

The Case of DONALD MARSHALL

The Defendant

Except for the fact that his father was Grand Chief of the Mi'kmaq nation, Donald Marshall Jr. was not much different from the other five hundred people living on the Membertou reserve near Sydney, Nova Scotia. Like his peers, the good-looking seventeen-year-old was a product of the alcoholism, poor housing, high unemployment, and petty crime that characterize Canada's reserve system. He and his young friends formed a street gang and were frequently in trouble with the law. Consequently, Marshall was well known to the local police. He was big for his age, and his reputation as a skilled street fighter earned him the respect of rival gangs and the admiration of his peers. Despite the fact that he was destined to become Grand Chief, an honorary position, Donald Marshall Jr. was a man without a future. He had failed two grades in school and had been expelled from school when he was fifteen. Rejected and feared by much of the white population of Sydney, he was denied access to mainstream society and could look only inward, to a life on the reserve. The fact that he was a Mi'kmaq living in a racist society ensured that Donald Marshall Jr. was an angry young man on the margins of Canadian society.

The Crime

On the evening of May 28, 1971, Marshall and his friends set out, as they had often done in the past, for the weekend dance at St. Joseph's Parish Hall in Sydney. Sandy Scale, a young Afro-Canadian, also wanted to attend the dance, but when he found it was sold out he headed for Kings Road, intending to catch a bus home. On the way he met Marshall. They knew each other but were not close friends. Scale told Marshall (known as Junior to his friends) that the dance was sold out and that he was on his way home. Marshall asked Scale if he wanted to make some money. Scale asked him how they could do that. Marshall said they would burn the money from someone or just take it if necessary.¹ Panhandling and mugging were not activities with which Scale was familiar, but he did not oppose the idea.

Looking for victims, the two youths strolled through Wentworth Park, crossed a footbridge and headed up the rise toward Crescent Street. It was here that they encountered Roy Newman Ebsary and Jimmy MacNeil. Of all the people whom they could have met during this quest for easy money, few could have been more dangerous than Roy Ebsary.

MacNeil and Ebsary made an unusual pair. Ebsary was a tiny fifty-nine year-old with a twisted and knotted goatee that matched his straggly white hair. MacNeil was an awkward, inarticulate twenty-five-year-old who seemed mesmerized by Ebsary's storytelling and his swashbuckling manner. The two did not know Ebsary well viewed him as a simple-minded eccentric who draped a tattered blue Burberry over his shoulders and wore fake war medals on his chest. He spent much of his time frequenting the bars of Sydney and regaling anyone who would listen with imaginary stories of his wartime exploits. He was fond of telling how he was decorated for his role in the sinking of the Bismarck. As Donald Marshall Jr. and Sandy Scale were to discover, however, Roy Ebsary was not the harmless old alcoholic he appeared. The man was an dark side to this aging little man that was soon to manifest itself in violent rage that would take the life of Sandy Scale and rob Donald Marshall of his youth.

Marshall and Scale hinted to Ebsary and MacNeil that they were broke. Ebsary ignored the hint but invited the boys back to his place for a drink. An invitation they declined. The conversation was interrupted when two old acquaintances, twenty-year-old Terry Gushue and fourteen-year-old Patricia Harris, walked by. Gushue, who was quite drunk, asked Marshall for a light. Marshall left Scale with Ebsary and MacNeil and gave Gushue a light. When Harris, intrigued by Ebsary's unusual appearance, asked what the two men were, Marshall simply said, "They're crazy."

As Gushue and Harris left, Marshall turned to find that Ebsary and MacNeil were also leaving. Marshall called them back, suggesting more forcefully that he and Scale wanted some money. Marshall grabbed MacNeil, who appeared to be the stronger of the two, in hopes that Ebsary would hand over some cash to Scale. This, as it turned out, was a fatal error in judgment. Ebsary had been mugged in the park several times before and had vowed that the next person who accosted him "would die in his tracks" (Harris 1986: 4). Barry Donham 1989: 54). In a matter of seconds Ebsary stabbed Scale in the stomach and slashed Marshall's arm. Scale slumped to the ground, his hands trying to cover the wound, while a terrified Marshall ran from the scene.

Marshall continued to run along Crescent Street until he overtook fourteen-year-old Maynard Chant, who was hurrying along Byng Avenue toward George Street. Donald showed Chant his arm and told him Scale had been stabbed and was still in the park. Marshall and Chant caught a ride in a passing car and returned to the park, where Chant tried to stop Scale bleeding with his shirt. As it happened, Chant and Marshall's conversation over Byng Avenue had been overheard by Marvel Matson, a retired RCMP officer through his open bedroom window. He telephoned the Sydney city police and told them something may have occurred in the park. Before Marshall and Chant reached the park, Scale, still alive and in agony, had been discovered by a young couple who had left the dance. It was only when Marshall and

Chant returned that the four young people rushed to a nearby house to call the police.

After the owner of the house assured them he would call the police, the four headed back to the scene but were intercepted by the police car responding to Mattson's call. Marshall described the attackers' appearance to the police and showed the constables his wound. The officers pushed Marshall into their car and sped to the crime scene. By the time they arrived, a second squad car was already there, along with a sizable crowd of onlookers. The Sydney police were relatively inexperienced with violent crime, and the officers were shocked at the spectacle of Seale's intestines oozing out on to the pavement. This inexperience showed when the police neglected to have one of their members ride to the hospital in the ambulance with Seale. Had they done so, Seale may have been able to provide them with valuable information about his attackers. By the time he arrived at the hospital Seale had lost most of his blood and was near death.

Meanwhile, Maynard Chant had been all but forgotten in the excitement. He had recovered his bloody shirt from the scene but was still faced with the problem of finding a ride back to Louisbourg. He had made his way to George Street hoping to hitch a ride home when a police car pulled up beside him and stopped. Staring at the bloody shirt in Chant's hand, the concerned officer wanted to know what had happened. "Do you know about the stabbing in the park?" Chant asked. In answer, the officer asked Chant if he had seen anything. "Yeah, I seen it all," lied Chant (Barrs Donham 1989: 177). The officers then took Chant to the hospital.

We may never know if Chant's admissions were simply thoughtless words uttered by a tired and excited young man or an attempt to gain some sense of personal importance. Whatever the reason, the lie was to play a major part in the subsequent prosecution and conviction of Donald Marshall Jr for the murder of Sandy Seale.

The Investigation

Detective Michael MacDonald was off duty and at home when he received a call about the Seale stabbing. He rushed to the hospital, but the doctor would not allow him to question the dying man. He then interviewed Donald Marshall Jr., who was at the hospital and had indicated a willingness to help the police in any way. Marshall described the assailants to MacDonald, although he did not tell him about the failed robbery. Unfortunately, the police handling of this case was inept from the very first evening. MacDonald, for reasons known only to him, did not take a formal statement from Marshall or Chant at the hospital, nor did he bother to circulate a description of the assailants to other members of the Sydney police force. Furthermore, the scene of the crime was neither secured nor searched, the names of people in the park at

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the time of the crime were not recorded, and people in the neighbourhood were not questioned about anything unusual they may have seen that evening. The man in charge of the investigation was Sergeant of Detectives John MacIntyre. He had had several run-ins with Marshall in the past, and the two men viewed each other with distrust. When he came on duty the morning after the incident, he reviewed the files of the investigating officers and summoned Donald Marshall for an interview. Marshall repeated his account of the incident but MacIntyre, like the officers before him, did not take a formal statement.

Sandy Seale died at 8:05 P.M. Saturday, May 29 without identifying his assailant. The Sydney police were now looking for a killer. The city's last homicide, five years before, had gone unsolved, and the community was in no mood for a repeat performance. The police sensed a need to apprehend Seale's killer quickly. Indeed, the recently created Nova Scotia Black Unit Front issued a statement calling for a "quick and speedy apprehension of the assailant or assailants" (Harris 1986: 67). It was imperative to MacIntyre that an arrest be made, and the sooner the better, so he quickly formulated a theory that Marshall had killed Seale in the course of an argument. Before interviewing any witnesses or taking a formal statement from Marshall, MacIntyre sent a telex early on the morning of May 30 stating that "investigation to date reveals Marshall probably the person responsible" (Harris 1986: 63).

Remembering that Chant had said "I seen it all," MacIntyre and another officer drove to Louisbourg to question the boy further. Confronted in a police car in the absence of his parents, Chant repeated the story of the crime as it was related to him by Marshall: that two men had stabbed Marshall and Seale. He implied, however, that he had seen the event, not just heard about it from Marshall. Chant was then taken to the Sydney police station, where he gave a formal statement. Chant left the police station feeling that the police were not happy with his story, but he did not know what they wanted to hear from him.

Another police witness was John Pratico, a teenage acquaintance of Marshall. Someone had tipped the police that Pratico may have been an eyewitness to the killing, so MacIntyre called him in for questioning. Nervous and bewildered by the interrogation, Pratico at first denied any knowledge of the event. Indeed, all Pratico knew about the event was what he had heard on the radio and what Marshall had told him the day after the killing. But the police thought he knew something and pressured him until he slowly began to build a fictitious story that he hoped would please the police. His concocted description of what he saw involved two men running from the scene of the crime and jumping into a white Volkswagen. One of the men he described as being six-feet tall and dressed in a gray suit; the second as five-and-a-half-feet tall and dressed in a brown corduroy jacket. He said he had seen all this while standing by the courthouse. MacIntyre now had signed

eyewitness statements from Chant and Pratico describing the event they had seen in the park as well as the verbal description of Ebsary given to him by Marshall. The problem was that all three witnesses were giving him different descriptions of the assailants.

MacIntyre returned to Wentworth Park at midnight and discovered that Pratico could not have seen the events if he had been standing by the courthouse. The youth was obviously lying, so the next day MacIntyre confronted him and demanded the truth. Pratico repeated his original story that he had not really seen anything in the park. MacIntyre did not like this version either, and told Pratico that if he did not tell the truth he would be put in jail until he did. Taken back to the police station, then questioned further by MacIntyre and Detective Sergeant William Urquhart, Pratico began to understand what it was the police wanted him to say. He told the officers that he was walking towards the tracks when he saw Seale and Marshall on the other side of the bridge arguing about something. He said that he saw Marshall's left hand driving towards Seale's stomach and then pulling back, and that Seale fell to the ground and Marshall ran up Crescent Street towards Argyle Street. Pratico added that no one else was in the area at the time. Now MacIntyre had an eyewitness account that supported his own suspicions about Donald Marshall Jr. If he could extract a similar account of the crime from Maynard Chant, the case would be all but wrapped up.

MacIntyre and Urquhart arranged to talk to Chant and his mother in the Louisbourg Town Hall. "All we want is the truth from Chant," MacIntyre said to Mrs. Chant. "That's not too much to ask of anyone is it?" (Barss Donham 1989: 182). Mrs. Chant agreed that it was not and instructed her son to tell the truth. Chant realized he had lied to the police the last time he was questioned and now wanted to be honest. He told MacIntyre that the only thing he knew about the stabbing was what Marshall told him on Byng Avenue shortly after Seale was wounded. Angered at this revelation, MacIntyre told Chant that the police had an eyewitness that had seen him in the park at the time. This was a lie, of course. Chant had not been in the park, and no one had claimed to have seen him there.

MacIntyre again broke police regulations by asking Mrs. Chant to leave the room so the police could question Chant alone. He then resorted to intimidation techniques, threatening to jail the fourteen-year-old (who was on probation for petty theft) if he did not tell everything he knew. Chant, crying and scared, maintained he saw nothing. As was the case with Pratico, Maynard Chant slowly succumbed to the pressure and began to piece together what it was the police wanted to hear. Near the end of the session MacIntyre began to record Maynard Chant's heinous lie. Chant's claim now was that he had been walking down the railroad tracks when he saw a dark-haired youth, John Pratico, crouched behind some bushes watching something on Crescent Street. He looked across to Crescent Street and saw two men standing close

together. One of these he recognized as Donald Marshall Jr. The two men were arguing, and Marshall drew a knife from his pocket and drove it into the right side of Seale's stomach. Marshall then ran from the scene toward Byng Avenue. It was at this point that Marshall caught up to Chant and showed him the wound on his arm.

It was the perfect story for MacIntyre. Not only did it have Marshall stabbing Seale, but it confirmed Pratico as the second eyewitness to the crime. This was all the evidence MacIntyre needed, so he quickly presented it to Crown prosecutor Donald MacNeil. An arrest warrant was issued for Donald Marshall, who was picked up at home, handcuffed, and driven back to Sydney. "I didn't do it" was all he said to the officers (Barss Donham 1981: 185).

The police were ignoring eyewitness reports that did not jive with the statements of Chant and Pratico. Two teenagers, George and Roderic MacNeil (no relation to Jimmy or Donald), had reported to police that they had seen two men fitting Marshall's description of Roy Ebsary and Jim MacNeil in the park around midnight. The statements of Terry Gushue and Patricia Harris also mentioned the two men who were with Marshall and Seale shortly before the killing. Gushue admitted to being quite drunk at the time, so it was easy to dismiss his account of the evening, but Harris had been sober and had vivid memories of Ebsary and MacNeil, which presented a problem for the police.

Harris's descriptions of the two men she had seen with Marshall and MacNeil were identical to Marshall's descriptions. If the police were to have a clean case against Marshall it was essential that Patricia Harris abandon her original statement. After nearly five hours of intimidating interrogation by MacIntyre and Urquhart, Harris caved in. All she wanted was to get out of this terrible situation, and the only way she could see to do that was to tell the police what they wanted to hear. Her new statement made no mention of seeing anyone resembling Ebsary and MacNeil, while she claimed to have seen Marshall and Seale alone on Crescent Street just before the time of the murder. There were no longer any complicating factors in the police case against Marshall. Maynard Chant, John Pratico, and Patricia Harris were all going to give the same eyewitness account of the crime in court. A preliminary hearing into the case was held in June, and Marshall was bound over for trial on November 2, 1971. Shortly after Marshall's arrest the atmosphere in the community was heavy with racial tension. The Marshall family was inundated with so many threatening phone calls that Donald Marshall Sr. temporarily moved his family out of the community.

The Trial

If the police seemed convinced they had a tight case against Donald Marshall, Crown prosecutor Donald MacNeil may not have been as confident. The best evidence available to the Crown was the eyewitness testimony of three teenagers who had been pressured by the police to tell the same story. Furthermore, one of the three, John Pratico, was schizophrenic and had been admitted to a mental hospital in Dartmouth shortly after the preliminary hearing. He returned to Sydney a week before the trial under heavy medication. In an attempt to ensure conformity, the prosecutor had both Pratico and Chant review their stories prior to the trial. The third witness, Patricia Harris, did not receive the same attention. As a result, her testimony proved to be considerably less supportive of the Crown's case.

The prosecutor was counting on Harris to testify that she had observed Marshall and Seale alone together in the park the evening of the murder. But Harris wanted to tell the court what she knew to be the truth. When she took the stand to testify, the prosecutor asked her if she had seen more than one person with Marshall. The answer he expected was a simple "no." He was shocked when she responded "yes" (Harris 1986: 151; Barrs Donham 1989: 189). Knowing Harris's testimony could cause him to lose the case, the prosecutor began questioning her in more intimidating tone. Harris's resolve to tell the truth was no match for MacNeil's courtroom skills. She quickly reverted to her fabricated testimony, saying that she had seen no one except Marshall and Seale in the park.

Marshall's defence lawyer, C.M. Rosenblum, had been given the case by the federal Department of Indian Affairs. For reasons unknown, he had not interviewed any of the prosecution's star witnesses before the trial and was therefore unaware of the statements they had initially given to the police. Since he knew nothing of Harris's original statement concerning the gray-haired man she had seen with Marshall and Seale, he did not pursue this line of questioning when he cross-examined her. Instead, he emphasized the flimsy quality of her testimony and had her agree that she was not sure if the person seen with Marshall had been a man, woman, or child.

If Patricia Harris's performance on the stand was less than the prosecution had expected, Maynard Chant was to add to their problems. At the preliminary inquiry Chant had claimed that he recognized Marshall and Seale as the two people in the park and that they were having a bitter argument. He also stated that he had seen Marshall take a knife from his pocket and stab Seale. At the trial Chant told the prosecutor that he *thought* he heard two people arguing in the park but he did not know who they were. He added that one of the men had taken *something* from his pocket and drove it towards the left side of the other man.

Chant's testimony was almost useless for the prosecution's case against

Marshall. In desperation, Crown prosecutor MacNeil asked the judge declare Chant a hostile witness. Such a ruling would give the prosecution the right to cross-examine its own witness. Although the defence objected that there was little legal justification for this move, Judge Louis Dubinsky agreed to the request.

MacNeil suggested to Chant that the testimony he had given at the preliminary hearing was considerably different from his present recollection of events. He then refreshed Chant's memory by reading his original testimony to the court. Chant knew that he faced a charge of perjury if he denied the original testimony. Once again, MacNeil's intimidating style was sufficient cause the witness to revert to his preliminary hearing testimony. She stated that he had seen Marshall stab Seale with a knife.

Meanwhile, John Pratico was waiting outside the courtroom to testify. If conscience was bothering him. He knew that his statement to the police had been a lie and that if he repeated it in court he would be helping to convict Marshall of a crime he did not commit. He wanted to tell the truth. In spontaneous act of bravery Pratico approached Donald Marshall Sr., who was also in the corridor, and told him that he knew Marshall did not kill Seale. Stunned by this revelation, Marshall Sr. had Pratico repeat the statement to Simon Khattar, a member of the defence team, who then had him repeat to a sheriff standing nearby. The little group in the corridor quickly grew to include Crown prosecutor MacNeil and Sergeant MacInyre.

ushered into a small antechamber, Pratico once more repeated his observation that Marshall did not stab Seale and that he had lied to the police and to the prosecution because he was scared. Both MacInyre and MacNeil demanded to know if he was suggesting that they had threatened him. Pratico said they had not, but it was obvious to Khattar that Pratico was indeed terrified by the two men. He tried to reassure the teenager and told him not to be afraid of anyone but to just tell the truth to the court.

When Pratico took the stand, MacNeil began to question him about the statement made in the corridor. However, Judge Dubinsky insisted that MacNeil confine his questioning to the events in Wentworth Park. The judge's instruction worked to the prosecution's advantage. MacNeil asked Pratico to tell the court exactly what he had witnessed the night of May 28. Khattar's heart sank as the youth related that he had seen Marshall kill Seale. It would seem that the teenager's desire to tell the truth had been overcome by his fear of MacNeil and MacInyre.

Cross-examined by Khattar the next day, Pratico admitted to the recantation in the corridor. However, Judge Dubinsky, citing and incorrectly interpreting a section of the *Canadian Evidence Act*, ruled that Khattar could not fully question Pratico on his corridor statement. But Dubinsky did allow the prosecution to ask Pratico why he had made the comments in the corridor. Pratico's simple response to the question was that he was afraid for his life

Judge Dubinsky's faulty interpretation of the *Canada Evidence Act* and his ruling that Khattar could not question Pratico about the corridor conversation had allowed the prosecution to imply that Pratico had made the comments because Marshall Sr. had threatened him. Nothing could have been further from the truth, but shielded from the facts of the encounter, the jury was predisposed to believe the prosecution. Rosenblum and Khattar now realized they had little choice but to put Marshall on the stand.

Rosenblum asked Marshall to tell the jury about the events of May 28. Marshall related the story of how they had met two men on Crescent Street and stopped to ask them for a light. One of the men was old and dressed like a priest; the other was younger. The men said they were from Manitoba and then said they did not like Indians or Blacks. They then assaulted Marshall and Seale. But Marshall's testimony was so disjointed and erratic that he did his case irreparable harm. As he left the stand, many of those on the jury appeared to have had good reason to believe that the young Mi'kmaw was Sandy Seale's killer.

After the defence and the prosecution gave their summations, the jury retired to consider its verdict. Four hours later the jury found Donald Marshall guilty of second degree murder. He was sentenced to life in prison.

The Struggle for Freedom and Truth

Donald Marshall Jr. was an innocent man sentenced to life imprisonment on the basis of police interrogation procedures and perjured evidence. John Pratico and Maynard Chant swore that they had seen Marshall stab Sandy Seale. Patricia Harriss likewise swore that she had seen Marshall and Seale alone in the park. All three witnesses were later to recant their testimony, claiming they had been intimidated by the police to the point that they would say on the witness stand whatever the police wanted them to say.

Had it not been for the perseverance of RCMP Staff Sergeant Harry Wheaton and a few other members of the force, Donald Marshall Jr. may very well still be in prison. In the process of discovering the truth in the Marshall case, Wheaton and the others exposed the dark side of the Canadian justice system. During the many years that Donald Marshall was serving time in prison, many people attempted to correct the wrong that had been done to the young Mi'kmaw. One of these was Jimmy MacNeil, the young man who had been with Ebsary the night the old man stabbed Sandy Seale.

MacNeil and Ebsary had run the 400 yards from the crime scene to Ebsary's home immediately after Seale had fallen to the ground. Excited and terrified by the events he had just witnessed, MacNeil did not know whether Ebsary was a hero who had just saved his life or a madman who had committed cold-blooded murder. As they slammed the door of the house behind them, Ebsary's wife Mary instinctively knew her husband was in one of his

bad moods. Not wanting a family fight she sent Donna, their fourteen-year daughter, to bed. But MacNeil was babbling on about the night's advent and Donna decided to spy on them. She was gripped with both fear and fascination as she watched her father standing at the kitchen sink wash blood from one of his homemade knives. Donna would carry this secret with her for many years before relating it to the authorities.

Jimmy MacNeil suffered the agony of his guilty conscience almost immediately after Marshall's conviction. When his brother John arrived home for a visit in early November 1971, Jimmy was in the depths of a severe depression. After a little probing from his brother, the dam broke and Jimmy spilled his story. His brother insisted he go to the police. A few hours later Jimmy was relating the true events of the murder to John MacIntyre. MacNeil's description of Ebsary was almost identical to the man described by Donald Marshall. Patricia Harriss had also initially described such a man before he was pressured by the police to change her story. Obviously, MacIntyre had acted on this information, so he contacted Assistant Prosecutor Lew Matheson. Matheson read MacNeil's statement and ordered the detectives to pick up Ebsary and his family. While interviewing Ebsary's wife, the detective did not pursue some of the information about Ebsary's activities as related to him by MacNeil. He failed to ask whether her husband ever carried a knife or whether she had seen him washing blood from a knife the evening of May 28. MacIntyre also failed to interview the one person who had seen Ebsary washing the bloody knife — Ebsary's daughter, Donna.

MacIntyre interviewed Roy Ebsary on the same evening. Yes, he remembered the evening well. He and Jimmy MacNeil had been accosted in the park that evening by two men who wanted their money. After a short altercation he and MacNeil had managed to beat the two men off and they ran away. Ebsary further stated that he certainly did not stab anyone that night and at no time did he carry a knife on his person. MacIntyre's acceptance of this statement is interesting because Ebsary had been arrested by the police department several months earlier for carrying a concealed knife. It is not known whether MacIntyre knew this and ignored the fact or whether he had not bothered to check Ebsary's record before he questioned him.

Meanwhile, Robert Anderson, the Nova Scotia director of criminal investigations, had been informed of Jimmy MacNeil's confession and decided to solicit the assistance of the RCMP. The Mounties sent Sub-Inspector Alan Marshall to assist in sorting out the investigation. He listened to John MacIntyre's views on the murder and interviewed Jimmy MacNeil, but did not interview Ebsary, the man singled out by Jimmy MacNeil as Seale's killer. He subjected both Ebsary and MacNeil to a polygraph test. MacNeil was nervous during the test that the results were useless; Ebsary, on the other hand, passed the test with ease, giving absolutely no indication that he was lying when he denied killing Sandy Seale. In writing his final report in 1972, Al-

Marshall was obviously swayed by the polygraph results. Jimmy MacNeil, he concluded, was a young man of low intelligence who only imagined that he had seen Ebsary stab Seale. The unwritten inference of the report was that the justice system had not erred when it convicted Donald Marshall Jr.

During the RCMP investigation, Marshall's lawyer Moe Rosenblum had been preparing an appeal for his client — an appeal that he expected to lose. Had Rosenblum known of Jimmy MacNeil's statement and the fact that John Pratico, one of the prosecution's star witnesses, had been admitted to a Dartmouth mental hospital while suffering from severe paranoid delusions, he may have had a more positive outlook. Ignorant of these important facts, the lawyer was unable to pass them on to the Appeal Division of the Supreme Court. The court turned down the appeal in early September 1972. But if the formal participants in the Marshall case thought the final chapter had been written, they were wrong.

Over the next decade certain events began to unfold that were to make the trial and conviction of Donald Marshall Jr. one of the most celebrated cases in the annals of Canadian legal history. Donna Ebsary, Roy Ebsary's daughter, played a major role in these events. Donna was only fourteen when she saw her father washing blood from a knife in their kitchen sink the night Seale was murdered. Three years later, as a more mature seventeen-year-old, she desperately wanted to tell what she had seen to someone she could trust. She found that person in David Ratchford, who operated the martial arts school she was attending. Because Donna was afraid, Ratchford agreed to go to the police on her behalf. When he told the story to John MacInyre and William Uryuhart, he was told the case was closed and they had no interest in talking to Donna.

At about the same time, it was becoming obvious to Mary Ebsary that her husband was displaying a growing sexual preference for young men. When he brought young Mitchell Sarson home to live with him and became increasingly rowdy and obnoxious, Mary tossed them both out of the house. Before the relationship between the two men ended, Ebsary had told Sarson about the time he had stabbed a man in the park.

Coincidentally, Donald Marshall Jr. had developed a relationship with Mitchell Sarson's sister, Shelly. In 1981 Mitchell accompanied her on one of her prison visits to Marshall. As Mitchell listened to Marshall and Shelly talking he realized just how important his previous relationship with Ebsary might be to Marshall. Mitchell told Marshall that Roy Ebsary had once confided to him that he had killed an Afro-Canadian man in Wentworth Park and wounded an Indian during the same incident. It was an unbelievable moment for Marshall, after years of telling people that an unknown old man with a beard was the actual killer of Sandy Seale, Donald Marshall now had that man's name. The long process of proving his own innocence had finally begun.

It would be six months before the authorities began to act on this new evidence. Had it not been for the intervention of the Union of Nova Scotia Indians, the delays may have gone on indefinitely. The Union had retained lawyer Stephen Aronson to follow up on Marshall's story. Aronson met with Mitchell Sarson and heard his story about Roy Ebsary's confession. He also discovered that the Sydney police had arrested Roy Ebsary in 1981 for stabbing another man. When Aronson asked MacInyre (who had become Sydney police chief in 1976) to check out Sarson's story, the chief became defensive. He told Crown prosecutor Frank Edwards and Inspector Don Scott, the man in charge of Sydney's RCMP detachment, that Marshall's conviction was soundly based on the eyewitness reports of two individuals. He stated that Sarson's story was obviously a fabrication because Marshall was romantically involved with his sister. The chief gave the RCMP inspector some files relating to the case and told him to check things out for himself.

Scott asked Staff Sergeant Harry Wheaton to assist him on the case. After talking to MacInyre, Wheaton initially thought that Marshall was guilty. However, when he learned that Ebsary had been convicted of carrying a concealed weapon in 1971 and charged with stabbing a man in 198 he began to have some nagging doubts. Mary Ebsary confirmed that Roy Ebsary and Mitchell Sarson had a brief relationship in 1971. Wheaton now felt he could be on to something worth pursuing.

Mitchell Sarson told Wheaton and Corporal Jim Carroll that he and Ebsary had a brief relationship and that Ebsary had told him he had killed an Afro-Canadian man in the park. The two policemen now had strong reason to believe that Donald Marshall's claims of innocence were true. But if MacNeil and Sarson were telling the truth, that meant that the eyewitness testimonies of John Pratico and Maynard Chant had been perjured.

Wheaton and Carroll found Maynard Chant working at a Louisiana fish plant. Chant told the officers that he had been pressured by the police into saying that he had seen Marshall kill Seale. He indicated that MacInyre in particular had intimidated him. Wheaton and Carroll were stunned by the fact that a key witness for the prosecution was now saying that he had been under pressure from the Sydney police and presented perjured testimony on the stand.

John Pratico was no longer living at home, but his mother suggested that Wheaton speak to her son's social worker or psychiatrist. Wheaton contacted Pratico's psychiatrist and was told that Pratico was a schizophrenic who would have been a very unreliable witness at Marshall's trial. Wheaton also discovered that Pratico had been placed in a mental institution shortly after the trial. It was only some time later that Carroll located Pratico through a psychiatric social worker who had Pratico as a client. Carroll arranged an interview with Pratico, who admitted he had perjured himself on the stand. He said he had done so because the police had told him he would be put in

jail if he did not sign a statement saying he had seen Marshall stab Sandy Seale.

On February 18, 1982, Wheaton and Carroll interviewed Marshall in Dorchester Penitentiary. What he told them confirmed their belief that he was innocent. Furthermore, it now seemed clear that Roy Ebsary was the real killer. Both Wheaton and Carroll wanted to talk to the man who had evaded justice for so long and had knowingly let Donald Marshall serve time for a crime he himself had committed. However, the subsequent interview with Ebsary provided little more than drunken rambling. All Ebsary would say to Carroll was that if Marshall were to have a new trial he would be willing to give evidence. This statement was better than nothing, but given Ebsary's propensity to lie, there could be no assurance that the man would tell the truth in court.

When RCMP Inspector Scott confronted MacIntyre with the new evidence, especially the recantations of Pratico and Chant, MacIntyre claimed they must be lying and pointed to Patricia Harris's 1971 statement that she had seen Marshall and Seale alone in Wentworth Park just before the murder. Since the Mounties had not been previously told of Harris's statement, Scott began to suspect that MacIntyre may have withheld other material. Scott requested that all relevant information be turned over to him. He also wanted to interview Patricia Harris and get her version of the events in Wentworth Park.

When Wheaton interviewed Harris on March 1, 1982, she indicated that she had been bothered about her role in the case for eleven years. She said that the Sydney police took several statements from her in 1971 and changed them to suit their version of the murder. She confessed that she felt scared and intimidated by the police and had said things in court that were not true. In truth, she had seen Donald Marshall on Crescent Street with several other men on the night of the murder. She had not seen Marshall alone with Seale as she had told the court. Wheaton now had all three key witnesses for the prosecution admitting that they had given perjured testimony at the trial because they had been coerced by MacIntyre.

Greg Ebsary, Roy's son, had shown Wheaton a number of knives that his father had made before the murder. Wheaton sent them off to the RCMP laboratories in Halifax with the hope that traces of Seale's blood could be found on one of them. The lab report confirmed that one of the knives contained several fibres from Sandy Seale's jacket. A lesser number of fibres matched those of the jacket worn by Donald Marshall.

On April 5, 1982, the Crown prosecutor recommended that Ebsary be charged with murder and that the process of freeing Marshall be implemented. But the wheels of justice grind slowly. Some very nervous individuals within the judicial bureaucracy attempted to impede Marshall's appeal, while others attempted to stonewall any inquiry into police misconduct. Had people like

Wheaton and Carroll not been so determined to see justice properly served it is possible that Donald Marshall's name would never have been cleared and the reprehensible behaviour of the Sydney police would have remained undetected.

The appeal hearing began December 1, 1982. Marshall's lawyer, Stepl Aronson, attempted to have Marshall tell the court everything that happened the evening of the murder, including the fact that he and Seale had gone to park with the intent of getting some money from people. Prosecutor Edwards pushed the point, suggesting that Marshall and Seale had intended to kill someone that evening. Marshall admitted that they had agreed to get more regardless of the method, but denied carrying through with the intention. As the hearing progressed, Edwards seemed less intent on proving Marshall innocent of murder than he was proving him guilty of robbery. This was exceptional turn of events because Marshall had never been charged with robbery. When Aronson objected to the line of questioning, he was overruled. Maynard Chant and Patricia Harris took the stand and recanted their 1971 testimonies. The RCMP forensic expert, Adolphus Evers, testified that 15 cloth fibres found on Ebsary's knife matched the jackets of Sandy Seale and Donald Marshall, and Donna Ebsary told the court that she had seen her father washing blood from a knife the evening of the murder.

Despite all the evidence to the contrary, Crown prosecutor Edwards sensed that the five appeal court judges were hesitant to rule it a miscarriage of justice and would not recommend an outright acquittal. At best, he thought they would order a new trial — a trial the prosecution could not win because there was simply no longer any evidence that would link Donald Marshall to the crime. Edwards had to come up with an approach that would allow a new trial but ensure that Marshall was acquitted. To placate the judge, Edwards adopted the premise that Marshall had not been the victim of a miscarriage of justice. He argued that Marshall ensured his own conviction because he had not informed the court or his lawyers that he and Sandy Seale had planned a robbery in the park. To further appease the five judges he insisted that the Sydney police force had acted with propriety in the case displaying no malicious intent toward Marshall. In his summation he argued that since there was no evidence Marshall had committed the murder, the court should acquit him.

Some may question whether Edwards' interpretation of the facts represents a responsible action on the part of a Crown prosecutor. Most certainly Donald Marshall must have been angered by the suggestion that he brought about his own incarceration and that the Sydney police had acted with malice. What Marshall did not know was that Edwards had put his own in jeopardy by arguing for the acquittal. Deputy Attorney General Gort Coles was a powerful political figure in the province and Edwards' superior. When he heard of Edwards' intention to seek an acquittal, he summoned him

to his office and demanded that instead of asking for an acquittal Edwards simply take no position. Coles threatened to take him off the case if Edwards insisted on proceeding with the acquittal.

Edwards broke with tradition and used some threats of his own. He told Coles that if he was forced to take no position in the appeal, he would inform the court that he was doing so under orders from the deputy attorney general. Such a public revelation would have been a political disaster for Coles. He had little choice but to acquiesce to Edwards' position. The appeal court reconvened in February and heard both Aronson and Edwards argue for Donald Marshall's acquittal on the grounds that there was no evidence of his guilt. Three months later the appeal court came down with its decision that no reasonable jury could find Marshall guilty based on the evidence and, twelve years after his arrest, Donald Marshall Jr. was acquitted.

But the five appeal judges were not about to admit a miscarriage of justice had taken place. In their summation the judges noted that in relation to the Marshall case "any miscarriage of justice is more apparent than real" (Harris 1986: 368). Marshall's arrest and conviction were rationalized as being a product of his own lies and evasions during the course of the investigation and trial. The court concluded, "Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction" (*R v Marshall* 1983).

As for the real killer, Roy Ebsary was to stand trial three times for the manslaughter of Sandy Seale. His first trial resulted in a hung jury; the second, in a conviction that was overturned by appeal; the third, again in a conviction. On appeal his three-year sentence was reduced to one year. He served seven months and died in his Sydney rooming house of a heart attack at the age of seventy-five. It is an interesting comment on the justice system that a young Mi'kmaq was sentenced to life in prison for a crime for which an older non-Indian later received a one-year sentence.

Why Was Donald Marshall Wrongfully Convicted?

Donald Marshall became central to the police investigation of the case from the moment Seale was stabbed. He was an eyewitness to the event and had himself sustained an injury when he was slashed by the killer. The fact that homicide was a rare event in Sydney meant that the police had little experience in this area of crime and made some serious errors. For example, when the police first arrived on the scene Seale was still alive and conscious. If a police officer had accompanied him in the ambulance on the way to the hospital, Seale could have told the officer who stabbed him. However, no officer rode in the ambulance, and the doctors at the hospital would not allow the police to question Seale, who died without making a statement. The scene of the crime was not searched that evening, nor were the names of people in the

park recorded by the police. Furthermore, the description of Ebsary given by the police by Marshall on the evening of the murder was not recorded, circulated to other members of the Sydney police.

Even more important was the antagonism between Donald Marshall and Sergeant of Detectives John MacIntyre. MacIntyre knew Marshall from his previous run-ins with the law, and the two did not like each other. Before interviewing witnesses, MacIntyre concluded that Marshall was the person responsible for the murder. From this point on, the police would ignore witness reports and other evidence that did not fit this version of the story.

Another disturbing aspect of this case is the tactics used by the police to obtain false testimony from vulnerable young people. John Pratico's knowledge of the stabbing was limited to what Marshall had told him and what he had heard on the radio, but pressured by police and threatened with the young man signed a fabricated account of the events in Wentworth Park. Maynard Chant also informed the police that he knew only what Mars had told him about the stabbing. Nevertheless, after the police insisted that Chant's mother leave the room so they could interrogate Chant without being present (a breach of police regulations), then threatened the four-year-old with jail, the terrified young man fabricated the facts they wanted to hear. Patricia Harris had been telling the truth when she informed the police that she had seen Ebsary and MacNeil with Marshall and Seale in the park the night of the murder. But because her statement did not support the police theory that Marshall and Seale were in the park alone, the police continued to interrogate her until she told them what they wanted to hear. The coerced and false testimony of these three young people was to be the key element in the Crown's case against Marshall. When the RCMP reopened the case, Sydney police initially withheld important files and other information.

In addition to police malfeasance, the numerous judicial errors by Judge Dubinsky, particularly his misinterpretation of the *Canada Evidence Act*, were detrimental to the legal interest of Donald Marshall Jr. We must consider the conduct of Crown prosecutor Donald MacNeil, who had disclosed the totality of the Crown's case to the defence as the law requires. Even officials in the Halifax Attorney General's office were accused by Royal Commission of failing to discharge their duties.

The wrongful conviction of Donald Marshall Jr. resulted from police targeting and legal incompetence on the part of the Attorney General's office, the prosecution, the defence, and the judiciary. These factors alone have been sufficient to convict Donald Marshall Jr. of Sandy Seale's murder but when combined with the systemic racism and bigotry characteristic of Sydney in 1971, Marshall had little chance of being found innocent.

The arrest and conviction of Donald Marshall is a perfect illustration of the systemic racism, racism, and social injustice that permeates our system of justice but Canadian society as a whole. The Marshall case

highlights two things. First, that the justice system is prepared to proceed on the presumption of guilt rather than innocence if the accused is a member of a marginalized minority group, and second, as Ratner, McMullan and Burch (1987) so aptly point out, when the authority of the state is challenged by public opinion, as it was in the Marshall case, the state seeks first to protect its own interests.

Joy Mannette makes the comment that "[w]hile from Marshall's perspective the system failed miserably, for most of the citizens of Sydney it worked to perfection: a clean solution to a very dirty incident with all the safeguards of the system observed and speedy justice prevailing" (Mannette 1992: 25). Mannette further notes that, even when it became obvious that the Sydney police had got the wrong man, the public believed Marshall's conviction was simply the result of malevolent action on the part of some individual police officers. Public faith in the system was only slightly tarnished, and it was felt that this could be corrected by admitting a mistake had occurred and awarding some compensation to Marshall (Mannette 1994). However, when the appeal court blamed Marshall for his own conviction, the public was outraged. It appeared that the court was more concerned about protecting the justice system's image and its officials than helping Donald Marshall Jr. to gain an apology and compensation. Only when the public outcry against this judicial whitewash became too loud to ignore did the government appoint a Royal Commission to investigate the Marshall affair.

The Royal Commission on the Donald Marshall Junior Prosecution began hearings on September 9, 1987. Because public faith in the Nova Scotia's judicial system was at a very low ebb after the Marshall fiasco, it was essential that any possibility of a conflict of interest among the various levels of the Nova Scotia system be avoided. This could be assured in part by appointing senior justice officials from other provinces to head the Commission. While it was obvious that the Commission's investigation was important to Donald Marshall Jr., it was equally obvious that the justice system itself was on trial. The \$8-million, seven-volume report, released January 26, 1990, was a damning indictment of Nova Scotia's criminal justice system and the inequality and racism that had infested the entire social structure of the region.

Casting aside the muted language usually required of such official reports, the commissioners observed that the arrest, trial, and conviction of Donald Marshall resulted from the incompetence of the police, lawyers and officials higher up in Nova Scotia's judicial system. It was noted that the police investigation of the Marshall case was "entirely inadequate, incompetent and unprofessional" and that the eyewitness testimonies of Maynard Chant, John Pratico and Patricia Harris were the product of police intimidation. Their report also blasted Judge Dubinsky for his incompetence during the trial, Crown prosecutor Donald MacNeil for failing to fully disclose the Crown's case to the defence team, and defence lawyer Moe Rosenblum for his failure

to adequately represent his client. The report concluded that one of reasons the justice system failed Marshall was because he was native (Royal Commission on the Donald Marshall Junior Prosecution, 1989: 1). The reasons for Donald Marshall Jr.'s wrongful conviction cannot be limited to social, professional or bureaucratic wrong-doing. The police, lawyers, judges, politicians involved in the case carried out their actions in a society plagued with racism and bigotry; a society that did not care about truth and justice. A society that did not care about Donald Marshall Jr.

James "Sakej" Youngblood Henderson indicates clearly how the testimony of witnesses at the Royal Commission Inquiry confirms the racism existing in Nova Scotia in 1971:

Staff Wheaton of the RCMP testified that he had originally disagreed with the characterization of Sydney, Nova Scotia, as having a "tense, neck atmosphere." But after his investigation with a cross section of people (for example, educators, lawyers, doctors, merchants and others) about racism in Sydney in 1971... he found that such an atmosphere existed and may have played on the jury's mind (Henderson 1992: 42)

Even the local judges and Crown prosecutors maintained racist attitudes towards the local Mi'kmaq population:

Continually, the local prosecutors and judges complained that "Indian" youth "did not know their place" in society. The "Indian" did not belong in Sydney and merely came to upset the peace and quiet. It was alleged by a court worker that a local judge stated in court that a fence should be built around the Eskasoni Reserve so that "Indians could not get out to come to Sydney to cause problems" (Henderson 1992: 42)

The author also notes that "[w]hen Staff Sergeant Wheaton asked Chief Police MacIntyre why he thought Chant lied in the first instance, in addition to his personal fear of Junior Marshall, MacIntyre indicated Chant was afraid of 'Indians'" (Henderson 1992: 42).

In concluding their report, the commissioners tell us very specifically why Donald Marshall became a victim of the system:

The criminal justice system failed Donald Marshall at virtually every turn, from his arrest and wrongful conviction for murder in 1971 to and even beyond his acquittal by the Court of Appeal in 1979. The tragedy of the failure is compounded by the evidence that the miscarriage of justice could and should have been prevented, or at least corrected quickly, if those involved in the system had carried

out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall Jr. is a Native. (Royal Commission, 1989: 1)

Even this damning indictment by the Royal Commission has not deterred attempts to deflect the social inequality issue and restore the credibility of the justice system. Shortly after the Royal Commission submitted its report, Deputy Attorney General Gordon Coles tried to dampen its political impact by suggesting that Marshall's release from prison after eleven years of wrongful incarceration was proof that the system worked. Donald Marshall may well disagree. Marshall did finally receive compensation for his wrongful conviction. He was awarded a \$250,000 lump sum payment and a monthly annuity from the Nova Scotia government (Roach 2001).

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Note

1. Those wishing more details regarding the Donald Marshall case are encouraged to read Harris (1986) and Bass Donham (1989). Most of the information in this chapter was derived from these sources.

The Case of DAVID MILGARD

The Defendant

David Milgard was a child of the sixties. At sixteen years of age, he appeared to be the perfect stereotype of the self-centered, long-haired hippie revelling in a life of free love and soft drugs. Like many of his friends, he flouted the law, selling drugs, stealing cars, and breaking into homes and businesses to meet his needs (*Regina Leader Post* April 13, 1992). He dropped out of school and became a drifter. His free and easy approach to sex earned him the name "Hoppy" among his friends, because he was forever hopping in and out of bed (*Regina Leader Post* April 13, 1992).

But there was more to Milgard than the thin veneer of his "hippie" persona suggested. Even before his teenage years, he had been in constant trouble. His parents withdrew him from kindergarten because he was a negative influence on the other children. The schools he attended labeled him as an impulsive, restless troublemaker who often fought with other students and resisted authority (*Regina Leader Post* April 13, 1992). By the time he was thirteen, he had spent three months in a regional psychiatric centre. When released, he was so difficult to handle that his parents did not want him at home, and he was placed in a series of foster homes and a boys' school. Life in the small town of Langenburg, Saskatchewan, was boring and unappealing. He was attracted to the bohemian youth culture that provided a home to countless alienated and marginalized teens. At sixteen he was travelling the country with his friends in search of new and exciting experiences. It was this search that placed him in Saskatoon on the morning of January 31, 1969.

The Crime

That January morning, the temperature had plunged to minus forty degrees in Saskatoon. Eleven-year-old Alice Marcoux had dressed for the cold before leaving her home and heading to school at 8:30 a.m. Taking a shortcut through an alley, she noticed something in the snow. It was the body of twenty-year-old Gail Miller, a nursing assistant at Saskatoon's City Hospital. Police quickly determined that the young woman had been the victim of a brutal rape and murder.

Miller had left her rooming house in a working-class district of Saskatoon at about 6:45 a.m. and was walking to a nearby bus stop when she was attacked and dragged into the alley. When police searched the area, they found what