

Appeal dismissed per reasons for judgment of Hart, J.A.; Clarke, C.J.N.S. concurring; Jones, J.A. dissenting.

HART, J.A.

On November 21, 1990, the appellant, Gregory William Pittman, was charged that he on or about the 13th day of August, 1990, at or near Glace Bay in the County of Cape Breton, Province of Nova Scotia, did commit second degree murder on the person of Deborah Neary contrary to section 235(1) of the Criminal Code of Canada.

After a jury trial presided over by Chief Justice Glube and heard between April 8 and April 11, 1991, Mr. Pittman was convicted of the offence as charged and subsequently sentenced to life imprisonment without parole for a period of 15 years. He now appeals from both the conviction and sentence.

Shortly before midnight on August 12th, 1990, Deborah Neary was stabbed to death in the downstairs apartment of Joseph Pyke at 3 Newton Street in the Town of Glace Bay. The upstairs apartment was occupied by the appellant and his wife, Johna.

The evidence revealed that Deborah Neary, Joey Pyke, Greg Pittman and his wife Johna had spent the evening in the upstairs apartment that Sunday night. All except Johna had been drinking heavily and taking some pills.

When the police arrived at about 1:15 a.m. on Monday, August 13th, after a call from Johna they found Debbie's body in the downstairs apartment displaying multiple stab wounds and lying on a pull out sofa or bed. There was no one else downstairs. The officers then visited the upstairs apartment where they encountered Greg who obviously had been drinking and Joey Pyke who was in an advanced stage of intoxication. They also found a knife that could have caused the fatal wounds on the back of the toilet in the Pittman apartment. There was no blood on this knife or on the clothing worn by the appellant but Joey Pyke's hands were covered with blood as was his clothing. Pyke was arrested at 4:05 a.m. but was released the next day without charge. The appellant's wife Johna was not arrested but she was questioned and statements were given to the

police by Greg Pittman. These three persons continued to be suspects in the ongoing investigation.

On August 13th, during the afternoon and evening, the appellant gave videotaped statements to the police. He was arrested but he was released from custody the following day at 2:00 a.m.

The Crown then obtained permission to place listening devices and tap the phone of the Pittman apartment and for the next three months all conversations were recorded.

On November 21st Greg Pittman was charged with second degree murder and the trial proceeded during April of 1991. A summary of the evidence is as follows:

Gregory MacDonald, a taxi driver, testified that he picked up the appellant a little after 11:00 p.m. on August 12th at 3 Newton Street and took him to a store and then back to Newton Street by 11:35 p.m. He described the appellant's condition as under the influence but not drunk.

Patrick MacDonald, another taxi driver, testified that he drove Debbie Neary from the Community Hospital to 3 Newton Street at about 9:40 p.m. on August 12th. Dr. Rajaraman testified that on August 12th, 1990, at some time after 7:00 p.m. he treated Debbie Neary for a laceration between the second and third fingers of her left hand. The laceration was at least eight hours old; too old to be sutured so he dressed it and gave her antibiotics. She also had a few abrasions on her right forearm and her lower back and she had a bruise on her left flank. She was discharged at 9:45 p.m. She had been picked up at 3 Newton Street by another taxi driver, Samuel Scott at about 5:00 p.m. and he had noticed the cut between her fingers and some of her other injuries.

David "Puffa" Burke and Debbie Neary had been living together on and off for a couple of years. They were staying at the Pittman apartment until about a week before the murder when they broke up and Puffa went up to live on Park Street. Johna and Debbie then had a falling out and Debbie went downstairs to stay with Joey Pyke. Apparently Johna made some allegations that Debbie had been fooling around with her husband.

On Saturday, August 12th, Puffa was visiting Greg and early in the evening they had a dispute so Puffa left and went back to his Park Street residence. There was an allegation that Puffa and Debbie had been stealing some of their pills.

Daniel Joseph Pittman, a brother of the appellant, who lived in Shafter, California, was called by the Crown to give evidence. He testified that he received a call from the appellant, his brother, on August 12th, 1990, at about 3:00 p.m., which would be 11:00 a.m. California time. The conversation was as follows:

- " A. I said hello. It was Greg's wife Johna.
- Q. Okay so you can't tell us what she said to you. So did you have any conversation with Johna.
- A. Just "is that you Dan Joe?" I said, "yes." She said, "just a minute." Then Greg got on the phone. He said, "I'm in deep shit down here. I killed a girl. You gotta send me the money to get out of here. Don't leave me hanging." I said, "you killed a girl, what made you do something like that?" He said, "she was going to squeal on me that I broke into the Black Diamond Pharmacy. I am on probation, it was either her or me, I cut her throat. Don't leave me hanging." I said, "okay." That was the conversation word for word.
- Q. Okay, you didn't speak with him anymore after that?
- A. No sir.
- Q. Mr. Pittman why have you come to Sydney to give this evidence?
- A. I come to Sydney, this is totally voluntary on my part to give this evidence for the simple reason why, this boy is sick in the head."

Although Dan Joe Pittman was fairly certain about the time he received this call, if he should be correct it would mean that the call was made before the murder was committed. There was also evidence that the appellant was in the jail at the time the call was supposed to have been

made. During cross-examination the following exchange took place:

- " Q. You notice on that telephone log that you had there that Mr. Pittman had at least six telephone calls to Shafter in one day, was that unusual for you to be contacted by, say the Pittman household, can't say it was Greg only
- A. Yes, yes it was unusual, very unusual.
- Q. Six times in the one day?
- A. Yes.
- Q. How often would Greg call you on the average?
- A. I would hear from Greg three days in a row and another time I wouldn't hear from him for six months.
- Q. Right, what was the nature of the conversation when he would call you?
- A. Looking for money.
- Q. And would you send him money?
- A. Nine times out of ten yes probably.
- Q. Did he ever tell you what the money was for?
- A. Well I knew what the money was for, he didn't have to tell me.
- Q. What was it for?
- A. For drinking.
- Q. You told us earlier when you were with your brother he didn't have a drinking problem?
- A. Well that was 1972, 73, and 74, this is 1991 now sir.
- Q. Right.
- A. He never hit a lick since 1976 was the last job he had.
- Q. He developed a drinking problem after that?
- A. Yes years after that.

- Q. Would you say that it is a severe drinking problem?
- A. Well yes he had a severe drinking problem in the 80s.
- Q. Now Mr. Pittman this telephone conversation you say you had with your brother in Shafter, the one between 11 and 2 in the morning, the morning and afternoon actually, you said that was a very brief conversation?
- A. Yes.
- Q. And the telephone log indicates a minute?
- A. Yes. Well that's what it says.
- Q. But what you said it could have been said in a minute presumably, what you told us on the stand is essentially the whole conversation?
- A. Yes.
- Q. And that was a brief conversation?
- A. Yes I didn't go into detail with it. I didn't want to talk to him.
- Q. Right. Now how did he sound on the phone in that conversation, by way of intoxication or
- A. Sober, dead sober.
- Q. And presumably because of the drinking problems that he had you would have heard him on the phone when he was drinking before?
- A. Oh yes.
- Q. That is the reason you knew what he wanted the money for?
- A. Yes.
- Q. He would run out of money and he would call you looking for money?
- A. Exactly.
- Q. And when he would be drinking on the phone you could tell, he would stutter and his speech would be

slurred.

A. Oh yeah. The normal signs, "how ya doing boy," you know, "how's my favorite brother."

Q. But on this occasion there was no slurs in his speech
....

A. Very direct and very clear.

Q. Yeah and very brief?

A. Very brief.

Q. Now when this statement that was made to you by this caller said that they killed a girl, you didn't believe that?

A. No sir.

Q. You figured this was another . . .

A. Hair brained scheme to get a few dollars to drink.

Q. Right, and later you checked in and found out that there was, there was a murder in Glace Bay?

A. Yes.

Q. And it was the girl who was described to you on the telephone?

A. It was Johna who called me the next morning when I got in from work at 6:30 in the morning, it was 6:30 and it was Johna.

Q. And you checked this out with the police I understand and established that in fact there was a murder?

A. Yes I called Banfield that morning.

Q. When Corporal MacQueen first contacted you and asked you about this telephone conversation, you denied that there was any conversation?

A. Yes sir.

Q. You told them there wasn't, didn't know anything about it?

A. Didn't know anything about it.

Q. But then you reconsidered, did your duty that you had to do, and you did an hour later or so?

A. I told them to call me back in an hour."

Joseph Pyke was called as a witness by the Crown. He testified that he occupied Apartment 1, 3 Newton Street, in August of 1990, that he lived on a disability pension, was not married and took two types of medication for epilepsy as well as prescription painkillers for rheumatoid arthritis and nerve pills which had been prescribed by his psychiatrist. He stated that he had been chronic alcoholic all his life. He had been on a bender at the time that Debbie Neary died. He had been guilty of double doctoring in the past and was also convicted of breaking into a liquor store.

Debbie Neary had been sleeping at his apartment for three or four days before she died. She had been previously staying upstairs in the Pittman apartment with Puffa Burke.

Although Joey and Debbie slept in the same bed in his apartment he said there was no relationship between them.

Joey testified that a few days before Debbie died Greg Pittman had complained about some pills being stolen from his apartment and he had blamed Puffa and Debbie. He also said that Debbie and Johna had had a fight a few days earlier and after Debbie was thrown out of the Pittman apartment she asked if she could stay at his place since she had nowhere else to go.

Joey stated that he had been at the Community Hospital when Debbie was there for treatment of the cut between her fingers but he didn't know how this wound was received. He was then questioned about the actual night of the murder and he testified as follows:

" Q. . . . Mr. Pyke were you present the night Debbie Neary was killed?

A. Yes sir.

Q. Where did that happen sir?

A. It happened in my bed in my apartment.

Q. In your bed in your apartment?

A. Yes sir.

Q. Who else was present at the time if anybody?

A. Gregory Pittman.

Q. Gregory Pittman was there?

A. Yes.

Q. And who actually killed Debbie Neary?

A. Gregory Pittman.

Q. Did you take any part in it whatever sir?

A. None whatsoever."

Joey was then asked about the events earlier in the evening and he said that he had gone up to Greg's apartment when he had returned from the hospital. Greg and Johna were there and after a while Debbie Neary arrived. He said that his condition was fair since he had taken a couple of Tuinal and that although these were sleeping pills, if you take too many they make you high. He had been at the hospital to get some stitches out from an injury suffered earlier in the week after a fall in the Pittman apartment.

Because of the drinks and the pills he had been taking that evening his recollection of the events in the Pittman apartment on the evening of the murder was not too clear but he remembers that Debbie went downstairs first and she was asleep on the bed when he arrived back in his apartment around midnight. She had her clothes on. When Joey entered the apartment he tripped and fell down beside the bed and had a hard time getting himself up off the floor and onto the bed because of his condition. He then testified:

" A. I am pulling myself up, I am getting up, it is taking me a while and Mr. Pittman comes down and sits in the

armchair that is in the picture there.

Q. Okay let me stop you there, because I want you to show the jury what chair Mr. Pittman sat in. Can you see it there?

A. Yes this one right here.

Q. Now you are pointing to the printed chair in the lower left corner of Photograph No. 8?

A. Right.

Q. So when he sits in that chair, how is he facing in relation to the bed?

A. He is facing like, just towards this way, like you know.

Q. Where is the bed from him?

A. Like this here, like the chair

Q. You are indicating to the right.

A. The chair is like pointing to the bed so if you are sitting on the bed you could be sitting talking to someone sitting in the chair, or it could be moved around because I had other people there, drinking, and eh, but he sat there.

Q. He sits in the chair?

A. Yes not very long.

Q. When he sits in the chair what does he do?

A. He was just staring for a couple of seconds.

Q. Where was he staring?

A. Just staring straight ahead. I never seen him stare like that before, I mean to say eh, I have known the man a long time, I never seen him stare like that, you know, never in my life, never.

Q. How long did he continue staring like that?

A. Not very long because then he got up.

Q. He got up then.

A. Yes.

Q. And by the time he gets up out of the chair where are you?

A. I am pulling myself up onto the bed, and I am halfway onto the bed, and halfway on the floor.

Q. And when Mr. Pittman gets up out of the chair what does he do then?

A. He puts his hand behind his back and pulled out a filleting knife with a brown handle on it.

Q. Yes. Now you are holding your arm up in the air, your right arm up in the air.

A. Well he pulled it out of that pocket see, right.

Q. The right rear pocket you are indicating?

A. If I put the way the chair, the chair was facing, right, that is what I am trying to indicate the way it was. So he pulled it out from there, just went over and started sticking it in her.

Q. Where did he stick it in her first?

A. In around her chest and all she was was "no Greg, no Greg," and then he stuck her I don't know how many times and then he put one in the side of her neck and she gurgled.

Q. She what?

A. I heard her gurgle eh.

Q. Yeah.

A. And he backed off then?

Q. He backed off then?

A. Yes.

Q. You said that she said, "no Greg"?

A. Yes.

- Q. How many times did she say that?
- A. Two or three times, I am not exactly sure, but she said "no Greg, no Greg, no Greg."
- Q. When did Debbie wake up?
- A. She never opened her eyes as far as I know, because I couldn't see over that far eh. Oh she said it in a very low tone.
- Q. Did Greg say anything between the time he came into the room and the time he went over and started sticking the knife in her?
- A. No.
- Q. He didn't?
- A. Not that I remember.
- Q. Did he say anything while he was sticking the knife in?
- A. Not that I remember.
- Q. After he backed away after he stabbed her as you described, did he say anything then?
- A. Yes.
- Q. What did he say then?
- A. He said, "that's one rat gone and the next one will be eh, and anybody who says anything will be the next one to get it."
- Q. Now . . .
- A. Or something similar eh, you know.
- Q. Yes okay. When he went over and started stabbing her you were still where?
- A. Trying to slop over on the bed see, the tuinal were after kicking in really good eh, your legs like, your legs are gone, eh. You can see but your legs are gone.
- Q. Did you say anything during any of this?

A. I said "no Greg, no Greg," I was hollering at him, "no, no."

Q. All right, so after Greg stepped back where did he go then?

A. He backed out by the door of my apartment there by the bedroom there, out there, and I checked her out.

Q. Yeah what did you do when Greg stepped back by the doorway?

A. I tilted back her head and her eyes were wide open and I went like that, she's gone, not that I touched her on the chest, no breathing, I put my ear down to her mouth, I thought, I decided to give her mouth to mouth resuscitation but I didn't I don't think. I just put my ear there, I got no breathing or nothing because there was nothing there at all. I was that shook up, I never seen nothing like that, never expected it eh, especially from eh, and I still to this day cannot believe that that was Mr. Pittman because I never believed he had it in him.

Q. I see. Was there any doubt in your mind as to who was in the room that night?

A. No, there is no doubt no, that is what happened is that.

THE COURT: You are dropping your voice again Mr. Pyke.

A. That's what happened you know.

MR. EDWARDS: So after you went over and checked Debbie as you out as you described, while you were doing that, where was Greg?

A. Greg was backed out a bit waiting for me, he said to come upstairs and stay up at his place.

Q. He said come upstairs and stay up.

A. Yes.

Q. What did you say?

A. I just followed him, I had no eh . . . I can't run nowhere my legs are gone. I could drag 50 people in here a waste of the court's time that my legs go just drinking along taking pills with it. I went out, up

along side of the house, we went upstairs, Greg went into the washroom to get washed

Q. Where was the knife?

A. The knife I don't know what he done with the knife see. At this time, I don't know, I was just eh, you know.

Q. So he went in the washroom to get washed, what washroom was that?

A. His washroom is straight there and his chesterfield is straight across and the stairs are over there to get out.

Q. And when he went in the washroom where did you go?

A. I layed on the chesterfield like he told me and I just put the thing over my head and he said come in and get washed and I said, "no I am not going to get washed." Johna, Mrs. Pittman called somebody, I thought it was the police but it might have been that Bruce fellow. She called someone and said, "Debbie is dead downstairs."

Q. And how long after that was it before the police arrived?

A. I'm not quite sure

Q. Do you remember the police arriving?

A. I remember them, I was waiting for them.

Q. Yes.

A. I'm not quite sure, I put my hand over there and I was just waiting and waiting and waiting for them to come, just to get out. I wanted to be out of there.

Q. Mr. Pyke why didn't you go wash as Greg Pittman had suggested?

A. I had nothing to hide."

Joey Pyke's testimony continued:

- " Q. Why did you go upstairs to Pittman's apartment rather than go to the police?
- A. I had no legs to go anywhere. I wasn't taking a chance on getting stabbed or killed.
- Q. Were you afraid that night?
- A. I was scared to death, I was never so scared in all my life.
- Q. Did you and Pittman go upstairs together or did you go up separately after Debbie was stabbed?
- A. Pretty well together so I couldn't get, so I couldn't you know get any distance away from him eh.
- Q. When you got back upstairs, where's Johna?
- A. I don't know she is either in the bed or sitting in the chair, I am not sure.
- Q. What were you going to tell the police if anything when they arrived?
- A. I was going to tell them the truth.
- Q. Had there been any discussion about what was going to be said to the police?
- A. Yes.
- Q. Between you and Greg or you and Johna?
- A. Yes.
- Q. You're nodding yes.
- A. I'm nodding before this happened, when I didn't believe that the man would do it. I still, it's still hangs in me that that man done that because I still find it hard to believe, but I seen what I seen, that is all, that is all I can say.
- Q. Okay now my question was, regarding discussion about what was going to be said to the police. When did you say that discussion took place?
- A. Before Deborah Neary was stabbed he said he was

going to get her and Puffa and I was . . . they were going to say that I was letting on I was sleeping up on the coach when he got her down there. Puffa was after taking off I guess, see. But I don't away with that see.

Q. What do you mean you done away with that?

A. I went down.

Q. So that conversation did take place that night or some other night?

A. That took place it was either that night or the night before. Probably the night before, now it all depends see. There was a lot of confusion going on here.

Q. About which part?

A. Eh.

Q. Which part are you confused about?

A. There was a lot of confusion at the place, there were pills, these kinds of pills missing, there was different kinds of pills missing from this eh, pills from me Psychiatrist were being missing and I didn't know if anybody was stealing them or if she was hiding them or whatever. I know I wouldn't have to steal one, all I would have to do if ask him for one and he would give it to me, if I wanted a pill, but I don't take . . . there are certain pills I will not take it is like a psychotic drug eh. I take a pain killer or a nerve pill but nothing psychotic.

Q. After you and Greg went upstairs after Debbie was stabbed, between that time when you went back to Pittman's apartment and the time the police arrived, can you tell us whether or not anybody else the apartment, left and then came back, or left altogether?

A. I know Greg didn't leave, and I didn't leave, Johna I don't think.

Q. You don't think Johna left?

A. I don't think anybody else, I am not sure, but I am not positive. You see I am there with this over my head.

Q. You are indicating your arm was up over your head.

A. My arm was up over my eyes like this here. I am just hoping that the police are going to get here as quick as possible in my own mind eh. That was the one time I wouldn't mind being arrested, right off the bat.

Q. One time you wouldn't mind being arrested?

A. That is right."

When Joey Pyke was asked about the pool of blood that was under the foldout bed he stated:

" A. Yes that would be underneath the bed.

Q. All right, now my question is, can you tell us how that blood would have gotten there?

A. I can't tell you how that beer bottle could have gotten there, let alone the blood.

Q. Can you tell us whether or not there was any type of relationship between Debbie and Greg?

A. Not that I know of, no, not that I know of no, no there was never any relationship.

Q. Did Greg ever tell you why he stabbed Debbie?

A. Pardon.

Q. Did Greg ever tell you why he stabbed Debbie?

A. He told me he was going to get them because they knew that he had broken into the Black Diamond Pharmacy.

Q. Who was he going to get, you said them?

A. Her and David Burke."

He continued:

" Q. Joey when did Greg tell you that?

A. Pardon.

Q. When did Greg tell you that?

A. Days before.

Q. Pardon me.

A. Days before.

Q. Days before.

A. Yeah because there were pills disappearing, they had a cookie jar full of Turenol, and they were being stolen. And they were getting the blame for stealing them.

Q. Mr. Pyke has there been any agreements or deals made with you in relation to your testimony?

A. No none whatsoever, no."

During cross-examination Joey admitted that he had had some scuffles with Puffa and that he had accused Debbie and Puffa of stealing his pills. He also said that Johna was getting fed up with all the drinking in her apartment as she was a very tidy housekeeper and became upset. When they would run out of booze Joey would offer his television to Johna for enough money for another bottle. Arguments would flare up and, in fact, it was suggested that Johna had called the police and that both Greg and Joey were taken off to jail on August 12th. Joey claims no recollection of this but only remembers being at the Community Hospital that evening where he saw Debbie before returning to his apartment.

He was further cross-examined about why he didn't run across the street and call the police after the stabbing rather than follow Greg up to his apartment and lie down on his couch. He stuck to his explanation that he was scared and when Greg told him to come up he went up. Cross-examination continued:

" Q. You were telling us about how debilitated you were at that time, you were in pretty bad shape.

- A. I was pretty well getting there, yeah.
- Q. And yet you had the strength to attempt to revive Debbie Neary?
- A. To try.
- Q. To try to revive her.
- A. To try.
- Q. Yeah. And that's how you managed to get the blood on your hands and on your pants and on your shirt?
- A. I didn't say that.
- Q. But I'm suggesting to you, that's how the blood got on your hands and your pants and your shirt. Fair?
- A. I don't think so, no.
- Q. Maybe it got on when you were killing her?
- A. Eh?
- Q. Maybe the blood got on when you were stabbing her. That's a more logical explanation, isn't it?
- A. My dear son, I wouldn't hurt nobody for anything. Let alone a pill or a break and enter or anything.
- Q. You wouldn't use a knife on anybody.
- A. I would not use a knife on nobody. On a dog or a cat, let alone a man or a woman."

The appellant, Greg Pittman, did not testify at his trial but the Crown presented to the jury several of his out of court statements which were admitted by defence counsel to have been freely and voluntarily made. The Crown also produced a composite tape of conversations between the appellant and other persons in the appellant's apartment and on his phone.

The first statement was given to Corporal John Trickett of the R.C.M.P. at 4:18 a.m. August 13th, 1990, in the kitchen of Greg Pittman's upstairs apartment at 3 Newton Street. That

statement is as follows:

" 'At about 7 pm last night Johna and I were in the livingroom. Joey and Debbie came up to our place. We sat around and had a few drinks for a couple of hours anyway. They left around 11 I would say. They went down over the stairs, they either went to Joey's or somewhere else. I didn't follow them or watch them. At about 11:30 p.m. Johna went to check on them. Then she came upstairs and said, 'Debbie is down there in a mess of blood.' I said, 'well call the cops.' I ain't going down there and looking at it. I said, 'did you phone an ambulance.' She said, 'the police are phoning one.' And I just left it at that. When Johna came back upstairs Joey was about five seconds behind her. He didn't do nothing. He sat on the couch there and layed back on the pillow. After he layed down I waited for a while for you to come up and then I got tired and layed down on the bed. When I woke up you were all here and he was still laying there.'"

The Corporal then asked some questions as follows:

" 'Question: How much did you have to drink tonight?

Answer: Oh we split a bottle of wine and a half dozen beer.

Question: Who did you split the liquor with?

Answer: Debbie and Joey.

Question: How much did Debbie have?

Answer: Oh jumpings she probably had the same amount as we did.

Question: How much would that be?

Answer: Ah two beer and split the wine.

Question: How much did Joey have?

Answer: The same amount.

Question: Was he drinking before he got here?

Answer: Ah I don't know.

Question: Did you hear any fighting when Joey and Debbie left?

Answer: No.

Question: Did you have any other people at your house?

Answer: No.

Question: When you say 'Joey and Debbie' what is their last names and where do they live?

Answer: Joey Pyke, 3 Newton, Debbie Neary, I don't think she's got a fixed address. She was down at Joey's for the last couple of days, maybe two or three.

Question: When were you last at Joey's?

Answer: Ah the night before last.

Question: You haven't been down there since?

Answer: No.

Question: Did you hear any glass break last night?

Answer: No I didn't hear no window breaking."

After the statement had been made at about 4:30 Joey Pyke was arrested and taken to the Reserve Mines Detachment. Constable Martell testified that Joey was extremely intoxicated at that point and could barely stand. His hands were covered in blood and his clothing was in a very dishevelled condition.

After interviewing Joey Pyke the police arranged to have Greg Pittman brought to the Detachment and during the afternoon he participated in a videotaped interview. Following this interview he was placed under arrest. At 2:00 a.m. on August 14th both Greg and Joey were released.

On September 11th, 1990, Greg Pittman contacted the R.C.M.P. and told them that he wished to make a voluntary statement concerning the murder of Debbie Neary. Two police officers went to his residence and the following statement was reduced to writing by the police officers:

" Well we were up here drinking. After the booze was gone Debbie started for the stairs first then Joey said to me, "come on down Greg, I've got a couple of beers down there." When we got down there I sat in the armchair. Debbie layed on the bed. She would have been on the right hand side of the bed like facing me, me facing her. And Joey, he wasn't laying along side of her, but it was like his feet were on the bed and he was propped up against the back of the bed. I asked him, I said, "where's me beer Joe." He went out and he came back in and he said they even took them couple of beers on me. I said, "that's great." He told me I could have a pint of beer and no beer. He was positioned on the bed like I told you, eh, and Debbie said to me, "Greg we may as well forget about it tonight, I don't think we're going to get another drink." Then he got up off of the bed and he walked right around the bed and he was standing right at the edge of the bed and I was still in the armchair. That's when he reached around and he pulled the fuckin knife out of the back of his queer-things, pants I guess. I could see it when he pulled it out. He had the knife out and he was looking at Debbie, and he said, "you and Puffa." He went on about that for three days up here and him standing there with the knife, and he said, "you stole my fuckin pills." And she got up off of the bed and said, "no Joey it wasn't me, it was Puffa." She was scared. No fuckin wonder. And he walked towards her with the knife and when he got right up to her he stabbed her right in the guts. She was standing up at the time. He pushed it in right up to the handle and me in the chair shaking. After he stabbed her she didn't even make a fuckin noise. She just layed back and put her feet up on the bed and put her head on the pillow. That is when he started coming down on her. It was like she wasn't even fuckin stabbed. When she was back on the bed he started coming down on her with the knife. Don't ask me how many times, but it was quite a few. Then he stood in an upright position and he looked down on her for about five seconds. Then he pushed the knife into the right side of her neck, right slow, and then he pulled it out right slow and it seemed like he was putting pressure across. I know one fuckin thing, an awful lot of blood came out of it. I said to Joey, "she's dead now boy." I could hear the death rattle. When you hear that there is no hope. And the look on her face, right pale, she turned snow white. I guess that was all the blood leaving and I could hear that fuckin rattling. When he was done with that he took a couple of steps backward and that is when I got up out of the armchair. I said, "Joey that's my knife." It was my filleting knife, well actually it is Johna's she got it at the plant but it belonged to the house. He give me the knife, I wanted the fuckin thing because I figured my prints would be on it because I used it Friday to cut some fish up for the cats. When he gave me the knife, I ran out of the door and up the stairs. When I got to the top of the stairs, Johna was standing there, and I said "Johna he killed her this time." And that ain't the first time he stabbed her either. Then I went right into the bathroom with the knife and I washed it off under the tap. I was scared my prints would be on

it. when I washed it off, I dried it off in one of them little hand towels. I washed all up inside the handle where the blade and the handle come together to get all the blood off and prints and everything, and that is when Johna went over the stairs and the two of them came back up together. I told Johna to phone the ambulance and the police for fuck sakes. When Johna came back out of the bedroom from using the phone, Joey was sitting beside me on the couch and he said to Johna, "if the Mounties come," he said, "just tell them I was here all night." Johna said, "no I won't." He said, "Johna you wouldn't mind me staying all night." Johna said, "you're not staying here all night." That is about it."

Constable Martell then placed some questions to Greg and he continued as follows:

" Answer: It could have been 12 or a little later. He pulled that same fucking shit Saturday night and it was pitch fuckin dark. He invited me down for a beer and when we got out on the step he pulled this big long knife out. I couldn't even see the handle of it. I asked him what he was going to do with it. He said, "I am getting rid of that cocksucker once and for all." I knew who he meant because Puffa wasn't there. He was over at Manning MacKenzie's or somewhere. He was gone about three days.

Question: Who did Joey mean?

Answer: Debbie who the fuck else.

Question: What happened after he said that?

Answer: He got off the step and I went behind him. He said to me, "come on around the back I am going to make this look good." I said, "all right." We went around the back and he said I am going to put this back window through to make it look good. They will think someone came over the back fence and went in through the window or something. I don't know if he used a brick or a board to put her through but I heard the glass breaking. Me and him were pretty full that night. We come around to Joey's side door and the two of us went in, the place was in darkness. There was no light on in that house that I can remember. I stayed in the kitchen and Joey kept proceeding into the bedroom and it was like pitch fuckin dark. Of course he could find his way through the place anyway. When he was in the bedroom I heard "ooh ow ooh". I said to myself, she got her. He came

running out of the bedroom, she couldn't see a fuckin
....

Q. Excuse me, you said "I said to myself, "she got her or
he got her.

A. She got her.

Answer: He come running out of the bedroom, she couldn't see a fuckin thing. She'd of had no idea it was too God Dam dark in there. He bolted out the kitchen door and me behind him. We made a run for my place and he was going up the stairs a head of me but I caught up to him half way up and we were side by side going up the stairs and he said to me, "I broke the fuckin, cocksucking knife in half." I guess he figured he didn't finish the job. We got upstairs, I sat on the chair and Johna was in the armchair. I said to Johna, "he stabbed fuckin Debbie." And Joey went out into the kitchen. He still had the knife. When he came back out of the kitchen he had something wrapped up in a brown paper bag. I imagine it was the knife. He said to Johna, "Johna will you take this down to the brook for me and get rid of it." And Johna left with the knife wrapped in the brown paper bag. Then she came back and I asked, "where did you drop it off at?" She said, "I threw it in the brook. Joey said, "I am going to stay here all night." I told Johna, "I'm going to bed." She said, "I'm going too." The next morning me and Johna got up and he was here on the coach and when we came out in the morning he was sitting up. We just came out and all of a sudden I heard Debbie hollering, "Greg, Greg, Johna." I said, "come on up Debbie." Debbie came up and said to me, "I don't know if I got bet or I got stabbed." She looked at me and said, "Greg, would Puffa do this to me." I said, "I don't know Debbie, I don't know who done it. Which I fuckin did. I was protecting him. There was blood all over her clothes in different places, on her shoulder, her back. There was a queer hole between her finger where the knife must have caught her. I picked the phone up and I called the ambulance. When the ambulance driver came I told her to go and get checked over but she wouldn't go with the ambulance driver. I phoned the police and two of them came. They were trying to talk her into going but she wouldn't go. There was nothing else they could do so they left. She just hung around. I told Debbie it wouldn't be wise for her to

hang around her for another day and night. The look of her. Fuck she should have knew better.

Question: What kind of shape were you and Joey in Sunday night when you went downstairs?

Answer: We were pretty full.

Question: Was Debbie pretty full as well?

Answer: All yeah all three of us yeah.

Question: Did you know that Joey had the knife before you went downstairs?

Answer: No.

Question: How would Joey get your knife?

Answer: He'd have to get it out of the drawer buddy, that is where we keep them.

Question: Did Joey have an opportunity to get a knife from your drawer that night?

Answer: He went out in the fuckin kitchen. He had an opportunity there.

Question: When you were downstairs with Joey and Debbie did Joey waive the knife around trying to scare Debbie at first?

Answer: No, no he didn't waive it he just came around the bed and reached behind and pulled it out. He didn't scare her, he meant business.

Question: Did you have the knife before Joey stabbed Debbie?

Answer: No.

Question: Why did you wash the knife off rather than just get rid of it?

Answer: I didn't want to get rid of the knife either. I just washed it off. Wiped it off with the towel and layed it on the tank. I should have left him downstairs with the cocksucking knife.

Question: Why didn't you try to stop Joey from stabbing Debbie?

Answer: I was scared buddy. He had a fuckin knife and the man was drinking. I was shivering and shaking.

Question: Did you say anything to Joey when he stabbed her or while he continued to stab her?

Answer: No I didn't say fuck all. I told you I was too fuckin scared.

Question: Did you think that he might stab you?

Answer: If I had of jumped up and tried to stop him, I would have probably got it in the guts. He hated fuckin Debbie and Puffa for stealing his pills. He went on about it for days about them fuckin pills.

Question: Was the bed folded up or down when Joey stabbed Debbie?

Answer: It was down yeah.

Question: What about the night before was it up or down?

Answer? I can't recall the night before because it was pitch fuckin dark and I was in the kitchen.

Question: Did you have a fight or an argument her with Debbie Sunday night?

Answer: No the only thing I asked her was, "Debbie did you tell Johna that I screwed you." And Debbie said, "no." It was left at that.

Question: Is there anything else that you would like to tell us at this time?

Answer: No buddy.

Question: What did you have on your feet that night when you went down to Joey's.

Answer: I just threw my rubber boots on.

Question: Can you remember what Joey was wearing

that night, Sunday night?

Answer: He had a white fuckin shirt on him with a black strip on it. He had a pair of blue jeans on.

Question: Did he change his clothes after he stabbed Debbie?

Answer: I don't think he had that white shirt on. I don't think he had that white shirt on I remember a striped shirt and it had a spot of blood on the shoulder.

Question: Did Joey have any blood on his hands?

Answer: Yes he did yes. His fuckin hands was smeared in it. He was sitting beside me and I looked at his hands. He asked me if he could wash his hands. I said, "go ahead boy." And he never made a fuckin move. He just sat there like he was rum-dumb.

Question: You said the blood went everywhere when Joey stuck the knife in her throat. Did any blood get on you or your clothes?

Answer: The only way anything would get on me would be when I walked over to get the knife. If there was any blood on the floor I might have walked in it. The only way I could get blood on my clothes is when I was coming upstairs with the knife or if he rubbed up against me. I was too far away for any blood to get on me. I was in the chair and he knows it."

The conversations that were taped in the Pittman apartment start on August 16th, 1990. Greg repeatedly denied that he had done the killing. He hinted that it had been Joey who had done it and that Johna only went down there to check on Joey and Debbie. He said several times that he was not going to take the rap for what someone else had done and that if anybody did point the finger at him he would get them before going to jail. There was a suggestion that the people in the room knew that the place was tapped because they saw a policeman outside. Johna accused Greg of trying to place the blame on her and he claimed he was simply trying to help her out and that she was foolish for thinking that he and Debbie had been messing around.

Just before midnight on August 16th the following things were said by Greg Pittman in the presence of Johna and friend, Alex MacLellan:

" It was a grizzly murder", he said.

. . .

I'm not puttin nothin on you, Johna. I'm going to tell them what I really know.

. . .

They're going to find no blood on me on my clothes nothin (indiscernible).

. . .

I stood back yes. I watched.

. . .

He took the knife from me. He said, "let me do it". I say, "Do it". I ain't going to cover up for him.

. . .

Joe was standing there with the knife in his hand and he starts, he says this is what happens to pimps, Debbie and he brings the knife around and he starts coming on to her.

. . .

All I heard her sayin was, "Don't touch me, don't fucking do it (Indiscernible) her face turned right white-fuckin white.

. . .

He done it I know it. I can't say that in court. I just can't.

. . .

Can't haul (indiscernible) can't haul you out.

. . .

Do you know what a fuckin rat is? A fuckin pimp. A no good prick. That's what a rat is.

. . .

Lord fuckin Jesus. He came on to her (Indiscernible) fuckin shock treatment. That's enough. I'm going to make sure. I said, "She's dead". No, I want to make sure. Shoved the knife in here - ripped her across (indiscernible).

. . .

Johna, when you're a rat. He said, "Worse than being in jail". It would be murdered on the street. They all, (Indiscernible) they say his hands were full of blood and there was none on mine."

On August 17th Greg Pittman and Alex MacLellan were alone in the apartment when Greg made the following statements:

" I know what happened. Yeah, I pulled a knife. He took the knife from me. "Let me do it". "You do it".

. . .

I just stood back (Indiscernible) nut. That's what I did. Whose the (Indiscernible) blame me when you're gonna turn around as soon as I talk to Allan in the mornin.

(Indiscernible)

Tell him exactly what I saw and what happened. You're in the clear. But you tell the mounties I wasn't down there (Indiscernible) it sounds worse (Indiscernible). Gotta tell him them I fuckin saw but I can't, what I heard, what I didn't hear (Indiscernible). I know new (Indiscernible). "Give me the knife. Let me do it." (Indiscernible). I said what happened. He don't like pimps or rats. You know what happens to pimps and rats. He started laughing about it. Holy fuck, I don't think you should be laughing at something like that. It's not funny. Sure she was a rat, she was a pimp, she was a whore, a liar, a thief.

(Indiscernible).

Never deserved that.

. . .

He said that Joey is in an awful mess. He said, "And it don't look good for Johna and she went down there". I said, "Allan, she just went down there to check to make sure he don't take seizures but she

always does that. I was covering up for Johna could get away (Indiscernible) covering him up". She always do. She want to check him see if there's any fits or something.

(Indiscernible)

Yeah. That's going to change all in the mornin. It's all gonna change. The Probation Officer told me and the Mounties told me and the cops told me. Tell us what you know the Mounties told me. Now I got to tell them."

On August 17th Greg called his sister, Linda Bresuk, and tried to convince her to call the police station and tell them what Joey Pyke had told Mary "on the phone". Greg said that Joey was trying to blame him and Linda flatly refused. When Greg said that Joey had committed the murder his sister said that he must have had help because he couldn't have done it alone.

On August 28th the listening device picked up the voice of Greg Pittman apparently talking to himself about 1:30 a.m. In a drunken way he repeated many of the details of the murder blaming Joey Pyke. He repeated that Pyke had taken the knife out of his hand. He said that he would be able to prove his innocence because blood was supposed to squirt and there was none on him.

It was on September 11th that Greg called the police and had them come to his house where he gave them a statement saying that it was Joey Pyke who committed the offence and that he did not know how Joey had gotten his knife for that purpose.

In a taped telephone conversation with his sister Linda on December 5th, 1990, after discussing the fact that Joey was saying that Greg committed the murder and Greg was saying that Joey was the culprit the following exchange took place:

" I just wanted to get a point across to ya - Johna had nothin to do with that.

But Johna (Indiscernible) fuck.

I can swear on a stack of bibles.

That's not what I heard.

(Indiscernible) take (Indiscernible) proof for you ...

She was up, she was upstairs that night Linda. There was me and Joey and Debbie down there.

. . . about that.

That's not what I heard.

Well that's what, I was there.

Oh, I know you were there ...

Yeah she ...

And that's why ...

was upstairs.

you're charged with murder. You were there. She was upstairs.

Well I don't know why you'd ever want to go down over the stairs with Joey PYKE.

he invited me down ...

Ah what, an, an watch the likes of that going on.

he invited me down for a beer.

Yes, I can imagine.

Yeah, I know.

Yes, I can imagine.

Well Johna a, Linda I'm only telling ya what I know.

He invited ya down for a beer.

Yeah, "C'mon down Gregggy an have a beer". He calls me Gregggy.

Well that didn't say ya had to sit there an watch it.

What was I supposed to do Linda? Me in the chair sitting there drinking.

Ya shoulda got up outta the chair and went back up the stairs.

I was too scared.

That's what you shoulda done. Ya had, what do ya mean you were too scared.

I was shaking an shivering.

Well, ya shoulda got up outta the chair and left ...

(Indiscernible)

if you were that scared?

I couldn't get up outta of it.

For fuck sake. That fuckin girl, ya know, that she didn't deserve that; I don't care what anybody says. That wasn't fuckin right - to take her life.

No.

Especially over nothing.

Yeah.

That's if it was over nothing.

It was, it was only over a bottle of pills.

Well that's nothing.

Well it's, a, a, a dope addict, it's a lot, it, it means a lot. Let me tell ya.

Yeah, don't I know it.

Well there ya go.

Imagine a bottle of pills, well that's over nothing.

Well, she did ...

Took her life for the likes that.

In your eye in other peoples' eye who are on drugs like that - heavy, it, it don't mean too much. Means fuck all really.

That's right.

But, you get Joey PYKE an, an, an stealing his pills. You know him and pills.

I, I know you too an pills.

Yeah but I mean a they never, they never a robbed me. My, my pills or nothing.

An I mean to go ...

(Indiscernible) to take ...

An, an to go and to go an kill somebody especially like that, the, because she was gonna pimp to the cops about the Black Diamond that, that's crazy that.

Yeah, I know it's crazy.

Holy fuck.

I never even heard nothing about that a, her pimping on me about the Black Diamond.

Lord Jesus Christ, no matter if she was an old whore or what she was ...

I had nothing to do with that Black Diamond. Let them try and prove that one.

She a, she didn't deserve that. That was an awful fucking way for that woman to die.

Sure, it was an awful way for her to die but I don't think she felt too much.

It don't matter, she's gone.

Once that first blow was delivered to the stomach, she laid back on her bed.

Do you think that, that, that judge is gonna let you ...

Somebody ...

and Joey PYKE walk outta that courtroom.

How many...

free?

as many times as he, he stabbed her like she wasn't even feeling it.

Makes no difference if she felt it or not. She shouldna got the knife in her.

She didn't even fight back.

No, cause she knew she was fucked anyway.

Yeah, I guess.

That's why.

Allright then.

Ok.

Ok, bye.

Bye."

There were several other taped conversations on December 6th in which Greg was trying to get some of the family members to pass on to the police information which had been given to them about Joey Pyke's role in the murder.

At 11:00 that evening Greg was speaking with his sister Linda once again and the following exchange took place:

" You sound like you're all puffed out. What? Whata ya crying for? Ah, they told ya they got enough evidence on me to convict me, is it?

And that fuckin Johna, she told them everything. An I saw the fuckin statement with her name signed to it. She even fuckin led them to the other knife, the skinny lookin cunt and Jean Anne said she's gettin her and she's gonna beat her fuckin face that skinny

Here we go.

lookin cocksucker.

Here we go.

Yeah and you don't fuckin believe it. I fuckin saw it and her fuckin name signed to it.

Signed or initialed?

Her name. She fuckin told them. She told them every fuckin thing, all full of fuckin pills that day.

What was on it?

Wha, every fuckin thing. Everything about the time you, rate from the time you went down over the fuckin stairs and come back up for the knife.

I went down over the stairs and come back up for the knife?

Hm hm.

Johna, did you say that?

(Indiscernible).

And what else they have to say?

And Dan Joe fuckin told on ya too.

He told on me?

Yes he did. He fuckin squealed on ya.

They might be just sayin that Linda.

No, he was down California, the Mountie. he even told me what Dan Joe, Dan Joe got made for Jimmy COLLINS for Christmas.

What's wrong with Dan Joe?

He's a fu, he's a nut. He's a nut. You went and called him the morning of the murder and then ya called him the night that ya cut Debbie with the knife. The night that she went to outpatients.

I never cut her with that knife that night.

Well somebody did and she went to outpatients and got stitches and then she went back to your place.

Great.

And he want, he went and fuckin squealed. He said, "I know", he said, "It's gonna mean hard feelins", he said, "With all the family", he said, "But Greg gotta be taken of the streets".

Yeah, that's great, alright...

and put away.

I don't wanta hear no more, alright bye."

In a later conversation with his sister that evening Greg questioned whether the Mounties had gone to California and Linda said that they had. The conversation then continued:

" If Dan Joe says that I stabbed her, you tell Dan Joe they can't keep me in prison for ever and Linda so help me fuck . . .

Yeah, I know Greg.

If he squeals on me, I'll kill him.

Yeah, I know.

I'll get em before I go to jail.

Ah ah, what was it ah ...

I never did nothin to that girl.

He said ah . . .

He's makin up lies on me, he'll pay for it.

you went and called em you went and called, like the first time that you called Dan Joe ...

I'll make a special trip down.

the first time that you ever called Dan Joe was the night that Debbie was cut and she went to the hospital for stitches. I remember that because when he was done talkin to ya, he called down Jean Anne's to see if I was down there an I was there. An when I went to the phone he said, "Greg just called me and he told me ...

I was fuckin around with Dan Joe because she got stabbed the night before.

Well, yeah and the Dan Joe told them about the, the, the, the morning of the murder. Now you can ask Johna that. I know Dan Joe was on the phone cause Johna was talkin to him and Johna passed the phone to the cop.

She was talkin to him.

And the cop . . .

And you passed the phone to the cop ... (speaks to Johna).

And the cop went and told ...

Did not, I was in the fuckin police station (Indiscernible) (Hollering in Background).

No, no, the cop was waitin for Johna to get ready. He was waitin for Johna to get ready.

He was waitin for you (Speaks to Johna).

And, and, she, she went and passed the phone to the cop and Da, Dan Joe went and asked the cop.

(Indiscernible) (In Background).

some questions.

Johna just said, "That's a lie ...

No ...

rate there".

No, it's not a lie. Johna ...

I'm gonna prove it today when they get here. (In Background).

Johna and Dan Joe are two compulsive liars. They always were - the two of them.

Get a hold a him on the phone.

Yeah, goodbye.

Bye."

The last conversation between Greg and his sister took place on December 8th at 8:45 p.m. and since this was the conversation that the jury asked to rehear before they brought in their verdict I will set it forth in full:

" Hello?

Hello, where's Linda?

One minute, Linda ...

They were there.

... never again.

Hello?

Yeah, I was talkin to, I just called Dan Joe.

Yeah.

Yvonne answered the phone. She said, she said he should be in, in any minute from work.

Hm hm.

So, I said, "I'll call back", I said, "Would it be allright to call back in about 15 minutes/half hour?" She said, "Yeah, he should be home by then". I said, "Yvonne, were the Mounties down there?" She said "Yes they were".

Yeah, I told ya.

They were there.

Yeah, I told ya. I saw the statements. I saw his and Johna's and Joey PYKE'S.

Well, I'm fucked.

I told ya.

I'm fucked.

So now you believe me, eh?

Yeah, I'm fucked.

It's about time.

I'm fucked.

Yeah, well you're not the only one. You're not goin alone.

But I'm calling him back ...

Yeah?

I'm gonna find out just what he told them.

Yeah, well I told ya what he told them.

They'll probably tell me lies anyway.

Yeah.

But I won't, I won't fall for it.

I don't think he'll go to the phone anyway.

I don't think.

No.

But I'll give Yvonne a message if he ...

Yeah ...

won't come to the phone.

Give it to her.

I'm gonna say, "Tell him he's goin the same way Gregor went".

Yeah.

And I'm not gonna, it ain't gonna be a blade that's gonna do it. I'm gonna beat him to death.

Hm hm.

Allright.

Ok, bye.

Bye."

No evidence was called by the defence and it can be seen from the evidence as presented by the Crown that a jury might well have some problems. Joey Pyke said that Greg committed the murder and Greg claimed that Joey Pyke had done the stabbing. There was an unexplained pool of blood under the sofa that did not jive with either Greg's or Joey's version. Greg protested all along

that he had not killed Debbie and that Johna was not involved but the police, at the time of the trial, still considered all three to be suspects. The confession to Dan Joe might have been made before the killing according to the evidence or Dan Joe could have been mistaken. Greg could have called his brother on the morning of the 13th, after the murder, before he went to the police station or it could have been the next day after he was released. In the telephone conversations with his sister Greg appeared to have accepted the fact that he had spoken to his brother after the event.

The jury also had to consider the fact that no blood was found on the person or clothing of Gregory Pittman whereas Joey Pyke was covered with it. The evidence of the taxi driver, however, was that Greg's clothing when he picked him up Sunday evening was not the same as that shown in the photograph depicting what he was wearing at the time of his arrest.

Another fact which would have influenced the jury was the change in Greg Pittman's original story to the police in which he denied even having been downstairs and the eventual stories that he told in his subsequent statements and taped conversations that had been admitted in evidence with the encouragement of defence counsel.

The jury retired at 2:50 p.m. and returned at 5:25 p.m. and asked for a replay of the last taped conversation between Greg Pittman and his sister Linda. At 5:30 p.m. they resumed their deliberations and ten minutes later returned to the court with a verdict of guilty as charged. He was then sentenced to life imprisonment with ineligibility for parole for a period of fifteen years.

The appellant now appeals against his conviction and sentence upon the following grounds:

- " (1) That the Learned Trial Judge erred in law in that she failed to properly warn the Jury regarding the dangers inherent in accepting the evidence given by Joseph Pyke.
- (2) That the Learned Trial Judge erred in law when she permitted the Jury to re-hear only part of the taped evidence before the Court.
- (3) That the Learned Trial Judge erred in law when she permitted the Crown Attorney to speculate and suggest inferences to be drawn by

the Jury when there was no evidence upon which such speculation or inferences could be based.

(4) That the Jury erred in law in that the verdict of guilty was premised on a piece of wiretap evidence which is founded in heresay and other inadmissible evidence, contrary to the directions of the Learned Trial Judge.

(5) That the verdict was perverse in light of the evidence before the Court.

(6) That the sentence imposed by the Learned Trial Judge was excessive.

(7) Such other grounds as may appear upon receipt of the transcript."

Ground No. 1

" That the Learned Trial Judge erred in law in that she failed to properly warn the Jury regarding the dangers inherent in accepting the evidence given by Joseph Pyke."

The leading case on the duty of a trial judge when dealing with the evidence of accomplices or witnesses of a disreputable character is **Vetrovec v. R.** (1982), 27 C.R. (3d) 304 where Dickson J., speaking for the Supreme Court of Canada, stated:

" Before elaborating, however, I would like to review and reassess general principles relating to the law of corroboration of accomplices. This is one of the most complicated and technical areas of the law of evidence. It is also in need of reform. Both the Law Reform Commission of Canada's Report on Evidence (1975), s. 88(b) of the proposed code, and the English Criminal Law Revision Committee (Eleventh Report on Evidence (General) (1972), Cmnd. 4991, paras. 183-185) have recently recommended a drastic overhaul of the law of corroboration. The Evidence Code proposed by the Law Reform Commission of Canada would contain the following provision:

"88. For greater certainty it is hereby provided that . . .

"(b) Every rule of law that requires the corroboration of evidence as a basis for a conviction or that requires that the jury be warned of the danger of convicting on the basis of uncorroborated evidence is abrogated.""

He continued:

" In the case of a jury charge in which a witness who might be regarded as an accomplice testifies, it has become not merely a rule of practice but a rule of law for the trial judge to warn the jury that it is dangerous to found a conviction on the evidence of an accomplice unless that evidence is corroborated in a material particular implicating the accused. The jury may convict in such circumstances, but it is dangerous to do so. The judge must determine as a matter of law whether the witness might be an accomplice for the purposes of the rule. The jury must then decide whether he is in fact an accomplice. The judge explains the legal definition of "corroboration", with heavy reliance upon what was said by Lord Reading C.J. in *R. v. Baskerville*, supra. The judge lists for the jury the pieces of evidence which are, in his view, capable of amounting to corroboration. Finally, they are told that it is for the jury to decide whether the evidence to which their attention has been directed does amount to corroboration. As the study paper of the Law Reform Commission of Canada, *Evidence: II. Corroboration* (1975), dryly observes (p. 7), an "enormous superstructure . . . has been erected on the original basic proposition that the evidence of some witnesses should be approached with caution."

Mr. Justice Dickson then explained the development of the corroboration rule as follows:

" The common law, rejecting the "numerical criterion" common to some legal systems, has traditionally held that the testimony of a single witness is a sufficient basis for a criminal conviction. The general rule applied equally in the case of accomplices: where the testimony of an accomplice was admissible, it could justify a verdict of guilty. But while the common law (after some initial doubts) recognized an accomplice as a competent witness, it continued to harbour some suspicions as to the trustworthiness of his testimony. There appeared to be something unsavoury about a self-confessed knave, often for reward, accusing his companions in crime. Thus the practice arose in the 18th century of warning the jury that, while they might legally convict on the basis of the testimony of an accomplice, it would be dangerous to do so unless the testimony were supported, or "corroborated", by other unimpeachable evidence. This warning was for many years a matter for the discretion of the trial judge, but in 1916 the English Court of Criminal Appeal declared that the practice had become "virtually equivalent to a rule of law": *R. v. Baskerville*, supra, at p. 663. The court also took the opportunity to state that "corroboration" had a precise legal meaning (p. 667):

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence

which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.""

Dickson J. then discussed the various fallacies of the rule and concluded as follows:

" This court has in the past declared its willingness to depart from its own prior decisions as well as decisions of the Privy Council and the House of Lords: *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257, 19 N.R. 361; *A.V.G. Mgmt. Sciences Ltd. v. Barwell Dev. Ltd.*, [1979] 2 S.C.R. 43, [1979] 1 W.W.R. 330, 8 R.P.R. 1, 92 D.L.R. (3d) 289, 24 N.R. 554. The present case is an appropriate occasion to exercise this discretion. The law of corroboration is unduly and unnecessarily complex and technical.

I would hold that there is no special category for "accomplices". An accomplice is to be treated like any other witness testifying at a criminal trial, and the judge's conduct, if he chooses to give his opinion, is governed by the general rules.

I would only like to add one or two observations concerning the proper practice to be followed in the trial court, where, as a matter of common sense, something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character. There are great advantages to be gained by simplifying the instruction to juries on the question as to when a prudent juror will seek some confirmation of the story of such a witness before concluding that the story is true and adopting it in the process of finding guilt in the accused as charged. It does not, however, always follow that the presiding justice may always simply turn the jury loose upon the evidence without any assisting analysis as to whether or not a prudent finder of fact can find confirmation, somewhere in the mass of evidence, of the evidence of a witness. Because of the infinite range of circumstance which will arise in the criminal trial process, it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word "corroboration", or indeed in any other comparable expression, such as "confirmation" and "support". The idea implied in those words may, however, in an appropriate case be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the

evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness' testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is in some circumstances, particularly in lengthy trials, the need for helpful direction on the question of sifting the evidence where guilt or innocence might, and probably will, turn on the acceptance or rejection, belief or disbelief, of the evidence of one or more witnesses. All of this applies equally in the case of an accomplice, or a disreputable witness of demonstrated moral lack, as for example a witness with a record of perjury. All this takes one back to the beginning, and that is the search for the impossible: a rule which embodies and codifies common sense in the realm of the process of determining guilt or innocence of an accused on the basis of a record which includes evidence from potentially unreliable sources such as an accomplice."

The appellant argues that the trial judge failed to include the type of warning referred to by the Supreme Court of Canada when she addressed the jury in the Pittman case. He argues that Joey Pyke was either the perpetrator of the crime or an accomplice and was certainly a person of unsavory character. It is argued that a clear and sharp warning should have been given to the jury to attract their attention to the risks of adopting the evidence of Joseph Pyke and basing a conviction thereon.

The Crown on the other hand takes the view that the **Vetrovec** case wipes out the need for any formalistic direction or warning to the jury and leaves it within the discretion of the trial judge to analyze and present the evidence in a way that would allow them to exercise their common sense in assessing the weight to be placed upon the evidence of each witness.

In support of this position they quote the majority decision in the case of **R. v. Bevan et al.**, (1991) 4 C.R. (4th) 245 (Ont. C.A.) where Galligan J.A. dealt with the refusal of a trial judge to give a **Vetrovec** type warning in a murder case where the chief Crown witnesses were persons of acknowledged unsavory character. He commented that the charge of the trial judge as a whole was fair to the accused and that she had wisely exercised her discretion not to give the **Vetrovec** caution

which would have required her to emphasize the evidence that would support the witness' testimony and might have resulted in the eventual unfairness to the accused. He stated:

" By its decision in *Vetrovec*, supra, the Supreme Court of Canada ended earlier ritualized instruction respecting corroboration of accomplice evidence. It replaced that instruction with a discretionary caution to be given in any situation where, as a matter of common sense, the trial Judge thinks it appropriate. Integral to that judgment are the cogent words of Dickson J. at p. 17 [67 C.C.C. (2d), p. 831 [1982] 1 S.C.R., p. 322 27 C.R. (3d)]:

"Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula or a direction the concept of the need for prudent scrutiny of the testimony of any witness."

Those words left trial Judges with a wide and, in my opinion, flexible discretion of how they would tell juries of the need for careful scrutiny of the testimony of witnesses such as Dietrich and Belmont. In my opinion, this trial Judge clearly and explicitly told the jury that it must be careful with respect to this testimony. She avoided the danger of either repeating or emphasizing evidence that might have been prejudicial to the appellants.

I think the judgment in *Vetrovec* was not intended to replace one ritual with another every time a trial judge thinks the evidence of a particular witness might be suspect. If trial judges were always required to tell the jury that such a witness's evidence should be approached with caution, unless it is supported by other evidence, as well as to draw the jury's attention to evidence which could be supportive, it seems to me that the only corroboration ritual would be replaced by a very similar one using slightly different words. There may very well be cases where that type of caution should be given. However, in other cases such as this one, where the evidence capable of supporting the witness's testimony might appear to the trial Judge to be so strong that the drawing of the jury's attention to it could neutralize or indeed reverse the benefit of the caution, I think the discretion given by *Vetrovec* to the trial Judge is flexible enough to allow her to impress upon the jury the need for care in the fashion the trial Judge adopted in this case.

I should not be taken as laying down a rule that a jury should never be cautioned about the danger of acting on unsupported evidence when there is evidence which could support the testimony. Because of the "infinite range of circumstance which will arise in the criminal trial process", it seems to me that the words appropriate to alert a jury to the care or caution with which a particular witness's evidence should be approached can vary from case to case. What may be appropriate in one case, may not be in another. So long as the

need for care, when the trial judge thinks it exists, is clearly brought home to the jury, I think the words chosen ought to be left to the discretion of the trial judge. When the trial judge does bring home to the jury that the evidence of a particular witness should be approached with special care, it seems to me that an appellate court should be hesitant to interfere with the manner in which the trial judge has done so."

Counsel for the Crown suggests that Chief Justice Glube faced a similar situation to the trial judge in the **Bevan** case and that she properly exercised her discretion to deal with the evidence without any formal warning about the danger to rely upon the witness Pyke. Her charge as a whole was fair to the appellant and no objection was taken to that charge during the trial.

When looking at the judge's charge to the jury as a whole more than adequate instructions were given on the presumption of innocence, the burden of proof and the meaning of reasonable doubt. She advised the jurors of their duty as judges of the facts and that they must weigh all of the evidence and determine the credibility and truthfulness of the various witnesses. After explaining some of the normal aspects of witness testimony she suggested they should also consider whether the witness has any interest in the outcome of the trial or any motive for either favouring or injuring the accused. They must look to see whether the witness's testimony is reasonable and consistent within itself and whether it is consistent with the testimony of other witnesses. She advised them that they may accept some part of a witness's evidence and reject other parts or reject all of it. She then said:

" Use your everyday common sense and your everyday experience in judging people and what they have to say to you. If you have a reasonable doubt as to the accuracy of the evidence given by the witness, or to the weight you should give to such evidence, you must give the benefit of the doubt to the accused and not to the Crown."

Regarding the evidence of Joey Pyke the trial judge pointed out that there had been some differences between his videotaped statements and his evidence at trial regarding the purpose of the

utility knife that was found in his apartment. The trial judge then said:

- " It is for you to decide therefore, first of all, whether or not there was a contradiction between their testimony in court and their earlier statement, and if there was, what, if any effect does that have on the witness's credibility."

The trial judge further discussed Mr. Pyke's evidence by saying:

- " Mr. Pyke acknowledged that he had a criminal record and that his last conviction was last year or a year and a half ago. It wasn't exact, but it was for break and enter and then you heard in cross examination Mr. Nicholson brought out that he has been charged for double-doctoring. I guess, as he put it. But apparently for this previous break and enter he received a three year probation and a day in jail.

The fact that a person has been convicted of a crime maybe considered by you for only one purpose, namely, in judging the credibility or truthfulness of the witness. The fact of a criminal record does not necessarily destroy or impair his credibility. It is simply one of the factors to take into consideration in weighing his testimony."

Chief Justice Glube referred at length to the statements of Greg Pittman that were made to the police and instructed them that they were entitled to believe all, some or none of the information contained therein. She also referred to the part of his statements where he claimed that Joey Pyke had committed the killing and denied any part in the offence himself. She then said:

- " Some of Mr. Pittman's statements are exculpatory in that, as I said, he denies committing the offence and in one he says he was present but took no part in the killing. This of course is evidence in favour of the accused, and you need not be satisfied beyond a reasonable doubt that Mr. Pittman said this, or that it is true. If the evidence indicates Mr. Pittman could have said this, and it is reasonable to believe that it could be true, then it may raise a reasonable doubt in your mind in favour of Mr. Pittman. I want to emphasize that it is up to you to decide how much weight or importance, if any, you should give to the statements or any part of them, if you decide the statements were made and that they are true. So it is totally for you to decide what you believe and what you disbelieve."

The trial judge reviewed the elements of the offence necessary to be proven by the Crown beyond a reasonable doubt in order to convict the appellant and then went on to say:

" However, in this case the main issue before you is whether or not Mr. Pittman was the offender. Mr. Pyke said he was, that he was there and that he saw Mr. Pittman do the stabbing. You got the statement of Mr. Pittman where he denied, and seen the statements as well, where he denied any participation and then in his September statement he said Mr. Pyke did it, but that he himself took the knife upstairs and washed it to wash off the blood and the fingerprints, because the knife belonged to him."

Chief Justice Glube then reviewed the evidence of all of the witnesses and with regard to that of Joey Pyke said as follows:

" Joey Pyke said after he returned from the hospital that evening he went upstairs with Greg and Johna Pittman and that Debbie arrived later, and although Mr. Pyke described his condition after returning as pretty fair, he then said he took some pills, he had some drinks and then he finished off some more pills, that Debbie went down first around midnight, and he said she was asleep when he went down and that he fell and he pulled himself up by the bedrail and then Greg came down, first sat in the chair staring straight ahead and then putting his hand behind his back pulled out a filleting knife and went over and started stabbing Debbie. According to Mr. Pyke, Greg said nothing until it was over and then he was alleged to have said, "that is one rat down and anyone that says anything will be the next one down to get it." Mr. Pyke said he went to the body and closed her eyes and touched her on the chest and put his ear down to see if she was breathing. We know that Mr. Pyke, he acknowledged it himself, is an alcoholic and we know he also abuses prescription pills. He told us earlier Greg Pittman was blaming Miss Neary and Puffa Burke for stealing some of Mr. Pittman's prescription drugs."

The trial judge referred to the evidence of Dan Joe Pittman claiming that Greg had confessed to the murder over the phone to him in California but also pointed out the difficulty with the timing of this telephone call.

Finally, in dealing with the evidence, the trial judge states:

" The Defence says that there isn't evidence to convict Mr. Pittman, that what the Crown has presented to you is not logical, that Mr. Pyke's evidence, I should say that the Crown's presentation of Mr. Pyke's evidence, that Mr. Pyke's evidence is not logical, that he has a very selective memory, and that he is the one that was covered with blood and that he eh, it is not logical that he just followed Mr. Pittman upstairs and Mr. Pittman had just done what he claims he has

done. The Defence says that you are being asked to convict Mr. Pittman on Joey Pyke's evidence and that you should look very carefully at his evidence.

The defence further says to you that the phone call allegedly made by someone who sounded like Greg to his brother, was really the thing that triggered the charge being laid, and in fact, it turned out that wasn't evidence of a confession to a murder because it occurred before any murder had occurred."

In my opinion the trial judge properly exercised her discretion in the manner in which she directed the jury in this case. It would have been obvious to anyone that Joey Pyke might have been the murderer or could have been an accomplice and was certainly an admitted alcoholic. Common sense dictates that such a witness would have to be looked at very carefully before his testimony was accepted as true. Warning a jury to this effect would have accomplished nothing. It might, on the other hand, have required the trial judge to select certain parts of the evidence and tell the jury that they could be confirmatory of Joey Pyke's testimony. This emphasis could have been to the detriment of the accused.

After reviewing the evidence and the addresses of counsel and the judge's charge I am satisfied that the jurors were able to consider fairly whether it was Greg Pittman or Joey Pyke who committed this offence. The entire emphasis of the Crown was to the effect that Pittman was the principal perpetrator of the crime and he was not being portrayed as a party under **s. 21** of the **Criminal Code**. The jurors were told by the trial judge that they must find that Greg Pittman did, in fact, commit the killing before they could find him guilty of any offence.

I am satisfied that on a reading of the trial judge's charge to the jury as a whole no error was committed by her failure to give a so-called **Vetrovec** caution and I would therefore dismiss the first ground of appeal.

I would point out that a similar conclusion was reached by this court in **R. v. Pepin** (1990), 98 N.S.R. (2d) 238. In that appeal Matthews, J.A., speaking for the court, concluded that

a **Vetrovec** caution was unnecessary where a drug trafficker was convicted partly on the evidence of three accomplices. He reached the conclusion that the trial judge was correct in simply reviewing the evidence in detail and showing that there was sufficient evidence to justify the conviction.

Ground No. 2

" That the learned Trial Judge erred in law when she permitted the jury to re-hear only part of the taped evidence before the court."

In my opinion there is no merit to this ground of appeal. The audio tape of the last conversation between Greg Pittman and his sister was replayed at the request of the jury. Obviously the jury wanted to be certain of exactly what had been said before reaching their verdict. There was no cross-examination of the persons participating in the conversation which could in any way limit or alter the meaning of the words which they had used and the general rule requiring the full examination and cross-examination of a witness to be replayed does not apply in this case.

I would reject this ground of appeal.

Ground No. 3

" That the Learned Trial Judge erred in law when she permitted the Crown Attorney to speculate and suggest inferences to be drawn by the Jury when there was no evidence upon which such speculation or inferences could be based."

Counsel for the appellant suggests that the closing address of the Crown attorney was inflammatory. He bases this conclusion on the fact that Crown counsel speculated on the reasons why the appellant would not admit that he was the killer. The appellant also complains of the Crown's suggestion that the appellant's offer to take a polygraph test during his videotaped statement did not necessarily prove his innocence but could have been revoked if the test had, in fact, been offered and further objects to the fact that the Crown suggested different explanations for no blood being found on the appellant or his clothing. Finally, when discussing the call to the appellant's brother the Crown suggested that if the call had been made prior to the killing that it was proof of

what was on the appellant's mind at the time.

Counsel for the respondent says that there was nothing unfair in the closing address of the Crown attorney. I agree. He was simply suggesting to the jury the way in which they might properly assess the rather unusual evidence before them. There were what have been called "glitches" in the evidence; that is, the unexplained pool of blood, the timing of the telephone confession and the fact that the appellant had never in any of the taped conversations admitted guilt. It was necessary for the Crown to try to explain away these inconsistencies and persuade the jury to concentrate on the direct evidence of Joey Pyke and the statements and conversations of the accused when considering their verdict.

I would reject this third ground of appeal.

Ground No. 4

" That the Jury erred in law in that the verdict of guilty was premised on a piece of wiretap evidence which is founded in hearsay and other inadmissible evidence contrary to the directions of the Learned Trial Judge."

The appellant has taken no objection to the admission of the various statements made by himself or to the admission of the wiretap evidence. In fact, defence counsel encouraged the Crown to present this evidence before the court.

Nor has the appellant taken any objection to the caution given by the trial judge to the effect that statements made by persons other than the appellant in these taped conversations were not evidence save to the extent that the appellant adopted them as his own. The only real objection appears to be that the jury in relying upon the last taped telephone conversation between the appellant and his sister may have disregarded the trial judge's instructions and treated the sister's statements as evidence of the truth.

The respondent denies this allegation and points out that the jury could well have relied upon the appellant's emotional reaction to the fact that the police did interview his brother Dan Joe.

His realization of this followed by the statement made repeatedly "I'm fucked" amounted to a consciousness of guilt and was a perfectly justifiable conclusion for the jury to reach.

In my opinion it is pure speculation to assume that the jury disregarded the instructions of the trial judge as to the proper use of the evidence relating to telephone conversations. I would therefore reject this ground of appeal.

Ground No. 5

" That the verdict was perverse in light of the evidence before the Court."

The **Criminal Code** provides in **s. 686(1)(a)(i)** that a court of appeal may allow an appeal against conviction where the court is of opinion that "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence".

The proper interpretation of this subsection requires the court to go beyond considering merely whether there is some evidence supporting the verdict. In **Yebe v. R.**, (1987) 36 C.C.C. (3d) 417 McIntyre speaking for the Supreme Court of Canada at p. 430 said:

" The function of the Court of Appeal, under s. 613(1)(a)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."

Under this ground of appeal the appellant points out the various weaknesses of the Crown's case and the several glitches in the evidence and suggests that the verdict should be set aside. What the appellant has failed to emphasize however is that the verdict had to be based upon whether the jury believed Greg Pittman or Joey Pyke. Although credibility is one of the matters to be looked at under the **Yebe** formula an appeal court must be cautious in that regard. In **R. v. R.W.**,

(1992) 137 N.R. 214 Madam Justice McLachlin of the Supreme Court of Canada speaking for the unanimous court stated at p. 224:

" It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must reexamine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: **White v. The King**, [1947] S.C.R. 268, at p. 272; **R. v. S.H.M.**, [1989] 2 S.C.R. 446; 100 N.R. 1; 100 A.R. 321; 50 C.C.C. (3d) 503, at pp. 465-466. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable."

In my opinion the jury was free to accept the evidence of Joey Pyke in preference to that of the appellant and after considering all of the evidence to conclude that Greg Pittman was guilty as charged. In addition to the evidence of Joey Pyke there was the confession to the appellant's brother, the fact that the appellant had several motives and the change in the appellant's story as given to the police. In fact, the evidence against the appellant could be classified as substantial.

In my view the conviction of the appellant was not only reasonable but was amply supported by the evidence in accordance with the **Yebe**s test and I would therefore reject this ground of appeal.

Ground No. 6

" That the sentence imposed by the Learned Trial Judge was excessive."

In my opinion this ground is without merit as nothing has been shown to indicate in any way that the trial judge improperly exercised her discretion in determining the 15 year period of ineligibility for parole. I would reject this ground.

Ground No. 7

" Such other grounds as may appear upon receipt of the transcript."

The appellant, under this ground, has added that the learned trial judge erred in law when she instructed the jury "to find Mr. Pittman guilty of manslaughter the Crown must satisfy you beyond a reasonable doubt either that Mr. Pittman was so drunk that he could not form the intent or that there was provocation as I have described it to you."

The appellant argues that based on this instruction the appellant was deprived of any possibility of a manslaughter verdict as the Crown's position had been that the appellant was neither drunk nor provoked.

When reviewing the judge's charge as a whole it can be seen that she thoroughly directed the jury on the question of intent necessary to constitute the offence of murder. She then said:

" And there are some ways in which a person who might be guilty of murder may not be guilty of murder because they fail to have the intent, which I have described for you. So we have to look at manslaughter and we have to look at things that might change a murder conviction to a manslaughter conviction.

Loss of self-control or irresistible impulse caused by voluntarily induced intoxication, in other words, drinking, because you chose to drink, is not a defence to a criminal charge in Canada, but in the case of second degree murder we have to look at whether or not Mr. Pittman was under the influence of alcohol and/or drugs, to such an extent that he might not be capable of having the intent for murder."

Chief Justice Glube then reviewed the evidence on drinking on behalf of the appellant and stated further:

" If you find on the evidence before you that Mr. Pittman was so drunk or intoxicated that he was incapable of forming the intent to cause

Miss Neary's death or to cause her the bodily harm as I have defined it, then obviously he could not in fact have had the necessary intent and you may not convict him of murder. If you find Mr. Pittman was capable of forming the intent, you cannot convict unless you are satisfied that he did in fact have the intent, because of course a person could have the capacity without the intent. If the accused, Mr. Pittman, had the capacity to form the requisite intent and had such intent, it is no defence that he acted in the way that he did because of drink or that he would not have acted in that way had he been sober. A man may be drunk or intoxicated or be on drugs to a high degree and yet be able to form the intent to act as he does act. The fact that his mind was so affected by drink that he more readily gave away to some violent passion or to temptation or that he was more inclined to pick up the knife, provides no defence if he had the intent necessary for murder. As I have already mentioned you must take into account all the surrounding circumstances in deciding whether the accused had the requisite intent for murder.

You must first of all, of course, as I've said earlier on but not to forget it, the key thing of course is to find that it was Mr. Pittman who was involved. Because if you find it was not Mr. Pittman involved, then of course he can't be found guilty of anything. All these remarks are made to you dealing with intent on the assumption that you have concluded that it was Mr. Pittman who was involved. . . .

Do recall again what I said about the burden of proof it rests upon the Crown and there is no burden on the accused to prove that he was drunk. The burden is on the Crown to prove if they want to have a conviction for murder that he did it and that he was not drunk so that he lost the intent."

The trial judge then dealt with the concept of provocation in the same thorough manner with which she had directed the jury that they may reduce murder to manslaughter when talking about drunkenness. In summary, the trial judge said:

" I just want to briefly explain to you what manslaughter is so that I am sure you will understand it. If you find that Miss Neary died as a result of an unlawful act and the unlawful act was committed by Mr. Pittman, that you are not satisfied that he had the necessary intent for murder, as I previously described it to you, then you may find him guilty of manslaughter. Murder is an intentional killing, manslaughter is unintentional killing resulting from an unlawful act. To find a verdict of manslaughter, the Crown does not have to prove the intention to kill or cause bodily harm of a nature I described to you under murder. To find Mr. Pittman guilty of manslaughter, the Crown must satisfy you beyond a reasonable doubt, either that Mr.

Pittman was so drunk that he couldn't form the intent or that there was provocation as I have described it to you, that Mr. Pittman unlawfully assaulted Miss Neary with a knife and that would be the unlawful act.

"A person commits manslaughter when he causes the death of another by an unlawful act even though he did not intend to cause death or bodily harm that he knew was likely to cause death."

If the Crown has proven his guilt beyond a reasonable doubt, then of course you must convict him of manslaughter. If the Crown has failed to prove murder or manslaughter against the accused, in other words if you find that Mr. Pittman was not the person who committed these acts against Miss Neary, you must acquit him.

I've dealt separately with the evidence of drunkenness or intoxication from drugs and I've dealt separately with provocation, but I just want to remind you that you must consider all the facts surrounding the killing, that may have any bearing on the intent of the accused in deciding whether you are satisfied beyond a reasonable doubt that he had the necessary intent for murder. Even if the evidence of drunkenness by itself does not by itself give rise to a reasonable doubt, that the accused had the requisite intent for murder, and you are satisfied that the accused did not act in provocation, as I have defined it to you, you may find, when you consider together the evidence on drunkenness and provocation along with any other evidence that bears on the intention of the accused, that you have a reasonable doubt that he had the requisite intent for murder at the time the killing occurred. So you have to give consideration to the accumulative effect of the evidence and make your decision on whether or not the accused had the intention necessary for murder or he did not have the intention necessary for murder and it then becomes manslaughter."

I am satisfied that the reference in the judge's charge to the Crown satisfying the jury that Mr. Pittman was so drunk that he could not form the intent for murder or that there was provocation in order to justify a finding of manslaughter when considered in its proper context is merely a reference to the fact that the Crown had presented all of the evidence and the jury could only find manslaughter if from that evidence they concluded that the necessary intent had been negated. It does not, in my opinion, refer to any burden of proof lying on the Crown to establish drunkenness or provocation. I would reject this ground of appeal.

In summary, I would dismiss the appeal against conviction and the appeal against sentence.

J.A.

Concurred in:

Clarke C.J.N.S.

JONES, J.A.: (Dissenting)

The appellant was convicted on a charge of second degree murder. The charge arose out of the stabbing death of Debra Neary on August 13, 1990 at Glace Bay.

On August 13, 1990, Constables McKinnon and MacKenzie of the Glace Bay Police Department answered a call at 1:18 a.m. to go to 3 Newton Street in the town. They were met by the appellant's wife Johna Pittman. The house consisted of two apartments, one upstairs occupied by the Pittmans and one downstairs occupied by Joseph Pyke. They found the deceased lying on a sofa bed in the Pyke apartment. The deceased had been staying at the upstairs apartment with David Burke. Following a dispute Burke had moved out and the deceased moved downstairs a few days before her death as she had no place to stay. Apart from Johna Pittman these persons were alcoholics and in addition imbibed in prescription drugs some of which were prescribed. Joseph

Pyke testified that there was a cookie jar full of pills in the Pittman apartment. The parties had been on a binge for several days before the killing.

Dr. Khalsa, the medical examiner arrived at the scene at 2:00 a.m. The deceased had been the victim of numerous stab wounds including a gapping wound in the neck. In his opinion the time of death was between 11:30 p.m. and 12:30 a.m. The deceased's blood contained 60 milligrams of ethyl alcohol per 100 millilitres of blood.

There was a large pool of fresh blood under the fold-away sofa bed which matched the deceased's blood. There was no evidence that the blood seeped through the mattress and the only explanation offered was that the deceased was on the floor at some point during the murder. A knife was found on the top of the toilet bowl in the upstairs apartment. Defence agreed that this knife could have been the murder weapon. There was no blood on the knife. A t-shirt and pants were found in a bag behind the residence. There was evidence that these items were the deceased's and contained blood which matched her blood.

Corporal Trickett took a statement from the appellant in the upstairs apartment at 4:18 a.m. This was the first of several statements given by the appellant. In the statement he related that he was drinking in his apartment with the deceased and Joey between 7 and 11 p.m. on the 12th and that Joey and Debbie then went downstairs. His wife went down to check on them at 11:30 and came back and reported that "Debbie is down there in a mess of blood". He told her to phone the police and an ambulance. Joey came up right behind her. The appellant then went to bed. In his statement he gave details of the drinking.

Gregory MacDonald, a taxi driver testified on the trial that he picked the appellant up at 3 Newton Street at 11:00 p.m. on August 12 and drove him to White's store. The appellant came out of the store and MacDonald drove him back home arriving about 11:30. He stated he thought the appellant was wearing jogging pants and shoes and a striped shirt. He stated that the appellant was having a few but was not drunk. The description of the clothing did not match the clothes being

worn by the appellant after the murder.

Samuel Scott, a taxi driver stated that he picked the deceased up at 3 Newton Street on Sunday the 14th and drove her to the Community Hospital around 5 p.m. Sunday in fact was the 12th. She was holding her arm and had a cut between her fingers.

Patrick MacDonald drove the deceased from the hospital at 9:35 on Sunday back to 3 Newton Street. She had no shoes or socks on her feet. The day before he had her as a passenger and she had blacked out and had to be carried into the apartment.

Dr. Rajoraman treated the deceased at the Community Hospital at 7 p.m. on the 12th of August. She had a laceration between her second and third fingers on her left hand. She had abrasions on her right forearm and lower back. The wound to the hand was caused by a knife or sharp object. The injury to the hand had been caused at least eight hours before his examination. He described the deceased as sober. She was discharged at 9:45 p.m.

At 4:05 a.m. on August 13, Constable Martell arrested Joseph Pyke in the Pittman apartment for the murder. He was extremely intoxicated and could barely stand. His speech was slurred and the officer could not understand what he was saying. His hands were covered in blood. There was blood on his clothing. The blood on his hands and clothes matched that of the deceased. During an interview on the afternoon or evening of the 13th Pyke was still pretty well under the weather.

The appellant was arrested apparently after Pyke. At 7:12 a.m. he was at the detachment office where he remained until later that night when he was released at 2 a.m. On August 13 the appellant gave three videotaped statements to the police. The statements were exculpatory. There was evidence in the statements of an altercation on the night of the murder between the parties as to whether the appellant was intimate with the deceased which was denied by the appellant and the deceased. There were also accusations that the deceased was stealing the appellant's pills. The appellant denied knowing how the deceased got stabbed in the hand. The appellant was wearing

a plaid shirt, rubber boots and sweatpants on August 13. The clothing was seized. There was no blood on the pants or boots. There was blood on the shirt which could not be identified.

On September 12, 1990, the appellant gave a statement to the R.C.M. Police. The statement is set out in Mr. Justice Hart's decision. In that statement the appellant admits that he went downstairs with Pyke and the deceased. He then alleges that it was Pyke who stabbed the deceased and describes the scene in detail. He acknowledged that the knife was his and that he took it upstairs and washed it in the sink to remove the blood stains and any fingerprints. He also recounted how Pyke broke the window in the apartment the night before and apparently tried to stab the deceased.

Joseph Pyke testified for the Crown. He is single. He is epileptic. At the time of the offence he was taking pain killers, nerve pills and seizure pills. He acknowledged that he is an alcoholic and at the time was on a bender. When asked for how long he replied "God knows really". The deceased had been staying with him for three or four days. They slept on the fold-up bed. The appellant and the deceased had arguments over pills being stolen. Pyke could not recall how the deceased received the injury to her hand. Counsel for the Crown had stated earlier that Pyke would testify that Pittman had caused the injury. Pyke saw the injury at the hospital. He could not even recall how he got there. He did not recognize the knife which was found in the brook.

Pyke testified as follows:

"Q. When had you suffered that injury to your lip in relation to the night that Debbie died?

A. I am not sure, not sure.

Q. Okay in any event you went up to the hospital about your lip and then you came back to the Pittman apartment and you were telling us about having taking...

A. Two may be three tuinal.

Q. Tuinal?

A. Tuinal yeah because I had ten.

Q. Okay so take it from there.

A. We all had a few drinks and apparently Debbie must have come in...

Q. No don't tell us apparently, just what you know.

A. All right Debbie came in as far as I...see I can't say as far as I know. Debbie came in.

Q. Did you see Debbie in the Pittman's apartment that night?

A. I don't know.

Q. You don't know?

A. No but I took the eh, we had some drinks, so I finished off the tuinal...

Q. Who had some drinks with you?

A. I swore I know Debbie was up in the apartment because she went downstairs first, she was asleep on the bed. I went down, I was after taking another seven tuinal and I said I had better get down to bed before I take all the stairs, one at a time, you know, plump, plump, plump.

Q. Now you went from Pittman's apartment down to your own?

A. Yes.

Q. Now who was left in the Pittman apartment when you went downstairs?

A. Mr. Pittman and his wife.

Q. When you got down to your own apartment, can you tell us about what time it would have been roughly when you went downstairs?

A. It had to be around midnight anyway, somewhere around there.

Q. Okay so when you got down to your apartment downstairs, who was down there?

A. Debbie Neary.

Q. And where was she in your apartment when you got downstairs?

A. She was over the far end of the bed sleeping.

Q. Which bed now, in what room?

A. The big bed, like the pull-out bed.

Q. In what room?

A. In the big room with the big windows in it.

Q. Was she awake or asleep when you got down there?

A. She was asleep.

Q. She was asleep?

A. Or she was pretending she was asleep one or the other, I don't know, she was, you know.

Q. Now did she have her clothes on or was she undressed?

A. Yes she had her clothes on.

Q. Do you remember what she had on?

A. No I fell down.

Q. Pardon me.

A. I fell down, downstairs.

Q. I see, when did you fall down?

A. I fell down coming into the bedroom, well I fell down right there.

Q. Um-hum.

A. I fell on my hands and my knees and that, my face was down, but I pulled myself up.

Q. What were you pulling yourself up on?

A. That queer thing on the side, do you see the picture of the bed there.

Q. Okay I will show you that and may be you can...

A. Because I crawled over to that.

Q. Okay I am showing you Photograph No. 7, can you show us in Photograph No. 7.

A. I had a hold of this thing here, right here.

Q. Okay just stop here, because I want the judge and the jury to see what you are point to. What were you pulling on?

A. This thing here.

Q. You are indicating like an iron bar at the right hand bottom corner at the bed.

A. Like the round thing, I had a hold of it right about here, approximately right about here.

Q. All right, just point there for the judge.

A. Approximately right around here. It was up from the bottom see.

Q. Okay so you are pulling yourself up on that, and you say, you already said that Debbie was either asleep or pretending she was asleep.

A. Well to me she seemed very much asleep.

Q. Now I asked you whether she was dressed and I also asked you whether she was covered up. Did she have covers over her?

A. No she had her clothes on.

Q. Okay and how was she positioned on the bed was she crossways on the bed or...

A. She was a little ways over that way eh, crossed over, but not you know, not as much as it shows in that picture.

Q. What about her feet, were her feet up on the bed or over the bed?

A. I'm not sure, I can't remember noticing it eh, because I wasn't noticing it eh.

Q. When you went...

A. I was just trying to get up on the bed at the time.

Q. Yeah now at that time, can you just picture in you mind and tell us whether there were any lights on then?

A. There must have been lights on.

Q. Why do you say that?

A. Because I could see.

Q. So as you are pulling yourself up as you describe, what happens next?

A. I am pulling myself up, I am getting up, it is taking me a while and Mr. Pittman comes down and sits in the armchair that is in the picture there.

Q. Okay let me stop you there, because I want you to show the jury what chair Mr. Pittman sat in. Can you see it there?

A. Yes this one right here.

Q. Now you are pointing to the printed chair in the lower left corner of Photograph No. 8?

A. Right.

Q. So when he sits in that chair, how is he facing in relation to the bed?

A. He is facing like, just towards this way, like you know."

He went on to describe how the appellant stabbed the deceased. He denied he took any part in the killing. After the killing Pyke went upstairs. To do so he went out the side door, along the side of the house and entered the upstairs apartment by the front door. Pyke lay on the chesterfield where he remained until the police arrived. Mrs. Pittman called the police. He did not know if the appellant changed his clothes. Pyke had an injury to his right shoulder. He could not recall how he got it. He could not explain how he got the blood on his hands. Pyke also testified as follows:

"Q. Okay now my question was, regarding discussion about what was going to be said to the police. When did you say that discussion took place?

A. Before Deborah Neary was stabbed he said he was going to get her and Puffa and I was...they were going to say that I was letting on I was sleeping up on the couch when he got her down there. Puffa was after taking off I guess, see. But I don't with that see. (sic)

Q. What do you mean you done away with that?

A. I went down.

Q. So that conversation did that take place that night or some other night?

A. That took place it was either that night or the night before. Probably the night before, now it all depends see. There was a lot of confusion going on here."

Pyke could not recall how the blood got on the floor under the bed. He said that Pittman was going to get Debbie and Burke because they knew he broke into the Black Diamond Pharmacy.

In cross-examination Pyke stated:

"Q. Now what you are telling us Mr. Pyke is that you were barely able to get downstairs because your legs were going...

A. No no, they were going, you know, but as long as I had something to hold onto eh, you know. It takes about 15 and 20 minutes you know to head for where you are going to stay. I know from experience. I will tell you why, because I have been taking them for so many years, that is why. I know when to head, if I don't head I am going to have to stay where I am.

Q. And you fall down and cut your lip, that is what happened before?

A. That is what happened before, or fall downstairs.

Q. But by the time you got down to your apartment your legs were completely gone then you were crawling, you fell down in the doorway and you crawled over to the bed?

A. They went, I don't know if I tripped over something or nothing, there was no light out in that kitchen eh, down I went, pulling on the thing.

Q. The pills were really starting to take effect then?

A. The pills were starting, I was feeling good, yeah. Yeah.

Q. Okay, And when you got to the bed you couldn't even stand up to get into the bed, you had to drag on the bed. I was like you were paralyzed from the waist down. You had to drag yourself kind of up in the bed?

A. I was dragging myself up partly and partly trying to push me feet up."

Daniel Joseph Pittman testified that the appellant called him on August 12th at 2:57 Sydney time and stated that he had killed a girl. He had cut her throat because she was going to spread that he broke into the Black Diamond Pharmacy. Daniel Pittman was positive that the call was made on Sunday. Crown counsel on the trial conceded that the call was made before the murder. All the calls on Sunday were made before 11:30 p.m. Between 11 and 11:30 the appellant was in a taxi. From 1 to 6 p.m. on the 12th the appellant was in jail. The following day he was in the police detachment. There is no explanation in the evidence as to the reason for the number of calls on August 12 to Daniel Pittman. On August 13 Johna Pittman called Daniel at 6:30 in the morning.

The police obtained authorization for electronic surveillance of the Pittman premises on August 16, 1990. The Crown introduced a number of the resulting tapes on the trial. The main conversations are set out in the decision of Mr. Justice Hart. There are statements in the tapes which constituted admissions by the appellant. Generally the appellant denied he stabbed the deceased.

In his first ground of appeal the appellant contends:

"(1) That the Learned Trial Judge erred in law in that she failed to properly warn the Jury regarding the dangers inherent in accepting the evidence given by Joseph Pyke."

The appellant argued that Joseph Pyke was a prime suspect in this case and that there was evidence that he was implicated in the commission of the offence and therefore the jury should have been warned regarding the dangers inherent in accepting Pyke's evidence.

In her address to the jury the learned trial judge stated at p. 506:

"In this case there is evidence that Miss Neary was killed at 3 Newton Street in Glace Bay, on or about the 13th day of August, 1990, death was caused by a knife and repeated stabbing. From the autopsy evidence and the photographs it appears possibly that who ever stabbed Miss Neary did so a number of times, that it would appear the person might be considered to have meant to cause her death, or meant to cause her bodily harm, that the person knew was likely to cause her death and was reckless whether death ensued or not, but I shall deal with intent more in a moment.

However, in this case the main issue before you is whether or not Mr. Pittman was the offender. Mr. Pyke said he was, that he was there and that he saw Mr. Pittman do the stabbing. You got the statement of Mr. Pittman where he denied, and seen the statements as well, where he denied any participation and then in his September statement he said Mr. Pyke did it, but that he himself took the knife upstairs and washed it to wash off the blood and the fingerprints, because the knife belonged to him."

She continued at p. 508:

"Joey Pyke said after he returned from the hospital that evening he went upstairs with Greg and Johna Pittman and that Debbie arrived later, and although Mr. Pyke described his condition after returning as pretty fair, he then said he took some pills, he had some drinks and then he finished off some more pills, that Debbie went down first around midnight, and he said she was asleep when he went down and that he fell and he pulled himself up by the bedrail and then Greg came down, first sat in the chair staring straight ahead and then putting his hand behind his back pulled out a filleting knife and went over and started stabbing Debbie. According to Mr. Pyke, Greg said nothing until it was over and then he was alleged to have said, 'that is one rat down and anyone that says anything will be the next one down to get it.' Mr. Pyke said he went to the body and closed her eyes and touched her on the chest and put his ear down to see if she was breathing. We know that Mr. Pyke, he acknowledged it himself, is an alcoholic and we know he also abuses prescription pills. He told us earlier Greg Pittman was blaming Miss Neary and Puffa Burke for stealing some of Mr. Pittman's prescription drugs.

As to intent, you are entitled as a matter of common sense to draw an inference that a sane and sober person intends the natural and probable consequences of his voluntary acts. If you decide that Mr. Pittman did the unlawful act and that Miss Neary's death would be a natural consequence of those actions, you are entitled to conclude that Mr. Pittman intended to kill Miss Neary. However, you are not required to make this conclusion. You may decide that Mr. Pittman did not intend to kill Miss Neary even though her death was the natural consequence of his action."

At p. 515 she stated:

"The Crown and the Defence gave very thorough addresses to you this morning and as a result I don't intend to try to summarize everything that they said to you, but essentially the Crown says look at all of the evidence, put it all together, look at the fact that Mr. Pittman first denies that he was present and then changes his mind and says yes he was present, but he didn't do it. The Crown says he wasn't that drunk. The taxi driver and others testified as to his state

when they saw him, including the police officer, and that he formed the intent and committed the murder. That you should accept the evidence of Joey Pyke, that his evidence is believable and that you should convict him of second degree murder as he is charged. The Crown points out that it is not your function to decide what, if any, involvement Joey had but rather it is only to deal with Mr. Pittman.

You've heard the Crown's explanation to you about what they consider to be, perhaps some pitfalls in the evidence or glitches in the evidence about the blood under the bed and the telephone call to his brother. But eh all in all the Crown says you should put it all together and you should find that the accused is guilty as charged.

The Defence says that there isn't evidence to convict Mr. Pittman, that what the Crown has presented to you is not logical, that Mr. Pyke's evidence, I should say that the Crown's presentation of Mr. Pyke's evidence, that Mr. Pyke's evidence is not logical, that he has a very selective memory, and that he is the one that was covered with blood and that he eh, it is not logical that he just followed Mr. Pittman upstairs and Mr. Pittman had just done what he claims he has done. The Defence says that you are being asked to convict Mr. Pittman on Joey Pyke's evidence and that you should look very carefully at his evidence.

The Defence further says to you that the phone call allegedly made by someone who sounded like Greg to his brother, was really the thing that triggered the charge being laid, and in fact, it turned out that wasn't evidence of a confession to a murder because it occurred before any murder had occurred. Mr. Pittman didn't have to, that he gave a statement placing himself at the scene of the murder in order to identify who committed the murder. That he had kept silent about this up to that time and certainly didn't have to give that statement.

The Defence also says to you that listening to the tapes which have been presented to you, the fact that there are 4 1/2 months of tapes altogether, and throughout that period at no time did Mr. Pittman actually acknowledge that he had committed the murder and that you should accept that he in fact did not commit murder, and you should acquit him."

It was the theory of the Crown that the appellant stabbed the deceased to death. To sustain that theory the Crown had to rely on the evidence of Joseph Pyke. Joseph Pyke's evidence was unreliable for three reasons, first he was highly intoxicated at the time of the offence, second there was evidence that he was implicated and third the obvious weaknesses in his evidence.

At the time of the offence Pyke had been drinking for some time and in addition imbibing

drugs. He could not remember events that occurred on that Sunday. He was extremely intoxicated after the offence. He could not recall events that occurred on Saturday or the injuries to his own person or to the deceased. As to Pyke's participation in the offence he acknowledged that he was present. The deceased's blood was on his clothes and his hands. There were the statements of the appellant that he was involved. He admitted that he had some conversation with the appellant in which Pittman stated that he was going to get rid of her. He could not explain the events that occurred in his apartment on the 12th when Debbie was stabbed and the window was broken. The knife referred to by Pittman was found in the brook where his wife allegedly disposed of it at Pyke's request. Pyke's evidence was unreliable because he could not explain all of these events. He could not explain the blood on the floor although he claimed to have a clear picture of the stabbing. The blood on the floor was consistent with the deceased being on the floor at some stage of the killing. That is not consistent with his holding onto the bed as he described it. He stated he could not walk yet following the killing he went out of the apartment along the side of the house and upstairs.

In his address to the jury Crown counsel stated at p. 459:

"I suggest to you further that it is not your function here to determine the extent of Joey Pyke's involvement, that may or may not be the duty of some future jury, your job here is strictly to determine whether Greg Pittman was the one who wielded the knife."

The learned trial judge repeated that statement in referring to the position of the Crown. With respect it certainly was the duty of the jury to consider Pyke's involvement in assessing his credibility and who was responsible for the murder. One could conclude from the evidence that both Pittman and Pyke were involved as parties in the stabbing.

In my view it was incumbent on the trial judge not only to warn the jury of the danger of relying on Pyke's evidence but to review the weaknesses in his testimony in placing the position of the defence before the jury. In **Vetrovec v. The Queen** (1982), 67 C.C.C. (2d) 1 Dickson, J. stated at p. 17:

"...It does not, however, always follow that the presiding justice may always simply turn the jury loose upon the evidence without any assisting analysis as to whether or not a prudent finder of fact can find confirmation somewhere in the mass of evidence of the evidence of a witness. Because of the infinite range of circumstances which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness's testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is, in some circumstances, particularly in lengthy trials, the need for helpful direction on the question of sifting the evidence where guilt or innocence might, and probably will, turn on the acceptance or rejection, belief or disbelief, of the evidence of one or more witnesses. All of this applies equally in the case of an accomplice, or a disreputable witness of demonstrated moral lack, as, for example, a witness with a record of perjury."

If ever there was a case requiring a warning this is one. Pyke was arrested in the first instance for the murder and remains a prime suspect. He had ample reason to assist the Crown and blame the appellant to escape his own involvement. The main passage in the learned trial judge charge to the jury relating to Pyke's evidence which I have quoted would lead the jury to believe that they could accept his evidence in the same way as any other witness.

In addition the trial judge had a duty to review Pyke's evidence and its weaknesses in stating the position of the defence. See **Azoulay v. R.**, [1952] 2 S.C.R. 495. While defence counsel took no objection to the charge, in his address to the jury it is clear that he expected that the trial judge would address the issue.

There was substantial evidence in this case which implicated the appellant in the

commission of the offence. He admitted that he was present. The knife was from his apartment and he cleaned it after the stabbing. The statement that Pyke took the knife from him. There was evidence of motive. On the other hand there is no satisfactory explanation of the absence of blood on the appellant. Reading Pyke's evidence in the light of the events after the stabbing does not confirm that the appellant changed his clothes. The appellant made no attempt to get rid of the knife. The statement to the brother may have reference to the events on Saturday night. In any event one cannot say with any assurance what verdict the jury would have rendered if they had rejected the evidence of Pyke. With respect the appellant is entitled to succeed on the first ground of appeal.

It is unnecessary to deal with the other grounds of appeal. I would note that the trial judge left provocation to the jury. I could find no evidence to raise that defence. In that regard I would note that the appellant did not testify.

Reference was made during the argument as to the admissibility of the tapes. The tapes consisted largely of hearsay. Much of the conversation was highly prejudicial and of little probative value. The admissibility of tapes was considered by the Ontario Court of Appeal in **R. v. Pleich** (1980), 55 C.C.C. (3d) 15 and **R. v. Dubois** (1986), 27 C.C.C. (3d) 325. Only that part of the conversation was admissible which was confirmed by the statements of the accused. The appropriate procedure would be to hold a **voir dire** in each case to determine the admissibility of the conversations.

I would allow the appeal, set aside the conviction and sentence and order a new trial.

J.A.