C.A.C. No. 112289

NOVA SCOTIA COURT OF APPEAL

**Cite as: R. v. Whynder, 1996 NSCA 100**
Freeman, Roscoe and Pugsley, JJ.A.

**BETWEEN:**

| | | |
|---|---|---|
| KEVIN ALLEN WHYNDER<br><br>Appellant<br><br>- and -<br><br>HER MAJESTY THE QUEEN<br><br>Respondent | ) | Robert J. McCleave<br>for the Appellant<br><br>William D. Delaney<br>for the Respondent<br><br>Judgment Heard:<br>January 3, 1996<br><br>Judgment Delivered:<br>March 21, 1996 |

**THE COURT:** Appeal dismissed as per reasons for judgment of Pugsley, J.A.; Freeman and Roscoe, JJ.A. concurring.

**PUGSLEY, J.A.**

On November 21, 1994, Kevin Whynder was convicted by a jury, after deliberating for three and one half hours, of first degree murder of Kelly Lynn Wilneff.

Mr. Whynder appeals from his conviction submitting that:

1. Fresh evidence ought to be admitted which will show Samantha Grouse's testimony was not truthful;

2. The trial judge, Chief Justice Glube, erred in:

a) failing to instruct the jury to disregard the testimony of Guy Leaman Robart or, in the alternative, to warn the jury adequately of the dangers of accepting his testimony;

b) failing to caution the jurors adequately concerning inconsistencies and other shortcomings in testimony of the undercover officers, David Williams and Gary Meeks;

c) requiring defence submissions to be made to a tired jury, causing the defence to jettison most of its final argument and effecting the fairness of the trial;

d) admitting the testimony of the undercover officer Meeks after the *voir dire*;

e) failing to caution the jury adequately about statements which were classified as admissions and allegedly made through Tinika Cunningham;

f) failing to caution the jury adequately about statements made in the course of taped telephone conversations;

g) suggesting it could be inferred that Kevin Whynder had been picked up on a warrant and brought to Court while charging the jury with respect to the defence argument concerning motive;

h) failing to charge the jury respecting the "sexual motive" evidence.

3. The effect of the errors outlined in the second issue included, but was not limited to, a violation of Mr. Whynder's right under s.7 and 11(d) of the Canadian Charter of Rights and Freedoms.

**Background**

The body of Kelly Lynn Wilneff, a 17 year old female, was discovered on the afternoon of February 16, 1993, a short distance from a dirt road in North Preston, Halifax County. The body was lying on its back with a plastic garbage bag over the upper part.

The medical examiner determined that death was caused by gunshot wounds to the head. At the autopsy, ten bullet entry wounds were discovered on the left side of the head. Her face and hands were covered with blood, and there were "relatively recent" bruises about her knees, legs and mouth.

First degree murder charges were laid against Mr. Whynder and Guy Robart. On the morning of the preliminary inquiry (March 21, 1994) the Crown directed a letter to Mr. Robart's counsel providing in part:

> "The Crown is prepared to withdraw the charge of first degree murder against Mr. Robart on the understanding that Mr. Robart will testify at both the preliminary inquiry and the trial of Mr. Whynder. It is understood that Mr. Robart will tell the truth - all of it without holding back. It is further understood that his version of events will be consistent with his earlier statements, particularly statements to the police officers on March 9, 10, and 11, and September 9, 1993 . . . It is expressly agreed that if Mr. Robart were to breach any of the understandings of this agreement that the Crown will be at liberty to reinstitute proceedings against Mr. Robart . . . "

The Crown called twenty-nine witnesses over eight days. The defence did not call any evidence.

The critical evidence, for the purposes of this appeal, was adduced from the following witnesses.

Guy Robart, 24 years of age, testified in chief that:

- Whynder was a close friend, although they had only met in the summer of 1992;
- Around the beginning of February, 1993, together with Scott MacKellar, he accompanied Whynder to a residence in Dartmouth where Whynder arranged for the purchase of a box of 9mm bullets. Robart as well identified a photograph of two guns, both 9mm, which were similar to one

he had seen in Whynder's possession some months earlier;

- On February 16th, 1993, after receiving a phone call from Whynder, Robart was picked up in Halifax by Whynder who was operating his two-door Mustang motor vehicle. Ms. Wilneff was in the back seat. Robart knew her "from seeing her around", and she seemed "normal". The radio was playing. There was no conversation in the car while Whynder drove to North Preston, a trip of approximately 20 minutes;
- Whynder stopped the car on a dirt road near a "water place" and told Ms. Wilneff that he wanted "to talk to her". Both Whynder and Ms. Wilneff exited by the driver's door and walked down the dirt road out of Robart's sight;
- After they left the car, Robart got out of the vehicle for about 5 minutes to have a cigarette. Upon re-entering the car, he heard "two shots, then I heard several shots";
- Whynder returned to the car without Ms. Wilneff. Robart was "Shocked . . . I wasn't expecting it". Robart asked to be driven home. There was no conversation between him and Whynder, before Robart was dropped off in Halifax.

On cross-examination, the following additional details were provided by Mr. Robart:

- When Mr. Whynder returned to the car, he was wearing gloves that were "soaked in blood". He took them off and placed them on the front seat. Whynder then retrieved a chamois from the trunk to clean the blood from the seat and from his gloves. He took his jacket off and Robart noticed Whynder had a 9mm gun;
- On the way back to Halifax, Whynder stopped the vehicle at the rear of a MacDonald's restaurant, and threw the gloves, the chamois, Ms. Wilneff's purse (which had been left on the back seat) in a dumpster;
- Robart made his living selling drugs;

- He lied in some of the answers he gave at the preliminary, because he did not think the questions were "important"; and because he had determined "what is necessary for the courts to know".

Scott MacKellar, testified that:

- In late December, 1992, or early January 1993, Whynder asked him to purchase some 9mm ammunition for Whynder's 15 shot 9mm Smith & Wesson handgun. Together with Robart and Whynder, MacKellar purchased four boxes of 9mm ammunition for Mr. Whynder, from a residence in Dartmouth.

Samantha Grouse, 18, testified that:

- She did not wish to give evidence but was compelled by warrant to attend;
- Mr. Whynder was her boyfriend from 1991 until some time in 1992;
- She saw three guns in Mr. Whynder's basement during the time they were together; one of the guns was similar to what was described by a subsequent witness as a Browning 9mm;
- She knew Ms. Wilneff to be a prostitute who was a "crack head";
- In May or June of 1992, Whynder hit Ms. Wilneff in the head with a stick and "split her head open . . . There was blood." Whynder said "something like you owe me something". She recalled that Whynder "got charged" for this assault;
- Later she heard Whynder say that he wished that Kelly Wilneff "was dead and if he couldn't do it, he'd get someone else to do it". In cross-examination, in response to the question, "What did you feel Kevin meant?" She replied, "He said it for something to say. I didn't take it like he meant it."

Constable Allen Cullen of the Halifax Police Department testified that:

- On June 16th, 1992, he saw Ms. Wilneff at the emergency department of the hospital and that she had a "bruised left eye, cut on her nose and a cut on her left nostril";

- A charge of assault with a weapon was laid against Whynder. The matter was set for trial on October 19th, 1992. Mr. Whynder did not attend at the time scheduled, a warrant was issued, and he showed up later the same day. The matter was rescheduled for December 2nd. Whynder appeared on December 2nd but Ms. Wilneff failed to appear. A warrant was issued for her arrest. The trial was rescheduled for February 18th, 1993. Whynder showed up but the charge was dismissed since at that time Ms. Wilneff was deceased.

Tinika Cunningham, 18, a former girlfriend of Whynder's, testified that:

> "A couple of days after the discovery of Ms. Wilneff's body, Mr. Whynder asked her if she "heard the news" and I said "about Kelly" and he said "Yeah." . . . And he said, "he did the crime, he has to pay the consequences"."

Expert evidence established that bullets recovered from the crime scene were 9mm, and that they had been fired from a 9mm gun. The murder weapon was never recovered.

RCMP Corporal Gary Meeks and Constable David Williams, both acting in an undercover capacity, were placed in a holding cell at the Halifax Courthouse at the end of March 1993.

Corporal Meeks testified that:

- He told the other inmates that he was "caught" in Halifax while armed robbery charges were "pending out west";
- On March 29th, 1993, Mr. Whynder, who was in the same cell, advised that he and some friends had made a quick trip to Montreal the previous weekend to pick up "some 9mm pieces". Corporal Meeks understood the reference to be to a 9mm handgun;
- Corporal Meeks, Constable Williams and Mr. Whynder were transferred to the Halifax Correctional Centre on March 29th;
- On the evening of March 30th, Mr. Whynder speaking to another prisoner within hearing of Corporal Meeks, said something to the effect "about a girl getting shot in the head . . . six

times";

- On April 1st, 1993, Corporal Meeks told Whynder that he may not be taken back to Saskatchewan as there may be some "problems with the victim identifying me . . ." Whynder responded that he:

> "had, and he uses the word "bitch" . . . that was going to testify on me, and that I made her, and he uses the word, and I have it in quotations, "disappear";

Constable Williams testified that:

> "In the course of watching a movie, in the company of Mr. Whynder and other inmates, a 9mm handgun was depicted in one of the scenes. Mr. Whynder stated that the 9mm handgun was his "gun of choice".

**Application to Introduce Fresh Evidence**

Mr. Whynder's counsel seeks to have this Court consider fresh evidence, which it is submitted, "cast considerable doubt on the veracity of the testimony of Samantha Grouse".

Two affidavits sworn in Halifax on November 20th, 1995, before Counsel for Mr. Whynder, are filed in support of the application. We received the Affidavits at the beginning of the hearing and reserved decision as to their admissibility pending the hearing of the appeal following the procedure recommended by the Supreme Court in **R. v. Stolar** (1988), 1 S.C.R. 480 at 491.

One deposed by Chantelle Gabriel provides, in part:

> "2. THAT during the summer of 1994, Samantha Grouse and her son came to live with me . . .
>
> 4. THAT in the month of August when Samantha and I were returning from an evening walk, we had a conversation about Kevin Whynder.
>
> 5. THAT during our conversation, Samantha Grouse told me that she testified at the preliminary inquiry that she had seen Kevin Whynder hit Kelly Wilneff and argue with her and that this testimony was not true.
>
> 6. THAT Samantha Grouse told me that she had heard about Kevin

Whynder hitting Kelly Wilneff and arguing with her but had not actually seen it.

7. THAT Samantha Grouse told me the reason that she testified that she actually saw Kevin Whynder hit Kelly Wilneff and argue with her was because the police threatened to take her son away from her and put him with Children's Aid.

8. THAT Samantha Grouse told me that when she returned to Nova Scotia to testify at Kevin Whynder's trial for the murder of Kelly Wilneff,she was going to tell the police the truth.

9. THAT Children's Aid had taken Samantha Grouse's child away from her in Toronto in the summer of 1994 . . .

11. THAT when Samantha Grouse returned to Toronto after testifying at the trial of Kevin Whynder, I asked her whether she had told the truth.

12. THAT Samantha Grouse told me that she did not because the police said they would not let her out of jail if she did.

13. THAT Samantha Grouse told me that she testified at Kevin Whynder's trial for the murder of Kelly Wilneff that she had seen Kevin Whynder hit Kelly Wilneff and argue with her and that this was not true.

14. THAT I did not tell Kevin Whynder's lawyers about this until after he was convicted of murdering Kelly Wilneff.

15. THAT the reason I didn't tell Kevin Whynder's lawyers about this was because Samantha Grouse had told me she was going to tell the truth when she came back to Nova Scotia to testify at his trial."

The second affidavit, by Patricia Mercer, discloses that while staying with Chantelle Gabriel in the summer of 1994, Ms. Mercer spoke with Samantha Grouse:

"3. THAT Samantha Grouse told me that although she had testified that she had seen Kevin Whynder hit and fight with Kelly Wilneff, this was not true.

4. THAT Samantha Grouse told me that she only had said this because the police threatened to take away her son if she did not.

5. THAT I did not inform Kevin Whynder's lawyers of what Samantha Grouse told me until after he was convicted of the murder of Kelly Wilneff."

The powers of this court respecting the introduction of fresh evidence are derived from s.683 of the **Criminal Code**.

The Supreme Court of Canada interpreted this section in **Palmer & Palmer v. The Queen** (1980), 50 C.C.C. (2d) 193 at 204 as follows:

> "Parliament has given the Court of Appeal a broad discretion . . . The overriding consideration must be in the words of the enactment "the interest of justice" . . . The following principles have emerged:
>
> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: See **McMartin v. The Queen** [1964], S.C.R. 484;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

The Crown submits that none of the four principles of **Palmer** (supra) have been met.

Respecting the first **Palmer** principle, the Crown argues that no attempt was made by Mr. Whynder's counsel on cross-examination to discredit Ms. Grouse; rather, the questions were directed towards picturing Mr. Robart, and Ms. Wilneff, as unsavoury people who were both involved in the drug trade, one as pusher, the other as user. That approach which is based on supporting Ms. Grouse's credibility, the Crown submits, may have prevented the defence from carrying out a timely investigation of Ms. Grouse's background.

We were advised by Crown counsel at the hearing of the appeal, that Chantelle Gabriel, had a previous intimate relationship with Mr. Whynder resulting in the birth of a child. This information could affect the credibility of her evidence.

The failure of the defence to satisfy the second and fourth **Palmer** principles, is in my opinion, fatal to the application.

Both counsel agree that there were three critical issues that were covered in the testimony of Ms. Grouse:

1. The alleged assault by Whynder on Ms. Wilneff which resulted in a criminal charge being

laid against Mr. Whynder, could serve as a reason for Whynder wishing Ms. Wilneff to be unavailable to testify at his criminal trial;

2. Ms. Grouse saw three guns in the basement of Whynder's residence, and identified one in a photo, confirmed by a subsequent witness to be a photo of a Browning 9mm gun; 3. Ms. Grouse heard Mr. Whynder say that he wished Ms. Wilneff were dead "and if he couldn't do it, he'd get someone else to do it".

The new evidence sought to be introduced relates only to the first issue. Even if Ms. Grouse were to recant her evidence respecting her observation of Whynder striking Ms. Wilneff, Constable Cullen had testified that the charge of assault with a weapon was still before the courts, and was scheduled for trial two days after the discovery of Ms. Wilneff's body. The evidence of a motive for the killing, therefore, was before the jury through another witness.

The new evidence sought to be introduced did not touch upon the remaining two issues to which Ms. Grouse testified.

More significant, the new evidence did not bear on the main issue as to whether or not Whynder was guilty of murdering Ms. Wilneff, but only sought to attack the credibility of Ms. Grouse on a collateral matter, and hence does not meet the test described in the second and fourth principles of **Palmer**. (**Regina v. E.J.B.** (1993), 76 C.C.C. (3d) 530 at 535 (Sask. C.A.))

In my opinion, the fresh evidence did not have sufficient weight or probative force that if accepted, when considered with the other evidence in the case, might have altered the result at trial (**R. v. Stolar** (supra)).

I would dismiss the application to introduce the evidence of Ms. Mercer and Ms. Gabriel.

Since the hearing of the appeal, Mr. Whynder's counsel wrote the panel requesting an opportunity to file a further affidavit. The letter reads in part:

> "Subsequent to the hearing of this appeal a further potential witness approached John O'Neil. We have now been able to obtain an affidavit, which provides more detail than those of Ms. Mercer or Ms. Gabriel."

The Crown, to whom a copy of the letter and Affidavit were sent, submitted the Affidavit

should not be given any weight by the Court and in fact, should not be considered by the Court.

I infer from the wording used in counsel's letter that the content of the Affidavit of the third deponent relates to the same issues detailed in Ms. Mercer and Ms. Gabriel's Affidavits.

Accordingly, for the reasons advanced for rejecting Ms. Mercer's and Ms. Gabriel's Affidavits, I would reject the application to file the third affidavit.

2. (a) The Chief Justice erred in failing to instruct the jury to disregard the testimony of Guy Leaman Robart or, in the alternative, to warn the jury adequately of the dangers of accepting his testimony.

It is important to refer to the specific instructions given by the Chief Justice to the jury respecting prior inconsistent statements of witnesses generally, and Mr. Robart, in particular:

> "Prior inconsistent statements - I am now going to discuss with you the rule of evidence of a prior inconsistent statement of a witness. Specifically in this case, you heard several witnesses give evidence and during the course of their respective testimonies it was put to them that they made out-of-court statements prior to trial, which it is suggested differed from their testimony at trial . . .
>
> In the case of Guy Robart, and again I shall deal more fully with Mr. Robart in a moment, there are several references to possible inconsistencies. At the trial he acknowledged he was a drug dealer - at the preliminary he denied being a drug dealer. In his direct evidence he said he only saw Kevin Whynder with a gun on one occasion - during cross-examination he agreed he saw Kevin with a gun after he came back without Kelly Wilneff . . .
>
> If the previous statement was given under oath as in the case of Scott MacKellar, Guy Robart and Constable Williams, then I must give you a special warning. As I said, it is up to you to decide whether the previous statement is inconsistent with the sworn evidence given in court. If you find it is different, it would be dangerous for you to accept the testimony of that witness unless you are satisfied with the explanation.
>
> The reason is that where a witness tells inconsistent stories under oath at different times, it indicates that the witness does not take a solemn oath very seriously. Of course, I'm not talking about minor differences in a person's testimony. Having said all that, it is still your right to accept all, part or none of the witness' testimony.
>
> Criminal record - evidence was given that several of the witnesses had

criminal records, and I want to tell you how you can use that evidence . . .

Finally, Mr. Robart had an extensive juvenile record dating back to 1985 up to 1988, including five counts of break and enter and committing theft; one count failing to attend school, possession of stolen property, aggravated assault, mischief; and four counts of theft under. As an adult in 1989 attempted theft; 1990 possession of a narcotic; 1991 two counts of disturbing the peace and he is currently awaiting sentencing on a conviction for unlawful assembly.

. . . The criminal record is simply one factor you should consider when you decide how much weight you will give to the evidence of those witnesses. You are free to decide that the evidence you heard from them should be believed despite the criminal record which they have.

The fact that a person has been convicted of a crime is relevant to his trustworthiness as a witness . . .

Unsavoury witness - I will now give you a special warning about the testimony of Guy Robart. You recall I told you earlier about the credibility of witnesses. You should consider the things I told you when you decide whether or not you believe Mr. Robart's evidence. In addition, I warn you that you should be extremely cautious in accepting his testimony. It is unsafe for you to rely on his evidence alone. You should regard his testimony with great caution, unless there is corroboration for that testimony.

This is for several reasons: he has admitted to a series of criminal convictions including one for which he is awaiting sentencing. His admitted occupation of trafficking in drugs at the time of this offence gives him an unsavoury reputation. He agreed to testify on a grant of immunity from the prosecution. He admitted choosing what he would and would not tell the court, the judge and the jury, and his capacity for telling the truth is questionable.

His extensive criminal record, which the crown read out and I've just read; his admitted occupation at the time of this offence, namely trafficking in drugs (cocaine); his acknowledged lie denying he was a drug dealer when he was under oath at the preliminary inquiry; his admitted selectiveness in what he told the crown, the police, and the court, and the jury; his telling the court he only saw Kevin with a gun on one occasion in direct examination and then agreeing with defence counsel on cross that he saw Kevin come out of the bushes after the shots, and when he took his jacket off he had a nine millimetre gun, and other things which you may recall, are all things to look at.

Mr. Robart is an example of what the law would describe as a witness of unsavoury character. The evidence of such a person should be looked at and weighed with great care. It is dangerous to act on his evidence unless it is corroborated. . .

I have referred to corroboration - what does that mean? It is a technical, legal term. Corroborative evidence must satisfy the following requirements: it must be independent of the testimony of the witness whose testimony is sought to be corroborated. It must implicate the accused, that is, connect or tend to connect

> the accused with the crime. It must be evidence which confirms in some material particular, not only the evidence that the crime has been committed, but also that the accused committed it.
>
> The corroborative evidence need not confirm all such evidence, but it is not sufficient if it confirms only a very minor or insignificant part. It need not relate to the same subject as the evidence of the accomplice or unsavoury person, but it must relate to a matter in issue. It may consist of a number of items of evidence which individually do not provide such confirmation, but which do so when considered cumulatively. Such evidence must not only be consistent with the guilt of the accused, but it must be more consistent with such guilt that with innocence . . ." (emphasis added)

Shortly before the jury retired for deliberation, the Chief Justice revisited the defence theory respecting Robart:

> "As for the evidence of Guy Robart, the defence says it is totally unbelievable and should not be believed. Guy had a motive to lie, he acknowledged lying to all of us in court, he had a deal and the defence suggests he made up his evidence as he went along. Defence says common sense dictates you should reject his evidence entirely; therefore, the crown has not met the burden of proof." (emphasis added)

Counsel agree that the comments of Dickson, J., on behalf of the court in **Vetrovec v. The Queen** (1982), 1 S.C.R. 811, set forth the guidelines to be followed by a trial judge respecting the reliance that should be placed on the evidence of a witness of disreputable character whose testimony "occupies a central position in the purported demonstration of guilt".

Justice Dickson stated at page 831:

> "Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. . . " (emphasis added)

In my opinion, the warning given by the Chief Justice to the jury respecting the evidence of Mr. Robart was "clear and sharp" and fully complied with the mandate laid down by the Supreme Court.

The next point to be considered is the defence submission that:

> "When cross-examined, several things become apparent. The first is that Mr. Robart is willing to add details when they are suggested to him on cross-examination, and comes out for the first time with a story about Mr. Whynder returning with bloody gloves, cleaning up the blood on the car seat with a chamois, having a gun and ditching the gloves, the chamois, his jacket and Kelly's purse at a dumpster at McDonald's. These are all critical details. If true, there is no way Mr. Robart can flee from his obligation to have brought them forward at the Preliminary Inquiry or under direct examination."

There are several responses that are prompted by this submission.

Crown counsel exercised a fairly tight rein when examining Robart in chief. Robart was asked for the most part, specific questions, which were presumably intended to elicit short answers. Mr. Robart responded in kind.

The more expansive answers he gave on cross-examination did not just result from suggestions made by Mr. Whynder's counsel in the course of his questioning, but appeared to be spontaneous and derived from Robart's own independent recollection. The following example from the cross-examination illustrates the point:

"Q. No, when Kevin came back to the car he had gloves on?

A. Yes, he did.

Q. Those gloves were soaked in blood weren't they?

A. Yes, they were.

Q. Do you recall what type of jacket Kevin was wearing that day?

A. Charlotte Hornets.

Q. Charlotte Hornets. You saw blood on Kevin's gloves and as well, did you see blood on Kevin's jacket?

A. Not that I can recall.

Q. Not that you can recall. When Kevin got in the car, what did he do with the blood stained gloves?

A. Took 'em off.

Q. Took them off. You saw blood on his hands, didn't you?

A. No.

Q. Did Kevin get blood on the steering wheel?

A. No.

Q. What did Kevin use to wipe off the blood?

A. A chamois.

Q. A chamois - where did he get the chamois from?

A. The car.

Q. The glovebox?

A. No, in the trunk. . .

Q. So, Kevin had to go out to the trunk and get a chamois out and the chamois is just a cloth, isn't it?

A. Yes.

Q. He came back and he had to clean that up, didn't he?

A. Yes.

Q. When he cleaned it up, there was blood as well, on the steering wheel, wasn't there?

A. No.

Q. Did Kevin wipe the steering wheel down?

A. Not that I can remember."

The jury might well have speculated concerning the source of counsel's knowledge to develop this line of questioning. The answer may have been provided when counsel for Mr. Whynder asked Mr. Robart:

> "to think back to Sunday afternoon, this Sunday afternoon past, I had the opportunity to speak with you, didn't I?
>
> A. Yes."

While Mr. Robart did not bring out these additional details in his examination in chief, I conclude upon a review of the transcript, that he was never asked questions which would have

prompted the disclosure. It was open to the jury to speculate that Crown counsel was not aware of the additional details, but that they were provided by Mr. Whynder to his own counsel.

The next point raised by defence counsel is that once the Chief Justice embarked upon the exercise of attempting to assist the jury in respect of confirmatory evidence of Mr. Robart's testimony, that she should have engaged in a more extensive analysis, and in particular, should have balanced the examples given of corroboration, with other examples of "where no corroboration exists or of where evidence which might otherwise be corroborative might also be inconclusive".

Counsel suggests the following areas such as:

11. "No fibres or hairs seized from any of the search locations matched fibres from Ms. Wilneff's clothing or body . . .

12. No gunshot residue was located on any, of the many items, of clothing or footwear seized from any of the searches . . .

13. There was no evidence offered of any blood staining on any items of clothing recovered from the various searches and seizures of places frequented by Mr. Whynder.

14. Although Mr. Whynder's automobile was throughly searched for hair, fibre, blood, semen, and any other forensic evidence, none was found . . .

15. Bullets recovered by the R.C.M.P. Dive Team off Point Pleasant Park (an area where a witness said she threw away bullets from Whynder's gun) were from the "wrong" type of gun."

The submission embraces the duty of a trial judge in addressing a jury in a criminal case which was authoritatively stated by Tachereau, J., on behalf of the Court in **Azoulay v. The Queen** (1952), 2 S.C.R. 495 at 497:

> "The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them . . . "

Mr. Whynder's trial lasted over eight days. It was not necessary for the Chief Justice, in

my opinion, to review every singular piece of evidence and develop every possible inference that could be taken from that evidence, and relate it to the theory of the defence, in order to present the defence fully and fairly to the jury.

In my opinion, the Chief Justice fully complied with the mandate stipulated in **Azoulay** (supra); she gave a full and complete direction on all relevant principles of law, and related the salient features of the evidence to the issues raised (**R. v. Reddick** (1989), 91 N.S.R. (2d) 361).

There was clearly evidence before the jury capable of corroborating the evidence of Mr. Robart, some of which was referred to by the Chief Justice in summation, but other potentially corroborative evidence was not. The forensic evidence that was adduced by the crown was essentially evidence of a neutral kind - it neither supported, nor detracted from, the evidence of Mr. Robart.

For example, Constable Hiebert, whose qualifications in the area of crime scene identification were accepted, testified that there were no significant amounts of blood in Mr. Whynder's car when it was examined on March 9th. He also testified that cleaning products, such as Javex, or ammonia, would destroy any blood initially deposited in the car interior. This evidence was referred to by the Chief Justice.

She went on to say:

> "Also there is a lack of forensic evidence linking the accused to the murder, and I'm referring to the hair and fibres collected with no results being reported to you linking anything of that nature to the accused. All of these things are for you to consider . . ."

While summarizing the theory of the defence, the Chief Justice remarked:

> "As to the garbage bag, it was not shown to be linked with any of the seizures . . . (Whynder was reported by Cpl Meeks as) quick to say he had a Winchester 357 and the bullets found off Point Pleasant Park were all 357 calibre, and he never mentioned a nine millimetre . . . I have not dealt with all of the exhibits, nor with all of the evidence, but all of it is for you to consider. Just because I do not deal with a particular piece of evidence does not mean that it is not important."

While some minor elements of forensic evidence that failed to provide corroboration for

Robart's testimony were not referred to, I do not find the omission was material.

> The Chief Justice, quite correctly emphasized that she was leaving this issue for the jury:
> "In the end you must ask yourself whether enough of the important parts of his testimony have been confirmed to persuade you that his story is true."

2. b) The Chief Justice erred in failing to caution the jurors adequately concerning inconsistencies and other shortcomings in testimony of the undercover officers, David Williams and Gary Meeks;

Defence counsel raises three separate issues in connection with this ground:

1. a caution should have been given respecting the evidence of the undercover agents, because of inconsistencies;

2. the jury should have been addressed concerning alternate inferences that might be made from certain parts of the evidence, particularly comments allegedly made by Mr. Whynder; and

3. the jury should have been advised that Whynder's conversation about purchasing a 9mm handgun in Montreal related to a trip that occurred six weeks after Ms. Wilneff's death.

While not fatal to the submission, there was no reference to any inconsistencies in the evidence of the two undercover agents during the course of defense counsel submission to the jury, nor did counsel request that the Chief Justice charge the jury in respect of the matter about which a complaint is now made.

The failure to object means that the Court "is being invited to substitute its view for that of the trial judge as to what were, and what were not essential matters to be included in a charge which had met with the approval" of counsel (**R. v. Imrich** (1978), 1 S.C.R. 622 at 631).

At trial, counsel obviously did not consider the failure to charge the jury on these "inconsistencies" to be fundamental to the theory of the defense. (**R. v. Lewis** (1979), 2 S.C.R. 821 at 840)

With respect to the first two issues, the comments of Dickson, J., on behalf of the Court in **R. v. Lewis** (supra) at 847, while directed toward the failure of the trial judge to charge a jury

on lack of motive, are relevant:

> "A trial judge has a difficult task to perform in charging a jury at the end of a lengthy trial, and he must be given reasonable latitude in the discharge of that responsibility. It is the charge as a whole that must be considered in determining whether justice has been done . . . Views will in all likelihood differ in any case as to the evidence which should be alluded to, and the evidence which may be disregarded, by the trial judge in the preparation of his charge, but unless the result is such as to give rise to a substantial wrong or miscarriage of justice, then the failure to refer to any particular evidence should not, in my view, be regarded as reversible error entitling the accused to a new trial." (emphasis added)

I will deal with each of the issues in turn.

1. The Chief Justice did instruct the jury respecting internal consistency of a witness' testimony, and the consistency, or lack of same, with the testimony of other witnesses in manner following:

> "A witness may testify to certain facts which are true, and then by reason of poor powers of observation, or faulty recollection, or poor memory, or in some cases from a desire to hide the truth, may testify to other things which are false . . . Compare one witness with another and by your powers of observation of their conduct, demeanour and the apparent consistency of their evidence you will be able to decide how much of the testimony of the several witnesses you will believe and how much weight you will give to any particular part of the evidence . . . If you have a reasonable doubt as to the accuracy of the evidence given by a witness, or to the weight you should give to such evidence, you must give the benefit of the doubt to the accused and not to the crown."

Neither Corporal Meeks nor Constable Williams were equippped with any electronic device to record conversation while they were located in the City lock-up or the Correctional Centre.

They each made notes on those brief occasions when they were removed to a secure place, but on occasion were required to write down the key elements of conversation that had occurred some days previous.

It is not surprising there were some inconsistencies in their recollection, bearing in mind they were trying to appear not unduly attentive to what they overheard.

The inconsistencies noted were not, in my opinion, material, not did they require any specific caution from the Chief Justice.

2. Although the Chief Justice did not expressly address the jury respecting alternate inferences that might be drawn from the evidence complained of, and in particular, that certain alleged comments by Mr. Whynder could be interpreted as simply braggadocio, rather than representations or fact, she did instruct the jury on the matter generally:

> "However, you should not draw any inference against the accused unless it is the only reasonable inference open upon the proven facts. . . Inference must never be based on speculation or guesswork, and you must not draw any inference against the accused unless it is the only reasonable inference open upon the proven facts."

In my opinion, there was no substantial wrong or miscarriage of justice that was occasioned arising from the first two issues.

3. During the course of the evidence of Constable Williams and Corporal Meeks, references were made to a statement by Mr. Whynder that he drove to Montreal to pick up a 9mm handgun.

Constable Williams did not testify as to when Whynder indicated the trip occurred. Corporal Meeks testified, however, that: "From the gist of the conversation, I thought that the trip to Montreal to pick up these pieces had been made sometime the previous week-end."

The only inference that can reasonably be taken from this comment is that the trip to Montreal was six weeks <u>after</u> the death of Ms. Wilneff.

The Chief Justice made four references to the trip to Montreal in her charge to the jury:

1. "In the case of Scott MacKellar, if you accept that he bought nine millimetre bullets for Kevin, the crown asks you to infer that this was for the nine millimetre gun which Samantha says she saw or which Kevin talked about getting in Montreal as overheard by Meeks and Williams. And that he then used these bullets <u>in that gun</u> to kill Kelly."; (emphasis added)

2. "Corporal Meeks overheard the discussion of Kevin with Norman Lawrence about going to Montreal for some pieces . . . There was the evidence of Constable Williams also in the cells and the several discussions which he overheard about a nine millimetre gun and Kevin having got

one in Montreal . . .";

3. "Guy Robart said he saw Kevin two weeks before the murder with a gun and the evidence of Scott MacKellar buying nine millimetre bullets for Kevin, and Kevin's own later remarks overheard by Constable Williams about "going to Montreal to get a nine millimetre gun";"

4. "Also there are the remarks related by Samantha of wishing Kelly dead, of arranging for Scott MacKellar to buy nine millimetre bullets, the discussion after his arrest of going to Montreal for a nine millimetre gun or for pieces including a nine millimetre several weeks earlier."

When dealing with this issue, it is important to bear in mind Chief Justice's opening remarks to the jury where she stated:

> "You, the jury, are the sole judges of the facts and I am the sole judge of the law . . . As judges of the facts, it is your duty to decide what the facts are in this case . . . I shall deal with some of the facts to try to assist you in coming to a proper conclusion. I may express an opinion on the facts but you are not bound to follow my opinion, nor my recollection of the facts, and indeed you should not and must not do so unless that opinion or statement of the facts agrees with your own judgment and recollection of the evidence."

With respect to the incorrect inference that might be taken by the jury from the Chief Justice's words, and in particular her statement that the Crown ask that the jurors accept that Mr. Whynder "used these bullets <u>in that gun</u> to kill Kelly", I find the comments of Twaddle, J.A., on behalf of the court in **Regina v. Fosty** (1989), 46 C.C.C. (3d) 449 at 466 (Man. C.A.) to be particularly apposite:

> "In considering complaints that evidence has been misstated or mischaracterized in a judge's charge, we must not forget that the jury members have listened to the evidence themselves. They knew that they are the triers of fact. They know that they must decide the factual issues on the basis of the evidence and not on the basis of the judge's summary of it. A summary is not intended as a complete recapitulation, but as a reference back to the actual testimony which the jury members heard and can evaluate for themselves. The words of Channell, J., delivering the judgement of the
>
> English Court of Criminal Appeal in **R. v. Cohen and Bateman** (1909), 2 Cr. App.

R. 197 are apt. He said (at pp. 208-9):

> When one is considering the effect of a summing-up, one must give credit to a jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact.

In the context of the entire case against Mr. Whynder, the misstatement by the Chief Justice was, in my opinion, insignificant. Without it, the jury would necessarily have returned the same verdict of guilty on the charge of first degree murder. There was, as pointed out earlier in this opinion, evidence from several witnesses who testified they saw Mr. Whynder in possession of a 9mm gun prior to Ms. Wilneff's death. Consequently, I conclude that no miscarriage of justice has occurred as a result of this relatively minor error in the Chief Justice's charge.

2. c) The Chief Justice erred in requiring defence submissions to be made to a tired jury, causing the defence to jettison most of its final argument and affecting the fairness of the trial;

The *viva voce* evidence was concluded at approximately 12 o'clock noon on Thursday, November 17th, after the jury had sat for approximately two hours and five minutes. The jury returned at two o'clock the same day, but after the introduction of certain joint admissions into evidence, adjourned at 2:30 for the day.

The jury did not sit on Friday morning, November 18th, but returned at 1 p.m. for summation by Crown counsel, which concluded at approximately 3:40 pm.

During the course of a twenty-five minute break about 3 p.m., there was a brief discussion by counsel with the court:

The Court: Well, you're (addressing Crown counsel) . . . you're an hour and three-quarters. We will continue until we're finished today, until both sides are finished. All right?

Mr. O'Neill: (Defence counsel) That . . . that is the . . .

The Court: I don't . . . I don't want to leave yours over till Monday.

Mr. O'Neill: The concern that I have is, is that the jury certainly appears tired. I've noticed . . .

The Court: Well, I appreciate that, but they're going to get a little more tired.

So we'll just . . . I mean that's why I wanted to start earlier than . . . than 1:00 o'clock, than 2:00 o'clock or 1:00 o'clock.

Mr. O'Neill: But I have noticed one juror, My Lady, appearing to be asleep at times.

The Court: Well, that's . . . I hadn't noticed it, but I was trying to keep some eyes on it. But I'm writing a lot, so . . .

Mr. O'Neill: And that's my concern is, is that I'm going to rush a Friday . . .

The Court: Don't you rush it, don't you rush it. We'll see what time. Please let's get going now because . . . Do you have any idea how long yours is? Have you timed it at all?

Mr. O'Neill: I've never timed it, no.

The Court: Okay. Well, I . . . I would like to finish them today. I . . . I really think there's no reason why we shouldn't. They haven't set all morning, so they can certainly sit a little longer.

Mr. Fetterly: (Crown counsel) I . . . I certainly noticed . . . I can indicate one juror sort of closing her eyes, but I did notice that within a few minutes she opened them up again . . . "

At the conclusion of the Crown's address, the Court asked defence counsel if he would "like to start". Counsel indicated his assent, and completed his address in approximately sixteen minutes.

The Chief Justice did not charge the jury until Monday morning, November 21st, at 9:30 a.m.

At this appeal, counsel for Mr. Whynder:

> ". . . acknowledges having been able to make many of its most important arguments, but that the discussion reveals the limited attention span of the jury at the end of a long trial is a strong concern of defence counsel. The submission ultimately presented can be categorized as a pared-down version of the defence argument, leaving out any detailed attack on some of the more time-consuming aspects of the case, such as the testimony of the undercover officers or the wire-tap evidence.
>
> All of this affected the fairness of the trial, and could easily have been dealt with by holding argument over until Monday, by splitting the defence argument and/or polling the jurors to determine whether they wished to receive the entire argument commencing as it was late on a Friday afternoon."

Defence counsel apparently made a strategic decision to present a "pared-down version" of the defence argument, for reasons best known to the defence.

The Chief Justice was not advised that defence counsel considered that it was required to make such a choice.

It is pertinent that defence counsel did not make a motion to delay his address but simply mentioned a "concern . . . that the jury certainly appears tired". This comment elicited responses from the Chief Justice and Crown counsel, which were consistent with each other, but not similar to that expressed by the defence.

I find it difficult to understand how a jury that had only sat for two hours the previous day, and for only two and a half hours at the time the Crown concluded its summation at 3:40 pm on a Friday afternoon, could be too tired to listen to an address for one, or two, or three hours, with appropriate recesses.

If counsel had made a motion, and if the court had been adjourned after the Crown had concluded its summation, conceivably it could now be advanced that the jury might have given undue weight to the submissions of the Crown since defence was not in a position to reply in a timely manner.

This is not a case where the jury were under any pressure to arrive at a verdict such as **Regina v. Owen** (1983), 4 C.C.C. (3d) 538 (N.S.C.A.D).

I would dismiss this ground of appeal.

2. d) The Chief Justice erred in admitting the testimony of the undercover officer Meeks after the *voir dire*;

The testimony which counsel submits should have been excluded is that by Corporal Meeks who overheard Mr. Whynder on April 1, 1993, say something:

> ". . . to the effect that I had, and he used the word, "bitch". I have that in quotation in my notebook, that was going to testify on me, or something to the effect that she was going to testify on him, and that I made her, and he uses the word, and I have it in quotations, "disappear".

Counsel for Mr. Whynder makes two objections to the admission of this evidence: 1. The comments were of such questionable accuracy they should not be admitted. I find no merit in this submission. Notwithstanding a searching cross-examination, in my opinion, Corporal Meeks' evidence remained cogent.

2. The comments were "induced" by Corporal Meeks, and consequently the evidence contravened Mr. Whynder's Section 7 Charter Rights, and should be excluded under s.24(2) of the Charter.

Before examining this issue, it is appropriate to mention a preliminary objection raised by the Crown, namely that the issue of a breach of s.7 of the Charter was never raised by defence counsel before the trial judge, and accordingly, this Court should be extremely reluctant to consider this ground of appeal. While the Crown acknowledges that the Court has a discretion to entertain Charter arguments not developed in the courts below, the discretion, it is submitted, should only be exercised in exceptional circumstances (where there's been a change in the law between the time of trial and the time of appeal, or where the evidence before the Court of Appeal overwhelmingly establishes a breach of the individual rights under the Charter, citing in support **Regina v. Brown** (1993), 83 C.C.C. (3d) 129.)

I need not decide this point as I have concluded that the comment made by Mr. Whynder was not "actively elicited" by Corporal Meeks. There is, therefore, no violation of Mr. Whynder's

Section 7 rights (**R. v. Hebert** (1990), 57 C.C.C. (3d) 1 (S.C.C.)).

In the subsequent case of **R. v. Broyles** (1991), 68 C.C.C. (3d) 308 at 321 (S.C.C.), Justice Iacobucci, writing on behalf of the Court, said there were two sets of factors to be considered when viewing the issue:

> 1. "Did the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation? . . .
>
> 2. Did the state agent exploit any special characteristic of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused?

Corporal Meeks was obviously not in any position of trust respecting Mr. Whynder. In fact, he had only met him a few days previous when both were occupants of the same cell.

The issue is whether the comment ("I had a bitch that was going to testify against me and I made her disappear") was actively elicited by Meeks by a technique that was the functional equivalent of an interrogation.

The statement was made on the fifth occasion that Corporal Meeks was in a position to overhear Whynder's comments. On two of those occasions, Corporal Meeks did not engage in any discussion with Whynder at all but simply overheard remarks made by Whynder.

On two of the other occasions, the topics discussed were not germane to the issue raised in this submission.

On Monday, the 29th of March, Meeks had entered into a discussion with Whynder concerning the passing of counterfeit money and a credit card scheme. At 7:30 am on April 1st, Whynder asked Corporal Meeks about the chances of Constable Williams being released and later on the same day Whynder volunteered that he wished that he had run into Meeks "on the outside" that he could help him out a lot.

The critical conversation, which took place on the evening of April 1st, 1993, was described by Corporal Meeks as follows:

> A. "We returned to the chances of me being released and I advised it was going to cost big money to get me back out West to answer these charges that I had pending out there and that they may not take me back out West, that it would cost 8 to $900.
>
> Q. Was there anything further discussed about that?
>
> A. We went on to explain that there may be problems with the victim identifying me and that the charge might go away.
>
> Q. Did Mr. Whynder make a response to that?
>
> A. He did. Mr. Whynder then went on to advise that he had, and I'll quote, "a bitch" who was going to testify on him, and that he made her, and I quote, "disappear"."

I have carefully reviewed Corporal Meeks' evidence, and in my opinion, the statement

made by Whynder was not "actively elicited" by Corporal Meeks within the meaning of **Hebert** (supra) or **Broyles** (supra).

This was not a case of subtle, or persistent, manipulation or questioning by Corporal Meeks which amounted to the "classic example of the function equivalent of an interrogation" such as existed in **Regina v. Brown** (supra).

I would accordingly dismiss this ground of appeal.

2. e) The Chief Justice erred in failing to caution the jury adequately about statements which were classified as admissions and allegedly made through Tinika Cunningham;

Tinika Cunningham, Mr. Whynder's girlfriend, testified that a couple of days after the identification of Ms. Wilneff's body was publicly announced, Mr. Whynder said:

". . . he did the crime, he had to pay the consequences".

The Chief Justice commented during the course of her charge to the jury:

> "Tinika Cunningham said Kevin called her a couple of days after the identification of the body was announced and he said he did the crime and he has to pay the consequences. She said she never raised it or confronted him again and they continued their relationship until this case unfolded."

Counsel for Mr. Whynder submits that in order for the charge to be fair, the Chief Justice should have said something more than this brief comment. Alternative inferences should have been advanced such as, for example, that the comment could have been a "sarcastic comment".

The Chief Justice reviewed, in my opinion, the salient features of Ms. Cunningham's evidence. A trial judge is not obliged to advise the jury of every possible inference that can be taken from a witness' evidence, or of every possible inference that defence counsel would wish the jury to take from the evidence.

Ms. Cunningham was not asked in cross-examination, for example, if Mr. Whynder's tone

was sarcastic, or ironical, when he made the statement, neither was it suggested that Mr. Whynder was not speaking in earnest.

This is in contrast to the approach taken by defence counsel during the cross-examination of Samantha Grouse, earlier in the trial:

"Q. You've known Kevin for quite sometime?

A. Yes.

Q. How did you interpret that remark?

A. How did I interpret that remark?

Q. What did you feel Kevin meant?

A. I, what did I feel that he meant. He said it for something to say.

Q. I'm sorry, I can't hear you?

A. He said it for something to say. I didn't take it like he meant it."

Defence counsel did not suggest to the jury that the words of his client were capable of an alternate inference, electing to make no reference to Ms. Cunningham's evidence.

The Chief Justice dealt fully, in my opinion, with the topic of alternative inferences in the part of the charge quoted earlier in this opinion.

I would dismiss this ground of appeal.

2. f) The Chief Justice erred in failing to caution the jury adequately about statements made in the course of taped telephone conversations;

The police obtained appropriate authorization to wiretap and record telephone conversations from Mr. Whynder's residence.

The Chief Justice referred to the taped telephone conversations in the course of her charge:

> "The crown also referred to a number of remarks made during the telephone conversations, such as he did not think he was going to be let go, that he was not getting out for this, and that upon his arrest he was just going to start his time. Also during the probe in the car he said, "I knew this day had to come".

Counsel for Mr. Whynder submits there were other possible inferences the Chief Justice failed to discuss with the jury that could be drawn from these taped conversations - inferences that would have placed a benign interpretation on the conversations.

The Chief Justice instructed the jury respecting the taped telephone conversations as follows:

> "The fact that evidence of these statements was given does not mean that they were made or that they are true. It is for you to decide. If you have a reasonable doubt about whether a particular statement was made you must give the benefit of the doubt to the accused and reject the statement. If you find the statements were made it is up to you to decide whether an unsworn statement alleged to have been made by the accused is an acknowledgment by the accused of the truth of the matters contained in the statement.
>
> If you find all or part of the statement to be an acknowledgment of the truth, you will take it into consideration as evidence in this case, and you will decide what weight is to be given to such evidence. Consider what you accept along with other evidence you accept. You must reach your decision on the whole of the evidence that you decide is worthy of belief."

The Chief Justice had earlier considered the issue of inferences and when they could properly be drawn in the following words:

> "However, you should not draw any inference against the accused unless it is the only reasonable inference open upon the proven facts . . .
>
> Inferences must never be based on speculation or guesswork, and you must not draw any inference against the accused unless it is the only reasonable inference open upon the proven facts . . .
>
> Again, I remind you that when you are drawing inferences from circumstantial evidence they must be based on the evidence you accept, and you must be satisfied beyond a reasonable doubt that the inference you draw is the only reasonable inference open upon the proven facts . . .

Justice Cory on behalf of the majority in **R. v. Cooper** (1993), 1 S.C.R. 146 outlined the necessary ingredients that should be contained in the charge at 163:

> "The directions to the jury must, of course, set out the position of the Crown and defence, the legal issues involved and the evidence that may be applied in resolving the legal issues and ultimately in determining the guilt or innocence of the accused. At the end of the day, the question must be whether an appellate court is satisfied that the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues."

In my opinion, the directions of the Chief Justice fully satisfied these "basic requirements".

2. g) <u>The Chief Justice erred in suggesting it could be inferred that Kevin Whynder had been picked up on a warrant and brought to court while charging the jury with respect to the defence argument concerning motive</u>;

The Chief Justice instructed the jury with respect to this issue as follows:

> "The defence says Mr. Whynder submitted himself to the criminal process and suggests, although a warrant was issued, Mr. Whynder was released the same day, from which you should infer he was just late for court. I must add that it could also be inferred he was picked up and brought to court as a result of the warrant on the same day it was issued."

Defence counsel submits that Mr. Whynder would have no need to kill Ms. Wilneff because she already had a track record of not showing up, while he himself had shown a

willingness to submit to the process. Had the Crown drawn the same inference, as the Chief Justice, it is argued, the defence could have been tempted to bring forward evidence presumably to show that Mr. Whynder always intended to show up for his court appearance but was simply late on the day in question.

I conclude that the Chief Justice was simply indicating to the jury that an inference, other than that suggested by Mr. Whynder's counsel was possible. This, to my mind, was a perfectly reasonable inference which must have occurred to the jury not from the words of the Chief Justice in her charge, but rather from the evidence of Constable Allen Cullen. Constable Cullen testified that he attended at Court on October 19th, 1992, the date scheduled for Mr. Whynder's trial, and Mr. Whynder did not attend, resulting in an endorsement on the back of the Court document indicating that a warrant was issued for Mr. Whynder's non-appearance. Crown counsel also brought out quite fairly that Mr. Whynder attended at the Court later on the same day (ie. October 19th, 1992).

I conclude the Chief Justice committed no error in her direction to the jury respecting this issue.

2. (h) <u>The Chief Justice erred in failing to charge the jury respecting the "sexual motive evidence"</u>.

The "sexual motive evidence" consisted of DNA testing of swabs taken from Ms. Wilneff's vagina, rectum and throat, the presence of a condom and condom packet at the murder site, and Ms. Wilneff's lack of undergarments.

Defence counsel in his closing address, referred the jury to this evidence in manner following:

> "The crime scene - there are troubling questions. Does the crime scene or the reconstruction fit the theory of the crown? As you recall from the testimony, there was a condom found some three feet from the body. As well, a condom package was found nearby. I would suggest to you that that is indicative of something of a sexual nature.

Those findings do not parallel the theory of the crown. How does this impact against the motive that has been related by the crown? . . .

Forensics - the condom, we know next to nothing about it. There's been no link provided by the crown. There's no calling card or signature offered by way of DNA. I would suggest that the condom and the condom package . . . suggest sexual activity.

We do know that Mr. Whynder is not the donor of the DNA that was found in the vagina or the rectum. The throat and the anal swabs obtained are of insufficient samples to reach any conclusion. You can't rule it in; you can't rule it out . . ."

I take it that the defence theory is that the presence of male DNA, other than that of Mr. Whynder, on swabs taken from the vagina and rectum of Ms. Wilneff's body, suggests that she may have been murdered by an unhappy sexual partner.

The Crown called evidence from one Raymond Carvery, an acknowledged drug addict and trafficker, who was with Ms.Wilneff for a period of 12 and perhaps 36 hours, up until approximately 1 p.m. on February 16th, 1993. According to Mr. Carvery, Ms. Wilneff, and other participants, were all "getting high on rock cocaine". He testified that he had vaginal intercourse with her over that period.

The Crown also called evidence from one John Ryan who testified that he was with Ms. Wilneff on February 14th and until approximately 10:30 a.m. on February 15th. Mr. Ryan testified that he employed Ms. Wilneff and Mr. Carvery to purchase cocaine for him. According to Mr. Ryan, Mr. Carvery's payment for his service, was in the form of having sexual relations with Ms. Wilneff.

Admissions introduced in evidence pursuant to s.655 of the **Criminal Code** provide in part that:

> "Prior to her death (Ms. Wilneff) had worked as a prostitute in the Halifax area . . . At the time of her death (she) had cocaine in her blood, urine, and stomach. The amount of cocaine in her blood was consistent with cocaine abusers."

The DNA evidence, the presence of the package of condoms and Ms. Wilneff's lack of undergarments, were consistent with her acknowledged profession.

There was no realistic factual basis in the evidence to suggest that Ms. Wilneff's execution-like murder resulted from the rage of an unhappy or dissatisfied sexual partner. There was, therefore, no obligation on the Chief Justice to place this theory, which has in my opinion, no air

of reality, before the jury. (**R. v. Whynot** (1983), 9 C.C. C. (3d) 449 (N.S.S.C. App. Div.))

I would dismiss this ground of appeal.

3. The effect of the errors outlined in the second issue included, but was not limited to, a violation of Mr. Whynder's right under s.7 and 11(d) of the Canadian Charter of Rights and Freedoms.

Defence counsel submits that a fair hearing cannot be held without a fair jury charge and that the Chief Justice's failure to remove Mr. Robart's evidence from consideration by the jury, or in the alternative, by failing to warn the jury adequately about his testimony, infringed Mr. Whynder's right to a fair trial.

The evidence of Mr. Robart, it is argued, was "so dangerous" that the suggestion that it could be corroborated, and employed against Mr. Whynder, created a condition in which Mr. Whynder's trial was unfair and accordingly, the evidence ought to be excluded under s.24(2) of the Charter.

For the reasons advanced earlier, I have concluded that the warning fully complied with the guidelines of **Vetrovec** (supra).

The defence also submits that any error of the trial judge should not result in applying the provisions of s.686(1)(b)(iii) of the **Code**.

That section provides:

"686(1) On the hearing of an appeal against a conviction . . . the court of appeal
. . .

> (b) may dismiss the appeal where
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred . . . "

Subparagraph (a)(ii) refers to the setting aside of the judgment of the trial court on the ground of a "wrong decision on a question of law".

There is no need to consider the curative prosivions of s.686(1)(h)(iii) as I do not consider that the Chief Justice committed any error of law throughout the entire case.

**Disposition**

I would dismiss the appeal.

PUGSLEY, J.A.

Concurred in:

FREEMAN, J.A.

ROSCOE, J.A.

C.A.C. No.112289

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

| | | |
|---|---|---|
| KEVIN ALLEN WHYNDER | ) | |
| | ) | |
| Appellant | ) | |
| - and - | ) | REASONS FOR |
| | ) | JUDGMENT BY: |
| HER MAJESTY THE QUEEN | ) | |
| | ) | PUGSLEY, J.A. |
| Respondent | ) | |
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