C.A.C. No. 02883

NOVA SCOTIA COURT OF APPEAL

Chipman, Freeman and Pugsley, JJ.A.

Cite as: R. v. Wood, 1994 NSCA 239

BETWEEN:		
DEREK ANTHONY WOOD		J. Arthur Mollon, Q.C., Patricia Fricker and Allan F. Nicholson for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Dana W. Giovannetti for the Respondent
	Respondent	
		Appeal Heard: October 17, 1994
		Judgment Delivered: November 30, 1994

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Freeman and Pugsley, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant was convicted following a trial in Supreme Court with a jury at Sydney of:

(a) attempted murder of Joan Arleen MacNeil;

(b) confining Donna Alecia Warren without lawful authority;

(c) robbery of Donna Alecia Warren;

(d) first degree murder of Donna Alecia Warren;

(e) first degree murder of Neil Francis Burroughs.

These charges stemmed from a robbery and murders which took place on May 7, 1992 at McDonald's restaurant, Sydney River, Nova Scotia.

The appellant's trial before Tidman, J. commenced on April 21, 1993 and concluded on June 2, 1993. The appellant received the following concurrent sentences:

(a) life imprisonment;

(b) ten years imprisonment;

(c) ten years imprisonment;

(d) life imprisonment with no parole eligibility for 25 years;

(e) life imprisonment with no parole eligibility for 25 years.

Two other persons, Freeman MacNeil and Darren Muise were tried separately on charges relating from the same events at McDonald's restaurant on May 7, 1992. On June 3, 1993, Muise pled guilty to second degree murder of Neil Francis Burroughs and armed robbery. On October 8, 1993, Freeman MacNeil was convicted of confining Donna Alecia Warren without lawful authority, first degree murder of Neil Francis Burroughs, second degree murder of James Patrick Fagan and armed robbery.

On June 11, 1993, the appellant brought an appeal to this Court against his conviction. The most significant evidence at his trial implicating the appellant was a number of statements given by him to the police on May 7, 8, 16 and 19, 1992. This appeal is confined to an attack on the admissibility of the statements, no challenge being made to the reasonableness of the verdicts of the jury.

Following an eight day **voir dire**, Tidman, J. gave a brief oral judgment on

May 10, 1993 holding that all statements given by the appellant to the police were admissible in evidence. He indicated that he would file written reasons at a later time. These were released on August 13, 1993 and are reported: **R. v. Wood (No. 1)** (1993), 124 N.S.R. (2d) 118.

Before addressing the issues raised relating to the admissibility of the various statements, I will outline the salient facts and then provide a detailed account of the statements at issue.

On May 7, 1992 Daniel MacVicar was listening to the 1:00 a.m. radio news in his taxi while parked on the Esplande in Sydney. James Fagan got in the cab and asked to be taken to McDonald's restaurant at Sydney River, a five to seven minute drive at the most. MacVicar dropped Fagan off near a drive through window of the restaurant. As he was driving away, he heard what he described as a snap like a fire cracker coming from in back of the building. He looked back and saw two people running away on the sidewalk. He could not describe them except to say that he thought he saw a tote bag swinging as they ran. He then drove back to the rear door of the restaurant and saw Fagan's body in the doorway. At 1:07 a.m., he radioed his dispatcher for help.

John MacInnis, another taxi driver received a call on his radio while parked on George Street in Sydney. He reached McDonald's restaurant no more than two minutes later. MacVicar was in his taxi there with the doors locked. The two men went to Mr. Fagan. MacInnis rolled him over and discovered that he had been shot in the forehead but was still alive. On entering the restaurant on the main floor, he discovered Donna Warren in the office containing the safe. She was badly injured with much blood in her chest area and what appeared to be brain matter coming from her nose. She was still alive but was not speaking. He then saw the body of Neil Burroughs in the kitchen area in a pool of blood.

Stanley Jesty, the telephone operator and dispatcher at the R.C.M.P. Detachment in Sydney received a phone call at 1:09 a.m. from a taxi dispatcher reporting the shooting at McDonald's. Corporal Kevin Cleary drove from the detachment and was the first officer to arrive at the scene. Within seconds, he was joined by Constable Jensen and the officers entered the restaurant with guns drawn. They discovered Fagan, Burroughs and Warren on the main floor. They found Arleen MacNeil at the foot of the stairs leading to the basement. She was alive, but seriously injured. All of these victims were employees at McDonald's. The scene was exceptionally bloody and was video taped at 3:00 a.m. on May 7.

Ambulance attendants arrived shortly after Corporal Cleary. They transported Fagan to the Sydney City Hospital where he died the next day. Arleen MacNeil was taken to the Sydney City Hospital. Although she survived, she suffered permanent mental and physical disability to such an extent that she was not able to testify at the trial. Burroughs and Warren died at the scene.

Dr. Daniel Glasgow, a pathologist, performed autopsies on the deceased persons. Donna Warren was shot twice in the head at close range. Neil Burroughs was shot three times in the head, two close range shots and the other a contact wound. He also sustained a cutting and stabbing injury to the neck and other injuries. Fagan had been shot once in the forehead at close range. All wounds were consistent with having been caused by a small calibre firearm such as the .22 calibre revolver referred to by the appellant in his statements to the police and later found by them. A number of bullet fragments were recovered but Darrell Harvey, a forensic firearm expert, was unable to identify or eliminate the revolver as the murder weapon. This revolver was owned by Joseph Chaisson, stepfather of Freeman MacNeil's girlfriend, Michelle Sharpe. Chaisson and Sharpe were not implicated in these offences.

The police officers made a number of significant findings at the scene.

The safe had been opened by its combination. Donna Warren, the shift manager, was the only employee on duty that night who would have known the combination. The restaurant manager testified at the trial that $2,017.27 and other property had been stolen.

The police discovered footprints in a room known as the training room. This room led out through a door to a cement porch. They found this door propped open by a kit bag which was later identified as belonging to the appellant, who was also an employee at the restaurant. The cement porch had a second door leading to a driveway running from the front of the building. That door was closed and latched shut. It did not close by itself and would be difficult to close from the outside. When Corporal Cleary arrived, he found that the building was secure, with all doors locked except the rear main floor door. Corporal Leadbeater found that there were exit footwear impressions, that is, impressions which appeared to lead from the training room in the basement to the porch, consistent with the pattern on Reebok shoes seized from the appellant. There were other impressions which appeared to have been made subsequently. These impressions were moving from the porch through the training room. One was a set of Reebok impressions, also consistent with the appellant's footwear. Overlying that and made after, was a set of impressions made by Brooks footwear. Corporal Leadbeater, an expert in the field of footwear impression examination, concluded that at least two persons entered the training room from the porch and that of these two, the person wearing the Reebok shoes was in the lead.

At 1:20 a.m., Stanley Jesty received a call at the detachment from a person who identified himself as Derek Wood, the appellant. The caller said that he was at King's Convenience Store in Sydney River, a short distance from McDonald's restaurant. The calls made to Jesty were recorded and played in evidence at the trial. The appellant told Jesty that he had been outside McDonald's with the door open,

having a smoke when he heard a bang inside. Jesty took his name, phone number and address and suggested that he go home. The call concluded at 1:23 a.m.

Employees and customers of King's Convenience Store testified at the trial.

At 3:30 a.m. on May 7, Constable John MacDonald of the Sydney Detachment of the R.C.M.P. arrived at the intersection of Kenwood Drive and King's Road, not far from the McDonald's restaurant. While directing traffic, he was approached by the appellant, who told him that he was at McDonald's when the shootings occurred. He said he heard shots and ran. Constable MacDonald stated that the appellant appeared pale and confused. He asked the appellant to remain.

Corporal Brian Stoyek of the R.C.M.P. arrived at McDonald's restaurant at 1:40 a.m. By then there were several police officers, ambulance attendants and taxi drivers at the scene. He remained there until approximately 3:30 a.m. He then went to King's Convenience Store and at about 3:39 a.m., went to the intersection of Kenwood Drive and King's Road. There he met the appellant standing by himself, just off to the side of the road. He approached him and asked if he had phoned the police from King's Convenience Store earlier that morning. The appellant said that he had, and Stoyek asked him to enter his police vehicle. The appellant did so and identified himself and when asked what happened, he stated that while standing by the basement door of the restaurant, he heard two gunshots and a scream. He immediately ran away. The next thing he could remember was being in the vicinity of the Sydney River Bridge on the Sydney side. He could not recall how he had gotten from the restaurant to there. He then traced his route from that location to King's Convenience Store and his movements after leaving the store.

The first thing that Corporal Stoyek noticed about the appellant was that he had a cut on one of the fingers of his right hand. This appeared to be between the

first and second knuckle and there was fresh and dry blood around the cut. The officer asked the appellant what had happened and the appellant said that he had cut it the day before with a knife. The cut appeared to Corporal Stoyek to be more recent than that.

The appellant agreed to accompany Corporal Stoyek to McDonald's restaurant. They arrived there at 3:46 a.m. The appellant remained in the vehicle and between 3:54 and 4:10 a.m. Stoyek took an exculpatory statement from him. In that statement, the appellant said that he was working at McDonald's that night from 8:30 p.m. He punched out at 12:20 a.m. He then had a smoke with another employee in the lobby, following which he assisted Arleen MacNeil with some work. After changing clothes, he opened the basement door to smoke. He was on his second cigarette when he heard two gunshots and heard who he thought was Donna Warren scream. He ran from the scene, arriving at King's Convenience Store where he used the phone. He did not go home because he was "too hyper". Subsequent evidence from the daily time sheets from McDonald's showed that the appellant punched out at 12:01 a.m., some 20 minutes before the time given in his statement and just a little over one hour before the murders.

At 4:15 a.m., the appellant accompanied Stoyek on a drive retracing his purported movements following the shootings. At 4:45 a.m., they arrived at the detachment office in Sydney and the appellant was placed alone in an interview room.

Between 6:30 and 8:20 a.m., Stoyek took a detailed exculpatory statement from the appellant. He started by saying that he was having a smoke after work. He heard two shots fired and heard who he thought was Donna Warren scream. He said that he had been driven to work that evening by Freeman MacNeil, starting work at 8:30 p.m. and finishing between 12:00 and 12:30 a.m. MacNeil had told him he might drive him home after work. Wood went downstairs to use the washroom and phoned a

friend, Lawrence Muller, to give him a woman's phone number. He then had a cigarette with another employee in the lobby, assisted Arleen MacNeil with the inventory, then changed his clothes and went to the outside downstairs door for a smoke. Both doors were open, the inner door being held opened by his kit bag. He was there for about ten minutes and did not see any cars or people in the parking lot. It was about 1:00 a.m. Arleen, Burroughs and Donna were upstairs. The other employees had left. He heard two loud shots fired close together after which it sounded like Donna Warren screamed once. He was afraid to go back inside and ran, eventually arriving at King's Convenience Store. He gave a detailed account of his phone calls from the store to the police and to Lawrence Muller. He said that he left his kit bag holding the door open.

After consulting outside the interview room with Corporal Cleary, Corporal Stoyek reentered the room at 8:27 a.m. and again at 9:50 a.m. to ask further clarifying questions. In response to these, the appellant indicated that he had been smoking by the basement door and had flicked at least one cigarette butt outside the door.

During the taking of these statements, Cleary and Stoyek were growing increasingly suspicious of the appellant. Upon reviewing his statements, they prepared a list of discrepancies, the chief ones being: the basement door was very difficult to close from the outside as the appellant had led the police to believe he had done; no cigarette butts could be found outside the door in the area where the appellant said he had discarded at least one butt; and the cut on the appellant's finger appeared too fresh to have occurred the day previous.

At about 1:10 p.m. on May 7, Stoyek and Cleary entered the interview room and placed the appellant under arrest for two charges of attempted murder, two charges of murder and one of armed robbery. The appellant was given his **Charter** rights to counsel and a police caution. His response was that he had no need for a lawyer. The police officers then questioned him further. At about 1:50 p.m., however,

the appellant asked the officers to call a Legal Aid lawyer. Cleary called Arthur Mollon, handed the phone over to the appellant and he and Stoyek left the room. They returned to the room a few minutes later and were advised by the appellant that Mollon would be up in a few minutes. The officers left the room but returned to remove the telephone. On this occasion, the appellant asked Cleary "who was the fourth person". Cleary made no response.

Prior to the arrival of the Legal Aid lawyer, the appellant was searched and the officers found a piece of paper containing a phone number subsequently determined to be a public telephone outside the Tim Horton's restaurant located some 200 feet from the McDonald's restaurant. This phone was checked and was found to be in proper working order, but had a very quiet ring.

From about 2:12 to 2:45 p.m., the appellant had a private interview with his lawyer, Arthur Mollon of the Legal Aid office in Sydney.

At 2:55 p.m. Cleary and Stoyek resumed their interview of the appellant which lasted until 6:20 p.m. Shortly before the interview ended, the appellant said:

> "I don't know as much as you think I know. I don't know where the gun is."

He added:

> "Let me call my lawyer and then I will talk to you."

The appellant was allowed to speak with his lawyer on the phone and this was followed by a private interview between the two of them which lasted from 6:59 p.m. until 8:37 p.m. Thus, by this time, the appellant had had two interviews with counsel of a total duration of about two hours.

At about 8:46 p.m., Stoyek and Cleary returned to the interview room to question the appellant once again. At 8:50 p.m. Cleary departed and Stoyek continued the interview. At one point, the appellant suggested that he did not know everything the police wanted and that he had lied in the first statement . The following is an extract

from Stoyek's evidence:

> "Q. Okay. Now it was just yourself and Mr. Wood present at that time that he made that comment, "I don't know everything you want.", and you asked him if he had lied and he said, "Because I had left."?
>
> A. Yes.
>
> Q. Okay. Would you continue, please?
>
> A. I asked what he meant by the comment, "Because I left." He said he left the door open and walked down to Tim Horton's in the Cape Breton Shopping Plaza to see if Freeman was there to get a drive. He said he walked around in front of the Tim Horton's store but didn't go inside. He then returned to the restaurant, locked the door - - went inside, locked the door and started to go inside. Once he was inside he heard a shot. He didn't hear any screams and only one shot. He said he kept walking inside and then he saw Arleen on the floor near the basement door - - the basement stair door leading to the upper floor. He said he opened this door, the basement door. When he looked upstairs, he could see two fellows running out of the garbage room door and saw a body laying on the floor at the entrance to the door. He said one fellow was carrying a kit bag and the other was wearing a mask over his head. He said he could tell it was a mask even from the back. He said he went up the stairs and went out the same door that the two fellows he saw ran out. Wood said he was running across the back lot and realized he was behind the two fellows. He could see them running towards the highway through the field. Wood said that when he realized this, that he ran around the far side of the house located on the right-hand side of McDonald's. He - - he still maintained that he couldn't recall how he had gotten from the restaurant to the Sydney River Bridge. He stated he was scared and that he saw the police go by while he was calling to report the incident from King's Convenience. He gave the reason for not returning to the scene as being told to have - - been told to go home and that he'd be contacted tomorrow. He said he only saw the two bodies. Arleen and the one by the garbage room door. He said he didn't see any other vehicles or people other than the two running from the scene, remembers one of the two wearing or carrying something red in colour. He said that when he left the basement door open, that it would have been open about three to six inches and that there was no light on inside. I asked him why he

> had lied about leaving by the basement door at first and he replied he didn't want to get involved and had panicked. I asked when he thought of making up the story he originally told. He replied while he was calling from King's Convenience. Wood drew a diagram of how he ran from the restaurant around the house that - - that was there."

This interview concluded at about 11:20 p.m.

Stoyek questioned the appellant again at about 4:00 a.m. on May 8th. At this time, the appellant maintained that his version of the events was correct. He was released from custody at about 7:00 a.m. on May 8th.

On May 15, 1992, Gregory Lawrence gave a statement to the police which implicated the appellant, Freeman MacNeil and Darren Muise. In testimony at trial, Lawrence said that he was approached a week or two before the robbery and murders by Darren Muise at Tim Horton's on Charlotte Street in Sydney. Muise asked him to go outside where he met Freeman MacNeil whose car was parked in front of Tim Horton's. Present were Muise, MacNeil and the appellant. The appellant was sitting inside the car. As Lawrence remained outside the car, he was asked if he wanted to participate in a robbery at a place for the sum of $20,000. It was proposed that he brace an outside door and use a club to knock out anyone trying to escape. It was anticipated that $80,000 would be obtained from the safe. The whole conversation lasted five to ten minutes. Lawrence refused to get involved. Two days earlier he had seen a duffle bag with clothes and a mask in it in Freeman MacNeil's car. The next night after the robbery had been proposed to him, he saw a gun and a duffle bag in the trunk of MacNeil's car. The gun was a chrome .22 calibre pistol with a wooden handle. The appellant, Darren Muise and Freeman MacNeil were there when he saw this gun. There was discussion about robbing McDonald's during the evening. MacNeil told him that he had gotten the gun from his girlfriend's stepfather.

On May 16, 1992 at 12:20 a.m., the appellant was arrested by Corporals

Karl Mahoney and James Wilson of the R.C.M.P. as he was leaving the Irish club on Townsend Street in Sydney. He said to Mahoney, "You're Karl" and "Look out for Lawrence". Lawrence Muller was with the appellant. He was a close friend. He was arrested at the same time by other officers. Although the appellant's breath smelled of alcohol, in the opinion of the officers he was not impaired. He was coherent and understood what was going on.

The appellant was taken to the R.C.M.P. Detachment in North Sydney. He was placed in an interview room equipped with audio-video equipment. Everything which occurred in that room from 12:38 a.m. until 9:52 a.m. was recorded to the knowledge of the appellant. The video tapes were entered in evidence at the trial and shown to the jury. They have been seen as well by this Court.

At 12:41 a.m., the appellant was advised of his right to counsel. He requested counsel. From 12:56 a.m. until 2:36 a.m., a duration of over an hour and a half, the appellant had a private interview with his lawyer, Arthur Mollon.

Corporals Mahoney and Wilson commenced an interview of the appellant at 2:50 a.m. For the next two and one-half hours, the police officers maintained an intense interrogation of the appellant. At the outset, the appellant made it clear that he had nothing to say.

> "If there's anything I know, it's going to be said to my lawyer.
> There's nothing I'd say tonight."

The appellant then said that if he knew anything, it would come out in time, but for the moment, he had nothing to say. Notwithstanding this, he continued to engage in conversation with the police, at times to the point of ridicule and belittlement of them.

One tactic adopted by the officers was to suggest to the appellant that his friend Lawrence Muller was involved in the robbery and murders. Although the

appellant repeatedly said that he had nothing to say, he stoutly maintained that Lawrence had nothing to do with the matter. He did, at times, indicate a concern that Lawrence was being dragged into it, telling the officers at one point that they were "full of bullshit if you think that someone is trying to tell me Lawrence is involved in it" and that "Lawrence doesn't fit in anywheres".

As the interview progressed, the police officers frequently appealed to the appellant's conscience. They asserted their belief in his guilt, referred to the horrible deaths of his co-workers at the restaurant, referred to what they "up in heaven" must be thinking of him and referred to what his family would think of him.

The officers returned to the subject of Lawrence. Mahoney asked the appellant what he thought Lawrence was saying now. The appellant said that Lawrence did not know anything so he could not have had anything to say. Mahoney then, untruthfully, said:

> "Yeh, that's right, because I just come from talking to him. I told you I was going to go see him and you're sitting there saying that he doesn't know anything and he's trying to take the fall for you . . .
>
> You know what he's saying now? He said, "Give me 20 minutes with Derek", he said "And I'll get the gun for you." That's what he's saying now. So why are you sitting there telling me that he doesn't know anything about it and that the likes of this is coming out of him?"

The appellant's response, at about 5:19 was that he did not know. The interview then continued as follows:

> "Mahoney: You don't know. You don't know because you were there and he knows that you were there and he's trying to take the blame for you.
>
> Wood: Can I call my lawyer?
>
> Mahoney: What do you want to call your lawyer for?
>
> Wood: I want to talk to him for a second.

Mahoney: Do you want to call him right now?

Wood: Yes.

Mahoney: You figure you're going to get a hold of him now?

Wood: What time is it?

Mahoney: Twenty after five. But he's telling us this and you're saying this, that's he got nothing to do with it. He knows. He knows that you're guilty. He's trying to take the blame for you.

Wood: Can I talk to him?

Mahoney: Who do you want to talk to?

Wood: Lawrence.

Mahoney: Lawrence is busy. He's over there . . . The only reason that you outlasted us last time is that we had some bright person around here that called us and sent us on a total false fox run was all it was. There was - - three other people were arrested. That's right. They were. But Mr. Derek Wood, he walked that time, that's all. That's the only reason why you walked last time, because we were led down the garden path. That's not going to happen this time mister."

From this point on for nearly one half hour, the appellant and Mahoney engaged in a spirited exchange which clearly indicated that any rapport that might ever had existed between them had totally broken down. They were moving farther and farther apart and it was clear that the appellant had no intention of cooperating with Mahoney in any way. Specifically, he told Mahoney over and over again that Lawrence "had nothing to do with it".

Sergeant Phil Scharf was a polygraph operator who had been monitoring the entire interview in another room. He entered the interview room at about 5:49 a.m. and introduced himself. He then embarked upon a virtual monologue for the next ten minutes or so with but few interruptions from the appellant. The thrust of Sergeant

Scharf's message was that a tragedy of almost unprecedented proportions had occurred and that the appellant was the author of it. Sergeant Scharf had thus changed the focus of the interview from that of Lawrence as a fall guy for the appellant to the enormity of the appellant's crime. He accused the appellant of dragging others into it, including Lawrence. This was the only reference to Lawrence. Sergeant Scharf suggested that the appellant could never live with himself knowing these things. He suggested that if the appellant was experiencing torment now, it was but a picnic to what he would experience in the future. He was a sick person who needed help and lacked the courage to admit it even to himself.

This approach proved effective. It is clear from the video tape and the transcript that the appellant instead of responding with defiance was listening to the message. At 6:01 he said:

> "Can you shut up for a second. What do you want?"
>
> Scharf responded:
>
> "I want the truth. I want your involvement. I want to know why it happened. God, this can't go on. I don't know what you're trying to do. You can't kid yourself Derek this has to..."
>
> Wood then responded:
>
> "Well if you'd shut up and let me talk."
>
> Scharf then told the appellant to talk and be truthful.

The appellant confessed his involvement in the robbery and murders by pointing at the charge sheet which was before him and saying, "guilty, guilty, I'm not sure about that one . . . guilty, not guilty and guilty." From this, it was open to the jury to conclude, as they obviously did, that he was indicating guilt of conspiracy to commit robbery, murder of Donna Warren, attempted murder of Arleen MacNeil, uncertainty about the charge of murdering Neil Burroughs and a denial of responsibility for the murder of Fagan. Sergeant Scharf asked him why, to which he first replied that he did

not know but then stated that he "got scared". After a further exchange, Sergeant Scharf indicated that he would like the appellant to tell Corporal Wilson everything that happened. He made it clear that he did not want him to take responsibility for anything that he did not do. The appellant agreed, and at 6:05 a.m. Sergeant Scharf left the room and Wilson entered. Mahoney was also present. A lengthy conversation between Wilson and the appellant ensued during which Wilson wrote out the appellant's statement. He read the statement back, asking further questions for clarification or detail. The appellant then signed the statement. The written statement, Exhibit 74, was read to the jury by Corporal Wilson:

> "Q. Would you read the statement to the Court, please?
>
> A. Yes.
>
> I went to McDonald's Restaurant in Sydney River, Nova Scotia, at 8:30 p.m. the night of the shooting. I got off work about 12:20 in the morning. I went downstairs to the staff room and I called Lawrence Muller and gave him Rachelle's telephone number. I went upstairs and got a couple of smokes and had a smoke with Rachelle. Rachelle left and I gave Arleen a hand doing the stock. I then went downstairs and I got changed. I called the pay phone at Tim Horton's at the Cape Breton Shopping Plaza and there was no answer. I went and put my kit bag in the lower door and I went down to Tim Horton's at the Cape Breton Shopping Plaza in Sydney River, Nova Scotia. The bag held the door open.
>
> I found Freeman MacNeil and Darren Muise and we drove over and parked in the area across from the 125 Highway from McDonald's, just as I showed you in the diagram. There may be some evidence there. It's a stick or something. It's in the drain pipe there. We were in Freeman's car. He was driving a beige-coloured Impala.
>
> Me, Freeman and Darren went back down to the metal door that I had left open with my kit bag. All three of us were going up the stairs

and Donna and Arleen were coming out of one of the offices downstairs. We all stopped and Donna asked what is going on. I remember looking over to Freeman and Darren and I shot Arleen. After that was over, I panicked. I ran upstairs and I shot Neil. I then went back downstairs and I got Donna and got her to open up the safe and then I shot her. I remember asking Darren to get a bag. I never had the gun after that. I put a couple boxes of money in the bag. I grabbed the stuff and I went out the back door and then Freeman and Darren were there. I opened up the door and I started running out. I seen Jimmy and Freeman shot him. And we took off to the car. I told Freeman and Darren that I left my kit bag back there. So we drove from where we were parked back to the Sydney River bridge. I ran from there to King's Convenience Store. I called the police from there and I called Lawrence Muller. As I said, he was home asleep. I told Lawrence that there was a shooting at McDonald's and I asked Lawrence if he would come down and pick me up. He put me on hold and I think he fell asleep. I then left King's Convenience Store and went on a walk. I walked up to Freeman's house and back. That is when I went up to the road block and that is when the R.C.M.P. officer picked me up.

Q. What became of the money that was taken from the robbery at McDonald's?

A. I know where Darren's share is. It's at the end of Ferguson Drive. There's a frog pond in back. It's in the frog pond in a tightly-wrapped plastic bag.

Q. How much money did Darren receive?

A. He said I think it was around $400 or so.

Q. Did you receive any money from the robbery?

A. No, I didn't. I didn't want any.

Q. Did Freeman receive any money?

A. I guess so. He had it, I think. They said they got about $1,700 in total.

Q. Where did the gun come from that was used in the

robbery at McDonald's?

A. I was told it was Michelle Sharpe's stepfather's.

Q. Do you know his name?

A. No, he lives at East Broadway with Michelle Sharpe.

Q. Where's the gun now?

A. They told me that it was back home where they got it.

Q. Do you know where the gun is kept?

A. No.

Q. Who planned the robbery?

A. It was my idea but we all went along together in planning it.

Q. Who helped plan it?

A. Me, Freeman and Darren.

Q. Was Michelle Sharpe involved or did she have any knowledge of the plan?

A. I don't know.

Q. What type of gun was used in the robbery?

A. It was a .22 calibre revolver, seven shot.

Q. What did it look like?

A. It was silver, the barrel, and the grip was brown in colour.

Q. What exactly was your plan?

A. I figured it was the cleaner and Donna left inside McDonald's.

Q. Why did you shoot the persons inside McDonald's?

A. I was scared. I can remember looking over at Darren and Freeman and they gave me looks like "Come on, what are you waiting for?"

Q. Where did you shoot Arleen?

A. I was about five feet away from her when I shot her. I just fired one shot at her.

Q. And where was she when she was shot?

A. Near the stairs. She was standing near the stairs.

Q. Where was the next person that was shot?

A. Neil was over by the sink in the upstairs area.

Q. Where was Neil shot?

A. I guess in the head. I just shot.

Q. How many times was he shot?

A. I just shot him once.

Q. Did anyone cut his throat?

A. I don't know.

Q. Did you have to have Donna open the safe in order to get the money?

A. Yes.

Q. What happened to Donna after she opened the safe?

A. I shot her.

Q. Where did you shoot her?

A. I shot her in the head.

Q. Was she standing or what was she doing when she was shot?

A. She was standing.

Q. Why did you have to shoot her?

A. I don't know. I was just scared then.

Q. How far away were you from her when you pulled the trigger?

A. I was close.

Q. What was Neil doing when you shot him?

A. I don't know. I think he was kneeling down.

Q. Did Arleen, Neil or Donna say anything?

A. Donna said, "I'm trying as fast as I can to open the safe." She got the safe open and I can't remember if she said anything after that.

Q. What did you take from the safe?

A. I grabbed cardboard boxes of money and put them into a kit bag

Q. How many kit bags did you have?

A. I think they had a plastic bag and a kit bag when we left.

Q. Where did you get the kit bag?

A. Darren got it somewhere.

Q. Was a cash box removed from the safe?

A. Yeh, I took it and held it in my hand.

Q. When you were leaving you said that you did not have the gun. Is that correct?

A. Yes. I gave the gun to Darren and I think he gave it to Freeman. I'm pretty sure that is how it went.

Q. What took place when you were leaving?

A. I had the kit bag in one hand and a garbage bag and a metal container in the other. I remembered Freeman wanted to go back down after Arleen.

Q. Why did he want to back down after Arleen?

A. He thought that she was still alive I guess and he was going to make sure that she was dead. I told him we were leaving or I was going to leave and I started out the door. I seen Jimmy Fagan. It looked like he was just about to ring the buzzer for the door. I stopped. I remember Freeman shot him, and we kept running over to Freeman's car.

Q. How did you enter McDonald's that night?

A. The bottom basement door facing the driveway. We all went in through that door.

Q. Do you recall what clothes Freeman had on that night?

A. I know he had an orange hunting cap on and he must have had dark clothing on. I think. They told me they ditched the shoes.

Q. Do you recall what clothes Darren Muise had on?

A. Darren had a mask on.

Q. What did the mask look like?

A. It was hairy, a Halloween mask.

Q. Why didn't you all wear masks that night?

A. I don't know.

Q. Were you recognized by all the employees that night?

A. Donna and Arleen saw me and like I said they said what's going on or something like that.

Q. Was a knife used that night?

A. I know Darren had a knife. I don't know if he used it. I was in the office where the safe was and Darren came in and said, "You didn't kill Neil. He's still alive.", or something like that.

Q. Do you know what became of the cash box and the garbage - - kit bag used that night?

A. I just threw it in the back of Freeman's car. I don't know what they did after that.

Q. When was the next time after that night that you saw Darren and Freeman?

A. I seen Darren around Sunday and I saw Freeman Monday or Tuesday. They just told me that everything was done and back in the right place and they burnt something, clothing or something. The rounds can probably be found around Freeman's house somewhere. Darren said he just threw them into the woods.

Q. Do you recall the day of the shooting at McDonald's?

A. It was early Thursday morning around 1:00 o'clock in the morning.

Q. Do you recall seeing any vehicles when you were leaving McDonald's immediately after the shooting?

A. I noticed a taxi. I saw the sign on the roof and we all took off.

Q. Did you know if Jimmy was coming to work that night?

A. I didn't know.

Q. Did you have the combination to the safe at McDonald's?

A. I knew a few of the numbers.

Q. Is there anything further you wish to say?

A. I'm sorry but there's nothing I can do about it now.

Q. Was the statement free and voluntary?

A. Yes.

Q. Were any threats or promises made to you by Karl, myself or Sergeant Scharf or anyone else?

A. No.

Q. How do you feel now?

A. I feel better that I told.

Q. Where was the taxi situated when you were leaving McDonald's the night of the shooting?

A. It was facing towards King's Road and was in the back parking lot.

Q. Do you recall the full names of the persons who were shot that night at McDonald's?

A. Donna Warren, James Fagan, Arleen MacNeil and Neil. I don't know Neil's last name.

Q. Where were Darren and Freeman when you shot Arleen?

A. They were practically standing beside me.

Q. Where was Donna?

A. She was standing beside Arleen.

Q. When you went upstairs, where were Donna, Darren and Freeman?

A. They were downstairs.

Q. Do you know if Darren or Freeman shot Donna, Neil or Arleen after you had fired one shot at each of them?

A. I don't know.

And the statement is signed by myself at 8:11 hours on the 16th of May, 1992, and it's also witnessed by Karl Mahoney at 8:12 a.m. on the morning of May the 16th, 1992. And also there's a diagram. These are other - - "

At 7:49 a.m., Wilson re-read the statement, occasionally asking questions for clarification. The appellant interrupted once to clarify a point. At 8:06 a.m. he signed the statement. He consented to providing hair and blood samples which were later taken.

Wilson left the room at 8:14 a.m. and Mahoney continued questioning the appellant who told him that he was "glad it's almost over".

At 8:16 a.m., the appellant asked what was going to happen to Lawrence and Mahoney advised that "we'll see". The appellant again reiterated that Lawrence did not know anything about the matter. He asked if Freeman MacNeil was trying to put Lawrence into it and Mahoney responded that he did not know what Lawrence was saying because he had not talked to him, nor had he talked to Freeman. Mahoney reiterated that if Lawrence had no involvement in the matter he had no need to worry about being charged.

The appellant was then asked by the police to do a reenactment of his movements after leaving the robbery and murders. He was once again advised of his right to counsel and his right to remain silent. He did not wish counsel and indicated a willingness to participate in the reenactment.

Shortly after 8:45 a.m., Wilson and the appellant had a discussion involving Freeman MacNeil's involvement during which the appellant said:

> "After doing something like that, I don't think I should be let out in public."

The appellant stated he never wanted to see another gun as long as he lived. He was asked why he did not "crack" the first day after being interviewed by Stoyek and Cleary. The appellant's response was that he wanted to make sure everyone was all right first because there was more than him involved, and he made the remark that the police would have got the whole story "tomorrow morning". He had been told by his lawyer to wait for the morning, although he did not know why. The lawyer said he wanted to consult with another lawyer first. The appellant said that he told his lawyer that he would tell the police whatever they wanted, but he did agree with the lawyer to wait until tomorrow "or whatever it is, today".

The video tape concluded at 9:52 when the officers and the appellant left the interview room.

The video reenactment was taped commencing about 9:56 a.m. after the appellant and the officers left the North Sydney Detachment and arrived at Britannia Street in Sydney River. Mahoney drove the vehicle and the appellant retraced his movements with MacNeil and Muise after leaving the restaurant until he left them. He showed where Freeman MacNeil disposed of a stick and described the route that he walked after leaving them. He directed the officers to a pond where he and Muise hid money from the robbery. The tape depicts the recovery of the money. Just prior to the conclusion of the taping, the appellant acknowledged that the reenactment had been made voluntarily.

In his testimony at trial, Mahoney agreed on direct examination that some of his statements to the appellant about Lawrence Muller were false. Lawrence was under arrest but not present at the North Sydney Detachment, had not spoken to

Mahoney and had not admitted involvement in the matter. Mahoney was asked about that portion of the interview occurring at 5:15 a.m. when the appellant asked if he could see his lawyer at that time. Mahoney responded that when the question was asked there was an exchange of conversation and as a result of that, it was his opinion that the appellant had given up on the idea of trying to contact his lawyer then. It was Mahoney's impression that he was either asking to talk to his lawyer or Lawrence Muller, and based on his answer to the question as to who he could call, Mahoney concluded that the appellant no longer wished to call his lawyer.

Although I will return to this later, I observe now that in his decision on the **voir dire**, Tidman, J. said (124 N.S.R. (2d) 118 at 127):

> "In dealing with the accused's request for his lawyer at 5:20 a.m. I am satisfied that Corporal Mahoney's response did not violate the accused's right under s. 10 of the **Charter**. The accused earlier the same morning had spoken to his lawyer for approximately one and one-half hours."

Tidman, J. pointed out that there was no change in the arrested status of the appellant such as in the case of **R. v. Black**, [1989] 2 S.C.R. 138 and in view of the fact that he had spoken at length with his counsel only two to three hours earlier, he was obliged to assert his right more clearly than he did if he wished to again consult counsel. He observed that it was indeed questionable whether the appellant had the right at that time to again consult counsel, an issue which I will develop later.

These conclusions of the trial judge arose from his assessment of all of the evidence, not only of the video tape but the extensive cross-examination of Mahoney during which he stated that he was totally satisfied that the appellant had abandoned the idea of talking to a lawyer. Tidman, J. concluded this portion of his decision with a finding that Corporal Mahoney was not, under all the circumstances, obliged to cease questioning at that time.

Corporal Wilson testified that on the evening of May 16th, he again

contacted the appellant who identified a knife shown in a photograph to be the one that Darren Muise had on the night of the shootings. Afterwards, while on route to the Correctional Centre at Gardener Mines at about 10:55 p.m. the appellant said:

> "We were all equally involved. I deserve to die for what I did."

The evidence of this spontaneous utterance was not shaken on cross-examination.

On May 19, 1992 the appellant was interviewed by Wilson and Mahoney at the Correctional Centre commencing at 1:50 p.m. Mahoney advised them that they had further questions. He advised the appellant of his rights to counsel, Legal Aid and to remain silent. Again, the appellant declined counsel. The officers testified that the appellant appeared normal and relaxed. A statement was taken and concluded at 3:10 p.m. It was read back to the appellant by Wilson. No corrections were made and he signed it.

The statement taken on May 19th details responses by the appellant to additional questions by the officers relating to the robbery and murders. The appellant advised that he received the gun from Freeman MacNeil around 8:00 on the evening of May 6, 1992. At the time, they were in MacNeil's car in McDonald's parking lot. The appellant put the gun in a leather pouch which he wore around his waist. He went into McDonald's and got changed for work, putting the gun in his kit bag where he left it until after work. After work, he met Darren Muise and Freeman MacNeil. They returned to McDonald's and entered via the basement door. He took the gun out of the pouch and stuffed it inside the pocket of his jacket. The gun had already been loaded when Freeman MacNeil gave it to him. There were seven shells in it. He had a handful of extra shells in his pocket.

In response to the question why he did not wear a mask, the appellant said he did not feel it would be of any value to him as he would be recognized with or

without one. When asked why he did not tie the employees up and lock them in a room, he indicated that he just got scared when he saw Donna and Arleen downstairs. While he knew there would be employees in the restaurant, he did not think they would be there. His original intention was that he was to get the money and MacNeil and Muise were to look after the employees. When asked if he had a plan to shoot them if there were problems, he said they talked about it in the planning stages but did not think they realized what they were talking about.

The appellant confirmed that he shot Donna Warren. He shot Neil Burroughs when he was kneeling down. After he got the safe open and shot Donna Warren, he thought he gave the gun to Darren Muise who then gave it to Freeman MacNeil. He remembers Muise asking him for the gun because he had said that Burroughs was still alive. He thought it was MacNeil who took the gun from the building. When asked why he did not shoot Donna downstairs, he said it was because he wanted her to open the safe. He knew she was the only person who could open it that night. When asked why he shot Donna, his response was:

> "I just shot her."

When asked if he had anything else to say, his response was:

> "I don't like the fact that you were trying to drag my brother David and Lawrence Muller into this when they are not involved."

From all of the foregoing, it is apparent that the confessions by the appellant to the police on May 16th and 19th were a major element of the Crown's case. They must have played a significant if not conclusive role in the jury's findings of guilt. I emphasize at this time that in his appeal to this Court the appellant does not challenge the reasonableness of the jury's verdict. This to my mind is an acknowledgment that his confessions are the truth.

What the appellant does say however is that Tidman, J. erred in admitting

these confessions in evidence. Counsel for the appellant framed this contention in the form of three issues:

(1) Whether the confessions were free and voluntary upon the application of common law principles.

(2) Whether in the obtaining of the confessions, the appellant's **Charter** rights to counsel and to silence were violated.

(3) Whether Tidman, J. failed to provide adequate reasons for his decision respecting the admissibility of the confessions prior to the actual trial.

In addressing each of these issues, we must keep in mind that the correct approach is to ask whether the appellant has shown that Tidman, J. erred. The statements fall broadly into three categories:

(a) the pre-arrest statements of May 7th and 8th;

(b) the statements of May 16th; and,

(c) the statements of May 19th.

At the outset, I have concluded that the pre-arrest statements alone, although raising a degree of suspicion, are not adequate to support a conclusion of guilt. They are fundamentally exculpatory and it is not necessary to make a detailed analysis of the circumstances under which they were taken.

FIRST ISSUE:

Tidman, J. referred (124 N.S.R. (2d) 118 at 124) to the position of appellant's counsel that the statements were obtained under duress as a result of long and persistent questioning. It was said that this negated the appellant's right to make a free and informed choice to remain silent and thus the statements were not free and voluntary. After referring to **R. v. Hebert**, [1990] 2 S.C.R. 151 and the discussion therein respecting the requirement that a statement be free and voluntary and its relation to the **Charter** rights of counsel and silence, Tidman, J. reviewed the

circumstances under which the statements were taken. He concluded that although the police exerted much pressure and although the appellant was at times visibly tired, he appeared in full command of his faculties. At no time did he ask the police to cease questioning or request sleep or refreshment. He referred to the fact that the court had the benefit of the video tape covering the critical interviews on May 16th. As an example of the value of the video, he referred to some physical contact by Corporal Wilson which, from seeing and hearing on the tape, did not constitute a form of force but rather was part of either a sincere or strategic fatherly appeal to the appellant to clear his conscience. Having seen the tape, I agree with this interpretation.

Tidman, J. concluded that the statements were at all times free and voluntary. He made specific reference to the accused's statement, "I deserve to die for what I did" made en route to the Correctional Centre as an example of a free and voluntary utterance.

Counsel for the appellant argues that apart from the **Charter**, the basis for excluding statements is now much broader than it was under the traditional common law principles. Counsel traced the history of the common law confession rule commencing with the leading case of **Ibrahim v. The King** (1914), A.C. 599 and ending with the discussion of the rule by the Supreme Court of Canada in **R. v. Hebert**, [1990] 2 S.C.R. 151. In **Ibrahim** the emphasis was upon a purely objective perspective towards the issue of voluntariness. The question was whether the statement of an accused was voluntary in the sense that it had not been obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority. The concern underlying this issue was that if it were not voluntary, the statement might not be true. The quest of the common law was to seek the truth in trials of accused persons. This was the primary objective.

The Canadian case law in the years preceding the decision of the

Supreme Court of Canada in **R. v. Wray**, [1971] S.C.R. 272 reveals that many judges were concerned not only with seeking the truth, but that it be done so "fairly". An example of this is the decision of Gale, J. (as he then was) in **R. v. McCorkell** referred to in a note prepared by M. H. Harris and reported in (1962), 7 C.R.L.Q. 395. Although Gale, J. considered that certain statements obtained from an accused were probably voluntary within the meaning of that word as used in the authorities, he exercised a discretion not to admit them because the accused had retained counsel, even though there was no evidence that the interviewing officers had knowledge of that fact. Although the statement was "probably admissible", the court declined to give encouragement to persons in authority to circumvent the position of an accused's solicitor.

The trend reflected in **R. v. McCorkell** was reviewed at length by the Supreme Court of Canada in **Hebert** commencing at p. 166. The court noted that this trend was halted by the decision of the court in **Wray** which established the ascendancy of the strict narrow foundation of the confessions rule as set out in **Ibrahim**. McLachlin, J. in **Hebert** at p. 169 said:

> "**Wray** changed this. The issue in that case was the admissibility, not of a confession but rather of real evidence obtained as a result of a statement. Nevertheless, the principle enunciated had a profound effect on the power of a trial judge to exclude a confession which was, strictly speaking, admissible on the **Ibrahim** test. The ruling was simple: a court did not have the power to exclude admissible and relevant evidence merely because its admission would bring the administration of justice into disrepute. This represented a divergence from the approach to confessions elsewhere in the Commonwealth. Instead of a two-pronged approach to confessions - the basic rule supplemented by a residual discretion to exclude on grounds of unfairness or the repute of the administration of justice - Canada was left with the narrow **Ibrahim** rule. Reliability was the only concern. All statements were admissible unless induced by threats, promises or violence."

McLachlin, J. referred to the fact that cases subsequent to **Wray** departed

from the objective threat-promise formulation and the exclusive concern with the reliability of a statement to the extent that a statement to be admissible must also be the product of an operating mind. See **Ward v. The Queen**, [1979] 2 S.C.R. 30 and **Horvath v. The Queen**, [1979] 2 S.C.R. 376.

McLachlin said at p. 172:

> "This then was the situation when the **Charter** was introduced in 1982. Notwithstanding a strong and continuing undercurrent of dissent, the narrow **Wray** principle continued to prevent the courts from considering the nature of the suspect's choice and the conduct of the authorities apart from threats, promises and violence, . . ."

It is the appellant's submission that **Hebert** establishes that the strictures of the **Wray** decision upon the exercise of judicial discretion in determining the admissibility of statements are no longer acceptable, altogether apart from any **Charter** requirement. Specifically, it is submitted that police officers must maintain a respect for the solicitor/client relationship of the accused, akin to that which governs opposing counsel under the various standards of ethics such as those promulgated by the Nova Scotia Barristers' Society and the Canadian Bar Association. The police, it is submitted, violated the relevant standards by questioning the appellant after he had obtained counsel and specifically in continuing to do so in the face of his request to speak to his lawyer at 5:18 in the morning of May 16th.

A review of the reasons of the court in **Hebert** establishes, in my opinion, that the court was not changing the common law requirements respecting the admissibility of confessions beyond the limits generally laid down in **Wray, Ward** and **Horvath**. The court in referring to such cases as **McCorkell** was not elevating them to the status of authority in the matter of the common law rule of confessions. The discussion of such cases was part of the historical review made by the Supreme Court of Canada of the development of the confessions rule. In **Hebert**, **supra**, McLachlin J.

said at p. 177:

> "This suggests that the drafters of the **Charter** viewed the ambit of the right to silence embodied in s. 7 as extending beyond the narrow formulation of the confessions rule, comprehending not only the negative right to be free of coercion induced by threats, promises or violence, but a positive right to make a free choice as to whether to remain silent or speak to the authorities."

Indeed later on in her reasons McLachlin, J. sanctioned police questioning of a detainee who has retained counsel. At p. 183 after referring to the rules underpinning the s. 7 right to silence she said:

> ". . . By contrast, the approach I advocate retains the objective approach to confessions which has always prevailed in our law and would permit the rule to be subject to the following limits.
>
> First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the **Charter**. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence."

...

The foregoing then sets the parameters of the confession rule for our analysis of the police conduct and the appellant's participation in the interrogation on May 16th. Specifically, the ethical code which requires that communication with a person represented by counsel should only be through such counsel is not applicable to police interrogations. See Goodridge, C.J.N. in **R. v. Cuff** (1989), 49 C.C.C. (3d) 65 at 72.

The appellant's argument is thus reduced to a challenge of Tidman, J.'s finding of fact that the confession was free and voluntary. Was the trial judge clearly wrong in so finding? Apart from the video the trial judge enjoyed the usual significant

advantages not available to an appeal court. Thus his findings of fact must not be lightly disturbed and will stand unless they are shown to be palpably wrong.

The principle thrust of the appellant's fact based argument is that the police officers improperly induced the confession, using an implied promise that such confession would remove his friend Lawrence Muller from the risk of a wrongful conviction.

Tidman, J. addresses this issue, 124 N.S.R. (2d) 118 at 126:

> [44] Defence counsel submit that the police took unfair advantage of the accused by constant references to Lawrence who they knew was a very close friend to the accused and whom the accused did not want to see in trouble. As well, they point out that Corporal Mahoney lied about information he had obtained from Lawrence. The accused, however, knew better than did the police that Lawrence took no part in the crime and, in fact, told the police they would just be wasting their time to arrest Lawrence for his involvement because they eventually would have to release him when they found out the truth.
>
> [45] As well, it is questionable whether any consideration of Lawrence led the accused to tell the police of his own involvement in the offences which he admitted only after a 12 minute monologue by Sgt. Scharf appealing to the accused's conscience and during which no mention of Lawrence was made by Sgt. Scharf. During the monologue when the accused asked Sgt. Scharf what he wanted, the Sgt. made it clear to the accused that he wanted to hear only the truth, whereupon the accused implicated himself in the crimes. I cannot accept the defence argument that the police took unfair advantage of the accused by their references to Lawrence.

An examination of the evidence provides ample material to support these conclusions. The appellant, not the police, first brought up the subject of Lawrence. He mentioned Lawrence at the moment that he was arrested on the street in Sydney . He also proclaimed that Lawrence "had nothing to do with this" at the very beginning of the interrogation - even before the reading of the **Charter** rights, police caution and the charges. He was more than willing throughout the entire interrogation to engage in conversation about Lawrence. The untruthful representations of Corporal Mahoney

did not mislead the appellant in the slightest. He repeatedly stated that Lawrence was not involved. He did so, as Crown counsel pointed out, to the point of sarcasm and ridicule. A number of examples could be cited but the following are sufficient to make the point.

> At 2:57 a.m. the appellant said:
>
> "It's all so pretty, pretty lame, if you are using him to get to me";
>
> and at 3:30 a.m.:
>
> "I know Lawrence didn't have anything to do with this ... he's not involved ... Lawrence ain't going to get charged";
>
> and at 3:48 a.m.:
>
> "He never done nothing ... Lawrence was home asleep when I called him";
>
> and at 3:52 a.m.:
>
> "You know, like if you want to sit here and, like, do your stupid games with me then you have to";
>
> and at 3:54 a.m.:
>
> "I give up. I don't even know how you made it through college then because you're not too bright";
>
> and at 3:58 a.m.:
>
> "Ah, no offence, man, you got to take better psychology classes";
>
> and at 5:17 a.m.:
>
> "He doesn't know anything so he can't say anything".

The appellant's confession fully supports the absence of involvement of Lawrence in the matter.

The appellant did not testify on the **voir dire**. He could have done so without facing the jury or having to face cross-examination on the ultimate issue of his guilt or innocence. See **R. v. MacLean** (1988), 36 C.C.C. (3d) 127 (N.S.S.C.A.D.) per

Macdonald, J.A. at 133. If the appellant felt that he had been induced surely he would have said so. In his statement to Wilson when asked if there were any threats or promises by any of the officers he said there were none. Everything he did and said indicates this to be the case. Only his counsel's assertions afford any support for his argument.

Indeed, the appellant so steadfastly stood his ground on the subject of Lawrence that the rapport between him and Mahoney had totally broken down. Mahoney was getting nowhere with him. It was at that point that Sergeant Scharf stepped in.

A review of the record and of the video tape establishes that the appellant was advised of his rights, that he knew his rights, that he consistently and persistently asserted them. I do not consider **McCorkell, supra**, to be representative of the common law rule relating to confessions. There is no common law right to counsel or common law obligation on the part of the police to refrain from questioning an accused because he has obtained counsel or even because he has asked to speak to counsel.

I do not consider that in the context of this interrogation, the line taken by Mahoney respecting Lawrence constituted an inducement. The response of the appellant throughout negates the suggestion that what was being said was considered by him to be an inducement. Even if it were, it is not what operated to bring about the confession. The confession was brought about as a result of the new line of approach taken by Sergeant Scharf.

Indeed, it is apparent that the appellant signalled his intention to ultimately confess, but at a time later than during the interrogation which commenced shortly after midnight on May 16. As Tidman, J. noted in his decision, 124 N.S.R. (2d) 118 at 127:

> "In fact, the accused never told the police he would not give them a statement. He told them on one occasion that they would find out in time what had happened at McDonald's and on other occasions that he would at a later time tell

> them what happened. The accused did exactly that beginning at 6:12 a.m. when he told Sergeant Scharf of his involvement".

In numerous places throughout the interview the appellant left the clear impression that he was going to tell his story but not at that time. At one point he indicated that it would be within the next twenty hours or so. Even earlier in the interview it is apparent that what seemed to be getting to the appellant was not the subject of the possible jeopardy of Lawrence but the enormity of his crime. At about 3:21 a.m. the following exchange occurred.

> Mahoney: How did you think Donna really felt after working there along side of you all night and then you come in and shoot her? Just think about that. How do you think that - that Arleen felt when she worked along side of this guy and was just sitting at the table with her, doing up work? They finished work so they could go home and then five minutes later, he comes in and he shoots her. Just think about that.
>
> Wood: I want to die.

A review of the complete transcript and especially of the video makes it abundantly clear that it was not the subject of Lawrence's possible jeopardy but the realization of the horrible things done by him that prompted the appellant to confess.

While it is not necessary to consider the principle of "tainting" with respect to some of the statements in the event that one or more of the others was not free and voluntary, I would say without hesitation that the spontaneous utterance "I deserve to die for what I did" is a classic free and voluntary statement. So too the reenactment on May 16th and the statements taken on May 19th clearly stand apart entirely from those included in the video of the early morning hours of May 16th.

I conclude that Tidman, J. was not shown to have erred in his judgment that all of the statements were proved by the Crown to be free and voluntary and the product of an operating mind as required by common law principles.

SECOND ISSUE:

In addition to the **Charter** duty to inform the detainee of his right to counsel, the police have at least two others. First, they must provide the detainee with a reasonable opportunity to exercise the right to counsel. Second, they must cease questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights but equally, if not more important, to obtain advice as to the exercise of them. Probably the most important right the detainee needs to know about at the time of detention is, as we have seen, the right to remain silent.

Counsel for the appellant submits that his request to speak to his counsel "now" at about 5:18 a.m. on May 16th was thus a signal to the police to refrain from all further questioning until the appellant had an opportunity to speak to such counsel.

I will repeat the critical portion of this interview:

"Mahoney: You don't know. You don't know because you were there and he knows that you were there and he's trying to take the blame for you.

Wood: Can I call my lawyer?

Mahoney: What do you want to call your lawyer for?

Wood: I want to talk to him for a second.

Mahoney: Do you want to call him right now?

Wood: Yes.

Mahoney: You figure you're going to get a hold of him now?

Wood: What time is it?

Mahoney: Twenty after five. But he's telling us this and you're saying this, that's he got nothing to do with it. He knows. He knows that you're guilty. He's trying to take the blame for you.

Wood: Can I talk to him?

Mahoney: Who do you want to talk to?

Wood: Lawrence.

Mahoney: Lawrence is busy. He's over there . . . The only reason that you outlasted us last time is that we had some bright person around here that called us and sent us on a total false fox run was all it was. There was - - three other people were arrested. That's right. They were.
But Mr. Derek Wood, he walked that time, that's all. That's the only reason why you walked last time, because we were led down the garden path. That's not going to happen this time mister."

Tidman, J.'s characterization of this exchange appears in his decision 124 N.S.R. (2d) 118 at 127:

" [49] In dealing with the accused's request for his lawyer at 5:20 a.m. I am satisfied that Corporal Mahoney's response did not violate the accused's right under s. 10 of the **Charter**. The accused earlier the same morning had spoken with his lawyer for approximately one and one-half hours. There was no subsequent change in the arrested status of the accused as the Supreme Court of Canada found there had been in **R. v. Black,** [1989] 2 S.C.R. 138; 98 N.R. 281; 93 N.S.R. (2d) 35; 242 A.P.R. 35; 50 C.C.C. (3d) 1; 70 C.R. (3d) 97; 47 C.R.R. 171, which was argued by defence counsel in support of their position. In **Black** the court decided that the accused had a right to see her counsel a second time, but in that case intervening events occurred which changed the charge against her to a much more serious offence and she had spoken earlier with her counsel for only a very short time. There is no such intervening change in the status of the accused here and the accused had spoken to his counsel for approximately one and one-half hours. Corporal Mahoney says he believed the accused abandoned his request for his lawyer when he learned of the lateness of the hour. He says this was confirmed to him when he later asked the accused who he wished to see and the accused responded 'Lawrence' and further that the accused did not again ask to speak to his lawyer. In these circumstances, where the accused had spoken at length with his counsel only 2-3 hours earlier he was in my view, obliged, at least, to assert his right more clearly than he did if he wished to again consult counsel. Indeed, it is questionable whether the accused had the right at that time to again consult counsel. I find that Corporal Mahoney under all of the circumstances, was not obliged to cease questioning at that time."

A review of the transcript and the video supports the conclusion that any

request by the appellant to speak to his lawyer "now" was soon abandoned. This is not particularly surprising in view of the fact that no change in circumstances had occurred which would warrant a call to the lawyer. From the appellant's assertion on some 53 separate occasions that he did not wish to make a statement (at least at that time), it is evident that he understood his right to choose whether or not to do so. Even though he frequently asserted his right not to make a statement he still elected to continue engagement in the conversation and ultimately to make one. He had received advice, and there was no reason for him to speak further to counsel. His hasty abandonment of any such notion is understandable. His subsequent declining of counsel at 9:45 a.m. prior to the reenactment further confirms his intention. His failure to testify can again be taken into account in this context. He could have told the court on the voir dire that he was seriously seeking counsel's advice and if so, on what topic. This is not a situation where the detainee has not as yet been advised - where the police would be obliged to immediately cease questioning.

In my opinion, once the **Charter** right to counsel has in fact been exercised, different considerations apply to the granting of subsequent access to counsel than those which apply before counsel has been consulted. Section 10 of the **Charter** says that the right to counsel is "on arrest or detention". What is the position after the right has already been afforded on arrest or detention?

Counsel for the appellant lays emphasis on the decision of this Court in **R. v. R. (P.L.)** (1989), 44 C.C.C. (3d) 174. In **R. v. R. (P.L.), supra**, this Court dealt with the case where the accused had already been afforded his **Charter** right to counsel. However, counsel had secured from the police an unusual assurance that they would call him again if the accused asked them to because, as he testified, he felt his client may not really have understood the advice. The interrogation continued, and during the course of it the accused said that he would like to call his lawyer. The Court found that

the police, in effect, refused to afford him this right at this time. The interrogation continued and a confession was obtained. In determining whether the **Charter** right to counsel was infringed, the Court applied the **Manninen** approach. At p. 179 Macdonald, J.A., said:

> "Under all the circumstances here present, that statement certainly may be interpreted as a request to consult with counsel. That request was not respected by the officers because, in my opinion, it was not a sufficient response for Constable Urquhart to simply motion towards the telephone. . . . The officers should have, in my view, then and there afforded R. the opportunity to telephone his lawyer in private by immediately leaving the room. Alternatively, they at least should have inquired whether the respondent wanted to make an immediate call to his lawyer. . . . The right to consult with counsel must be recognized and honoured by those in authority and the police must afford an arrested or detained person the right to speak in private to a lawyer if and when he asks to do so . . ."

In **R. v. Black**, [1989] 2 S.C.R. 138 the accused had already been afforded the right to counsel and had taken advice on the telephone which lasted over a period of some 30 or 40 seconds. The accused who was intoxicated and emotionally distraught had only this brief phone conversation with her lawyer. At that time she had been charged with attempted murder. Two hours later she was informed that the victim had died and that she would be charged with first degree murder. She became very emotional. When the officers managed to calm her down they gave her a second warning and she immediately requested to speak to her lawyer. He was not available and she refused to speak to another. After a call to a relative she began to converse with one of the police officers. In due course the officer engaged her in conversation about the killing. She subsequently gave a detailed inculpatory statement in writing. The Supreme Court of Canada held that in such altered circumstances the right to counsel had not been afforded by the very brief conversation she had with her lawyer shortly after her initial arrest.

As Jones, J.A. said in **R. v. Nugent** (1988), 42 C.C.C. (3d) 431 at 460:

> "Where an accused suggests that he should consult with counsel, then his rights under s. 10(b) should be made clear to him." (emphasis added)

Those rights had certainly been made clear to the appellant.

Section 7 of the **Charter** accords to a detainee the pretrial right to remain silent. This is in addition to the confession rule which is narrower in scope. The right to silence in the period of detention arises from the fundamental concept of the right to choose freely whether to speak to the police or remain silent. See **Hebert, supra**. Obviously, the most important reason for the exercise of the right to counsel at this time so that the detainee knows that he has this right. The right to counsel arises "on arrest or detention". See s. 10(b) of the **Charter**.

For this reason, the **Charter** jurisprudence has imposed on the police the duty to cease questioning the detainee until he has had a reasonable opportunity of exercising the right to counsel. Otherwise, the detainee might incriminate himself, unaware of his right of choice not to do so.

The position of the police in the interrogation of a person who has already received his right to counsel is, I believe, generally different. The police have now complied with the informational and implementational components of s. 10(b) of the **Charter**. Presumably, such a detained person has now been advised of the right to choose whether to talk or remain silent. The pressing need to stop questioning until counsel's advice has been obtained on this and other matters is no longer there.

Circumstances, however, will always govern in every case. So in **Black, supra**, where the status of the detainee had changed and in **R. (P.L.), supra**, where the police had undertaken to secure counsel upon request, it was held that the police must cease questioning until counsel had been consulted. Other situations can readily be imagined as for example where it is obvious that the detainee does not understand his

rights and is seeking further explanation of them. Thus the right to counsel can in certain circumstances be reactivated. Subject to such situations, however, the "advised detainee" does not enjoy the automatic right of cessation of the interview merely upon indicating that he would like to speak to counsel. He who knows of his right to choose participates further in the interrogation at his peril.

A detainee always has a right to a reasonable opportunity to consult counsel. However, once he is informed he cannot, without more, stop an interrogation or investigation merely by purporting to exercise his right to counsel again. He can, of course, stop the interview by exercising his right to remain silent and thus withdraw further participation in it. However, the right to counsel is not something that can be asserted without reasonable limit. Police pressure short of denying the right of choice or of depriving the detainee of an operating mind does not breach the right of silence once the detainee has been advised.

In **R. v. Logan** (1988), 68 C.R. (3d) 1 (Ont. C.A.) at p. 27, the following statement of the Ontario Court of Appeal supports the proposition that there is no right in a detainee to the continued attendance of counsel throughout the police investigation. The court said:

> "To sum up, the decisions of the Supreme Court of Canada concerning s. 10(b) deal only with a right to counsel upon arrest or detention. Although in **Clarkson**, supra, Wilson J. spoke of "fairness" to the accused, we agree with Crown counsel that she did so in the context of an accused who was too intoxicated to understand the police warning concerning her right to counsel. The right to counsel arose at the time of the initial detention. Nothing in the judgment of Wilson, J. adopted the American sense of a right to the assistance of counsel apparently on a continuing basis.
>
> In **Manninen**, as in **Clarkson**, and for that matter **Baig** and **Anderson**, statements sought to be introduced in evidence were obtained before counsel was retained. The clear implication in the judgment of Lamer J. in **Manninen** is that s. 10(b) confers the right, upon arrest or detention, to retain, instruct and be instructed by counsel before any statements of the accused are elicited. The words "upon arrest or

> detention" indicate a point in time, not a continuum. They do not deal with a continuing right to be re-instructed before every occasion on which the police obtain a statement from the accused. It is true that "retain" has a connotation of continuity (The Shorter Oxford English Dictionary (1973), p. 1813), but this is with respect to the engagement of services, i.e., the availability and subsequent resort to them when one wants to do so. It does not express a prerequisite to every subsequent elicitation of information.
>
> Accordingly, although the right to counsel continues after the initial retention and instruction, we hold that in this case there has been no contravention of the right to retain and instruct counsel under s. 10(b) of the Charter."

Returning again to the facts, the appellant had had three lengthy conferences with his counsel since he was first placed under arrest on May 7th. One of these was immediately prior to the interrogation in question. It was of a duration of one and one-half hours. During the interview which followed, the appellant first took the position that while he might ultimately tell what had happened at McDonald's, he did not intend to give the police a statement at that time. He stated his intention not to give a statement on some 53 separate occasions. He was truly an informed detainee. His persistent assertions of his rights to the officers put this conclusion beyond a shadow of a doubt. He resisted pressure by the police in the form of suggestions that his friend Lawrence was in jeopardy. He knew better. He asked, but quickly dropped the idea of speaking to counsel "now". At no time was he deprived of his right to choice - a right of which he was well aware. In the end, he gave a statement in response to the psychological pressure exerted by Sergeant Scharf.

In response to Tidman J.'s statement that it was questionable whether the appellant had the right at the material time to again request counsel, I would affirm that he did not have that right in the circumstances existing at that time.

Counsel for the Crown has invited us in any event to make a s. 24(2) **Charter** analysis relevant to the statements obtained. It is difficult to conceive that these confessions were obtained in a manner that infringed any **Charter** rights.

Therefore there is much to be said for declining this invitation.

I have, however, reviewed the record to determine whether the appellant could establish that such confessions, if in violation of the **Charter**, would bring the administration of justice into disrepute. I keep in mind the approach mandated by the Supreme Court of Canada in **R. v. Collins**, [1987] 1 S.C.R. 265 and the factors to be considered as relevant in making the necessary judgment.

Were there a violation, it is so insignificant that the fairness of the trial could not be compromised by the evidence. Looking at the statements in the context of the **Charter** rights accorded to the appellant, his awareness of them and his continued willingness to talk, it is difficult to think of him in terms of one being "conscripted against himself". Any conscription if it existed was very, very minor indeed.

In terms of the seriousness of the assumed violation, it too was trivial considering that Corporal Mahoney clearly put to the appellant the opportunity to state just who it was to whom he wished to speak. The police officers in the totality of their dealings with the appellant were making a conscious effort to keep in mind his rights which they had previously accorded to him in the fullest measure. In **Hebert, supra**, McLachlin, J. said at p. 186:

> "Moreover, even where a violation of the detainee's rights is established the evidence may, where appropriate, be admitted. Only if the court is satisfied that its reception would be likely to bring the administration of justice into disrepute can the evidence be rejected: s. 24(2). Where the police have acted with due care for the accused's rights, it is unlikely that the statements they obtain will be held inadmissible."

Finally, while no serious violation can be simply ignored because the charge is either major or minor, the assumed breach here in relation to the serious nature of this proceeding is so trivial that to exclude as a result of it this most important evidence would have a profound effect on any informed, dispassionate and reasonable

person's perception of the fairness of the justice system.

I would, were it necessary to do so, hold that the confessions obtained ought not in any event to be excluded by virtue of s. 24(2) of the **Charter**.

THIRD ISSUE:

The appellant's argument is based on a misperception of the reasoning of the Ontario Court of Appeal in **R. v. Barrett** (1993), 82 C.C.C. (3d) 266. The importance of reasons given by a trial judge following a **voir dire** rests in the need of a Court of Appeal to understand the trial judge's thought processes so as to determine whether there was error in law or in fact or in both.

Counsel for the appellant has submitted that without having the reasons of Tidman J. at the trial, it was impossible to fairly conduct cross-examination of the officers. With respect, that is simply not so.

What the trial judge decided - although his reasons therefor were then not spelled out - was that the confession was free and voluntary and not in violation of the **Charter**. What the jury was then to decide was whether the confessions were made, whether they were true, and what weight should be given to them in determining whether or not the case had been proved beyond a reasonable doubt. In dealing with these issues, counsel for the appellant would receive no assistance from knowing the basis on which the trial judge considered the confession admissible on the **voir dire**. With or without reasons, counsel for the accused was confronted with the evidence, and the task at that point was to develop in the jury's mind by evidence or argument or both, a reasonable doubt on the issues of the existence, the truth or the weight of the statements. The absence of Tidman J.'s reasons was no more prejudicial than their

presence would have been of assistance. The **voir dire** issues were irrelevant to the trial issues.

I would dismiss the appeal.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.