OPINION RE

THE USE OF EVIDENCE AND THE MAKING OF EVIDENTIARY RULINGS AT THE TRIAL OF DONALD MARSHALL, JR.

by

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INTRODUCTION:

The purpose of this opinion is to assess the use of evidence and the making of evidentiary rulings at the trial of Donald Marshall, Jr. It is undertaken in response to the request made by George W. MacDonald, Counsel to the Royal Commission on the Donald Marshall, Jr. Prosecution that I review the transcript of the trial in order to comment on the various rulings on evidentiary points and also on objections which might have been made but were not. I have also made certain recommendations for reform which flow from my analysis of what transpired during the Marshall trial.

The method utilized here has been to examine the transcript to assess the actions of counsel for the Crown and for the defence as well as those of the presiding judge in the light of evidentiary law and criminal trial procedure as applicable in November of 1971. (Although sources published after 1971 will be referred to where they nevertheless reflect the law at that time.) In doing so, an attempt has been made to assess the situation from the point of view of the participants at that time with the knowledge of the facts surrounding the death of Sandy Seale and of the applicable law which they had or ought reasonably to have had in the circumstances. While a review in 1987 has the benefit of hindsight, the participants involved in the trial cannot be assessed as if they

had or even ought to have had knowledge of all of the facts which have become a matter of general public knowledge and which led to the conviction of another man in relation to the crime with which Donald Marshall, Jr. was charged and found guilty in 1971. In particular this opinion will concentrate on matters which were not raised in Mr. Marshall's appeal to the Nova Scotia Supreme Court, Appeal Division. See Regina v. Marshall (1972), 8 C.C.C. (2d) 329.

The most crucial parts of this opinion present an overview of certain problematic evidentiary issues raised at the trial of Donald Marshall, Jr. and analyse in some detail the examination and cross-examination of the witness John Pratico. However, the analysis of these specific issues at the Marshall trial are preceded by a presentation of the nature and purpose of evidentiary law in a criminal trial in order to set the specific issues in a meaningful context. Thus, this opinion is divided into four parts entitled, respectively: (i) General Principles of the Law of Evidence; (ii) An Overview of Problematic Evidentiary Issues at the Trial; (iii) Hearsay, Out of Court Statements and Impeaching Witnesses: the Evidence of John Pratico; and (iv) General Conclusions.

I General Principles of the Law of Evidence

The rules of evidence applied in Canadian criminal trials are designed to give effect to a process of dispute resolution which is adversarial in nature. Conduct of the trial is primarily in the hands of counsel for Crown and defence while judge and jury take a relatively passive role. A classic Canadian description of this method of inquiry is given by Evans, J.A. in Phillips v. Ford Motor Company (1971), 18 D.L.R. (3d) 641 (Ont. C.A.) at p. 661:

> Our mode of trial procedure is based upon the adversary system in which the contestants seek to establish through

> relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matter in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of research director; it is a forum established for the purpose of providing justice for the litigants. Undoubtedly a Court must be concerned with truth, in the sense that it accepts as true certain sworn evidence and rejects other testimony as unworthy of belief, but it cannot embark upon a quest for the "scientific" or "technological" truth when such an adventure does violence to the primary function of the Court, which has always been to do justice, according to law.

It is recognized, however, that a trial judge may have a special duty in certain circumstances in a criminal trial to safeguard the liberty of the subject by taking a more active role which, in extreme cases, might even include the judge calling witnesses. See Regina v. Cleghorn, [1967] 1 All E.R. 996; Regina v. Brown, [1967] 3 C.C.C. 210 (Que. Q.B. App. Side) and Regina v. Bouchard (1973), 12 C.C.C. (2d) 554 (N.S. Co. Ct.).

The law of evidence consists of a large and sometimes confusing body of rules which regulate the adversarial trial process and balance a number of competing interests in this process, including: (a) the ascertainment of the true facts at issue; (b) assuring fairness as between Crown and defence in the presentation of evidence; (c) assuring public confidence in the fairness and impartiality of a criminal trial; and (d) the elimination of unjustifiable expense and delay. See E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation, 1956, The King v. Barbour, [1938] S.C.R. 465, and S.A. Schiff, Evidence in the Litigation Process, Carswell, Toronto, 1983, Vol. 1, p. 11.

The first principle of the law of evidence is that of relevance. Only relevant evidence is admissible at trial, and all relevant evidence is admissible unless excluded by some particular rule of evidence. See James Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), pp 264-266 and Morris v. R. (1984), 7 C.C.C. (3d) 97 (S.C.C.). Evidence is relevant where it tends to prove a fact in issue, that is, where the presentation of the evidence tends to show that a fact which must be proved existed, or at least that such an inference is more likely given the evidence tendered than without it. This is a matter of both logic and experience. See R.J. Deslisle, Evidence: Principle and Problems, Carswell, Toronto, 1984, pp. 4-6.

A clear distinction must be made, however, between the relevance of evidence and its weight. The threshold test of relevance for the admissibility of evidence is not a difficult one to meet. Evidence may be relevant to an issue and therefore admissible, but far from conclusive on that issue, particularly in light of the requirement in criminal cases that the guilt of the accused be proved beyond a reasonable doubt. Thus, evidence that the gun which killed the victim belonged to the accused will be relevant to proving the accused's guilt, but it might have little weight in the absence of other relevant evidence of the accused's motive or opportunity to commit the crime or in the face of clear evidence of an alibi. To use the metaphor employed by one commentator, it takes many bricks to make a wall. If the "wall" is proof of guilt beyond a reasonable doubt, the required quantity of "relevant bricks" will depend upon their size, shape and weight.

While relevance to a fact in issue may be the first principle of the law of evidence, it is equally true that the vast bulk of evidentiary law consists of a body of "exclusionary rules" which prevent the admission in the proceeding of

relevant evidence for a variety of reasons of policy. For example, "hearsay" evidence is excluded for a number of reasons: out of court statements may be unreliable since they are not given under oath, and their admission may be unfair to the opposing party who will be unable to cross-examine the declarant concerning such factors as his or her bias, opportunity for observation, ability to remember, or capacity to accurately describe the events perceived. A witness' statement that "X said he saw the accused commit the offence" may therefore be highly relevant, but the hearsay rule has been developed by the courts to exclude such testimony out of concerns about reliability and fairness. See E. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948), 62 Har. L. Rev. 177.

The general approach of the law of evidence, then, is that relevant evidence is admissible unless excluded by a particular rule. A judge is not free to exclude evidence on the basis of his or her personal views but must apply pre-existing standards or principles. However, it is widely accepted that a Canadian judge in a criminal trial has the authority to exclude relevant evidence in the absence of a particular exclusionary rule where there is "evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling". The Queen v. Wray, [1971] S.C.R. 272 at 293. (Of course, since the advent of the Charter of Rights and Freedoms in 1982, courts may exclude evidence obtained by a Charter breach in accordance with the broader and more flexible standard of whether "having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into disrepute" - Charter, section 24(2).)

One of the most confusing aspects of the application of the law of evidence

in practice is the principle that evidence which is inadmissible for a particular purpose according to one rule may be admissible for a different purpose by means of another rule. For example, in a negligence action arising out of an automobile accident, the hearsay rule would prevent the defendant from testifying that a mechanic told him his brakes were in good order when the purpose is to refute the plaintiff's allegation that faulty brakes had caused the accident. The court would want evidence directly from the mechanic on this issue. On the other hand, such a statement from the defendant about what the mechanic said would be admissible on the issue of whether the defendant had acted negligently in failing to have his brakes tested further. In the second instance the hearsay rule would not apply to exclude the testimony. Proper procedure in such cases of "conflicting" rules, is usually for the judge to admit the evidence, that is let the question be answered, but to instruct the jurors that they are limited in the use which they can make of such answers. In the example given, the jury would be told that the defendant's testimony on the mechanics' statement could be used in determining whether the defendant was negligent but not in determining the cause of the accident. See Stanly A. Schiff, Evidence in the Litigation Process, Carswell, Toronto, 1983, Vol. I, p. 73. [This type of occurrence in fact happened in the Marshall trial when Maynard Chant was declared to be an adverse witness. He had made a prior statement inconsistent with the testimony he gave at trial. The presiding judge, in accordance with established practice, told the jury that they could not accept the prior statement as evidence but could take into account the fact that he made it in determining whether to believe his statements on the witness stand in the trial.] Needless to say, there is some scepticism about the effectiveness of such limiting instructions, but the technique is widely used and thought to be a practical necessity.

The final general comments on the law of evidence relate to the manner in which evidentiary rules are invoked, applied and enforced, both at a trial and through the mechanism of appeal. Trial judges presiding in an adversarial setting are rightly loath to interfere with the conduct of the case by counsel. Thus, where competent opposing counsel does not object, a judge may allow relevant testimony to continue, where the evidence might be technically inadmissible, in order not to interrupt the flow of otherwise proper testimony. This, of course, is a matter of judgment because a judge in a criminal trial, even in the absence of objection from opposing counsel, must not admit in evidence testimony which would result in an unjust trial. Colpitts v. The Queen, [1965] S.C.R. 739. In the event of a dispute over whether a judge has exercised proper judgment in this regard, the only remedy is to take the matter on appeal. However, the law on criminal appeals is such that a mere finding of a trivial or technical misapplication of the law of evidence will not result in a new trial or a reversal of the original verdict. Criminal Code section 613(1)(b)(iii) provides that an appeal may be dismissed even where there has been a wrong decision on a matter of law when the appeal court "is of the opinion that no substantial wrong or miscarriage of justice has occurred". Thus, the strict application of the rules of evidence is tempered by a practical appreciation of the particular circumstances of each trial and the interplay among counsel and presiding judge in relation to them. Given the complexity of the law of evidence, such a flexible approach is essential; otherwise almost every criminal verdict might be overturned for trivial reasons.

II An Overview of Problematic Evidentiary Issues at the Trial of Donald Marshall, Jr.

In conducting an overview of the problematic evidentiary issues at the trial

two general areas are revealed as worthy of analysis: (i) a series of witness statements which were of tangential relevance, questionable weight and potential prejudice; and (ii) the approach to the hearsay rule taken by the presiding judge and counsel for Crown and defence in relation to testimony from several witnesses.

(1) Problems with Relevance, Weight and Prejudice

As mentioned above, the determination of whether any particular statement or evidence tendered is "relevant" is a matter of judgment which must be exercised in the light of logic and practical experience. However, the test of relevance is whether the evidence offered tends to prove a fact in issue - that is, an element of the offence charged or an aspect of a pertinent defence. Evidence may be classified as direct, that is where a witness testifies to have perceived a matter which must be proved, or circumstantial where the witness testified to having observed something from which it may be inferred that a fact in issue existed. Many criminal cases are properly proved by the use of circumstantial evidence only. However, judgments as to what evidence is relevant and what evidence is irrelevant in such cases can be difficult, since the relevance of any particular item or observation may not be clear except when viewed in relation to all the rest of the evidence which "gives the total picture" or ties the individual elements of proof together. Evidence may be clearly irrelevant in which case it is inadmissible. On the other hand, it may be of some relevance, and a presiding judge may admit it on the assumption that counsel will "tie it in" before the conclusion of the case. Thus evidence in a criminal trial may consist of both highly relevant and tangentially relevant bits of information. This highlights the importance of the role of the trial judge's charge to the jury in which he or she has the duty to help the jury separate the evidentiary

wheat from the chaff.

It may be thought that problems of relevance and attendant potential prejudice flow from aspects of the testimony given at the Marshall trial by witnesses Merle Faye Davis, Oscar and Leotha Seale, Patricia Harris and Terrence Gushue. Each of these will be dealt with in turn.

A. The Evidence of Mrs. Davis

Mrs. Merle Faye Davis was called by the Crown and examined in chief by Mr. McNeil. Her evidence was to the effect that she had, in her duties as a nurse at the City of Sydney hospital, treated the accused for a laceration on his left forearm on the night of the death of Sandy Seale, and she testified that the accused had been wearing a yellow jacket. It is apparent from a reading of the transcript that the Crown believed that evidence concerning the laceration would be relevant to an anticipated defence of self-defence (which was not ultimately put forward by the accused in the manner anticipated by the Crown), and that the evidence of the accused's wearing a yellow jacket was relevant when taken together with that of purported eye-witnesses to the stabbing who "saw" Seale's assailant wearing a yellow jacket. This was the core of Mrs. Davis' testimony and presented no problems of relevance.

In passing, however, there occurred the following interchange during the examination-in-chief of Mrs. Davis:

Q. Did you notice anything else about his arm?

A. I noticed a tatoo on his arm.

. . .

Q. Can you tell us what that tatoo is?

A. "I hate cops"

This evidence is not directly relevant to the proof of any element of the

offence, or to the proof of any defence. It is relevant to prove the character of the accused and his disposition toward the police, and only indirectly, if at all, to show that he is the kind of person capable of committing crimes. Since the accused had not put his character in issue at this point in the trial, the admission of such evidence was improper. R. v. Rowton (1865), 10 Cox C.C. 25 at p. 38 (per Willes, J.). Crown counsel should not have asked a question designed to elicit this testimony, defence counsel could have objected to it, and the trial judge might have prevented a reply or directed the jury to disregard it. (See Stirland v. DPP, [1944] A.C. 315 (H.L.).) However, the incident may not be serious enough to warrant the declaration of a mistrial. (See R. v. Ambrose (1976), 25 C.C.C. (2d) 90 (N.B.C.A.).) On appeal, the giving of this evidence might be thought insufficient, in and of itself, to overturn a verdict of guilty as not being a "substantial wrong or miscarriage of justice" in the language of section 613 of the Criminal Code in 1971. As such, one can understand what appears to have been the response of the court and defence counsel, if indeed they turned their minds to the issue: that is, to ignore the "tatoo" matter on the assumption that to draw attention to it would heighten its prejudicial impact on the jury. However, it is impossible to assess, in retrospect, what the effect of the wrongful admission of this evidence might have had in a trial where the outcome depended upon assessing the credibility of witnesses for the Crown and of the accused, where two totally conflicting versions of the events in question were being advanced by each side.

B. The Evidence of Mr. and Mrs. Seale

The Crown called Mr. and Mrs. Seale, the parents of the victim, in order "to prove the continuity of the exhibits" in the form of a brown jacket and overalls which had been worn by the victim on the evening in question. While it was the

practice in criminal trials in 1971 to present formal proof of the continuity of possession of all exhibits in order to demonstrate the absence of falsification or error in relation to them, the exhibits must be shown to be relevant in the first place to be admissible at all. The rationale for the relevance of these items to the Crown's case was not demonstrated at the time they were admitted in evidence, and the fact that they were virtually ignored in the subsequent parts of the proceeding confirms the difficulty concerning their lack of relevance. Comments from Crown counsel, Mr. McNeil, during his summation (transcript p. 233) to the effect that continuity must be demonstrated and that requirements of proof may differ where the accused testifies, side-step the issue of the relevance of these exhibits.

While the argument in favour of the admissibility of these items was never made, their admissibility was not challenged by defence counsel or adversely commented upon by the presiding judge. All participants seemed to assume that their relevance would or could be demonstrated, though this did not turn out to be the case in the final analysis.

Though the relevance of the exhibits referred to by Mr. and Mrs. Seale was never demonstrated, they both appeared on the witness stand and may have become the objects of considerable sympathy on the part of jurors. Their son had been the victim of a gruesome murder, and the transcript seems to indicate that they were being treated with solicitude by both Crown and defence counsel. However, the ultimate irrelevance of their testimony and the impropriety of allowing sympathy for their plight to influence the decision in the case were not made the subject of comment by the trial judge in his charge to the jury. It is doubtful, however, that there is an appealable error of law in this matter, and even more doubtful that there is one which alone would pass the "no substantial wrong or

miscarriage of justice" test. While this issue might have been better handled in a charge to the jury, it is a matter of speculation as to whether by itself or in combination with other evidence adverse to the accused, it contributed to Mr. Marshall's wrongful conviction.

C. The Evidence of Miss Harris and Mr. Gushue

It was the evidence of Patricia Harris and Terry Gushue that they had encountered the accused, Mr. Marshall, in the company of one other person (although there was doubt about whether others might have been present) in the vicinity of the stabbing some little time prior to the event. Their evidence was clearly relevant to proof of the material elements of the offence in that they identified the accused and put him at the scene of the crime. Their testimony was also relevant to the extent that their inability to specifically recall others at the scene tended to rebut any defence of denial which would put the blame onto others. While this was not direct testimony of the "eye-witness" variety, and while it was far from conclusive circumstantial evidence, it was certainly relevant and therefore admissible evidence.

With present knowledge of Mr. Marshall's wrongful conviction, it might be tempting to characterize this evidence as having been improperly admitted. In the language of The Queen v. Wray, was this evidence "gravely prejudicial to the accused", was its admissibility "tenuous", was its "probative force" in relation to the main issue before the court "trifling"? The answer to these questions must be "no". The evidence of Harris and Gushue was not gravely prejudicial; it was rather one more brick in a wall which the Crown was trying to construct. Its relevance and therefore admissibility in the absence of an exclusionary rule was evident and direct. Its probative force or weight, while not conclusive, was certainly more than trifling. This latter judgment would have appeared, at the

time of the trial, to have been confirmed by Mr. Marshall's inability in cross-examination to explain how his version of the events could have co-existed with the circumstances described by Miss Harris and Mr. Gushue. While in retrospect it may be clear that the inferences which the Crown wished the jury to draw from the evidence of Miss Harris and Mr. Gushue were incorrect, it is equally clear that there were no "evidentiary errors" in the manner in which their testimony was elicited.

(2) The General Approach to Hearsay at the Trial

In its attempt to restate the law of evidence in a statutory framework, the Federal/Provincial Task Force on Uniform Rules of Evidence (Report, Carswell, Toronto, 1982, p. 124) defines hearsay in the following manner:

> "'Hearsay' means a statement by a person other than one made while testifying as a witness at the proceeding, that is offered in evidence to prove the truth of the matter asserted." (emphasis added)

The Task Force also recommended unanimously that in the foregoing definition, "statement" should mean "an oral or written assertion" and that it should include "non-verbal conduct intended as an assertion". The Task Force recognized that defining hearsay has been a matter of some controversy, but for the purpose of this opinion subtle differences among competing definitions are not determinative of issues raised in the Marshall trial. The above definition contains the commonly accepted core of the notion of hearsay, and corresponds to a definition referred to by the judge in the Marshall trial from the Eleventh Edition of Phipson on Evidence at p. 268:

> Former oral or written statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.

The policy behind the rule which normally excludes hearsay evidence from

criminal trials was referred to in part I of this opinion. However, as all practitioners of law are aware, the general rule excluding hearsay testimony is subject to numerous exceptions which operate to allow in evidence what would otherwise be excluded by a blanket application of the rule. Many exceptions have developed in accordance with a "necessity" principle, while others have emerged as courts have become convinced that in the particular fact patterns there are circumstances which guarantee the trustworthiness of these statements not withstanding the so-called "hearsay dangers" discussed earlier. See R.J. Delisle, Evidence, Principles and Problems: Carswell, Toronto, 1984, pp. 219-221. The result of this accretion of common law precedent has been the development of a highly complex even arcane body of evidentiary law. As one famous judge put it: "It is difficult to make any general statement about the law of hearsay which is entirely accurate." Per Lord Reid, Myers v. D.P.P. [1965], A.C. 1001 (H.L.) at p. 1070. Counsel and the presiding judge at the Marshall trial encountered difficulty with the hearsay rule and its exceptions during the testimony of Sgt. Michael MacDonald, Maynard Chant, M.D. Mattson and John Pratico. The first three witnesses and hearsay issues will be dealt with in this section as a group. The problems with "hearsay" in Mr. Pratico's testimony are sufficiently important to be addressed separately in Part III of this opinion.

A. Sgt. MacDonald's Hospital Conversations with Maynard Chant

Sgt. Michael MacDonald was called by the Crown and questioned briefly by Mr. MacNeil concerning the proof of "continuity of exhibits" as discussed earlier. Controversy concerning the applicability of the hearsay rule arose during Mr. Rosenblum's cross-examination of Sgt. MacDonald. The process of cross-examination had elicited the facts that Sgt. MacDonald had encountered Maynard

Chant for a few minutes at the City of Sydney hospital in the early morning hours following the stabbing. The exchange which sparked the controversy began as follows:

Q. ... when you saw Mr. Chant and you had a brief conversation, was Donald Marshall present?

A. No sir. He was in the building.

Q. Did Chant tell you anything -

At this point Mr. MacNeil objected on the grounds that conversation which took place "between the officer and Mr. Chant is inadmissible unless the accused is present". Somewhat later in argument in the absence of the jury Mr. MacNeil rephrased his objection in the following manner: " ... I know of no rule that would allow a conversation to go in that may work to the detriment of the accused when he wasn't present." Mr. Rosenblum for the defence, apparently inhibited by the potential application of the hearsay rule, attempted to avoid its invocation with the following argument:

> "... I'm not asking for the words that were used, my Lord. I'm asking the question as to whether or not Chant made any accusation to this witness concerning Donald Marshall, at any time -"

Later in argument the trial judge correctly says: "You're asking him about conversation which he had with Mr. Chant, and however you may phrase it, it gets to what Chant said to him." But in immediate reply to this statement from the judge, Mr. Rosenblum indicates indirectly the rationale behind his cross-examination when he stated: "Or didn't say - or didn't say! This is the point. Silence!"

One way to analyse the defence line of question is to say that Mr. Rosenblum was seeking to put in evidence statements, or at least implied assertions, from Mr. Chant as heard by Sgt. MacDonald, that Mr. Marshall did or did not stab Sandy

Seale for the purpose of their being taken into account by the jury as evidence of Mr. Marshall's guilt or innocence. This interpretation may have been reinforced in the mind of the Court and Counsel for the Crown by the nature of the formal restatement of the question made by Mr. Rosenblum in seeking an evidentiary ruling:

> Q. "Did Maynard Chant on that occasion say anything to you to implicate Donald Marshall, Jr., the accused in this case, in connection with the injuries which had been sustained by the late Sandy Seale?"

This might be interpreted as seeking the admission of the statement for reasons contrary to the policy behind the hearsay rule as described above. But the other purpose for asking this question, which is alluded to by Mr. Rosenblum in his argument although not made entirely clear, is to determine not the contents of any accusation or lack thereof, but the mere fact that an accusation was or was not made. This purpose is not to elicit evidence which would go directly to the main issue of Mr. Marshall's guilt or innocence but rather to Maynard Chant's credibility as a witness. Chant did not implicate Mr. Marshall when he had an opportunity to do so, and as he ought to have done as an upstanding credible person. This would surely be the main point of the "silence" which Mr. Rosenblum apparently expected Sgt. MacDonald to describe. Moreover, it would be to use the out of court statement for a proper non-hearsay purpose, but one which would invite a limiting instruction in the judge's charge to the jury.

The trial judge refused to allow the question to be put to the witness. However, it is not entirely clear from the transcript whether he based his ruling on the principle that an answer would be inadmissible hearsay or because to allow cross-examination of one witness about statements made by another in order to impugn the latter's credibility would be improper. His ruling is perhaps based

upon an amalgam of both sets of reasons. Given the revelations subsequent to the trial, it becomes important to know why Maynard Chant's credibility was not challenged. Mr. Rosenblum may not have understood at the time he made them the full significance of his repeated statements during the course of argument on this evidentiary issue that it was of "great importance to the case", the "nub of the case" and the "heart of the case".

In assessing Mr. MacNeil's objection to Mr. Rosenblum's question to Sgt. MacDonald from the viewpoint of hearsay analysis, a number of points must be made. Firstly, there is Mr. MacNeil's assertion that "conversation took place [sic] between the officer and Mr. Chant is inadmissible unless the accused is present." If this involves an assertion that testimony on all conversation outside the courtroom implicating an accused in the absence of the accused is inadmissible hearsay, then it is incorrect because it fails to take into account the purpose for which the statement may be adduced (i.e. challenge to credibility rather than for truth of contents). To the extent Mr. MacNeil viewed the presence of the accused as determinative, it appears to be an incorrect statement of law with two possible sources of origin. Prior to the 1955 revision of the Criminal Code the provision which established procedures at a preliminary inquiry was worded in part:

> "The evidence of the said witnesses shall be given upon oath and in the presence of the accused, and the accused, his counsel or solicitor, shall be entitled to cross-examine them."

Perhaps Mr. MacNeil believed this rule, found in Code section 468 in 1971, extended to statements made during police investigation. On the other hand, it may be that Mr. MacNeil was misconstruing an established exception to the hearsay rule which provides that where an accusation is made in the presence of an accused and is not denied, it can be treated as an admission against interest and

admitted in evidence. Regardless of the mistaken origins of Mr. MacNeil's asserted rule, and even though the trial judge did not immediately accept it in the form in which it was asserted, Mr. MacNeil's insistence upon it may have had the effect of inhibiting enquiry into the manner in which the trial dealt with police investigation. Mr. Rosenblum seemed to be sensitive to this purported interpretation of the hearsay rule which proved so adverse to his client's interests. Furthermore, it may have influenced the decision made by the trial judge in ruling on this particular issue.

The trial judge was ambiguous about the basis on which he made the ruling that Mr. Rosenblum could not ask Sgt. MacDonald about his conversations with Maynard Chant. On the one hand he quoted at length from Phipson on Evidence, Eleventh Edition (at p. 63 of the transcript) at the point in the text that deals with the hearsay rule. Significantly, he omitted to cite the passage which points out that one of the most frequent sources of error in hearsay analysis is to exclude out of court statements without reference to the purpose for which they are adduced. However, after citing Phipson on hearsay, he shifts discussion to a case, apparently cited by Mr. Rosenblum, called Rex v. Rewniak, [1949] C.R. 127 (Man. Q.B.) which considered the issue of cross-examination of witnesses as to credibility of other witnesses and held that unnecessary restriction of cross-examination might, in a proper case, be grounds for appeal. Without further analysis the trial judge concluded:

> "While I repeat again that I appreciate very much the reasons for the submission, both the legal reasons and the practical reasons from the point of view of the Defence, I have come to the conclusion that in this particular case, in the circumstances of this case, my ruling is that the witness cannot be questioned about the conversation which he had with Mr. Chant."

A reading of Rex v. Rewniak and the annotation by A.E. Popple which follows it at

(1949) 7 C.R. (3d) 136 should lead to the opposite conclusion. However, the judge then assured Mr. Rosenblum that the latter would be able to ask Maynard Chant directly about his conversations with Sgt. MacDonald (even though the accused was not present!). The ruling thus appears to have been mainly based on an application of the hearsay rule. However, it is clear that its main effect was to inhibit the defence in any effort to examine the manner of police questioning as a basis for challenging the credibility of one of the two key "eye-witnesses".

To assess the potential effect of this confused evidentiary ruling on the trial, it is important to examine what might have occurred if proper analysis had flowed along the lines of credibility and not hearsay. It is to be remembered that what was at stake here was the credibility of Maynard Chant as a Crown witness. Maynard Chant had not yet testified and Mr. Rosenblum, in his cross-examination of Sgt. MacDonald, was anticipating difficulties which he might have with Chant's testimony based, presumably, on what the latter had said at the preliminary inquiry. The propriety of Mr. Rosenblum's question must be assessed in the light of the recognized purposes of cross-examination. These purposes are described by Professor Stanley A. Schiff in his Evidence in the Litigation Process (2nd Ed.), Carswell, Toronto, 1983, Vol. I, p. 201 as follows:

> "First of all, counsel may seek to elicit testimony relating to the substantive issues helpful to his case or harmful to the opponents case. Secondly, he may seek to impugn the witness's credibility so that the trier of fact will discount the probative value of the testimony given during the examination-in-chief - sometimes called 'impeaching the witness' or 'impeaching his [sic] testimony'. In addition, counsel may seek to elicit testimony relevant to the credibility of other witnesses." (emphasis added)

Professor Schiff then continues at p. 204:

> "The purposes of cross-examination define generally what counsel may do in the questioning of the witness, and also

> define what he [sic] must not do. Thus, counsel should not ask the witness any question seeking an answer irrelevant to a substantive issue or to the trier's assessment of that (or some other) witness's testimonial factors. Moreover, counsel should not ask questions inviting testimony barred by exclusionary doctrine unrelated to relevency, for example, the hearsay rule." (emphasis added)

This broad approach to cross-examination is also described by P.K. McWilliams, Q.C. in his Canadian Criminal Evidence (2nd Ed.), Canada Law Book, Aurora, 1984, at p. 774 where he says: "Cross-examination as to credit may extend to collateral matters which, of course, cannot be led in chief, let alone be anticipated. The defence is not limited to matters which happen in the presence of the accused: R. v. Rewniak (1949), 93 C.C.C. 142 (Man. C.A.)." In other words, Mr. Rosenblum, in this interpretation, would have been fully entitled to question Maynard Chant about what he said to the police, when he said it, and why he said it - and why he changed his story.

But as the second passage from Schiff quoted above indicates, the scope of cross-examination as to credit is not unlimited, particularly where the testimony sought to be elicited would also contravene another exclusionary rule, such as the hearsay rule if advanced for another purpose. The trial judge has a duty to exercise a discretion to see that the right of cross-examination is not abused. The standard by which to assess the exercise of discretion was set out by the Manitoba Court of Appeal in the widely cited case of Rex v. Anderson, [1938] 3 D.L.R. 317 at p. 321 as follows:

> "That full cross-examination of an opposite witness should be permitted by the trial judge is well settled. The judge may check cross-examination if it becomes irrelevant, or prolix, or insulting but so long as it may fairly be applied to the issue, or touches the credibility of the witness [or another witness?] it should not be excluded." (question in square brackets added)

This problem was long ago described by the Supreme Court of Canada in Brownell v.

Brownell (1909), 42 S.C.R. 368 at p. 373 in the following terms:

> "The character of this discretion, however, is such that its precise limits are not easily defined and in practice its exercise, though undoubtedly reviewable, must be left largely to the sound judgment and wisdom of the presiding judge who, from his observation of the demeanor of the witness and also the manner of and the conduct of the case by counsel, has means and opportunities of forming a correct opinion as to the importance and real purpose of questions propounded which are not open to an appellate court."

In the trial of Mr. Marshall, the presiding judge was faced with the relatively rare circumstance of ruling on the admissibility of a question which would elicit an answer barred by the hearsay rule if offered for the truth of its contents, but justifiable if accepted as a challenge to an important Crown witness who had yet to testify. In accordance with the authorities represented by Rex v. Anderson and Brownell v. Brownell cited above, a court of appeal would in all likelihood have found the trial judges decision to be incorrect. In retrospect, it is clear that the ruling closed, at least in part, what might have been an important avenue for the demonstration of Mr. Marshall's innocence. At the time, however, Mr. Rosenblum did not press his argument with such allegations as collusion between Mr. Chant and Mr. Pratico, or police misconduct during the questioning of witnesses. Indeed, in the absence of knowledge by Mr. Rosenblum of evidence for challenging Maynard Chant's credibililty on such bases, to suggest them would have been highly improper. But a court of appeal might find it very difficult to say that foreclosing cross-examination on this issue involved "no substantial wrong or miscarriage of justice" if presented with facts to show how this could have been the case.

B. Cross-Examination of Maynard Chant

Maynard Chant was called as a witness by the Crown and testified to having been an eye-witness to the stabbing of Sandy Seale. There was conflict between

what he said on preliminary inquiry in identifying Mr. Marshall as the perpetrator of the crime, and his testimony at trial which was uncertain in this regard. The controversy about his being declared an adverse witness and being cross-examined by the Crown was dealt with on appeal before the Appellate Division of the Supreme Court of Nova Scotia in the decision cited earlier. It will not be canvassed in this opinion. However, in cross-examination by Mr. Rosenblum, the issue of the nature of police questioning and Maynard Chant's statements to police was the subject of testimony and will be examined here.

In the trial transcript there is an exchange between Mr. Rosenblum and Maynard Chant concerning the latter's conversation with police officers at the hospital and at the police station in the early morning hours after the stabbing. Also the subject of cross-examination were subsequent periods of questioning of Maynard Chant in Louisburg and at the Sydney police station during which time he changed his version of the events, and identified Mr. Marshall as the perpetrator of the crime.

During these exchanges, and in accordance with the presiding judges' prior ruling, Mr. Rosenblum was at pains to elicit testimony that Maynard Chant had not implicated Mr. Marshall in the period immediately following the stabbing but only after prolonged police questioning. Mr. MacNeil raised his earlier unfounded objection about statements made "in the presence or absence of the accused". The court rejected this contention with the statement at p. 112 of the transcript:

> "He [Mr. Rosenblum] is now perfectly within his rights to cross-examine <u>this witness</u> on the subject matter that he was proceeding with." (emphasis added)

However, Mr. Rosenblum asked no questions about what the police said to Maynard Chant in their interrogation. This may be because of a fear that the hearsay rule would apply. But it might also be based on an interpretation of this

intervention by the trial judge to the effect that the earlier evidentiary ruling was confirmed which seemed to exclude cross-examination, and perhaps direct examination (although this issue was never canvassed in argument) of any police officers who had questioned Maynard Chant, including Det. Sgt. John McIntyre to whom Chant said he had told "the untrue story" - the one which presumably might have exculpated Mr. Marshall.

The result was that Mr. MacNeil for the Crown obtained from the court a ruling which limited the damage to Maynard Chant's credibility and had the effect, intended or unintended, of shielding the police from inquiry about their methods of investigation. However, this was a result in which Mr. Rosenblum, for reasons which do not appear on the transcript, seemed to have concurred. At page 116 of the transcript there appears this enigmatic but perhaps revealing exchange:

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.

MR. ROSENBLUM:

Excuse me, just a moment. Now, My Lord, we're going into the recesses of a man's mind. There's an old saying that even the devil doesn't know what's going on in a man's mind, it's not tryable and for him now to give explanation as to why he did something or why he lied or why he lied to or why he lied yesterday or why he lied in the police statien-

THE COURT:

I know. Any further questions?

MR. MacNEIL:

No, no further questions but do I understand that Your Lordship won't allow that question.

Maynard Chant might have been afraid of reprisals from Mr. Marshall's friends, or from the police or for some other reason. Defence counsel seemed unwilling to pursue the matter, perhaps because he believed, with apparent good reason, that the court would not allow him to substantiate any response by questioning other witnesses on the issue. The impact on the trial is incalculable.

C. Examination and Cross-Examination of M.D. Mattson

Mr. M.D. Mattson was called as a witness by the Crown. He testified that as a result of a conversation he overheard in the street he called the police. Both Mr. MacNeil in direct examination and Mr. Rosenblum in cross-examination were very careful not to allow this witness to recount the contents of any conversation which he overheard. It may be that both counsel were fully apprised of what this witness had heard and were rightly of the view that to elicit it as evidence would only be to seek inadmissible hearsay. On the other hand, the arguments over the scope and applicability of the hearsay rule in relation to other witnesses do not encourage confidence in such a view. Both counsel and the presiding judge demonstrated an apparent confusion over the principle of multiple bases for the admission of evidence and the distinction between using out of court statements for hearsay and non-hearsay purposes. Mr. Mattson may have over-heard remarks the importance of which was not the truth of their contents, but the fact that such statements were made at the time they were made. In particular, such matters might have been explored in cross-examination, perhaps with the aid of a voire dire. But even if Mr. Rosenblum had been convinced that Mr. Mattson had important "non-hearsay" evidence to give, Mr. MacNeil's interpretation of the hearsay rule, which was apparently accepted in part by the presiding judge, would have precluded consideration of the matter.

III Hearsay, Out of Court Statements and Impeaching Witnesses: The Evidence of John Pratico

John Pratico testified in direct examination that he observed Donald Marshall, Jr. stab Sandy Seale in the stomach with a "shiny object". As one of two purported eye-eitnesses to the homicide, one must conclude that his testimony was an important element in the jury's verdict of guilty. Where the accused's claim was that he did not commit the offence and that he saw someone else do it, John Pratico's credibility as a witness was crucial.

The two standard techniques for challenging a witness's credibility are (I) to cross-examine that witness to bring out inconsistencies which tend to show the witness to be lying, to have a poor memory, to have had no opportunity to really observe the events or to be incapable of accurately describing events observed, or (II) to obtain statements or evidence from other witnesses which contradict or "impeach" the principal witness's story. In relation to the first of these techniques, the law has traditionally allowed great scope in cross-examination. To cite the 11th Edition of Phipson (which, as the transcript indicates, was available to the trial judge in the Marshall trial): "So, all questions may be asked in cross-examination which tend to expose the errors, omissions, inconsistencies, exaggerations or improbabilities of the witness's testimony." (p. 654). However, there are restrictive rules about the second technique of bringing in other witnesses to impeach the credibility of the principal witness, and these rules are particularly strict where one wishes to cross-examine or impeach one's own witness by having him declared hostile or adverse. The principal concern here is that it is the accused, not the witness who is on trial. Disputing the testimony of every witness with other witnesses raises potentially limitless collateral issues.

One evidentiary problem with the hearing of John Pratico's testimony was

that the trial judge limited the scope of cross-examination by Mr. Khattar on prior inconsistent statements (technique I) through the improper application of rules designed to limit impeachment of witnesses by other testimony (technique II).

The afternoon before John Pratico was cross-examined he told a number of people outside the court room, including Mr. Khattar, Mr. MacNeil, the Sheriff Det. Sgt. McIntyre and Mr. Donald Marshall, Sr., that Donald Marshall, Jr. did not stab Sandy Seale (transcript p. 148). This is a "prior inconsistent statement" which can be used to challenge the witness's testimony to the contrary by probing in cross-examination whether he or she made the statement, why he or she made the statement, the circumstances surrounding the statement, etc (technique I). In accordance with the general rule as stated above by Phipson, cross-examination about such a statement may be extremely wide ranging. However, the precondition for obtaining evidence about such statements from other witnesses for the purpose of impeaching the principal witness's (i.e. Pratico's) credibility (technique II) is governed by the Canada Evidence Act. Section 11 of that Act reads (and read in 1971):

CROSS-EXAMINATION AS TO PREVIOUS ORAL STATEMENTS.

> 11. Where a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S., c. 307, s. 11.

This section would only have been applicable if Pratico had denied making the statement outside the courtroom. But this section of the Canada Evidence Act was used by the trial judge not to permit testimony from other witnesses about what

John Pratico had said outside the courtroom following a denial, but rather to limit cross-examination of Pratico himself. The section was cited by the trial judge, and followed by the comment:

> "So you have the right to ask him about any statement which he made to anyone inconsistently - but Mr. Khattar, let us limit ourselves to anything that he said that was inconsistent." (transcript, p. 154)

Mr. Khattar limited his questions to John Pratico to eliciting the names of those present when the statement was made, and the time at which they were made. That is, Mr. Khattar limited his cross-examination in accordance with the judges appliction of s. 11 of the Canada Evidence Act. Whether Mr. Khattar might have wished to pursue in cross-examination the <u>reasons</u> for this prior inconsistent statement is a matter of strategy and is not clear from the transcript. It does seem clear, however, that the trial judge would have stopped him if he had attempted to do so.

While the trial judge limited defence counsel's cross-examination of John Pratico, he accorded the Crown a right of re-examination on the issue of prior inconsistent statements. However, he incorrectly limited re-examination by Mr. McNeil as well. As the Phipson text available to the court correctly states (at p. 664): "The right to re-examination exists only when there has been cross-examination, and must be confined to the matters arising thereon." There was a voir dire on the extent to which questions might be put to the witness Pratico as to <u>why</u> he had made prior inconsistent statements, and the Crown wished to elicit evidence concerning alleged threats made by a number of persons (including the accused) to Pratico. The trial judge summarized his reasoning and his ruling on this point in the following passage (transcript pp. 169-170):

> "Mr. Khattar, the witness was examined yesterday and today was subjected to a very searching and careful cross-examination and I found your cross-examination to be in

> order. But you have brought up the matter of inconsistent statements and now the law is, that in re-examination a witness may explain - may explain - the reasons why he gave this inconsistent statement. That is the law Mr. Khattar. Now then, he cannot tell in court what somebody said to him because it was not in the presence of the accused. He cannot say what Donald Marshall, Sr. said to him or Theresa Paul or Tom Christmas. But there is no such prohibition relative to the reason why he gave this inconsistent statement affecting the accused himself. You see, Mr. Khattar, as was your right to bring out the inconsistent statement, now surely the law is that in re-examination the witness can explain why he gave an inconsistent statement."

This reasoning is seriously flawed. It begins from the premise that Mr. Khattar had exercised a "right to bring out the inconsistent statement" but, for reasons explained above, ignores the fact that cross-examination concerning the statement had been improperly limited. It continues to declare inadmissible out of court conversation which might explain the motive for making the prior inconsistent statement, on what appears to be the incorrect interpretation of the hearsay rule discussed earlier. Moreover, the reasoning seems to adopt Mr. MacNeil's erroneous contention (discussed above and earlier both allowed and disavowed by the court) that only out of court statements made in the presence of the accused are admissible. The reasoning is correct only in so far as it states the proposition that a witness may explain in re-examination the reasons for having given a prior inconsistent statement.

The upshot of this approach was that in the re-examination, John Pratico stated that he had made prior inconsistent statements because he was "scared of his life" (transcript p. 173). Furthermore, conversation between the court and counsel (transcript p. 175), and questions from Mr. MacNeil identified a number of acquaintances of the accused who had been in contact with the witness Pratico after the murder and prior to the trial. However, because of the judge's ruling, there could be no exploration of the nature of any conversation which had

occurred on these occasions. It is in this way that the trial judge incorrectly limited the Crown's right of re-examination. The trial judge then even appeared to limit exploration of any actual conversation between the witness and the accused, and concluded the matter with his own question (transcript p. 174):

> Q. Now, your being scared of your life, is that because of anything the accused said to you at any time?"
>
> A. No.

In the result, the jury might draw the conclusion that the witness had been threatened, and in all likelihood by acquaintances of the accused, but any attempt to find out what might have been said of a threatening nature was foreclosed to both Crown and Defence. Furthermore, the limitation on cross-examination on the broader issue of why Pratico made conflicting statements was not allowed, while it might have clarified the question of whether threats were relevant to the problem at all. Given that the trial rested on the credibility of witnesses, it cannot be said that this curtailment of the cross-examination and re-examination of John Pratico might not have contributed significantly to "a substantial wrong or miscarriage of justice".

IV General Conclusions

In the light of the foregoing analysis, general conclusions may be drawn concerning three broad sets of issues related to the evidentiary controversies in the Marshall trial discussed above, and a recommendation for improvement in the handling of evidentiary matters in criminal trials, like that of Mr. Marshall, may be made.

The first general conclusion relates to the manner in which a trial judge exercised his discretion in directing jurors as to how to appropriately evaluate the testimony which they heard. The analysis of the testimony of Ms. Davis, Mr.

and Mrs. Seale, Miss Harris and Mr. Gushue indicates that the jury heard some evidence which was both irrelevant and potentially prejudicial, as well as other evidence which, while relevant, was of controverted weight. The trial judge's charge to the jury did not carefully identify for the jurors the evidence from these witnesses which they could not consider in reaching their verdict, and that which they should regard with caution because of its limited weight. While it cannot be said that any one of these matters, if taken alone, would inevitably have led to Mr. Marshall's wrongful conviction, taken as a whole they may have contributed to the jury's process of reaching the false conclusion that Mr. Marshall's version of the events could not be believed and that he was guilty.

The second general conclusion relates to the manner in which the concept of hearsay was used by the trial judge to support evidentiary rulings. In either direct examination, cross-examination or re-examination of Mr. Mattson, Sgt. MacDonald, Maynard Chant and John Pratico out of court conversations were not related to the jury on the erroneous theory that their admission would contravene the rule excluding hearsay evidence. Some of these conversations, if admitted, might have had the effect of enhancing Mr. Marshall's credibility and challenging or destroying the credibility of the purported eye-witnesses. Whether defence counsel would have availed themselves of the opportunity to present evidence of such conversations to the court would depend on what they knew of such conversations through their own investigations, from disclosure, if any, by the Crown or from the preliminary inquiry. What can be said, however, is that the trial judge's approach to hearsay (often acquiesced in by Crown and defence counsel) precluded the jury from hearing admissible evidence relevant to the credibility of important witnesses in the case.

The third general conclusion concerns the way in which the trial judge

limited cross-examination of Maynard Chant and John Pratico, the two purported eye-witnesses to the murder. As a result of the misapplication of the hearsay concept and the trial judge's confusion over the use and challenging of prior inconsistent statements, cross-examination of the Crown's two most important witnesses was incorrectly limited so as to prevent their credibility from being challenged. Once again, the extent of any challenge would have depended on how defence counsel used information available to them through their own investigation, from Crown disclosure, or from evidence taken on preliminary inquiry.

The recommendations relate to the present state of the law of evidence in Canada, and its use and application in criminal trials, such as that of Donald Marshall, Jr. The law of evidence in Canada is needlessly complex and difficult to master. As the matters canvassed in this opinion indicate, the trial judge and three experienced counsel appear to have been unclear about a number of important aspects of the law of evidence. The trial of Donald Marshall, Jr. represents a dramatic illustration of the need for reform in the evidence law in Canada. As the Law Reform Commission of Canada said in 1975 in its Report on Evidence to the Parliament of Canada, at p. 5, "While we are satisfied that rules of evidence are necessary to maintain a reasonable degree of consistency in court procedure, the time has surely come for a reformulation on broader lines. What is needed are easily available, clear and flexible rules."

Since the release of the Law Reform Commission's Report on Evidence, the Government of Nova Scotia along with the governments of five other Canadian jurisdictions (Canada, Ontario, Quebec, British Columbia and Alberta) established a Federal/Provincial Task Force on Uniform Rules of Evidence. The report of this task force was released in 1982 and was the subject of broad consultation within

the legal profession and the general public. The Department of Justice of Canada has drafted a new Canada Evidence Act as a result of this process which would restate the law of evidence in a more comprehensible form which might assist trial judge and litigation counsel in more easily resolving evidentiary issues to ensure fairness and uniformity in the administration of criminal justice. The provincial government, in the light of the trial of Donald Marshall, Jr. should be urged to press the Federal Government to enact immediately its proposed legislation to reform the law of evidence. Furthermore, the Government of Nova Scotia should introduce a parallel reform to the Nova Scotia Evidence Act to ensure uniformity where possible in the rules of evidence to be applied in federal and provincial proceedings in the Province.

Without limiting the generality of this recommendation concerning the benefits to the administration of justice of a general restatement or reform of the <u>whole</u> of the law of evidence, the following example may be apposite. The latest draft of the proposed Canada Evidence Act contains the following provision:

> 92. A party may cross-examine any witness not called by the party on all facts in issue and on all matters relevant to the credibility of the witness, and on cross-examination may ask the witness leading questions.

Had such a provision been found in the Canada Evidence Act at the time of Mr. Marshall's trial, the confusion which led to the curtailment of the cross-examination of John Pratico by Mr. Khattar might easily have been avoided.