This is the paper writing marked "A" referred to in the affidavit of Maynard Vincent Chant Exh. "A" sworn before me this 4th day of June A.D. 1971 A Commissioner of the Supreme Court of

COPY

June 4, 1971 - 2:55 P.M.

Statement of Maynard Vincent Chant, age 14 yrs., residing Main St., Louisburg, C.B.

Last Friday night after 11:30 P.M., I left the Acadian Line on Bentinck St. and walked down Bentinck St. to the tracks. Then I started down the tracks towards George St. I noticed a dark haired fellow sort of hiding in the bushes about opp. the second house on Crescent St.

Q. Did you know him.
A. No. I did not know his name but I seen him before out at the dances in Louisburg

Q. Did you see him since
A. Sunday afternoon at the Police Office in Sydney. I was by this fellow on the track. I looked back to see what he was looking at. Then I saw 2 fellows standing about 1' from each other on Crescent St. near the house with the railing up the middle of the steps. The same house when I called the police from. An old man with grey hair & glasses answered the door

Q. Were they the same size
A. One was taller than the other

Q. Which one was facing you
A. Short dark fellow was facing the tracks

Q. The taller man was facing the houses
Q. At this pt. did you recognize either of these men
A. The only man I recognized was Marshall
Q. What was he wearing
A. Dark pants and I think a yellow shirt with the sleeves up to the elbows. I wish to say that when he was argu I mean Donald Marshall with the other men his sleeves down to his wrist at that time.

Continued - page

continued - page 2-----

Q. How long were you on the tracks watching them
A. About 5 minutes

Q. Could you hear what they were talking about
A. No. I just heard a mumbling of swearing. I think Marshall was the one who was doing most of the swearing. Then I seen Marshall haul a knife from his pocket and jab the other fellow with it in the side of the stomach.

Q. What side
A The right side - I seen him jab it in and slit it down

Q. How could you tell it was a knife
A. By the figure of it - it was shiny and long

Q. What happened then.
A. When Marshall drove the knife in, Seale, he bent over. Then I ran toward George St. down the ~~xx~~ tracks. I went into the Park, through the Park; then up to George St.; crossed the tracks and then on to Byng Ave.-about 3 houses over I met Donald Marshall and he said look at my arm. It was his left arm; his sleeve was up. The cut was on the inside of his arm - it was not a deep cut and it was not bleeding at that time-until we caught up to 2 boys & 2 girls who were walking. Donald said could you help us. One of the fellows said what is wrong. Then he said look what they done to me.

Then the other guy said "Who" and Donald Marshall said the 2 fellows. He said my buddy is on the other side of the Park with a knife in his stomach. They ~~they~~said they would try and help us . At the time a car came along and Donald stopped it and we asked for help. They picked us up and drove to the other side of the Park and we stopped about 6 ft. away from Seale. At this time, Seale was lying on the opp.side of the street. Donald Marshall got out; came over near the body of Seale andstood there. There was another man came along and knelt by Seale and then went over to a house and called an ambulance. Then he came back and knelt along side of [illegible] about 5 minutes. I asked this dark haired fellow to look [illegible]

continued - page 3------

after Seale while I went up and called again. I forgot to state that the minute I got to Seale, I put my white shirt on his stomach. I said hold it and he mumbled. Police and embulance arrived and he was taken to hospital.

Q. Did Donald Marshall call the police or ambulance at any ti
A. No

Q. Did you
A. Yes, first at the house with the railing coming down the center of the steps

Q. Who was with you
A. Marshall stayed on the sidewalk

Q. Was there any other conversation between you and Marshall at that time
A. He said-there were 2 men -tall one had brown hair done the stabbing.

Q. This of course is not true
A. No

Q. Did he know you were over the tracks
A. No - he did not.

Signed: Maynard Chant

3:45 P.M.

By: Sergt.Det. John McIntyre

Sergt.Det.Wm.Urquhart.

Mrs. Beulah Chant - mother

Lawrence Burke - Probation Officer
Juvenile Court

Chief Wayne R. McGee

Urquhart and myself.

SUBJECT 102 Court No. | CASE No.

EXH "B"

COPY

June 4, 1971
10:45 A.M.

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

Last Friday night I went to the dance at St. Joseph's Hall, George St., Sydney. I went with Bobbie Christmas; Donald Gordon and I met Bob Janes from Alexander St. there. He gave me money to get in. This was about 9:30 P.M. I was at the dance till about 10 or 5 to 12. Then I walked out by myself.

I met Donald Marshall and Sandy Seale. We walked to the corner of Argyle St. Donald said John come down to the Park in a rough voice. I said No. I went down Argyle St. and over Crescent St. I was walking on the park side. I seen Sandy and Donald on the other side of the bridge stopped. I did not pay much attention to them. I kept walking for the tracks. On the tracks, I stopped where I showed you. Then Donald Marshall and Sandy Seale were up where the incident happened. I heard Sandy say to Junior, you crazy Indian and then Junior called him a black bastard. They were standing at this time where the incident happened. They were still arguing. They were talking low. I could not make out what they were saying.

Q. Which way was Sandy Seale facing
A. Facing the tracks
Q. Which way was Donald Marshall facing
A. The street
Q. ~~xxxxxxxxx~~ How close were they
A. Arms length
Q. What did you see or hear next
A. I did not hear. I just seen Doald Marshall's hand going towards the left hand side of Seale's stomach. He drove his hand in -turned it and pulled it back.
Q. What happened then
A. I seen Sandy fall to the ground and Donald Marshall running up Crescent St. towards Argyle St.

continued - page 2

C O P Y

---continued - page 2

Q. What did you do
A. I run home up Sentinck St.
Q. Were you standing on the track at the time Sandy Seale fell to the ground
A. Yes. I was.
Q. Why were you standing there
A. I was drinking a pt. of beer
Q. Was there anybody else around the scene
A. Nobody - not a soul
Q. Did Seale scream when Donald Marshall struck him in the stomach
A. He screamed - aah
Q. How long did you know Sandy Seale
A. 4 or 5 years
Q. How long did you know Donald Jr. Marshall
A. Since last summer
Q. Did you ever quarrell with either boy
A. No
Q. Were you talking to Sandy Seale at the dance
A. Yes outside about 10:30 P.M.
Q. How far away would you be from Sandy Seale and Donald Marshall when they were on Crescent St.
A. 30 to 40 ft.
Q. How long were they standing there
A. About 10 minutes. They were arguing over something
Q. How is it you did not come down where they were at
A. I was scared
Q. Did they notice you on the tracks
A. I don't know
Q. Would there be any obstruction between you and Seale and Donald Marshall when you were on the tracks from them seeing you
A. Bushes between them and me - blocking the view on t. It was easier for me to see them.
Q. Did you see Donald Marshall since
A. Yes, Saturday or Sunday.

Signed: John [illegible]

Court No. 19

This is the exhibit marked William Urquhart referred to ... 26 day of July Sworn before ... A.D. 198...

JUNE 17, 1971 - 8:15 P.M.

STATEMENT OF PATRICIA HARRIS, 15 KINGS ROAD
BORN: 1957-Nov-15

On the night of the dance at St. Joseph's, May 28, 1971, my boyfriend Terry GUSHUE, 2 Tulip Terrace, left the dance at 11:45 P.M. We sat on a bench near the Bandstand. We sat on a bench. Robert PATTERSON was on the grass sick, throwing up. We smoked a cigarette. Terry and I left, walked back of the Band Shell on to Crescent Street in front of the big green building. We saw and talked to Junior MARSHALL. With MARSHALL was two other men.

Q. Describe the other men to me?

A. One man was short with a long coat. Gray or white hair, with a long coat. I was talking to Junior. Terry got a match from Junior and Junior said they are crazy. They were asking him, Junior, for a cigarette.

Q. Did you see Sandy SEALE in the Park?

A. No.

Q. Was there anyone else in the Park?

A. Yes, boys and girls walking through the Park. Gussie DOBBIN and Kenny BARROW, they left while we were still on the bench.

C O P Y

Exh D

June 18th - 1:20 A.M.

Statement of Patricia Ann Harris, age 14 yrs., residing at 5 Kings Road, Sydney

On May 28th, 1971, I went to St. Joseph's Dance Hall. I met Terry Gushue there. We danced for awhile and then a fight started. Terry got mixed up in it and he was asked to leave. So I went with him. I got mad at him for drinking & fighting. We went to the Park and sat on a bench and started arguing. Robert Patterson came to the Park with us. After a while, we crossed the park back of the bandshell. Then we went up to Crescent St. and by the green apt. building, we met Jr. Marshall. Terry got a match of him.

Q. Was there anybody with Jr. Marshall
A. Yes
Q. Who was it
A. He had a dark jacket on
Q. Was it Sandy Seale. Do you know him
A. Yes, I know Sandy and it looked like him
Q. Did he speak to you
A. No
Q. Did Jr. Marshall say anything else
A. He was drinking
Q. How was he dressed
A. He had a light jacket on
Q. Were they standing or walking when you met them
A. Standing facing one another but when we came closer, they sort of parted and Sandy Seale moved back. We talked to Jr. got a match and left for home.
Q. Did you see anybody else in the area
A. No. Not on Crescent St.
Q. Did you notice anybody on the railroad tracks
A. No
Q. Where did you learn about the stabbing
A. My mother told me

continued - page 2------

COPY

continued - page 2 - Patricia Harris

Q. Did you see any weapons on either Jr. Marshall or Sandy Seale

A. No

Q. How were they facing

A. Sandy was facing the houses and Jr. Marshall was facing the Park

Q. What time would this be

A. I would say about 12 P.M. xx We left the dance about 11:30P

Sigied: Patrician Harris

June 18th - 12:25 A.M.

Sergt.Det. J.F.MacIntyre

Sergt. W. Urquhart.

IN THE SUPREME COURT OF NOVA SCOTIA
(APPEAL DIVISION)

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

AFFIDAVIT

I, WAYNE ROBERT MAGEE, MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am presently the Sheriff for the County of Cape Breton.

2. THAT in 1971, I was Chief of Police for the Town of Louisbourg.

3. THAT on the 4th day of June, 1971, I was visited at the Police Station in Louisbourg by John F. MacIntyre and William Urquhart, both of whom were at the time Detectives with the City of Sydney Police Department.

4. THAT I was advised by the said John F. MacIntyre that he was investigating the murder of Alexander (Sandy) Seale and that he wished to question Maynard Vincent Chant in connection with that investigation.

5. THAT I advised John F. MacIntyre that I knew Maynard Vincent Chant and, after being requested to do so, I went to Chant's home and brought him to the Council Chambers at the Town Hall in Louisbourg.

6. THAT, shortly upon our arrival at the above mentioned Council Chambers, Maynard Vincent Chant gave a written statement, a copy of which is annexed hereto as Exhibit 'A', to John F. MacIntyre.

7. THAT those persons named in Exhibit 'A' were present for the entire interview.

8. THAT at no time did anyone in my presence or to the best of my knowledge make any threats or promises, or offer any inducements to Maynard Vincent Chant to have him give Exhibit 'A'.

SWORN TO at Sydney
in the County of Cape
Breton, Province of
Nova Scotia, this
day of 1982 A.D.

WAYNE ROBERT MAGEE

DOROTHY L. BEZANSON
A Commissioner of the Supreme
Court of Nova Scotia

June 4th 1971 2:55 PM

Statement of Maynard Vincent Chant age 14 yrs residing at Main St Louisburg Co.::

Last Friday Night after 11:30 PM I left the Acadian Lines on Bentinck St and walked down Bentinck St to the tracks. Then I started down the tracks towards George St I noticed a Dark Haired fellow sort of Hiding in the Bushes almost oppo. the Second house on Crescent St.

Q Did you know him

A No I did not know his name but I seen him before out at the Davison Building

Q Did you see him since

A Sunday afternoon at the Police Office Sydney. I walked by this fellow on the track I looked back to see what he was looking at then I saw 2 fellows standing about 1½ ft from Each other on Crescent St near the house with the Railing up the middle of the steps. The same house which I called the Police from. an old man with Grey Hair & Glasses answered the Door

Q Were they the same size

A one was taller than the other

Q which one was facing you

A Short Dark fellow was facing the tracks

Q The taller man was facing the houses

Q at this pt did you recognize either of these men

A The only man I recognized was Marshall

Q what was he wearing

A Dark Pants and I think a yellow shirt with the sleeves up to the Elbows

Maynard Chant

3.45 PM Sgt of Det J. MacIntyre Sgt Wm Urquhart

I'd like to say that when he was
arguing I mean Donald Marshall
with the other man his sleeves were
down to his wrists at that time.

Q How long were you on the tracks watching
them

A about 5 minutes

Q Could you hear what they were talking about

A No. I just heard a mumbling of swearing
I think Marshall was the one
who was doing most of the swearing.
Then I seen Marshall haul a knife
from his pocket and jab the other fellow
with it in the side of the stomach.

Q what side

The Right side I seen him jab him
in and slit it down

Q How could you tell it was a knife

A By the light. It was shiny and
long.

Q What happened then

after Marshall done the knife in
Seale he ran over the [illegible]
toward Argyle St. along the tracks
I went into the Park through the back
then up to Argyle crossed the tracks and
then into the [illegible] about 3 houses over
I met Donald Marshall and he said
look at my arm. It was his left arm
his sleeve was up. The cut was on
the inside of his arm it was not a deep
cut and it was not bleeding at that time
until we caught up to 2 boys & 2 girls
who were walking. Donald said could you
help us. One of the fellows said what's
wrong. Then he said look what they
done to me

Maynard Chant

[signature]
3:45 PM Sgt Det [illegible]

Then the other guy said Wille and Donald Marshall said The 2 fellows. He said my Buddy lay on the other side of the Park with a knife in his stomach. Then they said they would try and Help us at the time a Car Came along, and Donald stopped it and we asked for Help. they picked us up and drove to the other side of the Park and we stopped about 6 ft away from Seale. at this time Seale was lying on the opp side of the street. Donald Marshall got out, Came over near the Body of Seale and stood there Then another man came along and I went [illegible] and then went to a house and Called an ambulance. then he Came back and knelt along side of me about 5 minutes. I asked this Dark Haired fellow to look after Seale while I went up and Called again. I forgot to state that the minute I got to Seale I put my t-shirt shirt on his stomach. I said Hold it and he nodded. Police and ambulance arrived and he was taken to Hospital

Q Did Donald Marshall Call the Police or talk about anything

A No

Q Did you

A yes just at the house with the Bailey [illegible] down the Center of the steps

Q who was with you

A Marshall stayed on the side walk

Q Was there any other Conversation between you and Marshall at that time.

A He said that two men told me had been there doing the stabbing

Q This I Conversation is not true

A No

Sgt. [illegible]

Fingerprint taken 3.45 P.M. [illegible]

Q [illegible] you [illegible] the tracks.

A [illegible]

[illegible]

3.45 PM

[illegible]

[illegible]

[illegible] Court - Appeal Div.

19 . No.

This is the paper writing marked "[illegible]" referred to in the affidavit of [illegible] P. [illegible] Sworn before me this 23 day of [illegible] A.D. 19[illegible]

[illegible]

A Commissioner of the Supreme Court of Nova Scotia.

DOROTHY L. BEZANSON
A Commissioner of the Supreme Court of Nova Scotia

[illegible] [illegible]
Elizabeth Clark Mathe.
Lawrence Burke - Probation Officer
Juvenile Court
Chief Wayne R. McGee
Vigilant & myself.

September 13, 1982

The Prothonotary
The Law Courts Building
1815 Upper Water Street
Halifax, N.S. B3J 1S7

Dear Sir:

Re: Reference Re R. v. Marshall - S.C.C. No. 00580

Please find enclosed with this note the following material in the above-captioned matter:

1. The Affidavits of Donna Ebsary, A.J. Evers, Keith Beaver, George MacNeil, Simon Khattar, Q.C., M. Rosenblum, Q.C., S/Sgt. Wheaton, and Donald Marshall, Jr.

In addition to the originals of these Affidavits, five copies of the Case on Appeal, the Transcript of the November, 1971 trial in The Queen v. Marshall in two Volumes and the Affidavits filed by the Appellant and a Brief submitted on behalf of the Appellant in one Volume.

I have by way of a copy of this letter provided the materials not already in Mr. Edward's possession to him.

Yours very truly,

Stephen J. Aronson

SJA:md
Enclosures
c.c. - Mr. Frank Edwards

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, Donna Elaine Ebsary, presently residing in Newton, in the Commonwealth of Massachusetts, in the United States of America, make oath and say as follows:

1. That I am the daughter of Mary P. Ebsary and Roy Newman Ebsary and was born in Sydney, Nova Scotia on June 16, 1957 and at all material times hereto, we resided at 126 Rear Argyle Street in Sydney.

2. That on Friday night, May 28, 1971, at or about 12:00 midnight, my mother and I were watching television in our living room when my father, Roy Newman Ebsary and James William MacNeil came into the house.

3. That my father and the said James William MacNeil went down the hallway connecting the living room and kitchen and I followed them into the kitchen, where they engaged in a conversation and I saw my father, Roy Newman Ebsary standing over the kitchen sink washing blood from a knife, which had a brown handle.

4. That I was interviewed by R.C.M.P. S/Sgt. Wheaton in Sydney on April 17, 1982 and gave to the said S/Sgt. Wheaton a free and voluntary written statement, a copy of which is produced herewith and marked Exhibit 'A', concerning my knowledge of the matters before this Honourable Court, and that to the best of my knowledge and belief the facts contained therein are true.

SWORN TO at Boston, in the Commonwealth of Massachusetts, United States of America, this 23 day of July, A.D. 1982, before me,

A Notary Public in and for the Commonwealth of Massachusetts

DONNA ELAINE EBSARY

My Commission Expires:

Sydney, N.S. 17 April 82

STATEMENT OF: DONNA ELAINE EBSARY,
B: 16 June 57, 287 Washington,
NEWTON, U.S.A.

I am the daughter of Roy EBSARY, and presently reside in Boston. I was born in Sydney and we lived at 126 Rear Argyle Street until I was 15 or 16 years old at which time we moved to 46 Mechanic St. Sydney. In 1971, I would have been 13 years of age and I remember the night of the SEALE Murder, vividly, as it made such an impression on me.

I was home when father and Jimmie McNEIL arrived home, and I can recall them facing me in the living room. My mother was there and we were watching T.V. Jimmie said to Roy, "you did good, or you did a good job", words to that effect: he was exicted. He turned like he was going to tell us and father, said, "Shut up, don't say anything" They went down the hall to the kitchen and I followed along. Father was at the sink washing off something.

I know it was a knife and as I remember, it had a brown handle. He took it upstairs and it always bothered me and I used to hunt for it. At school everyone talked about the Murder, and I know they were looking for an old man with a goatee, white hair and a cape. Outwardly, to other kids, I pretended it was not my father, but inwardly I knew it was.

I feared my father and he disrupted the household. I always felt that if I could get the knife he would be put away. I remember going to the Police station with father, Greg, and myself. I stayed out in the car with the dog and was never spoken to by the Police. I can remember Detectives coming to my home during this time.

//////2

STATEMENT OF DONNA ELAINE EBSARY - CONT'd

The next thing I can recall, around 1974 I told Dave RATCHFORD that I knew my father did the stabbing in the park. We got a hold of the Sydney City Police and apparently they would do nothing. We also got a hold of Cst. Gary GREEN of the R.C.M.P. and they apparently got nowhere with the City Police either. I also talked to Diane LEWIS, who was with a group of people that was trying to get MARSHALL parolled. I didn't tell her I saw the knife, just that I knew MARSHALL was innocent. I also mentioned it to Debbie COUTOURE that father did it. She was with National Parks.

I felt totally frustrated to think MARSHALL was in jail and my father had committed this crime, and there was nothing I could do about it. While going to the College of Cape Breton, I mentioned it to one of my professors, Liz BOARDMORE.

Around 1975, Uncle Bob EBSARY was over from Newfoundland. Father and Uncle Bob were drinking and I heard father tell Bob about the attempted Robbery. He said, "they asked me for my money, and I said, I'll give you what I have". Father then made an underhanded stabbing motion as if he had a knife in his hand. As he was telling Uncle Bob this, he was acting it out as if he put his hand in his coat pocket , pulled out a knife and stabbed forward with it. He also said you should have seen the look on the other fellow's face, meaning the person accompanying the person he stabbed. He explained that people had tried to roll him before in the park, and he always carried a knife.

During the period between 1971, at the time of the Murder, until I left home in late 1978 or early 1979, Father stayed completely in the house and mainly in his room. He wrote, read

STATEMENT OF DONNA ELAINE EBSARY - CONT'd

...and generally acted eccentric. He still had knives around all the time and still had an extremely violent side. He rambled on about killing during the war and the present like killing a neighbour. I don't think killing anything bothers father, human or animal. I know he killed a budgie of mine when I was a kid. He literally ripped its head off.

Father dressed like a Five-Star General with his coat over his shoulders. He read a lot and would act out the lives of the people.

Donna E Ebsary

(Sgd) Donna E. EBSARY

WITNESS:

H.F. WHEATON, S/Sgt.

This is Exhibit "A" referred to in Affidavit of Donna E. Ebsary sworn before me this 23 day of July, A.D., 1982.

A Notary Public in and for the Commonwealth of Massachusetts.

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, Adolphus James Evers, civilian member of the RCMP, of Sackville, in the County of Westmorland and Province of New Brunswick, make oath and say as follows:

1. That I am in charge of the Hair and Fibre Section of the RCMP Crime Detection Laboratory, Sackville, New Brunswick and have been so employed since 1970.

2. That I have given evidence, as an expert in the science of hair and fibre examination and comparison, before various courts in British Columbia, the Yukon, New Brunswick, Prince Edward Island, Newfoundland, and Nova Scotia.

3. That I testified at the trial of Donald Marshall, Jr., who was charged with the murder of Sandford (Sandy) Seale, on November 2, 1971, as an expert in the science of hair and fibre examination and comparison and that my testimony appears at pages 13-17 of the transcript of the said trial.

4. That the yellow jacket, which I understand was worn by Donald Marshall, Jr. on the night of May 28, 1971, and which is referred to as Exhibit No. 3 in my testimony, referred to in paragraph 3, has not been located, but I have had in my possession since June, 1971, a swatch of material from the said yellow jacket.

5. That the brown coat, which I understand was worn by

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Sandford (Sandy) Seale on the night of May 28, 1971, and which is referred to as Exhibit No. 4 in my testimony referred to in paragraph 3, has not been located, but I have had in my possession since June, 1971, microscopic slides containing samples of the fibres which were taken from the said Exhibit No. 4.

6. That on or about March 17, 1982, I received 10 knives and that produced herewith and marked Exhibit "A" is a photograph of the said knives.

7. That on or about March 26, 1982, I received a cardboard basket, which I have been informed was the container in which the 10 knives, referred to in paragraph 6, had been stored.

8. That I conducted a microscopic examination of the 10 knives, referred to in paragraph 6, for the presence of any fibres consistent with the fibres composing the yellow jacket, referred to in paragraph 4 and the brown coat, referred to in paragraph 5.

9. That in examining a knife, marked with an "X" on Exhibit "A" hereto, a green handled knife with tape, I found:

(a) 8 synthetic fibres consistent with the synthetic fibres composing the said brown coat;

(b) 3 synthetic fibres consistent with the fibres composing the said yellow jacket;

(c) 1 light brown wool fibre consistent with the light brown wool fibres composing the said brown coat.

10. That in examing the tape from the said knife and envelope in which the said tape had been placed, I found:

(a) 2 synthetic fibres consistent with the synthetic fibres composing the said brown coat;

(b) 2 light brown wool fibres consistent with the light brown wool fibres composing the said brown coat.

11. That in examining the cardboard basket, referred to in

paragraph 7, I found 4 synthetic fibres consistent with synthetic fibres composing the said brown coat.

12. That I have formed an opinion concerning the relationship between the fibres found on the said knife, tape and envelope, and cardboard basket and the said yellow jacket and brown coat, which opinion requires some explanation and that if requested to provide my opinion to this Honourable Court, I would prefer to do so orally.

SWORN TO at Sackville in the County of Westmorland and Province of New Brunswick this day of July, 1982, before me

A Notary Public in and for the Province of New Brunswick.

ADOLPHUS JAMES EVERS

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, Keith Beaver, a Constable in the R.C.M.P., of Baddeck, in the County of Victoria and Province of Nova Scotia, make oath and say as follows:

1. That on Friday night, May 28, 1971, I attended a dance at St. Joseph's Hall in Sydney and left the said dance at approximately 12:00 midnight in the company of Alanna Dixon and Karen MacDonald.

2. That upon leaving the said dance we were in the company of Alexander (Sandy) Seale, who was alone, and we talked to the said Sandy Seale, and the four of us proceeded to walk to Wentworth Park, in Sydney.

3. That when we arrived at the said Wentworth Park, Sandy Seale left our company and I do not recall whether or not he actually entered the said Wentworth Park.

4. That from the time we left the dance at St. Joseph's Hall until we parted company from Sandy Seale, no other person joined our company nor did Sandy Seale engage in a conversation with any person, other than myself, Alanna Dixon and Karen MacDonald.

5. That on March 2, 1982, I gave a free and voluntary written statement to the R.C.M.P., a copy of which is produced herewith and marked Exhibit "A", concerning my knowledge of the events leading to the death of Alexander (Sandy) Seale, and that to the best of my knowledge and belief the facts contained therein are true.

SWORN TO at)
in the County of ,)
Province of Nova Scotia, this)
day of A.D. 1982,)
before me,)
)
)
A Barrister of the Supreme Court)

KEITH BEAVER

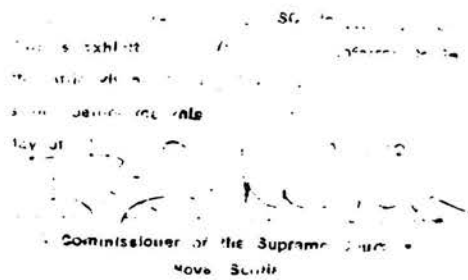
14:00 Hrs
72-01-02

STATEMENT OF: Melvin Keith BEAVER
P.O. Box 400
Baddeck, N.S. 55-09-10

On the evening of 28th May 71 myself, Lana DIXON (not sure of spelling), Karen MACDONALD, and Sandy SEAL left a dance at St. Joseph's Parish on George St., Sydney just around midnight. SEAL was going to catch the bus for Westmount at the depot on Bentinck St. DIXON and MACDONALD came with me to my parent's house on Richardson Ave. I'm not sure where SEAL and I split up but it was either on George St just before entering the park or by the bridge in the park (walkway) separating two small ponds on the George St. side. The girls and myself walked up to Cresent St. after going through the park, down Crescent, up St. Bentinck, and down Richardson. I'm not sure how long the girls were at my place, maybe ten to fifteen minutes, and then they left. SEAL did not come up to my house because he wanted to make sure he caught the bus for home. I believe it was the next day that I went to the City Police after hearing what had happened. They didn't seem very concerned at the time and that is all I had to do with them.

Trying to recall who I saw around the park area, only one person comes to light. One man was sitting on a park bench on the George St of the first pond to the Band Shell. We would have passed him on our right. He seemed to be asleep but I'm not sure. I do not recall seeing anyone else.

M.K. Beaver
Baddeck Hwy Patrol (Signed)



1982 S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, George Wallace MacNeil of 3536 Elsworth Avenue in the Town of New Waterford, County of Cape Breton and Province of Nova Scotia, make oath and say as follows:

1. That I was born on ~~May 21~~ 27 April, 1953, and on the night of May 28, 1971, I was 17 years of age.

2. That on the night of Friday, May 28, 1971, at about 11:40 p.m. I left a dance at St. Joseph's Parish Hall, Sydney, in the company of ~~George~~ Roderick Alexander MacNeil and we proceeded to walk through Wentworth Park, Sydney.

3. That as we walked through the said Wentworth Park, I saw two men who I have described as follows:

(a) Gray-haired wearing a gray or white top coat, trampish looking, five feet nine inches tall and weighing about 180 pounds in his late 50s (years of age);

(b) Wearing a brown short jacket, six feet tall or better, thin to average build, dark hair, in his late 30s or early 40s.

4. That I was interviewed on or about May 31, 1971, by a member of the Sydney City Police and gave a written, signed, free and voluntary statement to the police, a true copy of which is produced herewith and marked Exhibit "A", concerning my knowledge of the events of the evening of May 28, 1971, in Wentworth Park.

5. That I do not now recall the contents of the statement

referred to as Exhibit "A", without reference thereto, but I believe that all facts referred to therein are true.

SWORN TO at ,)
in the County of Cape)
Breton, Province of)
Nova Scotia, this)
day of , 1982.)
)
)
A Barrister of the)
Supreme Court of)
Nova Scotia.)

GEORGE WALLACE MACNEIL

CITY OF SYDNEY POLICE DEPARTMENT "ATTACHMENT # 13"

CONTINUATION REPORT

128

SUBJECT | CASE No.

COPY

1971
May 31st, 6:30 P.M.

Statement of George Wallace McNeil, 18 yrs., 91 Bungalow Road and Roderick Alexander McNeil, 17 yrs., 84 Bungalow Road, Coxheath.

We left the dance at St. Joseph's Hall, Friday night, 11:40 P.M. We walked through the park and seen 2 men hanging around. Description as follows:

1 man - grey haired; grey or white top coat - 5-9 - W. 180 lbs. hair flat on his head no wave - straight back - round fat face trampish looking - late 50's

2nd man - tall 6 ft. or better thin average size - dark hair - late 30 ~~yrs~~ early 40 yrs - thin face. brown jacket - short.

They spoke to a fellow and girl sitting on a bench closest to the railroad tracks as you came over the hill. They asked them for a cigarette. The grey haired fellow said he had just a dollar. We kept on home. We called at Fatima at a school dance on the way home.

Q. Did you know Sandy Seale
A. Yes, to see him

Q. You seen him at the dance hall that night
A. yes

Q. He was there when you left
A. Yes. He was outside of the hall - all the tickets were sold early.

Q. Would you know them again
A. We don't know.

Signed: George McNeil
Sandy McNeil

A Commissioner of the Supreme Court
Nova Scotia

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, Simon J. Khattar, Q.C., Barrister, of 378 Charlotte Street, Sydney, in the County of Cape Breton and Province of Nova Scotia, make oath and say as follows:

1. That I have personal knowledge of the matters herein deposed to, except where otherwise stated.

2. That C.M. Rosenblum, Q.C., and I were retained by Donald Marshall, Jr., the Appellant herein, to act as his counsel with respect to his indictment for the non-capital murder of Sandford William (Sandy) Seale, contrary to S.206(2) [then] of the Criminal Code, said murder having occurred on or about May 28, 1971.

3. That C.M. Rosenblum, Q.C., and I acted as counsel for the said Donald Marshall, Jr., at the trial on the said charge of non-capital murder which took place from November 2 to November 5, 1971.

4. That Maynard V. Chant, John L. Pratico and Patricia Ann Harris were Crown witnesses who testified at the said trial.

5. That I have now been provided by Stephen J. Aronson, present counsel for Donald Marshall, Jr., with copies of the Affidavits of: Maynard V. Chant, sworn to July 14, 1982, produced herewith and marked Exhibit 'X'; John L. Pratico, sworn to July 15, 1982, produced herewith and marked Exhibit 'Y'; and Patricia Ann Harris, sworn to July 22, 1982, produced herewith and marked Exhibit 'Z'.

6. That I have read the Affidavits referred to in Paragraph 5 herein and the Exhibits attached to the said Affidavits.

7. That I was not provided with copies of any of the Statements referred to in the said Affidavits, purportedly taken by the Sydney City Police prior to the said trial in November, 1971, nor was I, at the time of the said trial aware of the Statements.

8. That the Affidavit of Maynard V. Chant, referred to as Exhibit 'X', indicates that the said Maynard V. Chant did not in fact witness the murder of Sandy Seale by Donald Marshall, Jr. or any other person on May 28, 1971.

9. That the Affidavit of John L. Pratico, referred to as Exhibit 'Y', indicates that the said John L. Pratico did not in fact witness the murder of Sandy Seale by Donald Marshall, Jr. or any other person on May 28, 1971.

10. That the Affidavit of Patricia Ann Harriss referred to as Exhibit 'Z', indicates, inter alia, that the said Patricia Ann Harriss saw Donald Marshall, Jr. and two other men, neither of whom was Sandy Seale, on the night of May 28, 1971.

11. That every possible effort was made at trial to obtain the truth from the witnesses Maynard V. Chant, John L. Pratico and Patricia Ann Harriss, but there was no indication at that time that they were willing to change their original testimony, and I believe that if evidence of the contents of the Statements and Affidavits referred to herein, had been adduced at trial, then the jury might reasonably have been induced to change its views regarding the guilt of Donald Marshall, Jr.

SWORN TO at Sydney, in the County of Cape Breton and Province of Nova Scotia, this 4th day of August, A.D., 1982, before me,

Leo A. MacPhee
A Barrister of the Supreme Court of Nova Scotia

Simon J. Khattar
SIMON J. KHATTAR, Q.C.

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, C.M. Rosenblum, Q.C., Barrister, of 197 Charlotte Street, Sydney, in the County of Cape Breton and Province of Nova Scotia, make oath and say as follows:

1. That I have personal knowledge of the matters herein deposed to, except where otherwise stated.

2. That Simon J. Khattar, Q.C., and I were retained by Donald Marshall, Jr., the Appellant herein, to act as his counsel with respect to his indictment for the non-capital murder of Sandford William (Sandy) Seale, contrary to S.206(2) [then] of the Criminal Code, said murder having occurred on or about May 28, 1971.

3. That Simon J. Khattar, Q.C., and I acted as counsel for the said Donald Marshall, Jr., at the trial on the said charge of non-capital murder which took place from November 2 to November 5, 1971.

4. That Maynard V. Chant, John L. Pratico and Patricia Ann Harriss were Crown witnesses who testified at the said trial.

5. That I have now been provided by Stephen J. Aronson, present counsel for Donald Marshall, Jr., with copies of the Affidavits of: Maynard V. Chant, sworn to July 14, 1982, produced herewith and marked Exhibit 'X'; John L. Pratico, sworn to July 15, 1982, produced herewith and marked Exhibit 'Y'; and Patricia Ann Harriss, sworn to July 22, 1982, produced herewith and marked Exhibit 'Z'.

6. That I have read the Affidavits referred to in Paragraph 5 herein and the Exhibits attached to the said Affidavits.

7. That I was not provided with copies of any of the Statements referred to in the said Affidavits, purportedly taken by the Sydney City Police prior to the said trial in November, 1971, nor was I, at the time of the said trial aware of the Statements.

8. That the Affidavit of Maynard V. Chant, referred to as Exhibit 'X', indicates that the said Maynard V. Chant did not in fact witness the murder of Sandy Seale by Donald Marshall, Jr., or any other person on May 28, 1971.

9. That the Affidavit of John L. Pratico, referred to as Exhibit 'Y', indicates that the said John L. Pratico did not in fact witness the murder of Sandy Seale by Donald Marshall, Jr. or any other person on May 28, 1971.

10. That the Affidavit of Patricia Ann Harriss referred to as Exhibit 'Z', indicates, inter alia, that the said Patricia Ann Harriss saw Donald Marshall, Jr. and two other men, neither of whom was Sandy Seale, on the night of May 28, 1971.

11. That every possible effort was made at trial to obtain the truth from the witnesses Maynard V. Chant, John L. Pratico and Patricia Ann Harriss, but there was no indication at that time that they were willing to change their original testimony, and I believe that if evidence of the contents of the Statements and Affidavits referred to herein, had been adduced at trial, then the jury might reasonably have been induced to change its views regarding the guilt of Donald Marshall, Jr.

SWORN TO at Sydney, in the County of Cape Breton and Province of Nova Scotia, this 25 day of August, A.D. 1982, before me,

A Barrister of the Supreme Court of Nova Scotia

C. M. ROSENBLUM, Q.C.

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, Harry F. Wheaton, R.C.M. Police Sergeant of Halifax, in the County of Halifax and Province of Nova Scotia, make oath and say as follows:

1. That at all material times hereto, I was posted in Sydney with the R.C.M. Police as co-ordinator of the General Investigation Section of the Sydney Detachment and have been a member of the R.C.M. Police for over 20 years.

2. That as a result of information submitted on behalf of Donald Marshall, Jr. in January, 1982, I was given the responsibility of conducting an impartial investigation into the circumstances connected with the conviction of Donald Marshall, Jr. for the murder of Sandford William (Sandy) Seale.

3. That during the course of the investigation many witnesses were interviewed, written statements taken, and a great deal of documents concerning the 1971 conviction were reviewed.

4. That I have read the Affidavits of Maynard V. Chant, John L. Pratico, James William MacNeil, Patricia Harris, Terrance P. Gushue, Donna E. Ebsary, Mary P. Ebsary, Gregory A. Ebsary, Keith Beaver, Barbara M. Floyd, Sandra V. Cotie, Dr. M. A. Mian, A. J. Evers and George W. MacNeil concerning this matter and, in substance, the said Affidavits contain a fair and accurate summary of the results of our investigation.

5. That during the investigation and on or about March 4, 1982, I received from Mary P. Ebsary and Gregory A. Ebsary, 10 knives and 1 cardboard basket, and to the best of my knowledge and belief the said knives are those depicted in a photograph marked Exhibit 'A' and referred to in the Affidavit of Adolphus James Evers dated July 30, 1982.

6. That on or about February 22, 1982, having interviewed Roy Newman Ebsary in person on that day, I returned a phone call from the said Roy Newman Ebsary at about 4:30 P.M., the relevant portion of our conversation being as follows:

EBSARY: All our talking today was not in vain.

WHEATON: What do you mean by that

EBSARY: Well you know I am a British Officer and a gentleman

WHEATON: Yes

EBSARY: You called me a homosexual.

WHEATON: Yes.

EBSARY: All our talking was not in vain you know.

WHEATON: Why is that.

EBSARY: Well I did it.

WHEATON: Are you admitting to stabbing SEALE.

EBSARY: Yes.

WHEATON: Would you like to speak tc me.

EBSARY: No, the other fellow.

WHEATON: Okay, I'll send Jim down.

7. That as a result of the conversation referred to in Paragraph 7, Cpl. James E. Carroll of the Sydney R.C.M.P. Detachment attended at the home of the said Roy Newman Ebsary, ~~but no~~ written statement was taken from Ebsary.

SWORN TO at Halifax, in the County of Halifax and Province of Nova Scotia, this 7 day of September, A.D. 1982, before me

A Barrister of the Supreme Court of Nova Scotia

HARRY F. WHEATON

S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

AFFIDAVIT

I, Donald Marshall, Jr., of Halifax, in the County of Halifax and Province of Nova Scotia, government employee, make oath and say as follows:

1. That I am the Appellant in the present Reference, and that, except where otherwise deposed to, the substance of this Affidavit is true.

2. That on May 28, 1971, shortly before midnight I entered Wentworth Park, in the City of Sydney, alone, from George Street near the C.N.R. Railway tracks and walked along the walkway into the Park.

3. That as I entered the Park I saw Sandford William (Sandy) Seale, who I knew, enter the said Park from George Street near the store known as Mac's Dairy and that we met in the centre of the walkway adjacent to Wentworth Creek.

4. That very shortly thereafter two men, entered the Park from George Street, one of them being a short, older man wearing a blue coat or cloak over his shoulders, the other man taller and younger, and I did not know either of these men, nor, to the best of my knowledge and belief have I seen either man since May 28, 1971.

5. That I do not recall precisely how Sandy and I arrived on the Crescent Street side of the Park, but I remember seeing Patricia Harris and Terrance Gushue in the Park near Crescent Street and giving a match to Terrance Gushue, at which time Sandy was about 50 to 60 feet away

from us talking to the two men referred to in Paragraph 4 herein.

6. That I then proceeded over to Sandy and the two men and we had a short conversation.

7. That the shorter, older man pulled out a knife and stabbed Sandy, at which point he fell to the ground and then the older man attempted to stab me, catching the sleeve of the jacket I was wearing, cutting my left forearm and resulting in the knife falling to the ground, at which point I turned and ran, fearing for my own life.

8. That as I ran from the scene and crossed the footbridge over Wentworth Creek I ran into Maynard V. Chant, who I did not know at that time, and informed him of what had occurred and that we should get help.

9. That to the best of my belief from the time Sandy and I first spoke to the two men, referred to in Paragraph 7, until I met Maynard Chant, as referred to in Paragraph 8, approximately 5-7 minutes elapsed.

10. That on or about June 4, 1971, I was charged with the murder of Sandy Seale and was convicted of the said murder on November 5, 1971 and sentenced to life imprisonment.

11. That from June 4, 1971 until July 29, 1982, I have been continuously in custody in a prison or penitentiary.

12. That to the best of my knowledge and belief the older, shorter man who stabbed Sandy Seale is Roy Newman Ebsary and the younger, taller man is James William MacNeil.

13. That I did not stab or otherwise injure Sandy Seale on May 28, 1971, and therefore it was not possible for Maynard V. Chant or John L. Pratico to have witnessed me stabbing Sandy Seale.

14. That I believe I saw John L. Pratico, who I knew, on the afternoon of Saturday, May 29, 1971, at which time we discussed the Seale stabbing and he gave no indication to me that he had been in Wentworth Park on the night of May 28, 1971 or that he had witnessed the stabbing of Sandy Seale.

15. That I did not see or speak to John Pratico in or

near Wentworth Park prior to the stabbing of Sandy Seale on May 28, 1971, nor did I attend a dance at St. Joseph's Parish Hall on that night.

SWORN TO at Halifax, in the County of Halifax and Province of Nova Scotia, this [illegible] day of [illegible], A.D. 1982, before me,

A Barrister of the Supreme Court of Nova Scotia

DONALD MARSHALL, JR.

THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

TO: Stephen J. Aronson, Esq. (Counsel for Appellant)
Aronson & MacDonald
277 Pleasant Street
Dartmouth, Nova Scotia
B2Y 4B7

AND Frank C. Edwards, Esq. (Counsel for Respondent)
Crown Prosecutor
County of Cape Breton
77 Kings Road
Sydney, Nova Scotia
B1S 1A2

Re: SCC No. 00580 - Donald Marshall, Jr., v.
Her Majesty The Queen

Please take notice that the above appeal will be heard by the Appeal Division at the Law Courts, Halifax, on: Tuesday, October 5, 1982 at 10:00 A.M.

Yours faithfully,

D.B. Morrison
Registrar, Appeal Division

Notice Mailed: July 29, 1982
Note: All briefs, appeal book and factums to be filed by September 14, 1982

B R I E F

FACTS

Although there is some difficulty in attempting to accurately reconstruct the events of May 28, 1971, given the passage of time, it is possible to at least outline those facts which are ascertainable from witnesses and which have been corroborated by other witnesses.

A dance at St. Joseph's Hall on George Street, Sydney, took place on Friday night, May 28, 1971. Sandford (Sandy) Seale was either in attendance at the dance or had attempted to gain entry to the dance. The dance ended some time between 11:30 P.M. and midnight. Sandy Seale left the area of the dance hall in the company of Keith Beaver and one or two others and they headed along George Street in the direction of Wentworth Park. Shortly thereafter Barbara Floyd and Sandy Cotie left the dance, having already heard of a stabbing in Wentworth Park, and passed John Pratico in the parking lot adjacent to the Hall. Pratico followed Floyd and Cotie in the direction of Wentworth Park.

The Appellant, Donald Marshall, Jr., did not attend the dance, but arrived at Wentworth Park alone and proceeded into the Park. Sandy Seale entered the Park, also alone, and met Marshall in the centre of the Park along a walkway. They spoke for a short time and saw two men, James MacNeil and Roy Ebsary (as it now appears), enter the Park.

Patricia Harriss and Terrance Gushue were already in the Park and both recall seeing Marshall, but neither recognized the one or more persons in the background as they talked briefly with Marshall. Marshall then joined Seale, Ebsary and MacNeil, a conversation took place, an altercation ensued and Seale was stabbed as a result. Marshall was also attacked with a knife, but managed to run from the scence. As he left the scene, he ran across a footbridge and met Maynard Chant and the two of them, in a state of some panic, ran to obtain assistance. The two other individuals, Ebsary and MacNeil, left the scene and went to Ebsary's home, a short distance from the Park. When the police and ambulance arrived Marshall and Chant were still near Seale and he was taken to the hospital where he died at about 8:00 A.M. on Saturday, May 29, 1971. Marshall was taken to the hospital as well and he received stitches to a cut on his left forearm. On June 4, 1971, Marshall was charged with the murder of Seale.

John Pratico and Maynard Chant were the key Crown witnesses against Marshall. Pratico does not appear to have been in the vicinity of the murder scene, but can state how he came to be contacted by the police. At the time Chant met Marshall in the Park, Chant was heading in the direction of a bus stop to take a bus to his home in Louisbourg.

There was no evidence at Marshall's 1971 trial, other than his own, indicating that Ebsary and MacNeil were in the Park on that fateful night. There are, however, statements of Patricia Harriss and George W. MacNeil taken prior to the 1971 trial, which describe individuals in the Park on that night, who resemble Ebsary and MacNeil.

Other Affidavit evidence on file indicates that Roy Ebsary is now suspected of having committed the murder of Sandy Seale.

Donald Marshall, Jr. was convicted of the murder of Sandy Seale on November 5, 1971 and sentenced to life imprisonment. As a result of information obtained by Marshall, a re-investigation was completed in May of 1982 by the R.C.M.P. On June 17, 1982, the Minister of Justice referred Marshall's conviction, pursuant to S. 617(b) of the Criminal Code to the Appeal Division of the Nova Scotia Supreme Court.

The matter before this Honourable Court is, to say the least, an unusual one and the mode of resolution, by way of a Reference pursuant to S. 617(b) of the Criminal Code, is not commonly applied. Section 617 of the Code reads as follows:

> POWERS OF MINISTER OF JUSTICE.
>
> 617. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,
>
> (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
>
> (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
>
> (c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly. 1968-69, c.38, s.62.

The substance of the Reference in the present case, as stated by the Honourable Jean Chretien, Minister of Justice, on June 16, 1982, is as follows:

> NOW THEREFORE, the undersigned pursuant to Paragraph 617(b) of the Criminal Code, hereby refers the said conviction to the Honourable Court for hearing and determination in the light of the existing judicial record any other evidence which

> the Court, in its discretion, receives and considers, as if it were on appeal by Donald Marshall, Jr.

Although there has only been limited judicial consideration of S. 617 by Canadian courts, similar statutory provisions exist in other Commonwealth jurisdictions. See, e.g. Criminal Appeal Act, 1907, U.K., 7 Edward 7, C. 23, S. 19(a); Criminal Law Consolidation Act, 1956 (South Australia) S. 369.

LIMITS OF A REFERENCE

Generally, the court hearing the reference is limited to a consideration of the grounds set out in the document referring the matter; R. v. Caborn - Waterfield (1956), 40 Cr. App. R. 110 (Ct. Crim. App.). In the case at bar, there are no specific grounds set out. The present Reference terms are therefore distinguishable from the terms in Re Regina v. Gorecki (No. 2), (1976), 32 C.C.C. (2d) 135 (O.C.A.) at p.139; Re Regina v. Latta (1976), 30 C.C.C. (2d) 208 (Alta. C.A.) at p.210, although under S. 617(c).

In its broadest terms, the factual material in the present Reference falls in two categories. There is Affidavit evidence from Chant and Pratico, who testified at the 1971 trial, indicating that they did not in fact witness the murder of Seale by Marshall. This contradicts their 1971 trial testimony. Relating to the Affidavit

of Pratico, in particular, are Affidavits of other individuals who can place Pratico elsewhere than the murder scene. There is also the Affidavit of Dr. Mian setting out the fact that Pratico is not a reliable informant.

A second category of factual material points to a third party as being the person who murdered Seale. The Affidavits of James MacNeil, Mary Ebsary, Greg Ebsary, Donna Ebsary and A.J. Evers fall into this latter classification.

This being an application to adduce fresh evidence pursuant to S. 610(1)(d) of the Code, it is submitted that this Court must be satisfied that the facts sought to be adduced as evidence are fresh, in the legal sense, and if fresh, if the material is then admissible as evidence. Further, it is necessary to determine if the rules governing the admissibility of fresh evidence are tempered by virtue of the case being a Reference under S. 617.

ADMISSIBILITY OF FRESH EVIDENCE UPON APPEAL

The provisions of S. 610(1)(d) Criminal Code, R.S.C. 1970, c. C-34, provide the Appeal Court with a wide discretion to admit fresh evidence upon appeal. However, this discretion is to be guided by certain principles set out in R. v. Parks [1961] 3 All E.R. 633 (Ct. Crim. App.) at p. 634:

> Those principles can be summarized in this way: First the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issue. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the Appellant if that evidence had been given together with the other evidence at the trial.

In Parks (supra), the accused had been convicted of indecent assault. The jury had rejected the testimony of the defence witnesses and had convicted the accused on the basis of the complainant's identification of him as her assailant. The fresh evidence which the Appellant sought to have introduced before the Appeal Court consisted of the complainant's previous convictions for dishonesty as well as the testimony of a witness who was in the vicinity of the assault when it occurred. This evidence was admitted as the Court was satisfied that it met the guidelines of the aforementioned principles.

The principles as enumerated by the English Courts have generally been applied with only slight modification by the Canadian Courts. The Supreme Court of Canada decision in McMartin v. The Queen, [1965] 1 C.C.C. 142, dealt in part with the issue of the admissibility of

fresh evidence upon appeal. The Court of Appeal had refused to admit the testimony of a psychiatrist directed to the accused's mental state, on the basis that it could have been made available by the defence at trial. Ritchie, J., held, however that this evidence should not be excluded on the basis that reasonable diligence was not exercised to obtain it for trial if it was of sufficient strength that it might reasonably affect the jury's verdict. In civil cases, the strength of the fresh evidence must be "practically conclusive". However, in criminal cases, the new evidence must only be such as might reasonably affect the jury's verdict.

In R. v. Deacon (No. 2) (1947), 88 C.C.C. 308 (Man. C.A.), Bergman, J.A. had merged the distinction between civil and criminal cases to suggest that unless the fresh evidence was "practically conclusive", it should not be admitted, nor should a new trial be directed. However, the British Columbia Court of Appeal in R. v. Buckle, (1949), 94 C.C.C. 84, held that the discretionary scope of the rule applicable in criminal cases was indeed wider than that in civil cases. If the newly discovered evidence is in fact conclusive, the Court of Appeal in both criminal and civil matters may dispose of the appeal. Fresh evidence of less compelling force, but such that it might reasonably affect a jury's verdict should also be

admitted. In cases involving this latter category of evidence, the Court should order a new trial.

In R. v. Demeter, (1975), 25 C.C.C. (2d) 417 at p. 461, counsel for the Appellant sought the leave of the Ontario Court of Appeal to adduce new evidence. Although the evidence would serve to destroy a witness' original testimony at the trial, it was not relevant to the central issue as to whether Demeter had arranged his wife's murder. By weighing this fresh evidence against the entire evidence as presented at trial, the Court of Appeal were unable to find that this new evidence might have reasonably affected the verdict of the jury. The application under S. 610 was therefore refused.

The Supreme Court of Canada in Palmer and Palmer v. The Queen (1979), 50 CCC (2d) 193 considered what constitutes fresh evidence, as being not necessarily conclusive, but such as might reasonably affect the jury's verdict. A distinction was drawn with the McMartin case (supra). In McMartin, fresh evidence consisting of an expert opinion was involved and therefore, the issue of credibility did not arise. However, when the newly discovered evidence involves questions of fact, as it did in the Palmer case (supra), the court must consider not only the probative force, but also the credibility of such evidence. The following test was formulated at Page 206 of the case report:

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

The chief Crown witness, subsequent to the Palmer's conviction, claimed to have lied both at the preliminary, as well as at the trial. This evidence was presented to the Court of Appeal in the form of Affidavits by the Crown witness. The Court of Appeal found his evidence to be totally unworthy of belief in the circumstances of this particular case, and refused to admit such. The Supreme Court of Canada held that in refusing the Appellant's motion, the Court of Appeal had made no error in law and therefore the appeal was dismissed.

In R. v. Young and three others, [1970] 5 C.C.C. 142 (N.S.S.C., A.D.) leave to adduce fresh evidence was granted. The Court followed the Buckle decision (supra). Fresh evidence which is conclusive in nature, allows the Court of Appeal to dispose of the matter. Evidence which is not conclusive, yet of sufficient strength that it might reasonably have affected the jury's verdict, should be

admitted and a new trial directed.

The Appellants had been convicted of rape and sentenced. Shortly following the convictions, the complainant gave a voluntary statement in the presence of defence counsel, her mother and two R.C.M.P. officers, stating therein that she had lied at trial and in fact had consented to sexual intercourse with the four Appellants. Approximately a week later the complainant gave yet another statement to the R.C.M.P., in which she denied this previous statement. This evidence therefore, although not conclusive was certainly perceived to be such that if believed, it might raise a reasonable doubt as to the Appellants' guilt. The appeal was allowed and a new trial was ordered; See also: R. v. Adams (1978), 30 N.S.R. (2d) 47 (N.S.S.C.A.D.); R. v. Hogan (1980), 34 N.S.R. (2d) 641 (N.S.S.C.A.D.); R. v. Moore and Parsons (1980), 35 N.S.R. (2d) 85 (N.S.S.C.A.D.).

It is submitted that the issues of credibility of the witnesses and the relevancy and probative value of their statements are to be considered in determining whether or not the evidence is admissible.

In particular the Affidavit evidence of Chant and Pratico is distinguishable from the evidence sought to be adduced in Palmer (supra). The Court in Palmer could not rely on his testimony, in part, because his motive for changing his story was suspect. In Marshall's case, there is no

selfish motive and further, other evidence tends to corroborate the present Affidavit evidence of both Chant and Pratico. There is no doubt that their present evidence is relevant, as opposed to the evidence sought to be adduced in Latta (supra), going, as it does, to the root of the Crown's case in 1971. Finally their present evidence, if believed, is of value in establishing that Marshall did not murder Seale.

The availability of the evidence at the 1971 trial is also of concern. Both Khattar and Rosenblum indicate in their Affidavits that all reasonable efforts were made to have the witnesses, Chant, Pratico and Harriss state the truth during the 1971 trial. The balance of the evidence presented to this Honourable Court was not available at the 1971 trial, or, if available, did not provide Marshall with any form of defence on the charge of non-capital murder.

Finally the evidence presented to this Honourable Court would, undoubtedly, have raised a reasonable doubt in the minds of the jury concerning the Appellant's guilt if it had been adduced at the trial. Indeed, it is submitted that the evidence is conclusive in nature, and therefore this Honourable Court may finally dispose of the matter.

S. 617 APPLIED TO FRESH EVIDENCE PRINCIPLES

There is, it is submitted, a divergence of judicial opinion on whether References under S. 617 are to be governed by the usual rules of admitting fresh evidence.

In R. v. Sparkes, [1956] 1 W.L.R. 505, a reference by the Home Secretary pursuant to S. 19(a) Criminal Appeal Act, 1907, was considered by the Criminal Appeal Court. The petitioner sought to have introduced fresh evidence which had come to light since his conviction for break and enter.
It was held that the admissibility of fresh evidence upon a reference pursuant to the provisions of S. 19, depends upon the merits of each particular case. The principles which govern the admissibility of evidence on an appeal by an accused are applicable to a reference, but should not be binding upon the Court if the application of such principles would lead to injustice, or the appearance

of such.

In R. v. McGrath, [1949] 2 All E.R. 495, the Court of Criminal Appeal had stated that different principles applied to a reference as contrasted with an appeal brought in the usual manner. It was stated that since the object of a reference was to aid the Home Secretary in the exercise of the royal prerogative, any evidence which could assist to such end, could be considered.

Further support for this latter position is found in R. v. Collins, (1950), 34 Cr. App. R. 146 (Crim. App. Ct.) The case having been referred by the Home Secretary, the Court admitted evidence which would have been inadmissible had the matter been an appeal.

A contrary view was expressed in Aylett v. The Queen, [1956] Tas. S.R. 74 (Ct. of Crim. Appeal). The terms of the reference were governed by provisions similar to S. 19(a) of the U.K. Statute. The Court refused to distinguish a reference from an appeal which is brought in the ordinary manner, and hence the reference was said to be governed by the same principles which govern the latter. Evidence which is neither shown to be new, nor proved to have been unavailable at trial was not admissible.

Canadian Courts have canvassed the issues relevant to S. 617(b) and its predecessors, S.596 [Criminal Code, 1953-54, C.51] and S.1022 [Criminal Code, R.S.C. 1927, C. 36]. A reference from the Minister of Justice brought

pursuant to S. 1022(b) was considered by the Ontario Court of Appeal in R. v. Jarvis, (1936), 66 C.C.C. 20. Jarvis had been convicted of conspiracy to defraud the Provincial Government eleven years previously. He sought to have his conviction re-opened on the basis of fresh evidence which had subsequently arisen. The admissibility of such evidence was determined in accordance with the principles which govern appeals brought in the ordinary manner. Therefore, the evidence could only be admitted if the accused did not know of it, or could not reasonably have adduced such at the time of his trial.

The decision of the Ontario Court of Appeal in Reference Re R. v. Gorecki (No. 2), (1976), 32 C.C.C. (2d) 135, contains a thorough review of the authorities, upon the issue of the admissibility of fresh evidence in a case brought before the Court on a reference pursuant to S. 617(b). The reference was initially framed in terms of S. 617(c), but counsel for the accused was successful, during the course of the original reference, in having the matter referred back to the Court of Appeal pursuant to sub-section (b).

On the issue of the reception of fresh evidence, the court stated:

> "We are in agreement with the view expressed in R. v. Aylett, supra, in so far as it holds that on a Reference of a matter to the Court of Appeal

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

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

The Court, however, did look at fresh evidence: "lest the impression might arise that

> a review of his case had been refused for a reason which was merely procedural." A similar view was expressed by the New Zealand Court of Appeal in R. v. Morgan, [1963] N.Z. L.R. 593, in relation to the reception of further evidence on a reference under s. 406 of the Crimes Act, 1961, which contains provisions similar to s. 617 of the Code.

Another issue which arises in conjunction with S. 617(b) relates to the scope of the appeal available to the Appellant where there has already been an unsuccessful appeal brought by the accused according to the ordinary procedure. Whether the Court of Appeal is required to re-adjudicate upon a ground which has been dealt with upon the original appeal, does not appear to have been conclusively decided. Alex C. Castles, in an article entitled "Executive References to a Court of Criminal Appeal", (1960), 34 A.L.J. 163, suggests a trend against such a re-adjudication, unless, "some new matter has been brought forward which makes a reconsideration necessary or desirable". (at p. 168) The issue did not directly arise in either R. v. Jarvis, nor in Reference Re R. v. Gorecki (No. 2) (supra). In the Jarvis case, the initial appeal was against sentence, and not the conviction. In Gorecki, the appeal was against conviction, but the issue of the accused's insanity at the time of the offence was not relevant as it was not put forward as a defence at trial. The subsequent reference was concerned solely with whether Gorecki was insane within S.16 of the Criminal Code at the date of the

commission of the offence, a matter which had not been dealt with upon the initial appeal. As this issue relates, in part, to the evidence of Chant, Pratico and Harris, effectively changing their testimony of 1971, it will be examined under that discussion.

TESIMONY OF EYE WITNESS CHANGING

It has already been noted (at p. 5 , supra), that the Court is limited to inquiring into those matters specifically set out in the terms of the Reference. As those terms contain no limitation, it is submitted that this Honourable Court may hear all evidence submitted, insofar as it complies with the principles of S. 610(1)(d) and the usual rules regarding the admissibility of evidence.

However, in the original appeal to this Honourable Court in R. v. Marshall, (1973) 4 N.S.R. (2d) 517, the Appellant had objected "to the quality and sufficiency of the evidence given by Pratico and Chant." (at p. 532). In the present Reference, issue is again being taken by the Appellant with the evidence of these two witnesses. It is submitted that the substance of the Affidavits of Pratico and Chant is worthy of consideration, particularly as they now deny having been eye witnesses to the Seale murder. In 1971, their inconsistent evidence related to the course of events or recognition of persons seen by them on the night of May 28, 1971 and not to the fact they did not witness

the murder at all. It is this latter evidence which the Appellant suggests is fresh, not having been before the Jury at the 1971 trial nor the Appeal Court. Further on reading Chant's evidence in transcript of the 1971 trial, at pp. 114-116, one is left in some doubt as to what was untrue in his testimony, particularly having regard to the questioning by the Court at p. 117. Similarly Pratico's inconsistent testimony in 1971 is that Marshall did not murder Seale and as opposed to his present evidence that he did not witness the murder at all.

It is submitted that the evidence of witnesses who recant on their original trial testimony may be admitted as fresh evidence on an appeal. In particular the Affidavits of Pratico, Chant and Patricia Harris as to the matters on which they testified at the 1971 Marshall trial are admissible. In Horsburgh v. The Queen [1968] 2 C.C.C. 288 (S.C.C.), Martland, J., expressed the view that "...the fact that the witnesses in question had testified at the trial on the issues on which further examination was sought, and had been the subject at trial of cross-examination, is not a valid ground for the refusal to hear such evidence" (at pp. 300-301); see contra, R. v. Deacon (No. 2) (1947) 88 C.C.C. 308 (Man. C.A.).

This view has been subsequently approved by the British Columbia Court of Appeal in R. v. Stewart (1972) 8 C.C.C. (2d) 137. In Stewart a witness changed a portion of her

original trial testimony. The Court of Appeal ruled that the "new" evidence did not comply with principles to be applied in admitting fresh evidence as it was not of great relevance, nor of high probative value, nor "worthy of belief" (at p. 144). Similarly, in Palmer and Palmer v. The Queen (1980) 50 C.C.C. (2d), evidence of a witness, on appeal, who testified at the trial was not deemed credible, and therefore not admitted as fresh evidence.

The issue of credibility, it is suggested, is of prime importance in deciding whether the present declarations of Chant, Pratico and Harris are admissible. Both Chant and Pratico now claim that they did not see Marshall stab Seale, contrary to their testimony in 1971.

Chant's Affidavit refers to Exhibit 'B', a statement taken by the Sydney City Police on May 30, 1971. In this statement Chant describes having seen two other "fellows" with Marshall and Seale, one of the two having stabbed Seale. However, in Paragraph 6 of his Affidavit, Chant admits that this version of the events was told to him by Marshall upon their meeting immediately after the murder. The second statement given to the Sydney Police on June 4, 1971, referred to in Chant's Affidavit as Exhibit 'C',is the only statement in which he accuses Marshall of stabbing Seale. Aside from having indicated this latter statement is not true, when taken in the context of the Affidavit evidence of James MacNeil, Donna Ebsary and Mary Ebsary as well as the 1971

testimony of Marshall himself, it is suggested that Chant's present Affidavit testimony, Exhibit 'A', is independently corroborated and thereby given credibility. As to why Chant did not state the truth at the 1971 trial, three resons are given in Exhibit 'A': fear, a "feeling" that Marshall had committed the murder and the influence of certain police officers.

Pratico's evidence is discussed elsewhere in this brief. However, assuming that he is, prima facie, a credible witness, it is submitted that having regard to all the other Affidavit evidence submitted, that Pratico did not see Marshall stab Seale nor was he an eye witness to the murder itself. His original statement to the police of May 30, 1971, Exhibit 'B' is not at all corroborated. Pratico's reasons for lying aside from being one possible result of his mental illness, appear to be fear and, police influence.

Patricia Harriss gave evidence for the Crown at Marshall's 1971 trial. Her evidence, at pp. 74-81 of the transcript of the trial indicates that she saw one person other than Donald Marshall, Jr. at the critical time. Transcript,(p. 79, lines 15-18). However, this testimony is far more general than the substance of her second statement to the Sydney Police on June 18, 1971, referred to as Exhibit 'A' in her Affidavit. There she indicates her recognition of Sandy Seale, as being the only person with or near Marshall. Her

first statement to the Police on June 17, 1971, Exhibit 'A', however, is substantially different than the second statement, Exhibit 'B'. Harriss describes two men with Marshall, neither of whom was Seale. One of these men is described as short, gray or white hair, wearing a long coat. This description is remarkably similar to one of two men described by George Wallace MacNeil in Paragraph 3(a) of his Affidavit and Marshall's own trial testimony. It is her first statement, ironically enough not completed by the Police, which is corroborated by the evidence of James MacNeil, the Ebsary's and Marshall himself, not her second statement. Once again her reasons for not being truthful at the trial are attributed to police influence.

It is, therefore, submitted that the present Affidavit evidence of Chant, Pratico and Harriss is admissible, having regard to all the circumstances of this unusual case.

Furthermore, having regard to Gorecki (No.2) (supra), it is submitted that to exclude the present evidence of Chant, Pratico and Harriss may lead to injustice or the appearance of injustice. It was the testimony of these witnesses, and in particular Chant and Pratico, which led to Marshall's conviction for murder. To disallow their present evidence is, in effect, to give

their 1971 testimony an air of truth by permitting it to stand as evidence against Marshall.

ADMISSIBILITY OF EVIDENCE CONCERNING THE CREDIBILITY OF A WITNESS - JOHN LOUIS PRATICO

The Appellant has submitted an Affidavit sworn by John Pratico. Related to this declaration, additional Affidavits have been filed, taken from Dr. M.A. Mian, Barbara Mary Floyd, Sandra V. Cotie and Keith Beaver.

During the 1971 trial Pratico testified as a witness for the Crown and gave evidence that on the night of May 28, 1971, he saw Marshall stab Seale. Pratico's competency to testify was not in issue - but his credibility was questioned. His Affidavit now states that he was not, in fact, a witness to the murder.

The Appellant is not claiming that Pratico, by reason of mental illness or mental deficiency, is not competent to give evidence. (See McWilliams, Canadian Criminal Evidence, 1974, pp. 543-545). His competence, however, may very well become an issue as a result of Dr. Mian's evidence.

However, the Appellant does question Pratico's credibility. The Affidavit of Dr. Mian indicates that because of mental illness Pratico has a tendency to fantasize and thereby distort reality. Little reliance should, therefore, be placed on his testimony. It is submitted that Dr. Mian's evidence is admissible as it relates to the ability of Pratico to provide a reliable account of the events and circumstances surrounding the murder of Sandy Seale.

In R. v. Toohey [1965] A.C. 595 (H.L.), the Appellant had been convicted of assaulting a sixteen-year old boy in an alley. The accused denied that any assault had taken place at all and testified the victim had been drinking, bumped into him and became hysterical. A police surgeon, who examined the victim shortly after the alleged incident, gave evidence that the victim was in an acute state of hysteria, smelled of alcohol and showed no signs of bruises or other injuries. The Court of Criminal Appeal, following the decision in R. v. Gunewardene [1951] 2 K.B. 600; [1951] 2 A.E.R. 290, (C.C.A.), held that the physician could not give evidence of the general mental condition of the victim-witness. After reviewing the rules of evidence relating to the character or reputation of a witness in Toohey, Lord Pearce stated:

> The old cases are concerned with lying as an aspect of bad character and are of little help in establishing any principle that will deal with modern scientific knowledge of mental disease and its effects on the reliability of a witness. I accept all of the judgment in Gunewardene's case in so far as it deals with the older cases and the topic with which they were concerned. But, in my opinion, the court erred in using it as a guide to the admissibility of medical evidence concerning illness or abnormality affecting the mind of a witness and reducing his capacity to give reliable evidence. This unreliability may have two aspects either separate from one another or acting jointly to create confusion. The witness may, through his mental trouble, derive a fanciful or untrue picture from events while they are actually occuring, or he may

> have a fanciful or untrue recollection of them which distorts his evidence at the time when he is giving it. (at pp. 606-607)
>
> Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. If a witness purported to give evidence of something which he believed that he had seen at a distance of 50 yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than 20 yards, or the evidence of a surgeon who had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.
>
> It is obviously in the interest of justice that such evidence should be available. (at p. 608)

Whether expert evidence is or is not admissible on this issue turns in part on the relationship between the disease or illness and its effects on the witness's ability to give reliable evidence; R. v. Desmoulin (1976) 30 C.C.C. (2d) 517. Hence in R. v. French, (1977) 37 C.C.C. (2d) 201 (O.C.A.), evidence

by a psychiatrist was not admitted, as the expert was in no better position than the jury in determining the credibility of the witness.

In R. v. Hawke (1975), 22 C.C.C. (2d) 19 (O.C.A.), evidence of a psychiatrist was permitted, the witness having a long history of mental illness resulting in a misconception of reality, diminution of judgment and ability to recount, and active hallucination under stress.

At the 1971 Marshall trial, it was not known by the Appellant that Pratico suffered from a disease of the mind, nor did it appear obvious to the jury. Dr. Mian's Affidavit indicates Pratico was under his psychiatric care as early as August of 1970, prior to the Seale murder, and continues to be treated. Dr. Mian asserts that the illness suffered by Pratico results in fantasy, thus distortion in reality. Furthermore, Pratico's desire to be in the limelight was greatly catered to as he was a key Crown witness at the trial of Marshall in 1971.

Aside from the psychiatric evidence tendered through Dr. Mian, Pratico's testimony in 1971 is discredited by the evidence of Floyd, Cotie and Beaver. In the statement of Pratico, referred to as Exhibit 'C' in his Affidavit, he indicates having met Marshall and Seale shortly after he left the dance at St. Joseph's Hall, walking with them to the edge of Wentworth Park on Argyle Street and refusing

an invitation from Marshall to join them in the Park. Both Floyd and Cotie place Pratico in the parking lot adjacent to St. Joseph's Hall shortly after they had already heard of a stabbing in Wentworth Park and at approximately the same time Pratico claims to have been with Seale and Marshall. Keith Beaver states in his own Affidavit that he, along with others, walked with Seale from the dance to Wentworth Park and Pratico and Marshall were not in their company.

Further, Pratico provided a statement to the Sydney City Police on May 30, 1971, referred to as Exhibit 'B' in his Affidavit. In this statement he claims to have been with Seale and Marshall between the dance and Wentworth Park. This allegation is again discredited by the Affidavits of Floyd, Cotie and Beaver. The balance of Pratico's May 30th statement, it is suggested, is a complete fabrication, having regard to all the other factual material before this Honourable Court.

It is submitted that Pratico is not a reliable witness in 1982 and was certainly not a credible witness either at the time of the murder on May 28, 1971 or at the time of Marshall's trial on November 2, 1971. Dr. Mian's evidence indicates that due to mental illness, Pratico is not, prima facie, a reliable witness. The Affidavits of Floyd, Cotie and Beaver discredit Pratico's recollection

recollection of the events on the night of May 28, 1971. The evidence of Dr. Mian is admissible concerning Pratico's ability to provide credible testimony. The Affidavits of Floyd, Cotie and Beaver are admissible, whether or not Pratico is capable of giving reliable evidence, as they establish that Pratico's evidence of 1971, and to some extent, at present, is not credible on the facts.

CONDUCT OF THIRD PARTIES

It is submitted that it is competent, as a defence, for an accused to show that an act for which he is charged was more likely done by others. The Accused, "it has been said is allowed greater latitude, since to exculpate himself he may implicate others by evidence of acts which the Crown ould not tender against them". (See, Phipson on Evidence, 12th ed. (1976), Para. 404).

Therefore, if the fact in issue be whether A killed X, it is both relevant and permissible to show that X was killed by B. The basis of the admissibility of the evidence pointing to the third person's guilt is relevance.

It is necessary that there be a logical connection between the conduct of the third party and the fact in issue.

In Regina v. McMillan (1975), 23 C.C.C. (2d) 160 (Ont. C.A.), the accused had been charged with the murder of his infant child. The defence sought to introduce evidence that suggested that a third person, namely his wife, had caused the injuries which precipitated the child's death. This evidence consisted of the testimony of a psychiatrist who testified as to the wife's psychopathic personality disorder. Evidence offered by friends and relatives of the wife to the effect that she was indeed capable of harming the child, was also admitted.

On appeal by the Crown against the husband's acquittal, it was held by the Ontario Court of Appeal that evidence which tended to show that a third person had committed the crime had been properly admitted. The judgment of the Court of Appeal was delivered by Martin, J.A., and dealt with the admissibility of evidence pointing to a third person's guilt in the following manner:

> I take it to be self-evident that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X: see Wigmore on Evidence 3rd ed. (1940), Vol. 1, p. 573, S. 139. A may prove that B murdered X either by direct or circumstantial evidence. Evidence that a third person had a motive to commit the murder with which the accused is charged, or had made threats against the deceased is commonly admitted on this principle. Evidence directed to prove that the crime was committed by a third person, rather than the accused, must, of course, meet the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value: see Wigmore on Evidence; ibid., pp. 573-6.

The appeal was allowed, however, and a new trial ordered on the ground that the trial Judge had erred in refusing to allow the Crown to cross-examine the psychiatrist and call reply evidence to the effect that the husband himself was also suffering from a psychopathic personality

disorder.

The decision of the Ontario Court of Appeal, allowing the Crown's appeal and directing a new trial, was affirmed by the Supreme Court of Canada. (McMillan v. The Queen (1977), 33 C.C.C. (2d) 360). This latter decision dealt chiefly with the issue of the Crown's right to cross examine the psychiatrist as to the accused's psychiatric condition as well as the Crown's right to call reply evidence. The issue of an accused's right to adduce evidence pointing to a third party's involvment with the offence in question was addressed only peripherally in the decision of the Court delivered by Spence, J.:

> There is, of course, a question as to how far the defence may go in adducing evidence that some third party was, by virtue of that party's mental or emotional state, a more probable perpetrator than the accused. In my view, that is simply a question as to the relevance of the evidence. There would be no probative value in the evidence that some other person quite unconnected with the circumstances surrounding the charge might because of his or her mental or emotional state be a more probable person to have committed the crime. That situation is not reflected in the present circumstances. (McMillan v. The Queen, Supra p. 362.)

In Reference Re R. v. Latta (1976), 30 C.C.C. (2d) 208, the Minister of Justice had directed a reference to the Alberta Court of Appeal pursuant to S. 617(c) of the Criminal Code, on the issue as to whether certain evidence obtained

subsequent to Latta's conviction was of such a nature that it would have been admissible at his trial. Latta had been convicted of the murder of his former business partner and his appeal to Alberta Court of Appeal was dismissed. Subsequent to the conviction, a new witness was discovered who testified that she had overheard the deceased being threatened by unknown individuals some fourteen months before his murder. Furthermore, she testified that on several occasions the deceased had expressed fear for his life from these unnamed individuals. The Court of Appeal considered the evidence, but found it to be so tenuous as to offer no probative value and therefore in its' opinion it would have been inadmissible at trial. However, the Court clearly acknowledged that evidence of threats made towards the accused by some third party would be admissible if there also existed some other evidence connecting such person to the offence in question.

This position has also been mirrored in various American decisions. Evidence tendered by an accused which only casts a mere suspicion that a third party committed the offence will be deemed inadmissible. In Fortson v. State (1978), 379 N.E. (2d) 147, a decision of the Supreme Court of Indiana, the Court held that evidence which tends to incriminate another must be competent as well as confined to substantive facts. The decision in People v. Dukett (1974), 308 N.E. (2d) 590 adds the further requirement that the

substantive facts or circumstances pointing to a third party's guilt, must not be too remote. A father and son appealed their conviction for armed robbery and murder of a service station attendant. At trial, evidence of dislike between the victim and a third party was excluded because the Court found such to be too remote and therefore purely speculative, although the two accused had argued that it tended to show that another had committed the offence. As affirmed in State v. Woods (1974), 508 S.W. (2d) 277, by the Missouri Court of Appeal, evidence that another individual had an opportunity or motive for committing the offence for which the accused is charged is inadmissible without evidence that this third party committed some act which directly connects him to the offence.

By analogy it is submitted that fresh evidence has been provided by the Appellant, tending to indicate that Roy Newman Ebsary, a third party, and not the Appellant, committed the murder of Sandy Seale. There is no doubt that this evidence is of substantial relevance to the present proceedings and further that this evidence directly connects Ebsary to the commission of the offence.

In particular, the Affidavit of James William MacNeil, who claims to have been present at the time and place of the offence, establishes Ebsary's presence and his act of stabbing Seale. This evidence corroborates the testimony of Marshall at the 1971 trial and in his Affidavit on file

herein, Donna Ebsary's Affidavit corroborates MacNeil's evidence, in substance, as to the whereabouts of MacNeil and Ebsary minutes after the stabbing occurred. Her Affidavit, furthermore, places Ebsary in the kitchen of their home washing blood from himself and a knife.

The Affidavits of Mary Ebsary and Greg Ebsary indicate Roy Ebsary's enjoyment of knives, his possession of certain knives at the time the Seale murder took place and the continuous possession of a 'knife collection' until the knives were given over to the custody of the R.C.M.P. (S/Sgt. H. Wheaton). Mary Ebsary, in addition, places MacNeil and Roy Ebsary in her home, minutes after the Seale stabbing.

Adolphus Evers, a civilian hair and fibre expert employed by the R.C.M.Police, performed a microscopic examination on the ten knives referred to in his Affidavit, being the same knives given to S/Sgt. Wheaton by Greg Ebsary. Ever's compared fibres found on the knives with microscopic slides of fibres, already in his possession from the 1971 Marshall trial. These latter fibres were taken from the brown jacket worn by Seale on the night of the stabbing and the yellow jacket worn by the Appellant on that same night. Both of these items were introduced as Exhibits at the 1971 trial, but their present whereabouts are unknown. Fortunately, Evers had testified at the trial of the Appellant in 1971 and had retained microscopic slides of the fibres in his

possession, thus enabling him to have completed a fibre comparison. Although his opinion on the results of these fibre comparisons have not been elaborated on in his Affidavit, the opinion supports the Appellant's position that one particular knife, No. 8, had attached to it fibres similar, if not identical, to fibres from the jackets worn by Seale and Marshall on May 28, 1971. The Affidavit of S/Sgt. H.F. Wheaton contains an oral admission of guilt from Roy Ebsary. The whole of the evidence submitted on this particular issue connects Ebsary very intimately with the stabbing of Seale and is therefore of substantial relevance in this Reference. The probative value of the evidence is of sufficient character to warrant a criminal charge being laid against Roy Newman Ebsary for the stabbing of Sandy Seale. It is therefore submitted that the evidence contained in the Affidavits of James William MacNeil, Donna Ebsary, Greg Ebsary, Mary Ebsary and A.J. Evers is admissible, the evidence being tendered by the Appellant showing that Roy Ebsary committed the murder of Sandy Seale.

CONCLUSIONS

The Appellant submits that the Affidavit evidence tendered complies with the principles applicable to adducing fresh

evidence pursuant to S. 610(1)(d) and is, therefore, admissible, in the interests of justice.

Furthermore the Appellant respectively suggests that the Affidavit evidence is admissible evidence having regard to the question of whether Donald Marshall, Jr. is guilty of the murder of Sandy Seale.

All of which is respectfully submitted this 14th day of September, 1982.

STEPHEN J. ARONSON,
Solicitor for the Appellant

TABLE OF CASES

R. v. Stewart (1972), 8 C.C.C. (2d) 137 (B.C.C.A.)

R. v. Toohey, [1965] A.C. 595 (H.L.)

R. v. Gunewardene, [1951] 2 K.B. 600 (C.C.A.)

R. v. Desmoulin (1976), 30 C.C.C. (2d) 517 (O.C.A.)

R. v. French (1977), 37 C.C.C. (2d) 201 (O.C.A.)

R. v. Hawke (1975), 22 C.C.C. (2d) 19 (O.C.A.)

McMillan v. The Queen (1977), 33 C.C.C. (2d) 360 (S.C.C.); affg. (sub nom. Regina v. McMillan (1975), 23 C.C.C. (2d) 160 (O.C.A.)

Fortson v. State (1978), 379 N.E. (2d) 147 (Ind. S.C.)

People v. Dukett (1974), 308 N.E. (2d) 590 (Ill. S.C.)

State v. Woods (1974), 508 S.W. (2d) 277 (Mo. C.A.)

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S.C.C. No. 00580

1982

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

BRIEF ON BEHALF OF THE CROWN RESPECTING THE ADMISSIBILITY OF FRESH EVIDENCE

RE: DONALD MARSHALL JR.

SUBMITTED BY: FRANK C. EDWARDS
77 KINGS ROAD
SYDNEY, NOVA SCOTIA
SOLICITOR FOR THE
ATTORNEY-GENERAL OF
THE PROVINCE OF
NOVA SCOTIA

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PRELIMINARY OVERVIEW

In any criminal proceeding, the role of the Crown can be ambiguous. On the one hand, the Crown is charged with the responsibility of ensuring that all relevant evidence is placed before the Court. On the other hand, while strictly speaking, the Crown is not supposed to be an advocate, he is a key player in an adversarial process and unavoidably must assume some of the functions of an advocate. When Crown Counsel is addressing a jury, for example, he will seldom, if ever, urge them to acquit.

The Crown very often, therefore, finds itself on a tightrope and never more so than in the case at Bar. It would appear that the best contribution the Crown can make in the present proceedings is to ensure that the Court gets a full and balanced account of the events which led to the death of Sandy Seale in 1971 and the subsequent conviction of the Appellant in November of that same year. It is the Crown's intention to do so by:

(a) Subjecting such witnesses as the Court may permit the Appellant to call to appropriate cross-examination;

(b) Seeking to introduce certain evidence in reply to that given by certain witnesses, specifically that of Maynard Vincent Chant, John Louis Pratico, and Patricia Ann Harris;

(c) Subjecting the Appellant himself, if called, to cross-examination, or, in the alternative, seeking leave of the Court to introduce into evidence a written statement given by the Appellant to the R.C.M.P. in March of 1982.

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As far as the law respecting the admissibility of fresh evidence is concerned, there appears to be no significant difference of opinion between Counsel. Counsel for the Crown has had the opportunity of perusing the draft brief of Appellan Counsel and is in substantial agreement with the submissions contained therein. It is the Crown's submission that the four principles set down in Palmer and Palmer v The Queen (1979) 50 CCC (2d) 193 (S.C.C.) at page 205 form a convenient base fro which to proceed. Those principles are as follows:

> 1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, although this principle is not applied with the same strictness in a criminal trial as in a civil trial;
>
> 2. The evidence must be relevant in that it bears upon a decisive or potentially decisive issue;
>
> 3. The evidence must be credible;
>
> 4. It must be such that if believed it could, when taken with the other evidence adduced at trial, reasonably be expected to have affected the result.

It is further submitted that the Court should allow itself very broad latitude in determining what evidence it will permit each side to call on this Reference. Such a procedure would seem to reflect the philosophy contained in the following passage from Regina v Gorecki (No. 2), (1976), 32 CCC (2d) (Ont. C.A.) at p. 146.

> "We consider, however, that the correct approach in deciding whether to admit new evidence on an appeal which comes before the court by a Reference under s. 617(b) is to deal with each case on its merits, bearing in mind, of course, the policy considerations previously mentioned, but the court not considering itself bound by inflexible rules." (Emphasis Added)

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THE RECANTING WITNESSES

Three witnesses fall into this category; Maynard Vincent CHANT, John Louis PRATICO and Patricia Ann HARRIS. All three now say that the evidence they gave in 1971 was not true and, in fact, that not one of them witnessed the actual murder.

Harris, of course, never claimed to have witnessed the murder but her evidence was significant in that she said in 1971 that she saw only Marshall and one other in Wentworth Park on the night in question. Crown Prosecutor Donald C. MacNeil, Q.C., emphasized this fact when he addressed the jury. (Transcript pp. 234-5) Harris now says that she saw two other men in the park around the time that she saw the Appellant.

If admissibility is considered in light of the Palmer principles noted previously, it would appear that Defence Counsel at trial were not aware of the first written statements of each of the recanting witnesses. Otherwise, it is inconceivable that the witnesses would not have been cross-examined on their conflicting first and second written statements. Whether the existence of the first statements could have been discovered by "due diligence" of counsel is probably an irreleyant and inappropriate question at this point in time. The fact remains that Counsel were not aware of the statements and to try to determine whether they should have been aware would hardly be productive.

There is no question but that the evidence in question goes to the very heart of the matter, and therefore, the second principle in Palmer need not be in issue. The third principle, that the evidence must be credible seems to expose the initial problem for the Court, namely, how extensive an inquiry should be launched into the reasons why these three witnesses have changed their stories?

..... 4

It is the Crown's submission that the evidence of each of these three witnesses could be heard by the Court. Not only is there a certain amount of corroboration for their present versions in the affidavits of James MacNeil, and Donna and Mary Ebsary, but there is also the fact that each gave similar versions in their first statements to police, Chant and Pratico on May 30, 1971, and Harris on June 17, 1971. Because these first statements were not available to the Appellant in 1971, neither at the time of the trial nor, it would appear, at the time of the appeal, this Court will not be readjudicating an issue previously decided upon.

In view of the affidavit of Pratico's psychiatrist, Dr. Mian, one could seriously question the value of hearing from Pratico at this point. The Crown would be prepared to concede that he is not now capable of accurately relating what happened in 1971 nor was he any more capable then. In his brief, Counsel for the Appellant notes that in 1971 Pratico's disability "...was not known by the Appellant...,nor did it appear obvious to the jury." The Crown submits that at that time, it was no more apparent to either the police or the Crown and, therefore, neither should be criticized for having preffered Pratico as a credible witness.

Notwithstanding the above, the Crown will not oppose Pratico's being called, should this Honourable Court wish to hear from him after hearing the submission of learned Counsel for the Appellant. Even if Pratico is called, it is submitted that it will not be necessary to hear from Dr. Mian, Cotie, Floyd, or Beaver. The Crown does not question the truthfulness of their affidavits which in themselves should prove sufficient for any cross-examination of Pratico. If such were not the case, leave could be sought to call them in person on a date subsequent to Pratico's appearance.

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The evidence of Chant and Harris should be tested and it is submitted that this may only be done by hearing their viva voce evidence. Both of these witnesses cite police pressure as a factor influencing their testimony in 1971. It would, therefore, seem appropriate that the Crown have the opportunity of cross-examining Chant and Harris on their affidavits. It would seem equally appropriate that the Crown be permitted to call police evidence to rebut the allegations made by Chant and Harris. Indeed it is difficult to understand how the credibility of these witnesses could be assessed unless the Court heard both sides.

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CONDUCT OF THIRD PARTIES

(a) Subject to the concern mentioned below, the Crown does not oppose the granting of leave to hear the evidence of James William MacNeil and Donna Ebsary. In each instance, it is submitted that an assessment of their credibility is important.

If the sole purpose of Mary Ebsary's evidence is to establish that James William MacNeil was in her home with her husband, Roy Newman Ebsary, on the night in question, that fact is conceded by the Crown. The latter Ebsary's fetish for knives can be elicited from Donna Ebsary, and thus Mary Ebsary's evidence on that point would be redundant.

A few comments on the anticipated evidence from James William MacNeil and Donna Ebsary may be in order:

(i) James William MacNeil allegedly witnessed the stabbing on the night of May 28, 1971. Unquestionably, Defence Counsel were not aware of this individual in 1971, and there can be no doubt that his evidence would, if believed, have altered the eventual outcome. There would appear to be no reason to object to this witness being heard in person. Only in this manner will the Court be able to decide what weight, if any, to give his evidence. The only reservation the Crown has respecting the admissibility of MacNeil's evidence is discussed below in connection with Donna Ebsary.

(ii) Donna Ebsary can provide details relating to the activities of her father, Roy Newman Ebsary, and the aforementioned James William MacNeil, immediately after the

stabbing on May 28, 1971. Her evidence is of two types;

(a) What she saw, the knife being washed and MacNeil's agitated condition; and

(b) What she heard, the conversation between MacNeil and her father.

The Crown's concern regarding the admissibility of Donna Ebsary's evidence (and the same might be said of the evidence of James William MacNeil) is a practical one. Should this Honourable Court ultimately decide that the Appellant should be acquitted, then it is likely that another individual will be charged. It is difficult to speculate about what effec widespread public knowledge of James MacNeil's and Donna Ebsary's evidence would have on any subsequent trial. Indeed, it might be said that their affidavits have already been made public and therefore the damage has already been done. It can be expected, however, that their viva voce evidence would be much more exhaustive and probably more widely reported than their affidavits. The least of the problems which could arise would relate to jury selection. The greater problem may be one of principle in the sense that very damning evidence against another individual may be placed before the Court to which he may never have the opportunity to make full answer. Certainly he has no standing in these proceedings and should there be doubts about his fitness to stand trial, the prospect of subsequent proceedings would be uncertain.

(b) Laboratory Evidence - This evidence relates to the comparison of fibres from the jackets of the accused Marshall (yellow jacket Exhibit A) and the victim Seale (brown coat Exhibit B) with fibres found on knives and a cardboard basket seized by S/Sgt. Harry Wheaton of the R.C.M.P. on the 4t and 23rd days of March, 1982, respectively.

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The jackets (Exhibits A and B) were tendered respectively as Exhibits 3 and 4 on the trial of this matter in November, 1971. (Copy of Exhibit List at trial attached and marked A). Continuity of possession was proven at that time and is not now in dispute. There is no question that the yellow jacket was worn by Marshall and the brown coat by Seale at the time of the incident on the 28th day of May, 1971. The technician A.J. Evers is prepared to say that fibres from the jackets were in his exclusive possession since receipt by him in 1971.

The knives in question were contained in a cardboard basket when seized by S/Sgt. H. Wheaton from the cellar of the residence of 46 Mechanic Street, Sydney, N.S. Wheaton was directed to the knives by one Gregory Ebsary (D.O.B. December 16, 1951), son of one Roy Newman Ebsary. Gregory Ebsary will say that he removed the knives from Rear Argyle Street, Sydney, where the family lived in May, 1971, to their present address on Mechanic Street. Wheaton took possession of the knives on the 4th day of March, 1982, and the basket on the 23rd day of March, 1982.

The Crown has no objection to the admissibility of viva voce evidence from A.J. Evers relating to comparisons made by him in April, 1982. It is the Crown's submission that Mr. Evers' evidence should be given in person in order that the strength of the fibre evidence may be tested. Perhaps more than any other single factor, this evidence will prove to be the key to the ultimate resolution of this case. It is further submitted that Gregory Ebsary should be heard in order that the history of the knives in question may be more fully explored and continuity established.

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THE APPELLANT

The affidavit of James William MacNeil, if believed, makes it clear that the Appellant was less than forthright with either the police or the Court in 1971. It is entirely conceivable that had the police been told the whole truth, the investigation would have taken a different direction and another individual charged.

It is also likely that the Appellant failed to tell his Counsel the whole story in 1971, thus hampering their efforts to have him acquitted. In any event, the Crown respectfully submits that should counsel for the Appellant now wish to call the Appellant, he should be permitted to do so. It is the Crown's respectful submission that unless the Appellant is subjected to cross-examination the Court will get a distorted view of what occurred in 1971. Accordingly, should Counsel for the Appellant elect not to call his client, or should this Honourable Court deny leave for him to do so, then the Crown seeks leave to introduce a statement given by the Appellant to the R.C.M.P. at Dorchester Penitentiary in March of 1982. This statement would of course meet all the prerequisites for the admissibility of fresh evidence and would be subject to a voir dire to prove its voluntariness.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

S.C.C. 00580

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

B E T W E E N:

DONALD MARSHALL, JR.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

BEFORE: The Honourable Chief Justice of Nova Scotia
The Honourable Mr. Justice Hart
The Honourable Mr. Justice Jones
The Honourable Mr. Justice Morrison
The Honourable Mr. Justice Macdonald

Applications for leave to adduce evidence -

Applications allowed in part October 5, 1982

THE COURT per MacKeigan, C.J.N.S., ordered as follows:

We hereby allow the applications to receive oral evidence from the following persons for the purposes of this appeal:

James William MacNeil
Donna Elaine Ebsary
Gregory Allan Ebsary
Adolphus James Evers
Donald Marshall, Jr.
Maynard V. Chant
Patricia Ann Harriss

Subpoenas may be issued out of this Court (C.C. s.627(1)) requiring the abovenamed persons to attend and be examined before this Court at the Law

Courts, Halifax, Nova Scotia, on December 1 and 2, 1982.

We reserve decision on the applications made today for the examination of persons other than those named above.

We also reserve decision on the applications to receive in evidence any of the affidavits tendered.

Dated this 5th day of October, 1982.

C. J. N. S.

cc: Mr. Stephen J. Aronson
Mr. Frank C. Edwards

S.C.C. 00580

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

B E T W E E N:

DONALD MARSHALL, JR.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

O R D E R

THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

TO: Stephen J. Aronson, Esq. (Counsel for Appellant)
Aronson & MacDonald
277 Pleasant Street
Dartmouth, Nova Scotia
B2Y 4B7

AND Frank C. Edwards, Esq. (Counsel for Respondent)
Crown Prosecutor
County of Cape Breton
77 Kings Road
Sydney, Nova Scotia
B1S 1A2

Re: SCC No. 00580 - Donald Marshall, Jr., v.
Her Majesty The Queen

Please take notice that the above appeal will be heard by the Appeal Division at the Law Courts, Halifax, on: Wednesday and Thursday, December 1 and 2, 1982 at 10:00 A.M.

(TWO DAYS)

Yours faithfully,

D.B. Morrison
Registrar, Appeal Division

Notice Mailed: October 18, 1982
(as per order of Supreme Court of Nova Scotia dated October 5, 1982.)

Aronson, MacDonald Barristers & Solicitors

Stephen J. Aronson
Leo I. MacDonald

Dartmouth Professional Centre · Suite 305 · 277 Pleasant Street · Dartmouth, N.S. Canada B2Y 4B7 · (902) 463-9131

October 7, 1982

Supreme Court of Nova Scotia
Appeal Division
The Law Courts Building
1815 Water Street
Halifax, N.S. B3J 1S7

ATTENTION: Mr. Eric Vandervoort

Dear Mr. Vandervoort:

Re: Reference Re Donald Marshall, Jr. - S.C.C. No. 00580

Further to our attendance in the Supreme Court, Appeal Division on October 5, 1982, I am attaching a list of the names and addresses of the seven witnesses, as requested by Mr. Chief Justice MacKeigan.

I have by way of a copy of this letter advised Mr. Edwards and would add that if there is any difficulty in locating these witnesses Mr. Edwards and I would be glad to assist.

Yours very truly,

Stephen J. Aronson

SJA:md
Enclosure
c.c. - Mr. Frank Edwards

1. Maynard V. Chant
   Main Street
   Louisbourg, N.S.

2. Patricia Ann Harriss
   5265 Sackville Street, Apt. 5
   Halifax, N.S.

3. James William MacNeil
   222 Mount Pleasant Street
   Sydney, N.S.

4. Gregory Allan Ebsary
   46 Mechanic Street
   Sydney, N.S.

5. Donna Elaine Ebsary
   180 River Street, Apt. 5A
   Waltham, Massachusetts, U.S.A.

6. Adolphus James Evers
   R.C.M.P. Crime Detection Laboratory
   Sackville, New Brunswick

7. Donald Marshall, Jr.
   Department of Indian Affairs
   Sir John Thompson Building, 6th Floor
   Barrington Street
   Halifax, Nova Scotia

1982 S.C.C. No. 00580

IN THE SUPREME COURT OF NOVA SCOTIA,
APPEAL DIVISION

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

NOTICE OF APPLICATION
TO SET A TIME FOR THE HEARING OF THE APPEAL

TAKE NOTICE that an Application will be made by the Appellant to a Judge of the Appeal Division, sitting at the Law Courts, Halifax, Nova Scotia, on Thursday, the 13th day of January, 1983, at the hour of 12:00 o'clock in the afternoon, or so soon thereafter as an application can be made to set a time for the hearing of the Appeal.

DATED at Dartmouth, Nova Scotia, this 22nd day of ~~January~~ December, A.D. 1982.

Stephen J. Aronson
277 Pleasant St., Suite 305
Dartmouth, N.S. B2Y 4B7
Solicitor for the Appellant

TO: Frank C. Edwards, Esq.
Crown Prosecutor
County of Cape Breton
77 King's Road
Sydney, N.S. B1S 1A2

AND TO: The Registrar

1982 S.C.C. No. 00580

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

NOTICE OF APPLICATION
TO SET A TIME FOR THE HEARING OF THE APPEAL

Stephen J. Aronson, Esq.
Aronson, MacDonald
Barristers & Solicitors
277 Pleasant Street, Suite 305
Dartmouth, Nova Scotia B2Y 4B7

D. MARSHALL JR. - VS - HMT QUEEN

EXHIBIT LIST.

1. MARSHALL STATEMENT.
2. PLAN.
3. PHOTOGRAPH.
4. (A-J) KNIVES.
5. AFFIDAVIT [redacted] (P.A. HARRIS
6. FIBRE.
7. SLIDES (3).
8. ENVELOPE.
9. BLACK TAPE.