Appendix E
Appeal Judgment

IN THE COURT OF APPEAL FOR SASKATCHEWAN

ON APPEAL FROM

IN THE QUEEN'S BENCH FOR SASKATCHEWAN
(CRIMINAL SIDE)
JUDICIAL CENTRE OF SASKATOON

BEFORE:

The Honourable Chief Justice E. M. Culliton,
The Honourable Mr. Justice Mervyn Woods,
The Honourable Mr. Justice R. L. Brownridge,
The Honourable Mr. Justice P. H. Maguire,
The Honourable Mr. Justice R. N. Hall.

BETWEEN:

HER MAJESTY THE QUEEN,

RESPONDENT,

-and-

DAVID EDGAR MILGAARD,

APPELLANT.

C. F. TALLIS, Q.C. for the Appellant.

SERGE KUJAWA, Q.C. for the Crown.

JUDGMENT OF THE COURT ---------- CULLITON, C.J.S.

David Edgar Milgaard was charged in an Indictment that he, the said David Edgar Milgaard, at the City of Saskatoon, in the Province of Saskatchewan, on the 31st day of January, 1969, did unlawfully commit non-capital murder upon the person of Gail Olena Miller, by cutting and stabbing her with a knife, contrary to

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92

Sections 202A(3) and 206(2) of the Criminal Code.

After a trial by jury, presided over by Bence, C.J.Q.B., Milgaard was found guilty as charged and was sentenced to the mandatory term of life imprisonment. He has appealed in respect of this conviction. The grounds of appeal, as presented to the Court, are as follows:

(1) that the learned trial Judge erred in permitting the prosecution to adduce evidence on irrelevant or prejudicial matters and in particular erred in allowing the prosecution to adduce evidence with respect to the blood type or group of a Crown witness, namely, Ronald Wilson;

(2) that the learned trial Judge erred in his application of Section 9(2) of the Canada Evidence Act and should have held that the initial cross-examination by Crown counsel on a previous written statement be conducted in the absence of the jury and should have permitted counsel for the defence to question the witness concerning the circumstances under which the statement was obtained and adduce evidence in this connection, before making a ruling as to whether or not the witness was adverse;

(3) that the learned trial Judge's error in admitting cross-examination of the witness

Nichol John by Crown counsel in the presence of the jury, before any declaration was made as to her being adverse, was so prejudicial to the appellant that it would adversely influence the jury in arriving at their verdict;

(4) that having regard to the nature and character of the evidence adduced on behalf of the prosecution, the verdict of the jury is unreasonable and cannot be supported on the evidence.

It is to be noted that no objection has been taken to the learned trial Judge's charge to the jury.

Consideration of the grounds of appeal require a full and careful review of the evidence, as well as a review of certain aspects of the conduct of the trial.

Between 12:30 and 1:00 A.M. on January 31, 1969, Milgaard and Ronald Wilson set out from Regina to Saskatoon. They were driving in Wilson's car and were accompanied by a young lady named Nichol John. Plans for the trip had been made by Milgaard and Wilson on January 30th. Milgaard had a suitcase, but neither Wilson nor Nichol John had baggage of any kind. They were all young people, Milgaard being 17 years of age, Wilson about 18, and Nichol John 16 or 17 years old.

They intended to go to Edmonton. According to the evidence of Wilson, they were to pick up a friend of Milgaard's at Saskatoon, by the name of "Shorty". This turned out to be a young man named Albert Henry Cadrain.

On the way to Saskatoon they experienced car trouble. The car got stuck at Craik and, in trying to get out, the reverse gear was stripped. Wilson testified that on the way to Saskatoon he saw a knife in Milgaard's possession. He described the knife as a sort of paring knife with a reddish-brown handle. He said he had never had a knife of that kind in his car.

They arrived in Saskatoon between 5:30 and 6:30 A.M. on January 31st. The morning was foggy, visibility was poor and it was extremely cold, the temperature being near 40° below zero. Wilson was driving, with Nichol John sitting between him and Milgaard in the front seat. Upon arrival in Saskatoon, Milgaard directed Wilson where to drive. Pursuant to Milgaard's directions, they drove into a residential area of the city known as the Pleasant Hill district.

Wilson testified that as they were driving on one of the residential streets, they overtook a young lady who was walking on the sidewalk. He stopped the car and Milgaard spoke to her, either through the car window, or by opening the door. He asked directions but apparently she was unable to give him any. As they drove away, according to Wilson, Milgaard said, 'the stupid bitch'.

After that they continued on for three-quarters of a block to the end of the block, where Wilson attempted to make a 'U' turn and became stuck in the intersection. Wilson said he and Milgaard got out of the car and tried to push it, but were unable to do so. He testified they then decided to look for help. Wilson said he went in the direction the young lady had been walking, while Milgaard took off in the direction from which the young lady was coming. Wilson said he walked some distance and then returned to the car. Upon his return to the car, he stated, Nichol John was in the car and "she was pretty well in a hysterical state - screaming".

About five or six minutes later, Milgaard returned to the car. Wilson said when Milgaard entered the car, Nichol John moved away from Milgaard toward him. He said Milgaard was "awfully cold and he was breathing heavy". When asked whether Milgaard said anything at that time, Wilson stated Milgaard said, "I fixed her", or something to that effect. Shortly after that, Wilson said, two men came along and helped them get the car going. According to Wilson's evidence, he was away from the car about fifteen minutes and it was five or six minutes after his return that Milgaard came back. He also said it was about 6:30 A.M. when they got stuck.

Wilson said they then drove to a motel and Milgaard went in to obtain a map. At that time, according

to Wilson, Milgaard was in his stocking feet.

Mr. Rasmussen, Manager of the Trav-A-Leer Motel, at 3301 Twenty-Second Street West, testified that shortly after 7:00 A.M. on January 31st, a car stopped in front of the motel and one person came in. He said that person had no shoes on and he asked for a city map. When given the map, the recipient said 'thanks' and that he might be back for a room. Rasmussen did not go outside or look in the car, nor was he able to say that Milgaard was the person who came in on that occasion. He did say, however, he had only given one person a map that morning.

They then returned to the residential area of the city and, according to Wilson, became stuck in an alley. They were proceeding down the alley and came behind a car that was stuck. In their attempt to push that car, their own car became stuck.

Walter J. Danchuk, who resided at 129 Avenue "T" South, testified that about 7:30 or 7:40 A.M. on January 31st, he backed his car out of the yard and became stuck in the alley. At that time, he said, a car came up the alley behind him, in which were two men and a girl. He identified one of the men as Milgaard. He said both cars became stuck, so he went into the house to call a tow truck. Milgaard and the young lady went into the house. They told Danchuk they were looking for a man named "Shorty", who lived

near St. Mary's School. Danchuk said he noticed nothing unusual about Milgaard apart from a long tear in the seat of his trousers.

Finally a tow truck came and got Danchuk's car going. Danchuk then drove the three people to a service station and then drove them back to his place. A service truck came from that service station and got their car going. From there they drove around and finally arrived at the home of 'Shorty' Cadrain, at 334 Avenue "O" South, being the corner of Avenue "O" South and Nineteenth Street. They arrived there about 9:00 A.M.

In the City of Saskatoon the streets run east and west and the avenues north and south. In the block bounded by Twenty-First Street on the north, Twentieth Street on the south, Avenue "N" on the east and Avenue "O" on the west, there is an alley running from north to south through the centre of the block. The alley commences at Twenty-First Street, half way between Avenues "N" and "O". As the frontage on Twentieth Street is fully built up, the alley does not run straight through to Twentieth Street. Immediately behind the buildings facing Twentieth Street is an alley which runs from east to west, from Avenue "N" to Avenue "O". The alley which commences at Twenty-First Street, runs south and makes a "T" intersection with the alley between Avenues "O" and "N".

About 8:30 A.M. on January 31st, a youngster twelve years of age, named Mary Alice Marcoux, was on her way to school and, in so doing, entered the north-south alley. Just north of the "T" intersection she came upon the body of a young woman lying in the snow. She went to a neighbour's house, where a Mrs. Hnatiuk resided, and told her of this discovery. Mrs. Hnatiuk told her to go and tell the people at the Westwood Funeral Home nearby. This she did, and spoke to Mrs. Murdoch, the wife of the manager. As a result Mr. Murdoch and his assistant, Mr. Michayliuk, went to where the body was lying and covered it with a blanket. Michayliuk then telephoned to the city Police.

At approximately 8:50 A.M. Sgt. Parker and Sgt. Reid, of the Saskatoon City Police, arrived on the scene. At the time it was still foggy, the temperature was between 35 to 39 degrees below zero, and the daylight was just breaking. They removed the blanket and examined the body. Sgt. Parker said it was the body of a young woman. He said he checked her pulse, found nothing, and that her right hand was frozen. He said her coat was open; the right strap of her brassiere was off her shoulder; her dress was pulled down and up and rolled about the mid-section; her underclothing and nylon stockings and garter belt were down around her ankles. The right shoe was missing and there were lacerations to her throat and stomach area. There was attached to the dress a name-plate, "Miss Gail Miller".

Identification officers were called; pictures were taken, and these pictures show the dead girl's condition at that time more vividly and accurately than words can describe.

Sgt. Parker also testified that he examined the area where the body was lying. He said it appeared that a scuffle had taken place and the body had fallen to the snow and that there were patches of blood in the snow. Later that day the body was positively identified as that of Miss Gail Miller, employed as a certified nurses' aid at the City Hospital. A coroner, Dr. Fogel, was called and the body removed to St. Paul's Hospital.

A post-mortem was performed by Dr. Emson. He stated the body had been badly frozen. His findings were as follows:

On the front of the neck and on the upper chest, from beneath the chin to the regions of the collar-bone on both sides were a group of incisions. There were approximately 15. Many of them were superficial scratches which had not divided the skin completely. Two of them divided the skin and the tissues below the skin and had exposed the muscles of the neck. In the region of the left collar-bone were three stab wounds, each approximately five-eighths of an inch in width. Just below the left breast were three similar wounds. There was one more stab wound of the same size on the

right lower chest, just to the right of the midline. On the deceased's back there were five stab wounds of a similar nature - four were grouped on the back of the right chest and one almost in line with the right arm pit. In addition, on the back of the lower left leg was a small bruise, superficial abrasions to both cheeks, the chin and the nose, and a small bruise with an abrasion on the upper left eyelid. Four of the stab wounds, and the lateral wound, all penetrated the chest cavity, two of which injured the lung. Death ensued from loss of blood, there being about three pints of blood in the chest cavity.

Dr. Emson also examined the deceased's genital-urinary system. In the vagina was found a small amount of reddish material. This material was found to contain a large amount of spermatozoa which were not mobile. There was no evidence of forcible penetration or injury to the genitalia. The hymen was absent. Dr. Emson was unable to say whether intercourse had taken place while the deceased was conscious or unconscious. This part of the examination took place between 4:00 and 5:00 o'clock in the afternoon. The doctor said, as there was no evidence of disintegration of the spermatozoa, intercourse would have taken place some time within the twelve hours preceding the examination.

At about 10:20 A.M. of the same day, Lieut. Penkala was searching the area where the body was found.

Buried in the snow, below the spot where the body had been lying, he found the blade of a knife. This blade was three and a half inches in length, sharpened on one side, and five-eighths of an inch in width. Dr. Emson testified that the stab wounds on the body could have been made by this knife. He also expressed the opinion that the stab wounds were made by a knife sharpened on one side.

Adeline Nyczai, a University student, testified that she lived at 130 Avenue "O" South, about one block north of where Gail Miller's body was found. She said Gail Miller resided at the same place. She said that about a quarter to seven that morning she saw Gail Miller, who was fully dressed except for her shoes and appeared ready to go to work. She said she usually left about 7:00 o'clock, and that in order to get to the bus to go to the City Hospital, she would have to walk south on either Avenue "O" or Avenue "N" to Twentieth Street. In either case it is obvious she would have to pass the entrance to the alley between Avenue "O" and Avenue "N", either at the east or west end.

When Milgaard, Wilson and Nichol John arrived at Cadrain's, they all went into the house. Shortly after they arrived, Wilson stated, he saw blood stains on Milgaard's pants. He said Milgaard changed his shirt, sweater and pants and put them in a suitcase. Wilson

said he also changed his trousers, taking a pair Milgaard had in the suitcase, as he had previously spilled acid on the pair he was wearing. Wilson stated that Milgaard asked him for the keys to the car and that he gave the keys to Milgaard. He said Milgaard took his suitcase, and went to the car. Milgaard drove the car away and returned in about fifteen minutes.

Milgaard parked the car when he returned and it was ascertained something was wrong with the transmission system. A tow truck was called and the car hauled to a filling station. The three, accompanied by Cadrain, went to the filling station. It took some time for the car to be repaired. While the car was being repaired, Cadrain and Nichol John went to the Credit Union, where Cadrain obtained some money. When the car was repaired, the bill was $28.00, which was paid by Cadrain.

About 4:30 P.M., Milgaard, Wilson, Cadrain and Nichol John set out for Edmonton. Wilson said that somewhere between Saskatoon and Rosetown, Nichol John opened the glove compartment and found a compact in a zipper case. She asked whose it was. Milgaard, without saying anything, opened the car window and threw it out. Wilson said that he had never had such a compact in his car.

They continued on to Rosetown and purchased

81

some food at a grocery store and went on to Calgary; from Calgary to Edmonton and St. Albert's. According to Wilson they spent four or five days at Calgary, Edmonton and St. Albert's. While at St. Albert's they were joined by a girl friend of Wilson's by the name of Sharon Williams. She was left in Edmonton.

Wilson said, when in Calgary he and Milgaard went to the bus station as he wanted to phone a girl he had previously known. While there, Wilson stated, Milgaard said to him "I hit a girl", or "I got a girl in Saskatoon" and that he put her purse in a trash can and he thought she would be O.K.'

Cadrain was called to give evidence. He said Milgaard, Wilson and Nichol John arrived at his home about 9:00 A.M. on January 31st. He said Milgaard changed his shirt, sweater and pants. Cadrain testified he saw blood on both Milgaard's pants and shirt. He also said Milgaard got the car keys from Wilson, saying he wanted to go for a drive - that he left and returned fifteen minutes later. He said he did not know where he went.

In his evidence Cadrain also testified respecting the finding of the compact in the car by Nichol John after they left Saskatoon. He said, as did Wilson, Nichol John asked "Whose is this?", whereupon Milgaard, without answering, took the compact and threw it out of the car window.

After a stay in Edmonton, Calgary, and St. Albert's, Milgaard, Wilson and Nichol John drove to Banff, where they were questioned by the R.C.M.Police. They had no money, so Milgaard phoned his parents. Apparently they were sent some money, for, after spending the night in the car, they returned to Regina the following day.

After the body of Gail Miller was removed, the Police continued their investigations in the area. About 2:30 P.M. that afternoon, S/Sgt. Parker found a sweater, a boot, and a package of chiclets buried in the snow. They were found in the east-west alley, about 11 paces east of the "T" intersection. Sometime later there were found in the back yards in the immediate vicinity of where the body had been lying, a pair of surgical scissors, a comb, keys to Gail Miller's room, and the maroon handle of a knife. The expert from the R.C.M.Police laboratory testified that this handle and the blade found under Gail Miller's body fitted one to the other, and in his opinion were two parts of the same knife. There were also found in the vicinity of the Cadrain house a toque with blood stains on it and Gail Miller's wallet. The toque was not identified.

On February 3rd, Det. McCorriston followed a garbage truck that was picking up the garbage in the alley where the body was found. In a garbage can behind 1414 Twentieth Street West was found the purse of Gail Miller. This garbage can was located in the east-west

alley, behind the second house west of the "T" intersection.

An examination of the clothing Gail Miller had been wearing disclosed that the stab wounds she received in the back were made through her overcoat. There were no marks on her dress to indicate that the instrument which caused the wounds had passed through the dress.

On the afternoon of January 31st Lieut. Penkala, in examining the area in which Gail Miller's body was discovered, found two frozen lumps in the snow, yellowish in color. He retrieved these two lumps and placed them in vials. These vials were delivered to the R.C.M.Police Laboratory in Regina. On an analysis by S/Sgt. Paynter, one lump was found to contain semenal fluid. There were also found in the substances "A" antigens. According to the expert's testimony, 85% of people are secretors, that is, people who secrete blood group antigens in their other body fluids. According to the evidence, "A" antigens would be secreted by a person whose blood group was "A", but "A" antigens would not be secreted by persons whose blood group was either "B" or "O". Samples of blood were taken from the deceased, from Milgaard, and from Wilson. On examination, the blood group of the deceased was found to be "O" and that of Wilson to be "B"; that of Milgaard was found to be "A".

Craig Melnyk and George Lapchuk were called

as witnesses by the Crown. These two young men had learned from friends that Milgaard was at the Park Lane Motel at Regina. This was some time in late May of 1969. They testified they went to the motel about 10:30 P.M. and there found Melnyk and two girls, Ute Frank and Debbie Hall. They said the 11:00 o'clock T.V. news came on, in the course of which mention was made of the Gail Miller murder. Melnyk testified that someone asked Milgaard if he did it. Lapchuk stated he said to Milgaard, "Why don't you admit it? You did it, you know you did it". Lapchuk said he just made the comment to sort of bother Milgaard, as a joke.

Following this statement by Lapchuk, things began to happen. Melnyk said that Milgaard got up on his knees on the bed and started hitting a pillow as if he were stabbing it. He testified:

> "A. and he started hitting the pillow like he was stabbing something.
> Q. Just a minute - please - go ahead?
> A. He was hitting the pillow like he was stabbing something and he said - I killed her or something fourteen times.
> Q. I killed her . . . ?
> A. I'm not sure if it was - I killed her - but fourteen times was in there. It was either "I killed her . ." or"I stabbed her fourteen times."
> Q. You're sure it was either killed or stabbed? A.Yes.
> Q. Yes? A. And then he said: "I fixed her".
> Q. Yes?
> A. And then he sort of rolled on his side and started laughing. "

Lapchuk's testimony was as follows:

"Q. Alright, what happened when you said that?
A. Well, first of all he got a sort of funny look and then he jumped off the bed and straddled the pillow . . .
THE COURT:
Q. Just a minute, I want to get this down. he jumped off the bed, is that what you said? A. Yes.
Q. And straddled the pillow? A. Yes.
Q. Where was the pillow? A. On the floor.
Q. Yes?
A. And then he said: where is my paring knife?
Q. He said what?
A. Where is my paring knife?
MR. CALDWELL:
Q. Now, are you using - I'd like you to tell the Court anywhere where you are using exact words or words to a certain effect?
A. Well I believe this - to my remembrance this was the exact words.
Q. In this instance? A. Yes.
THE COURT:
Q. Yes?
A. And then he went through the motions of stabbing the pillow - raising his arm and stabbing the pillow. And then he said . .
Q. . . . just a minute. He went through motions of stabbing the pillow - with both hands or one hand?
A. I can't remember.
Q. Yes?
A. And then he said: Yes I stabbed her, I killed her, I stabbed her fourteen times and then she died.
Q. Just a minute. He said: Yes I stabbed her, I stabbed her fourteen times . . ?
A. . . . and then she died.
Q. Yes?
A. And these aren't the exact words. The only part I can remember for sure is that: and then she died. I can't remember whether it was stabbed her or killed her but - and then she died - stands out in my mind.
THE COURT: Thank you; go ahead.
MR. CALDWELL:
Q. Now, what happened when the accused did these things in the room?
A. Well, I was shocked, like I hadn't expected a display like that, you know; and I just started looking at him and I believe everybody else in the room was looking at him also; and then he looked up and saw that everybody - that I was staring at him with my jaw hanging down.

009356

"Q. I'm sorry; you'll have to talk louder.
THE COURT:
Q. You say: I was staring at him?
A. Yes.
Q. And you think everybody else was staring at him?
A. Yes, well I didn't look around the room but everything was all of a sudden quiet so --
MR. CALDWELL:
Q. Alright; and you were staring at him?
A. Yes.
Q. What did he do?
A. He just looked up and looked at me and then got up and shrugged his shoulders and smiled and sort of gave a little laugh and sat down. "

Both Melnyk and Lapchuk said that when Milgaard made the statements he was high on drugs. Shortly after this incident, Lapchuk left with Debbie Hall. Melnyk stayed the night with Milgaard and Ute Frank and left the following morning.

The Crown also called Nichol John as a witness. She testified, as did Wilson, that she, Milgaard and Wilson, left Regina about 1:00 A.M. in Wilson's car. She said they intended to go to Vancouver. She said, on the way to Saskatoon she saw in the car, apparently in the possession of Milgaard, a maroon handled paring knife. She also said that Milgaard had a second knife which she described as a hunting knife with a bone handle. She said they arrived in Saskatoon about 6:30 A.M. and started driving around looking for "Shorty".

She was not acquainted with Saskatoon. She said they were driving down a street and they overtook

a young lady who was walking on the sidewalk. She said the car stopped, Milgaard opened the door and asked the young lady where Pleasant Hill was, and she replied she didn't know. She said they then proceeded about half a block and, in attempting to make a turn, the car became stuck. At that point, she testified, Milgaard got out of the car and came back and said they couldn't get out. She said Wilson also got out of the car. She said she didn't know how they got out but remembered pulling up to the curb - that Wilson was in the car and Milgaard entered shortly thereafter. Apart from this, she said she had no recollection of what transpired at that time.

She said the next thing she remembers was getting stuck for a brief length of time in the alley and that from there they drove to a motel. At the motel she said Milgaard obtained a map. She said when Milgaard went into the motel he was without shoes. When they returned to the residential area, she related the incident of getting stuck behind the Danchuk residence. Her evidence respecting this incident was the same as that of Wilson.

After leaving the alley behind the Danchuk residence, she said, they arrived at the Cadrain place--where Milgaard and Wilson changed their pants. She said she did not see any blood on Milgaard's clothing. She stated Milgaard obtained the car keys from Wilson, drove away, and returned in about ten minutes. Her evidence

as to the events which transpired after that, prior to leaving for Edmonton, was the same as that of Wilson and Cadrain.

She said after they left Saskatoon Milgaard was driving and she was in the front seat. She said she opened the glove compartment and found therein a zippered cosmetic bag. She stated she had never seen it before and asked whose it was. She testified,

> "Nobody said anything and Dave - - all of a sudden grabbed it and threw it out of the window that way".

Her evidence as to subsequent events until their return to Regina was similar to that of Wilson.

Learned counsel for the Crown alleged that the witness Nichol John, at another time, made a statement in writing inconsistent with the testimony she had given, and asked for leave to cross-examine her as to that statement. This application was made pursuant to Section 9(2) of the Canada Evidence Act, Chapter 307, R.S.C. 1952, as amended by Chapter 14, S.C. 1968-69, and was made in the absence of the jury. Learned counsel for the appellant contended that, in the disposition of this application, the proper procedure was for learned counsel for the Crown to cross-examine Nichol John as to the inconsistencies in the absence of the jury, and that on the issue of whether or not she was adverse, he should be entitled to cross-examine her in the absence of the jury. The learned trial Judge

ruled that once he was satisfied that the witness had given, at another time, a statement inconsistent with her testimony, that all cross-examination in respect thereto should take place in the presence of the jury.

Learned counsel for the Crown produced the statement, allegedly signed by the witness Nichol John, dated May 24, 1969. The learned trial Judge read the statement and decided that it was inconsistent with her present testimony. He recalled the jury and learned counsel for the Crown cross-examined her. She admitted giving the 11 page statement and acknowledged her signature. She was asked to read the statement in its entirety which she did. Learned counsel for the Crown asked her specifically to read pages 3, 4, and 5. She admitted signing these pages, but stated she didn't remember saying what was contained therein. An application was then made to the learned trial Judge to declare her hostile, which he did. The cross-examination then proceeded.

The following are some pertinent questions and answers from that cross-examination:

"Q. Did you tell Sgt. Mackie:

'He offered to give her a ride to wherever she was going. She refused the ride. Dave closed the door and said, 'the stupid bitch'.

Did you tell Sgt. Mackie that?

A. Not all of it. I don't remember saying part of it. "

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"Q. O.K. Did you tell Sgt. Mackie:

'I recall Dave going back in the direction we had spoke to the girl. Ron went the other way past the funeral home.'

Did you tell Sgt. Mackie that?
A. Yes.
Q. And do you remember telling him?
A. Yes.
Q. And was it true?
A. Yes. "
****

"Q. And did you tell Sgt. Mackie this:

'The next thing I recall seeing Dave in the alley on the right side of the car. He had ahold of the same girl he spoke to a minute before. I saw him grab her purse. I saw her grab for her purse again.'

Did you tell Sgt Mackie those things?
A. I don't remember. "
****

"Q. Did you tell Sgt. Mackie this:

'Dave reached into one of his pockets and pulled out the knife. I don't know which pocket he got the knife from. The knife was in his right hand.'

Did you tell Mackie that?

A. I don't remember."
****

"Q. Did you tell Mackie this:

'I don't know if Dave had ahold of this girl or not at this time. All I recall is seeing him stabbing her with the knife.

Did you tell Mackie that?

A. I don't remember."
****

009361

"Q. Alright: did you tell Sgt. Mackie:

'The next I recall is him taking her around the corner of the alley. I think I ran after that. I think I ran in the direction Ron had gone.'

Did you tell Mackie that?

A. I don't know. "

* * * * * * * * * * *

"Q. Did you tell Sgt. Mackie:

'I recall running down the street. I don't recall seeing anyone. the next thing I know I was sitting in the car again. I don't know how I got back to the car.'

A. I don't remember saying that. "

* * * * * * * * * * *

"Q. Alright: Did you tell Mackie this:

'I seem to recall seeing Dave putting a purse into a garbage can. I don't remember which time it was or where I was when I saw this. I recall there were two garbage cans; the one on the left had the lid tipped; I don't recall which one he put it in.'

Did you tell Mackie those things?

A. I don't remember. "

* * * * * * * * * * *

"Q. Alright: did you tell Mackie:

'The next thing I remember sitting in the car. I don't remember Ron being in the car or coming back. I remember Dave coming back and getting into the front seat of the car. I remember moving over towards the driver's side because I didn't want to be near him.'

Did you tell Mackie those things?
A. Yes I did.
Q. And did those things happen?
A. Yes.
THE COURT: You remember that?
A. Yes, I remember that. Oh God! "

009362

The first ground of appeal is that the learned trial Judge erred in admitting the evidence as to the blood group of the witness Wilson. It was the prosecution's contention that Gail Miller was killed by Milgaard at a time when Wilson was in the vicinity. At the spot where Gail Miller's body was discovered, there were found two frozen lumps. These frozen lumps were recovered and analysed at the R.C.M. Police Laboratory in Regina. One of the lumps was found to contain semenal fluid and "A" antigens. The expert witness testified that "A" antigens would be secreted in other body fluids only by a person with an "A" blood grouping. I think the inference could be properly drawn by the jury that the spermatozoa were deposited by the person who had attacked Gail Miller. Thus, in my view, a blood sample of those who might have been involved was indeed relative evidence. Such evidence might be a factor to be considered by the jury in determining who may have committed the offence.

I cannot see how the admission of such evidence could, in any way, prejudice the appellant. This is particularly true as no reference was made to this evidence by the learned trial Judge in his charge to the jury. Such evidence, in my opinion, nonetheless was relevant and admissible and the learned trial Judge properly admitted it at the trial.

I will consider grounds 2 and 3 together. Section 9(2) of the Canada Evidence Act reads:

> "9. (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse. "

This subsection provides an exception to the law as stated in subsection (1). Under this subsection, a Judge in the exercise of his judicial discretion, may permit counsel to cross-examine his own witness as to a statement previously made in writing, or reduced to writing, that is inconsistent to the evidence which the witness is giving. The learned trial Judge may grant such permission without declaring the witness hostile. When such permission has been granted, the right to cross-examine is a limited one; it is confined to a cross-examination relative to the inconsistencies as disclosed in the statement. Under the section, however, if a subsequent application is made to declare the witness hostile, the learned trial Judge may consider the cross-examination as to the inconsistent statement in determining whether the witness is hostile. If the witness is declared to be hostile, then the right to cross-examine is not restricted.

While there may be decisions on the interpretation and application of Section 9(2), I have been

unable to find any, other than the oral judgment of Chief Justice Gale, delivered on behalf of the Court of Appeal for Ontario in R. v. Cooper, [1970] 2 O.R. 54. There the learned Chief Justice held that the cross-examination in that case went far beyond that authorized by the section; he did not consider the procedure to be followed in the disposition of an application to be permitted to cross-examine as authorized by that subsection. In the disposition of this ground of appeal, I think it is necessary to state what I believe the procedure should be.

It is to be noted that the right to cross-examine one's own witness respecting a statement in writing, or reduced to writing, previously made by the witness inconsistent with the evidence given, is not an absolute right. The Judge, in the exercise of his discretion, may or may not grant that permission. This requires some preliminary inquiry by the Judge. That being so, I think the consideration and disposition of the application in jury trials should be made in the absence of the jury. Allegation in the presence of the jury that the witness had, on another occasion, said something inconsistent with what she said in evidence, when leave to cross-examine is refused, might have a very adverse effect on the jury's deliberations, particularly as to the effect to be given to the evidence of that witness.

In my opinion, a procedure that would give effect to the legislation, and at the same time eliminate the possibility of any adverse effect upon the jury, would be as follows:

(1) Counsel should advise the Court that he desires to make an application under Section 9(2) of the Canada Evidence Act.

(2) When the Court is so advised, the Court should direct the jury to retire.

(3) Upon retirement of the jury, counsel should advise the learned trial Judge of the particulars of the application and produce for him the alleged statement in writing, or the writing to which the statement has been reduced.

(4) the learned trial Judge should read the statement, or writing, and determine whether, in fact, there is an inconsistency between such statement or writing and the evidence the witness has given in Court. If the learned trial Judge decides there is no inconsistency, then that ends the matter. If he finds there is an inconsistency, he should call upon counsel to prove the statement or writing.

(5) Counsel should then prove the statement, or writing. This may be done by producing the statement or writing to the witness. If the witness admits the statement, or the statement reduced to writing, such proof would be sufficient. If the witness does not so admit, counsel then could provide the necessary proof by other evidence.

(6) If the witness admits making the statement, counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial Judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted.

(7) The learned trial Judge should then decide whether or not he will permit the cross-examination. If so, the jury should be recalled.

The cross-examination provided for in Section 9(2) must be in the presence of the jury. The purpose of that cross-examination is to attack the credibility of the witness in respect to the evidence already given. As the jury are the judges of credibility, it is obvious the cross-examination would be meaningless if conducted in their absence.

The determination of whether a witness is hostile is a matter solely for the learned trial Judge. It is when the learned trial Judge is of the opinion that the witness proves adverse that subsection (1) of Section 9 comes into play. The declaration of hostility, as provided for in subsection (1), is an entirely different matter from that of permitting cross-examination under subsection (2). In my opinion, there is no conflict and subsection (2) is a specific exception to the provisions of subsection (1). In the present case the learned trial Judge had every right to declare the witness Nichol John hostile, and in so doing had the right to consider the cross-examination that had taken place in the presence of the jury on the permission granted under sub-section (2).

In the present case, the learned trial Judge did not pursue the procedure which I have suggested be followed. After deciding that the statement of Nichol John previously made, was inconsistent with the evidence she had given, he recalled the jury. Proof

of the statement was then made in the presence of the jury.

Had the learned trial Judge not permitted the cross-examination, then I think strong exception could have been taken to the procedure which he followed. In the present case he did allow the cross-examination and there was nothing that took place in the cross-examination of the witness, either by Crown or defence counsel, that would not have occurred had he followed the procedure I have outlined. Moreover, it would be difficult to find a case where the reason for permitting the cross-examination would be stronger than in this one. I do not think it can possibly be argued that the appellant was in any way prejudiced by the procedure which the learned trial Judge followed, or that there was any substantial wrong or miscarriage of justice. Under these circumstances, if he erred in law, I would apply the curative provisions of Section 592(1)(b)(iii) of the Criminal Code.

The learned trial Judge carefully instructed the jury that the statement which was the subject matter of the cross-examination was not evidence. He further instructed the jury that the only evidence of Nichol John was that which she gave in the witness box. Such a direction was a proper one. It is to be noted that no objection has been taken by the appellant to the manner in which the learned trial judge instructed the jury in this respect.

I have reviewed the evidence in detail. I am satisfied the learned trial Judge adequately instructed the jury as to the applicable principles of law. In his review of the facts, he was extremely careful, and presented them to the jury in a manner that was very fair to the appellant. In my opinion the jury, in finding the appellant guilty, applied the proper principles of law to the evidence before them, and on such evidence could properly find the appellant guilty as charged. There are, in my view, no grounds upon which this Court would be justified in interfering with the jury's decision.

The appeal is therefore dismissed.

DATED at the City of Regina, in the Province of Saskatchewan, this 5th day of January, A.D. 1971.

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CULLITON, C.J.S. for the Court.

CORAM: FULL COURT.

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