C.A.C. No. 02943

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. MacNeil, 1995 NSCA 10

Clarke, C.J.N.S.; Hart and Jones, JJ.A.

BETWEEN:

FREEMAN DANIEL MacNEIL Appellant	Kevin G. Coady and Marguerite J. MacNeil for the Appellant
- and -	Dana W. Giovannetti for the Respondent
HER MAJESTY THE QUEEN Respondent	Appeal Heard: January 10th, 1995
	Judgment Delivered: February 16, 1995

THE COURT: Appeals from conviction and sentence dismissed per reasons for judgment of Hart, J.A.: Clarke, C.J.N.S. and Jones, J.A. concurring.

HART, J.A.:

On October 8th, 1993, Freeman Daniel MacNeil was convicted of the following offences at the conclusion of a 23-day jury trial presided over by Mr. Justice Gruchy:

Count No. 1 - That on or about May 7th, 1992, at Sydney River, County of Cape Breton (in McDonald's Restaurant) he did without lawful authority confine Donna Alecia Warren contrary to s. 279(2) of the Criminal Code;

Count No. 2 - At the same time and place he committed first degree murder on the person of Neil Francis Burroughs;

Count No. 3 - At the same time and place he committed second degree murder on the person of James Patrick Fagan (in the indictment he was charged with first degree murder);

Count No. 4 - At the same time and place he committed robbery of a sum of money from Donna Alecia Warren while armed with a gun.

For the unlawful confinement of Donna Warren he was sentenced to imprisonment for seven years. For the first degree murder of Burroughs he was sentenced to life imprisonment without eligibility for parole for 25 years. For the second degree murder of Fagan he was sentenced to life imprisonment and on the recommendation of the jury no eligibility for parole for 25 years and for the armed robbery of Warren to imprisonment for ten years.

The appellant now appeals these convictions alleging the improper admission of his confessions and improper directions given to the jury on matters of evidence and law. He also appeals from the sentence of life imprisonment without eligibility for parole for 25 years for the second degree murder of Fagan on the ground that it was harsh and excessive. Before dealing with these grounds of appeal, however, I will set forth the facts established at the trial.

FACTS

On May 7th, 1992, Freeman Daniel MacNeil was 23 years of age. He was the youngest of five children being the only boy. He had had a relatively normal family upbringing with the exception that his father had committed suicide when he was still a young boy. He had a good relationship with his mother and sisters and was living at home. According to the trial judge he was a clean cut, neat, tidy and intelligent young man who had obtained his Grade 12 and attended one year at Nova Scotia Teachers' College. At the time of the offence he was unemployed and had been associating with his co-accused in what appeared essentially to be a worthless type of lifestyle. He had been employed from time to time and at one period was a security guard. He did not abuse alcohol or drugs and prided himself on his physical conditioning and qualifications in martial arts.

For two or three weeks before the McDonald murders he and two of his friends, Derek Wood who worked at McDonald's and Darren Muise, had been planning a robbery of the restaurant.

MacNeil played a dominant part in the formulation of these plans. He had a car available to him which was owned by his girlfriend's mother and also a handgun which he obtained from the dresser of his girlfriend's stepfather. MacNeil practiced shooting the handgun about a week before at a beach and he accumulated a supply of face masks, extra clothing, ropes and a wooden club which were all kept in the trunk of his car.

MacNeil, Wood and Muise tried to entice Greg Lawrence into participating in the robbery with them. His job would have been to guard the exit door and if those inside could not maintain control he was to knock unconscious anyone who tried to escape through the door. This was to be done with a club which would be provided. For his participation he was promised $20,000 of the anticipated $80,000 to $200,000 that they expected to obtain from the safe. Lawrence was advised that they would gain access to the restaurant through

a basement door which would be left open by Wood when closing time arrived. Mr. Lawrence refused to participate.

There were further discussions about the proposed robbery when MacNeil, Wood, Muise, Lawrence, Lawrence's girlfriend Christine Borden and MacNeil's girlfriend Michelle Sharpe were present. Apparently Muise needed money to go to Vancouver to work with the Hell's Angels to replace a friend named Scott who had just been arrested for trafficking. Derek Wood told the others that he had watched the managers at McDonald's opening the safe and he was pretty sure that he knew the combination. He would unlock the door and leave it open when everybody went home and they could get back in and get the money. They would then be able to escape in MacNeil's car. The robbery was planned for Wednesday night, the 6th of May, 1992.

MacNeil picked up Wood at 7:30 at his home and drove him to work. On the way they stopped at the Woolco Plaza and got the number of the pay phone in front of Tim Horton's. It was arranged that MacNeil and Muise would be at the pay phone around quarter to one and that Wood would call and let them know when the restaurant was clear.

About 12:30 MacNeil picked up Muise and took him to Tim Horton's to await the call. The phone did not ring but at ten to one Derek Wood arrived in the parking lot on foot. They then drove to a dirt road across from the bypass near McDonald's and parked the car. They got out of the car, changed jackets and MacNeil grabbed a piece of a shovel handle from the trunk. They walked to the restaurant and went inside through the metal door in the basement that had been left open by Wood. They got to the end of the storage room when two girls came walking around the corner and asked what was going on. Wood then fired a revolver and shot Arleen MacNeil in the head. She fell to the floor and blood was coming from her mouth. Donna Warren crouched down on the floor crying. Wood said "Stay here and watch them" and he ran upstairs. While MacNeil and Warren were there Muise pulled

a knife and told Warren not to move or he would slit her throat. Warren was the employee who knew the combination to the safe. Two more gunshots were heard from upstairs and Wood came down and grabbed Warren by the arm and demanded that she come upstairs. When she didn't move he said "come upstairs bitch". He pointed the gun at her and took her upstairs. Muise then followed them upstairs with a blue kit bag and MacNeil stayed by Arleen who was lying there with blood still pouring out of her mouth. Shortly thereafter MacNeil went upstairs as well and heard two more shots being fired. When he got up the stairs Neil Francis Burroughs was on his hands and knees and pleading for help. His throat was cut and there was blood everywhere. Muise was standing in front of him saying that this guy won't die "Derek had shot him, I cut his throat and he still won't die". Muise hit him six to eight times with the knife bending the knife while trying to stab him in the back of the neck. MacNeil then hit him with the wooden club and then Muise came back from the other room with the gun and said "You'll fuckin' die now" and shot him twice in the head from about one and a half feet. Burroughs then fell down on his face and did not move.

At this time Wood came out of the other room with the bag and said it was time for them to get out of there.

They had thought that everybody was dead although, in fact, Arleen MacNeil was not and they started to leave. As they exited the back door James Patrick Fagan was approaching. MacNeil took the gun from Muise and shot him in the head and he fell into the doorway. They then ran to the car and after MacNeil threw away his stick because it had blood on it they drove away.

As they drove away Wood realized he had left his bag with his name tag in it holding open the door and wanted to go back to retrieve it. He also wanted to make sure that the other girl downstairs was dead. They drove back to McDonald's but could see headlights in the parking lot so just kept going. It was agreed to drop Wood off so he could call the

police and create an alibi for himself as a result of his bag being left in the downstairs door by claiming that he was outside having a smoke when he heard some shots. He would say he was scared and ran to a nearby convenience store and called the R.C.M.P. from there.

MacNeil and Muise then drove to MacNeil's place where they changed their clothes because they were covered in blood and the next day they were burned. While at MacNeil's house they opened the cash box recovered from McDonald's which contained only about $1700 some of which was given to MacNeil and the rest taken by Muise. They then headed over to Michelle's house and on the way disposed of the cash box, Darren's shoes and two knives after fingerprints had been wiped from them. Muise was taken to his home but he did not have his keys so he hid the money back of his house and MacNeil drove him downtown and left him at a place where his father could later pick him up. MacNeil then headed for Michelle's house to perfect his alibi.

Shortly after 1 a.m. on May 7th a taxi driver had driven James Fagan to the rear door of McDonald's Restaurant and as he was driving away he heard something that sounded like a firecracker. He looked back and saw two people running. He drove to the rear door and saw Fagan's body propping the door open. He then radioed for police and ambulance assistance.

Another taxi driver heard the call for help and went to the scene. He found that Fagan was still alive but bleeding from the forehead. He heard a phone ringing and proceeded into the restaurant and found Donna Warren in a main floor office containing a safe. She was still alive but seriously injured. He also found the apparently dead body of Neil Burroughs in the main floor kitchen area.

The Sydney R.C.M.P. Detachment Communications Officer, Stanley B. Jesty, received the call from the taxi dispatcher at 1:09 a.m. He called the restaurant and received no answer. This was apparently the ringing phone that the taxi driver heard when he entered

the building. At 1:20 a.m. Jesty received a call from a person identifying himself as Derek Wood. The caller said that he was at King's Convenience Store which was located only a short distance from the restaurant. Wood told Jesty that he had been outside McDonald's with the doors open having a smoke when he heard a bang inside. Jesty took his name and other particulars and suggested that he go home and they would contract him tomorrow.

Corporal Kevin Cleary and Constable Henry Jantzen were the first police officers to arrive. They entered through the rear door with guns drawn and discovered Fagan, Burroughs and Warren on the main floor and later located Arleen MacNeil who was alive at the foot of the stairs connecting the basement and the main floor. There was blood everywhere. The victims were all McDonald's employees. Fagan and Arleen MacNeil were transported by ambulance to the hospital where Fagan died a few hours later and MacNeil survived with serious permanent disabilities. Burroughs and Warren died at the scene. Warren had been shot twice in the head at close range. Fagan was shot once, the bullet entering his forehead from close range. Burroughs received three gunshot wounds in the head, one a contact wound and the other two fired from close range. He also sustained a cutting and stabbing injury to his neck which was potentially lethal but survivable with appropriate care. In addition there was blunt trauma injury to the supra-orbital ridge and bridge of the nose. This injury is consistent with being inflicted by a wooden rounded object such as the club that MacNeil carried and would have had an additive effect to the other injuries. Arleen MacNeil was shot once at close range a bullet entering to the left of her nose.

All gunshot injuries were consistent with a low velocity weapon of small calibre such as a .22 calibre gun like the one in possession of MacNeil.

The police noted that the safe door was open and cash drawers and change were strewn about the place. The actual amount of money which had been removed from the safe

was a little over $2,000.

The restaurant manager testified that Donna Warren had been in charge of the 4-11:30 p.m. shift on May 6th and would have been the only one who knew the combination of the safe. The manager also indicated that Derek Wood had been working at the restaurant for about two months and worked on May 6th from about 8:30 to 12:01 a.m. when he punched out. Freeman MacNeil had also worked there for six months in 1987. All employees would know that the restaurant is occupied by staff at all times. Donna Warren punched out at 12:50 a.m., Arleen MacNeil at 12:52 a.m. and Burroughs, the cleaner, punched in at 11:45 p.m.

A good many of the facts stated here come from statements given to the police by the appellant. In those statements he attempts to minimize his role in the whole affair and places greater responsibility on his two co-accused. He did not testify at his trial. The evidence of other witnesses who testified about the planning and preparations for the robbery showed him to be a leader rather than a follower in the group. The jury could well have concluded that MacNeil, Wood and Muise intended the acts which they each carried out and intended that no witnesses would be alive to identify them after the robbery.

FIRST GROUND OF APPEAL - ADMISSIBILITY OF STATEMENTS

The first ground of appeal is as follows:

> " THAT the Learned Trial Judge erred in admitting into evidence statements attributed to the Appellant on May 15, 1992, May 16, 1992, and May 18, 1992, and in particular that he erred in finding that these statements were made freely and voluntarily, were the product of an operating mind, and were not obtained in breach of the Appellant's rights as guaranteed by the *Canadian Charter of Rights and Freedoms*, in particular Section 10(b), Section 7, and Section 11."

During the course of the investigation of the MacDonald murders the appellant gave several exculpatory statements to the police when he was considered merely a witness

and later gave inculpatory statements after becoming a suspect. The appellant claims that the inculpatory statements should not have been admitted in evidence by the trial judge since the tactics of the police in obtaining those statements rendered them involuntary and deprived him of his right to remain silent. A long *voir dire* was conducted in which the entire relationship between the appellant and the police was exhaustively reviewed after which the trial judge found some of the statements to be inadmissible and others to be properly admissible at the trial.

On May 7th at noon Constable Lambe took a statement from MacNeil at his home. The police had been advised by Derek Wood that he had been driven to work by MacNeil and they wished to confirm Mr. Wood's movements. The statement is as follows:

> " Statement in relation to the shootings at MacDonald's in Sydney River.
>
> About 12 noon yesterday Derek Woods called me and asked if I could take him to work at 8 p.m. I told him I was going to my girlfriends and to call me when he was ready. Around 7:30 he called and at approximately 8 p.m. I picked him up and took him to work. I dropped him off at about 8:15 p.m. He was going to call me if he needed a ride home. I was supposed to be at my house but I ended up staying at my girlfriends Michele Sharpe 327 EAST BROADWAY 562-8187 as she had a bad asthma attack. I left my girlfriends about 1:30 a.m. today to run home to get her asthma puffer as she used up the one she had. I got home, 10 Beaton Ave. at about 2 a.m. then back here at 2:30. I drove down through town Prince St., Charlotte then out Alexander to the highway. I came back the highway and in George St. On my way out I picked up Darren Muise, Patnic Ave. at Tim Horton's, Charlotte St. and dropped him off at Sanitary Dairy on George St. I dropped him off on the way back from home.
>
> Q. When did you last hear from Derek.
>
> A. When I dropped him off at work.
>
> Q. Did Derek Woods call looking for you?
>
> A. Ah he called my house but I was at my girlfriends.
>
> Q. What time was that?

A. My mother said it was around 1: a.m.

Q. What is your mothers name?

A. Edie MacNeil.

Q. How well do you know Derek?

A. Fairly well. He has been to my house a dozen of times.

Q. Is Derek involved in drugs?

A. Not that I know of.

Q. Where does he hang around?

A. At Pockets with some of the guys there.

Q. Is there anything else you wish to say. Are you aware Derek was around your place late last night.

A. Not that I know of. My mother never mentioned it. If he can get a ride he'll take it. He stays with his brother DAVE WOODS (21 yrs.) Dave used to work at a building supply place but he just got laid of.

Q. Do you know if Derek has or collects guns.

A. Not that I am aware of. He was in the Militia but he quit while he was in grade 12."

This statement was taken merely as a witness statement and no warning or Charter rights were given. Constable Lambe said that MacNeil at the time was very relaxed, calm and was not a suspect.

This first statement was found to be admissible by the trial judge without any objection from the defence.

On May 13th, 1992, at 7:15 p.m. Constables Gillis and MacDonald arrived at the home of Michele Sharpe to obtain a statement and noticed that MacNeil was present. Constable Gillis decided to question him about his whereabouts on the night of the 6th and 7th of May and he agreed to give a statement. Constable Gillis says that MacNeil had no

difficulty in talking to him and that he was not a suspect at all. No warning was considered necessary. Constable Gillis merely wanted to find out the exact route that he had followed when he took Wood to work that night and later when he picked up Muise.

The statement was really a repeat of his earlier statement with some more detail about the route followed when taking Wood to work and Muise home. At the end of the taking of the statement Constable Gillis asked MacNeil whether he would be willing to take a polygraph test to confirm the information that he had given and MacNeil readily agreed. According to Constable Gillis he seemed to be very calm, was not troubled at all and had no difficulty answering the questions. When he noted that he had seen police and ambulances near MacDonald's during his travels he said that he assumed there had been a car accident. Constable Gillis concluded from all appearances that he seemed to be giving a forthright account of the route he had taken and what he knew about the events of that evening.

This statement was also held to be voluntary and admissible by the trial judge and was admitted without objection from the defence.

On May 14th Constable Gillis contacted MacNeil and asked him whether he would be prepared to come in for a polygraph test as requested and MacNeil said that he was busy that night but would be prepared to come in the following morning. Early the next morning Constable Gillis picked up MacNeil and drove him to the Detachment at North Sydney where Sergeant Scharf was to administer the polygraph test.

The appellant arrived at the North Sydney Detachment at 9:00 a.m. on May 15th and was told by Sergeant Scharf that the test was completely voluntary. He was advised that he did not have to take the test and that he was free to leave at any time. He was also given the standard police warning and his rights to counsel in accordance with regular practice in the taking of polygraph statements. The entire test and the questioning of the appellant afterwards was recorded on video and audio tapes and transcripts of the audio were made for

use by the court. The trial judge reviewed the video tapes and had the transcripts available to him during the *voir dire* so that he would be familiar with all contact between the police and MacNeil prior to the taking of later inculpatory statements. The Crown was not proposing that the evidence of the polygraph test be admitted but did claim that the subsequent questioning by Sergeant Scharf produced answers which were admissible. The test itself lasted from 9:00 to 11:40. After the test results had been analyzed by Sergeant Scharf MacNeil was advised that he had failed the test. Sergeant Scharf once again gave Mr. MacNeil the appropriate cautions and advised him of his right to counsel. He then proceeded to question the appellant further.

The trial judge ruled that this interrogation was not separated sufficiently from the polygraph test and that the appellant might still have believed that his answers could not be used in evidence. The statement was therefore excluded.

The trial judge did, however, have a chance to observe the demeanour of the appellant during this period and was satisfied that he was voluntarily co-operating with the police and that no improper tactics were used to obtain that co-operation.

To the police he was still not a suspect but they were beginning to feel that he knew more about the situation than he was prepared to admit at that time. Constable Gillis had been monitoring what was taking place in the polygraph room on a screen in an adjacent office and when Sergeant Scharf had completed his questioning Gillis took MacNeil to another interview room where he and Constable Wayne MacDonald continued to question him about his involvement. They could not continue to use the polygraph room where the interview could have been taped on video because it was needed for other interviews so they conducted their questioning and the taking of a further statement by writing down the questions and answers and having the document signed by MacNeil. The usual cautions and the right to counsel were given and this session lasted from 1:42 to 4:23 p.m.

Once again the statement was exculpatory but it began to cast suspicion on Wood and Muise and indicated that MacNeil may have had some knowledge of a planned robbery and a possible connection with the disposal of some of the evidence.

Constable Gillis indicates that MacNeil appeared to be calm and completely in control of himself when answering questions. He was asked whether he wanted to call a lawyer and he said "No". No promises or threats were made during the interview and when the interview was completed Constable Gillis asked MacNeil whether he was hungry and wanted some food and upon receiving an affirmative answer he went to the Kentucky Fried Chicken in North Sydney to get food for himself, MacDonald and MacNeil.

The statement taken during this period was admitted by the trial judge although the defence had taken objection to its admission as well as the admission of all subsequent statements made by MacNeil.

At 4:25 p.m. Sergeant Scharf went into the interview room for a further discussion with MacNeil. He told him that information was coming in from other sources and that he wanted MacNeil to be totally honest with him. MacNeil expressed fear for the safety of his mother and girlfriend and Sergeant Scharf was able to tell him that this had already been attended to. This interview lasted only for 12 minutes and at the end Sergeant Scharf believed that MacNeil had been totally honest with him and that his only involvement was the fact that he had overheard plans for a robbery and had picked up Darren Muise after the robbery and that Muise had thrown a cash box in a brook.

Sergeant Scharf had not administered any warning or reminded MacNeil of his rights during this interview and the trial judge ruled that any evidence given was inadmissible.

At 4:47 Constable Gillis returned with the food and entered the interview room. At that point Constable MacDonald was writing down the statement that MacNeil had been

taking from the appellant and the food was simply left there. At 6:53 he was asked if he wanted to eat and said "No." At this point none of them had eaten.

The statement that was being reduced to writing at this point was once again exculpatory. Knowledge of planning by Wood and Muise for the robbery which was to take place on May 6th and the previous use of the gun was admitted. It was suggested there was an unidentified third person involved in the robbery and murders and that MacNeil was involved in the disposal of some of the evidence.

This statement was admitted by the trial judge.

Between 6:55 and 7:14 p.m. Constable Gillis put a few more questions to MacNeil and the answers once again were exculpatory and this statement was also admitted. Since MacNeil had indicated that he had driven Muise home and that Muise had disposed of some articles he was asked to do a re-enactment of that drive and he agreed to do so.

The police officers said that at this time he was answering questions forthrightly and there did not appear to be anything wrong with him.

The re-enactment was video-taped by Constable Fraser who travelled in the car with MacNeil and Constables Gillis and MacDonald. The trial judge had a chance to observe the appellant's condition during this period of approximately an hour and a half. The appellant was given the appropriate warnings and his right to counsel before embarking on the re-enactment and stated that his participation was free and voluntary.

According to the trial judge he appeared to be fully co-operating with the police at this stage and this re-enactment was ruled admissible.

When they got back to the North Sydney Detachment after the re-enactment Constable MacDonald asked MacNeil if he would volunteer to turn over his jacket and sneakers and he did. At the same time Constable MacDonald got the food out of the kitchen that they had purchased earlier and MacNeil began to eat.

After they returned to the Detachment MacNeil was advised that he would not be allowed to leave and he asked if he could call a lawyer or Mrs. Chaisson, his girlfriend's mother. This was at 9:35 on May 15th, a Friday night. Constable MacDonald made efforts to contact a lawyer for him and eventually he did talk with Arthur Mollon, a lawyer from the Legal Aid Department in Sydney. Mr. Mollon agreed to come to the Detachment and while everyone was waiting for his arrival MacNeil ate his supper and had a glass of water and remained in the interview room mostly by himself.

When Mr. Mollon arrived Constable Gillis told him all of the information about his client that they had in their possession and at 11:00 the lawyer went into the interview room to talk with Mr. MacNeil in complete privacy. The meeting lasted until 11:39 and then Mr. Mollon had some coffee and donuts with the police officers in the lunch room.

At 12:30 a.m. Constable MacDonald took MacNeil to the lock-up in the North Sydney Detachment. By this time he had been arrested as an accessory to the disposal of some of the evidence. He was observed during the night and was found to be sleeping from time to time. During the early morning hours his mother and sister visited him in the cell and it was not until 8:59 a.m. on the morning of May 16th that Constable Gillis had further contact with MacNeil.

During the early morning hours of May 16th Constable Gillis was observing on the monitor an interview being conducted with Derek Wood in the polygraph room. Wood gave a full confession which involved both MacNeil and Muise in the robbery. The Constable made notes of 30 pieces of information which were obtained from Wood during that interview and decided to question MacNeil further. At 8:59 MacNeil was brought to the interview room and given the appropriate warnings and his right to counsel. MacNeil requested counsel and as a result he was taken back to the cell block area where he phoned his lawyer in private. Arthur Mollon advised him that he now had a conflict of interest and

that he would send another lawyer over to speak to him. MacNeil was then returned to the cells to await the arrival of counsel.

At 9:46 Mr. David Ryan arrived and advised that he was now acting for MacNeil. He was shown to the cell area where he and his client had a conference.

Before Mr. Ryan visited MacNeil Constable Gillis briefed him on the statements that had already been taken from MacNeil and agreed to have photocopies of them made for Mr. Ryan's use.

At 11:44 Mr. Ryan completed his interview and left. He said he was going to pick up shoes and a jacket for MacNeil and would be back with them shortly. No attempt was made to interview MacNeil at this time. Mr. Ryan arrived back at 12:30 and after a further interview with his client he left at 12:44.

At 12:55 MacNeil was brought back to the interview room and Constables Gillis and MacDonald attempted to get a further statement from him. MacNeil advised them that he was not going to talk further as his lawyer had advised him not to give a statement and not to talk. He said this several times.

Constable Gillis realized that MacNeil was not going to say anything so he referred to the notes that he had made while monitoring Wood's interview and decided to inform MacNeil of the things that he had learned. He told MacNeil that they had recovered a gun from his girlfriend's trailer; that they had information that he was responsible for shooting Jimmy Fagan; that he, MacNeil, had wanted to go downstairs after Arleen but there was no time; that they left in MacNeil's car; that Darren was wearing a Halloween mask; that Derek killed Donna and then gave the gun to Darren who finally gave it to MacNeil.

Constable Gillis continued that they were aware that Darren had a knife with him; that the cash box and bag were thrown in the back of Freeman's car; that there was money in a plastic bag in the frog pond at the end of the bog; that they had burnt their clothing and

Wood had noticed a taxi leaving; that he did not know Jimmy was coming to work; that Wood believed he had the combination numbers to the safe or some of them; he got off work at 12:20 and gave Arleen a hand doing stock after he finished work; that Wood later found MacNeil and Muise and they parked across from the by-pass and came in through the metal door and met Donna and Arleen; that Wood shot Arleen and then went upstairs and shot Neil; that Wood went down to get Donna and took her upstairs to open the safe and then he shot her.

Constable Gillis further advised MacNeil that Wood left his kit bag in the door; that Darren's share of the money, around $400 was in the frog pond; that Wood did not get any of the money and that MacNeil was supposed to have $1700 in total; that the gun came from Michele Sharp's stepfather and that all three had planned it together.

As each of these items of information was revealed to MacNeil he did not respond except to say that he was not going to say anything because his lawyer had told him not to. Relating these various points took about an hour and a half and Constable Gillis testified that at 2:30 the following took place:

> " A. I mentioned to him, at the end, I said that I thought he was a low life and I said, "You're a big, strapping lad, you're a couple hundred pounds, you're over six feet tall." I said, "You have a black belt in Tae Kwan-Do," or something like that, "and you go around with ...carrying knives, you know, with knives and guns and beating people, young girls and whatever." I was, thought I'd get a response from that way perhaps. And I mentioned I thought he was a coward and that he probably felt like jumping over the table after me, but I said he was probably too much of a coward for that too.
>
> Q. Was there any response from him to that?
>
> A. Not a thing.
>
> Q. What tone of voice did you use when you said that to him?
>
> A. I didn't ...Much like I'm talking right now.

Q. You had been up, at that time, for how long, yourself? You had been awake for how long?

A. Quite a number of hours. I was up quite awhile.

Q. How long?

A. All told, by the time I got back home, I think it was somewhere in the vicinity of 37 hours.

Q. All right. So when you said this to ... Is there anything else that you said to Mr. MacNeil? You say you called him a low life; how did you do that, what did you say?

A. I just called him ... I said ... I told him what I thought of him.

Q. What did you say to him?

A. Just I ... I think you're a low life, and I told him he could probably walk under a snake wearing a top hat.

Q. Was there any response from Mr. MacNeil at this point.

A. No.

Q. Did you continue to use the same tone of voice you've described in doing, telling him . . .

A. I didn't shout at him, no. I did not shout at him.

Q. All right. Did you notice any response from him?

A. No.

Q. Emotionally?

A. No. I . . .

Q. All right.

A. Wayne MacDonald interjected right about that time. I guess he realized we were getting nowhere, and I was getting a little short, and just . . . he made some mention, "Well, that's it."

Q. So it was terminated at that time?

A. That was it, took him back to his cell.

Q. And what time was that, Constable Gillis?

A. 14:30, 2:30 in the afternoon.

Q. And who took him back to his cell, was it your or . . .

A. Myself and Wayne.

Q. You and ... and how did Mr. MacNeil appear to you when he was being taken back to his cell at that time, as far as his emotional state at that time?

A. I believe what I was saying to him was probably getting to him. He certainly had to think about it, because a lot more . . . I had learned a lot more information from what he was giving us and I wanted him to know that.

THE COURT: How did he appear:

THE WITNESS: Well, he certainly wasn't in a good mood. He was kind of dejected, I guess, or whatever, the best I can describe him."

At 3:30 that afternoon Constable Patrick Murphy and Corporal Kevin Cleary conducted a further interview with MacNeil in the interview room. They had not met MacNeil before but had been briefed on the investigation and had seen a statement given to the police by Derek Wood.

The two officers introduced themselves to MacNeil as Kevin Cleary and Pat Murphy, showed him their identification and shook his hand. They advised him that the interview would be conducted on a first name basis but firstly there were some things they had to do which were required by law.

Corporal Cleary went through the procedure of giving the standard right to counsel, police caution and secondary police caution and when asked whether these were understood MacNeil nodded his head affirmatively. He explained that he used to work for a security company and used to give these warnings himself. When he was asked whether he wished to contact a lawyer he indicated that he did and explained that he had had a guy

last night and a different guy this morning. He was then permitted to make a call in privacy to his lawyer and when he returned to the interview room he was asked if he was happy with counsel and he replied that he was.

Corporal Cleary then determined that MacNeil was not aware of all of the charges in connection with this matter and Constable Murphy read off the six charges alleged against Mr. MacNeil. Constable Murphy indicated that at that time MacNeil did not seem overly nervous, was well-groomed, clean cut, very polite, very courteous, well spoken, easy to talk to, athletic looking and gave a good appearance that the Constable had not expected.

At this point Corporal Cleary whose chair was adjacent to MacNeil moved in very close to him. He came quickly to the point and as was described by Constable Pat Murphy his words to Freeman MacNeil were:

> " A. ..."We've had three funerals and there may be one more," and he asked, "Are you proud of that?" Freeman MacNeil said, "No," and shook his head very vigorously.
>
> Q. What tone of voice was Corporal Cleary using when he said that?
>
> A. Corporal Cleary then and throughout the whole interview used ...and as I did myself, a very low, I'd describe it as a compassionate sort of tone. That had been our plan before we'd gone in there. I suppose I would describe it as softly, he spoke softly.
>
> Q. And you say that Mr. MacNeil shook his head vigorously?
>
> A. Yes.
>
> Q. After Corporal Cleary described the deaths and then there could be one more?
>
> A. Yes.
>
> Q. What do you recall next?
>
> A. I recall that and I had made note the next day that it appeared to me that Mr. MacNeil was holding back tears; that he was on the verge of crying. Corporal Cleary continued

speaking to him, told him it was very important for him to tell us what had occurred. At this point in time and perhaps two or three more occasions right in this vicinity of time, Freeman MacNeil advised that he had been advised to say nothing. Corporal Cleary and I both addressed that issue. We advised Mr. MacNeil that we were aware of what advice he would have received, but we pointed out to him that he was the one here facing very serious charges and that his lawyer would be home with his family. We told him that he was going to have to decide what was best for him and what would be best to help him deal with what had taken place.

Q. Best to help him deal with what had taken place?

A. Yes.

Q. And to what were you referring to?

A. I was referring to the fact that Freeman would have to deal with this on his own terms, so as to speak, and that he would have to deal with what had taken place at the restaurant at McDonalds.

Q. Continue please Constable Murphy?

A. I told Freeman MacNeil that I didn't know how I would feel about him when I came into that room. I then spoke of my own son who was sixteen years old and I told him that but then I thought that maybe this could be my son here and that something had gone bad that he was involved in and I said, "How would I feel then?" I told him then and I told him several times that I felt sorry for him. I spoke of a personal trauma that I gone through when I lost my daughter in a car accident. I spoke to him about going to a morgue at 2.00 o'clock in the morning to identify her and I told him that he didn't have to tell me about hurting. I told him I understood how the families would feel. I remember Kevin saying that you won't find a more compassionate man than him.

Q. Referring to who?

A. Referring to myself. I then spoke to -

Q. What you just related to Mr. MacNeil, was this . . .what can you say as to whether this was the truth what you were telling him about your own personal life or whether this was a trick or a ruse?

A. No, unfortunately this is the truth sir.

> Q. Was there any reaction from Mr. MacNeil during this time?
>
> A. As I think back now from the point in time of the mention of the funeral, we were getting reactions from Mr. MacNeil. As I said, he appeared to me to be somebody who has on the verge of crying and holding back tears."

The two police officers then mentioned MacNeil's need for forgiveness in both a psychological and religious sense and his need to relieve his mother's anxiety by telling the truth. They used examples of the removal of a cancer from a body and the need to get rid of it before it kills the patient. They referred to the grief being experienced by the families of the people who were killed and about 4:23 Corporal Cleary made a comment to Freeman MacNeil which according to Constable Murphy was without doubt the turning point in the whole interview. This was when Corporal Cleary said to Freeman MacNeil "And you had a stick in your hand?" At this point MacNeil started to cry and responded to questions by shaking his head either in the affirmative or negative direction. Constable Murphy described his demeanour as follows:

> " A. He started to cry there and that developed into crying very heavily at times. He cried and spoke through the crying and talked while he was crying. He spoke very quickly, almost rambled. He would say something and then later, repeat it. At times, we'd stop him. There was a box of kleenex there. Actually, I was writing my notes behind a box of kleenex so as to not to be overly obvious. Several times during the course of the interview we gave him kleenex and he would blow his nose and seemed to regain his composure a bit."

From that point on Corporal Cleary and Constable Murphy encouraged MacNeil to tell them everything that happened step by step like individual frames in a movie film and over a period of time the whole story came out. From the time they parked the car to the time when they disposed of the evidence everything was covered. The greatest amount of crying and emotional disturbance came when he was discussing the killing of Burroughs and

admitting to having hit him with his stick because he was trying to get up.

At about 5:05 p.m. Corporal Cleary was preparing the standardized statement forms for use in committing what MacNeil had been saying to writing. He had repeated the warnings and advice concerning counsel to MacNeil and had asked him if he wished to speak to counsel. MacNeil's reply was that he did not. MacNeil initialled the statement and Corporal Cleary commenced the formal questioning about MacNeil's involvement in the McDonald murders. At this time Constable Murphy realized that the room was warm and asked whether the others were thirsty. When they said they were he went outside to get some water. Mr. Ryan had just come to the Detachment to see his client and after being advised of the admissions that MacNeil had made he visited his client in the interview room. The conference between Mr. Ryan and his client lasted from 5:20 until 5:44 p.m. at which time Mr. Ryan left the room but remained at the Detachment. Corporal Cleary and Constable Murphy re-entered the interview room and gave MacNeil his glass of water and then continued with the taking of the written statement which was completed shortly before 9 p.m. The statement was read over to MacNeil and signed by him as well as Corporal Cleary and Constable Murphy. During the taking of the statement MacNeil had asked for some sandwiches and Constable Murphy made arrangements to order some for the appellant.

Mr. Ryan was still at the Detachment awaiting the arraignment of his client and in his presence the appellant consented to give a sample of his hair which he removed from his own head but he refused to give a blood sample.

During the taking of the statement MacNeil had offered to do a re-enactment of the crime, including a visit to McDonald's, but this was not practical so it was agreed that he would simply show the officers where certain things had happened during the evening. Before he left in the car he ate the two sandwiches which had been ordered for him. During the re-enactment Constable Murphy was driving and Corporal Cleary was making notes.

MacNeil directed the Constable to take a certain route and they ended up at Grantmyre Brook where he stated that the cash box, shoes and knives had been discarded.

They next stopped at the Beaton Road where the appellant indicated the location where the ammunition and spent cartridges had been thrown. They then proceeded to his home where he showed the constables three 45 gallon drums in which the kit bag and clothing had been burned.

On the way back to the Correctional Centre MacNeil insisted upon taking the police officers to the place where the car had been left prior to the robbery. At this point he showed them the culvert where he had put the stick.

During the re-enactment the appellant revealed that there were rolls of quarters which had come from McDonald's stored at a particular place in his house. He also indicated that there were ropes there that he had taken with him into the restaurant.

They arrived back at the Correctional Centre at 10:46 where he was booked.

The statements made by MacNeil and the re-enactment on May 16th, 1992, were found to be admissible by the trial judge over the objection of defence counsel. I will deal with this issue shortly but before doing so there is one further statement in the form of follow-up questions taken by Corporal Cleary on May 18th, 1992, at the Correctional Centre which is in dispute.

At 11:15 a.m. Corporal Cleary met with MacNeil in the interview room at the Correctional Centre and gave him the required cautions and right to counsel. MacNeil indicated he did not wish to call a lawyer.

The questions put to MacNeil dealt with who had brought the ropes to the robbery scene and what had happened to them and some of the money that was obtained from the restaurant. What had happened to the knives was also discussed. A few questions related to whether MacNeil had purchased any stereo equipment and where he had disposed of the

clothing that was worn at the time of the robbery.

The trial judge also admitted the answers to these questions over the objection of counsel.

Freeman Daniel MacNeil testified at the *voir dire*. He agreed that the statements taken from him on May 7th and May 13th were free and voluntary and he had agreed to take the polygraph test because he thought his refusal would put him in a negative light with the police. When told he had failed the test he became a little upset, nervous and anxious about whether he would be able to leave as he had expected to do. When questioned further he felt that he did not have the right to leave but expected he would be free to go when he had answered their further questions. At that time he was not overly concerned. When he was given his right to counsel he didn't feel he needed a lawyer because he was not placed under arrest. He felt that he had to answer their questions and on doing so he would be free to go. He did not ask for any food.

As time passed and he was still being asked to answer questions he testified that he became more nervous and was worried about his family and his girlfriend. He was advised that they would be looked after. He said that he was becoming more tired and upset and that he only stayed there to answer further questions because they had told him he would be free to go as soon as the matters were committed to writing. He finally agreed to the video re-enactment of the route he had taken in the expectation that that would be his final responsibility for the day.

After the re-enactment was over he was returned to North Sydney Detachment and was not free to go. He became upset with the two officers who he claimed had been telling him all day that he would be released as soon as the questioning was finished. He now had no further use for either one of them. "They were lying to me all day. I had nothing further I was going to say to these two guys".

When MacNeil was returned to the interview room and given the usual cautions and right to counsel he decided the time had come to call a lawyer. According to his testimony he later received legal advice and agreed to follow that advice and refuse to give any further statements. Mr. Mollon advised him that he had been arrested as an accessory after the fact and would have to remain in custody for the next 24 hours and during that time he did not have to answer any of the questions that were being put to him or respond in any way.

MacNeil says he was then very tired and wanted to go to sleep and was placed in a cell with a blanket. He was unable to sleep and between 2:30 and 3:00 in the morning had a visit from his mother and sister. At 8:59 he was taken from the cell having had nothing to eat and subjected to further questioning.

MacNeil tells how Constable Gillis read off the long list of points that he had written down during the statement given by Derek Wood and asked MacNeil to respond to them. When the appellant refused he says that Constable Gillis became verbally abusive. In his testimony he said:

> " A. He was calling me "gutless, a coward; I wouldn't even have the guts to go over the table after him", various things along those lines. You know, "no good bastard", things like that. Just ... you know, unpleasant things.
>
> Q. Now ... and what about Constable MacDonald?
>
> A. Constable MacDonald sat there for the most part of it and about another half hour after Gillis was ranting, which is about the best way to describe it, Constable MacDonald interjected that, "well, there's no point in this", indicating to me. He said, "that you, you're obviously not going to say anything and I'm sick of looking at you, and you had no problem sleeping last night - I didn't sleep at all; and I'm sick and tired of looking at your face, and you're going back to your cell, and I'm not dealing with you any more. But don't worry, there will be two more guys coming in and they'll ... they'll get anything, you know, that you have - they'll get it out of you. You're not going anywhere" and then I was taken back to my cell.

Q. Were you in any way touched by either of these officers . . .

A. No.

Q. ...physically touched?

A. Not physically, no.

Q. Okay. How did this session with Gillis and MacDonald effect the way you felt at that time, when you ... when they left and put you back in the cells at 2:30?

A. I felt the advice my lawyer had given me had been sound advice. You know, I sat there for an hour and a half - these guys didn't get anything out of me. They became very agitated, you know, then I was put back in my cell. I felt that the advice was sound and you know, as long as I sat there and didn't say anything they would eventually put me back in my cell.

Q. All right. On May 16th, 1992 what, if any, food or drink were you provided?

A. None until after . . . just before my remand, when my lawyer was present, there was food brought to me."

And further:

" Q. How were you feeling physically after the session with MacDonald and Gillis, and during that period of time?

A. I was still tired and hungry, and scared and anxious.

Q. How would you describe your . . . let's just say this, why were you scared and anxious?

A. I was still stuck in the cell. I just had two police officers screaming at me for a little while, and now I've been thrown back in the cell, and I have no idea when I'm leaving, if I'm leaving, what's going on. I ... I hadn't had any contact with any of my family since about 3:00 o'clock in the morning.

Q. Okay.

A. And I was told there were further officers coming down. I didn't know what to expect from them.

Q. And you what?

A. And I was told there was further officers coming to deal with me basically, and I didn't know what to expect from those officers.

Q. What kind of concern did that cause you? That ... that there were ...

A. I . . . I felt they were probably going to be like the last two were, which was verbally abusive and aggressive.

Q. Okay. What do you recall about the arrival of Constables . . . of ... of then Corporal Cleary and Constable Murphy? Had you even seen those officers before?

A. No, I had not.

Q. All right. How did you learn they were police officers?

A. Two officers came to my cell, told me that they were there to question me further, and to come with them. And I know from here that was Corporal Sutton and Kevin Cleary.

Q. All right.

A. And then I was escorted by Corporals Cleary and Sutton, and I believe Pat Murphy was in the hallway as well, to the same interview room again where I was placed with Murphy and Cleary.

Q. All right.

A. And they identified themselves as peace officers.

Q. All right. How would you describe the manner in which you treated them upon first meeting with them and being told who they were, and that sort of thing?

A. Oh, the same way I treated all the officers when I usually met them. I was cooperative and did what they asked me.

Q. All right. Did they give you a reason, and if so, what was the reason for your being brought to that room?

A. They told me they were going to question me further.

Q. How did you feel about that prospect at that time?

> A. I . . . well, I felt that they advice my lawyer had given me earlier was sound, and it would work in this case as well."

When the interview with Corporal Cleary and Constable Murphy commenced at 3:30 MacNeil asked to call Mr. Ryan and was permitted to do so. While awaiting Mr. Ryan's arrival Corporal Cleary started throwing questions at him and MacNeil says he advised the Corporal that he had no intention of answering any questions. Kevin Cleary then told him that the lawyer was at home but that he was the one facing serious charges and MacNeil claimed Cleary was trying to make him believe that the advice from his lawyer was not going to do him any good. The list of charges against MacNeil was then read to him and the two officers started talking about the three funerals and a possibility of a fourth. They also referred to other cases where young people had become involved with the law and although MacNeil says he was becoming emotionally upset he still intended to say nothing to either of the officers.

MacNeil says he was then beginning to break down; was becoming tearful and how he sort of curled up in a ball. Then Corporal Cleary put his hand on his arm and pulled his arms down not in a jerking motion but with a steady pressure. This happened twice.

The testimony of MacNeil continued:

> " Q. All right. Did you at any time say anything to them about touching your person?
>
> A. No, I was trying to ignore the both of them.
>
> Q. Okay.
>
> A. So I didn't make any comment to it, one way or the other.
>
> Q. Did you resist in any way to his taking hands . . his hands on you?
>
> A. I didn't fully cooperate, you know, I didn't like ... nor I didn't fully resist either. I just sort of reluctantly went along with it.

Q. All right. How would you describe the officers' tone of voice during this period of time?

A. Constable Murphy was coming off as very compassionate, very feeling, experiencing emotion of his own which was evident when he was reading the charges. Cleary was taking more of a condescending, blaming sort of tone of voice. It was ... they were both speaking in low voices.

Q. Um hm. When you say he was more "blaming and condescending" in respect to Cleary, what ... what things did he do that made you conclude that was how you'd describe him?

A. It's . . . things he'd say with emphasis, referring to the funeral on one example, the two young offenders who were involved in the homicide, things like that. He'd seemed to . . . he'd emphasize certain words in that when he . . . and then when we started reading from what I knew at that time to be from Derek Wood's statement, cause it was the same points that were brought up by Corporal Gillis on an earlier occasion.

Q. All right. What can you recall about all the crying which had been referred to in ... referred to in the direct part of the evidence part of this proceeding?

A. Not a lot. Once that happened I don't really ... it's not really all that clear from that point on.

Q. And what do you mean by "it's not all that clear"?

A. I remember up to the point where the officers say that I started to cry. After that point, it's ... I really don't have all that much memory of it. It's just ... sort of foggy.

Q. All right. Do you have any recollection of the rest of that interview?

A. Not really, no.

Q. All right.

A. Just little bits and pieces, nothing that I can really string together.

Q. Do you remember what ... do you have any independent recollection of what you told them after that point in the interview?

A. No.

Q. Are you able to give the court any indication when you feel that you lost that direct recall?

A. It's around the time of the mention of me entering the restaurant and me having a stick in my hand, or something along those lines.

Q. How ...how far away from your physical person were the police officers during that one hour interview?

A. At the beginning Corporal Cleary was about six to eight inches away; afterwards he was, once he pulled my arms down, he was directly in ... in contact with it ...

Q. All right. What about ...

A. ... holding on to ...

Q. ... Constable Murphy?

A. During that, Constable Murphy, I believe, was on the other side of the table.

Q. Did that position change, or did it remain the same throughout?

A. It changed towards the end, I believe, from ... from what they said. I don't have any conscious memory of it though, just from what the officers said.

Q. All right. Can you tell this court why you answered the questions that were put to you by Cleary and Murphy?

A. No, I can't. I had no intention of answering the questions when I ... when I initially entered the room.

. . . . .

MR. COADY: ... I want to direct your attention, Mr. MacNeil, to the written statement which was taken from 5:02 to 8:57 p.m. on May 16th. Why did you agree to the written statement that took place ... or let me just ask you, did you agree to participate in that written statement?

A. I believe so.

Q. Okay. Why did you agree to that written statement being taken from you after 5:00 o'clock that evening?

A. I was informed that I had made confessions to just about everything under the sun. The ... the actual ... what I confessed to at the time, I have no recollection of, but I ...told I had confessed to a lot of things and I didn't feel there was any point in my remaining silent at this point. They said they ... they had everything and it no longer mattered, and whether or not I gave a statement didn't really matter because the officers would be able to testify anyway.

Q. Was that information told to you by the officers?

A. The officers, I believe, made some mention of that, yes.

Q. Why did you not seek further counsel at 5:00 o'clock?

A. Dave Ryan was there, and I did confer with Dave Ryan.

Q. I see. Why did you not ...

THE COURT: I'm sorry. What was that ...the ...

MR. COADY: Okay, maybe you want to answer ...

A. Mr. Ryan was there and I believe I did speak with him.

Q. All right. Okay. Were you provided with any food or water, or coffee, or anything to this point in time on that day?

A. Around the beginning of the written statement, I believe I was given some water.

Q. All right. When would you have received food for the first time that day?

A. That was after the conclusion of this statement. Dave Ryan ...

Q. Of this ... this statement?

A. Yeah. Dave Ryan, my lawyer, asked me if ... if I wanted something to eat.

Q. All right.

A. And that was just prior to my leaving for the remand. I was provided with some sandwiches."

This completed the evidence of MacNeil at the *voir dire* and he was the only witness called by the defence.

Before determining the admissibility of the various statements presented by the Crown to the *voir dire* for approval the trial judge correctly stated the law regarding the admissibility of confessions. In his decision he cited the appropriate authorities dealing with voluntariness, oppression and the need for an operating mind. He further reviewed the law regarding the accused's right to remain silent and to receive the advice of counsel. There was no challenge to the law referred to by the judge at the trial nor has there been on this appeal. The sole position now taken by the appellant is that the inculpatory statements made by the appellant on May 15th and 16th should not have been admitted because the tactics of the police had been so oppressive that they brought on a complete psychological collapse of MacNeil and effectively robbed him of his right to remain silent and deprived him of the legal advice which he had obtained.

In considering these arguments it is necessary to review some of the factual findings of the trial judge.

When dealing with the alleged lack of food provided to the appellant Mr. Justice Gruchy stated:

> " MacNeil had not eaten since breakfast. I attach no significance to this fact. The accused was well able to ask for food if he wanted it. He is of such a personality that I have no doubt he would have asked for it if he had wanted it.
>
> Constable Gillis asked the accused at 3:39 p.m. if he wanted food and he declined. After they concluded the statement at 4:04, the accused was asked again if he was hungry and he declined. At 4:25 he was asked again if he wanted to eat and he accepted. My impression that the accused was not hungry was substantiated by his own evidence to the effect that when he eventually got the food he only "picked at it"."

The trial judge also made findings regarding the credibility of the various

witnesses who testified at the *voir dire*. He states:

> " The accused gave evidence. My impression of this young man gathered from my viewing of the videotapes, from reading his statements and from the officers who interrogated him was confirmed. On the stand and in the videos he appeared calm and self confident. He is obviously intelligent. He is articulate. He responded to all questions quickly and appropriately - obviously correctly anticipating the questions. He answered questions in a computer-like monotone and showed absolutely no emotion.
>
> The series of statements given by the accused started with no involvement or knowledge of the events at McDonald's restaurant. They proceeded chronologically from having some knowledge but no involvement, and finally to admissions that he was involved as a major participant in the crimes.
>
> I must evaluate the accused's credibility on this Voir Dire. That judgment must be exercised so as to evaluate his testimony about the taking of the statements, whether they were voluntary in the sense I had set forth above and whether they were the products of an operating mind.
>
> At each step of the way to his eventual arrest, the accused convinced seasoned experienced officers that he was telling the truth. But I know from a reading of those statements that he was lying in those statements. I need not judge which of the statements was or were untruthful. As each statement became more and more inculpatory, the blame for the incident seemed to shift, as his statements pointed guilt towards his alleged accomplices.
>
> I do not believe the accused as a witness. When he says the various officers held out promises he could leave when he gave a statement, I do not believe him. It is beyond my belief that the only period where the accused's memory fails him is when he began to make his inculpatory statements. When he makes any accusations of any nature against any of the police officers with whom he had contact, which those officers deny, then I reject as untruthful the accused's testimony and accept the officers' testimony beyond reasonable doubt. This finding is especially so with respect to the evidence of Corporal Murphy and Sergeant Cleary. Those two men gave evidence which I totally accept. I believe the accused has carefully reviewed his position in relation to the evidence and has attempted to find factors in it which may hint that statements were not the products of an operating mind."

When dealing with the video re-enactment Mr. Justice Gruchy found:

> " At the conclusion of the taking of Voir Dire Exhibit 9 the accused was asked if he would re-enact the route which he then claimed to have taken on the night in question. The Constables say in their evidence, and I fully accept, that the accused was not merely willing, but anxious to do so. The accused says, and I reject, that he was promised to be allowed to go home after the re-enactment. Arrangements were made for videotaping the re-enactment. I have seen the videotape and I have listened to the dialogue which occurred during it. I have read the transcript prepared from the videotaped re-enactment and I am satisfied as to its accuracy.
>
> If I had had any doubt about the voluntariness and admissibility of previous statements (which I did not), it would have been removed by my viewing of the videotaped re-enactment. The accused appeared in this film to be relaxed and completely in control of himself. He sat in the front seat of the vehicle and gave directions to the driver. His conversation was coherent and logical at all times and he showed no evidence of fear or of having been intimidated in any fashion whatsoever. When he is shown outside the police vehicle, he is even more strikingly self-assured.
>
> At the end of the re-enactment the officers asked if the accused had anything further to say. He replied, if he thought of anything, "I'll contact you". The defence says that is evidence the accused thought he was going home. At most, that statement is evidence only of wishful thinking on the part of the accused. It is not evidence that any inducement was held out to the accused."

When discussing the last interview between Constables Gillis and MacDonald and the appellant the trial judge stated:

> " At 12:55 p.m. Constables MacDonald and Gillis took the accused to the interview room once again. Constable Gillis had prepared notes of thirty points of evidence which had been developed in the case and which he felt implicated the accused. Constable MacDonald says he sat in the room with the accused while Constable Gillis went through each of the thirty points and expanded or explained them to the accused. Constable MacDonald says the accused only responsed that he would not say anything and had been so advised by his lawyer. Constable Gillis says he spent time on each point and explained them thoroughly, although the time required for each point varied. Constable Gillis did not make notes, as he

> was reading from those which he already had in his book and Constable MacDonald merely watched as there was no point in taking notes of items already in Constable Gillis' notebook.
>
> The accused's version of this interview is vastly different. He says that Constable Gillis went through each point within the first half hour while he (the accused) acted on legal advice and refused to say anything. MacNeil says that the officers became abusive, rude and insulting. He says that eventually Constable Gillis, in effect, challenged the accused physically, whereupon Constable MacDonald intervened and halted the interview. I reject the accused's version and accept the officers'.
>
> At the conclusion of this interview, Constable Gillis did become angry. He says, and I accept, that he did not raise his voice or become violent in the slightest. He had then been working steadily for approximately 30 hours. He was tired and frustrated by the lack of co-operation by the accused. He called the accused a coward and insulted him. When Constable Gillis did this, Constable MacDonald interrupted and the interview was terminated. The accused had made no response during the two-hour period.
>
> The contents of this interview are not admissible. The Crown does not seek the admission of the contents of this interview into evidence."

The trial judge returned to the question of food when he stated:

> The accused had not eaten during the day. The Constables said that they never gave that a thought. Neither Constable Gillis nor Constable MacDonald had eaten except coffee and donuts at midnight.
>
> I find in all the circumstances that the accused did not want to eat. He had spent considerable time with his mother and sister during the early hours of the morning and they did not make any request for food for him. He had spent time during the morning with his lawyer, Mr. Ryan. Mr. Ryan had done other favours for the accused, such as getting his shoes and jacket, but no mention was made of food. The personality of the accused is such that if he had wanted food he would certainly have asked for it.

Mr. Justice Gruchy discussed at length the interview with the appellant conducted by Corporal Cleary and Constable Murphy. His decision reads as follows:

" After the charges were read, Sergeant Cleary moved in quite close to the accused (at arm's length) and said, "We've had three funerals - there may be one more. Are you proud of that?" The accused said no vigorously. The officers attempted to keep the tone of their voices "low and compassionate". The accused noted that fact. They observed that the accused was holding back his tears. The accused said he had been advised to say nothing, to which the officers said they knew what he had been advised but that his lawyer was home with his family and he, the accused, would have to decide what to do. The accused said the officers attempted to undermine the accused's legal advice. That may have been his perception; in fact, they performed their duty. The accused, in testimony, alleged that the officers, in effect, threatened him by telling a story of young offenders who had not co-operated by telling on one another and then were given the maximum sentence. Sergeant Cleary denies that allegation and I accept without reservation the denial.

Sergeant Cleary then appealed to the accused by speaking of the necessity to forgive himself for what he had done, appealed to his religious beliefs and appealed to his conscience. The accused started to fold himself into a position resembling the fetal position, with his arms tightly crossed and his knees drawn up. Sergeant Cleary said, "Don't close yourself", and took him gently by the arm and put it down. He told the accused that they knew everything and wanted his version. He spoke of the accused's mother and appealed to the accused in that manner as well. In testimony the accused was asked if the officer's actions and comments affected his understanding of his right to remain silent and he said they did not. He had intended to say nothing. After various other appeals, Sergeant Cleary said, in referring to some details of the crime, "And you had a stick in your hand". That was the turning point of the interview. The accused cried, at times heavily. He started to talk rapidly about the crime. Sometimes he repeated his statements. He gave a fairly detailed but very rapid statement which could not be put into writing in the usual statement form. Corporal Murphy's notes are an excellent record of what was said, when supplemented with his explanations. This exchange and resulting admissions have all the appearances of the accused unburdening remorse and guilt.

At 5:05 p.m. Sergeant Cleary started to take a written form of statement. The accused had asked for some water and Corporal Murphy went out of the office. He found Mr. David Ryan outside who wanted to see his client. Mr. Ryan was allowed to see the accused from 5:20 p.m. to 5:44 p.m.

Before taking the written statement and before seeing counsel, the accused had signed the caution and the **Charter** provisions on the written form.

After Mr. Ryan left the officers again sat down with the accused. Sergeant Cleary repeated the beginning of the statement. The accused then gave a full and detailed statement. The taking of the statement was effected by Sergeant Cleary writing out his question and then reading it aloud. The accused then gave an answer which was then written out and repeated to the accused. Sergeant Cleary was struck by the details given by the accused, details which only a participant in the crimes could have known. The accused was at times very tearful, especially at certain images of the victims as they died. The accused made appropriate corrections while giving the statement. At the end he initialled each page. The answers given by the accused were more than perfunctory; they were detailed and flowed logically. He made certain amendments or corrections in this statement and initialled those. During the taking of the statement the accused asked for sandwiches and those were supplied to him. When he asked for sandwiches Corporal Murphy went out of the interview room and came back in to ask him if he would prefer to get chicken as that was easier to get on a Saturday afternoon. The accused said he preferred sandwiches. In my view that statement of preference is a sign of independence. At one point during the taking of the statement, he asked for water and it was supplied to him. I am satisfied beyond a reasonable doubt that there were no inducements offered or threats made or implied. I am satisfied beyond a reasonable doubt that the accused was given his right to counsel which he exercised and having exercised it, gave a voluntary statement. He was again given the police caution. At the conclusion of the taking of the statement by Sergeant Cleary, Corporal Murphy asked a few questions which were also answered. The accused offered to show the officers where he had thrown "other stuff".

There is no doubt in my mind from listening to the evidence of Constable Murphy and Sergeant Cleary about the contents of the statement, the actions of the accused and the manner in which the statement was given that it has high probative value.

There is further clear evidence that the accused was in control of himself and had an operating mind at the end of this re-enactment. The accused consented to give a hair sample, but refused to give a blood sample. Later, when going to the Correctional Centre, he insisted that the police

allow him to show a further piece of evidence."

In my opinion there was ample evidence upon which the trial judge could have made the findings and reached the conclusions that he did on the *voir dire*. The confession that started flowing out of MacNeil had not been caused by emotional disintegration brought about by police tactics but as the trial judge said, by the need for the appellant to unburden feelings of remorse and guilt. The trial judge had the opportunity of seeing and hearing the witnesses and was in the best position to make findings of fact and credibility. He did so and I would confirm that the various statements which he found to be admissible were properly admitted at the trial.

Although the case of **Whittle v. R.**,[1994] 2 S.C.R. 914 had not been decided by the Supreme Court of Canada at the time of this *voir dire* the legal principles relating to the confession rule, the right to silence and the right to counsel have now been clearly set forth in the decision of Sopinka J., speaking for the unanimous (seven to nothing) Court. I am satisfied that Mr. Justice Gruchy's decision properly reflects those principles and that he made no error either in law or in fact in his decision at the end of the *voir dire*.

For these reasons I would dismiss the first ground of appeal.

SECOND GROUND OF APPEAL - DIRECTED VERDICT - CONFINEMENT

The second ground of appeal is as follows:

> " THAT the Learned Trial Judge erred in dismissing the Appellant's motion for a directed verdict in relation to the charge of unlawful confinement contrary to s. 279(2) of the **Criminal Code of Canada**."

At the conclusion of the Crown's case counsel for the appellant moved for a directed verdict on the unlawful confinement charge. After hearing argument the trial judge concluded that there was some evidence of unlawful confinement of Donna Warren by the

appellant either as principal or as an aider or abettor under s. 21 of the **Criminal Code** and he refused the motion.

In my opinion there was ample evidence to support this finding by the trial judge and the matter was properly left with the jury.

I would therefore dismiss the second ground of appeal.

THIRD AND FIFTH GROUNDS OF APPEAL - MANSLAUGHTER

The third and fifth grounds of appeal were argued together and I will deal with them in that manner. They are:

> " 3. THAT the Learned Trial Judge erred in his direction to the jury with respect to counts two and three and the included offence of manslaughter. In particular that he failed to adequately and properly relate the theory of the Defence and the supporting law and evidence as they related to the included offence of manslaughter, and consequently erred in failing to adequately and properly place manslaughter before the jury as a possible verdict.
>
> 5. THAT the Learned Trial Judge erred in his direction to the jury with respect to the expert opinion of Dr. John Bradford by failing to adequately and properly direct the jury as to the application of that evidence to determining the Appellant's state of mind at the time of the commission of the alleged offences, and its application to the possible verdict of manslaughter."

In his charge to the jury the trial judge gave lengthy directions on the required proof necessary to find the appellant guilty of culpable homicide amounting to murder in the first degree or second degree. He dealt fully with the requirement of intent to kill or intent to commit bodily harm that he knew was likely to cause death in order to establish second degree murder and the need for proof of planning and deliberation or murder in the course of an unlawful confinement for first degree murder. He explained that proof of culpable homicide without the intent necessary to amount to murder was manslaughter. He further

pointed out that the various offences could be committed directly by the appellant or as an aider or abettor or conspirator under the provisions of s. 21 of the **Criminal Code**.

After discussing the evidence relating to the death of Neil Francis Burroughs the trial judge said:

> " If you are satisfied that the Crown has proved all the ingredients for murder but you are not satisfied that the murder was caused by the accused while the accused was committing the offence of unlawful confinement, and you are not satisfied that the murder was planned and deliberate then the accused is not guilty of first degree murder but is guilty of second degree murder. If you find that the accused is not guilty of the murder of Neil Francis Burroughs you will go on to consider the included offence of manslaughter.
>
> The essential difference between the offences of manslaughter and murder is found in the ingredient of intent. In order to find the accused guilty of manslaughter, you must find that the accused caused the death of Neil Francis Burroughs by an intentional and unlawful act. ....
>
> But in considering further in order to find the accused guilty of manslaughter it is not necessary to find that the accused meant to cause the death of Neil Francis Burroughs or to find that he meant to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not. You may find the accused guilty of manslaughter if you find that the unlawful act of assault, that is with the weapon of the handle was intentional and of such a nature that any reasonable person would inevitably realize that it would subject him to the risk of harm.
>
> So with respect to Neil Francis Burroughs and the count of murder and count number 3, you will return one of the following verdicts; guilty as charged, not guilty as charged but guilty of second degree murder, not guilty as charged but guilty of manslaughter, not guilty."

Mr. Justice Gruchy then reviewed the evidence relating to the death of James Patrick Fagan and pointed out the requirements of proof for the offence of first degree murder, second degree murder or manslaughter. He concluded:

> " If you find the accused not guilty of murder of James

> Fagan as alleged you will go on to consider the included offence manslaughter. I have already told you about the differences between the offenses of murder and manslaughter and I need not repeat them.
>
> So with respect to the murder of James Patrick Fagan on count number 3, you will return one of the following verdicts; (1) Guilty as charged, (2) Not guilty as charged but guilty of second degree murder, (3) not guilty as charged but guilty of manslaughter, (4) Not guilty."

When the trial judge was relating the evidence connecting the appellant to the deaths of Burroughs and Fagan he had told the jurors that they would have to consider the psychiatric evidence of Dr. Bradford and Dr. Akhtar. He then analyzed at some length the evidence of these two psychiatrists and concluded as follows:

> " The impact of the evidence of Doctor Bradford and Doctor Akhtar has to do with intent and I have already spoken to you about intent. As I have told you, intention to kill is an essential ingredient to the charge of murder and one which the crown must prove beyond a reasonable doubt. The testimony of Doctor Bradford raises the question of whether the accused had the capacity to form the intent from the time of the shooting of Arlene MacNeil. The burden is on the crown to show that such defence cannot succeed. Therefore having considered the two opinions of the doctors and all the other evidence available to you, if you are left with a reasonable doubt about the accused's intention to commit murder in his capacity as a principal, aider or a party to a common unlawful purpose, then you will give the benefit of that doubt to the accused and find him not guilty of the murders.
>
> I do remind you, however, of what I have said about manslaughter in each of the counts 2 and 3."

When dealing with the theory of the defence the trial judge read to the jury the document which had been provided by defence counsel setting forth that theory. It was as follows:

> " The theory of the defence:
>
> 'Freeman MacNeil agreed to participate in a robbery at McDonald's Restaurant in Sydney River on May 7th,1992.

The plan was to enter the building and proceed to the safe and to take the money.

The defence submits that Freeman MacNeil had no way of knowing of the events that were to occur that night. Whether you believe he knew or did not know about the gun or about whether anyone was still working, these points do not establish that Freeman MacNeil knew what was to come. That Freeman MacNeil was not a party to the confinement of Donna Warren. He was a passive observer in the confinement by Wood and/or Muise. That the action of Freeman MacNeil in striking Mr. Burroughs did not kill Mr. Burroughs. It did not sufficiently contribute to the demise of Mr. Burroughs and he did not contribute to Wood and Muise's actions which did kill him.

Mr. MacNeil lacked the specific intent to murder Mr. Fagan in that he did not possess an operating mind at the material time.'"

After the jury retired the defence counsel raised an objection to the adequacy of the direction relating to manslaughter. He stated:

" MR. COADY: To be as open about it as possible, we feel that the jury may have been left with the idea that manslaughter was a kind of a left field ...out in left field sort of verdict that was available to them because there wasn't sufficient attention paid to the components of it or the connection that it has to Doctor Bradford's evidence and that the issue that if they were to accept Doctor Bradford's evidence or if Doctor Bradford's evidence created a reasonable doubt about intention that the remedy would naturally be a verdict of manslaughter, because clearly it could not be one of murder, first degree or second degree. I think that is the best I can do in terms of trying to put the concerns that I raised to you on behalf of Mr. MacNeil before the court."

In response the trial judge gave the following redirection to the jury:

" Now, the ... you may have been left with the impression that manslaughter is not, in fact, a real possibility here in either of the counts of murder. I want to tell you that if the crown has not proven intent to commit murder, manslaughter is, in fact, an alternative. In this regard I refer you specifically once again of the evidence of Doctors Bradford and Akhtar. This is in relation to both the murder counts, 2 and 3. If you

> are not satisfied as to murder then you should consider the possibility of manslaughter for either of those two counts."

I am satisfied that the trial judge suitably left to the jury the consideration of manslaughter verdicts in the case of the death of Neil Francis Burroughs and James Patrick Fagan. He adequately discussed the theory of the defence and the evidence of the psychiatrist as it related to the lack of intent necessary for murder and the jury was free to find these verdicts if they wished.

I would reject grounds of appeal 3 and 5.

FOURTH GROUND OF APPEAL - PSYCHIATRIC EVIDENCE

The 4th ground of appeal is as follows:

> " 4. THAT the Learned Trial Judge erred in his restrictive and interventionist approach to the admission and delivery of the expert opinion evidence of forensic psychiatrist, Dr. John Bradford, such that with respect to this evidence, the Learned Trial Judge usurped the jury's function as trier of fact which hears relevant and admissible evidence, determines the weight to be given such evidence, and assesses the credibility of the witness presenting the evidence."

I have reviewed the record in relation to this ground of appeal and find that it is unsubstantiated. It was necessary for the trial judge to make clear to the jury that the opinion of Dr. Bradford was based solely upon the credibility of the story told to him by MacNeil. MacNeil did not testify at the trial.

The evidence of Dr. Bradford to the effect that MacNeil did not have the capacity to form the necessary intent for murder was diametrically opposed to that of Dr. Akhtar. The trial judge in reviewing this evidence explained how expert testimony should be evaluated and in my opinion fairly left to the jury the weight to be drawn from this testimony.

I would reject the 4th ground of appeal.

SIXTH AND SEVENTH GROUNDS OF APPEAL - CONSTRUCTIVE 1st DEGREE MURDER

The 6th and 7th grounds of appeal were argued together and they are as follows:

> " 6. THAT the Learned Trial Judge erred in his direction to the jury with respect to the application of section 21 of the *Criminal Code of Canada* to the offence of unlawful confinement pursuant to section 279(2) of the *Code*, and erred further in the application of both sections 21 and 279(2) to the charge of first degree murder in relation to the death of Neil Francis Burroughs.
>
> 7. THAT the Learned Trial Judge erred in his direction to the jury with respect to the element of causation in relation to the death of Neil Francis Burroughs, and in particular in relation to the application of the aforesaid *Code* sections 21 and 279(2) to that element."

These two grounds of appeal relate to the conviction of the appellant for first degree murder of Neil Francis Burroughs rather than second degree murder.

There are two ways in which the jury could have reached the conclusion that the appellant was guilty of first degree murder: (i) they could have decided that the murders were planned and deliberate as part of the robbery scheme to eliminate the possibility of any persons found in the restaurant at the time being able to hinder their plan or subsequently identify them as the robbers; (ii) they could have decided that Donna Warren had been confined by the three robbers for the purpose of advancing the robbery plan and that the participation in the killing of Burroughs by MacNeil during the confinement of Warren was a substantial cause of his death.

Section 279(2) of the **Criminal Code** is as follows:

> " 279. (2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years."

The law relating to the offence of confinement was properly explained to the jury by the trial judge in his directions with regard to the first count in the indictment. He told them that they could determine that MacNeil himself had confined Donna Warren beyond the transitory restraint that would have been inherent in a robbery or that he may have aided or abetted or acted in common with Muise and Wood in her confinement pursuant to s. 21 of the **Criminal Code**:

> " 21. (1) Every one is a party to an offence who
>
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
> (c) abets any person in committing it.
>
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

There can be no doubt that MacNeil, Wood and Muise had formed a common intention to rob McDonald's Restaurant and had agreed to aid and abet each other in doing so. There was evidence upon which the jury could have concluded as they did that MacNeil knew or ought to have known that confinement of an employee by one or more of the robbers would be a probable consequence of the carrying out of the common purpose of the robbery. The question then arises as to whether the murder of Burroughs would be classified as first degree or second degree murder, that is, whether it was planned and deliberate or whether it was occasioned during the robbery and confinement of Donna Warren for that purpose.

The appellant has not complained about the directions given to the jury concerning planning and deliberation but says that the trial judge improperly instructed them on the principles of constructive first degree murder pursuant to s. 231(5) of the **Criminal**

Code:

> " 231. (1) Murder is first degree murder or second degree murder.
>
> (2) Murder is first degree murder when it is planned and deliberate.
>
> (5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:
>
> (a) section 76 (hijacking an aircraft);
> (b) section 271 (sexual assault);
> (c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
> (d) section 273 (aggravated sexual assault);
> (e) section 279 (kidnapping and forcible confinement); or
> (f) section 279.1 (hostage taking).
>
> (7) All murder that is not first degree murder is second degree murder."

In support of grounds of appeal numbered 6 and 7 the appellant argues firstly that the trial judge improperly directed the jurors regarding s. 21 of the **Code**. It is suggested that there was no evidence that MacNeil acted as a principal in the confinement of Donna Warren and that he did not aid or abet Derek Wood and Darren Muise in the confinement of the victim but merely stood by and acquiesced to what was taking place. It is further suggested that the confinement of Donna Warren was not reasonably foreseeable under s. 21(2) since confinement had to be more than the type of transitory confinement inherent in an ordinary robbery. For MacNeil to be liable as a party under s. 21(2) he would have had to know that such a confinement would be a probable consequence of carrying out the common purpose of the robbery.

Although the appellant claims that the trial judge erred in his directions to the jury regarding s. 21 he has not in his factum nor did counsel on the hearing of this appeal make

reference to any such error. They incorporated the arguments previously made under ground number 2 relating to a directed verdict but those arguments dealt only with whether there was evidence sufficient to put the question of the confinement of Donna Warren to the jury.

The Crown has very properly taken issue with the appellant by arguing that there was ample evidence at the trial to establish that MacNeil was a principal to the offence of confinement and that he was an aider and abettor of Wood and Muise under s. 21(1) and knew as a participant in the robbery that such a confinement would be a probable consequence.

I see no error on the part of the trial judge in his directions to the jury on this issue.

The second allegation of the appellant with regard to grounds 6 and 7 is that the trial judge erred in his direction to the jury in relation to the element of causation for constructive first degree murder committed during the course of an unlawful confinement contrary to s. 231(5) of the **Criminal Code**.

During the course of his charge the trial judge properly instructed the jury on the meaning of the expression "cause the death of a human being" in the section of the **Code** dealing with homicide. In dealing with the offence of murder or manslaughter he followed the directions of the Supreme Court of Canada in **R. v. Smithers**, [1978] 1 S.C.R. 506 which required that the criminal act of the accused only had to be "a contributing cause of death outside the *de minimis* range". When dealing with MacNeil as a principal offender in the murder of Burroughs the trial judge stated:

> " The fact that Neil Francis Burroughs died and that the accused had hit him as he described does not necessarily mean that his conduct was the cause of that death. On the other hand, you do not have to find that the conduct of Freeman Daniel MacNeil was the sole or principal cause of death of Neil Francis Burroughs. It is sufficient if you are convinced beyond a reasonable doubt that the conduct of Freeman

> Daniel MacNeil was at least a contributing factor or an aid in the death of Neil Francis Burroughs, provided it was more than an insignificant or trivial factor in that death."

The trial judge also dealt with the element of causation when considering the appellant as a party to the murder of Burroughs and he stated:

> " I now remind you what I said above concerning the applications of s. 21, the aiding or abetting section, if you are satisfied beyond a reasonable doubt that the combined effect of assaults by the accused and his two accomplices in Burroughs' death and death was the very purpose of the assault, then those persons together have caused Burroughs' death. It is not only the person who does the harm, which is the pathological or diagnostic cause of death who falls within the phrase "when the death is caused by that person". Where the actions of a person are a substantial factor in bringing about a victim's death, that person also falls within s. 21. It is therefore necessary for you to determine beyond a reasonable doubt whether the blow to the face of Neil Francis Burroughs was a substantial factor in bringing about his death."

The final sentence of this direction goes beyond the requirements of the law of aiding and abetting in murder. It is only required that the act does in fact aid or abet the person who actually causes the death and that the aiding party knew the other participant intended to kill the victim or cause him such bodily harm that he knew was likely to cause death with recklessness to that consequence. The trial judge's direction could only have been beneficial to the accused as it set a higher standard than the law required to convict the appellant as a party to the offence.

Later in his charge the trial judge dealt with causation required by s. 231(5) which elevates murder to first degree murder if caused during an unlawful confinement. His first direction was as follows:

> " If you are satisfied beyond a reasonable doubt that the Crown has proved each of the elements of murder but you are not satisfied that the crown has proved that the murder was planned and deliberate, there is an additional consideration.

Sub-section 5 of Section 231 reads:

'Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:'

And section (e) is unlawful confinement.

Now, that, of course, brings home to you the importance of the unlawful confinement charge. What this section means is that in order for the crown to prove first degree murder, is to prove that the death of Mr. Burroughs was caused by the accused as I have described it to you while committing the offence of unlawful confinement. In other words, if you find the accused guilty of the first count, unlawful confinement, if the death of Mr. Burroughs was caused by the accused, either before or after the commission of the offence of unlawful confinement, the accused is not guilty of first degree murder under Section 231(5) because the death was not caused by the accused while committing the offence of unlawful confinement. However, this does not mean that the act of causing death and the act constituting the offence of unlawful confinement must have occurred at exactly the same time. The accused is guilty of first degree murder when the act causing the death and the acts constituting the unlawful confinement all form part of one continuous sequence of events making up a single transaction. This is so, even if you find that the commission of unlawful confinement was in one sense at the time of the death of Donna Warren. There must be a temporal and causative link between the unlawful confinement and the murder. If you accept that the statement of Murphy and Cleary as to what the accused said, then there is evidence upon which you could find that the acts against Mr. Burroughs occurred during the confinement of Donna Warren.

In order to prove that the accused, while committing the offence of unlawful confinement, caused the death of Mr. Burroughs, as I have set it forth to you above, the crown must prove beyond a reasonable doubt the ingredients of unlawful confinement which I set forth above when dealing with count number 1. That is, do you find the accused guilty of unlawful confinement?

If you are satisfied that the Crown has proved all the ingredients for murder but you are not satisfied that the murder was caused by the accused while the accused was committing the offence of unlawful confinement, and you are

> not satisfied that the murder was planned and deliberate then the accused is not guilty of first degree murder but is guilty of second degree murder."

At this point it could be argued that the reference to causation here was only to the type of causation necessary for proof of culpable homicide and not to the additional element required by s. 231(5) which required proof that the death was "caused by that person while committing or attempting to commit an offence" of unlawful confinement. The previous references to the necessary causation by the trial judge had however gone further than the **Smithers** test as the trial judge had told the jury that the actions of the aider or abettor had to be a substantial factor in bringing about a victim's death.

Before the jury commenced its deliberations the judge and counsel discussed this direction regarding s. 231(5) in the light of the decision in **R. v. Harbottle**, [1993] 3 S.C.R. 306. At that time the Supreme Court of Canada decision in this case had not been made known to the judge or counsel and it was the earlier decision of the Ontario Court of Appeal that was brought to the attention of the court. As a result of this discussion the trial judge told the jury that he was concerned that he had not been clear enough about the effect of murder committed while there was an unlawful confinement and was therefore going to give them additional instruction. He then said:

> " To prove the accused guilty of first degree murder under Section 231(5), which is the unlawful confinement section, in relation to the underlying offences of unlawful confinement, the crown must prove beyond a reasonable doubt, one, that the accused committed murder; two, that the murder took place while the accused was committing or somebody on his behalf was committing the underlying offence of sexual ...of unlawful confinement; and three, that the death was caused by the accused. Items 2 and 3, that is whether the accused committed murder and whether the murder took place while the underlying confinement was being committed may be established through the application of Section 21(1), that is the aiding and abetting. But item 3, that the accused...that the death was caused by the accused requires no determination of

> who was a party of a commission of a particular offence. What must be determined in this case, as a matter of fact is whether the acts of the accused caused the death. Where the combined effect of assaults by two or more persons upon a victim is the victim's death and death was the very purpose of the assaults, those persons have caused the victim's death. It is not only the person who does the harm, which is the pathological or diagnostic cause of death who falls within the phrase "when the death is caused by that person". When the actions of a person are a substantial factor in bringing about the death of the victim, he also falls within that section."

For emphasis the trial judge re-read this last direction and asked counsel if they had anything further and the unanimous response was no.

The following morning the trial judge advised counsel that he had decided over night to put his most recent instruction in layman's language so that the jurors could perhaps understand it better. Counsel reviewed his proposed re-instruction and agreed to its form. The trial judge then said to the jury:

> " THE COURT: Good morning ladies and gentlemen, I hope you had a restful night. I had gone over my re-reading of the charge as I indicated to you and counsel and I do not want to make any further charge on it at this point unless you want to come back with additional questions, and of course, you always have that right.
>
> But there is one point that I want to get back to. And you will recall that when I called you back to give you further instruction, I gave you an instruction about unlawful confinement and I read it and it was extremely concentrated in content and I want to ...I have taken some time overnight and have gone through that and I have put it in more lay language and have discussed it with counsel and I now wish to give you that further instruction. It really is the same as I have already read to you except put in lay language. It has to do with the combination of Section 21(1) and the ...that is the aiding and abetting section or the party section ... it is not aiding and abetting, it is the party section and the Section 231(5), which is what we call "constructive first degree". First degree as a result of murder committed during a confinement, an unlawful confinement. So I am going to read this to you and I think you might find it a little easier to follow.

Section 21(1) is before you in your excerpts from the various relevant provisions of the **Criminal Code**. For the sake of clarity, I will repeat it. Everyone is a party to an offence who commits it, does or omits to do anything for the purpose of aiding any person to commit it or assists any person in committing it. Please keep this section in mind when I say when two or more persons attack a victim intending to kill him or her and the combined effect of the blows struck by the two accused is to kill the victim, then in those circumstances, both the accused have murdered the deceased. The law will conclude that the persons who jointly assaulted a victim and killed him or her and death was the very purpose of the assaults, then those people caused the death. It is not necessary in such circumstances to sort out which accused did the precise act which is the pathological cause of death.

It is quite sufficient if the acts of one of the accused in circumstances of the illustration aided the other. The aiding act, however, must have more than a trifling effect or must contribute in some way to the death of the victim. The act must have the effect immobilizing or restraining the victim so as to facilitate or contribute to the ultimate cause of death.

If you will keep in mind my previous instructions concerning the essential elements of murder and if you are satisfied beyond a reasonable doubt that the accused murdered the deceased, Burroughs, but you are not satisfied that it was planned and deliberate then you must go on to consider the application of Section 231(5), that is that the murder took place while Donna Warren was unlawfully confined by the accused either as a principal or a party or within the continuous transaction of the unlawful confinement. I will read that sentence again. If you will keep in mind my previous instructions concerning the essential elements of murder and if you are satisfied beyond a reasonable doubt that the accused murdered the deceased, Burroughs, but you are not satisfied that it was planned and deliberate, then you must go on to consider the application of Section 231(5), that is that the murder took place while Donna Warren was unlawfully confined by the accused, either as a principal or party or within the continuous transaction of the unlawful confinement. You must decide beyond a reasonable doubt whether the accused was a co-participant in the unlawful confinement.

You must then decide beyond a reasonable doubt whether the death was caused by the accused in the sense that I have already explained to you. I remind you of the crown's contention that the accused was an active participant in the

> joint attack on Mr. Burroughs. The defence says that the accused did strike Mr. Burroughs but that such blows were not the pathological cause of death and were not intended to cause death.
>
> In conclusion, to find first degree murder under Section 231(5), the crown must prove, one, that the accused committed murder, two, that the murder took place during the confinement ...the confinement of Donna Warren or during the continuous transaction of the unlawful confinement. These two items may be established either by finding that the accused was a principal offender or aided and abetted pursuant to Section 21(1). And three, that Mr. Burrough's death was caused by the accused in the sense that I have described.
>
> Section 21(1) does not apply to the last item. I think I will read that conclusion again so that you will have it. In conclusion, to find first degree murder under Section 231(5), the crown must prove, one, that the accused committed murder, two, that the murder took place during the confinement of Donna Warren or during the continuous transaction of unlawful confinement. Those two items may be established by either by a finding that the accused was a principal offender or aided and abetted pursuant to Section 21(1). And three, that Mr. Burrough's death was caused by the accused in the sense that I have described."

The appellant objects to the references in this re-charge to causation "in the sense that I have already explained to you" because the jury may have thought he was referring simply to the **Smithers** test. This in my opinion is unrealistic. The trial judge had specifically read to the jury his corrected instructions on causation and repeated them at the conclusion of the hearing the day before. That morning he said that he was changing nothing from his previous instruction but simply putting it in layman's language. The jury in my opinion could only have considered that the actions of the appellant had to be a substantial factor in bringing about the victims's death before they could have found him guilty of first degree murder.

The appellant further argues that the trial judge failed to direct the jury on the concept of an intervening act in accordance with the **Harbottle** decision. It is argued that the

final shot to the head of Burroughs by Muise was an intervening act that broke the chain of causation leading to the death. After that shot it is claimed that MacNeil's actions can no longer be considered a substantial cause of Burroughs' death.

In the **Harbottle** decision the Supreme Court of Canada set forth five requirements for the proof of constructive first degree murder under s. 231(5) of the **Code**. They are:

> " (1) the accused was guilty of the underlying crime of domination or of attempting to commit that crime;
>
> (2) the accused was guilty of the murder of the victim;
>
> (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim;
>
> (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and
>
> (5) the crimes of domination and murder were part of the same transaction; that is to say, the death was caused while committing the offence of domination as part of the same series of events."

Harbottle was convicted of first degree murder for holding the legs of a female victim while his co-accused strangled her with her brassiere. In the course of the judgment Cory J., speaking for the Court, stated:

> " The question which does arise is precisely what causal effect is required by the phrase "death ...caused by that person." I think with respect, that the physically caused test advocated by the majority of the Court of Appeal is too restrictive. It would tend to raise the same impractical distinctions that Wilson J. warned against in *R. v. Paré, supra*, at p. 631, when she considered the phrase "while committing". She held that no sensible distinction existed between an accused who strangled his or her victim during the act of sexual assault and an accused who sexually assaulted and then shortly thereafter strangled the victim. In the case at bar, it would be unreasonable to suggest that, in order to be liable under s. 214(5), Harbottle must have pathologically

caused the death of the victim by pulling one end of the brassiere strap while his co-accused pulled the other. I find it impossible to distinguish between the blameworthiness of an accused who holds the victim's legs thus allowing his co-accused to strangle her and the accused who performs the act of strangulation.

In order to provide the appropriate distinctions pertaining to causation that must exist for the different homicide offences, it is necessary to examine the sections in their context while taking into account their aim and object.

At the outset, it is important to remember that when s. 214(5) comes into play it is in essence a sentencing provision. First degree murder is an aggravated form of murder and not a distinct substantive offence. See *R. v. Farrant*, [1983] 1 S.C.R. 124. It is only to be considered after the jury has concluded that the accused is guilty of murder by causing the death of the victim. An accused found guilty of second degree murder will receive a mandatory life sentence. What the jury must then determine is whether such aggravating circumstances exist that they justify ineligibility for parole for a quarter of a century. It is at this point that the requirement of causation set out in s. 214(5) comes into play. The gravity of the crime and the severity of the sentence both indicate that a substantial and high degree of blameworthiness, above and beyond that of murder, must be established in order to convict an accused of first degree murder."

When dealing with the substantial cause test Cory J. continued:

" Accordingly, I suggest a restrictive test of substantial cause should be applied under s. 214(5). That test will take into account the consequences of a conviction, the present wording of the section, its history and its aim to protect society from the most heinous murderers.

The consequences of a conviction for first degree murder and the wording of the section are such that the test of causation for s. 214(5) must be a strict one. In my view, an accused may only be convicted under the subsection if the Crown establishes that the accused has committed an act or series of acts which are of such an nature that they must be regarded as a substantial and integral cause of the death. A case which considered and applied a substantial cause test from Australia is *R. v. Hallett*, [1969] S.A.S.R. 141 (S.C. *in banco*). In that case, the victim was left beaten and unconscious by the sea and was drowned by the incoming tide. The court formulated the following test of causation, at

p. 149, which I find apposite:

> The question to be asked is whether an act or series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.

> The substantial causation test requires that the accused play a very active role - usually a physical role - in the killing. Under s. 214(5), the actions of the accused must form an essential, substantial and integral part of the killing of the victim. Obviously, this requirement is much higher than that describe in *Smithers v. The Queen*, [1978] 1 S.C.R. 506, which dealt with the offence of manslaughter. There it was held at p. 519 that sufficient causation existed where the actions of the accused were "a contributing cause of death, outside the *de minimis* range". That case demonstrates the distinctions in the degree of causation required for the different homicide offences.

> The majority of the Court of Appeal below expressed the view that the acts of the accused must physically result in death. In most cases, to cause physically the death of the victim will undoubtedly be required to obtain a conviction under s. 214(5). However, while the intervening act of another will often mean that the accused is no longer the substantial cause of the death under s. 214(5), there will be instances where an accused could well be the substantial cause of the death without physically causing it. For example, if one accused with intent to kill locked the victim in a cupboard while the other set fire to that cupboard, then the accused who confined the victim might be found to have caused the death of the victim pursuant to the provisions of s. 214(5). Similarly an accused who fought off rescuers in order to allow his accomplice to complete the strangulation of the victim might also be found to have been a substantial cause of the death."

Mr. Justice Cory then went on to set forth the five elements necessary to be proved in a prosecution under s. 214(5) and then summarized the evidence as follows:

> " The facts of this case clearly established that Harbottle was a substantial and an integral cause of the death of Elaine Bown.

> It will be remembered that Ross, who actually strangled the victim, weighed only 130 lb. and was about 5' 7" in height. Elaine Bown, although three inches shorter, was 10 lb. heavier. There was no indication in her blood of any alcohol or drugs so that it can be inferred that she was not impaired. Rather the bruising on her neck indicates she struggled valiantly. Indeed, it is apparent that even when her hands were bound, she successfully resisted the attempts of both Ross and Harbottle to cut her wrists. There is every reason to believe that, had it not been for Harbottle's holding her legs, she would have been able to resist the attempts to strangle her. In those circumstances, it is difficult to believe that Ross could have strangled her in the absence of the assistance of Harbottle.
>
> The evidence adduced clearly established all the elements of the test. The appellant was guilty (1) of at least one enumerated offence of domination (forcible confinement); (2) he participated in and was found guilty of the murder; (3) his participation in the murder was such that he was a substantial and integral cause of the death of the victim; (4) there was no intervening act of another which resulted in the accused's no longer being substantially connected to the death of the victim; and (5) the crimes of domination and murder were part of the same series of acts or transaction."

In my opinion an intervening act which would be sufficient to release the appellant's responsibility for first degree murder would be one that would disconnect the appellant's participation in the murder. In this case it was only because the original shot to Burroughs head by Wood and the stabbing by Muise and the clubbing by MacNeil had not accomplished the killing of the victim that Muise finally shot him again to complete that killing. There is no independent action by another that would result in the appellant no longer being substantially connected to Burroughs death. It was all part of one transaction which took place in a very short span of time and MacNeil's actions were undoubtedly a substantial cause of the eventual death of Burroughs.

For all of these reasons I would reject grounds of appeal numbers 6 and 7.

EIGHTH GROUND OF APPEAL - BIAS

The final ground of appeal is as follows:

" THAT the Learned Trial Judge erred in permitting and contributing to a perception of bias and partiality in favour of the families of the victims, and thereby infringed upon the Appellant's right to a fair and impartial trial, and the perception of said right by the jury, the public, and the Appellant."

I have reviewed the record and in my opinion there was nothing said or done in the presence of the jury in this case which would indicate a bias in favour of the families of the victims or lead to the conclusion that the trial was not fair and impartial. This was a horrible series of murders and the members of the victims' families were entitled to be present in court during the public trial. When emotions rose to the surface disturbances were adequately dealt with by the trial judge and the court room staff and it was only after the final verdicts were rendered that any substantial disturbance occurred.

I would dismiss this ground of appeal.

For the foregoing reasons I would dismiss the appeal against the convictions entered against Freeman Daniel MacNeil.

SENTENCE APPEAL

The appellant appeals against his sentences on the following grounds:

" 1. THAT the Learned Sentencing Judge erred in ordering the maximum parole ineligibility period for the second degree murder conviction. In particular, that the factors to be considered under Section 744 of the *Criminal Code*, the general principles of sentencing, and the existing case precedent, did not support an exercise of judicial discretion resulting in the imposition of the maximum period of parole ineligibility.

2. THAT the Learned Sentencing Judge erred in failing to give due consideration to the verdict of second degree murder by the jury, and ordering a parole ineligibility period which, in effect, substituted a verdict of first degree murder.

5. THAT the Learned Sentencing Judge erred in giving undue consideration and emphasis to denunciation of the crimes, to the virtual exclusion of all other relevant sentencing objectives.

6. THAT the Learned Sentencing Judge erred in referencing a version of the trial evidence which

> contained factual inaccuracies that served to aggravate the Appellant's circumstances, such that the overall disposition was unduly harsh and improper in the circumstances."

These grounds were argued together and the sole issue was whether or not the 25 year period of parole ineligibility on the second degree murder conviction relating to the death of James Fagan was appropriate.

The jury made a recommendation of 25 years pursuant to s. 743 of the **Code**.

In my opinion the trial judge properly considered the recommendation of the jury as well as the circumstances of the offender, the nature of the offence and the circumstances surrounding its commission. He felt that MacNeil was a leader in the planning of the McDonald robbery and the oldest of the three participants. He considered the manner in which MacNeil shot Fagan as they were leaving the scene of the crime and the steps which were taken to conceal the evidence.

The trial judge also considered the relevant authorities and concluded that MacNeil should be ineligible for parole for a period of 25 years.

In my opinion the sentence imposed upon the appellant was a fit and proper one under all of the circumstances and I would dismiss the appeal from sentence.

Hart, J.A.

Concurred in:

Clarke, C.J.N.S.

Jones, J.A.

C.A. C. No. 02943

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

FREEMAN DANIEL MacNEIL	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
HER MAJESTY THE QUEEN	)	HART, J.A.
Respondent	)	