

**The Causes of Wrongful Conviction and  
the Challenges Involved in Convincing Courts to  
Reopen Cases of Wrongful Conviction:  
A Case Study on the Wrongful Conviction of *Glen Eugene Assoun***

Lisa Vanessa Kiraly  
J.D. Candidate, Lincoln Alexander School of Law  
Ryerson University  
Canada

*Faculty Endorsement* – Alexandra V Orlova, Professor, Department of Criminology and Lincoln Alexander School of Law at Ryerson University. I endorse this case study for publication in the *Wrongful Conviction Law Review*

- I. The Decisions
- II. The Problems: Factors Contributing to Wrongful Conviction in Canada and Their Application to Glen Eugene Assoun's Case
  - A. Tunnel Vision in Police Investigations
  - B. False or Unreliable Witness Testimony
    - a. The Testimony of Margaret Hartrick
    - b. The Testimony of MG
  - C. Evidence Gathered from Jailhouse Informants
  - D. Direct Police Misconduct
- III. Conclusion

Although the factors leading to miscarriages of justice are well-known, wrongful convictions in Canada continue to occur.<sup>1</sup> The non-profit organization Innocence Canada has exonerated 24

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<sup>1</sup> Kathryn Campbell & Myriam Denov, *Miscarriages of Justice: The Impact of Wrongful Imprisonment*, *Just Research* Edition no.13, online: <<https://www.justice.gc.ca/eng/rp-pr/jr/jr13/p5a.html>>; Alan Young, *Book Review: Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, by Brandon L Garrett, (2012) 50:2 *Osgoode Hall Law Journal* 491, online: <<https://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss2/8>> [Young]; Dianne L Martin, *The Police Role in Wrongful Convictions: An International Comparative Study* in Sandra Westervelt and John Humphreys, eds, *Wrongfully Convicted: When Justice Fails*, (New Jersey, Rutgers University Press, 2001), online: <<https://docplayer.net/65336345-The-police-role-in-wrongful-convictions-an-international-comparative-study.html>> [Martin]; *The Path To Justice: Preventing Wrongful Convictions*, (2011), online: <https://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/ptj-spj-eng.pdf> [*Path to Justice*].

individuals since 1993 and is currently reviewing 90 cases of alleged wrongful convictions.<sup>2</sup> Glen Eugene Assoun (“Assoun”) is one of their latest exonerated clients.<sup>3</sup> Assoun has recently entered into an agreement for compensation with the Government of Nova Scotia and the Federal Government of Canada.<sup>4</sup> Systemic factors contributing to wrongful convictions and their relevance to Assoun’s case shall be discussed. This article was informed by Innocence Canada’s report to the Criminal Conviction Review Group (“CCRG”).<sup>5</sup>

## I The Decisions

On 17 September 1999, Assoun was convicted of second-degree murder.<sup>6</sup> According to section 235 (1) of the Canadian *Criminal Code*, everyone who commits second-degree murder is sentenced to imprisonment for life.<sup>7</sup> The victim, Brenda Way (“Way”), was Assoun’s estranged common-law spouse and a prostitute who engaged in said occupation to support her drug addiction.<sup>8</sup> Her body—throat cut and covered in stab wounds—was found behind a Halifax apartment building around 7:30 am on Sunday, 12 November 1995.<sup>9</sup> Assoun acted as a self-represented litigant at his trial, which ran for 36 days.<sup>10</sup> Since no one witnessed Way’s murder, the main issue to be determined was the identity of the killer.<sup>11</sup> The Crown argued that the “volatile relationship between Mr. Assoun and Ms. Way had been deteriorating for several months” and that he was “motivated primarily by anger and jealousy ... concerning her relationships with other men.”<sup>12</sup> Four Crown witnesses testified against him. Assoun was found guilty despite having a witness testify that he was with her throughout the night.<sup>13</sup>

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<sup>2</sup> Innocence Canada, *Exonerations*, online: <<https://www.innocencecanada.com/exonerations/>>

<sup>3</sup> Innocence Canada, *Glen Assoun*, online:

<<https://www.innocencecanada.com/exonerations/glen-assoun/>> [*Innocence Canada Assoun*].

<sup>4</sup> The Canadian Press, “Glen Assoun agrees to compensation deal for wrongful conviction, years in prison”, *Canadian Broadcasting Corporation* (5 March 2021), online: <<https://www.cbc.ca/news/canada/nova-scotia/glen-assoun-agrees-to-compensation-deal-for-wrongful-conviction-years-in-prison-1.5936781>>; *Ibid.*

<sup>5</sup> *Innocence Canada Media Backgrounder*,

online: <<https://www.innocencecanada.com/assets/Uploads/PDFs/Press-backgrounder-into-the-wrongful-conviction-of-Glen-Assoun.pdf>> at 1 [*Innocence Canada Media Backgrounder*].

<sup>6</sup> *R v Assoun*, [1999] NSJ No 479, 1999 CanLII 2819 (NS SC), online: <<https://canlii.ca/t/1f15x>> [*R v Assoun (1999)*].

<sup>7</sup> *Criminal Code*, RSC 1985, c C-46, s 235 (1) [*Code*].

<sup>8</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 2.

<sup>9</sup> *R v Assoun*, [2006] NSJ No 154 (QL), 2006 NSCA 47 (CanLII), online: <<https://canlii.ca/t/1n38p>> at para 2 [*R v Assoun (2006)*].

<sup>10</sup> *Ibid* at para 6.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* at paras 6-7.

In *R v Assoun (1999)*, Justice Hood of the Supreme Court of Nova Scotia determined the length of Assoun's parole ineligibility by considering the factors listed in section 745.4 of the *Criminal Code*.<sup>14</sup> The court examined the character of the offender, the nature of the offence, and the circumstances of its commission.<sup>15</sup> Assoun was described in trial testimony as violent and abusive, with a "history of violent behaviour towards the victim and evidence about her fear of him".<sup>16</sup> He possessed previous convictions for several offences, including a 1995 assault conviction against Way.<sup>17</sup> Pursuant to section 718.2 of the *Criminal Code*, Justice Hood considered the fact that Assoun allegedly murdered his spouse to be an aggravating factor.

Determinations of parole ineligibility in comparable cases were also considered.<sup>18</sup> The court referred to ranges of parole ineligibility denoted by the Crown in prior cases, including *R v Baillie*<sup>19</sup>, *R v Francis*<sup>20</sup>, and *R v Picco*.<sup>21</sup> In *R v Baillie*, the offender received parole ineligibility for 17 years because he strangled his spouse with a rope and locked her in the basement, while in *R v Francis*, the offender beat and strangled their victim, receiving twenty years of parole ineligibility. In *R v Picco*, the offender beat and stabbed a victim who was not his spouse. The offender received 18 years of parole ineligibility on appeal. Considering this information as a whole, the Nova Scotia Supreme Court concluded Assoun would serve a sentence of 18 and one-half years without parole eligibility.<sup>22</sup>

In *R v Assoun (2000)*, the Nova Scotia Supreme Court considered whether the preliminary testimony and videotaped (KGB) statement of a key witness, Margaret Elizabeth Hartrick ("Hartrick"), could be entered into evidence at trial.<sup>23</sup> Hartrick provided a written statement to the police on 14 November 1996, had her KGB statement filmed in January 1998 and testified at the preliminary hearing on 18 August 1998.<sup>24</sup> Hartrick stated that she saw Mr. Assoun on Albro Lake Rd at 4:15 a.m. on the day of the murder and that Assoun told her that Way was dead.<sup>25</sup>

Hartrick died on 18 September 1998, before Assoun's trial.<sup>26</sup> She was "prone to relating her 'psychic visions' as evidence to the police" and was known to provide inconsistent

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<sup>14</sup> *Ibid* at para 10.

<sup>15</sup> *Ibid* at paras 2, 11-20; *Code*, s 745.4.

<sup>16</sup> *R v Assoun (1999)*, *supra* note 6 at para 13; *R v Assoun (2000)*, *supra* note 9 at para 6.

<sup>17</sup> *R v Assoun (1999)*, *supra* note 6 at para 13.

<sup>18</sup> *R v Assoun (1999)*, *supra* note 6 at para 27; *Code*, s 745.4.

<sup>19</sup> *R v Baillie*, [1991] NSJ No 511, 1991 NSCA 47 (CanLII), online:

<<https://www.canlii.org/en/ns/nsca/doc/1991/1991canlii2477/1991canlii2477.html>>.

<sup>20</sup> *R v Francis*, [1994] NSJ No 14, 1994, 1994 CanLII 4164 (NSCA), online:

<<https://www.canlii.org/en/ns/nsca/doc/1994/1994canlii4164/1994canlii4164.html?autocompleteStr=R%20V%20FRANCIS%201994&autocompletePos=1>>.

<sup>21</sup> *R v Picco*, [1987] NSJ No 232, 1987, (1987) 79 NSR (2d) 139 (CA).

<sup>22</sup> *R v Assoun (1999)*, *supra* note 6 at para 29.

<sup>23</sup> *R v Assoun*, 2000 CanLII 14366 (NS SC), online: <<https://canlii.ca/t/dth>> at 1 [*R v Assoun (2000)*].

<sup>24</sup> *Ibid* at paras 58-59.

<sup>25</sup> *Ibid* at para 11.

<sup>26</sup> *R v Assoun (2000)*, *supra* note 23 at 2.

statements.<sup>27</sup> On 1 June 1999, prior to Assoun's trial, the court concluded that Hartrick's evidence passed the test of the principled exception to hearsay rule.<sup>28</sup> Thus, the court admitted her evidence.<sup>29</sup> The exception to hearsay rule was established in *R v Khan* and refined in *R v Smith*.<sup>30</sup> In *R v Smith*, the court stated that "hearsay evidence is now admissible on a principled basis, the governing principles being the [threshold] reliability of the evidence and its necessity."<sup>31</sup> Justice Hood concluded that the criteria of necessity were satisfied not only because she has passed away, but because her evidence was crucial to the case: "I conclude that in this case the evidence of Margaret Hartrick is necessary because without it the jury will not have information which it needs to carry out its function."<sup>32</sup> Police Constable Randy MacDonald of the Halifax Regional Police testified that only Hartrick could provide evidence about the whereabouts of Assoun at the time of Way's murder, that Assoun refers to himself as a suspect, and that Assoun was avidly searching for Way.<sup>33</sup>

Justice Hood also concluded that the preliminary hearing evidence and the KGB statement met the requirements of threshold reliability set out in the exception to hearsay rule. In particular, several safeguards of reliability were present.<sup>34</sup> Although Hartrick could not attend the trial, her statement was taken under oath and was videotaped.<sup>35</sup> This allowed the jury to make an assessment of reliability based on her demeanour and voice as if she was present in the courtroom.<sup>36</sup> Concerning the KGB statement, Justice Hood stated that "although [the] safeguards in this case do not absolutely guarantee the trustworthiness of the KGB statement, they, in my view, give it a sufficient guarantee of trustworthiness such that it can be put before the jury for its assessment of its ultimate reliability."<sup>37</sup>

In 2004, Jerome Kennedy ("Kennedy"), a criminal lawyer from Newfoundland and Labrador, was appointed as Assoun's counsel and represented Assoun for the appeal of his conviction and sentence.<sup>38</sup> On 17 January 2006, the Halifax Nova Scotia Court of Appeal heard Assoun's case.<sup>39</sup> According to Innocence Canada, Kennedy had requested Crown disclosure of the criminal profiling information related to Way's murder. The criminal profiling was conducted by RCMP ViCLAS Unit criminal profiling specialist Constable David Moore ("Moore").<sup>40</sup> Kennedy also questioned the Crown about ViCLAS's work relating to Michael McGray, a suspect

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<sup>27</sup>*Innocence Canada Media Backgrounder*, *supra* note 5 at 2; *R v Assoun (2000)*, *supra* note 23 at 2.

<sup>28</sup> *R v Assoun (2000)*, *supra* note 23 at 2.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid* at 10.

<sup>33</sup> *Ibid* at 9.

<sup>34</sup> Safeguards of reliability or "hearsay dangers" include: the lack of an oath, the lack of contemporaneous cross-examination, and the lack of presence of the witness in the courtroom testifying. *Ibid* at 11.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid* at 12 & 16.

<sup>38</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 2.

<sup>39</sup> *R v Assoun (2006)*, *supra* at note 9.

<sup>40</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 2 & 4.

who was recently discovered to be a serial killer based in Nova Scotia.<sup>41</sup> Kennedy's requests for disclosure were returned with "incomplete and misleading answers", and it was clear that something suspicious was brewing behind the scenes.<sup>42</sup> At the appeal, Assoun requested that fresh evidence relating to the potential suspects Avery Greenough, Robert Poole, Ashley Herridge, and Michael McGray be considered.<sup>43</sup> In *R v Wolkins*, the court stated that "an appeal court may... accept fresh evidence in support of a ground of appeal that the accused was denied a fair trial."<sup>44</sup> Assoun alleged that if the trial judge advised him properly as a self-represented litigant, the evidence of these third-party suspects would have been provided to the jury.<sup>45</sup> The court stated that Assoun's evidence was not a basis to demonstrate that the trial was unfair because "nothing indicates that the trial judge knew of any third-party suspect evidence related to ... Greenough, Poole, Herridge, or McGray. The trial judge "was not privy to the Crown's pre-trial disclosures to Mr. Assoun and his counsel" concerning these suspects, and the trial judge provided proper assistance respecting the rules of evidence on third party suspects.<sup>46</sup> Thus, if Assoun sought to tender fresh evidence related to the issues decided at trial, his only recourse would be to challenge the trial result. To do so, he must satisfy the criteria set out in *Palmer*:

Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called Palmer test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial... the rule requiring due diligence at trial is therefore important because it helps ensure finality and order, two features which are essential to the integrity of the criminal process.<sup>47</sup>

In *Palmer*, at p. 775, the Supreme Court said that the 'interests of justice' in s. 683 (1) (d) are governed by four factors:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. ...
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.<sup>48</sup>

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<sup>41</sup> *Ibid* at 2 & 3.

<sup>42</sup> *Ibid* at 3.

<sup>43</sup> *R v Assoun* (2006), *supra* note 9 at para 315.

<sup>44</sup> *R v Wolkins*, [2005] NSJ No 2, 2005 NSCA 2 (CanLII), online: < <https://canlii.ca/t/1jkz9>>; *R v Assoun* (2006), *supra* note 9 at para 316.

<sup>45</sup> *R v Assoun* (2006), *supra* note 9 at para 317.

<sup>46</sup> *Ibid* at paras 317-321.

<sup>47</sup> *Ibid* at para 59.

<sup>48</sup> *Ibid* at para 299.

Assoun's argument to tender fresh evidence did not satisfy the *Palmer* criteria.<sup>49</sup> According to *R v Macmillan*<sup>50</sup> and *R v Grandinetti*<sup>51</sup>, demonstrating third party involvement requires a "sufficient connection between the third party and the crime ... without this link, the third-party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation."<sup>52</sup> The first reason why the court rejected the fresh evidence provided by Mr. Assoun is because of its inadmissible form; without a statement or confession from a suspect, their evidence would be considered "multi-tiered hearsay."<sup>53</sup> The mere opinions of a private investigator hired by Kennedy were also inadmissible.<sup>54</sup> Concerning the third factor, the credibility of the evidence could not be tested because cross-examination of the private investigator cannot be used to determine the credibility of the sources in his affidavit.<sup>55</sup> Finally, the tendered fresh evidence could not have affected the result of the trial because the connections between the four suspects and Ms. Way's murder were even weaker than the connections in *R v Grandinetti*.<sup>56</sup> Although these suspects were located in the same neighbourhood, the evidence would still be inadmissible and thus could not affect the result under the fourth *Palmer* factor.<sup>57</sup> For these reasons, Assoun's application to tender fresh evidence was rejected.<sup>58</sup> His appeal was dismissed on 20 April 2006.<sup>59</sup>

Despite exhausting his appeal options, Assoun never gave up on his innocence. On 14 April 2013, Innocence Canada submitted a memorandum and application record to the Minister of Justice, which detailed Innocence Canada's re-examination of the evidence and key witnesses.<sup>60</sup> According to Innocence Canada, two individuals who knew McGray in prison revealed that McGray confessed to killing Way.<sup>61</sup> The findings of their investigation were provided to lawyer Mark Green of the Minister's CCRG, who uncovered new information unknown to the Crown and Assoun's counsel. In September 2014, the CCRG completed their preliminary assessment, concluding that "there may be a reasonable basis to conclude that a miscarriage of justice likely occurred in [Assoun's] case", hence it became the basis for a full CCRG investigation.<sup>62</sup>

On 23 October 2014, the Nova Scotia Supreme Court granted Assoun's bail, albeit with strict conditions.<sup>63</sup> Five years later, Assoun was finally freed. The Federal Minister of Justice

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<sup>49</sup> *Ibid* at para 322.

<sup>50</sup> *R v McMillan*, (1975) 7 OR, (2d) 750, 1975 CanLII 43 (ON CA), online: <<https://canlii.ca/t/1vlmv>>.

<sup>51</sup> *R v Grandinetti*, [2005] 1 SCR 27, 2005 SCC 5 (CanLII), online: <<https://canlii.ca/t/1jmfq>>.

<sup>52</sup> *R v Assoun (2006)*, *supra* note 9 at paras 301 & 312.

<sup>53</sup> *Ibid* at para 308.

<sup>54</sup> *Ibid* at para 309.

<sup>55</sup> *Ibid* at para 310.

<sup>56</sup> *Ibid* at para 314.

<sup>57</sup> *Ibid* at para 314.

<sup>58</sup> *Ibid* at para 323.

<sup>59</sup> Innocence Canada Media Backgrounder, *supra* note 5 at 3; *Ibid* at paras 308, 310, 314, 321 & 326.

<sup>60</sup> Innocence Canada Media Backgrounder, *supra* note 5 at 3.

<sup>61</sup> *Ibid*.

<sup>62</sup> *R v Assoun*, 2014 NSJ No 607, 2014 NSSC 419 (CanLII), online: <<https://canlii.ca/t/gfd15>> at para 3.

<sup>63</sup> *R v Assoun*, [2019] NSJ No 294, 2019 NSSC 220 (CanLII), online <<https://canlii.ca/t/j1frv>>, at para 7 [*R v Assoun (2019)*].

quashed Assoun's conviction and ordered a new trial pursuant to section 696.3(3) of the *Criminal Code*.<sup>64</sup> On 1 March 2019, just over 21 years after his conviction, Assoun was exonerated at the same Halifax courthouse that found him guilty.<sup>65</sup>

## II The Problems: Factors Contributing to Wrongful Conviction in Canada and Their Application to Glen Eugene Assoun's Case

The systemic factors contributing to miscarriages of justice in Canada include tunnel vision, false or unreliable witness testimony, untrustworthy evidence gathered from jailhouse informants, and direct police misconduct.<sup>66</sup> These factors adversely affect the reliability of an investigation and are commonly found in high-profile cases of wrongful conviction.<sup>67</sup> When the factors that contribute to miscarriages of justice occur, it is often difficult to convince courts to reopen cases of wrongful conviction. This difficulty may occur because evidence gathered against an innocent accused is augmented, while evidence that could prove the accused's innocence is downplayed, not pursued, or destroyed. The causes of wrongful conviction present in Assoun's case and why they made Assoun's exoneration challenging is discussed below.

### A. Tunnel Vision in Police Investigations

As stated by criminal law professor Dianne L. Martin, "the police investigation is inevitably at the heart of these miscarriages of justice because the police gather the evidence, identify the prime suspect and build the case for conviction."<sup>68</sup> Three predisposing circumstances may increase the occurrence of wrongful convictions. These circumstances include a high-profile case that places significant pressure on authorities to resolve a conviction, the marginalization of an outsider accused, and a case in which authorities rely on fundamentally unreliable evidence.<sup>69</sup> Tunnel vision refers to the occurrence of bias in police operations due to these predisposing circumstances.<sup>70</sup> Tunnel vision results in police authorities using preconceptions and heuristics to "select evidence to build a case for the conviction of their chosen suspect while suppressing or ignoring information and interpretations that point away from guilt."<sup>71</sup> According to Martin, "when the investigative process is distorted by tunnel vision, misconduct becomes prevalent in note and record keeping, witness interviews, the interrogation of suspects among other distortions."<sup>72</sup>

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<sup>64</sup> *Code*, s 696.3 (3).

<sup>65</sup> *R v Assoun (2019)*, *supra* note 63 at para 8.

<sup>66</sup> *Martin*, *supra* note 1; *Path to Justice*, *supra* note 1.

<sup>67</sup> *Martin*, *ibid*.

<sup>68</sup> *Ibid* at 77 & 78.

<sup>69</sup> *Ibid* at 83.

<sup>70</sup> Dianne L Martin, *Lessons about Justice from the 'Laboratory' of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, The Canadian Review of Policing Research, online: <<http://crpr.icaap.org/index.php/crpr/article/view/18/17>>.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*.

In high-profile cases of murder, the pressure to convict could stem from a “highly-charged and politicized environment generated by high-profile cases” or the “willingness to prosecute and convict someone without real scrutiny of the evidence.”<sup>73</sup> Miscarriages of justice also occur due to “institutional cynicism and neglect”, in which biased investigators assume that suspects with similar circumstances, attributes, and offences, require little to no investigation.<sup>74</sup> Such is the case of Donald Marshall Jr. (“Marshall”), whose wrongful conviction led to the first public inquiry on wrongful convictions in Canada.<sup>75</sup> In *R v Marshall*, Sergeant John MacIntyre headed a police investigation in which biased decision-making and tunnel vision were evident. MacIntyre crafted his investigation in a manner that only sought out evidence to convict Marshall and disregarded evidence against his conviction.<sup>76</sup> The Royal Commission on the Donald Marshall, Jr. Prosecution found that MacIntyre failed to pursue the two men Marshall stated were involved in the murder.<sup>77</sup> In Assoun’s case, it was discovered that Constable Macdonald also considered but failed to pursue other suspects.<sup>78</sup> McGray was not regarded as a suspect by MacDonald.<sup>79</sup>

However, tunnel vision doesn’t stop at the initial police investigation; its effects overflow to other parts of the justice system, including the Crown and the RCMP. The RCMP refused proper disclosure of information that could have changed the outcome of Assoun’s case.<sup>80</sup> Whether tunnel vision stems from bias or an overreliance on heuristics, it is a serious systemic issue that must be addressed at the initial police investigation and onward.

## B. Unreliable Witness Testimony

Informer evidence, originating from individuals who freely report information about a crime or developed by the police, is often used by police authorities to determine information about a suspect.<sup>81</sup> However, even if tunnel vision isn’t an issue, and the safeguards<sup>82</sup> ensuring threshold reliability of a witness’s testimony are present, miscarriages of justice can still occur. A witness may lie under oath, be mistaken in what they saw, or be coerced into adopting another individual’s version of the real story.<sup>83</sup> In *R v Hill*, the eyewitness testimonies of two bank tellers contributed

<sup>73</sup> *Martin*, *supra* note 1 at 79.

<sup>74</sup> *Martin*, *supra* note 1.

<sup>75</sup> Donald Marshall, Jr (Hickman Commission) (Nova Scotia, 1989) *The Marshall Inquiry*, online: [https://novascotia.ca/just/marshall\\_inquiry/docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution\\_findings.pdf](https://novascotia.ca/just/marshall_inquiry/docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf).

<sup>76</sup> *Ibid* at 1 [*Marshall Inquiry*].

<sup>77</sup> *Ibid* at 20.

<sup>78</sup> Tattie Jon & Tim Bousquet, “Why it took this man 20 years to prove he didn't murder his wife”, *Canadian Broadcasting Corporation* (29 July 2020), online: <https://newsinteractives.cbc.ca/longform/glen-assoun-murder-wrongful-conviction>; *R v Assoun* (2006), *supra* note 9 at para 306.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 3.

<sup>81</sup> *Young*, *supra* note 1 at para 3.

<sup>82</sup> *R v Assoun* (2000), *supra* note 23 at 16

<sup>83</sup> *Marshall Inquiry*, *supra* note 76 at 3; *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, 2007 SCC 41 (CanLII), online: <https://canlii.ca/t/1t3lv>, at paras 7-11 [*Hill*].



to the accused's wrongful imprisonment.<sup>84</sup> The two bank tellers were unwavering in their testimonies, although they were not shown photographs of the other suspects before the trial.<sup>85</sup> There is evidence that the unreliable witness testimony of Hartrick and MG also contributed to Assoun's wrongful conviction.

#### **a. The Testimony of Margaret Hartrick**

Hartrick possessed unstable qualities that placed her credibility as a witness into question. She had a habit of recounting events from psychic visions to the police, an addiction to drugs, and provided contradictory evidence.<sup>86</sup> Constable Peter Gallant testified about his experience taking Hartrick's November 1996 videotaped statement, asserting that she was not offered any favours nor coerced during the process. On cross-examination, he stated that Hartrick talked to the police differently while recounting her psychic visions compared to when she provided information about her encounter with Assoun on the day of Way's murder.<sup>87</sup> Peter Gallant also stated that it is possible she "had time to fabricate her evidence" as the interview occurred one year after the murder.<sup>88</sup> Moreover, Hartrick was well-acquainted with Way.<sup>89</sup> In the end, her testimony turned out to be a false and inconsistent tale.<sup>90</sup> Hartrick's false testimony exemplifies the danger of relying on contradictory information provided by witnesses of questionable credibility.

#### **b. The Testimony of MG**

MG was a young prostitute who testified at trial. She alleged that Assoun picked her up in his car, slit her breast with a knife and raped her. She stated that he repeatedly said Way's nickname while committing the act, and said that Assoun admitted he would kill Way.<sup>91</sup> Approximately 18 months after her alleged encounter with Assoun, she provided this information to police authorities.<sup>92</sup> According to Innocence Canada's 2019 report on Assoun's case, MG no longer believed Assoun assaulted her.<sup>93</sup> In a subsequent interview, she stated that Assoun was smaller than her assailant.<sup>94</sup> A man of larger stature, like McGray, was better suited to be her attacker.<sup>95</sup> One of the key pieces of information identifying McGray as the killer was also found in MG's original testimony. She referred to her attacker as wearing socks and sandals in the middle of winter, a characteristic of McGray that was confirmed by several witnesses.<sup>96</sup> The testimony of

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<sup>84</sup> Malini Vijaykumar, *A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada*, (2018) 51 UBC L Rev 161- 223; Hill, *ibid* at paras 9, 17 & 32.

<sup>85</sup> *Ibid*.

<sup>86</sup> *R v Assoun (2006)*, *supra* note 9 at para 66.

<sup>87</sup> *Ibid* at para 82.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 2.

<sup>90</sup> *Ibid*.

<sup>91</sup> *R v Assoun (2006)*, *supra* note 9 at para 25.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 3.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*.

MG demonstrates the ease at which wrongful convictions may occur due to evidence provided by a mistaken witness.

### C. Evidence Gathered from Jailhouse Informants

Another type of informant to consider is jailhouse informants. Jailhouse informants are prisoners who allege that they heard a suspect or fellow prisoner confess to a crime.<sup>97</sup> They are known to be unreliable as they oftentimes provide testimony in exchange for a benefit such as a lesser sentence or earlier release.<sup>98</sup> Unfortunately, their evidence may be resorted to because their “unique position” allows them to acquire a confession directly from an accused.<sup>99</sup>

David Carvery, a jailhouse informant convicted of murdering his cellmate, provided testimony against Assoun at trial.<sup>100</sup> Carvery’s testimony stated that he conversed with Mr. Assoun at the Halifax County Correctional Centre.<sup>101</sup> According to Carvery, Assoun admitted to killing Way by slitting her throat and throwing her body into a dumpster.<sup>102</sup> Innocence Canada’s reports stated David Carvery indeed received a benefit for his testimony, in which his sentence was reduced.<sup>103</sup> Such circumstances beg the question of what *justice* is done when weak<sup>104</sup> and inherently biased evidence is put forth to “help” a jury make the least biased decision possible.

### D. Direct Police Misconduct

Police authorities are the first individuals to gather evidence related to criminal investigations, and they have several opportunities to either destroy or exclude potentially exculpatory evidence.<sup>105</sup> Police authorities are also capable of managing their “paper trail” to ensure that their actions go undetectable.<sup>106</sup> Direct police misconduct was one of the reasons why Assoun’s exoneration took years to achieve. The CCRG’s Preliminary Assessment pointed to the fact that Kennedy made several requests for disclosure to the Crown in order to prepare for Assoun’s 2006 appeal.<sup>107</sup> The Preliminary Assessment also included information on internal discussions of the RCMP and Halifax Regional Police’s plan to never provide all the relevant information.<sup>108</sup> It was revealed that Moore’s viCLAS work on McGray was ordered destroyed by RCMP seniors.<sup>109</sup> Had the RCMP provided proper disclosure of Moore’s viCLAS profiling on

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<sup>97</sup> *Path to Justice*, *supra* note 1 at 98.

<sup>98</sup> *Ibid* at 97; *R v Assoun (2006)*, *supra* note 9 at para 148.

<sup>99</sup> *Path to Justice*, *supra* note 1 at 97.

<sup>100</sup> *R v Assoun (2019)*, *supra* note 59 at para 57.

<sup>101</sup> *R v Assoun (2006)*, *supra* note 9 at paras 148 & 157.

<sup>102</sup> *Ibid* at paras 24, 148 & 155.

<sup>103</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 2; *ibid* at para 24.

<sup>104</sup> “Jailhouse informant evidence is almost a hallmark of the weak prosecution case” per Dianne Martin in *Martin*, *supra* note 1 at 88.

<sup>105</sup> *Ibid* at 90.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Innocence Canada Media Backgrounder*, *supra* note 5 at 4.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid* at 5.

McGray to Kennedy, it is possible that the fresh evidence provided in Assoun's 2006 appeal would have satisfied the *Palmer* criteria.<sup>110</sup> This could have led to a new trial, and presumably, Assoun's eventual acquittal, 13 years earlier than it occurred in reality. The RCMP's destruction of Moore's viCLAS work shows how direct police misconduct makes it difficult to convince courts to reopen cases of wrongful conviction.

### III Conclusion

Tunnel vision, unreliable testimony of witnesses and jailhouse informants, and direct police misconduct make it harder to discover the truth behind miscarriages of justice. According to a 2011 report by the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, efforts should focus on ensuring that Prosecution Committees, the Canadian government, and the Canadian police force are educated about the causes of wrongful convictions and that they are held accountable when wrongful convictions occur.<sup>111</sup> Assoun's wrongful conviction shows that there is a desperate need for police accountability at local and national levels. Although the justice system, as a "human endeavour" will never be perfect, that doesn't mean its actors, especially police authorities, shouldn't be disciplined when they are at fault.<sup>112</sup> The freedom of a wrongfully convicted individual is priceless, and its deprivation is avoidable.

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<sup>110</sup> *R v Assoun (2006)*, *supra* note 9 at para 59.

<sup>111</sup> *Path to Justice*, *supra* note 1 at 211.

<sup>112</sup> *Ibid* at xii.