S.C.C. 01205

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

B E T W E E N:

ROY NEWMAN EBSARY

appellant

-and-

HER MAJESTY THE QUEEN

respondent

REASONS FOR JUDGMENT having been delivered this date by Macdonald, J.A., Morrison and Matthews JJ.A. concurring.

IT IS ORDERED that the appeal against conviction herein be and the same is hereby dismissed; that the application for leave to appeal against sentence be and the same is hereby granted; that the appeal against sentence be and the same is hereby allowed and that the sentence be varied to a term of imprisonment of one year in the Cape Breton County Correctional Center.

DATED this 6th day of May, 1986.

Bernard. MacDonald
Deputy Registrar

IN THE SUPREME COURT
COUNTY OF HALIFAX, N. S.

I hereby certify that the foregoing is a true copy of the original order on file herein.

Dated the 12th day of May
A. D., 1986 Bernard MacDonald
DEPUTY REGISTRAR

S.C.C. 01205

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

ROY NEWMAN EBSARY

-and-

HER MAJESTY THE QUEEN

ORDER

S.C.C. 01205

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Morrison, Macdonald and Matthews, JJ.A.

BETWEEN:

ROY NEWMAN EBSARY

appellant

-and-

HER MAJESTY THE QUEEN

respondent

Allan F. Nicholson
for the appellant

Dana Giovannetti
for the respondent

Appeal Heard:
January 13, 1986

Judgment Delivered:
May 6, 1986

THE COURT: Appeal against conviction dismissed, appeal against sentence allowed and sentence varied to one year imprisonment.

MACDONALD, J.A.:

The appellant Roy Newman Ebsary was convicted on January 17, 1985 after a trial before Mr. Justice Nunn and a jury on a bill of indictment alleging that he:

> "at or near Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May 1971, did unlawfully kill Sanford (Sandy) Seale by stabbing him and did thereby commit manslaughter contrary to Section 217 of the Criminal Code of Canada."

This was the third trial of Mr. Ebsary on such charge. The first trial was held in September 1983 and resulted in the jury being unable to agree on a verdict. A second trial later that year resulted in a conviction which was overturned on appeal by this Court by judgment reported in (1984),65 N.S.R. (2d) 16. The Court ordered a new trial. It is from the conviction that resulted from the latter trial that the appellant now appeals.

The facts are well summarized in the judgment of this Court in Ebsary #1 and for the purposes of this judgment need only be highlighted by me.

The facts in capsule form are that on May 28, 1971 Donald Marshall and Sandy Seale were in Wentworth Park in Sydney Nova Scotia. They there encountered the appellant and one James MacNeil. Seale was killed by the appellant with one knife blow to the abdomen. The appellant and Mr. MacNeil contended that the stabbing of Mr. Seale was a result of an attempt by Marshall and Seale to rob Mr. Ebsary and himself. Mr. Marshall who on several occasions has given different versions of the incident under oath told the jury in the present case that no robbery was in progress and that in effect the appellant for no apparent

reason stabbed Mr. Seale. The tragic aspect of this matter is twofold. One of course was the death of Mr. Seale. The other was that Mr. Marshall was charged with and convicted of the murder of Mr. Seale and spent eleven years in a federal institution for a crime that he did not commit.

The appellant has raised six grounds of appeal which are as follows:

1. That the Learned Trial Judge erred in ruling the statement of Ebsary admissable.

2. That the Learned Trial Judge erred in not declaring a mis-trial after the Crown's references to Marshall's 1971 testimony.

3. That the Learned Trial Judge erred in law both when he charged the jury and later when he re-charged the jury.

4. That the Learned Trial Judge erred in law when he failed to review the evidence with the jury, relying instead on the review given by defence counsel.

5. That the verdict was perverse.

6. That the Learned Trial Judge erred in dismissing the Appellant's application under Section 24(1) of the Charter of Rights and Freedoms.

Under the circumstances I think it appropriate that I deal with the last ground first. The argument is that the appellant should not have been placed on trial - "because doing so would violate his rights under s. 7 because of the excessive passage of time the appellant was not able to defend himself. He had to rely completely on the information that the Crown and police gave to his counsel. No meaningful independent investigation was

possible. Therefore the appellant was unable to 'present his case' or 'make full answer and defence' or 'meet the opposite case'. Because of the excessive and extreme prejudicial publicity the appellant was not able to 'receive a reasoned decision from a tribunal free of bias and not the subject of a reasonable apprehension of bias'."

This same argument was raised on the first appeal and rejected by this Court. MacKeigan, C.J.N.S. speaking for a five man court said at pp. 24 and 25:

> "The appellant also appealed from the rejection by the trial judge of his application under the Charter before and during the trial. He contended that the prosecution infringed or denied his rights under s. 7 (right not to be deprived of life, liberty or security 'except in accordance with the principles of fundamental justice') read with s. 11(b) (right 'to be tried within a reasonable time') and s. 11(d) (right 'to be presumed innocent until proven guilty according to law in a fair and public hearing').
>
> "I find no merit in the objection under. s. 11(b). It is true that the charge against Ebsary was laid and the trial held over ten years after Seale was killed and that the Crown had available from November 1971 its principal evidence, that of James MacNeil. Prima facie such delay is excessive. But in this case Ebsary suffered no apparent prejudice from delay.
>
> "The situation as to 'reasonable time' is similar to that in R. v. Rahey (1984),63 N.S.R. (2d) 275; 141 A.P.R. 275, and in the leading United States case of Barker v. Wingo, 407 U.S. 512, discussed in Rahey.
>
> "The objection under s. 11(d) of the Charter is based mainly on the extensive local and even national publicity which made Marshall's name a household word as a man who spent over eleven years in prison 'for a crime he did not commit' or words to that effect. He has been pictured as a completely innocent victim of maladministration of justice. Ebsary has been frequently referred to as the 'killer'. His counsel claims that the presumption

of innocence was violated and that a fair trial was not held and indeed cannot be held. He argues that Crown counsel at the trial (who was not the Crown counsel on this appeal) violated the principle of fairness which should govern the conduct of Crown prosecutors by overemphasizing the innocence of Marshall and exaggerating the lies of Ebsary.

"Defence counsel claims that the trial judge failed to counter the prejudice and failed to correct the Crown prosecutor.

"In my opinion the jury was adequately instructed by the trial judge to disregard anything heard outside the courtroom and to base their verdict solely on the evidence. The usual jury selection process was properly followed. I am not prepared to say that a jury properly instructed, after a trial properly conducted on evidence properly admitted, would have been unable to give Ebsary a fair trial. The trial judge thus did not err in refusing to quash the indictment for violation of the Charter."

I agree entirely with such comments and indeed under the circumstances am bound by them. I therefore reject each and every argument advanced on this appeal based on the Charter of Rights and Freedoms.

I turn now to a consideration of the submission that a taped statement given by the appellant to Cpl. Carroll of the R.C.M.P. should not have been received in evidence. In support of this submission counsel for the appellant raises two issues:

1. the mental state of Mr. Ebsary
2. that the statement was obtained as a result of inducements.

A re-investigation of Mr. Seale's death was begun in February 1982. S/Sgt. Wheaton and Cpl. Carroll were in charge of the investigation. On February 22nd these police officers

went to Mr. Ebsary's home and advised him that they wanted to discuss Mr. Seale's death and requested that Mr. Ebsary come with them to the R.C.M. Police office. The police officers described him as being sober at the time and quite jovial. At the police headquarters Mr. Ebsary was given the standard police warning and advised of his s. 10 Charter rights. He did not request a lawyer. A rather lengthy conversation then took place between the officers and the appellant, who talked generally of his life. He was shown a statement given by James MacNeil that alleged that Mr. Ebsary had stabbed Mr. Seale. The appellant however, would not commit himself to being directly involved, although he did say something to the effect that he knew much more than he was saying and that he did have knowledge of that particular night's activities and that he would give it some thought. According to the police officers they then left the interview room to see if Ebsary "might come around to our way of thinking". However when they returned to the room Mr. Ebsary did not provide any further knowledge or involvement of the incident. The appellant was then driven to his home by Cpl. Carroll. Later that day Mr. Ebsary phoned S/Sgt. Wheaton and admitted to stabbing Mr. Seale and asked to speak to Cpl. Carroll. Cpl. Carroll went alone to Mr. Ebsary's home where according to Cpl. Carroll the appellant informed him that the incident was self defence and that he had used a small penknife. He said that Mr. Seale took his money and ran away. Mr. Ebsary refused to give a statement but said he would like to meet Mrs. Marshall "to see her eyes and to more or less assess her, to see what

kind of a person she was."

A meeting was arranged between the appellant and Mr. and Mrs. Marshall. This took place February 23rd. The police officers picked Mr. Ebsary up at his home around 11:00 in the morning at which time he showed obvious signs of having been drinking. He was taken to the R.C.M.P. office where he met in private with Mr. and Mrs. Marshall. Apparently the conversation was simply a general one and did not touch the issue of the death of Mr. Seale.

Mr. Ebsary was a patient at the Nova Scotia Hospital from March 30 to April 29 as a result of a remand issued by His Honour Judge O'Connell of the Provincial Magistrate's Court. The remand related to a charge unconnected with the death of Sandy Seale. Dr. Aktar a psychiatrist in charge of the forensic unit at the Nova Scotia Hospital found that Mr. Ebsary was unfit to stand trial. On May 7th Mr. Ebsary was again admitted to the Nova Scotia Hospital under a Lieutenant Governors warrant. He again was examined, his condition was found to have improved and it was decided by the medical staff at the hospital that he was fit to stand trial. Dr. Aktar diagnosed Mr. Ebsary as suffering from chronic brain syndrome and chronic alcoholism in addition to several other physical illnesses. He said that Mr. Ebsary was "not lucid all the time" and sometimes confabulates.

On October 26th, 1982 Mr. Ebsary called Cpl. Carroll who along with S/Sgt. Barlow went to the appellant's home. Mr. Ebsary told the officers that he was concerned about a friend of his by the name of Mr. Doyle. According to the police officers

they at that time knew nothing about Mr. Doyle. Apparently he had been arrested and was in the County jail in Richmond County. Mr. Ebsary had previously met him at the Nova Scotia Hospital and was concerned about him. According to the officers Mr. Ebsary said that he would "give Carroll the Marshall case if the police would get Mr. Doyle out of jail." S/Sgt. Barlow testified that Cpl. Carroll's reply was:

> "Well," he said, "I don't know, you know, I can't promise you anything. I don't know anything. I don't - we didn't have any idea of why Mr. Doyle was in jail or anything or what for or where he was going or anything."

The officers promised to check into it. They did so and found that Mr. Doyle had been remanded to the Nova Scotia Hospital and was either in the hospital or on his way there. They communicated this information to Mr. Ebsary who they say appeared quite upset but said that he wouldn't go back on his word about the Marshall case and that he would write up a statement. He never did write up a statement giving as his reason the fact that he had broken his glasses. On October 29, 1982 Cpl. Carroll went to Mr. Ebsary's home and taped a conversation he had with the appellant in which Mr. Ebsary described the circumstances surrounding the death of Mr. Seale. The tape was later transcribed and the relevant portions thereof are as follows:

> "I remember the night vividly. It was a kind of misty night, a fine rain was falling, so I had to take off my glasses, but I can't see very well anyway, but with the glasses off, I couldn't see at all. So, I went over to visit Mr. O'Neil. Now, not the young O'Neil, his father, and we sat and we consumed, it was a few days before my birthday, so, the wife bought me a couple

bottles of wine, so naturally, I put the two bottles of wine in my pocket and I went over to visit Mr. O'Neil. His son wasn't home, so, okay, we consumed one bottle of wine, Mr. O'Neil and I, then his son came home and we consumed the second one. Now then, when I was about to leave to go home, the boy said he wants to go down to the State Tavern to meet someone, I don't know who, but he didn't have any success because (talking to his animal), 'Now darling, now darling', ah, so we decided to go home and we walked, let me see, we, we must have came up George and I've gone through the park several times with the police, but Went...Wentworth Park at that time, Cres...Crescent Street at that time was one of the darkest areas of the city, it was. There was no lights there, right. So, when the police asked me down there who attacked me, I wasn't able to, I wasn't able to even tell them the color. I said two men attacked me. Okay, he turns around and he says to me, give me everything you've got in your pocket, and I gave him everything I had in my pocket, but when I put my hand in my pocket, I discovered I had a pen knife. Now it was only a pen knife. It was no knife that you took from my home and it was a pen knife and that pen knife was given to me by young Jacques Brittan, a young Frenchman that the authorities here had placed in my care, and I was training him to be a cook, and he wanted, he said he wanted to live somewhere where there was a family, so I took him home with me, okay? But he gave me this pen knife. The blade was about three inches long, three inches long, so, when this bastard said to me give me everything you got in your pocket, I said listen, you fucker, you're going to get everything I got in my pocket. So I gave him everything I had in my pocket, everything, my watch, my ring, but the fucking knife was in my fucking pocket and I opened it in my pocket and I said brother, you asked for everything, you're going to get everything and I gave him everything. Now, the blade was that small that that boy that night, ran, he ran. In the meantime, Marshall was strangling the other boy across the road, that young O'Neil, because Marshall was a thug and so was Seale. So thugs become heroes and honest men become what? Honest men become what? You don't know, I do. Okay. How am I doing?"

Mr. Ebsary then went on to say that he acted in self defence and "I just made a blind swipe, but he ran" -- "probably I got him, probably I got him in the guts, probably I got him in the guts."

He said that he had been mugged before coming through the park but had never complained to the police about it. He went on to say "but I swore by my Christ, I swore by my Christ that the next man that struck me would die in his tracks." Mr. Ebsary did not testify on the voir dire held to determine the admissibility of this statement. The defence did introduce a transcription of the evidence given by Dr. Aktar before Judge O'Connell which resulted in Mr. Ebsary being found unfit to stand trial. Mr. Justice Nunn found that the statement had been given freely and voluntarily and also that it was the product of an operating mind and that he was satisfied that the accused had the capacity to give the statement. On that aspect of the matter the Learned Trial Judge said:

> "All right. With regard to the admissibility of a statement a Voir Dire has been conducted and the Crown has produced evidence from all members of the R.C.M.P. who were investigating the Marshall matter who had any contact with Mr. Ebsary the accused in two periods, February and October of 1982.
>
> "Ebsary himself was in the Nova Scotia Hospital from March 30th to April 26th, 1982 and on May the 7th a finding was made that he was unfit to stand trial and was returned to the Nova Scotia Hospital on a Lieutenant Governor's warrant. A finding that he had recovered and was fit to stand trial was made and he was discharged on July 30th, 1982.
>
> "The Defence produced only the evidence of Dr. Aktar. I have reviewed all of the evidence and submission of both Crown and Defence counsels.

> Nothing in the Crown's evidence would indicate any lack of lucidity on the part of Ebsary in February. He was given the standard police warning when taken to the police office before any conversation and understood it. All of the evidence re the February event clearly shows that there were no threats, promises or inducements of any kind on these occasions. Even if there were, they would only be relevant if they led to the October statement or put in another way, were still operating in October. There's no such evidence of that.
>
> "There is sufficient evidence as to what took place in October with regard to the meetings between the police officers and Mr. Ebsary so that a finding can be made. I'm satisfied again beyond a reasonable doubt the statement does represent the operating mind of the accused. There's no indication of lack of intellect or insanity. While there is some evidence of consumption of alcohol at all relevant times I'm satisfied that there was no degree of impairment which would come close to question the capacity of the accused to give a statement or to question its reliability or to have any effect on his will."

In R. v. Owen (1983), 4 C.C.C. (3d) 538, 56 N.S.R. (2d) 541 this Court in refering to the majority judgment of the Supreme Court of Canada in R. v. Rothman, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 57 C.C.C. (2d) 30, said p. 547 C.C.C. report, (pp. 550, 551 N.S.R.):

> "...Mr. Justice Martland, speaking for himself and five other members of the court, said of the confession rule (p. 45 C.C.C. report):
>
> 'In my opinion, the effect of the judgments in this Court as to the admissibility of confessions is that in order to render the confession admissible the Crown must meet the requirements stipulated in Ibrahim v. The King, [1914] A.C. 599. Even when this has been done, there may be circumstances involved in connection with the obtaining of the confession from which the Court may conclude that the confession was not free and voluntary, e.g., as in Horvath, supra, and Ward, supra, where there is a reasonable doubt as to whether the statement was the

utterance of an operating mind. In such a case, the confession is not admissible.'

"The effect of such pronouncement is to elevate once again to the front rank of importance the elements of fear of prejudice or hope of advantage in determining whether a confession is admissible or not. Statements therefore that do not offend the Ibrahim rule will apparently be excluded only if they are not the product of an operating mind such as the situation in the Horvath case (hypnosis); or in Ward (shock); extreme drunkenness (R. v. Richard (1980), 56 C.C.C. (2d) 129) (B.C.C.A.), and possibly oppression R. v. MacLeod (1968), 5 C.R.N.S. 101 (Ont. C.A.), Andrews v. R. (1981), 21 C.R. (3d) 291, at 294 (B.C.C.A.).

"In the present case the trial judge found that the statements had been given 'freely and voluntarily'. This conclusion should not be disturbed unless, as Mr. Justice Rand said in R. v. Fitton, [1956] S.C.R. 958; 24 C.R. 371; 116 C.C.C. 1, at p. 5. 'It is made evident or probable that he (the trial judge) has not weighed the circumstances in the light of the (Ibrahim) rule or has misconceived them or the rule ...'

"To like effect is the judgment of the Ontario Court of Appeal in R. v. Precourt (1976), 39 C.C.C. (2d) 311, where Mr. Justice Martin said at p. 318:

'Whether a statement made by an accused is voluntary is essentially a question of fact, and unless it appears that the trial judge had failed to consider and weigh the relevant circumstances or has misconceived the governing rule or failed properly to apply it, his conclusion that a statement was made voluntarily ought not as a general rule be disturbed.'

See also D.P.P. v. Ping Lin (1976), 62 Cr. App. R. 14 (H.L.) per Lord Hailsham at p. 21 and per Lord Salmon at p. 26."

I have carefully considered all the evidence touching on the mental capacity of the appellant to give a statement that could be classified as emanating from an operating mind.

To use the words of Mr. Justice Martin in R. v. Precourt I am not convinced that Mr. Justice Nunn "failed to consider and weigh the relevant circumstances or has misconceived the governing rule or failed properly to apply it." In addition I am not persuaded that Mr. Ebsary lacked the mental capacity to give a free and voluntary statement.

With respect to the contention of counsel for the appellant that the statement was the result of inducements made to Mr. Ebsary by the police the Learned Trial Judge in his decision on the voir dire said:

> "The activities of Constable Carroll re the Marshalls and arranging the meeting between the Marshalls and Ebsary do not in my view constitute an inducement.
>
> "With regard to the evidence concerning Mr. Doyle Ebsary himself initiated the request to get Doyle out of jail and was told immediately by Constable Carroll that he could promise nothing but that he would look into it. Constable Carroll knew nothing about Doyle at the time. Ebsary did say, if you get Doyle out I'll give you the Marshall case and after he learned that Doyle was on the way to the Nova Scotia Hospital on a 30-day remand and in the words of Constable Carroll 'that nothing could be done' he said he would not go back on his word. I'm satisfied beyond a reasonable doubt that the evidence clearly disclosed that no promises were made by persons in authority that could constitute an inducement in these circumstances."

In my opinion the evidence clearly supports the conclusion of the trial judge. I have carefully read the evidence with respect to the Doyle incident and that involving the Marshalls. I find nothing in the testimony that would indicate the existance of an inducement within the meaning of such conduct as expressed in the various cases such as Ibrahim v. The King (1914), A.C. 599. It follows that in my opinion the alle-

gation of inducement has not been made out. For all the foregoing reasons I would dismiss the challenge to the admissibility of the conversation between the appellant and Cpl. Carroll as taped by the latter.

The second issue raised by the appellant was that there had been a reference made during the testimony of Mr. Marshall with respect to his 1971 trial. A reference that left with the jury the incorrect impression that the evidence he gave at the present trial was exactly the same as that given by him in 1971. The background of this submission is that upon the re-examination of Mr. Marshall, Mr. Edwards obtained an admission from Mr. Marshall that he had testified in his own defence at his trial in 1971. Mr. Edwards, the Crown Prosecutor, then put the following question to Mr. Marshall.

> "Q. Would you tell us what you told the court in 1971? What did you tell the court happened after you and Sandy got to the footbridge in Wentworth Park?
>
> A. We were called up on Crescent Street by two men, asking for a cigarette.
>
> Q. Yes.
>
> A. And we . .
>
> MR. WINTERMANS: I will object at this point. I wonder if it's proper for the Crown to be asking what exactly it was that he said in 1971 and having him recount today what it was that he said. I suppose I could always refer him to any inconsistencies, of his account of what he says he said back then. I just bring that to Your Lordship's attention, that's all.
>
> THE COURT: I don't believe you did, though. You didn't ask him anything about 1971 testimony, did you?

MR. WINTERMANS: I didn't, so therefore how can . .

THE COURT: Well, that's the problem.

MR. WINTERMANS: That Mr. Edwards said anything . .

MR. EDWARDS: May I address that, My Lord?

THE COURT: Yes.

MR. EDWARDS: My Lord, the whole drift of my learned friend's cross-examination, and in particular this point is emphasized by the last question he asked this morning, is that the testimony that the witness gave on direct examination on Friday, was really a recent concoction harking to his words, aren't you just saying this now to make yourself appear as a saint? Now my understanding of the law is that when counsel on cross-examination challenges a witness and by imputation and he directly says it, he's alleging that the witness's testimony is recent concoction, that this is a new story he's telling now.

THE COURT: I think the jury better go out for a few minutes."

The Trial Judge after hearing argument from counsel ruled that Mr. Marshall could not be asked about the nature and content of the evidence he gave at the 1971 trial. Mr. Justice Nunn then went on to give the following instruction to the jury:

"THE COURT: All right, Mr. Foreman and members of the jury, I'm going to just give you a short instruction now and that short instruction is that you are to disregard and put out of your minds anything that Mr. Edwards has said, any questions he's asked or any responses or partial responses that were given so we'll start the re-examination again and anything that you may have heard is not evidence, not legally admissible evidence and therefore you can disregard it."

Up to this point on this ground of appeal I find no merit.

What does concern me, however, is that Mr. Marshall in giving evidence at the present trial described meeting who he now knows to be Mr. Ebsary together with a younger man. He

went on to say that he had the following conversation with Mr. Ebsary:

> "A. I asked him about his coat he had on, I told him you look like a priest with that coat on, he told me he was a preacher or something, I don't know, and he said that he was a sea captain and he was a priest or some sort of a priest, I don't know what kind of a priest he was, and we were talking and . .
>
> Q. What were you talking about? What type of things were you talking about?
>
> A. I asked him where he was from and he told me he was from Manitoba, right, and he asked me if there was any women around the park area and at that point I hung around the park for about three years at that time and I told him there was all kinds of women in the park and whatever, and he . .
>
> Q. Take your time, try to remember everything that was said as best you can.
>
> A. The only things I remember is he told me he was a priest and a sea captain, and he offered me, he offered us, Sandy Seale and I, he offered us to go to his home while we were talking and he told us he had a quart of rum up there at that time and . .
>
> Q. And what did you or Sandy say to that invitation?
>
> A. I said no to him because I didn't know the person and in '71 the Indian friends I had, we had to stick together for gang reasons or whatever it was."

In his address to the jury Mr. Edwards referred to the conversation that Mr. Marshall says he had with Mr. Ebsary. This is what he said:

> "...when you have ~~a~~ witness such as Donald Marshall who has been proved to have lied on other occasions, then you must treat his evidence with great care and the Crown agrees, that's what you should do - treat it with great care. But, having said that, Donald Marshall had to be telling the truth about something. We know now that Donald Marshall is telling the truth when he said he didn't stab (inaudible)...

> Ebsary did. He's truthful on that point. So, consider whether he's also truthful about this conversation and there's two very key factors there which bear directly on his truthfulness on that point. Number one - that conversation was not rebutted on cross examination, okay? See, if he had learned since 1971 of preacher and the sea captain .. well my learned friend could have asked him on cross examination, well why didn't you mention the preacher or the sea captain in 1971, but that wasn't asked. So the point is, he's not rebutted on that part of his conversation."

This comment by Crown Counsel could be interpreted as coming close to telling the jury that Mr. Marshall in 1971 gave substantially the same evidence as he did in the present case. This issue takes on added signifigance because the jury after retiring to consider their verdict sent the following question to the Trial Judge:

> "What reference if any was made by the Defence or Prosecution to the 1971 transcript of the trial? Of interest is if there is any reference to the conversation between the two parties, was it stated in this trial or from a transcript of Marshall referring to Ebsary as a captain. Is this information available to the jury?"

An examination of the transcript however indicates that Crown Counsel went no further than to ask Mr. Marshall what he had said when testifying at the 1971 trial. The only reference to Mr. Marshall saying that Ebsary referred to himself as a captain occurred in the present trial. However the jury's question may well have been based on the comment made to them by Crown Counsel that I have set out above.

Mr. Ebsary's statement makes it clear that he called himself Captain Ebsary and the importance of Mr. Marshall's

evidence about the conversation really is that it supports the Crown's position that a conversation did take place between Ebsary, MacNeil, Marshall and Seale. Both MacNeil in his evidence and Ebsary in his statement deny any such conversation.

The reference in re-examination by Crown Counsel to the 1971 trial was unfortunate and his comment to the jury was improper and is to be deplored. However on an overview of all the circumstances of this case it is my opinion that these matters did not result in any substantial wrong or miscarriage of justice and I would therefore invoke the provisions of s. 613 (1)(b)(iii) of the Code and reject this ground of appeal.

The remaining grounds of appeal relate to alleged errors in the Trial Judge's charge to the jury. The only defence raised was self defence and the instructions on such defence given the jury by Mr. Justice Nunn were in my opinion extremely favourable to the appellant. So much so in fact that at the conclusion of the charge the Crown Prosecutor said:

> "Yes I do, Milord. Milord, I regret, but I must register an objection to that charge in the strongest possible terms. I say with trepidation that it would be hard to imagine how a charge could have been any more unfair than that one."

The complaint of the appellant is that the jury were instructed in such a way that their verdict depended on whether they believed the evidence of Mr. Marshall or that of Mr. MacNeil and failed to bring home to them that if they were unable to resolve the conflict in the evidence of these two witnesses and hence were left in a state of reasonable doubt they should have given the benefit of the doubt to Mr. Ebsary and acquitted him.

In support of this submission counsel for the appellant relied upon the judgment of the Supreme Court of Canada in Nadeau v. The Queen, [1984] 2 S.C.R. 570, 15 C.C.C. (3d) 499. In that case the accused killed another man with a rifle shot. The incident occurred in the apartment of the accused's girlfriend. The accused was charged with first degree murder and relied upon the defence of self defence. His version of the facts was supported by his own testimony and that of his girlfriend. The Crown's case depended upon the evidence of a Mr. Landry who testified that he was in the apartment at the time of the shooting and apparently his evidence negated self defence. The accused and his girlfriend both testified that Mr. Landry was not there at the time of the shooting.

The trial judge in that case told the jury that they had to choose between the two versions and then went on to say (p. 572 S.C.R., p. 501 C.C.C.):

> "You have heard the analysis given of the two versions throughout the day, and I do not intend to repeat it. I will simply say that in deciding how you make your choice, you must have one thing clearly in mind: you must choose the more persuasive, the clearer version, the one which provides a better explanation of the facts, which is more consistent with the other facts established in the evidence.
>
> "You must keep in mind that, as the accused has the benefit of the doubt on all the evidence, if you come to the conclusion that the two versions are equally consistent with the evidence, are equally valid, you must give -- you must accept the version more favourable to the accused. These are the principles on which you must make your choice between the two versions."
>
> [My emphasis.]

The Supreme Court of Canada in a judgment delivered by Mr. Justice Lamer found this direction to be erroneous. At p. 572, 573 S.C.R., p. 501 C.C.C. Lamer, J. said:

> "With respect, this direction is in error. The accused benefits from any reasonable doubt at the outset, not merely if 'the two versions are equally consistent with the evidence, are equally valid'. Moveover, the jury does not have to choose between two versions. It is not because they would not believe the accused that they would then have to agree with Landry's version. The jurors cannot accept his version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, unless a fact has been established beyond a reasonable doubt, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation."

In the early part of his charge in the present case Mr. Justice Nunn correctly told the jury that the onus rested on the Crown to prove the guilt of the accused beyond reasonable doubt and that the Crown had the burden of establishing that the appellant did not act in self defence. He also told the jury that:

> "...You may believe all of the evidence given by a witness, part of that evidence or none of it. To help you in making your determination as to whether you believe a witness in whole or in part or not at all, you should consider a number of things: including the witness' ability and opportunity to observe the events recounted; the witness' ability to give an accurate account of what he saw or what he heard; the witness' appearance and manner while testifying before you; the witness' power of recollection; any interest, bias or prejudice that the witness may have; any inconsistencies in the testimony; and the reasonableness of the testimony when considered in the light of all of the evidence of the case.

You are not obliged to accept any part of evidence of a witness just because there's no denial of it. Should you have a reasonable doubt about any of the evidence, you will give the benefit of that doubt to the accused with respect to such evidence. Witnesses see and hear things differently. Discrepancies do not necessarily mean that testimony should be discredited. Discrepancies in trivial matters may be and usually are unimportant. A deliberate falsehood on the other hand, is an entirely different matter, always serious and one which may well taint a witness' entire testimony. Once you have decided what evidence you consider worthy of belief, then you will consider all of the believed evidence as a whole in arriving at your verdict."

The trial judge then went on to say:

"... on cross examination, it was established that Donald Marshall had testified to substantially different events in a number of other occasions where he has appeared in court under oath and given testimony as to the events of that night. And in at least four other occasions he gave statements under oath substantially different than the statement that he gave this time. The substantial difference was, in the other events, one of which was his hearing which led to his own acquittal, he gave clear evidence that there was a robbery in progress and in this event, he did not."

The defence of self defence is defined by s. 34 of the Criminal Code which reads as follows:

"34.(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and

> (b) he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. 1953-54, c. 51, s. 34."

The trial judge told the jury that there was no burden on the accused to establish self defence but rather the Crown had the burden of proving beyond reasonable doubt that the accused did not act in self defence when he stabbed Sandy Seale. He then went on to say:

> "Now if you believe the evidence of MacNeil, that a robbery was in progress, then in law, Ebsary was being assaulted. According to MacNeil, Marshall assaulted MacNeil in pursuing with Seale the common, unlawful purpose of robbery - consequently, at law, Seale is a party to that offence. Seale, an athletic, strong young man stood over the much smaller, older man and said, 'Dig man dig.' Obviously there was a clear indication of 'or else'. By that act in that place, at that time and in those circumstances, Seale was threatening Ebsary and in law, was assaulting him. Marshall and Seale, in carrying out their common purpose were thus jointly assaulting MacNeil and Ebsary."
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> . . .
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> "...The accused is entitled to be acquitted if upon all the evidence, there is reasonable doubt whether or not the blow was delivered under reasonable apprehension of death or grievous bodily harm and if he believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm. The accused has to prove nothing. Rather the Crown must prove beyond a reasonable doubt that the accused did not so act. Section 34(2) obviously provides for an acquittal, despite the fact that an accused means to cause death or grievous bodily harm, that he knows it's likely to cause death so long as the Crown had not negatived the elements of Section 34(2) beyond a reasonable doubt."

After properly instructing the jury on the law relating to the offence of manslaughter and self defence the learned trial judge said:

> "...If you have any reasonable doubt as to whether the accused acted in self defence, you will find the accused not guilty of manslaughter cause the Crown has failed to prove that the accused's acts were not justified. If on the other hand you are satisfied beyond a reasonable doubt that the Crown has proved that the accused's acts were not justified as coming within the meaning of Section 34(2), then of course the defence of self defence does not exist and you must consider whether or not the Crown has proved the offence charged, of manslaughter. Before turning to the offence of manslaughter itself directly, I must tell you that if you disbelieve MacNeil and accept the evidence of Donald Marshall Jr., then the defence of self defence does not arise as there would be no robbery and no assault by either Seale or Marshall, which would give rise to the operation of the self defence provisions of the Code."

Far from telling the jury that they must convict the appellant if they believed the evidence of Mr. Marshall, the learned trial judge said to the jury:

> "...If you accept as facts the details as given by Donald Marshall Jr., as I have said, you need not consider self defence. You must then consider the offence of manslaughter which is the offence with which the accused is charged."

After again instructing the jury with respect to the law relating to manslaughter Mr. Justice Nunn said:

> "...if you don't pay any attention to the self defence at all, you discard that as a..from your finding of the facts, then you have to make your finding of manslaughter. So what I'm about to say really applies in both situations, whether you accept Marshall's testimony or MacNeil's testimony except that the offence is justified if you find that the Crown has not negatived beyond a reasonable doubt the defence of self defence. If it has or if you accept Marshall's evidence as to the events, then the law of manslaughter really can be explained to you as follows."

In light of the instructions as a whole I interpret this latter direction not as an instruction to the jury that they must convict the appellant of manslaughter if they reject self defence, but rather as a direction that if the Crown has negated self defence then they must consider whether or not the offence of manslaughter has been proven beyond reasonable doubt.

Later however the trial judge did say to the jury that if they were satisfied that the appellant did stab Seale and was not then acting in self defence "then you will find the accused guilty of manslaughter".

Although such direction removed the element of reasonable doubt it is my opinion on the facts of this case that such direction does not amount to reversible error and if necessary I would invoke the provisions of s. 613(1)(b)(3) of the Criminal Code and hold that such direction did not amount to a substantial wrong or miscarriage of justice. The impugned passage occurred during the following directions:

> "...Now if you are satisfied beyond a reasonable doubt that the death of Sandy Seale was caused by the assault of the accused, an unlawful act, then you will find the accused guilty of manslaughter if you are satisfied beyond a reasonable doubt that the accused did not act in self defence. Essentially this case boils down to an issue of credibility. Do you accept the evidence of MacNeil or do you accept the evidence of Marshall? I spoke to you earlier on the issue of credibility. I now must add that the evidence discloses that Marshall testified under oath on four previous occasions relating to the events of this evening of May the 28th, 1971 and on those occasions has testified substantially differently than he did before you. On those occasions he testified that there was a robbery in progress. On each occasion

> he was under oath and was purporting to tell the truth. I must caution you that it is dangerous to rely on evidence given by a person who on so many occasions all under oath gave so substantially different evidence."

During the course of re-charging the jury Mr. Justice Nunn told them:

> "...I want you to understand clearly though I put two situations to you, that if you believe MacNeil's evidence and I summarized his evidence, then one situation occurs; if you believe Marshall's evidence, then another situation occurs and I thought I had told you - certainly at the outset I have - that you can believe all or part or none of a witness' evidence. So there's a possibility that you would believe some of MacNeil's, some of Marshall's, some of somebody else's, some of Ebsary's as to this whole event."

The submission of counsel for the appellant is that the total effect of the foregoing directions left the jury with only two options - "believe Donald Marshall and convict the accused or believe James MacNeil and acquit the accused".

The evidence of Mr. Marshall was diametrically opposed to that of Mr. MacNeil as to whether a conversation took place between Messrs. Ebsary, MacNeil, Marshall and Seale and whether a robbery was in progress at the time Seale was stabbed. Unlike the situation in R. v. Nadeau supra, the jury were not directed that if they rejected MacNeil's evidence they had to accept that of Marshall and convict the appellant. Indeed on the recharge the trial judge emphasized to the jury that they could believe all or part or none of a witness' evidence - "so there's a possibility that you would believe some of MacNeil's evidence, some of Marshall's...".

Both Marshall and MacNeil were Crown witnesses but Mr. MacNeil's evidence certainly supported the position of the defence. I have read and reread the charge to the jury and am not persuaded that they were left with two alternatives only, namely believe Marshall's evidence and convict the appellant or believe that of MacNeil and acquit Mr. Ebsary.

As I read the charge the learned trial judge instructed the jury that they must acquit the appellant if they found he was acting in self defence at the time he stabbed Seale; but that if they rejected the defence of self defence then they had to consider whether Ebsary's conduct amounted to manslaughter. It is true that at one time Mr. Justice Nunn told the jury that if they rejected the defence of self defence "you will find the accused guilty of manslaughter". However, when the charge is read in its entirety I am satisfied that the jury were not left with the impression that if they accepted Marshall's evidence they had to convict the appellant. They were told on more than one occasion that they could accept some or all or none of the evidence of the witnesses including MacNeil and Marshall. I am not persuaded that when the charge is considered as a whole that the error that occurred in R. v. Nadeau supra was repeated in this case.

Mr. Marshall is ~~a~~ self confessed perjurer and Mr. Justice Nunn properly instructed the jury that it was dangerous to rely on his evidence. How the jury arrived at its verdict we of course will never know. The evidence indicated that Seale was unarmed and that his hands were by his sides when he

was stabbed by the appellant. It well may be that the jury rejected Marshall's evidence and accepted that of MacNeil and Ebsary that they were being robbed when Seale was stabbed but that the appellant used more force than was necessary to defend himself. In other words the jury may well have concluded that Mr. Ebsary did not kill Seale under reasonable apprehension of death or grievous bodily harm from the assault of Seale and Marshall, or that he did not believe on reasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm (Code s. 34(2)). On such analysis the statement of Ebsary that "I swore by my Christ, I swore by my Christ that the next man that struck me would die in his tracks" is not irrelevant. For all the foregoing reasons I would dismiss the appeal against conviction.

I turn now to a consideration of the application for leave to appeal against the sentence of three years imprisonment.

The appellant will be seventy-four years of age on June the 2nd of this year. He has a previous criminal record consisting of a conviction in 1970 under what is now s. 85 of the Criminal Code (possession of a weapon dangerous to the public peace) and in 1982 of carrying a concealed weapon.

In imposing sentence Mr. Justice Nunn said in part:

> "~~The~~ evidence disclosed that that night you were armed and perhaps ready to take drastic measures if any situation presented itself. Even so, unless you orchestrated a situation, those facts need not be held against you. If you did orchestrate the situation or attack when unprovoked, it would have been murder. In my own mind, I do believe that these events did occur in a marginal self-defence situation, at least in the

public perception of self-defence. It may have been that your reaction was too violent, but there was some element of self-defence involved and I am entitled to take that into account in sentencing."

Later the learned trial judge said:

"...Taking into account your health circumstances, mental and physical, taking into account your age, taking into account the previous record that has been indicated to me, particularly the offence before this offence for which you stand convicted, and taking into account the circumstances surrounding the incident itself, taking into account the time since you've first been charged, I still am of the view that deterrence is a strong factor here; deterrence for yourself, who is still believed by some to have a violent nature, and for the public. It is repugnant to our system and one just cannot accept that a person can take matters into his own hands and become an executioner in situations such as you encountered.

"Also on the rehabilitation side, there are some pretty strong requirements for rehabilitation. Your use of alcohol, drugs, your inclination to violence all require a period of time to correct. As I said, all of the circumstances have to be taken into account and in so doing, it is my view that the protection of the public can best be served by a period of incarceration in a federal institution.

"Considering all of the factors that I've indicated, and giving you the benefit of what I suggest may be a public perception of a marginal self-defence situation, I think the Crown's recommendation is too long, and I can't agree with the Defence submission on probation, so I sentence you to confinement in a federal institution for a period of three years."

As pointed out by this Court in R. v. Myette (1985), 67 N.S.R. (2d) 154 at 162, 163:

"The offence of manslaughter carries a maximum sentence of life imprisonment. The range of sentences imposed in Nova Scotia has been from suspended sentence (e.g., R. v. Cormier (1974), 9 N.S.R. (2d) 687 (N.S.C.A.)), to twenty years' imprisonment (R. v. Julian (1973), 6 N.S.R.(2d)

504 (N.S.C.A.)). Lenient sentences have been imposed only where very strong mitigating factors exist or where the act, though culpable, was close to being an accident. In the great majority of manslaughter cases sentences range from four to ten years."

We have had the benefit of post-sentence medical reports with respect to Mr. Ebsary. On February 18, 1986 Dr. M. T. Ryan wrote to the appellant's solicitor as follows:

"I became familiar with Mr. Ebsary in Aug/Sept 1985. Prior to this period the late Dr. Abe Gaum attended him medically.

Since I have been treating Mr. Ebsary, I have been involved with the following conditions:

1. Surgery for small bowel obstruction in Oct/85. Since this time he has had chronic abdominal pain.

2. Chronic Degenerative Disease of the cervical spine. He currently has problems with his right arm secondary to nerve root compression. Since he has had two previous operations for the same, it is unlikely anything else will be attempted.

3. Cancer of Prostrate, prior to my taking over the case, with resection of the prostrate by Dr. Lawrence Schneiderman in July/85(?).

4. Chronic Lung Disease due to heavy smoking, he has been treated by myself for the same.

As far as his medical condition is concerned, Mr. Ebsary certainly does have major complaints. However I believe his major problem appears to be his neck, however I feel it is unlikely this would lead to surgery because of his two prior operations."

On February 13 Dr. H.G. Malik a neuro-surgeon forwarded a report to the appellant's solicitor in which he said in part:

"As you will recall, Mr. Ebsary had sustained a fracture dislocation at the C5-6 level and was treated for it in 1983. He also has cervical

> spondylosis. He has a residual weakness in his right arm. He complained to me of pain in his neck and weakness in his right arm. He mentioned that he gets dizzy at times and has been told by another surgeon that he may have narrowing of the blood vessels, going to his brain, and giving rise to the dizziness because of decreased blood supply to his brain. He has had surgery recently for a problem with his bowels. A prostatectomy has been performed for a malignancy as well."
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> "...I believe that the pain in his right arm and the weakness in his right arm is due to compression of the nerve roots and possibly the spinal cord in his cervical spine. This is a potentially correctable problem and may require a decompressive cervical laminectomy and foraminotomy. It is nevertheless a major undertaking and there would be serious risk of complications with regard to his cardio-respiratory system and also there are, of course, the inherent risks of the operation itself with regard to injury to his spinal cord and nerve roots. I had discussed with Dr. A. Gaum, in February 1985, that Mr. Ebsary should perhaps be referred to a larger centre. Following my examination in January 1986, I still feel that this should be done."

Letters were also received by Mr. Ebsary's counsel from Dr. Schneiderman and Dr. Dunn dated respectively February 7 and February 11, 1986. They really add nothing to what Dr. Ryan and Dr. Malik said in their reports.

As Mr. Justice Nunn pointed out there may well have been an element of self defence present at the time Seale was stabbed. I agree entirely because it appears inconceivable to me that the appellant would stab Mr. Seale for absolutely no reason. Mr. Marshall on other occasions testified under oath that Seale and himself were engaged in attempting to rob Mr.

MacNeil and the appellant at the time Seale was stabbed. This to me is the far more likely version of why the stabbing took place.

In light of the post-sentence reports, the circumstances both of the incident itself and of the appellant and bearing in mind that justice must always be tempered with mercy it is my opinion that a fit and proper sentence for this offence by this offender would be imprisonment for one year in the Cape Breton County Correctional Center. In result I would dismiss the appeal against conviction, but would allow the application for leave to appeal against sentence, allow the appeal and vary the sentence as indicated.

J.A.

Concurred in:

Morrison, J.A.

Matthews, J.A.