THEMIS: PEEKING THROUGH THE BLINDFOLD

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> But men may construe things after their fashion,
> Clean from the purpose of the things themselves.
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> Shakespeare, *Julius Caesar*, Act I, Sc. III

In 1971, Donald Marshall, Jr. was wrongly convicted of the murder of Sandy Seale. Of that fact there can now be no doubt for it has been clearly established by the decision of the Appeal Division of the Nova Scotia Supreme Court on the 1982-83 Reference, reported as *R.* v. *Marshall*,[1] and by the findings of the *Royal Commission on the Donald Marshall, Jr. Prosecution*.[2] The question before the Royal Commission was essentially why did this miscarriage of justice occur. In one section of its *Report*, the Royal Commission focussed on the final six paragraphs of the reasons for decision of the Appeal Division on the 1982-83 Reference. In those paragraphs, the Court, having already determined to quash the conviction, uttered the now infamous opinion that "[a]ny miscarriage of justice is, however, more apparent than real" and characterized Marshall as a perjurer and robber-in-waiting who had concealed vital evidence not only from the trial court but also his own trial counsel. The Royal Commissioners concluded that, by including these paragraphs, the judges of the Appeal Division had contributed to the overall injustice done Marshall by placing blame for the unfortunate sequence of events on Marshall himself, and inferentially found the panel members wanting in the proper execution of their duties. These conclusions, in turn, prompted the Attorney General of Nova Scotia to request that an Inquiry Committee be established under the federal *Judges Act*[3] to determine whether the five judges, who had formed the 1982-83 Reference panel, should be removed from office.

The Inquiry Committee, with a mandate directed at that very determination,[4] found in favour of the judges. Criticism of the latter decision, which is the general topic of this comment, would normally begin with the institutional problem of judges judging judges. To my mind, this criticism is pedestrian – it is obvious and a cheap shot. After all, two of the three members of the Royal Commission were

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[1](1983), 57 N.S.R. (2d) 286 [hereinafter the *Reference*].

[2]*Commissioners' Report*, Province of Nova Scotia, 1989 [hereinafter the *Royal Commission*].

[3]R.S.C. 1985, c. J-1, s. 63(1).

[4]*Report to the Canadian Judicial Council of the Inquiry Committee Established pursuant to subsection 63(1) of the Judges Act at the request of the Attorney General of Nova Scotia*, August 1990 [hereinafter the *Inquiry Committee*].

themselves sitting judges while the third was a retired judge. No more will be said about this. An evaluation of the Inquiry Committee's reasons for decision poses more of a problem than that. In my opinion, the most significant factor to consider is why those *obiter* paragraphs were included in the reasons for decision in the first place. This is a question which is not directly considered by the Inquiry Committee.

Both the four member majority and one member minority opinions of the Inquiry Committee focussed on whether the content of the six paragraphs in issue constituted misconduct as to justify removal of the judges from office. The majority opinion stated the issue before it as follows:

> Was it misconduct justifying removal from office for the Court to characterize the conduct of Mr. Marshall as it did having regard to all the circumstances it knew from the record which it had before it?[5]

This dry statement of the issue must be read through the prism of the majority's test of "justifying removal" – a test so qualified as to result in the removal of judges in only the most flagrant of circumstances:

> Is the conduct alleged *so manifestly and profoundly* destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be *sufficiently undermined* to render the judge *incapable* of executing the judicial office? [emphasis added][6]

It should also be noted that the majority drew upon the "shock the conscience" test as indicative of the standard of conduct considered "so manifestly and profoundly destructive" to justify removal from the bench.

Having so formulated the issue and the controlling test, the majority determined that the six paragraphs reflected the honestly held views of the Appeal Division panel based on findings of credibility properly grounded in evidence. The majority, however, characterized the content of those six paragraphs as a "legal error" because of the one-sided blaming of Marshall rather than including comments on other factors which contributed to the miscarriage of justice. Having made such a characterization, the majority applied the singular presumption that judges should not be removed for "legal error." This "presumption" is not necessarily as self-evident and unqualified as the majority would seem to believe, for it appears rather obvious that "legal error" amounting to incompetence or bias may well justify removal of a judge from office.

The minority reasons adopted the general test formulated by the majority but then proceeded to refute each of the conclusions of the Royal Commission and found no misconduct by the judges of the Appeal Division. I do not intend to

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[5] *Ibid.*, majority opinion at 28.

[6] *Ibid.*, majority opinion at 27.

discuss the conclusions of the Royal Commission nor the reasons of the minority in refuting those conclusions. I believe that it is sufficient for present purposes to simply point out that the minority reasons, while regretting the choice of language contained in the six paragraphs in issue, considered the views expressed therein as an exercise of the judicial task in providing comment "openly, directly and bluntly about matters that may be of public interest and importance."[7]

I do not wish to be understood as disagreeing with the ultimate decision of the Inquiry Committee. To my mind, if the inclusion, *simpliciter*, of the six paragraphs in the reasons for decision of the Appeal Division was judicial misconduct, it was misconduct near the lower end of the scale. More serious misconduct is well known in Canadian legal circles. Examples include a judge regularly falling asleep during the hearing of important constitutional matters, a judge who regularly had the recording machine in the court turned off during Bible-based diatribes to abused women, and a judge who would swivel his chair around so as not to face counsel when he disagreed with the submissions being made. These are only the examples which come immediately to mind. Press accounts of an American judge making racial slurs and imposing stiffer sentences on minorities do not, fortunately, have a direct counterpart in Canada. In my opinion, the most interesting question is the motive behind the six paragraphs.

Both the majority and minority reasons of the Inquiry Committee stressed that, in argument by counsel, no improper motives were attributed to the Appeal Division as explaining the inclusion of the six paragraphs in issue.[8] The question of motive was, therefore, not addressed by the Inquiry Committee. What was the motive for including the six paragraphs in the reasons for decision of the Appeal Division on the Reference? In the absence of testimony by the Appeal Division judges themselves as to their collective motives,[9] the Royal Commission may have pointed to the answer when it quoted the following paragraphs from the factum prepared by counsel for the Attorney General of Nova Scotia and submitted to the Appeal Division on the reference:

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[7] *Ibid.*, minority opinion at 25.

[8] *Ibid.*, majority opinion at 22; minority opinion at 24. It is interesting to note that the majority opinion of the *Inquiry Committee* contains its own suspect *obiter* concluding statement:

> We are deeply conscious that criticism can itself undermine public confidence in the judiciary, but on balance conclude in this case that that confidence would more severely be impaired by our failure to criticize inappropriate conduct than it would by our failure to acknowledge it. (at 36)

Now what does that mean? Is it implicit that the members of the majority restrained their criticisms so as not to undermine public confidence. Is that not the error of the Appeal Division?

[9] *MacKeigan* v. *Hickman*, [1989] 2 S.C.R. 796.

> It is the Respondent's respectful submission that the role of the Court goes much further in this peculiar situation. Here, if the Court does ultimately decide to acquit the Appellant, it is no overstatement to say that the credibility of our criminal justice system may be called into question by a significant portion of our community. It seems reasonable to assume that the public will suspect that there is something wrong with the system if a man can be convicted of a murder he did not commit. A minimum level of public confidence in the criminal justice system must be maintained or it simply will not work.
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> For the above reasons, it is respectfully submitted that the Court should make it clear that what happened in this case was not the fault of the criminal justice system or anyone in it, including the police, the lawyers, the members of the jury or the Court itself.[10]

A causal connection between the invitation to vindicate the justice system and the inclusion of the six paragraphs so slanted against Marshall, though speculative, is too coincidental to ignore. The Royal Commissioners' comment on these paragraphs, though guarded, is telling:

> One cannot know whether...the argument [of counsel for the Attorney General] exonerating the judicial system convinced the Court to reach the conclusion it did. (It would be a chilling indictment on the way in which justice was administered in this case if [counsel] accurately anticipated the need of the Court of Appeal to exonerate the system of justice before it would agree to Marshall's acquittal.)[11]

Those who administer the justice system would do well to consider this "chilling indictment."

It is, unfortunately, not too great an exaggeration to suggest that each day in the courts of every province and territory of this country and of every common law jurisdiction in the world, innocent accused persons are convicted because of institutional flaws and the instinctive and reflexive need felt by those in the system to defend it. Perhaps one of the most striking and common examples arises in situations of conflict between the testimony of a defendant and that of a police officer. Every lawyer knows that the defendant will be asked whether he or she has had any prior dealings with the officer or if any reason is known why the officer would want to "get" the defendant. When the answer to these familiar questions is "no," the judge will be faced with an issue of credibility and reasonable doubt – between the testimony of a self-interested defendant and a disinterested officer. Conviction normally follows. On appeal, the review by the appeal court will be tempered by deference to the trial judge who heard and saw the witnesses. The courts rely upon the good faith testimony and conduct of the police officers and counsel for the crown and defense. Our judges are passive arbiters in an inquiry for justice rather than active pursuers of justice.

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[10] *Supra*, note 2, at 129-31.

[11] *Ibid.* at 131.

Recent well publicized events involving police forces deserve consideration in relation to the justice in our justice system. The savage beating of a motorist by officers of the Los Angeles Police Department[12] and the recent release in England of the Guildford Four in 1989, Maguire Seven in 1990 and Birmingham Six in 1991[13] raise serious questions as to the reliability of police and prosecutorial conduct in the justice system. In the latter series of miscarriages of justice, it has now been revealed that pressure on police to solve a series of bombings in 1974-75, in which a number of persons were killed, led police to fabricate evidence implicating the accused and prosecutors to withhold exculpatory evidence from the courts. These innocent accused persons also had their convictions reviewed on appeal but without success, in part due to appellate deference to trial judges and judicial belief in the good faith of police and prosecutors. In these three *causes célébres,* persons identified by police because of religion and their place of origin in the north of Ireland became victims of the justice system and in the case of the Birmingham Six served sixteen years in prison before their release due, in large part, to the efforts of a few believers in justice.

These tragic situations cannot be permitted to continue. Nor can we afford to be smug in a false confidence that such events cannot occur here. The Marshall affair proves they can. Corrective measures though, are possible. In response to the unfortunate situation in England, Lord Scarman has suggested[14] that serious consideration be given to (i) the creation of a forensic science service independent of the police which would report to and be under the control of the judiciary; (ii) adopting the civilian system of the investigative judge; and (iii) creating a special tribunal to review alleged miscarriages of justice which would function as a board of inquiry rather than within the limited scope of a court of appeal. These proposals have merit. At present, a Royal Commission is in the process of being established in the United Kingdom to examine the criminal justice system from the police to the courts. The final report of that Commission will not be of inconsequential interest to those concerned about the administration of criminal justice in Canada, particularly after its sad record in the case of Donald Marshall.

> Nor stony tower, nor walls of beaten brass,
> Nor airless dungeon, nor strong links of iron,
> Can be retentive to the strength of the spirit.
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> Shakespeare, *Julius Caesar*, Art I, Sc. III

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[12]"Police blamed as tape shows beating of man" *The (National) Globe and Mail* (6 March 1991) A13.

[13]"Birmingham Six free after 16-year fight for justice" *The (National) Globe and Mail* (15 March 1991) A1.

[14]"Justice in the balance" *The (London) Times* (5 March 1991).