Date: 20000512
Docket: CAC 143210

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. MacDonald, 2000 NSCA 60]

Glube, C.J.N.S.; Chipman and Cromwell, JJ.A.

BETWEEN:

LAUCHLIN RONALD MACDONALD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel: Nash T. Brogan for the Appellant
James A. Gumpert, Q.C. and Richard B. Miller for the Respondent

Appeal Heard: December 7, 1999

Judgment Delivered: May 12, 2000

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Cromwell, J.A., concurring.

CHIPMAN, J.A.:

[1] Following a trial before Tidman, J. and a jury, the appellant was convicted of the first degree murder of Vernon Peter Rutland sometime between the 28th of November, 1995 and the 8th of December, 1995 at or near White's Lake, Halifax County, Nova Scotia.

[2] The trial was conducted over 25 days in September and October, 1997 and 53 witnesses were heard. Of these, the evidence of only two substantially implicated the appellant in the crime. These were Donna Reid, the appellant's girlfriend, who claimed to be an eyewitness to the murder and Ricky Williams, a jailhouse informant, who testified that the appellant admitted to him while in jail that he shot Rutland.

[3] Rutland's body was found by the R.C.M.P. on December 8, 1995 at a residence at 9 Seafarer's Lane in the White's Lake area. The cause of death was a gunshot wound in the head. During the latter part of November, Donna Reid and the appellant were living at this home which the appellant had rented earlier in the year. Although he had an apartment in Prospect Bay, Rutland spent much of his time at 9 Seafarer's Lane with them. The appellant and Rutland called each other "mate". The appellant made a practice of carrying loaded guns on his person around the house. Donna Reid testified that the three of them were using cocaine extensively during this time but ceased doing so, using none the day of the shooting or the day before. She said that they had been injecting cocaine up to six times daily and were also taking other pills and drinking alcohol. The appellant supplied all the drugs, procuring them from a couple of residences in the White's Lake area.

[4] Donna Reid testified that she knew the appellant for many years and became romantically involved with him around November 1, 1995. She spoke at length about the extensive use of cocaine, alcohol and other drugs by the three occupants of the residence in the month of November, 1995. She referred to the appellant's paranoid delusions during this period of heavy cocaine use. On one occasion he struck her with a baseball bat. He brandished a sword on another.

[5] Reid was unable to pinpoint the exact date of the murder, but she gave a vivid account thereof.

[6] Reid testified that on the day before the shooting she and the appellant cleaned up the house, saying that this was a good thing because they could rest their arms from extensive use of needles. She said that the three of them had run out of drugs and money to buy them. On the day of the shooting, she arose around midmorning and went downstairs, followed by the appellant. Reid said as soon as the appellant got up he "automatically" put the guns on himself. Rutland was seated on the right-hand corner of a chesterfield in the living room using the telephone. He waved to them. She sat down in the room and the appellant went over to the fridge, got a glass of juice and placed it on the counter. He then walked over to Rutland, produced a revolver, put it to the back of his head and said, "sorry mate". He fired the gun. At first, Reid thought that it was a joke, but as she put it, "all the light went out of his eyes and I could see smoke coming off the top of his head". The appellant muttered something about one shot not being sufficient to do the

job and she said to him, “don’t shoot him again, he’s dead, he’s dead”.

[7] Reid testified that the appellant remained behind Rutland after the shooting staring at her. The appellant said to her, “it was him or us”. The appellant then took the telephone receiver out of Rutland’s hand, hung it up, and put aside his gun to get a shower curtain to cover the body. The appellant asked Reid to help move the body to a position in front of the chesterfield. He covered the body with the shower curtain. Reid and the appellant cleaned up any blood and other evidence. The appellant instructed Reid to move parts of Rutland’s body that were protruding out from under the shower curtain. After doing this, Reid and the appellant had a snack. A number of times, the appellant said “three can keep a secret when two are dead”. Reid said that the appellant had the gun in his hand and was waving it around. She testified that she feared for her life and expected to be shot at any time. The appellant, she said, was wearing jeans and a white New York Yankees ball shirt. Later he put on a sweatshirt.

[8] After the house was cleaned up, Reid and the appellant went upstairs to lie down. The appellant still had the gun in his hand. He said again, “it was either him or us and if the cops show up, tell them Vern was coming on to you and I shot Vern in defence of you”. The appellant gave Reid four Valium tablets. After taking them, she fell asleep and did not wake up until around midday of the following day. She had thought the appellant would shoot her while she was asleep. After rising, they left the house. The appellant was still waving his gun around and talking about how three persons could keep a secret if two were dead. She repeated that she feared that she would be killed. Reid and

the appellant then got into what she thought was a taxi and went to either Gus' Pub in Halifax or an apartment above it. They ended up at the apartment and had cocaine. During this time, the appellant had two guns in his possession. After leaving the apartment, they went to the house of Steve Malone. As they walked down the street, the appellant gave one of his guns to Reid and told her to put it down her pants. At the appellant's instructions she later gave it to his brother.

[9] Malone's testimony was that about 3:30 p.m. on November 30, 1995, Reid and the appellant arrived at his house on Ontario Street in Halifax accompanied by Laura Lee Cross and the appellant's brother. The date, he said, stuck in his mind because his son was coming to visit that day. While they were there, Malone overheard Reid speak about cleaning a gun. The appellant and his brother were out of the room at the time and he did not know if they heard her. Malone said that the appellant was in rough shape, unshaven, tired looking and limping. Reid, he said, "looked like Hell, withdrawn, tired and unhealthy". He could not determine if the group was under the influence of alcohol or drugs at the time. Malone gave a statement about this visit to the police. They retrieved a towel from his bathroom where the appellant and his brother had been while out of the living room.

[10] After leaving Malone's house alone, Reid went to the home of Bib Shields and stayed there that night. She was joined by the appellant the next day. At this time, the appellant told her he gave a gun to his brother, who in turn had given it to "a black guy". The appellant now wanted to track it down. He instructed two daughters of Bib Shields to drive Reid back to the residence at Seafarer's Lane. When she arrived, the house was

freezing because the power had been shut off. The evidence was that the power had been cut off by Nova Scotia Power Corporation on November 30. Reid testified that the house was very cold. She lit the wood stove. It did not provide much heat. She called an ex-boyfriend, Steve Brideau, asking him to pick her up as there was no heat, and there was a body in the house. Brideau confirmed this statement, although he said that she later "changed her story" and said, "forget about it, don't worry about it".

[11] On cross-examination, Reid accepted the suggestion that Brideau came to the house on Seafarer's Lane to pick her up on December 2, 1995. Brideau's recollection was that he came there on December 2.

[12] There was a difference in the evidence of Reid and Brideau about whether the latter wanted to take her to his house. She claimed he wanted to take her there for sex and she refused to go. He said she wanted to go to his place but he refused to take her there. At any rate, Brideau finally returned her to 9 Seafarer's Lane. After she got there, she went to bed. Assuming the murder took place on November 30, this would be the night of December 2, 1995.

[13] The next day, the house was visited by two people, a realtor, Kevin Clarke, and the owner, Robin Self. Just as they came to the door the appellant telephoned, and Reid told him they were outside. The appellant told her to take as many things as she could and throw them over the top of the body. She threw cushions, coats and blankets over the body. Clarke and Self then entered the house. They viewed it but did not notice the body,

which had been covered. One of the men spoke to the appellant on the telephone telling him that he wanted the guns out of the house and wanted him out as well.

[14] Clarke and Self testified that they viewed the entire residence on Sunday, December 3, 1995, in the afternoon. The house was in a shambles. There was no power. They noticed a mess in front of the couch and were told by Reid that the items belonged to the appellant's ex-girlfriend. They did not see the body which remained there until it was discovered by the police on December 9, 1995.

[15] At the appellant's request, Clarke and Self drove Reid to Jenny's Pub, in the city. Reid testified that she met the appellant there. The appellant threatened her and told her what to say to the police. Then they went to the home of John Barton and Linda Glister on Gladstone Street where they consumed drugs, staying for a couple of days. Donna Reid told Glister that the appellant had shot Vern Rutland. They went to another residence for a day and a half and consumed more drugs. During this period the appellant had a gun and brandished it in a very threatening manner. He fired shots outside the residence. Convinced that the appellant no longer trusted her and was going to shoot her, Reid went to Bryony House, a safe house for women. While there she read in the newspaper that the appellant had been arrested and was released. She left Bryony House on December 9, 1995 and went to Gus' Pub where she was picked up by the police.

[16] Reid was 37 years of age at the time of the trial. She testified that she had lived by what she called the "street code". She had never had any use for the police as she

mistrusted them. She had convictions for “theft under” and “failure to appear”. She had been a heavy user of cocaine for over 15 years.

[17] It is apparent from reading Reid’s testimony that she claimed to fear the appellant greatly in the days following the shooting.

[18] Reid was subjected to a lengthy and searching cross-examination. She had given five statements to the police and had testified at the preliminary inquiry. She admitted that at first she was not very forthcoming in her statements to the police. She had told them in December, 1995, incorrectly, that she had been free of drugs for 18 months. There were other inconsistencies and inaccuracies in her statements to the police. For example, at first, when the police suggested to her that the appellant shot Rutland she professed to know nothing about it. At one point she repeatedly asked for a lawyer but none was called for her, and she ultimately ceased to pursue this request.

[19] Reid denied that she had told Steve Brideau that she had slashed her wrists, as Brideau had testified. There were other contradictions between her evidence and that of Brideau.

[20] Reid did not know the date or the day of the week of the shooting. One day, she said, just went into another. There was no calendar and she was not looking at a clock. She acknowledged that her use of cocaine during this time period was excessive. She was taking it intravenously up to six times a day. Reid thought the shooting occurred during

the month of December. She claimed there were no drugs used in the house at 9 Seafarer's Lane on the day of the shooting or the previous day, except that she did take a Valium the night before the shooting.

[21] John Barton confirmed that Reid and MacDonald stayed with him and Linda Glister at his house, probably on a Sunday in December, 1995. Both, he said, were upset. The appellant had a handgun. He agreed to have the clip taken out of it. He appeared stressed out and upset, delusional and paranoid. Reid was obviously upset. They stayed there for three or four nights. The four of them took Delaudid during this period. The appellant also had some cocaine.

[22] There was other evidence of heavy drug consumption by Reid and the appellant following the shooting.

[23] There was also evidence that on Friday, December 1, the appellant arrived at the residence of David Edwards, accompanied by Deborah Nowlan and somebody named Karen. Edwards gave evidence that on the following day, he received a telephone call from the appellant who was incoherent, claiming that Edwards owed him a $1,000.00 on a bet, a fact that Edwards denied.

[24] Theresa Novelli had resided with the appellant at Seafarer's Lane. She moved out in October, 1995, because she could not deal with his drinking any longer. She saw him once after that at a tavern. He looked drawn and tired but otherwise he was "good".

His emotional state "wasn't too bad". Subsequent to this they were in touch by telephone. He phoned her on December 1, 1995. He sounded distraught and said he was coming over and that he was "packing". She took this to mean that he was carrying a weapon. She could tell he was drinking. She called the police and left her home.

[25] The appellant called Novelli on December 3 to say that the landlord wanted him out of Seafarer's Lane. At that time he was emotional but was not drinking. He sounded good, she said.

[26] The appellant called Novelli again on December 8. He sounded very intoxicated. He sounded distraught and said that somebody had "ratted" on him.

[27] There was also evidence that on the night of December 2, the appellant stayed at the Chebucto Inn. The owner of the motel testified that he showed up at about 10:30 p.m. His condition appeared "kind of rough". There was evidence from the staff at the motel of seeing him with a gun on the morning of December 3.

[28] The Halifax Police arrested the appellant on December 8 for suspicion of carrying a firearm. He was later released. At the time of the arrest, he was in possession of a blank cheque in Vernon Rutland's name. He was re-arrested on December 9, 1995, at which time he asked the police "why couldn't you wait until tomorrow?" The police testified that the appellant appeared to be in rough shape at this time.

[29] Ricky Williams, the jailhouse informant, testified to conversations with the appellant over a six week period. He had known the appellant since 1987 or 1988. Both were in the Halifax Correctional Centre. He said that the appellant told him that he shot Rutland “in the pumpkin with his smitty”. The appellant said that: “The motherfucker owed me money and he wanted to be paid because [Rutland] was going back home in England”. Williams provided this information to the police to help him with pending criminal charges. He did not, in fact, receive any help in this respect. Williams had an extensive criminal record. The police paid him $12,000 for his testimony. He did, however, testify that he was providing it because he wanted to do “the right thing”.

[30] There was evidence that the appellant and the deceased were close friends and that there had been no apparent animosity between them prior to the shooting. Rutland was unemployed at that time, having spent his entire assets on drugs and having lost his employment. He had purchased a return ticket from Halifax to England. It was his habit to go to England to visit family a number of times each year. He had, at one time, stated that once he came back to Halifax, he intended to go to Vancouver to find work, a statement which was confirmed by the testimony of his former wife.

[31] There was evidence that Rutland and Annabelle Lucas, between them, owed the appellant $450.00. Lucas testified that on November 26, she believed, the appellant and Reid met her at Gus’ Pub. The appellant was agitated and scruffy looking. Lucas told the appellant that she had spent the money that she owed him on drugs. The appellant apparently wanted to compare her story with that of Rutland. They set out for Seafarer’s

Lane but met Rutland on the St. Margaret's Bay Road. Rutland's position was that he and Lucas had not spent the money on drugs. The appellant was dissatisfied with the conflicting stories. He was not pleased. He told Lucas that she was no longer required to go to Seafarer's Lane. He said he wanted money sent to an address on Brunswick Street. Lucas said, "The whole feeling of everybody in the car, the anxiety, the aggressiveness, the - - I was scared." She took a bus home and returned to New Glasgow.

[32] The Crown called forensic evidence, none of which implicated the appellant. Sergeant Victor Gorman, an expert in bloodstain and bloodstain pattern analysis, concluded that Rutland was seated on the right-hand side of a large chesterfield when he was shot and that the body had been moved to a position in front of the chesterfield. Attempts to remove bloodstains from a garment and cushion in the laundry room were evident.

[33] Thomas Suzanski performed a DNA blood analysis on blood samples from the clothing of MacDonald and the deceased. There was no DNA match. A toxicologist, James T. Archibald, found that Rutland had traces of cocaine in his system - 1.3 micrograms per millilitre of blood. It was his opinion that Rutland had used cocaine most likely during the two day period before his death, although it could have been outside the 48 hour period. He also found traces of Valium and minute traces of alcohol in the blood.

[34] Thus, there was no DNA evidence linking the appellant to the shooting, notwithstanding the fact that a number of items were tested, such as the towel seized from

the residence of Steve Malone, sneakers worn by the appellant, a T-shirt and a pair of jeans that he had been wearing. The evidence was that the presence of blood on clothing from a person injecting cocaine up to six times a day would not be unusual.

[35] Dr. Ashim Guha conducted an autopsy on Rutland on December 9, 1995. He concluded that the cause of death was a gun shot wound to the head, which occurred more than two days prior to the autopsy. He was unable to estimate the time of death. The weapon was in contact with Rutland's head at the time of the shooting, and in his opinion small amounts of brain matter would have exited the entrance wound.

[36] Victor LeBlanc was a firearms expert. He testified with respect to handguns belonging to the appellant, Exhibits 46 and 47. Exhibit 47 was excluded, in his opinion, as being the murder weapon. Exhibit 46 was a Smith and Wesson handgun and had been found on May 19, 1996 in Dartmouth. It was LeBlanc's opinion that the bullet taken from Rutland's head and identified as Exhibit 3 could not be excluded or eliminated as having been fired from this handgun. He did, however, conclude that Exhibit 4, an expended cartridge found on the chesterfield at Seafarer's Lane was fired from Exhibit 46.

[37] There was evidence from numerous witnesses that at various times after the shooting, the appellant was hallucinating, continually taking a gun from his pants, pointing it out windows, waving it around and making statements to the effect that they might get him too. Donna Reid testified to extensive drug use following the shooting. The appellant became delusional after taking cocaine, Delaudid and beer.

[38] The defence did not call evidence.

[39] The theory of the Crown was that the appellant's motive for shooting Rutland was the drug debt in the amount of $450.00, coupled with the fact that Rutland was planning to leave for England. There was, however, no evidence that the appellant had any animosity towards Rutland at any time prior to the shooting. Annabelle Lucas, who was also indebted to the appellant, testified that she feared him because of non-payment of this debt. Reference was made to the meeting of November 26 at Gus' Pub and later in Rutland's car.

[40] The theory of the defence was simply that the appellant did not shoot Rutland. The only direct evidence that he did so came from Donna Reid who, by reason of her heavy drug use and numerous inconsistent statements, it was submitted, should be considered an unreliable witness. It was also submitted that Ricky Williams, the jailhouse informant, was unreliable.

[41] On October 30, 1997, the jury returned a verdict of guilty of first degree murder. On November 17, 1997, the appellant filed a prisoner's notice of appeal. The matter was adjourned pending retention of new counsel by the appellant who, following his retainer, filed new grounds of appeal.

[42] The points in issue emerging from the prisoner's notice of appeal and the subsequent notice filed by counsel may be stated as follows:

(1) Whether the trial judge erred in failing to admit complete records of Bryony House in relation to Donna Reid, a key Crown witness.

(2) Whether the trial judge erred in admitting preliminary inquiry evidence of Deborah Nowlan or in the alternative failed to use his residual discretion and reject this evidence.

(3) Whether the trial judge erred in admitting a **KGB** statement of Deborah Nowlan.

(4) Whether the trial judge erred in admitting the evidence of the jailhouse informant, Ricky Williams.

(5) Whether the trial judge erred in allowing the jury to deliberate in relation to first degree murder as there was insufficient evidence of planning and deliberation.

(6) Whether the trial judge erred in not directing the jury in relation to evidence of alcohol or drug use by the appellant prior to, during and after the shooting as it would relate to planning and deliberation, and in not directing the jury in relation to manslaughter because of such evidence.

(7) Whether the trial judge erred in his charge to the jury in the following respects:

(i) He did not adequately point out to the jury the inconsistencies in the evidence of Donna Reid.

(ii) He did not adequately relate the evidence to the theory of the defence.

(iii) He erred in failing to give a **Vetrovec** warning with respect to the

evidence of Donna Reid, and gave an inadequate warning with respect to the evidence of Ricky Williams.

(iv) He prohibited counsel from citing law to the jury.

FIRST ISSUE - RECORDS OF BRYONY HOUSE:

[43] An application for the production of such records was made to the trial judge on September 26, 1997. Bryony House was represented on the application by counsel who argued against the production of the records, as did the Crown. The stated purpose of seeking production of the records was to determine what statements Donna Reid may have made concerning the death of Vernon Rutland, information with respect to alcohol and drug consumption by her and anything else that might bear on her integrity, honesty and general credibility. The court determined that the records were likely to be relevant. The records, or more likely copies of them were produced and the trial judge then viewed them. There were nine such documents, but only one was ordered to be released to the defence. That document was not tendered in evidence. No type of in-camera hearing was held to determine what documents should be released; nor did the defence then request such a hearing.

[44] In making his ruling to release one document and seal the other eight, the trial judge stated that he had examined them all. He had weighed the interests of the parties to the application, specifically the right of the appellant to make full answer and defence and the expectation of privacy of Donna Reid with respect to Bryony House. He also considered

the probative value of the documents. He stated that he was mindful of the seriousness of the accusations against the appellant. There was, he observed, no charge in the **Criminal Code** that carried a greater societal stigma and punishment than does first degree murder. The trial judge ordered that the eight remaining documents that had been sealed should remain so in the file and be returned to Bryony House at the conclusion of all appeals or appeal periods following the trial.

[45] On this appeal, the appellant now contends that there should have been an in-camera hearing rather than a disposition of the application in accordance with the principles laid down in **R. v. O'Connor** (1995), 103 C.C.C. (3d) 1 (S.C.C.) as was done by the trial judge.

[46] In making his case for an in-camera hearing, the appellant refers to ss. 278.1 to 278.9(1) of the **Criminal Code** which came into force on May 12, 1997. However, by virtue of s. 278.2, these sections only apply to certain listed offences of a sexual nature. Murder is not on the list.

[47] In **O'Connor, supra**, the decision in response to which ss. 278.1 to 278.9(1) were enacted, the Supreme Court of Canada dealt with the production and disclosure of therapeutic records in the possession of third parties. In **O'Connor, supra**, the accused was charged with a number of sexual offences alleged to have occurred when he was a priest in a native residential school some 25 years earlier. Lamer, C.J.C. and Sopinka, J.

dissenting in the result, but with whom four other judges concurred, addressed the issue of records in the hands of third parties commencing at p. 17. An accused's ability to access information from the Crown necessary to make full answer and defence is constitutionally protected under s. 7 of the **Charter**. This principle was established in **R. v. Stinchcombe** (1991), 68 C.C.C. (3d) 1 (S.C.C.). In that case, however, it was recognized that there were limits on the right of an accused to access information. If an assertion of privilege is made by the Crown, information will still be disclosed where the court concludes that the asserted privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence. A constitutional right to privacy extends to information contained in many forms of third party records. In **O'Connor, supra**, Lamer, C.J.C. and Sopinka, J. commented on the difference between disclosure by the Crown on the one hand, and production by third parties on the other at para. 17:

> [17] In our opinion, the balancing approach we established in *Stinchcombe* can apply with equal force in the context of *production*, where the information sought is in the hands of a third party. Of course, the balancing process must be modified to fit the context in which it is applied. In cases involving production, for example, we are concerned with the competing claims of a constitutional right to privacy in the information on the one hand, and the right to full answer and defence on the other. We agree with L'Heureux-Dubé J. that a constitutional right to privacy extends to information contained in many forms of third party records.

[48] In cases where third party records are sought, a two step procedure is involved. At the first stage, the onus is on the accused to satisfy the judge that the information is likely to be relevant. It is not an evidential burden requiring evidence and a voir dire in every case. Lamer, C.J.C. and Sopinka, J. elaborated at para. 24 of their decision:

> [24] While we agree that "likely relevance" is the appropriate threshold for the first stage of the two-step procedure, we wish to emphasize that, while this is a significant burden, it should not be interpreted as an onerous burden upon the accused. There are several reasons for holding that the onus upon the accused should be a low one. First, at this stage of the inquiry, the only issue is whether the information is "likely" relevant. We agree with L'Heureux-Dubé J. that considerations of privacy should not enter into the analysis at this stage. We should also not be concerned with whether the evidence would be admissible, for example, as a matter of policy, as that is a different query: **Morris v. The Queen** (1983), 7 C.C.C. (3d) 97, 1 D.L.R. (4th) 385, [1983] 2 S.C.R. 190. As the House of Lords recognized in **R. v. Preston**, [1993] 4 All E.R. 638 at p. 664:
>
> > . . . the fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of inquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible . . .
>
> A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" requests for production: see **Chaplin, supra**, at p. 236.

[49] At the second stage, after the production of the records to the court, the judge examines them to determine whether, and to what extent, they should be produced to the accused. In making this determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a nonproduction order would constitute a reasonable limit on the ability of the accused to make full answer and defence. Lamer, C.J.C. and Sopinka, J. said at paras. 30 and 31 of their decision:

> [30] We agree with L'Heureux-Dubé J. that "upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused" (para. 153). We also agree that in making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In some cases, it may be possible for the presiding judge to provide a judicial summary of the records to counsel to enable them to assist in determining whether the material should be produced. This, of course, would depend on the specific facts of each particular case.
>
> [31] We also agree that, in balancing the competing rights in question, the following factors should be considered: (1) "the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory

> belief or bias"; and (5) "the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" (para. 156).

[50] Although **O'Connor, supra**, dealt with charges of sexual offences, I am of the view that the Supreme Court of Canada applied principles which are generally applicable to the resolution of competing claims of the constitutional right to make full answer and defence on the one hand, and the constitutional right to a person's privacy on the other. See in particular, Lamer, C.J.C. and Sopinka, J. at paras. 20 and 32, L'Heureux-Dubé, J. at paras, 99, 126-130. **O'Connor, supra**, has not been affected by amendments to the **Code** in cases other than those listed in s. 278.2 thereof. I am of the view that the procedure to be followed and the principles governing the trial judge's decision were, in this case, governed by what the Supreme Court of Canada said in **O'Connor, supra**. The trial judge followed that procedure. He was not asked by the appellant's trial counsel to do more. Counsel agreed that such was the procedure to be followed. It was not necessary for the judge in any event and, in particular, in these circumstances, to hold an in-camera hearing where the records would be produced to counsel.

[51] This panel of the court considered that, given the appellant's submission that Tidman, J. erred in not releasing the eight sealed documents, we should review them. We requested the sealed packet from the court file but it could not be located. We caused an extensive search to be made in the court's records, which included an examination of some 600 files, in which it was thought that the packet might possibly be located. It was not found.

[52] The court then advised counsel for the appellant and the respondent, as well as counsel for Bryony House that the sealed packet could not be located. Counsel were asked to address the following:

(1) Submissions concerning the impact, if any, of the court's inability to review these materials on the disposition of this appeal.

(2) Whether these records or copies of them are in existence elsewhere and, if so, whether the court had jurisdiction to order them to be produced and, if so, should the jurisdiction be exercised?

(3) What the appropriate role for counsel for Bryony House was in further proceedings, if any, taken in relation to points (1) and (2) above.

[53] In response, counsel filed written submissions and following receipt of these, the court held a telephone conference hearing with all counsel covering the points raised.

[54] It appeared, that while a review of the transcript would lead the reader to believe that the original documents were sealed by the trial judge, these were copies only. Fortunately, Bryony House still had the original documents. Following the telephone hearing, the court advised counsel that it intended to order the production of true copies of these pursuant to s. 683(1) of the **Criminal Code**. This order was issued and served on Bryony House. Bryony House has furnished the court with a sealed packet containing photocopies of nine documents which we are advised were those constituting the record with respect to Donna Reid's visit there in December of 1995.

[55] I have reviewed the photocopies of all nine documents - the one produced to counsel at trial and the eight which were withheld. I am satisfied that Tidman, J. made no error in either his articulation of the appropriate test as laid down by **O'Connor** or in his application of it to the eight documents which he ordered should remain sealed. They are, in my view, of no probative value whatsoever and would be of no assistance to the appellant's defence.

[56] The materials produced to this court pursuant to the order for production should remain sealed in the file until the conclusion of all appeals and any other proceedings herein or upon the expiration of the time for appealing if no appeal is taken from this decision.

[57] In my opinion, the trial judge did not err in following the **O'Connor** procedure and in the result he reached by so doing.

[58] I would therefore dismiss the first ground of appeal.

ISSUES TWO AND THREE - PRELIMINARY INQUIRY EVIDENCE AND SO-CALLED KGB STATEMENT OF DEBORAH NOWLAN:

[59] Among the witnesses who testified at the preliminary inquiry was Deborah Nowlan. She described herself as an acquaintance of the appellant and Rutland and as a friend of Donna Reid. At the preliminary she gave evidence of encounters with the key players in

late November and early December, 1995. On November 29 or November 30 at about 7:00 p.m. she met Reid and the appellant at Gus' Pub. Reid was "pretty strung out, a mess, as if she had been partying for a few days". On re-examination the witness stated that she was satisfied that this meeting took place on November 30. The appellant seemed fine. Later that evening the appellant came to her apartment at about 11:00 - 12:00 p.m. A friend, Karen Dooks, was present. They were all drinking. No drugs were being consumed. The appellant seemed fine. He stayed overnight. About noon on December 1, 1995, the three of them went to the home of David Edwards on Novalea Drive. There was a lot of drinking there. The appellant was taking it easy. There were no drugs used. The appellant borrowed money from Edwards for rent, heat and power. He left at about 6:00 - 7:00 p.m. He did not return to the residence.

[60] Nowlan next saw the appellant on Saturday, December 2, 1995, at her place on North Street. She recalled that this was the day she moved out of her apartment. He was there briefly at about 7:00 - 8:00 p.m. He appeared upset. He spoke about four shots "or something". The appellant had been drinking but Nowlan could not tell if he had been consuming drugs. He was in possession of an orange garbage bag with contents that appeared heavy.

[61] Throughout her evidence at the preliminary, and particularly at this point, Nowlan appeared reluctant to answer questions. She was reminded of a statement she had given the police on December 11. She conceded that the appellant waved his hands in the air making a gesture as if he had a gun. She denied telling the police that the appellant spoke

of guns. When shown the statement given to the police, she admitted that it made reference to the appellant speaking of guns, but she did not recall that, and did not recall saying so to the police.

[62] About a week after these events, Nowlan heard of Rutland's death over the radio. She was with Ross Casey in Hants County at the time and she borrowed his car and drove into the city. The car broke down and she took a taxi to Steve Malone's place on Ontario Street.

[63] On cross-examination, she said that the appellant and Vern Rutland always acted "as good buddies". She never heard them arguing. When pressed on cross-examination, she said she had no memory of the appellant making gestures as if he had a gun. She said that when she gave the statement to the police she was "strung out".

[64] Nowlan had, on December 11, 1995, given a video taped statement to the police. She was warned of her liability of prosecution under s. 140 of the **Criminal Code** if she misled a police officer during the investigation and warned that it was a criminal offence to attempt to obstruct justice during a police investigation, as provided in s. 139 of the **Criminal Code**. She was advised that she might be a witness at trial and that if she changed her statement, she might be liable to prosecution for fabricating evidence contrary to s. 137 of the **Criminal Code**. She was administered an oath.

[65] In the video, Nowlan said that she had a conviction for possession of a narcotic in 1990. She had recently heard of Rutland's death and knew that Rutland and the appellant were often in one another's company. She knew that Donna Reid had recently established a relationship with the appellant.

[66] Nowlan said that the last time she had seen the appellant was when she and the appellant and Karen Dooks had been drinking on the night of December 2. On this occasion, the appellant was making gestures with his hand which she believed to represent gestures with a gun. The appellant spoke of four shots. He had something in an orange bag which looked heavy. She said he stayed at her apartment for only a few minutes and he and Karen left to go to a telephone. She believed he returned later in the evening because somebody had slept in the apartment.

[67] Nowlan said that when the appellant was talking about four shots and making gestures, he had been drinking. She would say that he was high. She last saw the appellant and Karen Dooks on December 2.

[68] When she heard about the killing, she came into the city because she was worried about Donna Reid.

[69] Nowlan had never seen the appellant with guns but had heard him say that he had guns on him, and that he had four shots on him and people "were after him or something".

[70] Nowlan was subpoenaed to testify at trial but did not appear.

[71] At the trial, the Crown applied to tender the transcript of Nowlan's preliminary inquiry evidence, as well as the video statement given by her under oath to the police on December 11, 1995. This video was edited by agreement of counsel so that if the court ordered it admitted in evidence, the edited version would be the one to be placed before the jury. This has been referred to as the **KGB** statement (**R. v. KGB** (1993), 79 C.C.C. (3d) 257 (S.C.C.)).

[72] The Crown's application for the admission of the transcript of Nowlan's preliminary inquiry evidence and the video was an application to admit hearsay evidence.

[73] In recent years, the Supreme Court of Canada has established the beginning of a modern principled framework for determining exceptions to the rule against hearsay evidence. This new approach has now become firmly established in the law of evidence in this country. Broadly speaking, a hearsay statement is admissible for the truth of its contents where it is necessary to resort to it because direct evidence is not reasonably available, and where it has been shown that the hearsay evidence is reliable in the sense of threshold reliability - it being given under circumstances where there is a reasonable guarantee of trustworthiness. These are known as the two requirements of necessity and reliability. These two requirements serve to minimize the evidentiary dangers traditionally associated with the evidence of an out of court declarant - risk of inaccuracy because of the absence of a firsthand account, the absence of an oath, inability to assess the

declarant's demeanor and lack of contemporaneous cross-examination of the declarant.

[74] The subject of necessity was discussed by McLachlin, J. (as she then was), in **R. v. F. (W.J.)** (1999), 138 C.C.C. (3d) 1 commencing at para. 34.

[75] After hearing submissions from counsel, the trial judge referred to **R. v. Hawkins** (1996), 111 C.C.C. (3d) 129 (S.C.C.). He observed that the admission of the evidence in question depended upon the fulfilment of the two requirements - necessity and reliability. He noted that counsel had agreed that the requirement of necessity had been met as the witness was not available to give evidence at the trial. Having heard submissions on the question of reliability, he ruled that this requirement had also been met. He observed that in both cases the evidence had been taken under oath. With respect to the video, there was an extensive explanation given to the witness as to what was taking place. She was made aware of the seriousness of the situation. At the preliminary, the witness was subjected to extensive cross-examination. Counsel for the appellant had the video available to him for this purpose. In these circumstances, the trial judge considered that there was a substantial guarantee of trustworthiness of the witness and of her evidence. The evidence was probative in that it corroborated the evidence of Edwards as to the dates of the accused's whereabouts.

[76] The trial judge granted the Crown's application for the introduction of the preliminary inquiry transcript and the video.

[77] The case of **KGB, supra**, dealt with out of court statements being introduced to contradict testimony of, and to constitute direct testimony of, witnesses who had changed their stories between the time of the statements and the time they took the stand. They had previously made statements that the accused had made certain admissions. At the trial they refused to adopt their statements in this respect. The Supreme Court of Canada in **KGB** held that it was open to the court to modify the orthodox rule that an unadopted prior inconsistent statement was not admissible for its truth. Where there was a sufficient guarantee of reliability, the prior inconsistent statement is admissible for its truth. It will only be admissible if the statement would have been admissible as the witness's sole testimony. In **KGB**, the prior inconsistent statement itself included an out of court statement. Since, however, the out of court statement could now be admissible under an established hearsay exception as an admission by the accused, it could be admissible as the testimony of the witness, provided it is not subject to exclusion for any other reason. In Nowlan's case, she did not, as in the **KGB** situation, refuse to adopt the prior statement as true while testifying, with one exception relating to gestures by the appellant as if he had a gun.

[78] For such a prior inconsistent statement to be admissible for substantive use, there must be indicia of reliability in substitution for the lack of an oath in court, lack of contemporaneous cross-examination and the ability of the trier of fact to observe the demeanor in the witness box at the time the prior statement was made. The best indication of reliability is that the statement had been made under oath, solemn affirmation or solemn declaration, and following the admission of an explicit warning of the witness's liability to

prosecution if it is discovered to be untruthful. This would satisfy the hearsay danger arising from a trier of fact being asked to make substantive use of prior inconsistent statements by using unsworn testimony over sworn testimony.

[79] On the hearing before us, counsel for the appellant conceded that the preliminary inquiry statement was properly admitted. The fundamental argument seemed to be that the so-called **KGB** statement should not have been admitted because it was not necessary, given the admission of the preliminary inquiry evidence. Concern was expressed respecting inconsistencies between the statement and the transcript as well as consistencies which, it was said, amounted to oath-helping. It was also suggested that the warning given at the beginning of the statement should have been deleted. I would dismiss this last point at the outset, noting that the editing of the statement was agreed to by the defence at the trial.

[80] In my opinion, the trial judge proceeded correctly when he dealt with these statements at the voir dire under the common-law exception to the hearsay rule as outlined in **R. v. Hawkins, supra**. The test in that case requires the party who wishes to have an out of court statement admitted as evidence to show on a balance of probabilities that the criteria of necessity and threshold reliability have been met. If they are met, the court must still be satisfied that the exercise of a residual discretion to exclude the statements where their probative value is slight and undue prejudice might result to the accused, is not warranted.

[81] Prior to the introduction of the transcript of the preliminary and the video tape, the trial judge explained to the jury the difficulties encountered with hearsay evidence that had historically been advanced in support of its exclusion. He referred to the four difficulties with hearsay - absence of a firsthand account, absence of an oath, absence of an opportunity to observe the declarant's demeanor, and absence of contemporary cross-examination.

[82] In the combined material being placed before the jury, some of these dangers were lessened. There was the video and the transcript of the record containing the speaker's utterances. In each case, the evidence was given under oath. The jury had the opportunity to observe the demeanor of the witness on the video. In the transcript of the preliminary examination there was extensive cross-examination. The trial judge pointed out to them that this was not a substitute for cross-examination of a witness in court. He told the jury that they should consider that fact in assessing the evidence that they were about to see and hear, as well as all the other factors and problems that he had told them originated with hearsay evidence. He further cautioned them that he was not, in any way, making a determination as to the importance of the evidence or the credibility of the witness, these being matters entirely within their province.

[83] I have already commented that at the hearing of the voir dire before the trial judge, the appellant's counsel conceded that the requirement of necessity had been met. While this issue was raised again in the appellant's factum, I would not be prepared to reopen it. Both sides conceded that the evidence was necessary because the witness was not

available at the trial.

[84] The so-called **KGB** statement gave the jury an opportunity to observe the demeanor of Nowlan as she testified before the video camera. On the other hand, if only the video were tendered, the jury would not have had the benefit of the extensive cross-examination administered at the preliminary. The preliminary was much more detailed than the **KGB** statement. It was not a mere repetition. Parts of the **KGB** statement were put to Nowlan in the preliminary inquiry by way of cross-examination. Thus, the statement and the preliminary inquiry transcript complement each other. There were some inconsistencies between the statement and the inquiry transcript. Not to put both before the jury would take away a means of assessing credibility and leave them with less than the whole picture. I have concluded that having regard to the principles laid down in **Hawkins, supra**, the criteria for admissibility of both the transcript and the video were met. In my view, it was necessary to admit both the preliminary inquiry transcript and the so-called **KGB** statement in fairness to both the accused and the Crown. This was not a case where an additional statement added nothing or was unnecessary for the purpose of completing the account. In **R. v. Meaney** (1996), 111 C.C.C. (3d) 55 (Nfld. C.A.), (application for leave to appeal to the Supreme Court of Canada dismissed, [1996] S.C.C.A. No. 591), O'Neill, J.A., speaking for the court, said at p. 76:

> The law is clear that, in order to get a full account of what is alleged to have happened to a particular complainant such as we have here, it may be necessary to take the evidence of more than one person. However, if any additional statements add nothing or are unnecessary for purposes of completing the account, then that evidence should not be admitted . . .

[85] Here, both the preliminary inquiry transcript and the **KGB** statement were necessary to put a "full and frank account" of Deborah Nowlan's evidence before the jury. See **R. v. Rockey** (1996), 110 C.C.C. (3d) 481 (S.C.C.) at p. 490.

[86] Here, the trial judge made a carefully reasoned ruling with respect to each statement.

[87] As to reliability, **Hawkins, supra**, establishes that the trial judge on a voir dire need only be satisfied of the evidence of threshold reliability, not the ultimate reliability of out of court statements presented for the truth of their contents. In **Hawkins, supra**, the court said at pp. 157-158:

> [74] The requirement of reliability will be satisfied where the hearsay statement was made in circumstances which provide sufficient guarantees of its trustworthiness. In particular, the circumstances must counteract the traditional evidentiary dangers associated with hearsay. As the Court explained in **B.(K.G.)**, at p. 787:
>
>> The history of the common law exceptions to the hearsay rule suggests that for a hearsay statement to be received, there must be some other fact or circumstance which compensates for, or stands in the stead of the oath, presence and cross-examination.
>
> [75] The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient **indicia** of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact.
>
> [76] We are persuaded that a witness's testimony before a preliminary inquiry will generally satisfy this threshold test of reliability since there are sufficient guarantees of trustworthiness. A preliminary inquiry will involve precisely the same issues and the same parties as the trial. The hearsay dangers associated with testimony in such an adjudicative proceeding are minimal. Preliminary inquiry testimony is given

> under oath, and is also subject to the adverse party's right to contemporaneous cross-examination. It is **only** tainted by the lack of the declarant's presence before the trier of fact . . .

[88] I am satisfied that the so-called **KGB** statement and the preliminary inquiry evidence in combination had sufficient indicia of reliability to meet the threshold requirement for admissibility. In the video there was an oath, and an opportunity to observe demeanor was presented. At the preliminary inquiry the evidence was taken under oath. Only a contemporary oath and cross-examination were missing.

[89] Indeed, even counsel for the appellant in his representations at the voir dire said this:

> Now my friend does make a good point that this case - this application here probably comes - once you take away the necessity issue, comes probably as close as you can without having the witness in court. And I would - I think I can accept that. And - but I would stress the word "as close as you can get".

[90] The appellant's concern over the inconsistencies in the evidence of Nowlan and in her statements is not, in my opinion, well-founded. There were few inconsistencies. The trial judge had resolved the issue of threshold reliability, but these inconsistencies were available to the jury in determining the ultimate value of Nowlan's evidence.

[91] Finally, even where the criteria of necessity and reliability are satisfied, the trial judge has a residual discretion to exclude the evidence where its probative value is slight and undue prejudice might result to the accused. In my opinion, a review of the transcript and the so-called **KGB** statement shows that the evidence, while not greatly implicating the

appellant, is relevant, but cannot be said to result in undue prejudice to him. It is consistent with much of the other evidence presented **viva voce** in court about the bizarre and intimidating behaviour of the appellant, following the 1st of December, 1995. I am not satisfied that the trial judge erred in not exercising his residual discretion to exclude the evidence of Nowlan.

[92] I would dismiss this ground of appeal.

FOURTH ISSUE - EVIDENCE OF JAILHOUSE INFORMANT:

[93] The appellant's counsel submits that the trial judge should have exercised a residual discretion and denied the Crown permission to call the jailhouse informant Ricky Williams. It is submitted that a residual discretion to reject evidence in criminal cases has been evolving over the years. Reference has been made to the discussion of this subject in the **Kaufman Report** that was commissioned as a result of the wrongful conviction of Guy Paul Morin. Appellant's counsel referred to the decision of the Ontario Court of Appeal in **R. v. Brooks** (1999), 129 C.C.C. (3d) 227 which held that in a case where the evidence of two jailhouse informants played a central role in the Crown's case, the trial judge erred in law in not giving a **Vetrovec** type warning to a jury respecting the evidence of unsavoury witnesses. That decision has since been overruled by the Supreme Court of Canada: **R. v. Brooks** (2000), 141 C.C.C. (3d) 321.

[94] **Brooks, supra**, is not an authority for the proposition that a trial judge has a residual discretion to prevent the Crown from calling unsavoury witnesses, such as jailhouse informants. In that case, the majority of the judges in both the Ontario Court of Appeal and the Supreme Court of Canada were of the view that the trial judge should have given a so-called **Vetrovec** warning in the circumstances. None of the judges in either court suggested that the trial judge had a discretion to exclude the evidence of so-called unsavoury witnesses, or that the accused had any right to have their evidence excluded. I will return to a discussion of this case later in these reasons.

[95] Tidman, J., after summarizing the evidence of Williams for the jury, reminded them of his criminal convictions, the fact that he received cash and the fact that he had not told others in the institution about what the appellant had told him. He summarized the points made in cross-examination of Williams by counsel for the appellant. He instructed the jury with respect to taking criminal convictions into account in considering a witness's credibility. He reminded them that Williams had received money from the Crown and was to be treated more leniently on new criminal charges in exchange for the information he gave.

[96] The trial judge told the jury that, in the circumstances, they should look at the evidence of Williams very carefully and would be wise to look to other reliable evidence to support his testimony. It was, he said, for them to decide what, if any, testimony of Williams they chose to accept as being true.

[97] In my opinion, the trial judge provided adequate safeguards to the appellant in his instructions to the jury respecting Williams. In the circumstances here present, he had no discretion to prevent the Crown from calling him. He gave a warning to the jury of the care that they should exercise in dealing with his evidence. I will address the appellant's submissions respecting the adequacy of this warning later. The negative aspects of Williams' evidence were explored, both on his direct and cross-examination, and reviewed by the trial judge for the jury. This ground of appeal should not prevail.

FIFTH GROUND - WHETHER THERE WAS SUFFICIENT EVIDENCE OF PLANNING AND DELIBERATION TO PERMIT THE JURY TO DELIBERATE ON THE CHARGE OF FIRST DEGREE MURDER:

[98] The appellant submits that there was no evidence of planning and deliberation sufficient to place this issue before the jury. Reference is made to **R. v. Whynot** (1993), 122 N.S.R. (2d) 81 and **United States of America v. Sheppard**, [1977] 2 S.C.R. 1067.

[99] In my opinion there was sufficient evidence of planning and deliberation to require the trial judge to charge the jury on first degree murder. Such evidence included:

(a) Donna Reid testified that when she and the appellant got up on the morning of the murder, the latter put his guns on. He came down the steps and went to the kitchen to get juice. He then came into the living room, came up behind Rutland, and took out his gun. He aimed it at Rutland's head, said "sorry mate" and shot him.

(b) Having shot Rutland, the appellant made the statement that one bullet

sometimes does not do the job. It appears that he was dissuaded from shooting again only by the plea of Donna Reid.

(c) Donna Reid testified that the appellant had stated that there was no money to buy drugs. Annabelle Lucas and Rutland owed the appellant money for drugs but had not paid. There was the evidence of the rather unpleasant meeting at Gus' Pub and on the St. Margaret's Bay Road, where the appellant raised the subject of the drug bill and heard the inconsistent stories of Lucas and Rutland. Rutland was planning to leave for England.

(d) Williams testified that the appellant told him he shot Rutland because he owed him money for drugs and Rutland was leaving for England.

(e) Williams testified that the appellant said he shot Rutland in front of Donna Reid because he trusted her.

[100] There was evidence before the jury that the appellant had a motive to kill. He said "sorry" before doing so, but he wanted to make sure that the victim was dead. He had given the matter enough thought in advance that he was comfortable about doing so with a witness present.

[101] In giving his ruling to put the issue of planning and deliberation to the jury, the trial judge said:

> . . . the test is the same as - in this application is the same as in - as the test set out in U.S.A. v. Sheppard, that is a test well known and used by all preliminary judges to determine whether there is any evidence upon which a jury, properly instructed, could find, in this case, first degree murder, that is that there was planning and deliberation.

[102] No exception to the issue of planning and deliberation being placed before the jury was taken by appellant's counsel at the trial.

[103] In my opinion, the trial judge correctly applied the test that must be applied in determining whether there is evidence of planning and deliberation. This subject was addressed by the Supreme Court of Canada in **R. v. Nygaard et al.** (1989), 51 C.C.C. (3d) 417 at p. 432.

> What then is the meaning of planned and deliberate and can that classification be applied to the requisite intents set forth in s. 212(a)(ii)? It has been held that "planned" means that the scheme was conceived and carefully thought out before it was carried out and "deliberate" means considered, not impulsive. A classic instruction to a jury as to the meaning of planned and deliberate was given by Gale J., as he then was, in **R. v. Widdifield**, Ontario Supreme Court, Gale J., September 29, 1961, unreported, as excerpted in 6 C.L.Q. 152, at p. 153:
>
>> I think that in the Code "planned" is to be assigned, I think, its natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed. But that does not mean, of course, to say that the plan need be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate.
>>
>> The important element, it seems to me, so far as time is concerned, is the time involved in developing the plan, not the time between the development of the plan and the doing of the act. One can carefully prepare a plan and immediately it is prepared set out to do the planned act, or, alternatively, you can wait an appreciable time to do it once it has been formed.
>>
>> As far as the word "deliberate" is concerned, I think that the Code means that it should also carry its natural meaning of "considered", "not impulsive", "slow in deciding", "cautious", implying that the accused must take time to weigh the advantages and disadvantages of his intended action.

[104] In my opinion, the trial judge did not err in placing the issue of planning and deliberation before the jury. There was evidence which, if believed by the jury, established

planning and deliberation. I would dismiss this ground of appeal.

SIXTH ISSUE - ALCOHOL AND DRUG USE AS IT RELATED TO PLANNING AND DELIBERATION AND MANSLAUGHTER:

[105] The appellant submits that there was sufficient evidence of alcohol and drug use capable of impairing his mental capacity to require the judge to instruct the jury respecting it in his charge on planning and deliberation. Further, it is submitted, that he should have placed before the jury the option of finding manslaughter as a result of such impaired mental state.

[106] The appellant did not testify at the trial or offer evidence, expert or otherwise, bearing on the issue of how any consumption of alcohol or drugs by him may have affected his mental state. Appellant's counsel did not cross-examine any of the Crown's expert witnesses on the effect of the consumption of alcohol or cocaine, either generally or with reference to evidence relating to use of these substances by the appellant.

[107] Appellant's counsel does, however, refer to evidence of Annabelle Lucas that the appellant was "doing" about a gram of cocaine a day during late November 1995. She referred to him as being "rough shaven" and as having been on "a bit of a tear" when she saw him around midnight, November 27 - 28.

[108] Tim Sullivan, a taxi driver, had picked the appellant up on November 24, 1995

at about 3:30 p.m. at Seafarer's Lane. He was with a blonde female. Sullivan took them to Gus' Pub on Agricola Street. On the way, they stopped at a place on Club Road where there were dogs running around the yard. The implication was that drugs were obtained there. By Sunday, November 26, the appellant was, according to Annabelle Lucas, "rough looking, scruffy and tired looking".

[109] Donna Reid spoke of the appellant walking around the residence with his gun, going through a paranoid delusion, acting as if he was in outer space, swinging a sword and a baseball bat, and using cocaine extensively up until, but not including, the day before the shooting.

[110] Counsel for the appellant referred us to literature on cocaine from which it appears that the user gets an intense feeling of euphoria and well-being, but that cocaine use can lead, particularly during withdrawal, to severe agitation, violent behaviour, paranoid thoughts, delirium and fainting, particularly at higher doses. We are asked to take judicial notice that these are the effects of cocaine, and that there was sufficient evidence that the appellant was so affected by it and by alcohol that the issue of his capacity to form the requisite intent to plan and deliberate and indeed to even commit murder was in doubt.

[111] It is well established that a judge must put to the jury any defence for which there is an air of reality, whether or not such defence is relied on by the accused. See **R. v. Lemky** (1996), 105 C.C.C. (3d) 137 (S.C.C.) at paras. 12 and 18. A defence for which

there is no evidentiary foundation should not be put to the jury - see **R. v. Finta**, [1994] 1 S.C.R. 701 at para. 272.

[112] In **R. v. Park** (1995), 99 C.C.C. (3d) 1 (S.C.C.), L'Heureux-Dubé, J., speaking for the majority of the court said:

> [11] The common law has long recognized that a trial judge need not put to the jury defences for which there is no real factual basis or evidentiary foundation. Courts must filter out irrelevant or specious defences, since their primary effect would not be to advance the quest for truth in the trial, but rather to confuse finders of fact and divert their attention from factual determinations that are pertinent to the issue of innocence or guilt. Since this court's judgment in **Pappajohn v. The Queen** (1980), 52 C.C.C. (2d) 481, 111 D.L.R. (3d) 1, [1980] 2 S.C.R. 120, the requirement that such a foundation exist for a defence before it is put to the jury has generally come to be known as the "air of reality" test.

[113] In **R. v. Lemky, supra**, the accused was convicted of second degree murder. He had shot his girlfriend in the neck with a rifle during the course of an argument. The defence was one of accident. At the trial there was evidence of impairment of the accused at the time of the shooting. In the hours before the shooting, the accused had drunk whiskey and later beer. There was conflicting evidence as to his state of intoxication. A breathalyzer test administered about three-quarters of an hour after the shooting showed a reading of 130 mg of alcohol per 100 ml of blood. However, despite this evidence, it was held by the Supreme Court of Canada on appeal by the accused from a dismissal of his appeal to the British Columbia Court of Appeal, that the trial judge did not err in not putting manslaughter to the jury. McLachlin, J., speaking for the majority of the court, stated that the issue was when a trial judge must leave the defence of drunkenness vitiating intent to

the jury. What was the threshold for permitting the jury to consider whether to reduce murder to manslaughter on account of drunkenness?

[114] McLachlin, J. referred to the well known proposition that the trial judge must instruct the jury on any defence that on the evidence has an “air of reality”; **R. v. Osolin** (1993), 86 C.C.C. (3d) 481 (S.C.C.).

[115] It was agreed by counsel that the Court of Appeal correctly concluded that the evidence was insufficient to raise a reasonable doubt that the accused lacked the capacity to foresee the consequences of his act. The question then was whether there was sufficient evidence to permit a reasonable inference that notwithstanding the accused’s capacity to foresee the consequences of the act, he did not foresee them. If there was, the jury should have been instructed respecting manslaughter. The question was answered by McLachlin, J. at p. 145:

> [20] In my view, the evidence, considered most favourably for the accused, falls short of supporting such an inference. His blood-alcohol level shortly after the shooting was only slightly over the legal limit for driving an automobile. He carried out purposeful actions both before and after the shooting, actions which ranged from ordering drinks at the dance beforehand to calling his mother and the police immediately afterward. His conduct before and after the shooting demonstrated an awareness of the consequences of what he was doing. This demonstrates that he in fact foresaw the consequences of what he was doing immediately before and after the shooting.

[116] In the case before us, it is not possible to come to a firm conclusion as to the date of the shooting or the exact whereabouts of the major players before and in the days immediately following it. One cannot know to what extent the jury accepted the testimony

of the witnesses about times and places, although it seems clear that they accepted Reid's testimony that the appellant shot Rutland. That said, a chronology can be developed which suggests that the shooting took place on the morning of November 30.

[117] Annabelle Lucas testified about the meeting at Gus' Pub and St. Margaret's Bay Road on or about November 26, 1995. It will be recalled that the appellant wanted to discuss the drug bill which she and Rutland owed him because her story and Rutland's were at variance. On November 29, 1995, a Wednesday, she left two messages on Vern Rutland's phone. These were recorded and entered at the trial as Exhibit 52. Later she called Rutland and spoke to him telling him that she had not sent anything to which he replied "That's okay love". Reference to her phone bill which was introduced in evidence showed that she had called Rutland's number on November 29 between 6:13 p.m. and 6:18 p.m. It is a fair inference from this that Rutland was alive on November 29 in the evening. The murder had to take place later than that.

[118] On November 30 Reid and the appellant were seen in Gus' Pub. They were also seen on that day in Halifax at about 3:30 p.m. by Steve Malone. It will be recalled that he had a reason to recall the date - that his son was coming to visit him. Moreover, the power was shut off at Seafarer's Lane on the afternoon of November 30. This makes it likely that Reid was mistaken about spending the night after the murder at Seafarer's Lane. She had not complained of cold in the house until she was returned to the residence by Bib Shields' daughters. The jury was made aware of this apparent error in her evidence by Crown counsel in his summation. It was, of course, open to it to accept, as it obviously did, her

testimony about the shooting notwithstanding this error.

[119] Notwithstanding that there was evidence of heavy cocaine use and bizarre behaviour on the part of the appellant in the days preceding the shooting there is, in my opinion, no evidence of such use on the day before or the day of the shooting to support the reasonable inference that he lacked the capacity to foresee the consequences of his acts. Nor was there evidence of such use in that time period to support the reasonable inference that the appellant did not, in fact, foresee such consequences. Nor was there evidence that such use rendered him unable to plan and deliberate or that by reason of such use he did not plan and deliberate. The only relevant evidence is that of Donna Reid that he was not using cocaine or alcohol the day prior to the shooting or the day of the shooting. The forensic evidence respecting the mere traces of alcohol and cocaine in Rutland's blood at the time of his death suggests that he was not using these substances within the day or the day prior to his death. Clearly, this serves to lend no support to the supposition that the appellant was using these substances during that period.

[120] There was evidence that immediately before and after the shooting, the appellant engaged in a number of purposeful acts.

[121] The appellant discussed with Reid what he should wear that morning. He dressed and put on his guns, walked down the stairs, and went to the fridge for a glass of juice. He laid this down on the counter, then went up behind the victim as he was finishing his telephone call, took out his gun and pointed it to the back of the victim's head. He said

to the victim "sorry mate" and then shot him. He replaced the telephone receiver on its cradle. He mumbled about one bullet not being enough to do the job. He threatened Reid to keep quiet. He moved the body to a position in front of the chesterfield and covered it with a shower curtain. He instructed Reid to clean up the evidence. He changed his shirt. He ordered Reid to get him something to eat and told her what story to make up for the benefit of the police.

[122] There was evidence of motive. The deceased and Annabelle Lucas jointly owed the appellant $450.00. There was the meeting on or about November 26 at which time the appellant heard the conflicting stories of Rutland and Lucas about what happened to money that was intended for the appellant. The evidence of Ricky Williams, the jailhouse informant, was that the appellant told him that the unpaid drug bill was the reason he killed Rutland.

[123] The only evidence of the appellant's condition and his actions on the day before and the day of the shooting came from Donna Reid. Nowhere in that evidence is there any suggestion of him having consumed alcohol or drugs nor of behaving in a manner consistent with their consumption or impairment resulting therefrom. There is nothing in the record sufficient to give the defence of impairment an air of reality.

[124] At the trial, the theory of the defence was that the appellant did not commit the murder. He neither testified nor offered evidence of impairment. His counsel did not cross-examine Crown witnesses to adduce evidence of impairment by cocaine or alcohol at the

relevant times. While the duty of the trial judge to place a defence before the jury is not dependent on a request from defence counsel, I attach weight to the fact that the experienced defence counsel representing the accused at the trial did not request a charge on manslaughter, nor raise the issue following the charge to the jury. Nor did he raise this issue in his submissions to the jury.

[125] Following the judge's charge to the jury, Crown counsel briefly raised the issue of drug use in the context of a statement by the trial judge that the jury must consider not only the actions of the accused, but the state of mind as affected by real or imagined things. In response to this, counsel for the appellant said:

> And I don't think there was anything that was said in Your Lordship's charge, with respect, that would leave a message with these jurors that anybody was pinning their hat on the fact that Mr. MacDonald did shoot him, Mr. Rutland, but didn't have any - because he was so overwhelmed by cocaine that he really didn't know what he was doing. I don't think that's a realistic analysis of what the jury are probably considering.
>
> . . . And obviously Your Lordship has made a decision on the drug-use issue, and I'm sure you've made it after a great deal of advice and deliberation, and I'm perfectly comfortable with what you've arrived at. Thank you.

[126] Literature on the subject of cocaine to which our attention has been drawn was not in evidence at the trial. No application to adduce fresh evidence respecting it was made on this appeal and the requisites for entering it as fresh evidence have not been established. I am of the view that literature dealing with the effects of cocaine generally is not of such notoriety and weight as to enable us to take judicial notice of what effect the appellant's cocaine consumption in the days previous to, but not the day prior to or the day

of the shooting, had on his mental faculties.

[127] Simply, the evidence here is not capable of supporting a reasonable doubt on capacity to form intent or intent in fact. As Lamer, C.J.C. said in **R. v. Robinson** (1996), 105 C.C.C. (3d) 97 at para. 48:

> . . . I am of the view that before a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect *might* have impaired the accused's foresight of consequences sufficient to raise a reasonable doubt . . .

[128] I would dismiss this ground of appeal.

SEVENTH ISSUE - ALLEGED ERRORS IN THE CHARGE:

(I) inconsistencies in the evidence of Donna Reid;

(ii) relating the evidence to the theory of the defence.

[129] Counsel submits that Donna Reid, a key Crown witness, was a drug addict and a person of unsavoury character. It is submitted that the time of death was critical to the prosecution. Reid had stated that there were no drugs consumed the day of and the night before the shooting. Reid indicated that she went to Halifax with Clarke and Self the third day after the murder and continued her drug use in the company of the appellant. She thought she went to Halifax on December 2, but Clarke and Self gave the date of the drive into Halifax by them as December 3. If, it is said, Reid was in error by 24 hours, her

evidence as to what happened is unreliable.

[130] In **Azoulay v. The Queen** (1952), 104 C.C.C. 97, the Supreme Court of Canada restated the rule which has been consistently followed respecting the duty of the trial judge to review the evidence in the charge to the jury. Except in cases where it would be obviously needless to do so, the judge must review the substantial parts of the evidence and give the jury the theory of the defence so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

[131] In **R. v. Mullins-Johnson** (1996), 112 C.C.C. (3d) 117 (Ont. C.A.), (appeal to the Supreme Court of Canada dismissed, [1998] 1 S.C.R. 977), the trial judge had not included in his charge a section dealing with the theory of the defence. The Ontario Court of Appeal held that following a review of the charge as a whole, it was clear that the jury was given a fair picture of the position of the defence in such a way that they could appreciate the evidence which related to it. At p. 123, Catzman and Labrosse, JJ.A. said:

> It is the duty of the trial judge to place the defence before the jury and to refer the jury to the substantial evidence bearing on the defence in a way that will ensure the jury's due appreciation of the evidence: **R. v. Yanover and Gerol** (1985), 20 C.C.C. (3d) 300 (Ont. C.A.), at p. 328. The function of this court is not to subject the directions to the jury to minute scrutiny and criticism but rather to examine it as a whole to see whether the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues: **R. v. Cooper** (1993), 78 C.C.C. (3d) 289 (S.C.C.), at p. 301. In his reasons for judgment, Borins J. has identified twelve points bearing on the theory of the defence that he has distilled from defence counsel's closing address to the jury. While the trial judge did not conduct his thorough and careful review of the evidence by specific, individual reference to the twelve points identified, we are of the view that, from his charge as a whole, the members of the jury were presented with a fair picture of the position of the defence in a manner that ensured their due appreciation of the evidence that bore upon that position.

[132] At the appellant's trial, the theory of his defence was that he did not shoot Rutland. No defence evidence was called, and in the closing address the main argument was that the jury should not accept the evidence of Donna Reid for a number of reasons. The defence emphasized that the Crown's case was almost entirely based on her evidence, and that her evidence was unreliable and untrue.

[133] The trial judge clearly stated the theory of the defence to the jury. He told them that the theory as given by defence counsel was that the appellant did not shoot Rutland and that the only evidence that he did came from Donna Reid.

[134] The trial judge had outlined the evidence of each witness to the jury. In particular, he reviewed the evidence of Donna Reid and Ricky Williams in detail. In his review, he pointed out a number of concerns respecting Reid's evidence. These were concerns which had already been voiced by counsel for the appellant in his closing submission. In particular, the trial judge brought the following matters affecting Reid's credibility to the attention of the jury:

(a) her long term use of cocaine on a daily basis;

(b) inconsistencies in her statements to the police;

(c) the effect of her heavy drug use on her, and her ability to accurately recollect past events and to relate past events to others;

(d) inconsistencies between her testimony and that of Steve Brideau;

(e) her criminal record.

[135] The appellant was represented at trial by experienced defence counsel. When asked by the court for comments, he responded that he had none to make in relation to the charge.

[136] I have reviewed the charge and am satisfied that it was detailed, fair and balanced, and the jury's attention was carefully drawn to all of the matters of concern with respect to the credibility of Crown witnesses generally and, in particularly, Donna Reid, which had been emphasized on the appellant's behalf. The absence of an objection to the charge by his counsel lends further comfort to this court in assessing its adequacy. In **Mullins-Johnson, supra**, it was said at p. 123:

> . . . In this regard, it should be noted that the appellant was represented at trial by experienced defence counsel, who made three objections to the charge to the jury but none on this subject. We consider the absence of such an objection to be a reflection of the fact that the trial judge's charge fairly captured the theory of the defence.

(iii) **Vetrovec** warning.

[137] The appellant submits that the trial judge erred in not giving a **Vetrovec** warning with respect to the evidence of Donna Reid. He was not asked to do so by the appellant's counsel, and following the charge, his counsel had no comment to make, as I have already noted.

[138] The development of the law respecting the testimony of persons convicted of a

felony and of accomplices was traced by Major, J. in **Brooks, supra**, at para. 62 **et seq.** As he noted in para. 68, the decision of Dickson, J. (later C.J.C.), in **R. v. Vetrovec** (1982), 67 C.C.C. (2d) 1, varied the law in several respects.

[139] In **R. v. Vetrovec, supra**, Dickson, J. in giving the judgment of the court said at p. 11:

> None of these arguments can justify a fixed and invariable rule regarding all accomplices. All that can be established is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witness. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of the law of evidence a blind and empty formalism. Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an "accomplice" no warning is necessary.

[140] It can be seen from this passage that the need to give a caution is not restricted to cases of accomplices, but arises whenever the trial judge considers that the credit of a witness is such that a caution should be given. It can also be seen that a great deal of discretion is necessarily left to the trial judge. In exercising this discretion, the trial judge will be governed by circumstances of the particular case and the particular witness. Decisions since **Vetrovec** have recognized that while the warning is discretionary, there are circumstances where the failure to give a warning can be an error at law.

[141] In **R. v. White** (1996), 108 C.C.C. (3d) 1 (Ont. C.A.) (affirmed 125 C.C.C. (3d) 385 (S.C.C.)), the appellants were convicted of first degree murder. They appealed to the

Ontario Court of Appeal on a number of grounds. Among them was that the trial judge did not adequately instruct the jury respecting the evidence of a Crown witness with an extensive criminal record who testified that the accuseds admitted to the killing. He was said to be an unsavoury witness. The trial judge cautioned the jury to look at the evidence of the unsavoury witness with great care and circumspection. His words were:

> . . . I want to give you this warning. You have seen and heard Corner in the witness box. You have observed his demeanour. You have heard what he had to say and what his attitude was and so on. He is not a witness of the most reputable character. *Because of that I want to tell you that you should look at his evidence with great caution and circumspection.* However, you are free to accept his evidence in whole or in part as you would the evidence of any other witnesses. But, in his case I think you should do so after you have taken into consideration what I have just said.

[142] The judge did not continue this caution by instructing the jury to act on the evidence of this witness only to the extent that it was supported by confirming independent evidence. In response to a submission that the warning was in this respect inadequate, the Ontario Court of Appeal said at p. 32:

> . . .
>
> The giving of a **Vetrovec** instruction is a matter for the discretion of the trial judge (**R. v. Vetrovec** (1982), 67 C.C.C. (2d) 1 at 11 and 17-18 (S.C.C.) and **R. v. Yanover and Gerol** (1985), 20 C.C.C. (3d) 300 at 321-26 (Ont. C.A.)) and so, necessarily, is the matter of its content. We note the similarity of the instruction in this case to that given in **Yanover**, which was upheld by this court.
>
> The instruction that was given made it clear to the jury that they should "look at [Corner's] evidence with great caution and circumspection." If the trial judge had gone further and instructed the jury in the manner the appellants now suggest, it would have been open to the trial judge to refer to more pieces of evidence than he did that tended to support Corner's credibility. They included the evidence: . . .
>
> As we have indicated, we do not think that, in all of the circumstances, the trial judge erred in the particular **Vetrovec** instruction which he gave.

[143] In **R. v. Glasgow** (1996), 110 C.C.C. (3d) 57 (Ont. C.A.), the accused was convicted by a jury of exercising control over a woman in such a manner as to show that he was aiding or compelling her to engage in prostitution. He was also convicted of assaulting her with a stun gun. The main Crown witnesses were the complainant and another prostitute. The trial judge alerted the jury to the importance of the assessment of credibility of these two witnesses. He was not asked to give and did not give a **Vetrovec** warning. Doherty, J.A., speaking for the majority of the court, pointed out that an appellate court must show deference when reviewing the exercise of a judge's discretion whether to give such a warning. As he put it at p. 60:

> . . . If a trial judge was not asked to give the warning, it is difficult to understand how the trial judge can be said to have erred in the exercise of her or his discretion . . .

[144] In **R. v. Bevan** (1993), 82 C.C.C. (3d) 310, the majority of the Supreme Court of Canada held that the failure to give a **Vetrovec** warning was, in the circumstances of that case, an error which justified an order for a new trial.

[145] Two accused were charged with murder. Important evidence for the Crown was given by two individuals with extensive criminal records, Dietrich and Belmont. The trial judge did not give a **Vetrovec** warning with respect to their evidence notwithstanding a request from the defence, concurred in by the Crown. Major, J., writing for the majority of the Supreme Court of Canada, reviewed the court's decision in **Vetrovec, supra**, as refined

in **R. v. Babinski** (1991), 67 C.C.C. (3d) 187 (S.C.C.) where it was held that if a **Vetrovec** warning is given, the trial judge should make some reference to any evidence capable of supporting the witness in question. He thus reiterated that both the giving of the warning and the reference to supporting evidence is discretionary. He then said at p. 326:

> The trial judge's decision on this type of question is similar in principle to the decisions often made by trial judges as to whether to admit cogent but prejudicial evidence. Where that kind of issue arises, the trial judge decides whether the probative value of the evidence outweighs its prejudicial effect. Because the trial judge is in the best position to assess the atmosphere of the trial and the effect that the evidence or instruction may have on a jury hearing the case, the trial judge's decision on these kinds of issues should not be lightly interfered with on appeal.

[146] Major, J. then concluded with respect to the case at hand at pp. 326 and 327:

> While under **Vetrovec** a caution to the jury is a matter of the trial judge's discretion and <u>is not required in all cases involving testimony of accomplices or accessories after the fact</u>, there are some cases in which the circumstances may be such that a **Vetrovec** caution must be given. The trial judge's discretion whether to give a **Vetrovec** warning should generally be given wide latitude by appellate courts. But in my respectful view, a **Vetrovec** caution was clearly required in this case with respect to the testimony of both Dietrich and Belmont.
>
> [emphasis added]

[147] Major, J. went on to point out that both witnesses had lengthy criminal records, had strong motivations to lie, and approached the police only when each perceived that some benefit, such as release from prison or dropping charges could be obtained for their testimony.

[148] In **R. v. Brooks, supra**, the accused was convicted following a jury trial of first degree murder. An appeal to the Ontario Court of Appeal raised a number of issues. A

new trial was granted on the ground that the trial judge erred in law in not warning the jury about the risk of accepting the evidence of jailhouse informants.

[149] The deceased was a 19 month old female. The only persons with access to her on the night of her death were her mother, and the accused who was living with the mother. The accused testified at the trial, denying any responsibility for the murder. The child's death had been caused by blunt trauma to the head. She had blood and vomit on her. There was evidence of bruising and redness in the genital area consistent with either diaper rash or the use of a blunt object. Sperm, not proved by DNA analysis to be that of the accused, was found in the genital area. Blood stains on the accused's track pants was of the same type as that of the deceased. Expert testimony on behalf of the Crown was that the blood's DNA signature matched the deceased and that the frequency of such a profile in Caucasians is one in 80 million. The mother denied causing injury to the child but did not assert that the accused had killed the child. Although not essential to the Crown's case against the accused, a very important part thereof was the testimony of two jailhouse informants who said that the accused had confessed to them that he had murdered the child. The trial judge was not asked by either the accused or the Crown to give a **Vetrovec** warning and did not give one.

[150] The Ontario Court of Appeal, by reasons of Laskin, J.A., Labrosse, J.A. concurring and Weiler, J.A. dissenting, ordered a new trial by reason of the failure to give the **Vetrovec** warning.

[151] An appeal by the Crown to the Supreme Court of Canada was allowed by the majority of a seven member court. Bastarache, J. (Gonthier and McLachlin, JJ. concurring) was of the opinion that there was no error of law on the part of the trial judge in failing to provide the **Vetrovec** warning. The trial judge had a discretion whether or not to give such a warning and there was a foundation for the exercise of that discretion having regard to the credibility of the witnesses in question, the importance of their evidence, and the failure of counsel for the accused to request a warning.

[152] Bastarache, J. referred to the great deference which appellate courts should show to findings of credibility made at trial and of the importance of taking into consideration the special position of the trier of fact in judging credibility. In examining the importance of the impugned evidence in the circumstances of this case, guilt or innocence did not turn on the acceptance of the evidence of the jailhouse informants. There was sufficient evidence to sustain a conviction even if their evidence had been completely rejected by the jury. Many of the facts in the accused's admissions to the informants were confirmed by independent evidence. The failure to request a warning must be considered in the context of trial tactics. The usual corollary of a **Vetrovec** warning is a reference by the trial judge to other evidence which supports the testimony of the unsavoury witnesses. Such reference could well be prejudicial to the accused. On balance, sound tactics might dictate not requesting the **Vetrovec** warning.

[153] Where a **Vetrovec** warning was not requested, the onus would rest upon the

appellant to show that the circumstances at trial so compelled the warning that the trial judge had no discretion not to give it.

[154] Major, J. (Iacobucci and Arbour, JJ. concurring) accepted that a **Vetrovec** warning is a matter of the trial judge's discretion and is not required in all cases of unsavoury witnesses. The two main relevant factors are the witnesses' credibility and the importance of the witnesses' testimony to the Crown's case. Where the circumstances require the giving of such a caution, failure to do so is an error of law.

[155] Major, J. concluded that the testimonies of the jailhouse informants were important but not crucial to the Crown's case against the accused. They were incriminating and relevant, although they did not reach the determinative level found by the court in **Bevan, supra**. He addressed the question whether in the circumstances an equivalent warning was given and concluded that the judge's charge taken in its entirety did not provide the clear, sharp warning to attract the attention of the jury to the risks of adopting, without more, the evidence of the jailhouse informants. At paras. 94 and 95, Major, J. said:

> [94] What then is a clear, sharp warning? It is obvious there is no particular language or formula. At a minimum, a proper **Vetrovec** warning must focus the jury's attention specifically on the inherently unreliable evidence. It should refer to the characteristics of the witness that bring the credibility of his or her evidence into serious question. It should plainly emphasize the dangers inherent in convicting an accused on the basis of such evidence unless confirmed by independent evidence.
>
> [95] The warning does not come without risk to the accused as it should also be accompanied by a reference to the evidence capable of providing independent confirmation of the unsavoury witness's testimony. The independent confirmation relates to other evidence that would support the credibility of the unsavoury witness. It does not mean reference to any other evidence supporting the Crown's case. It is not apparent what other evidence the trial judge could have referred to that would

have bolstered the evidence of Balogh and King.

[156] Major, J. referred to the **Kaufman Report, supra,** where it recommended that a **Vetrovec** warning should emphasize that jailhouse informants are almost invariably motivated by self-interest, and that historically such evidence has been shown to be untruthful and has produced miscarriages of justice. This report further recommended that the warning be given not only during the charge to the jury, but immediately before or after the evidence is tendered by the Crown. Major, J. pointed out that the law does not go this far. A proper **Vetrovec** warning suffices, but the trial judge in a particular case may find the extra caution helpful.

[157] Major, J. continued at para. 102 **et seq.** with a consideration of whether the failure to give the **Vetrovec** warning could be cured by s. 686(1)(b)(iii) of the **Criminal Code**. He concluded that on an examination of the evidence, it could not be said that the verdict would necessarily have been the same had the error not occurred. Major, J. and his concurring colleagues would dismiss the appeal.

[158] The impasse which emerged from the divided opinions of six judges was resolved by the reasons of Binnie, J. In his view, while the evidence of the jailhouse informants was so tainted as to have called for a **Vetrovec** warning, given the other evidence that must have been accepted by the jury there was no reasonable possibility that the verdict would have been different had the error of law not been made. Binnie, J. said at para. 128:

> [128] The courts have grappled for some years with a growing concern that a conviction based on the evidence of jailhouse informants has led in the past to some wrongful convictions and should be treated with special caution: **R. v. Frumusa** (1996), 112 C.C.C. (3d) 211 (Ont. C.A.); **R. v. Simmons** (1998), 105 O.A.C. 360 (C.A.); **Report of the Commission on Proceedings Involving Guy Paul Morin**, The Honourable Fred Kaufman, C.M., Q.C., 1998; Christopher Sherrin, "Jailhouse Informants, Part I: Problems with their Use" (1998), 40 C.L.Q. 106 and "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Option for Reform" (1998), 40 C.L.Q. 157; the **Report of the 1989-1990 Los Angeles Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County** (June 26, 1990). The most extensive review of this issue in Canada is the **Kaufman Report**, which concludes at p. 638:
>
>> The evidence at this Inquiry demonstrates the *inherent unreliability* of in-custody informer testimony, its contribution to miscarriage of justice and the substantial risk that the dangers may not be fully appreciated by the jury.

[159] In the result, the appeal was allowed and the conviction of first degree murder restored.

[160] While the emphasis in **Brooks, supra**, was of necessity upon the treatment of the testimony of jailhouse informants, it is clear that while great deference must be accorded to the decision of a trial judge not to give a **Vetrovec** warning, an appellate court has a duty to examine the record to determine whether or not that point was reached where it must be said that the failure to give the warning amounted to an error of law.

[161] Clearly, the purpose of a **Vetrovec** warning is to avoid the risk of a conviction based on unreliable evidence. The giving of the warning <u>and its content</u> are within the discretion of the trial judge. As with any discretion, it will not be interfered with unless it appears that it was wrongly exercised.

[162] The credibility of the witness and the importance of the witness's evidence in the case against the accused are the principal considerations in deciding whether a **Vetrovec** warning is required. The more important the witness is to the Crown's case, the greater the duty to make the warning. So, too, is the duty greater where the witness is more unsavoury. Other considerations, such as whether a warning is requested, the strength of other Crown evidence and the extent to which the trial judge has drawn the jury's attention to the weaknesses in the testimony at issue, are all relevant.

[163] Generally, Bastarache, J. would place the onus upon the appellant to show that the circumstances at the trial so compelled a warning that the trial judge effectively had no discretion in the matter. In **Glasgow, supra,** Doherty, J.A. was of the view that where no **Vetrovec** warning is requested by the accused, the onus is on the accused on appeal to show that such a warning is essential to a fair trial. In **Brooks, supra**, Bastarache, J. referred to that statement. He observed that the defence could have a clear tactical advantage in not requesting a **Vetrovec** warning.

[164] On the subject of a request for a warning, Binnie, J. said at para. 145:

> [145] While the Crown correctly concedes that lack of objection does not foreclose the right of the respondent to a proper instruction by the trial judge on the issue of jailhouse confessions, such failure usefully indicates the absence of prejudice in the professional opinion of experienced counsel who was retained to protect the interests of the accused and who was fully alive to the atmosphere and dynamics of the trial. The position taken by defence counsel in that sense is properly considered as a factor in the application of the curative provision.

[165] From all of this, I infer that the failure to request a **Vetrovec** warning is a matter to be taken into account either in the application of the curative provision of s. 686(1)(b)(iii) of the **Criminal Code** (Binnie, J.), or **inter alia** in considering whether the trial judge was entitled to take into account that the defence may be, as a matter of tactics, anxious to avoid a **Vetrovec** warning (Bastarache, J.). Clearly, however, the absence of a request by the defence of a **Vetrovec** warning does not absolve the trial judge of the responsibility to give it where it should be given (Major, J.).

[166] The overall objective is to guard against convicting innocent persons. There is a need for great caution in dealing with the evidence of jailhouse informants. Where the case against the accused is solely or materially based on the evidence of such witnesses, the warning is probably required and, if not given, a new trial will likely be ordered.

[167] In this case, Donna Reid was an important Crown witness. Donna Reid was not a jailhouse informant. She did not have an extensive criminal record. She was a drug addict with a minor record. It can be said that she had something to gain by assisting the police. Her actions following the shooting could render her liable to prosecution as an accessory after the fact. They still could. There is no evidence that she sought, or received, any benefits or favours. Before the decision in **Vetrovec**, a caution would have been required for evidence of an accessory after the fact. See **Paradis v. The Queen**, [1978] 1 S.C.R. 264; Re **Sellars**, [1980] 1 S.C.R. 527.

[168] The fact remains that no **Vetrovec** warning was required as a matter of law. Does this case fall within that class of cases where the circumstances require such a direction?

[169] As to Reid's credibility, the most serious concern arose out of her heavy cocaine use, particularly after the shooting. The position of the defence at the trial was that such made her an unreliable witness. In this respect, however, the trial judge specifically cautioned the jury that in assessing her evidence they should consider her ability to recall events accurately. The trial judge, not this court, was in the best position to assess whether Reid was such an unsavoury witness as to require a further caution.

[170] As to the second consideration, Reid's evidence could well be described as "central" to the Crown's case.

[171] Although the trial judge did not give a **Vetrovec** warning respecting Reid, he reviewed for the jury the various inconsistencies in her evidence. He cautioned the jury respecting witnesses with criminal records. As I have said, he referred to the fact that there was heavy drug use by Donna Reid, and that the jury might consider that fact in determining what effect alcohol or drug use might have on the witness and the witness's ability to accurately recollect past events and to relate past events to others.

[172] It will be recalled that in **Vetrovec, supra**, Dickson, J. said at p. 11:

> . . . If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an "accomplice" no warning is necessary.

[173] The trial judge in this case is an experienced trial judge. He had the opportunity to observe, as we have not had, the demeanor of Donna Reid. He was in the best position to determine the most appropriate caution, if any, to be given respecting her evidence. In my opinion, it has not been shown that the cautions he selected were inadequate.

[174] The **Vetrovec** warning was not requested by defence counsel. He had expressed concern regarding Reid's heavy cocaine use. A warning in that respect was given. Reid's evidence found support in a number of respects from the testimony of other witnesses. The fact that experienced defence counsel did not request the **Vetrovec** warning would not be lost upon the trial judge. He would be aware of the prejudice that might occur to the defence had he given the warning accompanied by references to other evidence upon which the jury might rely in support of the evidence of Reid.

[175] The jury was well furnished by the trial judge with the tools necessary to assess Reid's credibility.

[176] In all the circumstances, the appellant has not satisfied me that the trial judge improperly exercised his discretion not to give a **Vetrovec** warning with respect to Donna Reid's testimony.

[177] The appellant also challenges the adequacy of the **Vetrovec** warning given with

respect to the evidence of Ricky Williams, the jailhouse informant.

[178] The trial judge, in discussing Williams' testimony, reminded the jury of his extensive criminal record, including the nature of the offences, and of the fact that he was paid $12,000.00 cash for his testimony and relocated. He summarized the points made by appellant's counsel on cross-examination. He carefully explained to the jury the significance of criminal records, telling them to keep in mind the nature of the offence - i.e. whether it involved dishonesty - when the offence was committed and the number of offences. Then he said:

> It is the position of the Crown that you should believe the testimony of the witness, Mr. Williams. It is the position of the defence that the witness, Williams, because of his criminal record; his demeanour on the witness stand; the fact that he went to the police to make a deal and did so, to his benefit; and that the witness could have gotten the information from newspapers in the accused's cell as a result of legal communications that were there, that his evidence is not trustworthy.
>
> I say to you that because of the circumstances, you should look at the evidence of Mr. Williams very carefully, and you would be wise to look to other reliable evidence to support his testimony. However, it is you who will decide what, if any, of the testimony of Mr. Williams you will accept as being true.

[179] The appellant submits that the trial judge should also have instructed the jury that it may be appropriate to act on such testimony only to the extent that it was supported by confirmatory independent evidence. It is submitted that in effect the trial judge did not give a **Vetrovec** warning. The appellant says there was no confirmatory evidence of much of the specific statements made by Williams. However, there is no question there is the confirmatory evidence of Reid as to the commission of the crime itself. A further review of Reid's testimony at this point by the trial judge might well have been anything but helpful

to the appellant.

[180] As I have pointed out, not only does the trial judge have a discretion whether to give a **Vetrovec** warning, such discretion extends also to its content. There is no precise mandatory formula to be followed. In **White, supra**, the trial judge only told the jury to view the evidence of the witness with great caution and circumspection. He did not extend the caution by instructing the jury to act on the evidence only to the extent that it was supported by confirmatory independent evidence. The Ontario Court of Appeal found this direction to be sufficient.

[181] In **Bevan, supra**, Major, J. said at p. 326:

> While it is usually a corollary of the **Vetrovec** warning that the trial judge make some reference to evidence that the jury may consider supportive of the impugned evidence, in some cases part or all of the supporting evidence may be extremely prejudicial to the accused, such that to draw the jury's attention to that evidence in tandem with a **Vetrovec** warning could in some circumstances be unfair to the accused.
>
> I do not agree that the only remedy for this problem lies in not giving a **Vetrovec** warning. Instead, the appropriate remedy in those circumstances lies with the discretion of the trial judge to decide in the particular case (perhaps following argument) if a **Vetrovec** warning is to be given, and, if so, whether it should or should not be accompanied by a direction as to what other specific evidence the jury might conclude is supportive of the impugned evidence.

[182] I have already touched upon this point and the fact that it was clearly recognized and discussed by the judges in the Supreme Court of Canada in **R. v. Brooks, supra**.

[183] No issue was taken by the appellant's counsel at trial to the content of the

warning given respecting the evidence of Williams. As in the case of Reid, I am of the view that the trial judge afforded the appellant adequate safeguards with respect to this testimony. He did give a clear, sharp warning respecting it. It was accompanied by a recital of the weaknesses in Williams' testimony and the suggestion that the jury look to other evidence to support it. The trial judge's decision not to pick out and review that evidence for the jury was favourable to the appellant. In my opinion, the trial judge addressed the danger of an unfair trial resulting from misuse of the testimony of an unsavoury witness. He gave a clear sharp warning such as described by Major, J. in **Brooks, supra**, at para. 94. I find no error in his charge in this respect.

[184] I would dismiss this ground of appeal.

(iv) counsel citing law to the jury;

[185] The appellant complains that the trial judge erred in directing counsel not to cite law to the jury in their closing addresses. This issue came about as a result of the Crown counsel's comments to the judge on how the jury should be instructed on intent and its relation to cocaine consumption. Neither the Crown nor defence counsel suggested to the trial judge that they wished to address the jury on the law. The Crown simply indicated it wished to be on the same "wave length as the judge". The judge in response told counsel that he would address the jury on the law of intent. He encouraged counsel to argue facts to the jury. He told counsel:

And with respect, it seems to me that your position is to argue the facts and not the law. If you want to argue the law, then you can argue the law before me, but not before the jury. And it's my responsibility to instruct the jury on what the law is. So you can allude to all of these facts. All of the facts are in evidence. But to argue what the effect of those facts are on the legal issue, in this case specifically the intent of the accused, is an area in which I should instruct and which counsel shouldn't argue.

[186] The trial judge had earlier told counsel they could refer to the law in general terms:

THE COURT Well, with respect, I don't think it's within the purview of your position as the Crown in this case to presume to tell the jury what the law is. You can argue, and I say that there are general terms that we all - that counsel use in addressing juries, presumption of innocence, reasonable doubt, and those type of things. But to direct the jury specifically what the law is in a particular area - and there is law in this area and it's a question of interpreting what the law is. And it seems to me that you can argue the facts without getting into what the law is with respect to those facts.

[187] In **R. v. T.E.M.** (1996), 110 C.C.C. (3d) 179 (Alta. C.A.), it was said at p. 182:

Counsel for the Crown contends, as do I, that the judge, and not Crown counsel, properly should warn the jury. Indeed, as a general rule, counsel should never advise the jury about the law, for that is the office of the judge . . .

[188] In **R. v. Knipple** (1985), O.J. No. 174 (Ont. C.A.), the court took a slightly less strong stand. Houlden, J.A. said at p. 2 referring to general instructions given by the judge to counsel regarding their address to the jury:

. . . In order to make a summing up intelligible and understandable for the jury, counsel have the right to discuss relevant principles of law and the principle of 'reasonable doubt'. While it would be proper for a trial judge to give directions to counsel on some particular matter that he believes might cause difficulty in their addresses, he should not give general instructions such as were given in this case.

[189] I would also refer to **R. v. Cashin** (1981), 49 N.S.R. (2d) 653 (N.S.S.C.A.D.) at

p. 661.

[190] In my opinion, the trial judge made no error in the manner in which he directed counsel in this case with respect to discussing law before the jury.

[191] I would dismiss this ground of appeal.

GENERAL:

[192] Although the ground of unreasonable verdict was not advanced, counsel commenced his oral argument with the submission that the verdict, was in fact, unreasonable. Even though this ground was not raised, I have nevertheless reviewed the transcript and considered and reweighed to a certain extent the evidence. On the basis of this review, I am satisfied that the jury, properly instructed as it was, could reasonably have reached the verdict that it did.

[193] I would dismiss the appeal.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.