S.C.C. No. 02484
S.C.C. No. 02497

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hallett and Chipman, JJ.A.

BETWEEN:

MICHAEL TIMOTHY WAITE	)	Duncan R. Beveridge
	)	for Joseph Harold Scallion
- and -	)	
	)	Kevin G. Coady
JOSEPH HAROLD SCALLION	)	for Michael Timothy Waite
	)	
	)	Robert C. Hagell
appellants	)	for the respondent
	)	
	)	Appeal Heard:
- and -	)	September 15, 1992
	)	
	)	Judgment Delivered:
HER MAJESTY THE QUEEN	)	November 10, 1992
	)	
respondent	)	

THE COURT: Appeals against conviction of the appellants dismissed per reasons for judgment of Jones, J.A.; Hallett and Chipman, JJ. A. concurring.

JONES, J.A.:

Shortly after 1 a.m. on November 1, 1989, Bernie Langley Johnson was gunned down in Uniacke Square, a housing development, in the City of Halifax. Following a trial before Mr. Justice Tidman and a jury the appellants were convicted of first degree murder for the slaying and sentenced to imprisonment without eligibility for parole for twenty-five years.

The main witness for the Crown was Mr. Robert Hudson, a taxi driver. He testified on direct-examination as follows:

> "Q. Do you recall getting a call that morning to go from the Lord Nelson Stand to South Park Lodge?
>
> A. Yes.
>
> Q. And do you recall at approximately what time you received the call?
>
> A. It would be about ten to 1:00 o'clock.
>
> Q. So, having received that call, what did you do?
>
> A. I drove to the address and ah, as I pulled up in front of the house, there are two gentlemen sitting on the front steps of the South Park Lodge, and they got up and walked over to the car. Ah, one of them got in the front seat and one of them got in the, in the back seat. Ah, the one in the front, got in the front, asked me where another driver was and I didn't hear who he asked for and I asked him - who, he said ah, - oh, it doesn't matter, we asked for another driver, but you will do. He then said - I looked familiar, so I told him my name, and he said - yeah, I think I've had you before, and I looked at him and I said - well, you look a bit familiar too, and I told him my name, and he said - well, I am Joey Scallion.
>
> Q. Okay, I will stop you there. Perhaps you could describe that man's appearance at the time?

A. Ah, about six feet tall, late thirties, early forty's about 185 pounds, full beard, grey blondish hair, ah...

Q. All right, anything else you can recall?

A. He was wearing a light blue jean jacket.

Q. Okay, now I am going to ask you to look around the court room and indicate whether you recognize that same person in the court room?

A. Yeah, he is right behind you there.

...

ACCUSED IDENTIFIED: SCALLION

Q. Do you see any change in Mr. Scallion's appearance today, as compared to when you saw him on the 1st of November 1989?

A. Ah, yes, his hair seems to be greyer than it was at the time, it was more blonde a year and a half ago. He had a full beard and he doesn't appear to have one now.

Q. All right, now ah, the other man that was with him, have you ever seen that man before?

A. In the...

Q. When you responded to the call?

A. I didn't recognize him at first but as it turned out he was a passenger in my car two nights before that, the night of the Mardi Gras.

Q. And how would you describe him, his appearance on that night?

A. Ah, he was shorter, about 5'10" around 165 pounds, he had long dark brown hair, the mustache, he was wearing dark clothes, I don't know if it was a jean jacket, but a jean type jacket.

Q. All right now ah, yes?

A. Late....late 20's or early 30's.

...

ACCUSED IDENTIFIED: MR. WAITE

MR. DELANEY: Now ah, Mr. Hudson, when you first encountered those two, two men that morning, did you notice anything about their condition in terms of were they sober or did they appear to be under the influence of alcohol or drugs?

A. They appeared to be sober when they got into the car.

Q. And were either of them carrying anything when they first got in the car?

A. No.

Q. And I stopped you before when you had ah, arrived at the point in your evidence where you said that one man introduced himself as Joey Scallion?

A. That's correct.

Q. Would you resume from there please, further dealings you might have had with these two?

A. Okay, they were both in the car at that time. They said they had a couple of stops to make, they were going to Kent Street and then to Uniacke Square and then Mr. Scallion said I am going to ask you to stick with me. I assumed that he meant they might go in the place on Kent Street and I might have to wait for them for a while, or something like that maybe at Uniacke Square, and I said - okay, sure. We proceeded to Kent Street and I asked him whereabouts and he said - towards the bottom on the right, and they told me to stop in front of this red house on the south side of Kent Street.

Q. Okay, do you happen to know the number of that house?

A. It would be 5236.

Q. Okay, so you stopped by the, by the house did you?

A. Yes, right in front of it, ah...then Mr. Waite got out of the back seat of the car and as he was leaving he referred to an incident which happened two nights earlier on the night of the Mardi Gras.

Q. Mr. Waite did?

A. Yes, I had ah, had him as a passenger in the car that night, the night of the Mardi Gras and as I dropped him off on that night, as he was getting out a man came up to the car holding his hands, it was covered in blood and asked me to take him to the hospital, so I did. And ah, when Waite got out of the car on the morning of November 1st, he told me that the guy, he had found out that the guy had put his fist through a window. So, while he was gone, I related the story to Mr. Scallion, I then had a cigarette and then offered him one and he said, yeah, thanks. I lit it and he said I have some in my pocket but I am too pissed off to bother with the, bother getting them.

Q. Have some cigarettes in my pocket?

A. Yeah.

Q. Okay.

A. We talked a bit, I mentioned the fact that when I was in high school there was a Scallion in high school, a girl and asked him if it might be his sister and he said he had several sisters and it could well have been. Ah, shortly thereafter Mr. Waite came back to the car carrying a white plastic bag.

Q. Okay, now ah, do you have any idea of how long Mr. Waite ah, was away from the car that time?

A. Not terribly long, four or five minutes, perhaps.

Q. Okay, and ah, when Mr. Waite returned you were

seated in the car were you?

A. Oh yes.

...

Q. Okay, and what happened then?

A. He got back into the back seat and I am not sure which one said we are going on to Uniacke Square. I said fine, so I went down to Barrington Street, turned north on Barrington Street, turned North on Barrington Street, now I am not sure if the package was passed from the back seat to the front seat. Before we got to Barrington Street, or shortly after we turned onto Barrington Street, but the package was given from Mr. Waite to Mr. Scallion.

Q. And Mr. Scallion was in the front seat?

A. That's right.

Q. Okay.

A. So, I was travelling north on Barrington Street and at one point I was asked what time it was and had to look at, had to turn on the dome light to look at the clock I had, and it was five after 1:00 o'clock. I proceeded north on Barrington and the next thing I knew I heard a click and I looked from where the sound came and I saw ah, a gun, ah, in the front seat. Mr. Scallion had one hand on the barrel and the other hand on the handle of the, of the gun. And ah...

Q. Yes, are you able to estimate the length of the firearm?

A. I would...think it would be maybe 12 to 14 inches long.

Q. That's overall is it?

A. Yeah.

Q. Do you know much about guns yourself?

A. No, not at all.

Q. Okay, and after you noticed the gun, what's your next recollection?

A. Ah, Mr. Scallion asked Waite for a shell and Mr. Waite said there was a shell in the bag and then I heard another click which I assumed to be the loading of the gun. They ah, I kept driving towards, north on Barrington and ah, they talked about the gun. Mr. Waite was saying that there was no kick to it, there was, you just had to pull the hammer and then pull the trigger and at one point he said, I could have gotten you an uzi but you're too fucking drunk. That surprised me because I hadn't noticed either of them had been drinking.

Q. Okay.

A. Ah, as we approached the Misty Moon, Scallion had the gun in his hand and the gun was at dash level and I mentioned to him that if I were him, I wouldn't ah, wave that thing around because, you know, people would be liable to see it and I certainly, I knew I didn't like to see it, so I wanted it away. He didn't seem concerned or overly concerned but he did put the gun back in the bag and we continued.

Q. What were your opinions at this time?

A. Oh, I was scared to death, I didn't know, I didn't think anything was going to happen to me but I, you know, just being in the same car with a loaded gun and figuring you know somebody with a loaded gun could do anything and I, I was scared.

Q. Okay, now ah, do you recall other conversations on the, on the trip, on the drive?

A. Ah, yes, ah, I proceeded north on Barrington and turned up Cogswell to Brunswick Street and just around the corner of Brunswick and Cogswell, Scallion said, do I want to know what's going on, and I said - no, if it is not legal, I don't want to know anything about it, and

then he said he got ripped, all he got was soap, and that he didn't know who the guy thought he was dealing with, but he didn't understand Scallion philosophy, at which point Mr. Waite said, yeah White is right. Ah, Scallion rebutted him as if to say, you know it doesn't matter what color you are, you don't rip Joey Scallion off. I asked whereabouts in Uniacke Square to drop him off and they said, just on Uniacke Street. So, I turned up Uniacke Street and again I asked him where, and they said just up here, and it would be near the corner of Gottingen Street where I let them off across from Cragg Avenue.

Q. Now, I am going to show you Exhibit 3, which is another, a booklet of photographs. Again, providing copies to the Jury.

...

Q. Cragg is the centre street there?

A. Yes.

Q. So, Cragg is the...perhaps you could hold your booklet up and indicate to the, for the jurors where is, where Cragg Avenue is?

A. This...

Q. And now, ah, where did you stop your vehicle and let the two accused persons off that morning?

A. I stopped right where those tire marks are there by the lamp-post on the, on the far side of the street.

Q. Again, perhaps you could...

A. Right between...

Q. Hold that up, please, and show the jury again. Indicate where you left them off?

A. Just...

...

A. Right there is where I left them off, okay.

THE COURT: Okay, thank you.

MR. DELANEY: Ah, Mr. Hudson, what time was it when you ah, stopped your vehicle there and you let the two accused persons off?

A. I would think it would be approximately ten minutes after 1:00 o'clock.

Q. Was there any discussion about the fare?

A. Ah, the fare came to slightly over $6.00 dollars with the extra passenger and I just wanted them out of the car, so I said, just give me $5.00. I was given a $20.00 and I gave three 5's in change. At that point Mr. Scallion took the gun out of the bag and threw the bag back to Mr. Waite and they both got out of the car and I told Scallion that, you know, I wasn't sticking around thinking maybe that's what he might have meant at the beginning of the whole thing. And he said - no, don't stick around. And, I left, as I left, I looked over my shoulder and saw Scallion with a gun close to his, in his right hand, close to the left side of his body and he was standing on Uniacke Street facing Cragg and they were just walking towards Cragg. I left and went back to the taxi stand on South Park Street, I was trying to figure out what had just gone on and wondering what I should do."

On cross-examination Mr. Hudson admitted that his knowledge of guns was "virtually non-existent". He did not recall seeing any traffic in the vicinity of Uniacke Street. He identified the appellants from photos shown to him by the police. He took the police back to the addresses on Kent Street and on Inglis Street after he was interviewed. He also stated that neither of the men were wearing white pants.

Roger Robart lived in the area of Uniacke Square. At 12:15 a.m. on November 1, 1989, he was standing beside a house on Cragg Avenue. There were no other persons around Uniacke Square or Cragg Avenue at the time. He saw Bernard Johnson walking back and forth near the stairs at the end of Cragg Avenue. At approximately 1:10 a.m. two white men came into the Square from Uniacke Street and walked up Cragg Avenue to the area where Mr. Robart had seen Bernard Johnson. He did not pay particular attention to the men and could not describe them. About forty-five seconds later he heard a shot and Bernard Johnson screamed. Johnson said he was shot and "somebody help me". He ran a short distance and fell in the street. Mr. Robart did not see any cars or taxis on Cragg Avenue at that time. Roger Robart ran to his grandmother's house. He returned to Cragg Avenue a couple of minutes later to find the police and people milling about. The deceased was lying in the street.

On the preliminary inquiry Robart had stated that it was two or three minutes between the time he saw the two men and heard the shot. As shown on the photographs the distance from where he was standing to the deceased was not very far. He said that the deceased was a "street hustler" and he saw him once a day. By hustling he meant looking for money. At the end of Cragg Avenue there was a set of steps which went up to Gottingen Street. He could not see the deceased as the two men approached. He did not see the two men carrying a gun or leaving the scene.

Gary Wohlgeschaffen was near Gerrish and Gottingen Streets diagonally across Gottingen Street from the stairs leading to Cragg Avenue. He heard a loud noise that sounded like a shot or a fire cracker and then heard a man screaming. Shortly after that

two men came from Uniacke Square, ran along the sidewalk on Gottingen Street and then went down over a bank between the Square and an apartment building. He said the first man had white pants on. He was white, about 5'11" tall, had a beard and long sandy coloured hair. He was carrying something in his left hand. The second man was slim, a bit taller with long dark hair and dark clothing. The witness could not state whether the second person was black or white. The witness went into the building on the corner of Gerrish Street and called the police.

Dawn Carvery was at Margaret Grant's house at 2405 Cragg Avenue on November 1, 1989. She had been out with Margaret and Margaret's boyfriend celebrating Halloween during the evening. They arrived home about 12:30 a.m. Ms. Carvery went upstairs to wash makeup from her face. Margaret Grant said someone had been shot out front. Ms. Carvery came downstairs and went into the street. Greg Brooks went out before her. There was nobody else around. She found Bernard Johnson lying in the street. She saw blood on his right side. She felt a slight pulse and told Ms. Grant to call for the police and an ambulance. She was positive that there was no one else on Cragg Avenue except the deceased and Greg Brooks. She stayed at the scene until the police and the ambulance arrived. Before the police arrived a taxi came down Cragg Avenue and Carmella Seale got out. Ms. Seale walked over to the scene and asked who it was and when she was told got very upset. The police arrived within a couple of minutes.

Constable Lindsay Hernden was travelling north on Gottingen Street in a patrol car between 1:10 and 1:15 a.m. when he was instructed to go to the scene at Uniacke Square. He arrived at Cragg Avenue in less than a minute. There were a number of people standing

at the end of the street. Johnson was still breathing. He accompanied the body to the Victoria General Hospital.

Tony Reid was sitting in his van which was parked on Uniacke Street near Breen Street on the night of the murder. On direct-examination he stated it was late at night on October 31 or early the next morning. A taxi came along Uniacke and parked near the van. A man he identified as Joseph Scallion got out of the taxi and approached the van. He asked where he could buy some coke. He mentioned Bernard Johnson's name. Reid knew the deceased and said he used to hang around the corner of Gerrish and Gottingen Street. Reid had seen Johnson in the area about a half-hour or forty-five minutes before the inquiry. Scallion left the scene in the cab and went up Uniacke Street to Gottingen in the cab. On cross-examination he stated that it was around 9 or 10 o'clock when Scallion arrived in the taxi. There was no other passenger in the car. Mr. Reid was obviously a reluctant witness.

Vincent Ross was standing in front of his house, 2407 Cragg Avenue on Halloween night. It was early in the evening. He saw a cab stop on the street. There was a passenger in the cab. He had not seen the passenger before but described him and testified that it was Joseph Scallion. There were a couple of black men around the cab talking. The first time he saw the cab was between 7 and 7:30 in the evening. Later that same evening he saw Scallion in the Square between 10 and 11 p.m. He came into Cragg Avenue in a taxi. Scallion spoke to Michael Mantley. He was looking for dope. Michael got Scallion some dope. He gave Mantley a piece of the dope and then left the Square. Later when Ross was asleep his mother said she heard a noise which sounded like a gunshot. A few minutes later

he heard sirens. He looked out the window and saw the deceased lying on Cragg Avenue.

On cross-examination Ross stated that taxi cabs brought people to Cragg Avenue to buy dope. Mr. Ross sold dope in the area. He never saw the deceased in the Square that day. Mr. Waite was not in the cab with Scallion during the evening.

Darren Coleman was the manager of South Park Lodge. Joseph Scallion occupied a room in the basement. Mr. Scallion was in his room on October 31, 1989, between 7:30 and 8:00 p.m. Mr. Coleman spoke to him. Scallion was drinking but seemed to be very coherent. Waite was not in the room.

Michael Mantley was on Cragg Avenue on Halloween night between 10:50 and 11 p.m. He did not see the deceased. Around 11 p.m. Joseph Scallion arrived in a taxi. He was alone. He spoke to Mantley about obtaining some crack. The price was $50.00. Scallion only had $40.00. He asked the cab driver for $10.00. Mantley took the $50.00 and went and bought the crack. Scallion gave Mantley a piece of the rock. Mantley did not see Waite in the area. Mantley has a criminal record.

Wayne Covin was a taxi driver. He saw Scallion and Waite by the Misty Moon on Barrington Street around 10 p.m. on that night. He testified that he drove them to Cragg Avenue. Joey got out of the cab. He was gone for five minutes when he returned and asked Michael for $10.00. He left and returned a short time later. Covin drove the men to South Park Lodge. Mr. Covin saw Scallion a second time by the Misty Moon around 2 a.m. He was alone. When he drove the two men to Uniacke Square they appeared to be sober. In cross-examination he could not say whether Michael Waite was the other passenger in the cab.

Kenneth Silver was manager of the Club Flamingo at the Maritime Centre on Barrington Street. He knew Joseph Scallion and saw him in the bar shortly after 10 p.m. on Halloween night with Waite. They stayed about an hour and a half. They were drinking beer but appeared to be sober. He did not see them leaving the premises.

The deceased was a black man in his thirties. He was killed by a shotgun blast to the right side of the chest. The wound was approximately 2 x 2 1/2 centimetres and followed an upwards angle of 30 to 45 degrees, striking the lungs and the heart. A sample of pellets was removed from the wound. There was no powder residue around or in the wound. There were holes in the deceased's clothing at the site of the wound.

A piece of shotgun wadding was removed from the body of the deceased at the hospital. In the pockets of the clothing the deceased was wearing, the police found a Players cigarette package which contained a hash pipe. There was also a Preparation H container, containing a white envelope and cigarette papers. There was a white pebble substance in the pockets, some of which was wrapped in tin foil. A white substance was also found in the container.

A white gun case and a hacksaw blade were removed from Michael Waite's apartment. Blood samples were taken from the pavement on Cragg Avenue where the deceased was found. Clothing was seized from the appellants. Neither man was wearing white pants.

Staff Sergeant James David Swim is a firearms expert with the R.C.M. Police. He examined the shot shell wad and pellets removed from the deceased. The shot was number 5 in size. The wadding and shot were from a 410 gauge plastic shot shell. That type of shell

is normally used for shooting small game. The wound indicated that the firearm was discharged at close range. He felt the range was less than two yards having regard to the size of the wound. The clothing showed evidence of close range discharge. Unburned powder grains were found in the clothing. He stated that the barrel on a 410 shotgun is 26 or 28 inches long. He could not say whether the barrel on the weapon had been cut off. In his opinion the gun case found in Waite's apartment was a rifle type case.

Constable Wayne Currie searched Mr. Scallion's room at the South Park Lodge at 3:40 a.m. on November 1. He found a cocaine pipe made out of a toilet paper roll on a bureau next to the bed. There was a residue on the pipe which the officer believed could have been crack. When analyzed the substance was not a drug but indicated a soap like substance.

The drug paraphernalia removed from the deceased's pockets showed no evidence of drugs. The white substance was dextrose which is a sugar. The foil wrapped white substance was not a drug but was similar to soap.

In 1989 Corporal Kenneth Bennett was assigned to the area Uniacke Square. He observed the deceased and Scallion in the area together on three occasions. Waite was not present.

As a result of the investigation the police searched for the appellants. They were located on Barrington Street with Stephen Fredericks at 3:35 a.m. on November 1 and were arrested. They were taken to the police station. At 4:41 a.m. Scallion spoke to a lawyer on the phone. He was subsequently questioned. When asked where he had been he replied "the Misty Moon". He also said that he had been drinking for three or four days with

Michael at the Moon and the Club Flamingo. He was living at the South Park Lodge. He denied that he was in a taxi that night. When told that Bernie Johnson was shot, Scallion asked "Is he black?" Scallion then said "I never shot a black man". He also stated that he lived in apartment 2B in the basement of the South Park Lodge. Evidence of this conversation was admitted on the trial with the agreement of Mr. Scallion's counsel.

The appellant, Waite, was interrogated by Constable David MacDonald and Corporal Fox at 4:10 a.m. The police stated that his attitude was arrogant and that he was sarcastic. He was sober but had been drinking. At 4:20 a.m. the following conversation took place:

> "A. Constable Fox asked him 'where he was tonight' and he said 'this is really deep man, I could tell you but I don't think I will. I mean I was drinking with Joey at Bearly's Club Flamingo'. Something or place - we couldn't make out what he said. 'The Horse, the Moon'. Michael said 'Maybe I should call my lawyer, Barbara Beach', Constable Fox said 'Sure Mike, I'll get you a phone book'. Michael said 'No, she's probably in bed anyway'.
>
> At this point, at approximately 4:30, I asked Mr. Waite some questions and at that time I asked him if he had been to Uniacke Square last night or early this morning with Joe Scallion. His answer was 'No, I've never been to Uniacke or maniac Square, or Mulberry Park. I'm a downtown guy. I never go north of Duke Street'. I then asked Mr. Waite if he was with Joey Scallion last night or early morning and where. His answer was 'Yeah, Joey called for me around 9:00 or 9:30 last night. Actually I went to the store for cigarettes and when I came back, he was coming in my front door alone'. He then said 'He and Joey went drinking to several places, ending up at the Moon'.
>
> ...

The evidence was admitted by the trial judge following a lengthy **voir dire.**

Darwin Russell was an inmate in the Halifax County Correctional Centre between April and July, 1990. He testified that he met the accused in the Centre. In June he was with the two men outside in the recreation compound when they were talking. He testified as follows:

> "A. It all started over a charge that the pair were in on. Michael Waite was talking about making a deal..wanted to make a deal.. And Mr. Scallion got word of it and wanted to talk to him, so they were in the compound together and that's when Mr. Scallion said 'it's either 25 or nothing, there's no deals being made'. And, that when Michael said 'this is your beef Joe, you pulled the trigger. Why don't you plead guilty, don't take me down with you.'"

Later that same day Russell was with Scallion alone when the following occurred:

> "Q. Joey Scallion and yourself?
>
> A. Yes. Joey was still pretty upset, and he mentioned that 'Michael wants me to take the beef - he was with me when I did it. He has got just as much to do with it. Michael's next - Michael's getting it.'"

Russell informed the police of these conversations. He asked the police to speak to the Crown to see if he could get a sentence of less than two years on his charges. He denied that any deal was made for his testimony. Russell has a substantial record for fraud, break and entry, possession of stolen goods, assault, obstructing the police and escaping custody to name only a few. He had acted as an informant on other occasions. He received a sentence of 23 months for the offences for which he was awaiting trial.

Evidence was called by the appellant, Scallion. The appellants did not testify.

Evidence was adduced from the Crown witnesses to show there was considerable drug trafficking on Cragg Avenue and that the deceased was engaged in the trade. No blood identifiable with that of the deceased was found on the clothing being worn by Scallion or Waite. Constable John Parkin had gone to the scene at 1:17 a.m.. He said there were 20 or 25 persons in the vicinity where the deceased was lying. He interviewed Vivian Wilson during his investigation.

Carmella Seale was called by Scallion. She had been working downtown where she got a cab. The cab turned off Brunswick Street to Uniacke Street when she heard a gunshot. As they turned onto Cragg Avenue a taxi backed out and proceeded towards Brunswick Street. She got out of the cab and found the body of Bernard Johnson. She did not see the appellants in the area. In cross-examination Ms. Seale admitted that she was high on cocaine that night. She did not see any woman near the body. She went to Uniacke Square to purchase cocaine.

Vivian Wilson lived at 2413 Cragg Avenue. She had been in bed a short time when she heard several bangs. She looked out the window and saw a car backing out towards Uniacke Street. She opened the window and put her head out and heard people crying and hollering. She went out onto the street and saw the body. She went back to call the police and before she could call the police arrived. She could not say whether the car she had seen was a taxi. She did not see a car entering Cragg Avenue. Miss Wilson could not remember seeing Carmella Seale at the scene.

Cornell Slawter was a nineteen year old high school student at the time of the murder. He lived at 2400 Breen Street. He was doing his homework on the living room

floor when he fell asleep. He heard a shot and looked out the window and saw the deceased lying on the ground. He saw a car backing out of Cragg Avenue, before he noticed a lady coming onto the scene. He could not say whether the car was a taxi and did not see another car approaching.

Alan Rees was a friend of Michael Waite. He testified that he owned the gun case found in Waite's apartment. It was for a 22 calibre rifle. Waite had removed it from Rees' truck during the summer.

Constable Stephen Durling assisted at the scene. During the investigation he had access to photos of Scallion. At 3:35 a.m. he was heading home on Gottingen Street. He observed a man walking on the street whom he thought was Mr. Scallion. He reported the sighting to other officers.

Mark Shepherd was a waiter at Bearly's Beverage Room on Barrington Street. He testified that Scallion entered the tavern around 10:30 that night. Scallion left between 11 and 12 o'clock.

Jim Johnson was a bartender at the Victory Lounge. He observed Scallion in the bar between 8 and 9 p.m. He left at 9:15 and came back for a few minutes at 10 p.m. He borrowed a total of $70.00 or $75.00 from Johnson.

Robert Rabideau was in the Correction Centre between May 15th and August. He observed no contact between Russell and Scallion in the Centre. The same applied to Waite.

While there are two separate appeals the cases were argued as one and I propose to deal with the arguments together in this judgment although there is some difference in

the grounds of appeal. Counsel for the appellants were not the counsel that acted on the trial. The appellants were represented by experienced counsel on the trial. The grounds of appeal now being raised must be carefully examined in the light of the evidence and the issues raised on the trial. The key witness for the Crown was Robert Hudson. As I have noted the appellants did not testify. This limited the defences available and no doubt had a marked effect on the deliberations of the jury. It is also relevant to the issues being raised on the appeal.

Turning to the grounds of appeal raised by the appellant Scallion, Grounds 3, 5 and 7 were abandoned. Grounds 1 and 4 were argued together and are as follows:

> "Ground 1: That the learned trial judge failed to properly instruct the jury on the meaning of 'planning and deliberate', a misdirection amounting to non-direction;
>
> Ground 4: That the Learned Trial Judge failed to properly instruct the jury with respect to the defence of intoxication concerning the included offences which were left with the jury;"

The main objection here is the failure of the trial judge to instruct the jury on the defence of drunkenness as it related to the intent to kill.

I have carefully read the charge in relation to homicide and murder and with respect the intention for murder and first degree murder was clearly explained to the jury. The learned trial judge read s. 222, s. 235(1), s. 229 and s. 231 of the **Code** to the jury in that order. Copies of those sections were given to the jury. After reading the sections he went on to explain the meaning of culpable homicide and the distinction between murder and manslaughter. The trial judge continued as follows:

"You will recall that I have reviewed with you the sections of the **Criminal Code** that apply with respect to the charge of murder. In order to find murder, you must first find that the gunshot wound to Bernard Johnson was inflicted by the accused, or either of them, and that the gunshot wound caused the death of Bernard Johnson. In order to make those findings, you must be satisfied that they are so beyond a reasonable doubt.

In order to find that Bernard Johnson was murdered by the accused, or either of them, you must find not only that the Crown has proved beyond a reasonable doubt that one of the accused shot and killed Bernard Johnson as alleged, but you must also find that the accused intended to cause the death of Bernard Johnson, or intended to cause him bodily harm which was likely to cause death, and was reckless whether or not death ensued.

But if you find that the accused, or either of them, did so you will then go on to consider the evidence in order to determine whether the accused intended to do so as I have stated. You will look to all of the evidence, including the evidence of motive, in order to determine that intention.

You may consider that a man is usually able to foresee what will be the natural and obvious consequences of his own acts. So it is usually reasonable to infer that he did foresee them and that he intended them. For example, if someone points a loaded gun at another's chest and pulls the trigger, it is usually reasonable for that person to foresee what the result will be.

If from the evidence you believe beyond a reasonable doubt that the accused, or either of them, shot and killed Bernard Johnson, and that he or they meant to cause his death, or meant to cause him bodily harm that he or they knew was likely to cause his death, and was reckless whether death ensued or not, if on all of the evidence you believe that to be so beyond a reasonable doubt, then you would find that the accused, or one of them committed murder.

> To make a finding of first degree murder, you must have all the elements I have just told you of and, in addition, you must find that the Crown has proved beyond a reasonable doubt that the murder was planned and deliberate."

The trial judge then proceeded to deal with the evidence in detail outlining the position of the Crown and the defence. The trial judge then gave a detailed explanation of the words planned and deliberate. The trial judge stated:

> "If you are satisfied beyond a reasonable doubt that the accused murdered Bernard Johnson at the time and place set out in the indictment, and you are also satisfied beyond a reasonable doubt that Scallion alone - or with some one else - planned and deliberated the murder of Bernard Johnson, you will find the accused, Scallion, guilty of first degree murder."

With regard to Waite the trial judge stated:

> "As an aider or abettor, before you can find Michael Waite guilty of murder, you must find first of all that Joseph Scallion is guilty of murder. Secondly, that Waite aided or abetted Scallion in committing the murder. And thirdly, that Waite knew that the probable result of his aiding or abetting would be the death of Bernard Johnson, or of someone.
>
> In other words, Michael Waite can only be found guilty of murder if he aided or abetted Joey Scallion, knowing that Joey Scallion was going to kill or cause bodily harm that was likely to cause the death of some one, including Bernard Johnson. I will read that again. Michael Waite can be found guilty of murder only if you find he aided or abetted Joseph Scallion, knowing that Scallion was going to kill or cause bodily harm that was likely to cause the death of some one, including Bernard Johnson."
>
> Again, you may consider what you were told by Mr. Hudson took place on the way from South Park Lodge to Uniacke Square on the night in question. As well as

> Darwin Russell's testimony of what Waite said, such as 'this is your beef Joey', and any evidence which you find bears on the issue in determining whether the Crown has proved beyond a reasonable doubt, along with all the other elements of necessary proof, that Michael Waite - when and if he aided or abetted Scallion, knew that the probable result of doing so was the death of some one, including Bernard Johnson.
>
> If you find Michael Waite guilty of murder, then and only then, will you go on to consider whether Michael Waite is guilty of first degree murder. You can find Michael Waite guilty of first degree murder only if you find that he, Michael Waite, either alone or with Scallion planned and deliberated the murder of Bernard Johnson.
>
> That is, before you can find Michael Waite guilty of first degree murder, you will have to find that he took part in the planning and deliberation of the murder of Bernard Johnson."

After retiring the jury was recalled and a further instruction was given as follows:

> "During the course of my instructions to you with respect to murder, it is the proper way to instruct a jury with respect to charges of murder is to deal first of all with the offence of murder. And then, after finishing the instruction on murder and telling you that after you have considered murder and whether or not you find that a murder has taken place or not, then you go on to consider whether the murder was first degree murder, and then second degree murder. So in the course of your deliberations, if there is any confusion in your mind about that, you will first determine the question of murder - whether a murder has taken place. And then, if you find that it has, then you will go on to then consider whether or not the murder was first degree murder or second degree murder."

In my view the requisite intent for murder and first degree murder was made abundantly clear to the jury.

The trial judge referred to the defence of drunkenness only in the context of explaining the intent necessary for first degree murder. He stated:

> "You have heard testimony of the two accused consuming alcohol before 1:00 a.m. on the night in question. Under our law, drunkenness is to be considered when determining whether an accused intended to kill a person. If a jury finds by reason of drunkenness that an accused person is incapable of forming the requisite intent to commit murder, then the person cannot be convicted of murder.
>
> Let me say that the evidence of consumption of alcohol by the accused in this case is not, in my view, to the extent required to render either accused incapable of forming the requisite intent to commit murder, although of course, that is for you to decide. But I bring this to your attention because planning and deliberation might be negatived by drunkenness falling short of incapacity to form the intent required to constitute murder."

The trial judge then dealt with the evidence of drinking. After reviewing the evidence he stated:

> "If you find that the accused, Scallion, murdered Bernard Johnson, but that it was not planned and deliberate due to the consumption of alcohol, you must find Scallion not guilty of first degree murder, and only guilty of second degree murder. Any reasonable doubt on this issue must be resolved in favour of the accused. And this, of course, applies equally to Michael Waite."

When the jury retired counsel for Scallion stated:

> "I don't think your Lordship directed them concerning intoxication and second degree and manslaughter."

The trial judge did not comment on the exception and gave no further instruction to the jury on the issue. The following is from Scallion's brief:

> "Although the evidence was not terribly specific, there

was evidence that required consideration by the jury."

There was considerable conflict in the evidence. One fact was clear from the evidence, all of the witnesses saw no evidence of drunkenness and described the appellants as sober. The appellants did not testify. There was no evidence as to whether the appellants had taken drugs although there was evidence of Scallion's purchases. After hearing the evidence the trial judge concluded that there was not sufficient evidence to leave the issue to the jury on the capacity of the appellants to form the necessary intent to commit murder.

In **R.** v. **Spencer** (1976), 18 N.S.R. (2d) 315 Macdonald J.A. in delivering the judgment of this Court stated at p. 330:

> "In the present case drunkenness is only relevant to the question whether the appellant had the capacity to formulate the required specific intent. It is my view that the trial judge correctly stated the effect of drunkenness in that portion of his charge which immediately followed the statement to which counsel for the appellant has objected."

In **R.** v. **Salmons** (1978), 27 N.S.R. (2d) 271 Hart, J.A. in delivering the judgment of this Court stated at p. 280:

> "Drunkenness by itself is not sufficient to reduce a charge of murder to manslaughter unless the accused was so drunk as to be incapable of forming the intent that is a necessary part of the offence charged."

And at page 281:

> "Although there is some evidence that the appellant had been drinking during the evening, there is nothing to indicate that he was affected by this drink to the extent where he would be unable to intend the consequences of his act of setting the building on fire. None of the

> persons with whom he came in contact considered him to be drunk, and his own recollection of the events of the evening together with his statements of intention to various witnesses would, in my opinion, negate the state of mind that would justify placing drunkenness before the jury as a means of reducing murder to manslaughter."

In **Regina** v. **Korzepa** (1991), 64 C.C.C. (3d) 489 Wood, J.A. in delivering the judgment of the British Columbia Court of Appeal stated at p. 500:

> "The law as stated in **Beard** has been applied in Canada in cases too numerous to mention. While it is no doubt amusing to contemplate the ambiguity, or as Martin J.A. calls it the illogicality, of the second proposition enunciated by Lord Birkenhead L.C. in the **Beard** case, it has always been applied in this country, without any sense of uncertainty whatsoever, as narrowly limiting the defence of intoxication to the capacity of the accused to form the specific intent to commit the crime alleged:..."

In **R.** v. **Bernard** (1988), 45 C.C.C. (3d) 1 (S.C.C.) McIntyre, J. stated at p. 26:

> "Drunkenness in a general sense is not a true defence to a criminal act. Where, however, in a case which involves a crime of specific intent, the accused is so affected by intoxication that he lacks the capacity to form the specific intent required to commit the crime charged, it may apply. The defence, however, has no application in offences of general intent."

He concluded at p. 38 by stating:

> "In any event, should it be considered that I am wrong in my approach to the **Leary** case, this is none the less a case in which the provisions of s. 613(1)(b)(iii) of the **Criminal Code** should be applied. The Court of Appeal, reaching the conclusion that it did, did not find it necessary to consider this question. The issue, however, was raised by the respondent Crown in its factum. The trial judge found no evidence of drunkenness, except the statement of the appellant made to the police before trial. The appellant himself did not see fit to give

evidence at the trial. The trial judge in addressing the jury made the following statement:

> 'You heard the evidence of the police officers and of the complainant of the condition of the accused with respect to drink. None of them say that he was drunk. Only the accused in his statement says "I was all drunked up too". There was no evidence of drunkenness except that statement and it is open to you to accept it and find that he was drunk, but even if he was drunk drunkenness is no defence to the charge alleged against this accused. It is no defence.'

> It is my view that there is no sufficient evidence of drunkenness to form any basis whatever for the defence of drunkenness. I can only conclude after reviewing the evidence that even if the exclusion of the evidence of drunkenness was an error on the part of the trial judge, no substantial wrong or miscarriage of justice has occurred in this case and the verdict of the jury would necessarily have been the same, even if the evidence of drunkenness had not been excluded from the jury's consideration. Acting under the powers given in s. 623(1) of the Code, I would apply the proviso, dismiss the appeal, and confirm the conviction."

With respect, I agree with the learned trial judge that the evidence in this case fell far short of establishing the incapacity of the appellants to form the intent necessary for murder or to raise a reasonable doubt on the issue of intent. The actions of the accused from the inception of the plan to its execution, could lead to no other conclusion than that they formed the necessary intent to kill. That is confirmed by the conclusion of the jury that the evidence of intoxication did not raise a reasonable doubt on planning and deliberation. Any failure to leave the defence of drunkenness did not give rise to any substantial wrong

or miscarriage of justice in this case and if it was necessary to do so I would apply s. 686(1)(b)(iii) of the **Code.**

It was necessary under **R. v. Mitchell,** [1965] 1 C.C.C. 155 (S.C.C.) to leave the issue of intoxication to the jury on first degree murder. Spence, J. stated at p. 162:

> "...the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused's actions but of his condition, his state of mind as affected by either real or even imagined insults and provoking actions of the victim and by the accused's consumption of alcohol. There is no doubt that this is a finding of fact."

The issue was whether the appellant did in fact plan and deliberate on the killing. See **R. v. Kirby** (1985), 21 C.C.C. (3d) 31 (Ont. C.A.).

The trial judge told the jury:

> "A deliberate act is where the doer has taken time to weigh the advantages and disadvantages of his intended action. In considering whether the murder was planned and deliberate, you should consider all of the circumstances, not only the actions of the accused, but also the evidence of his condition, his state of mind as affected by real or imagined things, and possibly by provoking actions of the victim."

I have outlined his instructions on drunkenness. After giving that instruction he reviewed the evidence of drinking. He made it clear that any reasonable doubt on the issue had to be resolved in favour of the accused.

I can find no error on the part of the trial judge in his instructions on this issue. I find no merit in grounds 1 and 4.

Grounds 2 and 9(c) as raised by the appellant, Scallion, are as follows:

> Ground 2 - That the Learned Trial Judge failed to properly and comprehensively set out the facts based upon the evidence in conjunction with reasonable doubt in the Crown's circumstantial case, such failure a misdirection amounting to non-direction;
>
> Ground 9(c) The Learned Trial Judge erred in law in properly failing to review the evidence as it related to the theory of the defence and of the Crown so that they could appreciate the value and effect of the evidence and how the law was to be applied to the facts as they may find them."

It is clear that it is the duty of the trial judge to relate the evidence to the theory of the defence. See **Azoulay** v. **The Queen** (1952), 15 C.R. 181 (S.C.C.). This was a case of circumstantial evidence in that no one testified that they saw the appellants shoot Johnson. However, the issues were not complicated. The main witness for the Crown was Robert Hudson. His evidence was clear and identified the appellants as the passengers in his cab. Counsel for Scallion on the trial did not seriously contest that Scallion was in the cab. The jury obviously accepted Hudson's evidence. That evidence combined with the evidence of Roger Robart, Garry Wohlgeschaffen and Dawn Carvery gave rise to a very strong circumstantial case against the appellants. Essentially, the defence contended that there was a reasonable doubt that the appellants shot Johnson, that the area was notorious for the sale of drugs, that others had the motive and opportunity to kill Johnson and that another vehicle was seen leaving the scene. A number of arguments now being raised relate to deficiencies in the evidence which were raised on the trial. The trial judge reviewed the evidence in detail. On the issue of circumstantial evidence he stated:

> "Before dealing with the actual offence, let me explain to you about evidence. Evidence may be direct or circumstantial in nature. The facts may be established

by either or both direct and circumstantial evidence, but in this case, since there is no eye witness evidence of the actual shooting of Bernard Johnson, the Crown relies heavily on circumstantial evidence in its attempt to prove that the accused, or either or them, shot and killed Bernard Johnson.

Direct evidence is evidence which, if accepted as true, proves a fact in issue without the necessity of having to draw an inference. Circumstantial evidence, on the other hand, is evidence which does not directly prove a fact in issue. Any inference from circumstantial evidence must be based on a fact or facts proved by the evidence, and not on your suspicion or conjecture.

To prove a fact by circumstantial evidence involves this: there being no or insufficient direct evidence of a fact, you may infer the fact in issue from the evidence of other surrounding facts. For example, if the fact in issue was whether the accused was in a building on the night of a crime, and no eye witness has seen him there, the existence of his fingerprints on objects in the building, and the fact that he had been seen in the neighbourhood of the building that night would be circumstances from which you might reasonably infer that he had been there.

Both direct and circumstantial evidence are equally admissible in a court of law, but there is an additional risk with circumstantial evidence that does not arise in the case of direct evidence. In the case of direct evidence, the only uncertainties are as to the truthfulness and accuracy of the witness. The witness might be deliberately lying or honestly mistaken. Where the evidence is circumstantial, there is also the uncertainty as to whether the correct inference has been drawn from the proven facts. Circumstantial evidence should be scrutinized very carefully with this in mind.

Where there are many independent facts which support the inference, circumstantial evidence may be as persuasive as the testimony of witnesses giving direct evidence. The inferences drawn by a juror in a criminal case must be based on evidence, and not on mere hunches or guesses.

I have already explained to you that the burden is on the Crown to prove beyond a reasonable doubt that the offence charged was committed and that the accused, or either of them, committed it. In this case, where the Crown relies heavily on circumstantial evidence to prove the identification of the person who shot Bernard Johnson, the Crown will not have discharged that burden of proof unless you were satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from the proven facts is that the accused, or either of them, was the person who shot Bernard Johnson. And when I say either of them, in a minute or two I shall be speaking about that situation in relation to each of the accused.

You heard on Thursday, in Mr. Delaney's summation to you, a reference to the question of motive. I must tell you, as a matter of law, that proof of motive for the commission of an alleged crime certainly may be of assistance in removing doubt and completing proof, but it is not essential. Motive is a circumstance, but nothing more, and nothing more than that should be considered by you. The absence of a motive is equally a circumstance to be considered by you tending to support the presumption of innocence, and to be given such weight as you deem proper. For instance, if on the basis of evidence other than motive, one is satisfied beyond a reasonable doubt of the guilt of an accused, then it is not essential in a prosecution's case to prove motive. Motive in this case, however, takes on an additional significance since there is no eye witness evidence that the accused, or either of them, caused the death of Bernard Johnson. Motive is, of course, still only one of many factors for you to consider.

But if after a consideration of all the evidence and counsel's submissions and my charge, you are satisfied that it has been proven beyond a reasonable doubt that the accused persons, or either of them, committed the crime, the presence or absence of a motive becomes unimportant. It is not an essential element of the prosecution's case as a matter of law. Motive is always a question of fact, based on the evidence."

In referring to the evidence he stated:

> "Both accused deny, in verbal statements to the police, that they were at the scene of the shooting. You have heard no eye witness testimony of the shooting, that is, no one gave testimony of seeing Bernard Johnson being shot. You have the evidence of Robert Hudson that he took two persons whom he identified as the accused to Uniacke Square and when at 1:10 a.m. or so on November 1st, 1989, he last saw them, they were walking towards Cragg Avenue and Scallion was carrying (what he says) was a loaded gun.
>
> Robert Robart says he was standing in Cragg Avenue at about that time when two white men walked past him and shortly thereafter, he heard a shot and a scream, and saw Bernard Johnson lying on the ground. He says he cannot identify the two white men who passed him.
>
> At around the same time, Gary Wohlgeschaffen says he saw two persons running south on Gottingen Street who, when he first saw them, were a little piece south of the Gottingen Street steps into Cragg Avenue. He can't identify who the persons were. He says the person in the lead who was running was wearing white pants.
>
> The evidence of Robert Hudson was that Scallion was wearing light blue jeans, and Waite was wearing dark pants.
>
> The position of the defence is that someone other than the accused shot Bernard Johnson, and you have heard defence evidence that Bernard Johnson had a reputation as a rip off artist, and that he had been seen being beaten up by someone sometime before his shooting. The defence has adduced evidence from Carmella Seale, Vivian Wilson and Cornell Slawter that they saw a car backing out of Cragg Avenue shortly after the shooting, even though that is not the evidence of some of the other persons who allegedly were there."

The trial judge pointed out the weaknesses of the Crown evidence as disclosed in the cross-examination of the witnesses. He reviewed at length the evidence as it related to

Scallion. He also reviewed separately the evidence as it related to Waite and the fact that Waite could only be convicted as an aider or abettor provided he had the requisite intent to murder. I have already referred to those instructions. He outlined the theory of the defence as follows:

> "Now the position of the defence with respect to Joseph Scallion, as given to me by Mr. Knox is as follows, and I'll read it:
>
> > "The defendant, Joseph Scallion, has been charged with an offence for which there is no reliable evidence to convict. The Crown has produced absolutely no evidence linking the purchase of any narcotic, or imitation narcotic, from the deceased on the day of the shooting, or at any prior date.
> >
> > Mr. Scallion made a purchase from Michael Mantley and Mr. Mantley, in the presence of Mr. Vincent Ross - a known seller of soap cocaine - sold Mr. Scallion soap for $50.00.
> >
> > Suspicious white males had been seen in the area of Cragg Avenue several days prior to the shooting. Mr. Scallion was not seen in the presence of Mr. Johnson for approximately six weeks.
> >
> > Mr. Scallion went to Cragg Avenue around 7:30 and 10:30 on the date in question, but never was Bernard Johnson seen.
> >
> > There are many alternative explanations to the death of Mr. Johnson. He unfortunately had made many enemies.

Mr. Scallion's enemy was Mr. Michael Mantley, who had sold him the soap cocaine.

A taxi cab or vehicle was seen at the end of Cragg Avenue immediately following the shooting. It backed out of Cragg Avenue hastily. Two individuals were seen fleeing the scene on Gottingen Street following the shooting, and one had something in his hand. This person with white pants and sandy or blond hair, but not gray hair, led the pair as they fled down towards Brunswick Towers.

Mr. Scallion and Mr. Waite intended to get their money back from Michael Mantley. Not once was Bernard Johnson's name mentioned in Mr. Hudson's cab. His cab never entered Cragg Avenue and Mr. Scallion, wearing blue jeans and a dark blue coat, was not seen on Cragg Avenue after exiting Mr. Hudson's cab.

Sergeant Swim's evidence essentially rules out the possibility that a sawed off 410 shotgun was used to shoot Mr. Johnson. A 410 shotgun was used, but it was not twelve or fourteen inches long.

Mr. Darwin Joseph Russell's account of what he heard at the Correctional Centre is unbelievable.

Mr. Scallion's statement to the police, while containing an untruth about being in a cab earlier in the evening and about being to Uniacke Square, is merely an untruth and is not evidence of being guilty in this offence.'

And that's the position taken on behalf of Joseph Scallion.

The position taken on behalf of Michael Waite was given to me by Mr. Pink and I will read it. It is as follows:

> 'The criminal justice system is based on the fact that the Crown must produce evidence to such a degree that the only conclusion one can reach is that Michael Timothy Waite committed the offence as charged, or some included offence.
>
> Michael Timothy Waite is presumed innocent until you, the jury, should decide otherwise. Michael Timothy Waite states that the Crown has failed to prove beyond a reasonable doubt that he committed any offence within the meaning of the law. It is not a question of maybe Mr. Waite is guilty, or do you think Michael Waite is guilty, or even probably Michael Waite is guilty. After considering the Crown's case as a whole, Michael Timothy Waite states that the Crown has not met the burden of proof that is upon them. One million suspicions do not amount to proof beyond a reasonable doubt.
>
> Michael Timothy Waite states that there are a number of weaknesses in the Crown's case, which is based solely on circumstantial evidence.
>
> One, the Crown has not been able to match up the shotgun wadding to any gun Mr. Scallion may have had in his possession.
>
> Two, the Crown is not able to identify

the bullet that was placed, if at all, in the gun being carried by Mr. Scallion.

Three, the Crown is not able to prove that the gun that Mr. Scallion in fact was in possession of was a 410 shotgun.

Four, there is no tie in between Mr. Scallion and Bernie Johnson on the night in question.

Five, there were a number of other people dealing in drugs and ripping off people in the Uniacke Square area.

Six, there were a number of other white people, together with black people, hanging around the area on the night in question.

Seven, there is nothing that ties Mr. Scallion and Mr. Waite into the shooting other than possession of what Mr. Hudson thought looked like a real gun.

Eight, there is no evidence that Mr. Scallion in fact was ripped off by Bernie Johnson. It may very well have been any other person or persons whom he had dealt with.

The guilt of Michael Waite of any offence can only be determined after careful consideration of the evidence offered by the Crown, and it is Mr. Waite's submission that the evidence produced by the Crown and the Defence must leave you, the jury, in reasonable doubt, and that benefit of that doubt must be given to Mr. Waite, and he should be found not guilty."

When the jury retired defence counsel objected that the learned trial judge did not adequately review the evidence in support of the theory of the defence. The trial judge gave the following additional instructions:

> "There was also a comment that I reviewed some of the evidence that was adduced on behalf of the Crown, and did not review some evidence that was offered by the Defence, and I will say that I didn't review in detail some of that evidence, but... And that evidence concerning, particularly the evidence that there was a car backing out of Cragg Avenue shortly after...a car seen backing out of Cragg Avenue shortly after the shot was heard. And I want to say to you and although I did at the time say to you that that was the evidence of Mr. Slawter and Vivian Wilson and Carmella Seale. I want to say to you now that you will recall the evidence of Mr. Slawter who said that he was sleeping, and that he was...he awoke and he looked out the window. It was shortly after he heard the shot, and that he saw the, I believe, that he saw the front of a car and he drew a line, I believe, across the exhibit as to what his line of vision was, and that he saw a car backing out of Cragg Avenue at that time.
>
> And, of course, you also have the evidence of Vivian Wilson, who also was in bed on the night in question, and who says that she looked out the window and that she also, at that time, saw a car - and this was after the shot, shortly after the shot - that she described and saw a car also backing out of Cragg Avenue - a car or car lights - one of the two.
>
> And then, of course, you heard the evidence of Carmella Seale, who she says...and she says that she drove into Cragg Avenue, drove right into the centre part of Cragg Avenue on that night, and while she was there in her cab that another cab pulled in and drove further into Cragg Avenue at that time. Or drove past, and then backed up and drove away. So I want to bring that to your attention too.
>
> And finally you will recall that I mentioned to you in

> explaining manslaughter, and.... For instance, you will recall my instructions with respect to manslaughter, regarding both of the accused. And I said this in dealing with Michael Waite and the question of manslaughter. That 'you will find him guilty of manslaughter only if you find that Waite knew that the probable result of his aiding or abetting was that Scallion would commit an unlawful act.'"

After carefully reading the charge I can find no error on the part of the trial judge or his instructions with regard to the defence. The issues were relatively simple and I fail to see how the jury could have been left in doubt as to the position of the Crown and defence.

Waite and Scallion were seen together on that night. There was evidence that Scallion was in Uniacke Square purchasing drugs earlier in the evening. Material found on the pipe in his room appeared to be soap and matched the material found in the deceased's clothing. The accused called a taxi from Scallion's residence and proceeded to Waite's apartment where Waite obtained a gun and ammunition. He gave the gun to Scallion in the car and told him how to use it. While Hudson was not familiar with guns, there is no doubt in reading his evidence that he knew it was a gun. They drove to Cragg Avenue where they left the cab. Robart immediately sees two white men proceeding down Cragg Avenue where the deceased is located. He then hears the shot and Johnson falls down in the street. Two men are immediately seen leaving the area and running down Gottingen Street. According to Robart and Dawn Carvery no one else was in the area. Scallion and Waite disposed of the weapon that they had in the taxi. The jury must have accepted that evidence, which supported the theory of the Crown. The appellants did not testify. With respect, the only rational conclusion was that the appellants committed the murder and had

planned it beforehand. The theory that someone else just happened to be in the area with a shotgun and for the purpose of killing Johnson was not supported by the evidence. The upward direction of the shot was perfectly consistent with the evidence that Johnson was probably on the steps when the gun was fired.

Having regard to the evidence and the charge I see no merit in grounds 2 or 9(c) as raised by the appellant, Scallion.

Ground 9(a) in Scallion's brief states:

> "9(a) The Crown was permitted to make highly inflammatory and prejudicial comments with respect to the address to the jury by counsel for the Appellant and that the Learned Trial Judge erred in law in not charging the jury with respect to this issue."

In his address to the jury counsel for Scallion made the following submissions:

> "But the real crux of this entire case, I would respectfully submit to you, is the information that Sergeant Swim provides to the Court concerning what he did with the clothing items of the deceased, Mr. Johnson, and specifically, his examination of those clothing items, not just as you and I would look at those, or as we see those in the photographs, but he does what is necessary in his opinion to do a complete investigation or examination, and he uses the tools of his trade - he says a high powered microscope - to look at the clothing, to gather further evidence to assist him in coming to court and giving information that will be of assistance to you. And he describes, which I think is important, the mechanism of a shotgun."

He also stated:

> "He tells us that when you start tampering with the barrel or if you cut the barrel off, that you really vitiate, you avoid the effect of the choke. And what is the effect? Well the effect, as I understood it, is that instead of getting these standards of muzzle to target range, he

> says initially, I think it was a distance of about a meter - three feet, three feet or less. Instead of getting that from your standard 410 shotgun, you get some of these concepts that he was describing for you. You get singeing, singeing of the target area, and I understood him to be telling us that when you cut off the barrel, you get rid of the choke, you're causing an incomplete combustion of this shell, of this ammunition when it fires. And so you get this singeing, you get this burning of the target, and when you cut off the barrel, you have to be closer to the target to get similar... similar evidence. I understood him to be telling yourselves and His Lordship that 'yes, a meter away or less with a standard length barrel, I didn't find any evidence of singeing."

And further:

> "But I think there are facts that are really almost written in stone here, that tell almost the whole story of this case, and those facts, I will suggest to you, really start and probably as far as you have to go in terms of assessing your duty. It really stops with Sergeant Swim's testimony, because Sergeant Swim is not coming here telling you 'well, you know, as best as I can recall, or I think this is what I saw, or I was yeah I had a couple of drinks that day, or that evening, that Halloween'. These are facts that he is relating to you that he comes up with as a result of the most objective standards that are known to people that do what he does. He is a forensic ballistics or ammunition expert. He's a firearms expert. This is what he does, and I will suggest to you that when he comes to that conclusion: no singeing, smaller tattoo pattern - I'm surprised at both of those facts. That that is compelling...compelling evidence that the gun that was used to shoot Bernie Johnson was not a sawed-off 410 shotgun. If it was, you would have found on the clothing things that he did not find."

He reaffirmed this interpretation of Swim's evidence as follows:

> "I would suggest that what you hear from Sergeant Swim may be the most important evidence, the most objective evidence that comes out of this trial. And that's why it

> is so important. People's memories aren't so good. You all know that people see things differently, and you've seen stories or read accounts of many people in the same room, or at the same scene, doing as best as they can to recall what they experienced, and various people coming up with different accounts of exactly what they saw or heard. But when you get to the evidence of Sergeant Swim, this is a person who is experienced, has been doing this sort of thing, comes to court regularly, testifies before juries in various courts and his evidence, I would suggest to you, is really insurmountable in terms of the Crown attempting to prove that a sawed-off 410 shotgun was used."

With reference to the conversation in Hudson's cab counsel stated:

> 'There's a conversation that Mr. Hudson overhears and it's not being hushed up I don't think, a conversation that he hears something like this at the end of the cab ride. 'Mr. Scallion, is his name Michael?' Mr. Waite: 'Yes, that will do.' All right, they're not talking about Johnson, they're talking about Michael. And it's not Michael Waite, I would suggest, although he may and he did suggest to you that somehow they're attempting to cover up their identity, something like that. But this conversation about Michael links in perfectly to the last person who sold drugs, or what was thought to be drugs to Mr. Scallion, and that's Michael Mantley."

Staff Sergeant Swim testified as follows on direct-examination:

> "Speaking with respect to the photograph referred to, and looking at the wound over the right breast, keeping in mind the ammunition components we have here today, I can only say that really I can't give you a very precise answer to your question, other than the type of wound. The size that indicates to me that there is no appreciable range involved. In other words, the shot load has not began to spread out, which indicates to me that the range is fairly short, and fairly close to the target. ...
>
> Just for further explanation a shot charge such as we have here today, when it trails away from the bore of the

> barrel of the firearm, the area of damage the shot pattern will increase in size as the range increases. In other words, that a range of about two yards, just for an example, with this type of ammunition components in a 410 gauge shotgun, at a range of two yards, that is, from the end of the barrel to the target, I'd expect the damage for the shot pattern to be approximately two inches in diameter."

He also stated:

> "Well I feel quite safe in saying that - just looking at the photograph and the size of the wound and what have you - that to me it's an indication that the range would be...I certainly feel less than two yards. I can't be any more precise."

With reference to the examination of the deceased's clothing he stated:

> "I did examine the garments - the three garments which I received for this type of evidence of close range firearms discharge, and I did find on the golf shirt, on the...and the T-shirt in the vicinity of the damaged area, the hole over the right breast, I did find in my opinion, evidence of close range firearms discharge.
>
> This was in the form of unburned and partially propellant powder grains. There were numerous propellant powder grains in this area and they were actually impinged, or driven right into the cloth of the material, and I did find this type of evidence as a result of a microscopical examination. From an examination of the size and the nature of the damage in the garments, and from the presence of this unburned propellant powder, it is my opinion that the range involved, from the muzzle end of the bore of the barrel of the firearm to that particular target, in other words, the shirt and the sweatshirt, was less than one metre away."

In cross-examination the witness stated:

> "A. Well, the removal of this choke would, of course, we would not have any choke at all, and the shot load - the

load of shot coming out the barrel would spread out quicker than if the choke was present. In other words, where if we had a full choke - the choke was on the barrel - and we fired the shotgun, at three yards, just a distance of three yards, we may have a shot pattern of just less than three inches.

However, if we removed that choke - we sawed the end off the barrel and fired the shotgun, and once again we had a range of that three yards, the shot pattern could of spread out maybe four or four and a half inches, may be five. So the result in damage would be different. In other words, the area damaged by that particular shot spread would be greater - the diameter of it. Just simply, if the choke is removed, the shot charge will spread quicker as the range increases.

Q. Because it is not being held together so tightly?

A. That's correct, Yeah.

Q. Excuse me. So, based upon your examination of the clothing and the exhibits that are on the bench in front of you, is there any evidence to indicate that the weapon used was a sawed off 410 shotgun, without a choke?

A. No.

Q. All right.

A. I do not know.

Q. Okay. There is nothing to indicate that there is...I'm sorry - that that sort of weapon was used - a sawed off barrel?

A. No, not really. I can't... I could not determine that from my examination, no."

And further:

"Q. Okay. If a sawed-off shotgun was used, say a 14 inch barrel was used to inflict that wound, would you not expect to find more evidence of residue on the clothing

of Mr. Johnson?

A. More than I found?

Q. Yes.

A. No, I can't say that really.

Q. No.?

A. No.

Q. But when you take off the end of the barrel, you removed the choke and I assume you get a less complete explosion or combustion of the propellant in the gases?

A. I can only answer the question...in my opinion is that it would have very little effect. If you still had four inches of barrel left, as far as the complete combustion of the propellant powder. In other words, I guess what you are getting at is less of the propellant powder would burn on the shorter barrel. Is that correct?

Q. Yes.

A. Yes. In my opinion, under these circumstances, the difference between if there was any difference, I could not...would be undiscernible to me. Because in a shotgun, it's a very fast burning type of propellant powder, and the barrel is very thin, if you'll notice. It's designed ballistically so that the propellant powder in a shot shell will burn very quickly. In other words, the energy developed is very near the chamber area of the firearm, and it is not progressive burning powder. Some propellant powder burns fairly slowly, like in centre fire type of rifle, and there is a push to the bullet throughout the entire bore. Throughout the entire length of the barrel.

...

A. I would, yes."

In his address to the jury counsel for the Crown stated:

"Now recall the cross-examination of Staff Sergeant Swim by counsel for Mr. Scallion, an extensive cross-examination in which every factor relevant to the opinion that it was a close range shooting was gone into. And, in every possible way, it was suggested to you...the witness that it might have been from a more distant range...at a greater range that the shot was fired. Staff Sergeant Swim did not change his opinion. This shooting was from a close range.

Now in his address to you, just completed, Mr. Scallion's counsel appeared to tell you that he had derived evidence from Staff Sergeant Swim through his cross-examination from which you could conclude that a sawed-off shotgun was not used. That, ladies and gentlemen of the jury, is a distortion of the evidence and I ask you to remember Staff Sergeant Swim's evidence very carefully. He never did say that in his opinion, a sawed-off shotgun was not used. He said it was equally consistent. He couldn't tell whether it was a sawed-off shotgun or another shotgun. But my friend, Mr. Knox, would have you believe that he derived an opinion from Staff Sergeant Swim that it couldn't have been a sawed-off shotgun.

Remember the cross-examination of Staff Sergeant Swim on the articles of clothing taken from deceased, Bernie Johnson. I'm showing you photographs 7 and 8, and it was suggested to Staff Sergeant Swim that those two holes, white holes, the holes shown in photograph 7 to the right of the ruler that this might have been made by one of the lab people who took some of the material out of there. And, of course, that had to be clarified, that that was made by the shotgun blast itself.

...The evidence...cross-examination of Robert Hudson. Now Mr. Knox says in his address just completed that the evidence of Mr. Hudson is that Mr. Scallion said 'is his name Michael?' That wasn't the evidence. The evidence is 'is your name Michael?' and the response by Mr. Waite was 'it will do'. Now Mr. Hudson was very clear and he clarified that in his evidence that Mr. Scallion was talking about Michael, the Michael who was with him. Not about Michael Mantley, not about any

> other Michael. And again, I suggest, that's another distortion of the evidence. If you want to check your notes, I suggest you'll find what the real evidence was.
>
> Mr. Knox suggested that Michael Mantley didn't sell cocaine to Mr. Scallion, but he sold him soap. Where does he get that? Was there any cross-examination on that? If Mr. Mantley had sold Mr. Scallion soap, Mr. Knox was there to ask him if he'd done so. Why didn't he ask him then? Because he would have known the answer that he would have received. So there is absolutely no evidentiary basis for that assertion in the closing address.
>
> He suggested that you would find powder residue in the wound if a sawed-off shotgun had been used. There is no evidence to suggest that in any shape or form from any witness - Staff Sergeant Swim, Dr. Perry, or any other witness.
>
> He suggested that someone else may have done the shooting. This is, I suggest, an invitation to speculate. There is no evidence to link anyone else to this shooting, and criminal cases cannot be decided on the basis of speculation."

On the following day counsel for Scallion argued that the remarks of counsel for the Crown were inflammatory and prejudicial. He did not move for a mistrial but invited the trial judge to address the issue when charging the jury. After hearing counsel the trial judge stated:

> "**THE COURT:** Yes, okay. Well before, so that we won't take undue amount of time on this matter, I...because we have a long day ahead of us, I must say that I...that that occurred to me too, Mr. Delaney, during the course of...what you said during the course of Mr. Knox's address to the jury, but when I considered everything that he said, I didn't feel that what he did say was...was that prejudicial. It was an opinion. I think it will be clear to the jury that it was an opinion and Mr. Knox's opinion. Mr. Knox, I'll be referring to some of

> the evidence that you did during the course... during your address to the jury and I think that that will clarify some of the things that you said and which will indicate that it's certainly not my view that you were out of line in any way in what you said.
>
> I did think the reference to who was meant by Michael, I think the jury will take their own recollection of the evidence of that, and they'll believe what they accept as being so. With respect to Sergeant Swim's evidence on the gun, I think...I don't agree personally with your interpretation of the evidence, Mr. Knox. However, I don't think at this point that it would be...that it would serve the interest of justice to make comments in either way to the jury, and I'll give them my instructions on the law and we'll tell them again that they are to take my instructions on the law, and they will take their own...they'll have their own view, and must be guided by their own view of the evidence."

In his address to the jury the trial judge referred to Sergeant Swim's evidence as follows:

> "...Staff Sergeant Swim says that in his opinion the wadding came from a 410 gauge shotgun shell, and the pellets could as well have come from a 410 gauge shotgun shell. And he says that in his opinion, from the size of the wound and the gun powder residue - both burned and unburned - found on Johnson's clothing, he concluded that Bernard Johnson was shot from a range of less than one metre, which is just over three feet, by a 410 gauge shotgun blast. He could not say whether the blast was from a conventional or regular shotgun, or a so-called sawed off shotgun."

Defence counsel's reference to the evidence was inaccurate. He put the argument forcefully to the jury and the Crown responded in kind. The trial judge was in the best position to judge the effect of counsels' remarks on the jury. He was obviously satisfied that no prejudice had resulted from the exchange and I agree with that conclusion. He dealt

properly with the matter by not emphasizing it further. There is no merit in this ground of appeal.

Ground 9(b) in Scallion's submission is as follows:

> "9(b) The Learned Trial Judge erred in law on what use, if any, could be made with respect to statements on which various witnesses were examined and cross-examined;

There is no elaboration on this ground of appeal in the appellant's factum. No reference is made to specific instances where the jury's attention should have been drawn to specific statements. Witnesses were cross-examined by the defence and confirmed prior statements which were favourable to the defence. The trial judge pointed these inconsistencies out to the jury. I see no merit in this ground of appeal.

Ground 8 is as follows:

> "8 That the Learned Trial Judge failed to properly instruct the jury on the danger of accepting the evidence of the Crown witness, Darwin Joseph Russell, such error being misdirection amounting to non-direction;"

Darwin Russell was thoroughly cross-examined as to his past record and his dealings with the police including his activities as an informer. Counsel elaborated on the untrustworthy nature of his evidence. The trial judge instructed the jury as follows:

> "The fact that a witness has been convicted of a criminal offence is relevant to his or her trustworthiness as a witness, and you may take it into consideration in deciding whether a witness is credible or trustworthy. Obviously, convictions for dishonesty or false statements have a greater bearing on the question of whether a person is or is not likely to be truthful than do convictions, such as assault or for using drugs. You do not have much information as to the actual crimes

> committed by all of those witnesses I have mentioned, with the exception of Darwin Russell - you have a great deal of evidence regarding the criminal records of Darwin Russell, the number being somewhere in the area of fifty, and you will have with you in the jury room, as an exhibit, a record of most of those convictions, giving you the dates and the types of offences committed by him.
>
> I am going to speak briefly now about the evidence of Darwin Russell because it touches on more than one area of the law upon which I am not instructing you.
>
> Darwin Russell, according to my recollection, says that in the month of June, 1990 he was in the recreation compound at the Halifax Correctional Centre, and overheard a conversation between the two accused persons. He says that Waite wanted to make a deal through his lawyer and Scallion got word of it. He says Scallion said 'it's going to be twenty-five or nothing - there's no deals going to be made'. He says Mike said 'this is your beef, Joey, you pulled the trigger - why don't you plead guilty - don't take me down with you'. He says the conversation ended and both Scallion and Waite paced back and forth.

After reviewing the record I am satisfied that there could have been no doubt in the minds of the jury that they had to treat the evidence of Russell with extreme caution. Russell was not the principal witness in this case. In fact the Crown did not have to rely on Russell's evidence. Having said that it should be noted that there was a ring of truth in his evidence. The statements showed that appellants knew precisely the situation they were facing. With respect, the charge to the jury with regard to Russell's evidence was appropriate and I would dismiss this ground of appeal.

In Ground 6 Mr. Scallion raises the following issue:

> "6 That the Learned Trial Judge erred in law in

> admitting certain evidence, the value of which was highly prejudicial and minimally relevant;"

The trial judge allowed the Crown to introduce into evidence a gun case and hacksaw blade found in Waite's apartment. In admitting the evidence he stated:

> "Here there is evidence that the victim was killed by a shotgun blast. There is some evidence that something resembling a gun, but not as long as a rifle, was brought from the building by the accused, Waite. I've concluded that the evidence sought to be introduced by the Crown has some relevance to the issues before the court, and find that it is relevant.
>
> On the second issue, Mr. Justice Marland stated at page 17 of the **Wray** decision, and I quote:
>
> > '...It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.'
>
> In weighing the risk of grave prejudice to the accused against the probative force of the evidence, I am satisfied that it would be fair to allow the jury to hear the evidence and to decide what, if any, weight should be given to it. I'll therefore allow the introduction of the evidence of those two items."

It was not entirely clear at that stage of the proceedings whether additional evidence would be adduced to connect these items with the crime. Nothing further was adduced by the Crown except the evidence of Sergeant Swim which indicated that in his opinion the case was for a rifle and not a shotgun. There was no evidence that the hacksaw blade which was found with other tools, was used to shorten a shotgun.

Under **The Queen** v. **Wray**, [1970] 4 C.C.C. 1 (S.C.C.) the trial judge has a

exclude "evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly."

The trial judge did not elaborate on this evidence in his address. Taken in the context of the trial the evidence appeared to have little relevance. The gun case certainly did not establish that Waite had a sawed-off shotgun in his possession. Although defence counsel alluded to the fact there was no evidence that the weapon was shortened that evening. While the admissibility of this evidence was tenuous it could hardly be classed as gravely prejudicial to the accused. In my view it cannot be said that the admission of the evidence operated unfairly or prejudiced the appellants.

In the result I would dismiss the appeal against conviction of the appellant, Joseph Scallion.

I turn now to the appeal by Michael Waite. Two main issues are raised. The first is a **Charter** argument and relates to the right to retain and instruct counsel without delay under s. 10(b). The appellant, Waite contends that statements made to the police were inadmissible because they were obtained following a violation of the appellant's s. 10(b) rights.

Corporal Philip MacDonald arrested the appellants and told them the police were investigating a murder in Uniacke Square. He then advised them of their right to counsel. Waite was taken to the police station and again cautioned. Corporal MacDonald testified:

> "Q. And ah, you informed him that he could call a lawyer?
>
> A. Yes, I have it written here, I said...'you can call a

lawyer', and he made a response.

Q. Mr. Waite did?

A. Yes he did.

Q. What was the response?

A. He said...'does Legal Aid come this early'?

Q. I said, 'I don't know'. He said, 'I don't need one', and then we left the cubicle at 3:53 a.m.

Q. Is that the last contact you had with Michael Waite that morning?

A. Yes Sir, we cautioned him, we took him to a washroom and then brought him back to the cubicle, that was my last contact."

Corporal MacDonald did not advise Waite that he had the right to call Legal Aid. At that time the police did not have a list of Legal Aid lawyers who were available to take calls.

Constable David MacDonald and Corporal Donald Fox proceeded to interview Mr. Waite at 4:10 a.m. Corporal Fox advised Waite of his right to counsel and read him the police caution.

Constable MacDonald testified as follows:

"Q. What happened after that time?

A. Well, he declined a lawyer at that time, and ah, Corporal Fox put questions to him and at that time he appeared to be very sarcastic and indifferent about the whole thing, he just didn't seem to care one way or the other. Ah, after about ten minutes of this ah, talking with Fox, I had nothing to say at that time and I was just listening and making notes. After about ah, ten minutes or so, I started to ask him some questions myself and as

I say, I made notes of that, if I could read them.

Q. Okay, now ah, when you say he declined a lawyer, do you recall in what terms he did that or how that was, or how that came up?

A. Well, when Fox asked him if he wanted a lawyer, he said ah, who can afford one and Fox said - well you can have a phone and phone book and he didn't want one."

At 4:20 a.m. Corporal Fox produced a statement form. He read the caution on the form. The officer testified as to the proceedings that followed:

"A. Well, when he got down to the part where - do you wish to say anything, and ah, Mr. Waite said - no, but yet he continued to talk.

Q. Mr. Waite did?

A. Yes.

Q. Okay?

A. And ah, as I say he was very sarcastic and he was going on about, you know he appeared to be indifferent with us as to why we were there.

Q. Okay, did he continue to talk even without further questions from anyone?

A. Yes, he rambled on, yes.

Q. Okay, and ah were you able to make notes of any of the things he said as he continued to talk?

A. Yes, I made some notes yes.

Q. Okay, ah, perhaps I should ask you before you refer to the notes, do you, can you tell us what he said as he continued to talk or do you have to refer to your notes for that?

A. Well, basically Fox asked him where he had been that night and who he had been with and I believe his reply was he named a couple of drinking establishments that he had been at.

Q. Okay, do you recall anything else of the conversation?

A. I would have to refer, I think, to my notes.

Q. All right, please do that then. Fox had asked him where he had been tonight...he said this is really deep man, I could tell you but I don't think I will, I mean I was drinking with Joey at Bearly's Club Flamingo, he said something or place and I couldn't understand what he said, couldn't make him out, the Horse, the Moon and then he said, maybe I should call my lawyer, Barbara Beach. Fox said, sure Mike, I will get you a phone and a phone book and he said na, she is probably in bed anyway.

Q. Well ah, if I could pause for a moment, Barbara Beach, is that a person known to you at that time?

A. Yeah, she is a Legal Aid lawyer.

Q. All right.

A. Ah, then be bragged about how he did time for robbery and Fox said well this is a little heavier than that Mike, and Michael said - well that's nice maybe we can have some ah, maybe we can have a little faith in our justice system, and that's my notes as to the conversation he had with Fox.

Q. Okay, and you asked some questions, did you?

A. Yes, and that would have been about 4:30 a.m.

Q. Okay.

A. Shall I go on?

Q. Yes please?

A. At this point I asked him if he had been in Uniacke Square last night or early this morning with Joey Scallion?

A. He said no, I have never been to Uniacke or Maniac Square and I have never been to Mulgrave Park, I am a downtown guy and ah, I wasn't north of Duke Street. Ah, I then asked Michael if he was with Joey Scallion last night or early this morning and where? He said, Joey called for me around 9:00 or 9:30 last night, actually I went to the store for cigarettes and when I came back he was coming in my front door alone. He then said, him and Joey went drinking at several places ending up at the Moon. He said the police picked them up shortly after leaving the Moon. I then asked Jo...ah, Mr. Waite if Joey left him at anytime and his reply was he left me for ten or fifteen or twenty minutes to do some drugs just before the Moon closed and at that point he said he wanted a Legal Aid lawyer.

Q. Okay, now when he asked, when he said he wanted a Legal Aid lawyer, what ah, what was done?

A. Myself and Fox took him over to cubicle 142.

Q. Yes?

A. Which is a facility that will accommodate a phone.

Q. Was there a phone in the cubicle?

A. I think we put one in there.

Q. Okay.

...

A. So, we took him to cubicle 142 and he was provided with a telephone and a phone book, he asked us to look up the telephone number.

Q. Was he asking for a particular name, do you recall?

A. If he did, I didn't make note of it, Corporal Fox did

that.

Q. Okay?

A. I remember he tried several times and got no answer.

Q. Did you ah, did you assist him in looking up the number?

A. Yes, he was assisted by Corporal Fox.

Q. By Corporal Fox, okay?

A. He then asked myself for his lawyer's card which was in his wallet, that, that was outside the cubicle in the C.I.D. office.

Q. Okay, did you get it for him?

A. Yes, I went out and I got the card and returned with it, and ah, he made contact with his lawyer and ah, then he knocked at the door and he asked Corporal Fox to come in and speak to his lawyer which Corporal Fox did."

The police acknowledged that they did not offer Waite the services of Legal Aid. In ruling the statements admissible the learned trial judge dealt at length with the evidence and the submissions of defence counsel. The trial judge stated:

> Counsel for Mr. Waite agrees that the cases dealing with the **Charter** right to counsel establish that the accused must first positively assert his right to counsel. In my view, Mr. Waite not only did not positively assert his right to counsel, but he explicitly told the police he did not wish to call a lawyer, notwithstanding that the police had immediately offered to obtain a telephone and a telephone book so that he could do so.
>
> Mr. Pink suggests that the police questioning could have waited until the following morning so that Mr. Waite

> could have contacted a lawyer during the daytime hours. In Mr. Pink's questioning of Constable David MacDonald on the urgency of the questioning, he stated that speaking to the accused as soon as possible may have led to evidence. I agree that in circumstances such as these, it is important that the police obtain evidence as quickly as possible after the event. To do otherwise would, no doubt, attract criticism, and properly so.
>
> Mr. Waite was properly informed by the police of his right as set out in section 10(b) of the **Charter** to retain and instruct counsel without delay. He knew at that time he could obtain counsel free of charge.
>
> Under those circumstances, I find that Mr. Waite's right to counsel as guaranteed by section 10(b) of the **Charter** was not violated.
>
> Mr. Pink submits also that when at 4:20 a.m. the accused said 'no' to being asked if he wished to say anything, the police questioning should have ceased. He submits that the police by continuing to question the accused violated his right to remain silent as guaranteed by section 7 of the **Charter**."

On the second issue the trial judge stated:

> "Constable MacDonald, who at that time was taking notes of the events, testified that the accused continued speaking to the police following his stated decision not to. Although Corporal Fox, on cross-examination, says his notes indicated he asked a question following Waite's negative answer, he also, on cross-examination, says that Waite following his negative answer just kept talking.
>
> Regardless of whether or not Corporal Fox asked a question following Waite's negative answer, I find that Waite had indicated to the police constables a willingness to continue talking."

And further:

> "The specific question here, that is: whether continued questioning in the face of a declared determination to

> remain silent can give rise to a finding that the accused's **Charter** rights as embodied in section 7 had been violated, is a difficult question to answer. But after much deliberation on the facts of this case, I have concluded that there has been no such violation of the accused's rights.
>
> I find that the accused, with little or no prompting from the police, freely and willingly continued to talk to the police, notwithstanding his stated wish not to do so."

The trial judge went on to find that the statements were free and voluntary and therefore admissible.

The trial judge heard the evidence and made specific findings of fact. The appellant Waite, did not testify on the **voir dire.** In **R.** v. **Brydges** (1990), 53 C.C.C. (3d) 330 (S.C.C.) the appellant was not aware of his right to legal aid. It is clear in this case that Waite was fully aware of the availability of legal aid, indeed had a card in his wallet and in fact contacted a lawyer. Having regard to the evidence I see no basis for interfering with the trial judge's findings of fact. In **Brydges**, Lamer, J. stated at p. 337:

> "In my view, the findings of fact on which the learned trial judge based his conclusions regarding the issues of the restriction to the right to counsel and the admissibility of the evidence should not be reversed. First, it cannot be said that there was an absence of foundation for his findings. The learned trial judge specifically adverted to the relevant factual background to the arrest, and quoted passages from the transcript of the interrogation. Second, the trial judge had the unique advantage of observing the witnesses who gave testimony on the **voir dire**, and, perhaps more importantly, had the opportunity to listen to the tape recording of the interrogation. As a result, I conclude that the findings of fact made by the trial judge are sufficiently supported by the evidence before him, and, therefore, my consideration of the legal issues raised in this appeal is predicated on an acceptance of the facts as found by the

learned trial judge, more particularly, that Brydges wanted counsel in the form of Legal Aid or duty counsel."

In **R.** v. **Smith** (1989), 50 C.C.C. (3d) 308 (S.C.C.) Lamer, J. stated at p. 314:

"The police officers, in these circumstances, were justifed to continue their questioning and to act as they did. This court, in **R.** v. **Tremblay** (1987), 37 C.C.C. (3d) 565, 45 D.L.R. (4th) 445, [1987] 2 S.C.R. 435 (S.C.C.), clearly indicated, at p. 568, that the duties imposed on the police as stated in **Manninen, supra,** were suspended when the arrested or detained person is not reasonably diligent in the exercise of his rights.

> Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this court's decision in **R.** v. **Manninen** (1987), 34 C.C.C. (3d) 385, 41 D.L.R. (4th) 301, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath.

This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the **Charter**, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society. An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks.

The case at bar is a situation where an arrested or detained person was not reasonably diligent in the

exercise of his rights."

As there was no violation of the appellant's **Charter** rights the statements were properly admitted once the trial judge was satisfied beyond a reasonable doubt that they were free and voluntary.

I would dismiss this ground of appeal.

The second issue relates to the trial judge's instruction in relation to first and second degree murder. I have already set out the instructions of the trial judge in detail. The appellant contends that the evidence "did not, in any way, establish that he knew that the appellant Scallion would murder Bernard Johnson". He further contends that there was "absolutely no evidence" that he planned or deliberated on the killing. It was argued that there was very little evidence that Waite knew Scallion was going to kill Johnson and as there was no evidence of planning and deliberation, the trial judge should have instructed the jury accordingly. Again it must be noted that Waite did not testify on the trial.

The evidence only supported the inference that Scallion shot Johnson. The trial judge properly instructed the jury that Waite could only be found guilty by virtue of s. 21(1) of the **Code** provided he had the full **mens rea** for first or second degree murder. The instructions were fully in accord with the latest pronouncements regarding the necessary **mens rea** for murder in **R.** v. **Vaillancourt** (1987), 39 C.C.C. (3d) 118 (S.C.C.) and **R.** v. **Martineau** (1990), 58 C.C.C. (3d) 353 (S.C.C.). With deference I am unable to agree with the appellant's submission that there was no evidence to support a verdict of first degree murder. I have already elaborated on that evidence in detail. That evidence was fully reviewed by the learned trial judge. He did not err in leaving that issue with the jury.

In view of my conclusions I would dismiss Mr. Wait'e appeal from his conviction.

M. L. Jones

J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A. O.K.C.

CANADA
PROVINCE OF NOVA SCOTIA
1990 C. R. 11348

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

HER MAJESTY THE QUEEN

- versus -

MICHAEL TIMOTHY WAITE
JOSEPH HAROLD SCALLION

HEARD BEFORE: The Honourable Mr. Justice Gordon A. Tidman (and jury)
PLACE HEARD: Halifax, Nova Scotia
DATES HEARD: April 2, 3, 4, 5, 8, 9, 10, 11, 15, 16, 1991

COUNSEL:

William D. Delaney, Esq. for the Crown

Lawrence W. Scaravelli, Esq. and Mark T. Knox, Esq. for Michael Timothy Waite

Joel Pink, Q.C. for Joseph Harold Scallion

VOLUME II