

Appendix R  
Supreme Court of  
Canada Opinion



Supreme Court of Canada



Cour suprême du Canada

APPENDIX UUU 41

IN THE MATTER OF Section 53 of the  
*Supreme Court Act, R.S.C., 1985, c. S-26;*

DANS L'AFFAIRE de l'article 53 de la  
*Loi sur la Cour suprême, L.R.C. (1985),  
ch. S-26;*

AND IN THE MATTER OF a  
Reference by the Governor in Council  
concerning whether the conviction of  
David Milgaard in Saskatoon,  
Saskatchewan on January 31, 1970 for  
the murder of Gail Miller on January 31,  
1969 constitutes a miscarriage of justice,  
and what remedial action, if any, is  
advisable, as set out in Order in Council  
P.C. 1991-2376, dated the 28th day of  
November, 1991

ET DANS L'AFFAIRE d'un renvoi  
adressé par le Gouverneur en conseil  
pour savoir si la déclaration de  
culpabilité prononcée contre David  
Milgaard, à Saskatoon (Saskatchewan),  
le 31 janvier 1970, pour le meurtre de  
Gail Miller, survenu le 31 janvier 1969,  
constitue une erreur judiciaire, et pour  
déterminer quelle mesure corrective, le  
cas échéant, devrait être prise, tel  
qu'exposé dans le décret C.P. 1991-2376,  
en date du 28 novembre 1991

**CORAM:**

The Rt. Hon. Antonio Lamer, P.C.  
The Hon. Mr. Justice Sopinka  
The Hon. Mr. Justice Cory  
The Hon. Mme Justice McLachlin  
The Hon. Mr. Justice Iacobucci

**CORAM:**

Le très hon. Antonio Lamer, c.p.  
L'honorable juge Sopinka  
L'honorable juge Cory  
L'honorable juge McLachlin  
L'honorable juge Iacobucci

Appeal heard:  
January 16, 1992  
January 21-24, 1992  
February 17-20, 1992  
March 4, 1992  
March 9-12, 1992  
April 6, 1992

Appel entendu:  
Le 16 janvier 1992  
Du 21 au 24 janvier 1992  
Du 17 au 20 février 1992  
Le 4 mars 1992  
Du 9 au 12 mars 1992  
Le 6 avril 1992

Judgment rendered:  
April 14, 1992

Jugement rendu:  
Le 14 avril 1992

Reasons for judgment by  
The Court

Motifs de jugement par  
La Cour

Counsel at hearing:

Avocats à l'audience:

For David Milgaard:  
H. Wolch, Q.C.  
David Asper

Pour David Milgaard:  
H. Wolch, c.r.  
David Asper

008879

40

- 2 -

**For the Attorney General for  
Saskatchewan:**  
Murray Brown  
Eric Neufeld

**Pour le Procureur général de la  
Saskatchewan:**  
Murray Brown  
Eric Neufeld

**For the Attorney General of Canada:**  
S.R. Fainstein, Q.C.  
Robert Frater

**Pour le Procureur général du Canada:**  
S.R. Fainstein, c.r.  
Robert Frater

**For Larry B. Fisher:**  
Brian A. Beresh

**Pour Larry B. Fisher:**  
Brian A. Beresh

008880

39

**Indexed as:** *Reference re Milgaard (Can.)*.

**Répertorié:** *Renvoi relatif à Milgaard (Can.)*.

008881

38

THE SUPREME COURT OF CANADA

IN THE MATTER OF SECTION 53 OF THE SUPREME COURT ACT, R.S.C., 1985,  
c. S-26:

IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL  
CONCERNING WHETHER THE CONVICTION OF DAVID MILGAARD IN  
SASKATOON, SASKATCHEWAN ON JANUARY 31, 1970 FOR THE MURDER OF  
GAIL MILLER ON JANUARY 31, 1969 CONSTITUTES A MISCARRIAGE OF  
JUSTICE, AND WHAT REMEDIAL ACTION, IF ANY, IS ADVISABLE, AS SET  
OUT IN ORDER IN COUNCIL PC 1991-2376, DATED THE 28TH DAY OF  
NOVEMBER 1991

CORAM: The Chief Justice and Sopinka, Cory,  
McLachlin and Jacobucci JJ.

BY THE COURT:

This matter was referred to this Court by Order in Council, P.C. 1991-2376.

That Order provides:

WHEREAS David Milgaard was convicted on January 31, 1970 following a trial by Judge and Jury at Saskatoon, Saskatchewan, for the murder of Gail Miller on January 31, 1969, and was sentenced to imprisonment for life;

WHEREAS David Milgaard appealed the conviction to the Court of Appeal for Saskatchewan, which dismissed the appeal on January 5, 1971;

WHEREAS an application for leave to appeal against the conviction was dismissed by the Supreme Court of Canada on November 15, 1971;

WHEREAS, by a letter dated December 28, 1988, an application was made to the Minister of Justice by David Milgaard's counsel, seeking the mercy of the Crown pursuant to section 690 of the *Criminal Code*, which application, after due consideration, was declined on February 27, 1991;

WHEREAS, by a letter dated August 14, 1991, a second application was made to the Minister of Justice by David Milgaard's counsel for the mercy of

008882

the Crown, pursuant to section 690 of the *Criminal Code*, based on different grounds from the first application made on December 28, 1988;

WHEREAS there exists widespread concern whether there was a miscarriage of justice in the conviction of David Milgaard and it is in the public interest that the matter be inquired into;

AND WHEREAS the Governor in Council sees fit to refer that matter to the Supreme Court of Canada;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Justice, pursuant to section 53 of the *Supreme Court Act*, is pleased hereby to submit to the Supreme Court of Canada for hearing and consideration the following questions:

- (a) upon a review and consideration of the judicial record, the Reference Case that will be filed before this Court, and such further or other evidence as the Court, in its discretion, may receive and consider, does the continued conviction of David Milgaard in Saskatoon, Saskatchewan for the murder of Gail Miller, in the opinion of the Court, constitute a miscarriage of justice?
- (b) depending on the answer to the first question, what remedial action under the *Criminal Code*, if any, is advisable?

During the course of the hearing the Court determined that in the interests of justice the guidelines that would be followed in responding to the questions should be set out for the parties. These guidelines provide:

- (a) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, the Court is satisfied beyond a reasonable doubt that David Milgaard is innocent of the murder of Gail Miller. If we were to

008883

36

- 3 -

answer the first question put to this Court by the Governor General in the affirmative on this ground, we would consider advising that the Governor in Council exercise his power under s. 749(2) of the *Criminal Code* to grant a free pardon to David Milgaard.

(b) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, the Court is satisfied on a preponderance of the evidence that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground, it would be open to David Milgaard to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining whether the conviction should be quashed and a verdict of acquittal entered, and we would advise the Minister of Justice to take no steps pending final determination of those proceedings.

(c) The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this Court which is relevant to the issue of David Milgaard's guilt, which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict. If we

008884



35

- 4 -

were to answer the first question put to this Court by the Governor General in the affirmative on this ground we would consider advising the Minister of Justice to quash the conviction and to direct a new trial under s. 690(a) of the *Criminal Code*. In this event it would be open to the Attorney General of Saskatchewan to enter a stay if a stay were deemed appropriate in view of all the circumstances including the time served by David Milgaard.

- (d) If the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, fails to establish a miscarriage of justice as set out in paragraphs (a), (b) or (c) above, we might nonetheless consider advising the Minister of Justice that granting of a conditional pardon under s. 749(2) of the *Criminal Code* may be warranted where having regard to all the circumstances, it is felt some sympathetic consideration of David Milgaard's current situation is in order.

It is appropriate to begin by stating that in our view David Milgaard had the benefit of a fair trial in January 1970. We have not been presented with any probative evidence that the police acted improperly in the investigation of the robbery, sexual assault and murder of Gail Miller or in their interviews with any of the witnesses. Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing at the time. Milgaard was represented by able and experienced

008885

34

- 5 -

counsel. No error in law or procedure has been established. At the conclusion of the first trial, there was ample evidence upon which the jury, which had been properly instructed, could return a verdict of guilty.

However, fresh evidence has been presented to us. Ronald Wilson, a key witness at the trial, has recanted part of his testimony. Additional evidence has been presented with respect to the alleged motel room confession. More importantly, there was evidence led as to sexual assaults committed by Larry Fisher which came to light in October 1970, when Fisher made a confession.

In our view, this evidence, together with other evidence we have heard, constitutes credible evidence that could reasonably be expected to have affected the verdict of the jury considering the guilt or innocence of David Milgaard. Our conclusion in this respect is not to be taken as a finding of guilt against Fisher, nor indeed that the evidence would justify charging him with the murder of Gail Miller.

We now consider the options set out in the guidelines.

As to the first, we are not satisfied beyond a reasonable doubt that David Milgaard is innocent of the murder of Gail Miller.

008886

33

- 6 -

As to the second, we are not satisfied, on the basis of the judicial record, the Reference case and the further evidence heard on this Reference, on a preponderance of all the evidence, that David Milgaard is innocent of that murder.

Third, we are satisfied that there has been new evidence placed before us which is reasonably capable of belief and which taken together with the evidence adduced at trial could reasonably be expected to have affected the verdict. We will therefore be advising the Minister to quash the conviction and to direct a new trial under s. 690(a) of the *Criminal Code*. In light of this decision, it would be inappropriate to discuss the evidence in detail or to comment upon the credibility of the witnesses.

Nonetheless we will set out in brief the basis for our recommendation to the Minister of Justice that she should direct that a new trial be held.

Without being exhaustive it will suffice to observe that there is some evidence which if accepted by a jury could implicate Milgaard in the murder of Gail Miller.

Early in the morning of January 31, 1969, Milgaard, Nichol John and Ronald Wilson drove from Regina to Saskatoon. The evidence of Nichol John and the final version of the recantation of Ronald Wilson indicates that in Saskatoon, sometime before 7:00 a.m. on that morning they stopped a woman walking by their car to ask for directions. Shortly after that, the car became stuck, Wilson and Milgaard got out of the car and walked away in different directions to seek assistance. Wilson returned to the

008887

car before Milgaard. Justice Tallis, before his appointment to the bench, had acted as counsel for Milgaard. Ordinarily discussions between a solicitor and a client are privileged and cannot be disclosed by the solicitor without the permission of the client. Milgaard waived all privilege and as a result, Justice Tallis testified as to statements made to him by Milgaard.

Without enumerating them fully, or commenting on which should prevail, it will suffice to observe that there were a number of differences in the testimony given by Milgaard and Justice Tallis on this reference.

Justice Tallis testified that Milgaard denied any involvement in the murder. However, Milgaard did confirm to his counsel the sequence of events related by Nichol John and Wilson that is set out above. Milgaard confirmed the evidence given by Nichol John and Ronald Wilson that he had broken into a building at some point during the trip from Regina to Saskatoon. Justice Tallis stated that Milgaard referred to the pedestrian whom they stopped to ask for directions as an older woman, but could not give a more precise estimate of her age. As well, Milgaard admitted to Tallis that he looked at her with a view to possibly robbing her. Other evidence indicates that Gail Miller's purse was taken by somebody and thrown in a garbage can.

Nichol John and Albert Cadrain, whom the group picked up in Saskatoon, testified that Nichol John had found a compact or a makeup bag in the Wilson car after they left Saskatoon. It had not been there earlier. When Nichol John inquired about

008888

- 8 -

it, David Milgaard seized it and threw it out of the car. Justice Tallis testified that David Milgaard had confirmed this had occurred and could not give any explanation for his actions. Milgaard also told his counsel that he may have had a knife in his possession when he arrived in Saskatoon.

Albert Cadrain testified that he saw blood on the pants and shirt of Milgaard when Milgaard changed his clothes at the Cadrain house.

In addition there is the evidence of the motel room incident which could be taken as an admission of murder by Milgaard, or as a joke made in very poor taste, or as mere drug-induced rambling.

While there is some evidence which implicates Milgaard in the murder of Gail Miller, the fresh evidence presented to us, particularly as to the locations and the pattern of the sexual assaults committed by Fisher, could well affect a jury's assessment of the guilt or innocence of Milgaard. The continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence.

It is therefore appropriate to recommend to the Minister of Justice that she set aside the conviction and direct that a new trial be held.

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30

- 9 -

It would be open to the Attorney General of Saskatchewan under the *Criminal Code* to enter a stay if that course were deemed appropriate in light of all the circumstances.

However, if a stay is not entered, a new trial proceeds and a verdict of guilty is returned, then we would recommend that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed.

003890