COUR D'APPEL

PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

No: **500-10-000356-954**
(700-01-007384-889)

Le 18 octobre 1999

CORAM: LES HONORABLES BEAUREGARD
FISH
ROBERT, JJ.C.A.

MICHEL JETTÉ,

APPELANT - accusé

c.

SA MAJESTÉ LA REINE,

INTIMÉE - poursuivante

LA COUR, statuant sur le pourvoi de l'appelant contre le verdict d'un jury de la Cour supérieure (Terrebonne, le 26 mai 1989, l'honorable Réjean Paul) qui a déclaré l'appelant coupable d'homicide involontaire coupable;

Après étude du dossier, audition et délibéré;

Pour les motifs énoncés dans les opinions écrites des juges Beauregard et Fish, déposées avec le présent arrêt, le juge Robert souscrivant aux motifs du juge Fish;

ACCUEILLE le pourvoi;

ANNULE le verdict de culpabilité prononcé contre l'appelant en Cour supérieure;

ORDONNE l'arrêt des procédures.

MARC BEAUREGARD, J.C.A.

MORRIS J. FISH, J.C.A.

MICHEL ROBERT, J.C.A.

Pour l'appelant:
Me Julio Peris

Pour l'intimée:
Me François Brière

Date d'audition: 19 novembre 1998

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COUR D'APPEL

PROVINCE DE QUÉBEC
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No: **500-10-000356-954**
(700-01-007384-889)

CORAM: LES HONORABLES BEAUREGARD
FISH
ROBERT, JJ.C.A.

MICHEL JETTÉ,

APPELANT - (accusé)

c.

SA MAJESTÉ LA REINE,

INTIMÉE - (poursuivante)

OPINION DU JUGE BEAUREGARD

Je partage l'avis du juge Fish suivant lequel l'appel doit être accueilli, le verdict cassé et la procédure arrêtée.

Par ailleurs, je ne mets pas de côté la possibilité qu'ayant décidé de ne pas entendre le fond d'un pourvoi au motif que l'appelant est décédé, la Cour déclare caducs, non seulement le pourvoi, mais la condamnation elle-même. On peut en effet

prétendre avec sérieux qu'en toute justice pour la mémoire de l'accusé, la Cour ne peut refuser d'entendre un pourvoi pour une raison qui n'a rien à faire avec le bien fondé d'un verdict et, du même souffle, laisser subsister le verdict.

MARC BEAUREGARD, J.C.A.

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

No: **500-10-000356-954**
(700-01-007384-889)

CORAM: THE HONOURABLE MARC BEAUREGARD
MORRIS J. FISH
MICHEL ROBERT, JJ.A.

MICHEL JETTÉ,

APPELLANT - accused

v.

HER MAJESTY THE QUEEN,

RESPONDENT - prosecutrix

OPINION OF FISH, J.A.

I

The appellant, Michel Jetté, has been removed by death from the mundane effects of his appeal and the earthly consequences of his conviction.

He cannot be re-tried or further punished, whatever the outcome of the appeal. Preserving his conviction will have no

deterrent effect on anyone. Quashing it will precipitate no collateral, pecuniary consequences: Mr. Jetté was found guilty of manslaughter, and there is no question here of a fine, or of compensation, restitution, confiscation or forfeiture. Nor did the conviction, according to the materials before us, have any bearing on an inheritance or on a claim under a policy of insurance.

To dispose of Mr. Jetté's appeal, duly filed in a timely manner, we must nonetheless resolve, in an unusual context, difficult questions of legal principle and criminal procedure.

Has our jurisdiction been ousted by Mr. Jetté's demise? If not, should we dispose of his appeal on its merits, or declare it "abated"? Is this a matter of discretion? If the appeal is abated, must the conviction be vacated?

Canadian authority on these issues is scant and provides no settled solutions.

In England, the House of Lords concluded in 1993, "with some regret", that the appeal abates, leaving the conviction and sentence intact.[1]

Their Lordships reached this result largely by statutory construction. Under the law as it then stood, they found that the courts were powerless to prevent any resulting injustice: This was a matter for consideration by Parliament.

In the United States, where the issue has been extensively considered, the federal courts, including the U.S. Supreme

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1 **Kearley (No 2)**, [1994] 3 All E.R. 246, at p. 253. See also **Rowe** (1955), 39 Cr. App.R. 57 (C.C.A.), and **Jefferies** (1968), 52 Cr. App. R. 654 (C.A. Crim. Div.). There now exists a mechanism in England for reviewing convictions of deceased defendants. Convictions were quashed, for example, in **Bentley**, [1998] TNLR No. 561, and **Mattan**, The Independent, March 4, 1998, p. 17, in both instances by the Court of Appeal, Criminal Division, pursuant to references by the Criminal Cases Review Commission under section 9 of the **Criminal Appeal Act 1995**. Convicted of Murder in 1952, Bentley was hanged on January 28, 1953. On July 29, 1993, he was granted a royal pardon "in respect of the death sentence and execution" (at p. 1). **Mattan** involved a conviction for murder as well. Convicted in 1952, Mattan, too, had been executed some 45 years before the Court of Appeal finally quashed his conviction which, it said, had been "shown to be unsafe".

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Court[2], have consistently held that the appeal abates **ab initio**, so that the conviction must be set aside without any hearing on the merits. A majority of state courts follow the same rule. Others have held, as in England, that the appeal abates but the conviction survives. A third group permits continuance of the proceedings by a substituted appellant --

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2 See **Durham v. United States**, 91 S. Ct. 858 (1971) and **Dove v. United States**, 96 S. Ct. 579 (1976). Both **Durham** and **Dove** involved petitions for certiorari to review convictions, as opposed to appeals of right. In **Durham**, the defendant's death pending review of his conviction was held to have abated "all proceedings had in the prosecution from its inception". The Court expressly declined to distinguish, in this regard, between appeals of right and petitions for certiorari. Accordingly, certiorari was granted and the conviction was vacated. Five years later, in **Dove**, certiorari was **refused** and the Court, in its laconic reasons, overruled **Durham** "[t]o the extent that **Durham** [citation omitted] may be inconsistent with this ruling". **Dove** has generally been understood to have narrowed the application of **Durham** to appeals of right: See, for example, **United States v. Schumann**, 861 F. 2d 1234 (11th Cir. 1988); **United States Oberlin**, 718 F. 2d 894 (9th Cir. 1983); **United States v. Pauline**, 625 F. 2d 684 (5th Cir. 1980); **United States v. Moehlenkamp**, 557 F. 2d 126 (7th Cir. 1977). Thus in **Moehlenkamp**, at 128, the Court stated: "We do not believe that the Court's cryptic statement in **Dove** was meant to alter the longstanding and unanimous view of the lower federal courts that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him."

a family member, a friend, or even defence counsel who has earlier appeared on the record.

Essentially I have concluded that, in Canada, appellate courts retain jurisdiction over a pending appeal upon the death of the convicted accused and, in their discretion, may either declare the appeal abated or consider it on its merits. And bearing in mind the policy considerations set out below, I think it preferable not to disturb the conviction or sentence unless we would do so were the appellant alive.

While not final until all rights of appeal are exhausted, the conviction and sentence are, as a matter of legal principle, presumed sound until a higher court has otherwise determined. I would therefore leave them undisturbed until this presumption has been overcome. This would occur only where we have decided to hear the matter on its merits and concluded, applying the ordinary rules governing appellate intervention, that the conviction was unsound or the sentence unfit.

In my view, we should hear the matter on its merits only when the interests of justice require that we do so,

notwithstanding the absence of any temporal consequences for the accused who inscribed the appeal.

Here, I would admit the new evidence that has been proffered. With that evidence in the record, I feel bound to conclude that our system of justice would suffer disrepute if we allowed the conviction to stand.

It is essentially for these reasons that I would take jurisdiction on the merits, allow the appeal, quash the appellant's conviction, and enter a judicial stay of proceedings.

II

Mr. Jetté, as I have mentioned, was convicted by a jury of manslaughter. He appealed to this Court but died before the appeal could be heard. In the interim, new evidence was tendered which, if received, would discredit the verdict at trial. The evidence is of a particularly disturbing nature and casts serious doubt on the jury's finding of guilt. Were the appellant alive, we would therefore be bound to allow the

appeal on its merits, to quash the conviction, and to either order a new trial or enter an acquittal.

The only evidence capable of supporting Mr. Jetté's conviction is a statement he gave to the police. He gave that statement while under arrest. On the voir dire at trial, the police testified that they arrested the appellant on the strength of an incriminating conversation between the appellant and an informant by the name of Dugal. That conversation was recorded without judicial authorization, but with Dugal's consent.[3] One of the officers, Gaétan Rivest, testified at trial that the tape was afterward erased.

The fresh evidence tendered on appeal comprises that very tape and a transcript of Rivest's deposition before Proulx J.A. after the appeal was inscribed.

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3 It has since then been held that the interception of a private communication in these circumstances constitutes an unreasonable search and seizure within the meaning of s. 8 of the **Canadian Charter of Rights and Freedooms**: See **Duarte**, [1990] 1 S.C.R. 30 and secs. 184.1 and 184.2 of the **Criminal Code**, which were subsequently enacted. I would assume for present purposes that evidence regarding the intercepted conversation between Mr. Dugal and the appellant would nonetheless be admitted pursuant to sec. 24(2) or the **Charter**.

At trial, the appellant testified that his statement to the police was false, that it had been extracted from him by a beating and by threats, and that he was deprived of his right to consult with counsel before giving the statement. He claimed that he had been threatened by Rivest and beaten by other officers.

Rivest, at trial, contradicted the appellant's evidence. He denied any contact with the appellant that day.

Rivest now says that he lied at trial, that he did indeed threaten the appellant, and that the appellant was beaten by the other officers.

Moreover, the tape of appellant's conversation with Dugal -- thought by Rivest, until then, to have been erased -- has now been produced by the Crown[4]. It confirms Rivest's present evidence that the appellant did **not** incriminate himself during his conversation with Dugal.

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4 The material before us does not explain why the tape was not produced earlier. I think it safe to assume that its existence was previously unknown to the prosecutor in charge of the file.

From this freshly obtained evidence, it follows inescapably that the intercepted conversation between Dugal and the appellant could not have afforded reasonable grounds for the appellant's arrest.

The Crown's evidence at trial on this critical issue has thus been entirely discredited in this Court.

III

At least four appellate decisions in Canada bear, in varying degrees, on the issues that concern us here. Three were decided by the Ontario Court of Appeal: **Collins**[5], **Cadeddu**[6] and **Hay**[7]. The fourth, **Lewis**[8], is a judgment of the British Columbia Court of Appeal holding that **Cadeddu** stated the law correctly[9].

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5 **Re Collins and the Queen** (1973), 13 C.C.C. (2d) 172 (Ont. C.A.).

6 **Re Cadeddu and The Queen** (1983) 4 C.C.C. (3d) 112 (Ont. C.A.).

7 [1994] O.J. No. 2598 (QL)(C.A.).

8 [1997] B.C.J. n° 2339 (QL) (B.C.C.A.).

9 In its reasons, delivered orally, the Court nonetheless took care to note that "[t]here is no collateral benefit

Collins came before the Ontario Court of Appeal pursuant to the dismissal, by Donnelly J., of an application for an order prohibiting Vannini D.C.J. from proceeding with the appellant's trial. After hearing the appeal and reserving judgment, the Court was advised that the appellant had since died accidentally. In these circumstances, the Court found it sufficient to say that mere reference to the relief sought -- an order prohibiting trial of the deceased appellant --- was sufficient "to demonstrate the inappropriateness of the Court pronouncing judgment in this matter"[10].

Cadeddu involved an appeal by the Crown against a judgment granting respondent's successful application for **habeas corpus** with **certiorari** in aid and quashing the suspension and revocation of his parole. The respondent was killed in prison the day after his appeal was heard. The Court, which had reserved judgment, adverted in these terms to the English and American authorities:

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to Mr. Lewis [or, presumably, to anyone else] in proceeding with the matter" (at par. 3).

10 At p. 176.

> The English Court of Criminal Appeal has refused in two reported cases to hear the appeal of a person who, having been convicted on indictment, died before his appeal could be heard: **R. v. Rowe** (1955), 39 Cr. App. R. 57 and **R. v. Jefferies** (1968), 52 Cr. App. R. 654. Both cases were relied on by this court in reaching its conclusion in **R. v. Collins, supra**. The court in **Collins** also mentioned **State of Maine v. Carter** (1973), 299 A. 2d 891, where the same general rule of abatement of an appeal following the death of a defendant was expressed: see also **United States of America v. Moehlenkamp** (1977), 557 F. 2d 126.

The Court later concluded:

> We have not been referred to any case, nor have we found one, where the general principle of abatement has not been followed where the person charged or the subject of the proceedings has died pending an appeal. In our view none of the cases where an exception to the general rule has been stated and applied in special circumstances can properly be applied so as to justify our making a further exception in the present case.
>
> We therefore find that the appeal has abated by reason of the unfortunate death of Mr. Cadeddu, and we deem it to be inappropriate for us to deal further with it.

Finally, in **Hay**, the Ontario Court of Appeal allowed a motion by the Crown to quash an appeal against conviction on the ground that the appellant had died before the appeal could be heard. Referring to **Cadeddu, supra**, and **Kearley, supra**, the

Court disposed of the appeal by endorsement, in these terms: "On the facts of this case, we are not persuaded there is any basis upon which we should depart from the principle that with death of the appellant the appeal abates."

The result in each of these matters turned essentially on considerations that do not avail here -- the facts in **Hay** (which, understandably, are not set out in the brief endorsement), and the order sought in **Collins** and **Cadeddu**.

In each instance, however, the Court recognized that it had discretion to hear the appeal of a deceased appellant in appropriate circumstances. And while it is true that the Court mentioned a "general principle of abatement", I find particularly striking the Court's reiterated references to American case law applying that principle.

Thus, in **Cadeddu**, and therefore by reference in **Hay** and **Lewis**, the Court expressly cited with approval **State of Maine v. Carter**[11] and **United States v. Moehlenkamp**[12].

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11 299 A. 2d 891 (Maine 1973).

12 557 F. 2d 126 (7th Cir. 1977).

In **Carter**, the Supreme Judicial Court of Maine held that the appellant's death abated the appeal, requiring its dismissal. Applying the rule of abatement, however, the Court **vacated the conviction.** In **Moehlenkamp**, the Seventh Circuit of the United States Court of Appeals arrived at the same result.

Indeed, as I mentioned earlier, federal courts in the United States "have consistently held that death pending appeal of a criminal conviction from the trial court abates not only the appeal, but also all proceedings in the prosecution since its inception"[13].

The rationale underlying this approach was explained in these terms in **Moehlenkamp, supra:**[14]

> [W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of

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13 **State v. Makaila**, 897 P. 2d 967 (Hawai'i 1995 (S. Ct.)), at p. 969. See also: **Durham, supra**, p. 860; **Moehlenkamp, supra**, p. 128; **United States v. Pauline**, 625 F. 2d 684 (5th Cir. 1980); **United States v. Oberlin**, 718 F. 2d (9th Cir. 1983).

14 At p. 128. References omitted. A different but complementary rationale has been adopted in other cases: See **Gollott, infra.**

> justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is "an integral part of [our] system for finally adjudicating his guilt or innocence."

This approach does not rest on American constitutional principles since, in the United States, there is no federal constitutional right to appeal[15]. Moreover, as in Canada, "it is well established in the federal system that, once convicted, a criminal defendant is no longer presumed innocent"[16]. In some states, an accused has a constitutional right to appellate review[17]; but not in others[18].

The majority of state jurisdictions, like all U.S. federal courts, dismiss the appeal without a hearing on the merits and declare the prosecution abated **ab initio**[19]. In **Robinson,**

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15 **People v. Peters**, 537 N.W. 2d 160, 162 (Mich. 1995 (S.Ct.)).

16 **Ibid.**

17 For example, Ohio: See **State v. McGettrick**, 509 N.E. 2d 378 (Ohio 1987 (S.Ct.)).

18 For example Hawai'i: See **Makaila, supra**, at p. 970, note 5.

19 Annotation, **Abatement of State Criminal Cases by Accused's Death Pending Appeal of Conviction - Modern Cases** 80 A.L.R.4th 189 (1990). See also the list of

supra, the court held this to be the general rule in Illinois. But, because of a victims' rights amendment to the state constitution, the Court found that this general rule did not apply to appeals from convictions for violent crimes. In such instances, exceptionally, the appeal would be dismissed but the conviction would not be "voided".

In a smaller but significant number of states, the appeal is abated or dismissed, leaving the conviction intact[20].

A third group allow the appeal to be decided on its merits. Thus, for example, in **McGettrick**, **supra**, the court authorized the substitution of another person for the deceased defendant. The court found it to be in the interest of the defendant, of the defendant's estate and of society that any challenge initiated by a defendant to the regularity of a criminal proceeding be fully reviewed and decided by the appellate process[21].

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states set out in **Makaila**, **supra**, at p. 969, note 3, and **People v. Robinson**, 699 N.E. 2d 1086, (Ill. App. 1 Dist. 1998), at p. 1091, note 2.

20 **Robinson**, **supra**, at p. 1091, note 3.

21 See also **State v. Jones**, 551 P. 2d 801 (Kan 1976), where it was similarly held that the interests of the family of

I mentioned earlier that a second and complementary rationale underlying the general rule, in the United States, of abatement **ab initio**, had been adopted in **Gollott v. State**[22]. In that case, the Mississippi Supreme Court overruled its own previous decisions requiring dismissal of the appeal while allowing the conviction to stand. The Court explained its change of view this way:

> We are no longer of the opinion that the abatement **ab initio** rule obviously results in a "miscarriage of justice". There are essentially three reasons for penal statutes in our justice system: (1) to protect society from dangerous individuals; (2) to hopefully rehabilitate convicted criminals; and (3) to deter others from violating the law. Following the abatement **ab initio** rule does not undermine any of these purposes. What is obvious is that society needs no protection from the deceased, nor can the deceased be

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the defendant and the public in the determination of a criminal case, as well as the fact that collateral rights might be affected warranted adjudication on the merits, and **Commonwealth v. Walker**, 288 A. 2d 741, 743, where the Pennsylvania Supreme Court concluded that it was in the interest of both the defendant's estate and society that any challenge to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process. From cases discussed in **Makaila, supra**, it appears that some of states permitting continuation of the proceedings have done so on principle and not pursuant to legislation or to court rules providing for substitution.

22 646 So. 2d 1297, 1300 (Miss 1994).

> rehabilitated. Moreover, other potential criminals will be no less deterred from committing crimes. In the abatement **ab initio** scheme, the judgment is vacated and the indictment is dismissed, but only because the convicted defendant died. Surely this would not give peace of mind to the criminally inclined.

The Court declined, however, to adopt integrally the rule followed in all federal courts and the majority of state courts -- abatement **ab initio**, without a hearing on the merits. Instead, adopting the reasoning and conclusion of **McGettrick**, **supra**, the Court permitted substitution for the deceased appellant.

Abatement **ab initio** was held to be the appropriate disposition only where there was no request for substitution.

IV

In the United States, then, the favoured approach -- abatement **ab initio** -- results in dismissal of the appeal without a hearing on the merits and the automatic annulment of the conviction. And as we have just seen, two separate but complementary rationales are said to warrant this approach.

The first is that appeals form an integral element of our system of criminal justice. Where the right of appeal exists and has been duly exercised in a timely manner, the verdict at trial is not definitive until it is affirmed on appeal. Every appellant is entitled to this final determination.

Second, as explained in **Gollott**, **supra**, the generally-accepted objectives of a criminal prosecution are the protection of society, correction or rehabilitation of the offender, and the deterrence of those who might otherwise be inclined to offend. These objectives are not undermined when the conviction of a deceased appellant is set aside, even in the absence of a hearing on the merits.

On this view, death might well expose the appellant to the compelling dictates of an eternal system of justice, but his departure from this world does not validate the verdict entered against him at trial. Only an appeal on the merits can have that effect. Since there is no social or philosophic justification for further prosecuting the matter, it is thought best to simply dismiss the appeal, abate the proceedings **ab initio**, and void the conviction.

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In my respectful view, this approach, however attractive, attaches inadequate importance to the collateral effects of the verdict. It disregards the potential pecuniary consequences of a conviction and it ignores the significant interests of those who must bear its social and emotional impact.

The pecuniary consequences of a conviction include fines and orders of compensation, restitution, confiscation and forfeiture. A conviction may also impact on inheritances. Article 620(1) of the **Civil Code of Quebec**, for example, provides that "a person convicted of making an attempt on the life of the deceased" is, by operation of law, "unworthy of inheriting". The deceased appellant's conviction for an offence of this sort can thus affect the appellant's estate and, ultimately, the appellant's own heirs. Likewise, a conviction can preclude recovery under an insurance policy: See, for example, articles 2402 and 2443 of the **Civil Code of Quebec**.

The automatic eradication of a **sound** conviction, on the ground that the accused-appellant has since died, may also have an

undesirable impact on victims and their families. On the other hand, refusing to consider the appeal of an **unjust** conviction may unnecessarily perpetuate the pain and frustration of those who mourn the appellant.

The approach I propose is meant to respond to these concerns, while taking into account the policy considerations I have outlined.

First, I would hold that we retain jurisdiction over a pending appeal upon the death of the convicted appellant and, in our discretion, may either declare the appeal abated or consider it on its merits.

Second, I believe that an appeal should be heard on its merits where the Court is satisfied that there are serious grounds of appeal and that the verdict carried with it significant consequences for the party seeking to continue the proceedings. I would also hear the appeal on its merits where the Court is satisfied, for any other reason, that it is in the interest of justice to do so.

Where these threshold criteria are satisfied, I would authorize continuation of the appeal by a close relative or friend of the appellant; by counsel of record, either at trial or upon inscription of the appeal; or by any other person considered to have a sufficient interest.

V

Summary and Proposed Disposition

The appellant was convicted at trial of manslaughter. He appealed his conviction in a timely manner and, with the Court's authorization, later filed fresh evidence under reserve of a final determination as to its admissibility.[23]

This fresh evidence consists in the deposition of Gaetan Rivest, a former police officer who was an important Crown witness at trial.

Appellant's conviction rests entirely on a statement he gave to the police. He testified on the voir dire that the

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23 See **Stolar**, [1998] 1 S.C.R. 480.

statement was false and that the police had extracted it form him by threats and by physical violence.

Rivest, who on the voir dire contradicted the appellant's evidence, confirms it now. Were the appellant alive, this alone would entitle him to a new trial: The only evidence capable of supporting his conviction was ruled admissible by a trial judge who did not know then what we know now for certain -- that Rivest is a perjurer.

And while we do not know whether Rivest lied on the voir dire as to the free and voluntary nature of the statement, or is perjuring himself on that issue now, the fresh evidence does persuade me that he lied **at trial** on another -- and potentially decisive -- question.

The appellant's statement was obtained pursuant to his arrest. At trial, the Crown contended that the appellant was arrested on the strength of an intercepted conversation between the appellant and an informant by the name of Dugal. That conversation was said to have provided the required reasonable grounds to believe that the appellant was guilty of murder.

But the Crown, on the voir dire, neither called Dugal nor produced the recorded conversation. Dugal was plainly unreliable and the tape, according to Rivest, had been erased. To prove the conversation, the Crown therefore relied on the testimony of Rivest.

At trial, Rivest swore that the appellant had incriminated himself in his conversation with Dugal, thus providing the police with reasonable grounds to arrest him. In this Court, Rivest has now testified that the intercepted conversation was not incriminating at all, and therefore afforded no grounds whatever to make the arrest.

The tape itself, produced by the Crown for the first time in this Court, confirms the deposition of Rivest tendered as fresh evidence.

With the benefit of this tape and fresh evidence, the trial judge might well have excluded appellant's statement to the police on constitutional grounds. From the materials before us, it appears that it had been obtained in violation of the appellant's right, under section 9 of the **Canadian Charter of Rights and Freedoms**, not to be arbitrarily detained or

imprisoned. This could reasonably have resulted in exclusion of the statement under section 24(2) of the **Charter**. Since there was no other evidence of the appellant's guilt, an acquittal would have ensued.

This issue, however, was neither raised in appellant's factum nor canvassed on the hearing of the appeal. It would be inappropriate to consider it decisive in the absence of full argument. And, particularly in view of my conclusion that the conviction should be set aside on other grounds, I would not reconvene counsel at this stage to address the issue.

Instead, I would dispose of the appeal in this way.

Mr. Julio Peris, appellant's counsel, was instructed by the appellant when the appeal was inscribed and when the fresh evidence was being constituted for our consideration. When the matter came on for hearing, we authorized Mr. Peris, provisionally, to argue the appeal on its merits. For present purposes, I consider this a valid and sufficient continuance of the proceedings.[24]

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24 Permitting counsel to continue the proceedings in this way, in a criminal matter, is consistent with the

I am satisfied that this is a case where the interests of justice require us to admit the fresh evidence tendered by the appellant, to allow the appeal, and to set aside the conviction. Since it would be inappropriate to enter an acquittal, and a new trial evidently cannot be had, I would instead enter a stay of proceedings.

In a case of this sort, I believe that we are empowered to do so in the exercise of our residual power under section 686(8) of the **Criminal Code** independently of a prior order under section 686(2)[25]. The stay order is not "at direct variance" with what I have proposed as our "underlying judgment"[26]: That we quash the conviction though no new trial can be had and an acquittal cannot properly be ordered.

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practice in the American jurisdictions I referred to earlier and with the rationale for permitting a hearing on the merits where, as in the present case, this would best serve the interests of justice.

25 See **Hinse**, [1995] 4 S.C.R. 597, especially at pp. 624-5.

26 **Hinse**, supra, at p. 627. See also **Thomas**, [1998] 3 S.C.R. 535, at p. 551.

Finally, unlike **Hinse**[27], a stay would not in this case prevent the appellant from seeking an acquittal in the trial court -- his death precludes that quest.

MORRIS J. FISH, J.A.

27 [1997] 1 S.C.R. 3.