evers conceded that he was left with a very limited standard. (p. 216 line 12; p. 224 lines 19-33)

62. On March 17, 1982, Mr. Evers took possession of ten knives which have been marked Exhibits R-4a to R-4j. The knives were contained in a large envelope marked Exhibit R-8 and the envelope also contained a piece of black tape, Exhibit R-9 (p. 217 lines 25 et seq.). On

March 26, 1982, Mr. Evers also took possession of a cardboard basket which, by agreement of counsel, was the basket which contained the knives R4a-j at the Ebsary's Mechanic Street address.

63. In summary, Mr. Evers said he found fibres on each of the exhibits and in the cardboard basket which were consistent with the material in the jackets. Significantly, he noted that Exhibit R4-i contained three fibres which were consistent with the fibres in the yellow jacket and nine fibres which were consistent with the fibres in the brown jacket. (p. 225 lines 10-16) He also noted that Exhibit R4-i was the only exhibit which had fibres consistent with the fibres in both jackets on it. (p. 227 lines 16-17) The fibres from all other exhibits are consistent only with those on the brown jacket.

64. He said that most of the fibres were so small he had to use a stereo microscope in order to see them. He also used a compound comparison microscope in order to examine the internal features of the hair and do an identification (p. 222 lines 3-5).

65. His evidence contains explanations of the number of fibre groups and types represented by the fibres he found. He noted that white acetate fibres he found were

very popular in the 1960's but it is fairly remote to find them now. He says "(t)he polyesters have taken over." (p. 230 lines 9-13)

66. Evers gave a lengthy explanation of what he meant by "consistent" and stated simply that "...a layman may use the term identical." (p. 229 line 6) He did say however that in regard to color he found no yellow fibres and only three brown wool fibres. (p. 230 lines 15-20)

67. He concluded that notwithstanding the very small standard he had to work with, the chances of the fibres coming from a source other than the two jackets "...would be fairly remote." (p. 225 line 33 to p. 226 line 4) With respect to the fibres on exhibit R-4i, he said that the chances of their coming from another source "...would be very, very remote." (p. 226 line 12)

G. THE EXPERT EVIDENCE

(ii) The Weight of the Expert Evidence

68. When one considers that eleven years passed between the date of the stabbing and the date the exhibit knives were seized by the R.C.M.P., one might expect some continuity problems.

69. Gregory Ebsary says that in 1973, when the family moved from Rear Argyle Street to Mechanic Street, all the knives went with them. The knives however were packed by various family members and were in different containers. (p. 206 line 33 to 207 line 15) Between 1973 and 1979 the knives were scattered throughout the house and some were used as kitchen utensils. (p. 200 lines 18-25) In 1979, the knives were all placed in a dining room drawer (p. 208 line 35) and stayed there until sometime after 1981. They were then placed in the cardboard basket by Gregory Ebsary and taken to the cellar. (p. 209 lines 20-28) There they remained until seized by the R.C.M.P. in March, 1982.

70. In view of the foregoing, it is reasonable to assume that the knives could have come in contact with many different materials in the eleven year period. It is submitted, therefore, that the strength of Mr. Evers' findings is thereby weakened.

71. On the other hand, Gregory Ebsary noted that Exhibits R-4c and R-4i would have been kept in his father's room. (p. 206 line 14) One might assume, therefore, that these knives were used less frequently than the knives in the kitchen. Noteworthy also is Donna Ebsary's identification of these two knives as favorites of her father's. (p. 131 line 30) When one then considers Evers' evidence with respect to R-4i, some probative value, however tenuous, must be acknowledged.

72. Of course, for a trier of fact to conclude that R-4i is the murder weapon, James MacNeil's description of a "pocket knife" (p. 93 line 3; p. 103 line 12) would have to be considered along with the fact that Donna Ebsary remembered the knife her father carried as having a different colored handle. (p. 132 line 20) The latter might be explained by Gregory Ebsary's evidence that his father changed the handles on his knives. (p. 201 lines 7-25)

73. It is submitted that the link between the knife that killed Seale and Exhibit R-4i is thus tenuous but still possible. The more plausible theory would be that the actual murder weapon did at some point during the intervening years come in contact with the Ebsary collection.

P A R T lV

CONCLUSIONS

(a) Submission re Facts

74. It is respectfully submitted that the evidence discloses that on the night of May 28, 1971, James William MacNeil and Roy Newman Ebsary were making their way through Wentworth Park in Sydney. As they proceeded along Crescent Street, they were accosted by the Appellant Donald Marshall Jr. and Sanford Seale who attempted to rob them. To effect their purpose the Appellant grabbed hold of MacNeil who was taller and younger than Ebsary. At the same time, Seale demanded money from Ebsary using the words "Dig, man, dig." Ebsary instantaneously pulled a knife out of his pocket and, as he said the words, "I got something for you", stabbed Seale in the abdomen. Seale later died at the Sydney City Hospital as a result of this wound.

75. When the Appellant noticed that Seale had been stabbed, he let MacNeil go. Ebsary made a thrust with the knife at the Appellant and caused a gash on the Appellant's left arm. The Appellant then fled from the scene to the intersection of Bentinck Street and Byng Avenue where he met Maynard Chant. He and Chant flagged

down a car and returned to Crescent Street where they found Seale still alive but gravely wounded. Either the Appellant or Chant ran to a nearby house and requested the occupant to call the police and an ambulance. Seale was then taken to the hospital by ambulance and the Appellant was taken to hospital by police for treatment for the wound on his arm.

76. In the meantime, MacNeil and Ebsary had fled to Ebsary's residence on Rear Argyle Street where Ebsary washed blood from the knife he had used and then took it upstairs.

CONCLUSIONS

(b) Submission re "Conclusiveness"

77. It is respectfully submitted that the evidence of each of the witnesses called before this Honourable Court is merely capable of belief and taken individually (with the exception of Gregory Ebsary), each could have affected the result at trial.

78. It is submitted however that, if the evidence is viewed as a whole, it is clear that it derives from a number of different and unconnected sources all of which are mutually complimentary. On that basis the cumulative effect of the evidence is conclusive of the fact that the Appellant did not stab Sanford Seale.

79. Perhaps the answers to a couple of admittedly hypothetical questions may clarify this "conclusiveness" proposition. First, if the evidence which is now before the Court had been known in 1971, would there exist reasonable and probable grounds to charge the Appellant with Seale's murder? Surely, where all the available evidence now points in another direction, the answer has to be no.

80. Similarly, on the basis of existing evidence, could a reasonable jury properly instructed convict the Appellant of Seale's murder? That question may be

answered with another question: in the event of a new trial, what evidence could the Crown possibly call against the Appellant? When one considers the existing evidence together with the admission that John Pratico was not then and is not now a reliable witness, the answers are clear. There is no evidence the Crown could call and a reasonable jury certainly could not now convict.

CONCLUSIONS

(c) Submission re Disposition

81. It is respectfully submitted that the appeal should be allowed, that the conviction should be quashed, and a direction made that a verdict of acquittal be entered.

82. It is also submitted that the basis of the above disposition should be that, in light of the evidence now available, the conviction of the Appellant cannot be supported by the evidence.

83. The Respondent disagrees with Counsel for the Appellant who argues that the aforementioned order could issue on the basis that there has been a miscarriage of justice. It is submitted that the latter phrase connotes some fault in the criminal justice system or some wrongdoing on the part of some person or institution involved in that system. The Respondent contends that such was not the case and that care should be taken to dispel any such notion. Hopefully, the following submission will clarify the Respondent's position.

38.

CONCLUSIONS

(d) Submission re Court's Role

84. Notwithstanding the fact that both Counsel agree upon what the ultimate disposition of this matter should be, it goes without saying that the Court retains the exclusive authority and responsibility to dispose of the case as it sees fit. The Court may reject the submissions of both Counsel and exercise any of the options open to it under Section 613 of the Criminal Code.

85. It is the Respondent's respectful submission that the role of the Court goes much further in this peculiar situation. Here, if the Court does ultimately decide to acquit the Appellant, it is no overstatement to say that the credibility of our criminal justice system may be called into question by a significant portion of the community. It seems reasonable to assume that the public will suspect that there is something wrong with the system if a man can be convicted of a murder he did not commit. A minimum level of public confidence in the criminal justice system must be maintained or it simply will not work.

86. For the above reasons, it is respectfully submitted that the Court should make it clear that what happened in this case was not the fault of the criminal

justice system or anyone in it including the police, the lawyers, the members of the jury, or the Court itself.

87. To function, our system depends on getting the truth and that is exactly what it did not get in 1971. The Appellant may argue that he told the truth but the fact remains that, not only did he put himself in a position which precipitated the stabbing, but he failed to disclose to anyone what he and Seale had actually been up to. Instead he told the police and his lawyers about an attack by two priests from Manitoba who did not like "niggers or Indians". It is not difficult to speculate upon how believable either the police or Defence Counsel found that story.

88. It is submitted that had the Appellant been forthright, the odds are that both the police investigation and/or his defence would have taken different directions. The likelihood is that he would never have been charged let alone convicted.

89. When the stories told by Chant and Harriss were added to the Appellant's lack of candour, the flow of subsequent events was as inevitable as it is now understandable.

90. Finally, it is important to note that this matter came before this Court by way of a Reference by the Minister of Justice under Section 617 of the Criminal Code. Presumably, the Minister had before him the same evidence which was heard by this Court and could have recommended a full pardon under Section 683 of the Criminal Code. His action begs the question of whether the Reference has any advantage not possessed by a pardon.

91. The answer, it is submitted, harkens to the time-worn but valid cliché about justice being seen to be done. By requiring the new evidence to be called and tested in open Court, the Reference procedure does much to allay the inevitable suspicions this case will generate. It might be argued that had the Appellant been pardoned and another individual charged, the same result would have been achieved. The problem with that argument is that it is far from certain that such proceedings will ever get to trial. Furthermore, even if there were a trial, there is always the chance of an acquittal and juries, of course, do not give reasons. In short, there would be considerable risk that this case would remain forever clouded.

41.

2. For those reasons, it is respectfully submitted that the Court should leave no doubt about its perception of the strength (or weakness) of the new evidence in this case.

3. ALL OF WHICH is respectfully submitted this 4th day of February, 1983, by:

F.C. Edwards
SOLICITOR FOR RESPONDENT

1982 S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,

APPEAL DIVISION

IN THE MATTER OF A Reference Pursuant To Section 617 of The Criminal Code By The Honourable Jean Chretien, Minister Of Justice, To The Appeal Division Of The Suprme Court of Nova Scotia Upon An Application For The Mercy Of The Crown On Behalf of Donald Marshall, Jr.

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PART 1

STATEMENT OF FACTS

1. The Appellant, Donald Marshall, Junior, was convicted on November 5, 1971, at Sydney, Nova Scotia, of the murder of Sanford William Seale, and sentenced to a term of life imprisonment. An Appeal against conviction was dismissed by the Appeal Division of the Nova Scotia Supreme Court on September 8, 1972.

2. On the evening of Friday, May 28, 1971, at or about 11:00 o'clock P.M., the Appellant entered Wentworth Park, located in the City of Sydney, where he joined the company of Sanford Seale. Seale had earlier in the evening been in attendance at a local dance held at the St. Joseph's Parish Centre, in the City of Sydney.

3. On the evening in question, Marshall was dressed in dungarees and a yellow nylon jacket. Sanford Seale was wearing brown slacks and a brown jacket. Marshall and Seale proceeded through the park until they reached a footbridge which spans Wentworth Creek and is marked with the letter "B" on Exhibit R-2; plan of survey of Wentworth Park. As they were crossing the footbridge, the Appellant testified that he and Seale were hailed by two men who were standing at the perimeter of the Park on Crescent Street. At this point, the Appellant

testified that he was also called by Patricia Harriss and Terrance Gushue, with whom he was acquainted, and supplied them with a light for their cigarettes. Harriss and Gushue had also been in attendance at the St. Joseph's dance that evening and had cut through the Park as a short cut to their respective homes. According to the testimony of the Appellant and Harriss, this meeting occurred on Crescent Street in front of the building marked "Green Building, Crescent Apartments"on Exhibit R-2; plan of survey of Wentworth Park. Meanwhile, according to the testimony of the Appellant, Seale had joined the two men who had initially called to them from Crescent Street.

4. In her original testimony at the Appellant's trial in 1971, Miss Harriss testified that she had seen only one other person in the vicinity of the Appellant on the evening in question. In her testimony of December 2, 1982, she testified that she had seen two men, who were unknown to her, on Crescent Street at the time she and Gushue spoke to the Appellant. The Appellant indicated that no one else was with him while speaking to Harriss and Gushue.

5. According to the Appellant, his conversation with Harriss and Gushue lasted for about five minutes, at which time Harriss and Gushue continued home, while the Appellant left to rejoin Seale who was conversing with

the two men who had earlier called to them. The Appellant has testified, both in 1971 and also in December, 1982, that these two individuals were unknown to him prior to this meeting.

6. James MacNeil testified at the hearing held on December 1, 1982, that he was one of these two individuals, whom the Appellant had referred to as "the younger one". MacNeil has identified the older man as being Roy Ebsary, and also has implicated him as the perpetrator of the fatal stabbing.

7. There appears to be some conflict between the testimony of Marshall and MacNeil concerning what actually occurred between the Appellant and these two men, now identified as MacNeil and Ebsary. MacNeil testified that Marshall and Seale attempted to rob them and in the attempt he was forceably restrained by Marshall. Although Marshall admitted that he and Seale were in search of money that evening, they had yet to formulate any specific plan as to how to obtain such, whether it be to "bum it off someone," steal from a store or to rob an individual. Marshall also testified that he had taken hold of MacNeil only to prevent the latter, who he claims was staggering, from falling.

8. However, both the Appellant and MacNeil claim that it was Ebsary who stabbed Seale. The Appellant also testified that Ebsary attempted to stab him and in fact,

succeeded in cutting Marshall on the left forearm.

9. At this point, after the attempt to stab him was made, Marshall, fearing for his life, ran from Crescent Street towards Bentinck Street where he met a young man whom he was later able to identify as Maynard Chant. After showing Chant the wound which had been inflicted on his forearm by Ebsary, they flagged down a motor vehicle and returned to the location where Seale's body was lying on Crescent Street. Either Chant or Marshall then called for an ambulance from a nearby house and both remained with Seale until it arrived.

10. It is the testimony of Maynard Chant who had appeared as a Crown witness at the Appellant's trial in 1971, which has substantially changed. Chant had testified that he had entered the Park and observed Marshall stab Seale on Crescent Street, at which point he fled to Bentinck Street, where the Appellant encountered him.

11. At the hearing held on December 1st and 2nd, 1982, Chant recanted this earlier testimony and claimed to have no knowledge of the events surrounding the stabbing, as he had not yet reached the Park when the incident occurred. Both Marshall and Chant's versions of events after the two met on Bentinck Street are similar and remain unchanged from the testimony as presented in 1971. (See note p. 28.)

12. MacNeil testified that immediately following the stabbing, he and Ebsary proceeded to Ebsary's home on Rear Argyle Street in the City of Sydney. They arrived at the house at approximately midnight, and shortly thereafter, MacNeil, who was standing in the living room, observed Ebsary at the kitchen sink, washing blood from a knife. MacNeil further testified that he recalled that Ebsary's daughter was present in the house when this incident occurred.

13. Donna Ebsary, the daughter of Roy Ebsary, confirmed in her testimony on December 1st and 2nd, 1982, that she was present at her parents' home on Rear Argyle Street on the evening of May 28, 1971. Miss Ebsary testified that she had been sitting in the living room of the house when her father and his friend, MacNeil, arrived. She followed her father to the kitchen where she observed him washing a substance, which she believes to have been blood, from a knife.

14. Miss Ebsary's testimony disclosed her father's propensity for violence and his habitual use of knives. She testified that Roy Ebsary was very easily enraged and on two occasions in particular, vented his anger by brutally killing household pets. She further testified that her father maintained a large collection of knives and was very seldom without one on his person.

15. A collection of ten (10) knives, labelled Exhibit R-4 (a-j) was introduced by the Crown through Miss Ebsary. She identified all ten knives as being ones which had belonged to her father and which had been kept at the family's residence.

16. Gregory Ebsary, the son of Roy Ebsary, also testified as to his father's propensity for violence, as well as his continuous use of knives. He testified that his father habitually carried knives and also that he would modify the knives in his possession; often producing stelleto-like blades from ordinary kitchen knives. Gregory Ebsary testified that his father's violent tendencies were magnified by alcholism and he confirmed his sister's testimony concerning their father's attacks upon household pets.

17. It was through this witness that the continuity of possession of the knives comprising Exhibit R-4 (a-j) was established. Gregory Ebsary testified that he had participated in moving the family's belongings, including the knives in question from the residence at Rear Argyle Street to Mechanic Street in 1973, where they remained until he transferred them into the custody of R.C.M.P. S/Sgt. H.W. Wheaton in the Spring of 1982.

18. A.J. Evers, a civilian member of the R.C.M.P., in charge of the Hair and Fibre Section of the R.C.M.P. Crime Detection Laboratory, in Sackville, New Brunswick,

presented testimony as an expert witness in the science of hair fibre examination and comparison. Evers had been tendered as an expert witness at the Appellant's trial in 1971 where he testified as to his examination of a brown coat (then labelled Exhibit 4) and a yellow jacket (then labelled Exhibit 3), for the presence of fresh cuts or tears. At the hearing on the second of December, 1982, Evers testified that fibres found on the knife labelled Exhibit R-4 (i) in the present Appeal, were consistent with those fibres which he took from Seale's coat and Marshall's jacket in 1971, and retained on slides which were introduced as Exhibits R-6 and R-7 (a-c) in the present Appeal. When asked by the Court as to his definition of "consistent", Evers testified that in layman's terms, the fibres found on the knife marked Exhibit R-4 (i) were identical to those fibres retained from the brown coat and yellow jacket which he had examined in 1971. In conclusion, it was Evers' opinion that the probability of the fibres on the knife, Exhibit R-4 (i), coming from sources other than the coat and jacket worn by Seale and Marshall on the evening of May 28, 1971, was "fairly remote".

PART II

LIST OF ISSUES

A. SUMMARY OF NOTICES GIVEN

19. On November 5, 1971, the Appellant was convicted of the non-capital murder of Sandford William (Sandy) Seale, contrary to S. 206(2) of the Criminal Code [now S. 218].

20. On September 8, 1972, an Appeal from the conviction was dismissed by the Nova Scotia Supreme Court, Appeal Division.

21. On June 16, 1982, the Honourable Jean Chretien, then Minister of Justice, referred the conviction to this Honourable Court pursuant to S. 617 of the Criminal Code.

22. On July 29, 1982, an Application was made to the Appeal Division to set a date for a hearing to determine the admissibility of fresh evidence pursuant to S. 610(1)(d) of the Criminal Code.

23. On October 5, 1982, an Order was granted permitting the Appellant leave to call as witnesses: Donald Marshall, Jr., James William MacNeil, Maynard V. Chant, Patricia A. Harriss, Donna E. Ebsary, Gregory A. Ebsary and A.J. Evers, and their testimony was heard by the Appeal Division on December 1 and 2, 1982.

B. SUMMARY OF ISSUES

24. The Appellant respectfully submits that there are essentially two legal issues. First, does the oral teatimony heard by this Honourable Court on December 1 and 2, 1982 comply with the rules for admitting fresh evidence pursuant to S. 610(1)(d) of the Code.

25. In applying the principles of fresh evidence to the present proceeding, consideration must also be given to effects of S. 617. Assuming the testimony is admissible, which the Appellant submits is the case, then a second issue arises. More particularly the second issue concerns the powers of the Appeal Division pursuant to S. 613 of the Code.

26. There is, without doubt, an intermediate step in the process, requiring this Honourable Court to determine, assuming the oral evidence is admitted as to what weight is to be given to it, particularly respecting the witnesses who testified at Marshall's trial in 1971 - Chant, Harriss and the Appellant.

27. It is respectfully submitted that the Appeal should be allowed, the conviction of the Appellant for murder be quashed and a verdict of acquittal entered on the grounds that it is unreasonable or cannot be supported by the evidence; or, in the alternative, there was a miscarriage of justice.

PART III

ARGUMENT

A. ADMISSIBILITY OF FRESH EVIDENCE UPON APPEAL

28. It is submitted by the Appellant that the viva voce testimony presented to this Honourable Court meets the requirements governing the admissibility of fresh evidence. It is submitted that the contents of the witnesses' testimony is fresh in the legal sense, and also satisfies the evidentiary rules governing the general admissibility of evidence: see, for example, R. v. O'Brien (1977) 35 C.C.C. (2d) 209 (S.C.C.).

29. In Palmer and Palmer v. The Queen, (1979) 50 C.C.C. (2d) 193, McIntyre J., delivering judgment on behalf of the Supreme Court of Canada stated:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and Courts of Appeal in various Provinces have pronounced upon them: see for example R. v. Stewart (1972), 8 C.C.C. (2d) 137 (B.C.C.A.); R. v. Foster (1978), 8 A.R. 1 (Alta. C.A.); R. v. McDonald, [1970] 3 C.C.C. 426, [1970] 2 O.R. 114, 9 C.R.N.S. 202 (Ont. C.A.); R. v. Demeter (1975), 25 C.C.C. (2d)

417, 10 O.R. (2d) 321 (Ont. C.A.) [affirmed 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, [1978] 1 S.C.R. 538]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;

(2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(3) the evidence must be credible in the sense that it is reasonably capable of belief, and

(4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The leading case on the application of s. 610(1) of the Criminal Code is McMartin v. The Queen, supra.
(at pp. 204-205)

30. In R. V. Young and three others, [1970] 5 C.C.C. 142 (N.S.S.C.A.D.) the Appellants sought to introduce fresh evidence, subsequent to their convictions for rape, that the complainant had voluntarily admitted to defence counsel and two police officers that she had lied at the trial, and had in fact consented to the act of sexual intercourse with the Appellants. The complainant later made yet another voluntary statement, this time denying her previous statement. Although this fresh evidence, by virtue of the complainant's conflicting statements, was not held to be conclusive, this Honourable Court

found it to be of sufficient strength that it might reasonably affect the verdict of a jury and allowed the appeal and ordered a new trial.

1. Available At Time Of Trial

31. The first principle had, to some extent, been modified in McMartin v. The Queen [1965] 1 C.C.C. 142 (S.C.C.) where it was established that evidence should not be excluded by a Court of Appeal on the grounds that reasonable diligence was not exercised to obtain it for trial, if in the circumstances of the particular case, it is of sufficient strength that it might reasonably affect the jury's verdict (at p. 150, per Ritchie, J.). There is no evidence before this Honourable Court, it is submitted, establishing, or tending to establish, that the Appellant withheld any evidence, either directly bearing on the issue of whether he stabbed Seale, or of any available defence. Marshall was certainly more truthful in his actual testimony in 1971, than Harriss, Chant and Pratico.

32. Although Marshall was not forthright in stating his and Seale's intentions to obtain money that night, his evidence does not bear on the decisive issue before this Honourable Court, nor, obviously could it afford a defence to murder. Its relevance is limited to explaining one possible factor in what might

have led to Seale's stabbing; and, to some extent, the credibility of the Appellant.

33. Alternatively, Marshall's new evidence may be admitted on the criteria formulated in R. v. Taylor (1975) 22 C.C.C. (2d) 321 (Alta. C.A.). In the Taylor case, the Appeallant sought to have introduced as fresh evidence, the testimony of witnesses who could confirm his alibi and point to a third person as having committed the break and enter for which he was convicted. The Appellant, aged 16 when the offence occurred, was a first-time offender. However, the evidence which he sought to have introduced was known by him at the date of his trial, yet purposely withheld. In allowing the appeal and ordering a new trial, the Alberta Supreme Court held that the requirement that the fresh evidence not have been available at trial is not absolute. In certain cases, the character of the accused himself must be examined. At page 328 of the decision, Moir, J.A., states:

> "In my opinion, the power of the Appellate Division to allow new evidence is broad. It ought to be exercised in cases where young persons, with no previous convictions, who have testified in their own offence [defence] are convicted even though they may have guessed who the really guilty person was. It is unlikely that people in the position of Taylor would have understood the finality of the trial process so far as evidence is concerned."

34. It is respectfully suggested that the Appellant, at his own trial in 1971, was in an analogous situation.

35. Even if Marshall had, in 1971, given the testimony which he gave at the hearing before this Honourable Court, for all practical purposes it would not have been of any assistance to him. After hearing the evidence of Chant and Pratico, Marshall's testimony was of little impact, the two versions of how the murder occurred and who was present at the murder scene, being at such remarkable variance. There is no doubt that Marshall was put in a most horrifying and damning situation: not one witness to support his testimony, faced with Crown witnesses who supported a fabricated version of the murder.

36. It is submitted that the testimony of the witnesses, James MacNeil, Donna Ebsary, Gregory Ebsary and A.J. Evers was not available to the Appellant or his counsel in 1971. The testimony of Patricia Harriss and Maynard Chant before this Honourable Court in December is examined below.

37. As to the relevance of all the witnesses testimony it is, on the whole, relevant, in terms of presenting a cohesive body of evidence supporting the Appellant's contention that he is not guilty of the murder of

Sandy Seale.

2. Capable of Belief

38. The Appellant submits that the viva voce testimony credible in the sense that it is capable of belief. In R. v. Parks [1961] 3 All. E.R. 633 (C.C.A.) it was stated that when deciding whether the fresh evidence is credible, the Appeal Court is not to decide whether the evidence is to be believed or not, but rather is to limit its' inquiry to whether such evidence is "capable" of belief.

39. It is submitted by the Appellant that the testimony presented before this Honourable Court meets the requirement of being credible evidence, in that the testimony of all witnesses is capable of being believed.

40. The testimony of A.J. Evers, who was presented to this Honourable Court as an expert witness consisted of evidence of an expert opinion and did not involve matters of fact and therefore the issue of the credibility in the ordinary sense of such testimony is not in issue. (Palmer and Palmer v. The Queen (1979), 50 CCC (2d) 193, 206).

41. Therefore the requirement that the fresh evidence be credible arises in regard only to the testimony of the remaining six witnesses: Marshall,

Chant, MacNeil, Donna Ebsary, Greg Ebsary and Harriss.

42. The requirement that the fresh evidence be capable of belief was discussed at length by the Supreme Court of Canada in Palmer and Palmer v. The Queen (1979) 50 C.C.C. (2d) 193 (S.C.C.).

43. The Appellant sought to have introduced as fresh evidence the testimony of a Crown witness who had claimed to have lied at the preliminary inquiry and trial due to police pressure and the enticement of a substantial monetary reward. The Court of Appeal in British Columbia had refused to admit such evidence, finding it to be unworthy of belief. In dismissing the appeal, the Supreme Court of Canada outlined the procedure to be addressed when considering fresh evidence involving questions of facts as opposed to expert opinion:

> Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. First, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the --------

> answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced. [per McIntyre, J., at p. 206]

44. It is submitted that the direction that fresh evidence which meets this test should be introduced at a new trial applies only to fresh evidence of less than conclusive force, but which possesses such strength that had it been introduced at trial, it might have reasonably affected the result. This position is supported by the adoption by the Supreme Court of Canada in McMartin of the distinction between fresh evidence which is conclusive, enabling the Court of Appeal to deal with the matter, and evidence of less compelling force, which necessitates introduction at a new trial.

45. The testimony adduced by the Appellant at the hearing falls into two broad categories. There are the recanting witnesses, Harriss and Chant; there are the witnesses establishing that a third party, Roy Newman Ebsary, committed the Seale murder. The testimony of Harriss in 1982 indicates that she saw two men with Marshall and not one person, as she stated in the 1971 trial. Chant claimed, in 1971, to have seen Marshall stab Seale in Wentworth Park. He now claims not to have seen the murder at all.

46. Harriss's testimony is not decisive. However it was relevant to the Crown's case against Marshall in 1971. Counsel for the Crown in 1971, it is suggested, was attempting to infer that the "one person" with Marshall, Harriss and Gushue was Sandy Seale. However, in 1982, as well as in her first statement to the Sydney Police in 1971 (Exhibit R-5) Harriss refers to two men, neither of whom was Sandy Seale. Harriss's present memory of the events is not great, but she still remembers having seen two people (Transcript of Hearing, Dec. 1 and 2, 1982, at pp. 138-139, 154).

47. Chant's evidence in 1971 was certainly crucial to the Crown's case. His current testimony that he did not see the Seale murder bears directly on a decisive issue. The admissibility of the evidence of Chant and Harriss does not turn on whether they testified and were cross-examined at Marshall's 1971 trial (Horsburgh v. The Queen [1967] S.C.R. 746.) The admissibility of their evidence turns only on whether it is capable of belief, as it is taken as fact that the Appellant and his counsel were not aware of their present testimony in 1971.

48. It is for this Honourable Court to determine the credibility of these two witnesses, as well as

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MacNeil, Donna Ebsary, Gregory Ebsary and the Appellant himself. With respect to Harriss and Chant, there is no selfish or suspect motive, as in Palmer and Palmer, which might indicate that they are not to be believed now. Furthermore both recanting witnesses explain their 1971 testimony in a similar, but independant manner: police pressure, fear of the police and threat of perjury. An additional factor in 1971 was their age at the time - both Chant and Harriss were 15. It is therefore submitted that the fresh evidence of Chant and Harriss is capable of belief.

49. In the alternative, it is submitted that the evidence of Chant, in particular, when taken together with the testimony of James William MacNeil and the Appellant, is credible. If the murder was at the hands of Roy Ebsary, as both eye witnesses MacNeil and the Appellant allege, then Chant could not have witnessed Marshall stab Seale, and therefore Chant is now being truthful. Parenthetically, it is noted that Pratico's 1971 evidence of seeing Marshall stab Seale, can be discounted on similar reasoning, without having to hear Pratico or admit Pratico's Affidavit. (It is however taken as agreed fact that Pratico is not a credible witness.)

50. It is submitted that there is no doubt that the viva voce evidence of the Appellant is credible with respect to the decisive issue - who killed Seale, as it

is consistent with his 1971 testimony. Furthermore, it is suggested that the testimony of James William MacNeil, Donna Ebsary, Gregory Ebsary and A.J. Evers is reasonably capable of belief without dispute. There is also no doubt that all oral testimony, if believed, could reasonably have affected the result of the 1971 trial.

3. Conclusiveness of the Evidence

51. A distinction between fresh evidence which is "conclusive" in itself as contrasted with evidence of a less compelling force, but yet of sufficient strength that it might reasonably affect the verdict of a jury was made in R. v. Buckle, (1949), 94 CCC 84 (B.C.C.A.) and adopted by Ritchie J. at page 152 of the McMartin decision. It is the Appellant's submission that the testimony presented before this Honourable Court on December 1 and 2, 1982, not only meets the requirements for the admissibility of fresh evidence, but by its very nature is conclusive evidence of his innocence. Fresh evidence which is conclusive, enables the Court of Appeal to deal with the matter without the necessity of ordering a new trial at which such evidence may be adduced. In support of this position, the Appellant cites the Buckle decision at page 85-86, which was subsequently adopted and quoted by the Supreme Court of Canada in McMartin:

> "In my opinion the rule to be applied in criminal cases in relation to the introduction of fresh evidence and consequential relief which may be granted by the Court, is wider in its discretionary scope than that applied by the Court in civil appeals. If the newly discovered evidence is in its nature conclusive, then the Court of Appeal in both civil and criminal cases, may itself finally deal with the matter. If on the other hand, in a criminal case, the new

> evidence does not exert such a compelling influence, but is of sufficient strength that it might reasonably affect the verdict of a jury, then, in my opinion, the Court may admit that evidence and direct a new trial, so that such evidence might be adduced to the scale and weighed by the trial tribunal in light of all the facts" (per Sloan, C.J. BC)

There appears to be little judicial consideration in Canada of what is meant by the expression "conclusive" or "practically conclusive". In R. v. Miller (1981) 59 C.C.C. (2d) 131 (Sask. C.A.), Culliton C.J.S. stated:

> While the evidence of Cavanagh, considered in the light of all other evidence, is not of such a compelling influence to enable the Court to finally come to a decision, it is such, however, viewed in light of the entire evidence of sufficient strength that it might reasonably affect the verdict of a jury. (at p. 135; emphasis added) (also R. v. Partridge (1974) 15 C.C.C. (2d) 434 (P.E.I.S.C. in Banco)

52. It is submitted that the testimony heard by this Honourable Court is of a most compelling nature. If all the testimony is admitted as evidence, there is no evidence at all to support the Appellant's conviction for the murder of Sandy Seale. The evidence points directly to a third party. The evidence before this Honourable Court essentially negates the crucial eye-witness evidence against Marshall in the 1971 trial and therefore there is no other evidence which might be considered by a jury.

4. The Application Of S. 617

53. The Appellant submits that in this Appeal, being a Reference under Section 617(b) of the Criminal Code, and not an Appeal in the ordinary manner, certain considerations become relevant in the reception of fresh evidence. It is the Appellant's submission that the principles governing the admissibility of fresh evidence on appeal are equally applicable to a reference, yet, that such principles are not strictly binding upon this Honourable Court if their application would lead to injustice, or the appearance of such. In support of this position, the Appellant relies upon the decision of the Ontario Court of Appeal in Reference Re R. v. Gorecki (No. 2) (1976), 32 C.C.C. (2d) 135. On the issue of the reception of fresh evidence, the Court stated:

> We are in agreement with the view expressed in R. v. Aylett, supra, in so far as it holds that on a Reference of a matter to the Court of Appeal under S. 617(b) the reception of further evidence is governed by the Court's interpretation of the statutory provisions, rather than by the Executive request contained in the Reference to receive certain evidence, since the matter is to be heard by the Court as though it were an appeal by the accused. We consider, however, that the correct approach in deciding whether to admit new evidence on an appeal which comes before the Court by a Reference under s. 617(b) is to deal with each case on the merits, bearing in mind, of course, the policy consideration previously mentioned,

but the Court not considering itself bound by inflexible rules. In our view, the principle upon which the Court should act in a case such as this is the one enunciated by Donovan, J., speaking for the Court of Criminal Appeal, in R. v. Sparkes, [1956] 1 W.L.R. 505. After referring to R. v. McGrath and R. v. Collins, supra, he refused to deduce any general rule applicable to the reception of fresh evidence on a reference, and he said at p. 514:

> On the one hand it might well be undesirable to stultify such a reference at the outset by a refusal to receive evidence which was available at the trial. On the other hand it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after conviction in the hopes that fresh evidence, genuine or otherwise, might be got before the Court as the result of a petition to the Home Secretary, and a reference of the matter by him to the court. Each case must, therefore, be decided upon its merits, although the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice. (at pp. 145-146)

54. It is the Appellant's primary submission that the testimony presented before this Honourable Court satisfies the necessary criteria for the introduction of fresh evidence upon appeal. It is the Appellant's further submission that due to the fact that the Appeal was initiated as a Reference to this Honourable Court, the necessity of weighing the strict application of the fresh evidence principles against the possibility of

injustice or the appearance of injustice arising from such application should be viewed by the Court as an overriding consideration in the determination of the application under section 610(1)(d).

B. POWERS OF THE COURT OF APPEAL PURSUANT TO SECTION 613

55. The Appellant respectfully submits that should this Honourable Court allow the application to adduce fresh evidence, the powers of the Court of Appeal pursuant to section 613 of the Criminal Code must be addressed.

56. Section 613(1)(a) outlines the circumstances in which an Appeal Court may allow an appeal. Correspondingly, section 613(1)(b) specifies those circumstances which will support the dismissal of an appeal.

57. It is the Appellant's submission that the reception of the fresh evidence will support the Appellant's position that his conviction for the murder of Sanford Seale was unreasonable and cannot be supported by the evidence or in the alternative, that the Appeal should be allowed on the grounds that there was a miscarriage of justice.

58. The Appellant submits that the interpretation of section 613(1)(a)(i) has been outlined by the Supreme Court of Canada in Corbett v. The Queen (1973), 14 C.C.C. (2d) 285. Pigeon, J., speaking for the

majority of the Court, held that a Court of Appeal when considering whether or not a verdict is "unreasonable or cannot be supported by the evidence", is not to have regard solely to the issue as to whether there was any evidence to support the conviction. Rather, he states at pages 386-387 of the decision, the function of the Appeal Court in the following manner:

> "...The Code expressly provides that the appeal may be allowed, not only when the verdict cannot be supported by the evidence, but also when it is unreasonable. In other words, the Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its' opinion for that of the jury. The word of the enactment is 'unreasonable', not 'unjustified'. The jurors are the triers of the fact and their finding is not to be set aside because the judges in appeal do not think they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no reasonable twelve men could possibly have reached it acting judically."

59. The Appellant respectfully submits that the application of the Corbett guidelines to the Appeal presently before this Honourable Court requires some necessary adaptation to the unique situation posed by this Appeal. It is sought to have the Appellant's

conviction set aside on the basis that not only is it "unreasonable", but also that it cannot be supported by the evidence.

60. The evidence which was adduced at the Appellant's trial in 1971, was sufficient in the minds of the jurors, to find the Appellant guilty beyond a reasonable doubt of the murder of Sanford Seale. However, it is the Appellant's submission that it is the subsequent, or more precisely, the fresh evidence which has come to light since the conviction of the Appellant, which forms the basis for the argument that the conviction is not only unreasonable, but that it is also not supported by the evidence.

61. In addition and in the alternative, the Appellant submits that the viva voce testimony heard by this Honourable Court on December 1 and 2, 1982, if accepted as fresh evidence, discloses sufficient grounds for the determination that the Appellant's conviction was a result of a miscarriage of justice of the gravest magnitude.

62. The Appellant submits that the term, "miscarriage of justice" can be understood in both a broad, as well as in limited meaning. In its broadest sense, it covers procedural defects in the trial process.

In its narrowest or most limited sense, it means the conviction of an individual for a crime which another has committed, for this is the ultimate miscarriage of justice. The distinction was alluded to in the decision of the British Columbia Court of Appeal in R. v. Wong (2), [1978] 4 W.W.R. 468 which contrasted the term "miscarriage of justice" in its' limited meaning versus its' broader meaning:

> "I cannot, of course, say that there was a miscarriage of justice in the sense that an innocent man has been convicted. It is however the right of an accused to be tried according to law and that includes an adequate charge by the trial judge on the law and its application to the evidence." [per MacFarlane, J.A. at p. 476.]

63. In conclusion, the Appellant submits that his conviction was the result of a miscarriage of justice in its' most limited and serious context, and that on this basis, the Appellant's conviction should be quashed and a verdict of acquittal entered.

PART IV

ORDER OR RELIEF SOUGHT

64. The Appellant submits that the oral testimony of Donald Marshall, Jr., James William MacNeil, Donna E. Ebsary, Maynard V. Chant, Patricia A. Harriss, Gregory A. Ebsary and A.J. Evers, adduced before this Honourable Court on December 1 and 2, 1982, be admitted as evidence.

65. The Appellant furthermore submits that [the appeal be allowed], the conviction of the Appellant be quashed and that a verdict of acquittal be entered.

66. All of which is respectfully submitted this 25th day of January, 1983, by:

STEPHEN J. ARONSON

(Solicitor for the Appellant)

APPENDIX "A"

LIST OF AUTHORITIES

R. v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.)

Palmer and Palmer v. The Queen (1979), 50 C.C.C. (2d) 193 (S.C.C.)

R. v. Young and three others, [1970] 5 C.C.C. 142 (N.S.S.C., A.D.)

McMartin v. The Queen, [1965] 1 C.C.C. 142 (S.C.C.)

R. v. Taylor (1975), 22 C.C.C. (2d) 321 (Alta. S.C.)

R. V. Parks, [1961] 3 All E.R. 633 (C.C.A.)

Horsburgh v. The Queen, [1967] S.C.R. 746 (S.C.C.)

R. v. Buckle (1949), 94 C.C.C. 84 (B.C.C.A.)

R. v. Miller (1981), 59 C.C.C. (2d) 131 (Sask. C.A.)

R. v. Patridge (1974), 15 C.C.C. (2d) 434 (P.E.I.S.C. in Banco)

Reference Re R. v. Gorecki (No. 2) (1976), 32 C.C.C. (2d) 135 (Ont. C.A.)

Corbett v. The Queen (1973), 14 C.C.C. (2d) 285 (S.C.C.)

R. v. Wong (No. 2), [1978] 4 W.W.R. 463 (B.C.C.A.)

APPENDIX "B"

SECTIONS 610;613;617 CRIMINAL CODE

POWERS OF COURT OF APPEAL—Parties entitled to adduce evidence and be heard—Other powers—Execution of process.

610. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,

(a) order the production of any writing, exhibit, or other thing connected with the proceedings;

(b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,

(i) to attend and be examined before the court of appeal, or

(ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;

(c) admit, as evidence, an examination that is taken under subparagraph *(b)*(ii);

(d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

(e) order that any question arising on the appeal that

(i) involves prolonged examination of writings or accounts, or scientific or local investigation, and

(ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal,

be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal; and

(f) act upon the report of a commissioner who is appointed under paragraph *(e)* in so far as the court of appeal thinks fit to do so.

(2) In proceedings under this section the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph (1)*(e)*, are entitled to be present during the inquiry and to adduce evidence and to be heard.

(3) A court of appeal may exercise in relation to proceedings in the court any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

(4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada. 1953-54, c. 51, s. 589.

Powers of the Court of Appeal

POWERS—Order to be made—Substituting verdict—Appeal from acquittal—New trial under Part XVI—Where appeal against verdict of insanity allowed—Appeal court may set aside verdict of insanity and direct acquittal—Additional powers.

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph *(a)*, or

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph *(a)*(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion as to the effect of a special verdict, and may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court;

(d) may set aside a conviction and find the appellant not guilty on account of insanity and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made, so that he was not criminally responsible for his conduct; or

(e) may set aside the conviction and find the appellant unfit, on account of insanity, to stand his trial and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor.

(2) Where a court of appeal allows an appeal under paragraph (1)*(a)*, it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered, or

(b) order a new trial.

(3) Where a court of appeal dismisses an appeal under subparagraph (1)*(b)*(i), it may substitute the verdict that in its opinion should have been found and affirm the sentence passed by the trial court or impose a sentence that is warranted in law.

(4) Where an appeal is from an acquittal the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law. 1974-75-76, c. 93, s. 75.

(5) Where an appeal is taken in respect of proceedings under Part XVI and the court of appeal orders a new trial under this Part, the following provisions apply, namely,

(a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;

(b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or magistrate, as the case may be, acting under Part XVI, other than a judge or magistrate who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or magistrate who tried the accused in the first instance;

(c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury it is not necessary, in any province of Canada, to prefer a bill of indictment before a grand jury in respect of the charge upon which the new trial was ordered, but it is sufficient if the new trial is commenced by an indictment in writing setting forth the offence with which the accused is charged and in respect of which the new trial was ordered; and

(d) notwithstanding paragraph *(a)*, if the conviction against which the accused appealed was for an offence mentioned in section 483 and was made by a magistrate, the new trial shall be held before a magistrate acting under Part XVI, other than the magistrate who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the magistrate who tried the accused in the first instance.

(6) Where a court of appeal allows an appeal against a verdict that the accused is unfit, on account of insanity, to stand his trial it shall, subject to subsection (7), order a new trial.

(7) Where the verdict that the accused is unfit, on account of insanity, to stand his trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires. 1953-54, c. 51, s. 592; 1960-61, c. 43, s. 26; 1968-69, c. 38, s. 60.

Powers of Minister of Justice

POWERS OF MINISTER OF JUSTICE.

617. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

(a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

(b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or

(c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly. 1968-69, c. 38, s. 62.

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

MacKeigan, C.J.N.S., Hart, Jones
Macdonald and Pace, JJ.A.

IN THE MATTER OF A REFERENCE PURSUANT TO SECTION 617 OF THE CRIMINAL CODE BY THE HONOURABLE JEAN CHRETIEN, MINISTER OF JUSTICE, TO THE APPEAL DIVISION OF THE SUPREME COURT OF NOVA SCOTIA UPON AN APPLICATION FOR THE MERCY OF THE CROWN ON BEHALF OF DONALD MARSHALL, JR.

BETWEEN:

DONALD MARSHALL, JR. Appellant - and - HER MAJESTY THE QUEEN Respondent	Stephen J. Aronson for the appellant Frank C. Edwards for the respondent Appeal Heard: February 16, 1983 Judgment Delivered: May 10, 1983

THE COURT:

On June 16, 1982 the Honourable Jean Chretien, Minister of Justice of Canada, referred the following matter to the Supreme Court of Nova Scotia, Appeal Division:

"WHEREAS Donald Marshall, Jr. was convicted on 5 November, 1971 by a court composed of Mr. Justice J. L. Dubinsky and a jury that he, on or about 29 May, 1971 at Sydney, in the County of Cape Breton, Province of Nova Scotia, murdered Sandford William (Sandy) Seale and was on the same date sentenced to a term of life imprisonment.

"AND WHEREAS an appeal from that conviction to this Honourable Court was dismissed on 8 September, 1972.

"AND WHEREAS evidence was subsequently gathered and placed before the undersigned which appears to be relevant to the issue whether Donald Marshall, Jr. is guilty of the crime of which he stands convicted.

"AND WHEREAS application for the mercy of the Crown has been made on behalf of Donald Marshall, Jr., pursuant to section 617 of the Criminal Code.

"AND WHEREAS the Attorney General of Nova Scotia and counsel acting on behalf of Donald Marshall, Jr. agree with the undersigned that this new evidence is of sufficient importance to be considered by this Honourable Court.

"NOW THEREFORE, the undersigned pursuant to paragraph 617(b) of the Criminal Code, hereby refers the said conviction to this Honourable Court for hearing and determination in the light of the existing judicial record and any other evidence which the Court, in its discretion, receives and considers, as if it were an appeal by Donald Marshall, Jr."

Section 617(b) of the Criminal Code is as follows:

"617. The Minister of Justice may, upon an application for the mercy of the Crown by or on

behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

. . .

(b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be;"

On October 5, 1982 a motion was presented to the Court by counsel for the appellant requesting the Court to hear fresh evidence, which was alleged to be highly relevant to the guilt or innocence of the appellant. Counsel for the Crown did not oppose this application, since it was felt that the evidence tendered should be made available to the Court, and stated that the Crown would be content to ensure that the Court got a full and balanced account of all the events which led to the death of Sandy Seale in 1971 and the subsequent conviction of the appellant in November of that year.

In deciding what fresh evidence should be heard by the Court the principles set forth in Palmer and Palmer v. The Queen (1980), 50 C.C.C. (2d) 193, by the Supreme Court of Canada were followed.

McIntyre, J., expressed these principles as follows:

"Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment

'the interests of justice' and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and Courts of Appeal in various Provinces have pronounced upon them: see for example R. v. Stewart (1972), 8 C.C.C. (2d) 137 (B.C.C.A.); R. v. Foster (1978), 8 A.R. 1 (Alta. C.A.); R. v. McDonald, [1970] 3 C.C.C. 426, [1970] 2 O.R. 114, 9 C.R.N.S. 202 (Ont. C.A.); R. v. Demeter (1975), 25 C.C.C. (2d) 417, 10 O.R. (2d) 321 (Ont. C.A.) [affirmed 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, [1978] 1 S.C.R. 538]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;

(2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(3) the evidence must be credible in the sense that it is reasonably capable of belief, and

(4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

"The leading case on the application of s. 610(1) of the Criminal Code is McMartin v. The Queen, supra. Ritchie, J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appellate Court. He considered that special grounds existed because of the nature of the evidence sought to be adduced and he

considered that it should not be refused admission because of any supposed lack of diligence in procuring the evidence for trial. The test he applied on this question was expressed in these terms at p. 152 C.C.C., p. 381 D.L.R., p. 493 S.C.R.:

> 'With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.'"

Since this matter came before us as a reference pursuant to s. 617(b) of the Criminal Code these normal principles of reception of fresh evidence were not applied with the same strictness as in an ordinary appeal, and accordingly evidence was permitted from not only new witnesses but also witnesses who had testified at the trial and now wished to change their evidence, and furthermore the accused was permitted to testify anew even though his evidence could not be said to come within the category of fresh evidence. This relaxation of the ordinary rules of reception of fresh evidence to prevent any possible injustice was also found necessary by the Court of Appeal of Ontario when dealing with a similar situation in Reference Re Regina v. Gorecki (No. 2) (1977), 32 C.C. (2d) 135. The Court said at p. 145 and 146:

"We are in agreement with the view expressed in R. v. Aylett, supra, in so far as it holds that on a Reference of a matter to the Court of Appeal under s. 617(b) the reception of further evidence is governed by the Court's interpretation of the statutory provisions, rather than by the Executive request contained in the Reference to receive certain evidence, since the matter is to be heard by the Court as though it were an appeal by the accused. We consider, however, that the correct approach in deciding whether to admit new evidence on an appeal which comes before the Court by a Reference under s. 617(b) is to deal with each case on the merits, bearing in mind, of course, the policy considerations previously mentioned, but the Court not considering itself bound by inflexible rules. In our view, the principle upon which the Court should act in a case such as this is the one enunciated by Donovan, J., speaking for the Court of Criminal Appeal, in R. v. Sparkes, [1956] 1 W.L.R. 505. After referring to R. v. McGrath and R. v. Collins, supra, he refused to deduce any general rule applicable to the reception of fresh evidence on a reference, and he said at p. 514:

> 'On the one hand it might well be undesirable to stultify such a reference at the outset by a refusal to receive evidence which was available at the trial. On the other hand it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary, and a reference of the matter by him to the court. Each case must, therefore, be decided upon its merits, although the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice.'

The Court, however, did look at fresh evidence: 'lest the impression might arise that a review of his case had been refused for a reason which was merely procedural'. A similar view was expressed by the New Zealand Court of Appeal in R. v. Morgan, [1963] N.Z.L.R. 593, in relation to the reception of further evidence on a reference under s. 406 of the Crimes Act, 1961, which contains provisions similar to s. 617 of the Code."

The motion of the appellant to adduce fresh evidence was granted at the conclusion of the hearing and the Court set December 1, 1982 as the day for taking the oral evidence of seven witnesses, four of whom, including the appellant, had testified at the original trial, and the other three who would be testifying for the first time. This testimony was presented to the Court on the date set, and along with the evidence taken at the original trial, is now part of the record before the Court.

The powers of this Court on this reference, in our opinion, are those possessed by the Court when hearing an ordinary appeal. They are set forth in s. 613 of the Criminal Code, the applicable parts of which are as follows:

> "613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> . . .
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> . . .
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),"

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered, or

(b) order a new trial."

The role of an appellate court when exercising its powers under s. 613 of the Criminal Code has been considered by the Supreme Court of Canada in Corbett v. The Queen (1974), 14 C.C.C. (2d) 385, where Pigeon, J., said at p. 386:

> "Of course, if the Judges of the majority had held that their function was only to decide whether there was evidence, this would be reversible error. The Criminal Code expressly provides that the appeal may be allowed, not only when the verdict cannot be supported by the evidence but also when it is unreasonable. In other words, the Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is 'unreasonable', not 'unjustified'. The jurors are the triers of the facts and their finding is not to be set aside because the Judges in appeal do not think they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no 12 reasonable men could possibly have reached it acting judicially."

We must not only consider here, however, whether the original verdict in the light of the entire record, including the fresh evidence, is unreasonable or cannot be supported by the evidence. Should the Court reach the

conclusion that either circumstance exists, then the Court must determine whether a new trial should be ordered or a verdict of acquittal entered in favour of the appellant. Before any such conclusions can be reached, however, it is necessary to review the original trial conducted more than eleven years ago wherein the appellant was convicted of the murder of Sandford William (Sandy) Seale, the original appeal, which confirmed that conviction, and the fresh evidence which has recently been placed before the Court. We will commence with the facts as revealed by the transcript of the original trial held before Dubinsky, J., with a jury, at Sydney, Nova Scotia, November 2 to 5, 1971.

Sandy Seale, a negro teenager, was stabbed in the abdomen on Crescent Street, adjacent to Wentworth Park, in the city of Sydney, on Friday, May 28, 1971 just before midnight. He died shortly thereafter in hospital. The appellant, Donald Marshall, Jr., said that he was with Sandy Seale at the time he was stabbed. Marshall was an eighteen-year-old Indian boy, who had been friends with Seale for three years. He had left another friend's home about eleven o'clock that Friday night and met Seale in Wentworth Park. He was wearing a yellow nylon jacket that he had borrowed from a friend in Halifax the day before. He had just arrived back in Sydney that evening.

Marshall explained that he was talking with Seale

for a couple of minutes when they met another acquaintance by the name of Patterson, who was drunk. They left him and walked up to a bridge in the park. He said that two men up on Crescent Street then called them up, and Marshall's testimony continues as follows:

"BY MR. ROSENBLUM:

Q. . . . You met two men and you walked up towards Crescent Street. Go ahead.

A. Bummed us for a cigarette.

Q. Umm?

A. A cigarette

Q. What?

A. Smoke.

Q. What about them?

A. Asked for a cigarette.

Q. What?

A. And a light.

Q. When they asked you for the cigarettes and the light, what did you do?

A. I gave it to them.

Q. Go ahead.

A. I asked them where they were from. Said Manitoba. Told them they looked like priests.

Q. Told them what?

A. Looked like priests.

Q. Why did you make that remark to them? Take your hand down, Donnie.

A. Looked like it.

Q. In what way?

A. Dressed.

Q. Umm?

A. Dress.

Q. What kind of dress? How were they dressed?

A. Long coat.

Q. What colour?

A. Blue

Q. What religion are you yourself?

A. Catholic."

His testimony continued:

"Q. What did you say to these men?

A. They looked like priests.

Q. Yes, go ahead. Did you get an answer to that?

A. Yeah.

Q. Tell us.

A. The other guy, the younger one, said, "we are".

Q. Go ahead.

A. They asked me if there were any women down the park. Told them there were lots of them down the park. And any bootleggers. I told them I don't know.

Q. Take your hand down, Donnie, please. Go ahead.

A. Told us, don't like niggers or Indians.

MR. MacNEIL:

Can't hear the witness, My Lord.

THE WITNESS:

We don't like niggers or Indians. Took the knife out of his pocket -

BY MR. ROSENBLUM:

Q. Who did?

A. The older fellow.

Q. What did he do?

A. Took the knife out of his pocket.

Q. Yes.

A. Drove it into Seale.

Q. What part of Seale?

A. Here.

Q. Are you referring to the stomach?

A. Yeah.

Q. Yes. And then?

A. Swung around me, moved my left arm and hit my left arm.

Q. Hit your left arm? Just roll back your sleeve, please. Is there a scar now visible from the slash of the knife?

A. Yes.

Q. Just show it please.

A. (Witness complied.)

Q. Is that the scar that the doctors described?

A. Yeah.

Q. Show it to His Lordship as well. On what arm is that slash?

A. Left arm.

Q. On your left arm. Yes, after that happened what did you do?

A. Ran for help.

Q. Where did you run?

A. Byng Avenue.

Q. Take your hand down Donnie. Did you meet anybody on Byng Avenue?

A. Yeah.

Q. Who did you meet?

A. I don't know his name.

Q. Take your hand down.

A. Don't know his name.

Q. Take your hand down, please. Did you see him on the witness stand here?

A. Yeah.

Q. May I suggest the name, My Lord? May I suggest the name of the person he met on Byng Avenue? He can't recall his name. Was it Mr. Maynard Chant?

A. Yeah.

Q. All right. And that was by Mr. Mattson's home, the man who gave evidence here this morning.

A. Yes.

Q. And when you met Chant what did you do?

A. Stopped the car.

Q. You stopped a car and where did you go with this car?

A. To Crescent Street.

Q. Who went with you? Did Chant go with you?

A. Yeah.

Q. When you got up to Crescent Street, what did you see there?

A. Sandy Seale, laying on the ground.

Q. Yes.

A. I went to Doucette's house.

Q. Where was this house?

A. Crescent.

Q. On Crescent Street, what did you do there?

A. Told them to call for an ambulance for me.

Q. Called an ambulance, yes.

A. And the cops.

Q. What's that?

A. And the cops.

Q. And the cops, yes. And did you stay there until the ambulance and the police arrived?

A. Yeah.

Q. How many police arrived, do you know?

A. No.

Q. Where did you go after that?

A. To the City Hospital.

Q. And you were treated by a doctor and a nurse as they have told us. And then where did you go after you were treated at the hospital?

A. Went home."

There had been a dance at St. Joseph's Church hall that Friday evening, and some of the witnesses that we will be

mentioning were returning from that dance by way of Wentworth Park. In cross-examination Marshall denied having been at the dance or having seen a sixteen-year-old teenager by the name of John Pratico near the park that night. He did admit having met Miss Patricia Harris somewhere near Crescent Street as she and her friend, Terrance Gushue, to whom he gave a light for his cigarette, were on their way home from the dance.

At the conclusion of the cross-examination the Court directed certain questions to Marshall as follows:

"BY THE COURT:

Q. Mr. Marshall, I didn't get what you had said. You saw two men. Two men and one asked for a cigarette?

A. Yeah.

Q. Speak up.

A. Yes.

Q. 'I gave them a cigarette and light.'

A. Yeah.

Q. Now they were from Manitoba?

A. Yeah.

Q. Who said that? How did you know?

A. I asked them where they were from.

Q. And they said one or two of them was from Manitoba?

A. Yes. The old fellow.

Q. The old fellow, said they were from Manitoba. Then I have here, 'I said you look like priests.'

A. Yeah.

Q. Is that correct?

A. Yeah.

Q. Then what did the younger man say?

A. 'We are.'

Q. 'We are.' Now then, then what?

A. I don't understand.

Q. The younger man said, 'We are.' and who spoke then, the same one?

A. Pardon.

Q. Who went on to say that they didn't like -

A. Coloured -

Q. The younger or the older?

A. The older.

Q. The older man said what?

A. We don't like niggers.

Q. We don't like niggers or Indians. That's the older man said that?

A. Yeah.

Q. And then what happened?

A. He took a knife and he drove it into Seale's stomach.

Q. He took a knife from where?

A. His pocket.

Q. Out of his pocket and drove it into Seale's stomach.

A. And turned on me.

Q. 'Turned around to me' -

A. Swung the knife at me.

Q. 'Swung the knife at me' -

A. I moved my left arm. He cut me in the left arm."

Maynard Chant, a fifteen-year-old Grade VII student from Louisbourg, had been visiting Sydney that evening. He had missed the last bus back to Louisbourg and was proceeding through Wentworth Park to the Louisbourg highway so he could hitch-hike back home. He was following the

railway tracks as a short-cut through the park, and said that he noticed a fellow hunched over in a bush. He did not recognize this person, and his testimony continued as follows:

"Q. What did you do?

A. Oh, I kept on walking down a little farther. I walked down a little farther and looked back to see what he was looking at. He was looking over towards the street. So I looked over and saw two people over there.

Q. Did you recognize either of these people?

A. No. And I guess they were having a bit of an argument.

Q. Why do you say that?

A. I don't have no reason why.

Q. Could you hear what they were saying?

A. No.

Q. What took place?

A. Well one fellow, I don't know, hauled something out of his pocket - anyway - maybe - I don't know what it was. He drove it towards the left side of the other fellow's stomach.

Q. What took place, when then?

A. Fellow keeled over and that's when I ran.

Q. You ran from the scene?

A. Yes sir.

Q. Can you describe these two men, what they were wearing?

A. The fellow what had keeled over, he had a dark jacket and pants and that on. The other fellow had, I thought it was a yellow shirt at first but after a while he caught up to me and it was a yellow jacket.

Q. Tell me, sir, before you ran from the scene did you recognize either of these two gentlemen?

A. No sir.

Q. Then what did you do?

A. I ran down the tracks and cut across the path right onto - I don't know the name of the street -

the street up from George Street - I started to walk up towards the bus terminal and I saw a fellow running towards me. I turned around and started to walk up the other way. He caught up to me and by that time I recognized him and it was a Marshall - Marshall fellow.

Q. Donald Marshall?

A. Donald Marshall.

Q. That's the accused in this case here. Do you see him in court here today?

A. Yes."

Maynard Chant then continued his testimony as follows:

"A. He caught up to me and I stopped and waited. He said, 'Look what they did to me.' He showed me his arm. Had a cut on his arm and I said, "Who" and he told me there was two fellows over the park. By that time another couple, like two girls and two boys come along and he stopped them and asked them for their help, you know. They said, 'What could we do to help?' and the girl gave him a handkerchief to put over his arm. He showed his arm and it was bleeding. So they kept on going. A car come along and he flagged that down -

Q. Who flagged it down?

A. Marshall. And we got in the car and drove over to where the fellow was at.

Q. Where what fellow was at?

A. Over - the body on Crescent Street I guess and the fellow was at Crescent Street."

His testimony continued:

"Q. You say you recognized Donald Marshall on Byng Avenue when he come up and talked to you?

A. Yes.

Q. What was he wearing?

A. He was wearing at that time a yellow jacket and dark pair of pants.

Q. I show you exhibit No. 3, what is that, please?

A. It's a jacket that Marshall wore.

Q. Jacket that Marshall wore and what colour is it?

A. Yellow.

Q. When Marshall caught up to you on Byng Avenue - I'm sorry, did you give us what he said - 'Look what they did to me' - did he say anything else?

A. He said that his buddy was over at the park with a knife in his stomach.

Q. Then you say, sir, that Marshall flagged down a car and you went where?

A. Over to Crescent Street on the other side of the park.

Q. Back to Crescent Street?

A. Yes."

He continued:

"A. Well after he flagged the car down, the police got out and went over by the body and Marshall - Donald Marshall showed 'em his arm. He got in the police car and they took him to the hospital. And by that time the ambulance had arrived and they took the fellow up and put him into a - wait now, a -

Q. Speak up now.

A. A stretcher and put him in the back of the ambulance.

Q. And then?

A. Then I started to leave to go home."

At this point Crown counsel obtained permission from the Court to cross-examine Mr. Chant on inconsistent evidence which he had given at the preliminary hearing of the case. The following exchange then occurred:

"BY MR. MacNEIL:

Q. Do you recall, Mr. Chant, giving evidence at the

Preliminary Hearing of this trial on Monday, July 5, 1971?

A. Yes.

Q. And do you remember being asked the following questions and answers: I refer to page 34 - line 16 -

'Q. What did you do?
A. I looked back to see what he was looking at. Then I saw two guys talking to one another.
Q. And do you know who these two guys were?
A. I didn't know Sandy Seale at the time but I didn't recognize Donald Marshall at the time either until afterwards.
Q. After what?
A. After what happened.
Q. Tell me, what did you see take place if anything?
A. Well first, the only thing I saw - I saw them talking and I guess they were using some - were using kind of profane language. Donald said something to the other fellow and the other fellow said something back to Donald and I saw Donald haul a knife out of his pocket.
Q. That's Donald Junior Marshall who you see in the court here today? Would you point him out to the court please? (The witness points to the accused.) You saw him what - haul a knife out of his pocket. What if anything did he do with that knife?
A. Drove it into the stomach of the other fellow -'"

Mr. Chant was then asked by Crown counsel whether he remembered giving that evidence and whether it was true, and the witness said "Yes" to both questions.

During cross-examination it was established that this young witness had repeated Grades II, V, and VI in school, and then defence counsel put the following questions to the witness:

"Q. All right. So I'm suggesting to you that you met - what you're saying is you met Donald Marshall on Byng Avenue as you were heading for George Street to try and get a lift to Louisbourg. Right?

A. Yes.

Q. And the first thing he said to you, was, 'Look what they did to me!', isn't it?

A. Yes.

Q. And there was blood on his arm then, wasn't there?

A. No -

Q. Well you saw -

A. - a few minutes after there was blood.

Q. A few minutes afterwards, okay. Now, this question, and you know you're under oath and I know you're not enjoying this. Under oath as you are, can you swear before God that Donald Marshall whom you met on Byng Avenue is the man you saw previous; are you sure of that, under oath before God?

A. Uh, you mean, like, uh - Donald Marshall, when I seen him on that there street that you were talking about, is the same fellow over on Crescent Street?

Q. Yes.

A. No, I'm not sure.

Q. You're not sure. So in other words, Maynard, that is your first name?

A. Yes.

Q. When you were talking about the fact that you saw two men over there on Crescent Street arguing, you can't swear that one of those men was Donald Marshall, can you?

A. No sir."

Mr. Chant further testified as follows:

"Q. And the first thing he did was, he said, 'Look what they did to me!' and he showed you the scar on his arm and from which blood showed a few minutes later?

A. Yes.

Q. And then the next thing he did was he flagged down a car didn't he?

A. No. There was a couple walking by -

Q. A couple walking by.

A. And he stopped the couple and asked them for help.

Q. For help?

A. Yes.

Q. And did you get a drive then in somebody's car?

A. After a few minutes later -

Q. Got a drive -

A. After they left, yes.

Q. A drive up to Crescent Street?

A. Yes.

Q. And that's where you saw the body of Sandy Seale or the body of a man laying on the street?

A. Yes.

Q. All right. When you got there, when you got there - now we're up on Crescent Street, Donald Marshall then tried to - not only tried but he succeeded in flagging down a police car, didn't he?

A. Yes.

Q. He flagged down a police car?

A. Yes.

Q. And he was telling them about these two men who had stabbed Seale and stabbed him, wasn't he?

A. Yes."

The cross-examination continued:

"Q. And the police were there then?

A. Yes.

Q. Now Maynard, at no time that evening, at no time that evening in the company of at least four policemen which you were, weren't you -

A. Yes.

Q. - did you say to any of those policemen, that this boy here stabbed the man on the ground, did you?

A. No, I didn't."

Maynard Chant went on to testify that he had been involved in several interviews with the police during the next day or so, and at no time did he say that Mr. Marshall was the person who stabbed Mr. Seale. The cross-examination then continued:

"Q. No. All right. Now just to clear up something and to help the court and the jury and everybody concerned with this case, the only reason, I'm suggesting to you, that you mentioned in the court below, in the magistrate's court, from which my learned friend read to you, that it was Donald Marshall who pulled out this object that looked to be a knife was because the police told you it was Donald Marshall who did it.

A. No, I never.

Q. They're the ones who told you the name Donald Marshall. Don't look at them! Look at me!

A. No.

Q. What?

A. Uh -

Q. Is that the only reason you said that in your evidence in the magistrate's court, was because it was the police told you it was Donald Marshall who did that?

A. Police didn't tell me Donald Marshall did it at all.

Q. No, and you didn't tell the police that he did it?

A. No -

Q. No -

A. Not until afterwards.

Q. Oh.

A. See, I told them a story that wasn't true.

Q. Oh! I'm coming to that. When did you tell this untruthful story? When did you tell them that?

THE COURT:

Now may I just make one point clear. This is not a TV program and if there will not be absolute decorum, the whole court room will be cleared. This is too serious a matter for any levity. Please keep that in mind. I don't mean to say that people can't speak and whisper if they wish but I do not want any expressions such as I have heard at this moment.

BY MR. ROSENBLUM:

Q. When did you tell that untrue story to the police, Maynard?

A. Sunday afternoon

Q. When?

A. Sunday afternoon.

Q. That was in Louisbourg?

A. That was in Sydney.

Q. Oh, I thought you met them in Louisbourg Sunday -

A. I did, but they took me in -

Q. Oh, they took you in to Sydney. How long did you stay at the police station in Sydney on Sunday afternoon?

A. Six o'clock.

Q. How long a period of time - a half hour, an hour, two hours?

A. Oh, approximately two hours.

Q. Two hours. And who was questioning you at the police station on Sunday afternoon after you had been speaking to the police in Louisbourg in the earlier afternoon? Who were the police then?

A. I don't know the policeman's name.

Q. Do you see anybody here?

A. Yes.

Q. Would you point him out, please?

A. I'm not too sure but I think it was that one there.

Q. You mean Det. Sgt. John MacIntyre here?

A. Yes.

Q. Was he one of them?

A. Yes.

Q. Was that your first contact with him?

A. Yes.

Q. Sunday afternoon, in Sydney?

A. Well I met him earlier in the morning but I didn't tell him the story until the afternoon.

Q. It was in the afternoon you had the long talk with him?

A. Yes.

Q. He was questioning you?

A. Yes.

Q. And another police officer was questioning you. There was two of them?

A. Yes.

Q. And for several hours?

A. Yes.

Q. That's all My Lord.

BY MR. MacNEIL: (Redirect Exam.)

Q. You told my learned friend in your evidence that you told the police an untrue story. Why did you tell them an untrue story?

A. Because I was scared."

At the close of the cross-examination the Court directed the following questions:

"BY THE COURT:

Q. When was it that you told them the untrue story?

A. On Sunday afternoon.

Q. On Sunday afternoon in Sydney?

A. Yes.

Q. Did you at any time tell them the true story?

A. Yes.

Q. When was that?

A. I don't know what day it was.

Q. Was it after you had told them first the untrue story?

A. Yes."

Another witness was John L. Pratico, a sixteen-year-old student, who lived near the park in Sydney. He testified that he had seen Donald Marshall, Jr. and Sandy Seale up by St. Joseph's hall where the dance was being held and he had walked down towards the park with them. He said that they went into the park and he continued on his way home, but sat down among some bushes near the railway track to drink a pint of beer on the way. He said that he saw Donald Marshall and Seale over on Crescent Street and they seemed to be arguing. His testimony continued as follows:

"A. I seen Sandy Seale and Donald Marshall talking, more or less seemed like they were arguing.

Q. Did you recognize them at that time?

A. Yes.

Q. Were there any street lights in that area?

A. (Inaudible response.)

Q. Take your hand down.

A. Yes, Sir.

Q. And you could recognize them at that time?

A. Yes.

Q. What if anything did you see them do?

A. Well they stood there for a while talking and arguing and then Marshall's hand come out, his right hand come out like this -

Q. What do you mean this way?

A. Come out like that, you know, and plunged something into Seale's - like it was shiny and I -

Q. Pardon me. You're confusing me. The hand came out of his pocket and, you said something about shiny. Now how does that connect in there?

A. Well it looked like a shiny object. Come out this way, you know.

Q. What did he do with the shiny object?

A. Plunged it towards Seale's stomach.

Q. Into whose stomach?

A. Seale's.

Q. What did Seale do?

A. He fell. And that's the last I seen.

Q. What did you do?

A. I started running. I run up Bentinck Street.

Q. And tell me, can you tell me what Donald Marshall, Jr., the accused, was wearing the night he -

A. He was wearing a yellow jacket or shirt."

On cross-examination it was established that Mr. Pratico had been drinking for several days, and that on the evening of May 28th he was so sick from liquor that he had to leave the dance. He admits that he could not be too sure of the events of the evening, but he thought it was Marshall and Seale that he was talking to. He testified that on the following day when he talked to Mary Theresa Paul he did not mention that Marshall had done the stabbing, and that he also told Tom Christmas that Donald Marshall, Jr. did not stab Sandy Seale. It was then brought out in evidence that the previous day during the trial in the Sydney courthouse in the presence of Sheriff MacKillop and counsel for the prosecution and defence that Mr. Pratico had said

that "Donald Marshall didn't do it, didn't do the stabbing."

On re-examination it was established that before making this statement in the court house he had talked for a minute with the father of Donald Marshall, Jr., who had suggested that he talk to defence counsel, and when defence counsel was alerted he insisted that Crown counsel and the sheriff be present to hear any statement that the witness wished to make. Sergeant MacIntyre, the chief investigating officer, was there as well.

On re-examination Crown counsel put the following questions to the witness:

"BY MR. MacNEIL:

Q. Donald Marshall. All right now why did you - Senior - that's Donald Marshall, Sr.?

A. Yes.

Q. Now why did you make that statement yesterday that Mr. Khattar referred to as being made - why did you make that statement which is inconsistent with your evidence as given before these gentlemen and His Lordship in this trial?

A. Scared.

BY THE COURT:

Q. What's that?

A. I was scared.

Q. Scared of what?

A. Of my life being taken."

At the conclusion of the re-examination the Court posed these questions:

"BY THE COURT:

Q. Mr. Pratico, Mr. MacNeil asked you why you made the statement outside yesterday to Mr. Khattar, to the sheriff. You now say you made it because you were scared of your life.

A. Yes.

Q. Now, your being scared of your life, is that because of anything the accused said to you at any time?

A. No."

The only other evidence before the Court which placed Donald Marshall, Jr., at the scene of the crime was that of Patricia Harris, a fourteen-year-old girl, and her friend, Terrance Gushue, who had left the dance and passed through Wentworth Park on their way home. They tell of speaking with Donald Marshall, Jr., on Crescent Street and having asked him for a match, which he gave them. Miss Harris testified as follows:

"Q. . . . Was there anyone with Mr. Marshall, the accused?

A. I think so, yes.

Q. Did you have any conversation with Donald Marshall, yourself?

A. Not long - like I said - he asked 'Were you at the dance' and I said, 'Yes.'

Q. Then what did you do?

A. Well, Terry lit the cigarette and then we just said 'Bye' and went home.

Q. And did you see the accused, Mr. Marshall, any more that evening?

A. No.

Q. What time did you arrive home?

A. I don't know. I'm not sure.

Q. Was there more than one person with Mr. Marshall?

A. Yes.

Q. How many were there?

A. I don't know really but there wasn't many there.

Q. I beg your pardon.

A. There wasn't many there.

Q. What?

A. There wasn't many there.

Q. Now what do you mean by that?

A. Well, there wasn't a crowd of people.

Q. How many people that you know were there?

A. Just Junior.

Q. Just Junior?

A. Yes.

Q. I may have confused you. Miss Harris, you saw Donald Marshall and did you see anyone else there?

A. Yes.

Q. Who was it, do you know?

A. (No response.)

Q. Answer me, please.

A. No.

Q. And how many people did you see there with Donald Marshall?

A. One.

Q. The one person.

A. Yes.

Q. Tell me, did you have any physical contact with Junior Marshall at that time?

A. Yes.

Q. What was that?

A. He held my hand.

Q. And did you notice anything about his condition insofar as liquor is concerned?

A. No, not really. You couldn't tell.

Q. You couldn't tell whether he had been drinking or not.

A. No.

Q. Did you have a conversation with Mr. Marshall while you were there on Crescent Street?

A. Just a short one."

On cross-examination she said:

"Q. Now can you say under oath that there was anybody at all with Junior Marshall that time or if there were other people around but you can't say if they were with him?

A. Well someone was there but I never paid any attention -

Q. No, you couldn't say if it was a woman, a man, a child?

A. No.

Q. So you really are not sure if there was anybody with Junior Marshall at all, are you?

A. I knew he was there.

Q. Pardon?

A. Sort of knew he was there.

Q. Knew who was there?

A. The person.

Q. You can't say if it was a man, woman or child, can you?

A. No.

Q. You say you knew there was somebody around?

A. (No audible response.)

Q. You will have to answer so we can get it down?

A. Yes.

Q. And that other person that you're speaking about, they never had any conversation with you or with Terry Gushue?

A. No.

Q. Or with Junior Marshall while you were there?

A. No.

Q. And so the sum net result is that you and Terry Gushue went to a dance, you left the dance, you went to the bandshell for a cigarette, a smoke, whatever it was; then you started to walk towards your home over there on Kings Road, and on the way you met Junior Marshall who gave Terry Gushue a match: Is that right?

A. Yes.

Q. And that's all. Isn't that it?

A. Yes.

Q. Anything else?

A. No."

Two expert witnesses were called, a serologist and an expert in hair and fibres. The serologist established that there was blood type "O" found on the clothing that had been worn by the deceased and on a piece of Kleenex found in the area. There was some blood on the yellow jacket worn by Donald Marshall, Jr., but insufficient to enable the typing of the blood.

A. J. Evers, the hair and fibres specialist, found one cut through the jacket being worn by the deceased on the front side about seven inches from the bottom, and also one cut one inch long on the left arm of the yellow jacket worn by Donald Marshall, Jr. He also described a second separation, approximately eight

inches long, continuing down to the cuff of the jacket and appearing to be a fresh tear of the material.

The theory of the Crown was that Mr. Seale had been stabbed as described by Mr. Chant and Mr. Pratico. It was argued that these men did not know each other before the murder and there was no way in which they could give the same account of the crime. The Crown submitted that Mr. Marshall's evidence was not credible and conflicted with the evidence of Miss Harriss and Mr. Gushue who did not see the two men described by Marshall on Crescent Street. The Crown contended that there was little evidence of bleeding from Mr. Marshall's arm and that it could not account for the blood on the front of the jacket. No attempt was made by the defence to produce evidence of Mr. Marshall's blood grouping. The Crown also asked the jury to consider why Mr. Marshall went to Mr. Pratico's home after the stabbing.

The defence theory was that the killing happened as Donald Marshall, Jr., said and that his evidence was supported by the fact that immediately after the killing he had related the entire facts not only to Maynard Chant but also to the police, who he

called to the scene. Further confirmation could be found in the fact that the doctor at the hospital thought it necessary to place ten or more stitches in the left arm of the appellant to close an actual wound that he had recently received.

Counsel for the defence attacked, very strongly, the evidence of the two witnesses, Maynard Chant and John L. Pratico, showing that neither of them had reported seeing Donald Marshall, Jr., commit the crime when they were first in contact with the police. Furthermore, Pratico had admitted to being drunk at the time and had told other civilians that Marshall did not commit the act. He even told the sheriff and counsel in the courthouse during the trial that Marshall had not stabbed Seale.

After full instructions by the trial judge, who related the principles of law to the evidence before the Court, the jury reached the conclusion that Donald Marshall, Jr., was guilty of the offence charged and had in fact murdered Sandy Seale. In order to reach this conclusion they had to disbelieve the evidence of the appellant and accept the eyewitness evidence of at least one of the two witnesses, Maynard Chant and John L. Pratico. They must have also, in our opinion, drawn an inference that the uncertainties of the accounts of the eyewitnesses and their failure to

immediately inform the police of what they had seen had been caused by some pressures brought to bear upon them on behalf of the accused.

The trial had lasted from November 2 to 5, 1971, and after the guilty verdict the Court pronounced the sentence of life imprisonment prescribed for the offence of non-capital murder by the Criminal Code of Canada.

On November 16, 1971 Donald Marshall, Jr., appealed his conviction to the Appeal Division of the Supreme Court alleging certain errors in the directions given to the jury by the trial judge and on the overall ground that the verdict was against the weight of evidence and perverse.

The Appeal Division found that there had been no error in the instructions given by the trial judge and that his charge had generally been very favourable to the accused.

The Appellate Court took the view that the jury had to decide which of two versions of the killing was to be believed and that the trial judge had properly pointed out the weaknesses inherent in the evidence relied upon by the Crown to support a finding of guilty against Donald Marshall, Jr. The Court was satisfied that the jury were left with this decision and that there was evidence which, if believed, could support the conviction. They therefore rendered a judgment on September 8, 1972 dismissing the appeal. (See R. v. Marshall (1973), 4 N.S.R. (2d) 517.)

Donald Marshall, Jr., commenced serving his life sentence in prison November 5, 1971 having been confined to jail since June 20, 1971. He was paroled from penitentiary on August 29, 1981, and the Minister of Justice referred this matter to this Court on June 16, 1982. The appellant contends that he never was guilty of the offence of murdering Sandy Seale, and that the fresh evidence taken before this Court on December 1 and 2, 1982, when considered along with the prior record of the case, is of sufficient force to require the Appeal Division at this time to set aside the original conviction of the appellant and enter a verdict of acquittal.

We turn now to a consideration of the fresh evidence.

As mentioned earlier, this Court in the interest of justice permitted a great deal of new evidence to be placed before it at the hearings held on December 1 and 2, 1982. Of all the evidence that given by James W. MacNeil was the most significant and met the test of fresh evidence that could be properly produced before an appellate court after the completion of a trial.

His evidence was unknown to the appellant's counsel, and in the light of their client's instructions could not have been discovered by them with reasonable diligence before the trial. It was evidence which, if believed, would establish that the appellant had not committed the crime, and

even if it were not completely accepted would permit a court to say that no jury properly instructed with such evidence before it could have reached a verdict of guilty of the offence charged.

The fresh evidence of Mr. MacNeil must therefore be considered in the light of all of the other evidence to determine whether it is not only credible but of sufficient substance to merit a finding that the conviction of Donald Marshall, Jr., for the murder of Sandy Seale was unreasonable or could not be supported by the evidence.

James W. MacNeil is a thirty-seven-year-old labourer, who was born in Sydney and lived there all his life. He testified that on the evening of May 28, 1971 he was at the State Tavern on George Street, in the city of Sydney, where he met by accident an older man by the name of Roy Ebsary, whom he had known for a period of months. He had visited Mr. Ebsary's home on Argyle Street several times, and when they had finished drinking together for the evening, near eleven o'clock, they were returning there once again. The two of them cut through Wentworth Park, crossed the bridge and arrived on Crescent Street on their way home.

Mr. MacNeil describes Mr. Ebsary as about sixty

years of age, kind of stocky, not real tall, about 5'7", with a little hunch back. He was wearing a kind of black shawl and a sports coat. Mr. MacNeil's testimony then continues:

"A. Then we went up and we went up to like the top of the hill. Like I said we were crossing over the street and we were -- we were approached by this coloured youth and this Mr. Marshall. At that time I remember I recall that Mr. Marshall put my hand up behind my back like that, eh, and I remember I kinda like panicked because I -- in a situation like that, you get 'stensafied' or something like that but I remember the coloured fellow asking Roy Esabary for money. He said, like, 'Dig, man, dig.' and he said, 'I got something for you.' and then he -- I just heard the coloured fellow screaming and everything was so you know, like, 'tensafied' and every darn thing and I seen him running and flopping. I seen him running and flopping.

Q. Okay. As you're walking through the park -- let's go back a bit to after you'd entered the park and bring you up to the scene. Did you see anyone else in the park or speak with anyone else in the park prior to meeting this Indian fellow and black youth?

A. No, I never - never spoke to anybody.

Q. Can you say from what direction you were approached by these two individuals?

A. I think I was approached from behind like, you know, and everything like happened so fast, eh, you know. You just -- you get one of them there 'tensafied' like you know, you just -- a spear of the moment, like you know.

Q. Okay. How certain are you as to whether you were approached from behind as you said?

A. I can't answer you. How certain --

Q. Take your time.

A. Well when my arm was grabbed like this, so I mustta hadda been approached from behind, you know.

Q. Now did you have any conversation with the Indian youth?

A. No, I had no conversation with Mr. Marshall at all, whatsoever, like.

Q. I see. How can you say that the individual you saw in the park that night was Mr. Marshall?

A. Well I -- just by -- well, I seen his face. I seen his face. I know -- I know a person's face. I seen his face."

His testimony then continued:

"Q. You were approached by two other people. Is that right?

A. No, No, I was just approached by Mr. Marshall and the coloured person.

Q. Where was Mr. Ebsary at this particular point in time?

A. He was right next to me.

Q. And was anyone standing with or near him?

A. The -- Mr. -- the deceased, Mr. Seale.

Q. Can you describe what -- you say the deceased, Mr. Seale. What did he look like?

A. He's sort of like mulatte, like a light type face like. Like he was light, light-complected.

Q. How tall would you say he was?

A. I'd say he was about -- probably about five foot seven or eight, something like that.

Q. And what happened again once you're -- what conversation did you hear between Ebsary and This other fellow?

A. I just heard -- conversation I just heard is that the coloured fellow asked him for money, told him to 'Dig, man, dig.', and then Roy said: 'I got something for you.', and bang-o, that was it.

Q. Now did you see this part where you say 'bang-o, that's it'?

A. Yeh.

Q. What happened?

A. Well he took a knife and he just slit him up.

Q. Slit who up?

A. Slit up Seale.

Q. And who had the knife?

A. Esabary.

Q. At the time you saw these two fellows or you were approached by these two fellows in the park you've described or indicated were Seale and Marshall, had you ever seen them before?

A. I have never seen them before, no.

Q. Have you ever seen them since that point in time?

A. No, I've never seen them, no."

Mr. MacNeil was asked about the knife, and he said:

"Q. Now you've indicated you saw a knife. Are you able to describe that knife in any way?

A. In any way, kinda dark that there night there too. Like I -- I didn't -- like I couldn't describe it, you know, like I couldn't describe the knife but like I said everything happened so darn fast.

Q. And after you say Seale was stabbed what did Seale do?

A. Well he ran for a piece and then he fell on the road like. I heard him screaming and he ran and he fell on the road."

He was further asked about Marshall's actions after the stabbing, and his testimony was:

"Q. . . . After the stabbing took place, what did you see Marshall do?

A. I noticed that Marshall tried to come at Mr. Esabary, like he tried to at -- come at him there but he -- then he just -- he ran himself. I don't know where he went but he disappeared out of the picture but I believe he tried to -- tried to help Mr. Seale at that there time."

Mr. MacNeil indicated that he had been drinking at

the tavern that evening but that he was not drunk, merely feeling good. He said that he "wasn't staggering or nothing," He said that after the stabbing Marshall disappeared and he and Roy Ebsary "automatically went to his home which is on the rear of Argyle Street", not far from the scene. He said they arrived there before midnight, and then continues his testimony as follows:

"A. I didn't stay too long, I think. His daughter was home. I remember that. I didn't stay too long. I seen him. He was wiping the blood off the knife underneath the sink and I went home and -- took off home and then I heard the next day that the fellow died, eh, that this Mr. Seale died.

Q. Okay, now you indicated that after you arrived at Roy Ebsary's home, you saw Roy Ebsary wash a knife off at a sink?

A. Yeh.

Q. Describe that knife. Are you able to describe that knife?

A. Well it's only -- it was only his pocket knife. I think it's only about six inches long. I think -- just -- it was only a pocket knife.

Q. Are you able to explain why we was washing the knife?

A. I guess he just wanted to clean the, get it clean and get the, you know -- I suppose he just wanted the --

Q. Now you've mentioned that you saw Ebsary's daughter?

A. Yeh.

Q. Do you know her name?

A. It's been so long since I seen her. I forget her first name, like."

His testimony continued:

"A. . . . The next day I went to Esabary's house and I told him that that fellow died, I said.

I said: 'You didn't have to kill him'. You know, 'You should have give him the money.' You know, and I told -- I told his son that so his son just said, well, he said: 'Well, if you say anything,' well, he said --"

Mr. MacNeil was then asked if he had ever communicated his story to the police, and in response he said:

"A. Yeh, I told the police in Sydney.

Q. Sir?

A. I told the police in Sydney after I -- after I heard that this fellow was in gaol, Mr. Marshall, for something he didn't do so I went and I told the police this and it bothered me because I wouldn't like to be in gaol for something I didn't do.

Q. And --

A. And so I went down and I made a statement to Sergeant MacIntyre and I just -- I don't know, is it Urquhart? There was another police -- what I remember was Sergeant MacIntyre. I made a statement to him and then I think a few days after that, --

Q. Okay, that's all.

THE COURT:

When was that?

MR. ARONSON:

I was just about to put that question.

BY MR. ARONSON:

Q. When can you recall having spoken to Sergeant MacIntyre concerning that event?

A. It was about a week after you were sentenced.

Q. Are you able to explain why you waited that length of time before going to the police?

A. Well because like, ah, Roy's son told me, he said: 'The whole family would be in trouble there.'"

On cross-examination Mr. MacNeil denied flatly that

there had been any conversation with Mr. Marshall or Mr. Seale and, in particular, there had been no mention of bootleggers. The only conversation was Mr. Seale saying, "Dig, man, dig" and then Mr. Ebsary replied, "I've got something for you" and then he saw a knife coming up and making contact with Mr. Seale. He said that neither Marshall nor Seale were carrying any weapons. He repeated, once again, that he saw Mr. Ebsary washing blood off his hands and the knife in the sink of his home shortly thereafter.

During cross-examination reference was made to an affidavit which Mr. MacNeil had sworn prior to giving testimony. In the affidavit Mr. MacNeil swore to facts substantially in agreement with his testimony before the Court, and then went on to say:

> "10. That subsequent to the conviction of Donald Marshall, Jr., for the murder of Sandy Seale on November 5, 1971, and more particularly on or about November 15, 1971, I went to the Sydney City Police Department and was interviewed by then Det. Sgt. J.F. MacIntyre and gave to the said MacIntyre a free and voluntary written statement, a copy of which is produced herewith and marked Exhibit 'A' and that to the best of my knowledge and belief the facts contained therein are true.
>
> 11. That on or about November 23, 1971, I freely and voluntarily took a polygraph test administered by a member of the R.C.M.P., regarding my statement, Exhibit 'A', and it is my understanding that the results of the polygraph examination were inconclusive.
>
> 12. That I was interviewed by R.C.M.P. Cst. R.D. MacQueen and S/Sgt. H.F. Wheaton on February 8, 1982 and gave to the said MacQueen and Wheaton a

free and voluntary written statement, a copy of which is produced herewith and marked Exhibit 'B', concerning my knowledge of the circumstances relating to the murder of the said Sandy Seale, and that to the best of my knowledge and belief the facts contained therein are true."

The statement which Mr. MacNeil had given to the Sydney police on November 15, 1971, shortly after having heard of the conviction of Donald Marshall, Jr., for the murder of Sandy Seale, was as follows:

"Nov. 15th, 1971 - 7:25 P.M.

Statement of James William McNeil, age 25 yrs., residing at 1007 Rear George St., Sydney:

Myself and Roy Ebsary were at the State Tavern, George St., Sydney, late in the evening in May of this year. We were there about an hr. or so. We left. We walked down George St. and took the short cut through the Park (Wentworth). We came up to Crescent St. and while walking along Crescent St. we were approached by an Indian & a colored fellow from behind. The Indian put my right hand up behind my back. The colored fellow said dig man dig. Then Roy Ebsary said I got something for you. He put his hand in his right pocket and took out a knife and drove it into the colored fellow's side.

Q. What side
A. The left hand side of the colored fellow. I seen Roy's hand & knife full of blood

Q. Did you see the Indian being stabbed
A. No. I did not

Q. What happened then
A. Roy went home and I was with him. He washed the knife under the tap and washed his hands off. Then he told me not to say anything about it.

Q. Did you ask him why he done it
A. Yes, he said it was self defence

Q. What time did you get home that night
A. About 12 P.M.

Q. How long were you at Roy's house that night
A. About 1 hr. after that

Q. When did you see Roy again
A. The next day I went to his house. He was laying in bed. I told him that fellow died

Q. What did he say
A. He said it was self-defence. I told him he did not have to kill him. He told me he had 2 children - a girl and boy and not to say anything to the police. I left then.

Q. Who seen you at the house besides Roy
A. His wife, daughter & son.

Q. Did they say anything to you then
A. No. Not that day. About 2 days after that his son, about 18 or 19 yrs old came to my house with his car. He drove me out to the Wandlyn Motel - He went in the motel and his mother came out to the car. She got in the back seat. He got in and she said don't go to their house any more because of what Roy done. The young fellow told me if I mentioned what happened to the police all your family will be in trouble. They will have to go to Court

Q. Was his mother present when he said that
A. No

Q. What were you wearing that night
A. I was wearing a college coat - blue with 2 white marks on the sleeve

Q. What was Roy wearing
A. A black shawl over his shoulders - something like a priest wears over his shoulders

Q. When did you tell somebody about this
A. The first one I told was my mother. She noticed I was not sleeping; and walking around since the trial. She asked me and I told her about the stabbing and Indian man was in jail for something he did not do. It isn't fair. Then I told my brother Johnnie last night. He told me to go to the police

Q. Did you know Marshall or Seale that night
A. No.

Signed: James MacNeil

Witness: Cpl.G.A.Taylor

Nov. 14th - 8 P.M.

By: Sergt. Det. J.F.MacIntyre"

In support of the MacNeil story the appellant called Donna Elaine Ebsary, the daughter of Roy Ebsary; Gregory Allan Ebsary, his son, and A. J. Evers, the R.C.M.P. expert on hair and fibres, who had testified at the original trial. Donna E. Ebsary, who was thirteen years old at the time of the trial, had been living with her mother and father at 126 Rear Argyle Street, in Sydney. She testified as follows:

"Q. When did you hear of the murder?

A. I started hearing stories about it probably the day after it happened. Stories that I recognized.

Q. Okay. Are you able to recall any of the events which took place the night before you heard of the murder?

A. The night before I was at home. I was with my Mom and my father was out. He was out drinking with a friend which wasn't uncommon for him. We were sitting at home just kind of waiting for him to arrive. Late in the evening or I guess late in the night he arrived home with a friend. The two of them -- no, his friend was kind of excited and my father was trying to get his friend to quiet down. The two of them went into the kitchen where I followed them into the kitchen. My father had a knife in his hand. He put the knife in the sink and he washed it and that was -- that was the night prior to me hearing any stories about any murder taking place."

She then said that she had known Jimmy MacNeil for some time and that he had been associating with her father. She described her father as a violent person who had a propensity to carry knives and had a tendency to dress in an unusual way.

He would drape a coat over his shoulders rather than putting his arms in the sleeves and he usually wore dark clothes. He was a chef by trade and enjoyed playing with different kinds of knives.

Donna Ebsary's brother, Gregory Allan Ebsary, generally confirmed Roy Ebsary as being the type of person described by his sister. He testified that the many knives kept by his father were eventually transferred to their next residence at 46 Mechanic Street, in Sydney, and although they had been used generally throughout the years for various purposes they were turned over to the R.C.M.P. for scientific inspection in 1982. It was from this collection of knives that A. J. Evers, the R.C.M.P. expert in identification of fabrics, selected one knife that he found to contain material consistent with the material of the jacket worn by the deceased, Sandy Seale, and the yellow jacket worn by Donald Marshall, Jr. From this evidence the appellant argues that it was Roy Ebsary rather than Donald Marshall, Jr., who stabbed Sandy Seale.

In our opinion the evidence of Donna Ebsary, Gregory Allan Ebsary and A. J. Evers is highly speculative and by itself would not be of much force in determining the guilt or innocence of the appellant. It is only to the extent that it is consistent with the evidence of James W. MacNeil that it has any independent validity.

The next witness to testify was Maynard Chant.

Mr. Chant now says that he did not in fact see anyone stab Mr. Seale and did not really know what was happening until he met Donald Marshall, Jr., on Byng Street in the park. When the police noticed the blood on his shirt and asked him if he knew what had happened, he told them that he had seen everything. He then went to the police station and gave a written statement as follows:

"May 30, 1971 - 5:15 P.M.

Statement of Maynard Vincent Chant - age 15 yrs., residing at Main St. Louisburg, C.B.

Friday night I was in town and I left the Bus Terminal on Bentinck St. about 11:40 P.M. I walked down Bentinck St. I came over Byng Ave. and started to cross the tracks. I got half way across the tracks - first I seen 2 fellows walking and 2 more were walking kind of slow talking. The 2 fellows who stabbed Donald Marshall and Sandy Seale - they talked for a few minutes over on Crescent St. One fellow hauled a knife from his pocket and he stabbed one of the fellow - so I took off back across the tracks to Byng Ave. and started to walk towards the bus terminal. Then I seen Donald Marshall coming down. I turned around and started to walk the other way. Donald caught up to me and said look what they did to me. He showed me a long cut on his left arm. Then he said help me - my Buddy is over on the other side of the park with a knife in his stomach. Then we started to look for more help. We met some boys and girls - one of the girls gave Donald a handkerchief - we got a car to take us over to where Seale was lying on the pavement. I took my shirt and put it around his waist and Donald went to a grey house and asked the man if he would call an ambulance.

About ten minutes later, I went up and asked the man in the house to call again and I knelt down beside Sandy Seale and he said it was hot. I unbuttoned his jacket. I then discovered his

stomach was cut. I took my shirt and put it where the cut was and made him comfortable. Then the police arrived. They called for the ambulance. He was taken to the hospital.

Q. Did you know those other 2 men
A. No

Q. Did you know Donald Marshall
A. I knew him to see him

Q. Did you know Sandy Seale
A. No

Q. Could you give me a description of these other men
A. One man about 6'2 - light brown hair; dark pants; suit coat - over 200 lbs. the other fellow 6' tall - dark pants; dark hair - 165 lbs.

Q. Did you see their faces
A. No

Q. Would they be young or old
A. I was not that handy

Q. Was there just 4 men there
A. Yes

Q. Did you see any knife
A. Yes it was a figure of a knife

Q. How far away would you be
A. 45 ft. or more down the tracks

Q. Could you tell if Marshall was drinking
A. I would not say he was

Signed: Maynard Chant

time 5:35 P.M.

Sergt. Det.J.F.MacIntyre"

No reference to this statement was made at the trial and counsel for Donald Marshall, Jr., did not know of its existence. A few days later, however, Mr. Chant made another statement in which he told the police that he had seen Marshall stab Seale, and his explanation for this change was that he was scared and being pressured; and when asked why he

had not subsequently revealed the true story he said in his sworn testimony:

"Q. Subsequent to the trial in 1971 and Donald Marshall's conviction, did you ever have any occasion to tell anybody about the difference in your testimony?

A. No.

Q. Can you say when if ever you told someone about any discrepancy in your testimony?

A. Four years ago.

Q. Can you say who you said that to or who you indicated that to?

A. My parents.

Q. Anyone else?

A. About a year and a half later I told it to my pastor. That was it.

Q. Can you give any reason for having waited for such a length of time in indicating that you did not witness the Seale stabbing?

A. All that was going on and the talk, even though I didn't witness the murder, I -- I figured he was guilty because of what was -- what had been told to me and what I had acquired through friends that were doing time in the Correctional Centre the same time Donald Marshall was doing time.

Q. I see. Now can you give any reason to the Court today why you should be believed as to your testimony that you have given in Court today as opposed to the testimony you gave in Court in 1971?

A. Roughly four and a half years ago, I became a Born-Again Christian. I accepted Jesus Christ as my Lord and personal Saviour. And this book that is being or used today to swear truth I hold very sacred in my life and I vow my life to it and I act the will that is in the Bible according to the commandments that Jesus Christ has given. That's why I speak the truth today.

Q. Do you know an individual by the name of John Pratico?

A. Yes.

Q. When did you come to know him?
A. At the trial.
Q. Did you know him prior to the trial?
A. No.
Q. Had you ever seen him prior to the trial?
A. No."

Mr. Chant has by now changed his story so many times that, in our opinion, no weight can be placed upon his evidence either at the trial or now. To the extent that his testimony cannot be relied upon to support the position taken by the appellant, however, it can no longer be of much assistance to the Crown should a new trial on the original charge ever take place.

John L. Pratico was not called before this Court to give evidence. Since he was the only other alleged eye-witness to the crime some explanation of his absence would be expected. With the consent of counsel for the Crown the appellant produced an affidavit in which Mr. Pratico indicated that he had not in fact been a witness to the actual killing even though he had said so at the trial, together with a second affidavit from a psychiatrist indicating that Mr. Pratico had been a patient prior to the time of the murder and continues under psychiatric treatment to the present day. This affidavit stated:

"4. THAT my medical diagnosis of the said John L. Pratico since August 1970, is that he suffers from a schizophernform illness manifested in his case by

liability to fantasize and thereby distortion of reality and rather childish desire to be in the limelight or center of attraction.

5. THAT in order to function outside of a psychiatric institution, the said John L. Pratico has, since August 1970, to date, been on continual medication under my direction.

6. THAT on August 31, 1971, the said John L. Pratico was admitted to the Nova Scotia Hospital, in Dartmouth, Nova Scotia, for psychiatric treatment.

7. THAT it is my medical opinion that the said John L. Pratico was, in 1971, and has been continuously to date, a wholly unreliable informant and witness with regard to any subject or event, but more particularly in the Sandy Seale murder case in 1971."

Attached to the affidavit of Mr. Pratico was the following statement which he gave to the Sydney Police on May 30, 1971:

"May 30, 1971

Statement of John Pratico, age 16 yrs., residing at 201 Bentinck St., Sydney

Friday night I was at St. Joseph's Dance. I left there around 12 P.M. I seen Junior Marshall and Sandy Seale between the store and dance hall. I was talking to them. They wanted me to walk through with them. I said no. I went down Argyle St. and went over Crescent St. I was over by the Court house when I heard a scream. I looked. I seen 2 fellows running from the direction of the screaming. They jumped into a white volkswagon; blue lic. and white no. on it. One had a brown cordroy jacket - 5'5 dark complexion; heavy set. The other grey suit about 6 ft. tall; husky; red sweater - like a pullover. I started to run home.

Q. Did you see the Volkswagon since
A. No. I saw the 2 fellows twice last night walking near the park.

Q. Did you see them at the dance
A. Yes. I seen them walking around. Bobbie Robert Patterson said they are from Toronto Saints Choice Bike Gang.

Signed: John Pratico

May 30th - 6 P.M.
Sergt.Det. J.F.MacIntyre"

Patricia Ann Harriss was the next witness, who had testified at the original trial, to testify before this Court that she had actually seen two people with Donald Marshall on Crescent Street rather than only one as she had said during cross-examination at the trial. Neither of the men whom she saw was Seale. Her original evidence was vague as to how many persons were about and was open to the inference that Seale was present. On June 17, 1971 Patricia Harriss gave the following statement to the Sydney Police:

"June 17 - 1 - 8.15 P.M.

Statement of Patricia Harriss, 5 Kings Rd. Born Nov. 15, 1957
On the night of the dance at St. Joseph's May 28/71 my boyfriend Terry Gushue, 2 Tulip Terrace left the dance at 11.45 P.M. We sat on a bench near the Grandstand. We sat on a bench. Robert Patterson was on the grass sick throwing up. We smoked a cigarette. Terry and I left. Walked back of the bandshell on to Crescent St. in front of the big green building. We saw and talked to Jr. Marshall. With Marshall was two other men.

Q. Describe the other men to me?
A. One man was short with a long coat. Gray or White hair. With a long coat. I was talking to Jr. Terry got a match from Jr. and Jr. said they are crazy. They were asking him Jr. for a cigarette.
Q. Did you see Sandy Seale in the Park?
A. No.
Q. Was there anyone else in the park?
A. Yes, boys and girls walking through the park. Gussie Dobbin and Kenny Barrow they left while we were still on the bench."

We turn finally to the evidence of Donald Marshall, Jr., the appellant herein. Mr. Marshall started off with the basic story that he had presented to the jury at his trial, but now includes many facts which if they had been known to Mr. Marshall at the time of his trial must have been wilfully held back from the Court at the time.

Donald Marshall, Jr., testified that he left some other associates at the Keltic Tavern and decided to head for the St. Joseph's dance. When passing through Wentworth Park he saw several people and then met Sandy Seale. He continued:

> "A. After I passed them four people, I met up with Sandy Seale in the centre part of the park and I asked him where he came from and he said from the dance hall, St. Joe's. And we had a little talk. I can't recall what we were talking about when we first met and I asked him if he would like to make some money with me one way or the other somehow.
>
> Q. Now when you say make some money with you, what did you mean by that?
>
> A. Nothing. Nothing in particular. I was looking for money from somewheres. I didn't have a plan how we were to make the money. I just asked him if he wanted to make some money with me.
>
> Q. Could you give any example of how you might have considered making money?
>
> A. Bumming it, breaking in a store probably, take it off somebody."

The appellant testified that he had known Sandy Seale for approximately three years, and that after they had talked for a few minutes they met Robert Patterson in the park, behind the bandshell. Patterson was drunk and they sat him down under a tree. He said at this time somebody called them up from Crescent Street asking for a cigarette and a light, and as they started up he was called by another party to give them a match. This second call came from Patricia Harriss and Terry Gushue. He gave them a light, talked a few minutes

and then he rejoined Seale and the two men who had called them first. He was asked to describe these men and he said:

"A. Yeh. The older guy, shorter guy, he was about five-eight. He had white hair, black rimmed glasses on, a top coat, a navy blue coat, I guess. It was dark. He had some kind of a sweater inside it or scarf or something under his coat.

Q. Could you place an age or estimated age for this particular person?

A. I'd say that he was about fifty-five anyway.

Q. Okay. And the other individual who you saw with this older man, can you describe him please.

A. He was younger. He was about I would say thirty, in his thirties and he was five-ten, about five-ten, five-nine and he had a brown corduroy coat on.

Q. Are you able to say how old you thought he might have been?

A. I would say he was about thirty years old.

Q. Had you ever seen these men before that particular occasion?

A. No.

He continued:

"A. Well when we first met them -- when I joined up with them, they -- I introduced myself to them. They introduced themselves to me and we shook hands and we just had a conversation. I was talking more to the older guy first when we first met. And I asked him where he was from and he -- what he did for a living and well, I asked him if he was a priest because he looked like a priest to me. He asked where the bootlegger's were and if there was any women in the park. I told him yes because I was familiar with the park and every time I'm there, there is females there. And at that time he invited us to his house. He pointed to his house where he lived and he invited us to his house for a drink. We told him no.

Q. Did he give you a specific address as to where the house was located?

A. He pointed to a house. He never give me an address only he pointed to a house. He told me he lived there.

Q. Now are you able to say where this particular conversation between yourself, the two gentlemen you've described, and Seale took place?

A. I'm not sure.

Q. Was it in Wentworth Park?

A. No, it wasn't in Wentworth Park.

Q. Was it near Wentworth Park?

A. Yeh, the street by Wentworth Park, Crescent Street.

Q. Now did the conversation take place on the street itself or at some other location near the street?

A. It was on the street.

Q. I see. Now how long did you speak with these two men?

A. Approximately I'd say about fifteen to twenty minutes.

Q. Then what happened after that?

A. After our conversation, we -- that's just before they were leaving, that's when they asked us to come to their house for a drink and we told them no and they walked away and they almost got to the end of the street. I wouldn't know the distance. Either Sandy Seale or I called them back. I don't know who called them back but one of us did.

Q. Okay, now before you continue, Donald, in what direction were they walking?

A. Walking in the direction of Bentinck Street.

Q. And you've indicated that you believe you had this conversation on Crescent Street. Is that correct?

A. Yes.

Q. Can you explain why you or Sandy Seale as you say called the two -- these two men back?

A. I don't know. I don't know why we called them back.

Q. Can you say with any certainty which of you or Sandy Seale called them back?

A. I'm not certain who called them back."

Donald Marshall, Jr., then described what took place when the men came back:

"A. They were walking -- when we called them back, they -- they did come back and they joined up with us and the younger guy, the taller guy, walked on my right-hand side and then he was having -- I guess he had a few drinks that night because when they did come back, he had his head down, he had his hands in his pocket and to me he looked like he was ready to pass out or he was too drunk or something. And the curb of that road, the street, the sidewalk, he slipped off that and I grabbed him and at the same time -- at the same time, I heard the older guy, the shorter guy, telling Sandy Seale if he wanted everything he had. And at the same time, he had him hoist up with his arm and this is within five seconds of the whole thing.

Q. Okay, now just to go back to when the two men -- you called them back, they returned to rejoin you. Where were you standing when they rejoined you?

A. We were standing on the pavement.

Q. And did -- how were you facing the man you've described you were with?

A. I was facing not directly to him but almost directly to him at a forty-five degree angle to him.

Q. Now were you able to observe Sandy Seale and this other gentleman you've described?

A. Yes, I was looking directly at them two.

Q. And what --

BY MR. EDWARDS:

Q. I'm sorry, I didn't catch that.

A. I was looking directly at them two, Sandy Seale and the older guy.

BY MR. ARONSON:

Q. And what did you see happen?

A. The older guy had Sandy Seale hoist up with his -- I don't know if it was his right hand or left hand but he had him hoisted up and told him -- he -- the older guy told him did he want everything I want to Sandy Seale and he had him hoist up and he said, 'I got something here.' He called him a nigger, and at the same time -- this is within five seconds, the whole thing -- let's see now, I had the taller guy, the older guy hoisted up and when I turned around the older guy let go of Sandy Seale and he come after me and I let go of the other guy. I blocked his arm with my arm and --

Q. Now when you say he came at you, what do you mean by that?

A. He came at me with his arm coming towards me. I don't know what he had in his hand but he hit me and that's when I started running.

Q. Now you mentioned that the older man had Sandy Seale hoisted up. I believe those were the words you used. What do you mean by hoisted up?

A. He had his arm under his stomach in his midsection and holding him up by the shoulder.

Q. And in what position was Sandy Seale?

A. He was hunched over.

Q. During the time you observed this happening right after the two men rejoined you and Seale on Crescent Street, did you have any conversation with the younger fellow that you've described who was with you?

A. Excuse me, I don't understand.

Q. Okay. During this incident that you've described, did you have any conversation with the younger fellow?

A. Before or after they came back?

Q. After they came back.

A. I don't recall.

Q. Can you say what caused Sandy to hunch over?

A. The older guy had him hoisted up with his arm. I don't know whether he was hitting him

or doing something to him and I didn't realize that he was stabbed until I started running.

Q. What happened after the older fellow came at you?

A. When he came at me, he took a swipe at me. He went to hit me in the stomach and I blocked him with my left hand and after I blocked him, I ran. I ran towards Bentinck Street.

Q. Now can you say where or what happened to these two men?

A. No, I don't know."

The appellant tells how he met Maynard Chant on Byng Avenue and just repeats what he told him, according to his testimony at the original trial, and how they then flagged down assistance and went to the aid of Mr. Seale.

Mr. Marshall was asked for an explanation of the difference between his testimony at the original trial and his recent testimony, and he said:

"Q. Well in what way does your testimony differ in 1971 to today?

A. In 1971 I did not mention anything about hitting somebody or robbing somebody or something like that. I did not mention that.

Q. Why didn't you speak of that?

A. The robbery didn't happen. It wasn't even an attempt of a robbery. I wasn't dealing with a robbery and I was afraid that one way or the other they would put the finger at me saying -- one way or the other they would have found a way -- in my opinion, they would have found a way to put it on me whether I told them or not.

Q. To put what on you?

A. Attempted robbery. Maybe the murder probably -- the robbery would have probably tried to cover up for the murder.

Q. Do you recall who the solicitors were who or the lawyers who acted for you at the 1971 trial?

A. C. M. Rosenblum and Simon Khattar.

Q. And were they aware of what -- at the time in 1971, were they aware of what you said in court today?

A. No."

During cross-examination the appellant identified the two men that they met in the park as Roy Ebsary and James MacNeil. He said that he did not know them at the time. He said that Mr. Ebsary invited them to his house for a drink and pointed in the direction where it was located. They just said "No." It was after they started to walk away that someone called them back, but he cannot remember whether it was Sandy Seale or himself. When they came back, however, the appellant grabbed Mr. MacNeil because he thought he was unsteady on his feet from drink. He said that he did not put MacNeil's arm up behind his back but merely tried to keep him from falling. Donald Marshall, Jr., then said he remembers Ebsary asking Sandy Seale if he wanted everything he had, and the cross-examination continued:

"Q. Is it possible that Sandy Seale could have said something to Ebsary at that point and you not heard it?

A. It's possible. I don't know.

Q. Isn't it true, Mr. Marshall, that when Ebsary and MacNeil were called back at least the intention in your mind -- you can't speak for Seale but in your mind, your intention was to roll those fellows?

A. Intentions of -- was to get money regardless how I got it. These men, after they left us,

they had a choice to keep going so -- they had the choice to leave when they left.

Q. They had a choice to leave when they left the first time?

A. Yes.

Q. All right. But then when they were called back, they knew you meant business then, didn't they?

A. Like I said, they had a choice to keep going. They were walking distance away from me. Nobody -- nobody cornered them, nobody pressured them. They had a choice to keep going. Nobody threatened their lives. I don't see why they came back. They lived a short distance where they said they lived.

Q. They came back because either you or Sandy Seale ordered them to come back. Isn't that correct?

A. They had a choice. Nobody's ordered to walk back.

Q. If they had not come back, isn't it probable that you and Sandy Seale would have gone after them?

A. I don't think I could say that. When they walked -- when they were walking away, we should have went after them then if that's the case but nobody went after them. They were close to their home and when we asked them back, they come back. The intentions I don't think it was to get robbed, you know, --

Q. I'm sorry. I can't hear you, Mr. Marshall.

A. The intentions of them coming back was not to get robbed so they had a choice to leave and they picked to come back and do us evil.

Q. When they came back -- what you're saying is they didn't intend to get robbed but your earlier testimony was that you intended to get money from them no matter what you had to do at that point. Isn't that what you're saying?

A. I didn't do anything to get the money off them. The intentions of getting money was there. The attempt -- any other thing else that will indicate that I tried to rob these people, I didn't. There was no indication from me or Sandy Seale. When they left, they should have kept going."

The cross-examination continued:

"Q. Now you told my learned friend that while you had hold of MacNeil and you heard the words coming from Ebsary that -- I believe you said: 'The old guy had Sandy Seale hoisted up', and you couldn't remember whether it was with his right hand or his left hand. Right?

A. I don't remember now.

Q. That's what you said --

A. Yes, I remember.

Q. -- in testimony to my learned friend. Isn't that right?

A. Yes.

Q. Yes?

A. Yes.

Q. Could you see the knife at that point?

A. No.

Q. Because Seale was bent over?

A. Yes. I had MacNeil - had MacNeil by the shoulders.

Q. You had MacNeil by the shoulders?

A. Yeh.

Q. You let him go at that point?

A. I threw him on the side when I was attacked by Roy Ebsary.

Q. The old man took a swipe at you. Ebsary took a swipe at you.

A. Yeh. His intentions was to stab me in the stomach.

Q. You saw the knife at that point?

A. Not really. Between -- within five seconds I guess I don't know whether I seen the knife or not. All I remember was I -- he threw a punch at me or took a swipe at me. I blocked it with my arm and I ran. And when I start running, I can feel blood coming down my arm.

Q. Well, you're saying you didn't know there was a knife there until after you had run away?

A. I don't know."

Later in the evidence Mr. Marshall was asked about a statement which he had made to the R.C.M.P. officer who was investigating his conviction while he was still in Dorchester on March 9, 1982. Part of this statement reads as follows:

> "I asked Sandy if he wanted to make some money. He asked how and I explained to him we would roll someone. I had done this before myself a few times. I don't know if Sandy ever rolled anyone before. We agreed to roll someone and we started to look for someone to roll."

Later in the same statement the appellant said:

> "I then walked down Crescent Street to Sandy and the two guys. We talked about everything, women, booze, about them being priests, and hinted around about money. The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them. I got in a shoving match with the tall guy. Sandy took the short old guy. I don't remember exactly what was said but I definitely remember Ebsary saying I got something for you and then stabbing Sandy."

There was also evidence before us to the effect that counsel for Marshall at the time of his trial had no knowledge of the prior inconsistent statements given to the police by Chant, Pratico and Harriss.

That then is the totality of the evidence before this Court from which it must be determined whether the conviction of Donald Marshall, Jr., is unreasonable or cannot be supported by the evidence, or whether an injustice has been done.

Although Mr. Marshall now puts forward Mr. MacNeil as his chief witness, their evidence in the main is in conflict. The only material particular on which they agree is that Ebsary stabbed Seale.

Mr. MacNeil's version of the incident has already been set out herein and we would but repeat the following extract from his evidence where he describes the meeting of Ebsary and himself with Marshall and Seale and the subsequent events:

> "Then we went up and we went up to like the top of the hill. Like I said we were crossing over the street and we were -- we were approached by this coloured youth and this Mr. Marshall. At that time I remember I recall that Mr. Marshall put my hand up behind the back like that, eh, and I remember I kinda like panicked because I -- in a situation like that, you get 'stensa fied' or something like that but I remember the coloured fellow asking Roy Ebsary for money. He said, like, 'Dig, man, dig,' and he said 'I got something for you,' and then he -- I just heard the coloured fellow screaming and everything was so you know, like 'tensafied' and every darn thing and I seen him running and flopping...."

Mr. Marshall on the other hand testified before us that he passed four people in the park, two of whom he knows now were Ebsary and MacNeil; that later when Seale and himself were in the park someone called to them from Crescent Street asking for a cigarette and a light, that at about the same time Patricia Harriss and Terry Gushue asked for a light; that Seale responded to the first request and that he went to Miss Harriss and Gushue with whom he talked for approximately five minutes; that he then went to where Seale was talking to

two men whom he knows now were Ebsary and MacNeil; that they introduced themselves; that Ebsary and MacNeil inquired about bootleggers in the area; that Ebsary invited them to his house for a drink; that they declined; that Ebsary and MacNeil then left; that when Ebsary and MacNeil had nearly reached the intersection of Crescent and Bentinck Streets they were called back: that he doesn't know why they were called back; that MacNeil had his head down "looked like he was ready to pass out or he was too drunk or something...."; that MacNeil slipped off the curb and he grabbed him to keep him from falling; that at this time Ebsary stabbed Seale. Mr. Marshall categorically denies jumping Mr. MacNeil from behind and putting his arm behind his back. He is obviously not prepared to admit at this stage that he was engaged in a robbery.

How two people could describe the same incident in such a conflicting manner has caused us great concern and casts doubt on the credibility of both men. However, the fact remains that Marshall's new evidence, despite his evasions, prevarications and outright lies, supports the essence of James MacNeil's story - namely, that Seale was not killed by Marshall but died at the hands of Roy Ebsary in the course of a struggle during the attempted robbery of Ebsary and MacNeil by Marshall and Seale. In our opinion, Marshall's evidence, old and new, if it stood alone, would hardly be capable of belief.

MacNeil's evidence although unfortunately not

adequately tested by rigorous cross-examination by Crown counsel, is clearly evidence that is capable of being believed. Even though the various members of this Court may have varying degrees of belief as to some aspects of that evidence, we have no doubt that in the light of all the evidence now before this Court no reasonable jury could, on that evidence, find Donald Marshall, Jr., guilty of the murder of Sandy Seale. That evidence, even if much is not believed makes it impossible for a jury to avoid having a reasonable doubt as to whether the appellant had been proved to have killed Seale.

Putting it another way, the new evidence "causes us to doubt the correctness of the judgment at the trial." - Reference Re Regina v. Truscott (1967) 1 C.R.N.S. 1 (S.C.C.)

We must accordingly conclude that the verdict of guilt is not now supported by the evidence and is unreasonable and must order the conviction quashed. In such a case a new trial should ordinarily be required under s.613(2)(b) of the Criminal Code. Here, however, no purpose would be served in so doing. The evidence now available, with the denials by Pratico and Chant that they saw anything, could not support a conviction of Marshall. Accordingly we must take the alternative course directed by s.613(2)(a) and direct that a judgment of acquittal be entered in favour of the appellant.

This course accords with the following submission of counsel for the Crown as set forth in his factum:

"It is respectfully submitted that the appeal should be allowed, that the conviction should be quashed, and a direction made that a verdict of acquittal be entered.

"It is also submitted that the basis of the above disposition should be that, in light of the evidence now available, the conviction of the Appellant cannot be supported by the evidence."

Donald Marshall, Jr. was convicted of murder and served a lengthy period of incarceration. That conviction is now to be set aside. Any miscarriage of justice is, however, more apparent than real.

In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged.

By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief.

By planning a robbery with the aid of Mr. Seale he triggered a series of events which unfortunately ended in the death of Mr. Seale.

By hiding the facts from his lawyers and the police Mr. Marshall effectively prevented development of the only defence available to him, namely, that during a robbery Seale was stabbed by one of the intended victims. He now says that he knew approximately where the man lived who stabbed Seale and had a pretty good description of him. With this

information the truth of the matter might well have been uncovered by the police.

Even at the time of taking the fresh evidence, although he had little more to lose and much to gain if he could obtain his acquittal, Mr. Marshall was far from being straightforward on the stand. He continued to be evasive about the robbery and assault and even refused to answer questions until the Court ordered him to do so. There can be no doubt but that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction.

We accordingly allow the appeal, quash the conviction and direct that a verdict of acquittal be entered.

C.J.N.S.

J.A.

J.A.

J.A.

J.A.

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

IN THE MATTER OF A REFERENCE PURSUANT TO SECTION 617 OF THE CRIMINAL CODE BY THE HONOURABLE JEAN CHRETIEN, MINISTER OF JUSTICE, TO THE APPEAL DIVISION OF THE SUPREME COURT OF NOVA SCOTIA UPON AN APPLICATION FOR THE MERCY OF THE CROWN ON BEHALF OF DONALD MARSHALL, JR.

BETWEEN:

DONALD MARSHALL, JR.	)	
	)	REASONS
- and -	)	FOR
	)	JUDGMENT
	)	
HER MAJESTY THE QUEEN	)	