J. Drawing a Conclusion as to Donald Marshall's Guilt Without Any Evidentiary Justification

The Allegation

234. Staff Sergeant Harry Wheaton expressed the opinion in 1983 to the Attorney General's Department through his superior officers that:

> ...Chief MacIntyre chose to believe the statements he wanted to believe and told the witnesses they were telling the truth and they agreed with him. This, I feel, is improper police practice.
>
> ...This case was investigated solely by Chief MacIntyre with some help from Detective Urquhart and was basically solved in one day - the 4th of June, 1971 when statements were taken from Pratico and Chant and the charge then laid and warrant issued. I found Chief MacIntyre to be adamant that Marshall is and was guilty and still refuses to look on the matter in balance. I would submit for your consideration that if a police officer in his drive to solve a crime refuses to look at all sides of an investigation and consider all ramifications, then he ultimately fails in his duty. (Exhibit 20 - R. v. 20, pp. 12-13)

In being questioned about how he would have approached this investigation in 1971 if he had been the investigating officer, Staff Sergeant Harry Wheaton explained:

> I...if I were investigating the case, I would have Marshall in mind at the beginning. But then I would look at what he did and so on and listen to his story. Donald Marshall at that time, from my investigation, was known to hang around the Park. He was known to travel with a bit of a rough crowd. He had been before the Courts several times. You would have to take him into

> consideration. But you would most certainly do numerous other things and I would think he would be eliminated. (Empasis added) (T. v. 43, p. 7860; see also T. v. 45, p. 8195).

235. There is proper technique involved in identifying a person and then setting out to connect that person with a crime because:

> ...some criminals leave a signature behind them and you know in your mind that, hey, that's so and so. He does things a certain way. And, in a city the size of Sydney, quite frankly, you can...where you know principally the people about you can...you can fall into that, of...a position of saying that, hey, the cellar window was broken into by you so they propaned torch melting the plastic and they were able to go in through that way. That's a unique methodology of entering a home. You know that Criminal X uses that. You would then zero in on Criminal X and take a look at him. Check where he has been, what was he doing that night...so there is some merit to that technique, yes. But you...in...you would go and you would do that and you would run the avenues out and if you found the man was home and had neighbours in and what have you and he was able to give an alibi and prove his alibi, well, then you would go looking for someone else, you know. (T. v. 43, p. 7859).

Superintendant Vaughan went further and suggested that it is not unusual or uncommon to suspect someone "very early in the game" based simply on proximity (T. v. 12917-12921; T. v. 73, pp. 12965-12967).

General Police Position

236. This Commission has evidence from the notes of David Murray Wood (Exhibit 40) that on Saturday, May 29, 1971,

either Edward MacNeil or Detective MacIntyre advised him that there had been a stabbing at Wentworth Park early in the morning involving two youth - Seale and Marshall - and that:

> Feeling at this time, Marshall was responsible. An incident happened as a result of an argument between both Seale and Marshall....only description received from Marshall was a man 45-50 years with grey hair (T. v. 10, pp. 1802-1803).

Wood was not able to say when or how long he had been at the Sydney City Police Station that day (T. v. 10, pp. 1819-1820, 1838). Wood does not think that the view of Marshall's responsibility was communicated by both MacIntyre and MacNeil (T. v. 10, p. 1839). Although Wood recalls that he met with MacIntyre and MacNeil at the same time he is unable to say for certain that that is the way it occurred, and does not know why he would now think that it was a meeting with both at the same time (T. v. 10, p. 1807).

237. The R.C.M.P. telex (Exhibit 16 - R. v. 16, p. 90), the information for which probably came from MacIntyre in part (See Section G, supra), indicates that:

> Circumstances presently being investigated by Sydney PD investigation to date reveals Marshall possibly the person responsible however Marshall states he and deceased were assaulted by an unknown male....

Counsel on occasion neglected when putting this document to witnesses to quote the word "possibly" (e.g., T. v. 32, p. 5954; T. v. 52, pp. 9501-9502), but that is as far as this document goes - Marshall was "possibly" responsible.

238. "Red" M. R. MacDonald says that he had no suspicion that Donald Marshall, Jr. was responsible or possibly responsible and no police officer expressed that opinion to him (T. v. 10, pp. 1686-1687). Marshall was not a suspect by the end of Saturday (T. v. 10, pp. 1685-1686), or Sunday if this Commission believes that "Red" MacDonald was not out on Saturday (See Section E, supra). John MacIntyre testified that Donald Marshall, Jr. was not a suspect on May 30, 1971. This appears to be confirmed by the documentation available (Exhibit 16 - R. v. 16, pp. 17, 186-190) which shows that no police caution or warning was given to Donald Marshall, Jr. on Sunday, May 30, 1971 but one was given to Roy Ebsary on November 15, 1971, because at that time a specific accusation against that specific individual had been made (T. v. 34, pp. 6292-6294).

239. It is known, and it is respectfully submitted that it was known, that in the week following the stabbing of Sandy Seale, Donald Marshall, Jr. had been speaking with a number of individuals such as John Pratico, Rudy Poirier, Mary O'Reilly and others. When referred to the nature of the discussion detailed in the statement of Catherine Ann O'Reilly (Exhibit 16 - R. v. 16, p. 75) - regardless of whether this Commission finds that that conversation occurred in this case - R.C.M.P. Officer Joseph Terrance Ryan stated that it would concern him as a police officer to know that a particular individual was making a point of talking to the witnesses and potential witnesses (T. v. 11, pp. 1895-1896). As a police officer of some considerable

experience he explained that his concern would be based on fears of encouragement of perjury, and the possibility that that individual himself, or someone else that the individual might be aiding, was actually involved in some way with the crime (T. v. 11, p. 1896).

240. Murray Wood's notes (Exhibit 40) record that on Sunday, May 30, 1971 both Wyman Young and Edward MacNeil of the Sydney City Police Force were of the opinion that Donald Marshall, Jr. was responsible for the Seale stabbing. Edward MacNeil testified that it would not be unusual for police officers to discuss among themselves who might or might not be a suspect, or to discuss that with the Detectives (T. v. 15, pp. 2621-2622). Wyman Young testified that it would have been unusual to discuss the matter with the R.C.M.P. (T. v. 17, p. 3095).

241. Neither Young nor MacNeil could recall whether or not at that time they themselves held the opinion that Marshall was responsible, unless it was something they had heard around the police station (T. v. 15, p. 2621; T. v. 17, pp. 3095-3096). Wyman Young went further and stated that while he did not have any recollection of anybody investigating the case expressing the opinion to him:

> Q. Now you say that you would have to hear that from somebody investigating the case. Would that mean a detective?
>
> A. Well not necessarily someone investigating the case. It could have been the policeman that was on

duty the night of the incident.

— —Q. I see.

A. It could have been anybody. I don't recall ever making the statement and I don't recall having the opinion but if I had the opinion, it had to be a second hand opinion because I wasn't investigating the case and I would have no reason to form an opinion of that nature. (T. v. 17, p. 3096).

242. Edward MacNeil acknowledged that the fact of Marshall's presence and involvement in the matter might have been a reason to consider him as a suspect (T. v. 15, p. 2621). Wyman Young only differed from this by saying that the two facts of Marshall's presence and a history of a "few scrapes" would not create a basis for "a strong opinion" (T. v. 17, p. 3097) of murder.

243. Ambrose McDonald testified that he spoke with Donald Marshall, Jr. on Sunday afternoon or evening at the Membertou Reserve, (T. v. 7, pp. 1132-1134, 1205). McDonald would certainly not have had any conversation with Marshall at that time or talked to him about the incident if he had been aware in any way that Marshall was a suspect (T. v. 7, p. 1174). McDonald did say that over that weekend immediately following the stabbing there were rumours <u>through the community</u> that Donald Marshall was a suspect, but he does not attach this to the Police Department (T. v. 7, p. 1131). Richard Walsh, who was also present for this Sunday evening conversation with Donald Marshall, Jr., testified that he was not aware of any suspects at this time (T. v. 8, pp. 1339-1340, 1344-1345), and indeed he felt

that Marshall was as much a victim as Seale at that point (T. v. 8, p. 1342). It was not until much later in the week that Walsh became aware that Donald Marshall, Jr. was a suspect (T. v. 8, pp. 1344-1345).

244. John Butterworth testified that it was common knowledge that there was a suspect, and that that suspect was Donald Marshall, Jr. (T. v. 11, p. 1969). Butterworth could not recall how he obtained this information other than talk amongst the men in the station (T. v. 11, pp. 1969-1970), and it is important to recall when assessing Butterworth's evidence on this point that he was on days off from the end of the afternoon on Thursday, May 27, 1971, until Tuesday, June 1, 1971 at midnight (T. v. 11, pp. 1968, 1970, 1983). This Commission does not know when Butterworth knew what he says he knew. Butterworth's shift partner, Horace Woodburn (T. v. 20, pp. 3696-3697) was not asked about Marshall's status to his knowledge on June 1, 1971.

245. Howard Dean does not recall any discussion around the police station about whether or not particular people might have been suspects (T. v. 9, p. 1490), but does know that he eventually heard that Donald Marshall, Jr. was a suspect (T. v. 9, p. 1491). As to whether Dean heard this before or after Marshall was charged he could not recall (T. v. 1491-1492). On Saturday, May 29, 1971, John Mullowney was not informed about any possible suspects (T. v. 9, pp. 1561-1562). Norman MacAskill who was Deputy Chief at the time could not recall when Marshall's name was mentioned, and is unsure which day he became aware that

the Detectives had a suspect (T. v. 17, p. 3023).

At Wentworth Park

246. John MacIntyre advised this Commission that he had done a walk-through at the Park with Maynard Chant before taking the May 30, 1971 statement from him (T. v. 32, p. 5996). Maynard Chant testified that at the time he visited Wentworth Park, John Pratico was there as well (T. v. 5, pp. 846-847; T. v. 6, pp. 971-972), but was unsure of the date of that visit (T. v. 5, pp. 847, 880-882, 884). John Pratico testified that he had visited Wentworth Park with John MacIntyre some time before June 4, 1971 (T. v. 12, pp. 2126-2128, 2221). This is confirmed by the documentation, given the comment in Pratico's June 4 statement - "I stopped where I showed you" (Exhibit 16 - R. v. 16, pp. 41, 43). As to who was present at the time when the visit to Wentworth Park took place, Pratico appeared to recall that only John MacIntyre was present there with him (T. v. 12, pp. 2126-2128), but he also testified that he had gone to Wentworth Park with both John MacIntyre and the Crown Prosecutor (T. v. 12, pp. 2078, 2220). Pratico also placed the time of the visit to Wentworth Park as <u>after</u> the June 4 statement but before the Preliminary Hearing in July. There is some hearsay evidence from Margaret Pratico that when she went to the police station on Sunday following her son John, she spoke with John MacIntyre and John MacIntyre apparently told her that:

> ...Him and John, they're going to have a busy day at the park. (T. v. 13, p. 2264; see also T. v. 13, pp. 2293-2294).

247. It is respectfully submitted that since there is nothing else ~~to~~ independently confirm the time of the visit to the Park area, the most reliable conclusion for this Commission to draw is that John MacIntyre indeed visited Wentworth Park and the Crescent Street area with both John Pratico and Maynard Chant on Sunday, May 30, 1971, prior to obtaining statements from them later that afternoon (Exhibit 16 - R. v. 16, pp. 18-23). It is respectfully submitted that this is evidence of John MacIntyre following appropriate police practice Inspector E. Alan Marshall acknowledged was one of the weaknesses with his own re-investigation was no visit to the scene with a witness who claimed to have been there:

> Q. Did it ever occur to you to go to the park with Jimmy MacNeil and say, "Jimmy show me -
>
> A. "Show us".
>
> Q. - "Show me, Jimmy, where this happened"?
>
> A. No.
>
> Q. That would've been a good way of testing -
>
> A. Yes.
>
> Q. - whether or not MacNeil was worthy of belief or not.
>
> A. Yeh.
>
> Q. In fact, a very obvious way of testing, would it not?
>
> A. Yes, sir.
>
> Q. <u>Because if he couldn't tell you where these things happened, that would</u>

support your view -

A. Yeh

Q. - that he was not telling the truth, but if he could tell you where he was, that would support his side.

A. Yes, sir but that wasn't done. (Emphasis added) (T. v. 31, pp. 5743-5744).

248. With respect to the visit to the Park, Maynard Chant recalls going through the whole incident with the officers, and Chant feels today that the officers were trying to help him understand where he would have to have been in order to see what he related about the incident (T. v. 5, pp. 828-829, 839). For example:

> I remember some Officers taking me to the Park and going through the whole incident of what had happened and telling me if I had been standing at such and such you wouldn't have saw this or you had to be standing back. I remember that - I remember, you know, them helping me get a clear sight onto what I was to see. (T. v. 5, p. 839).

It is respectfully submitted that this remark of Chant's is ambiguous and may be interpreted as John MacIntyre telling him what he had seen, or John MacIntyre expressing concern to Chant about what he was relating given where Chant said that he was - in other words - testing Chant's reliability.

249. The first alternative, that Chant was being told where he had to be to see certain things, is inconsistent with the statement he gave later that same afternoon (Exhibit 16 - R. v. 16, pp. 18-21) if one wants to suggest that John MacIntyre was

manipulating Maynard Chant to accuse Donald Marshall, Jr. If that is so, there would have been no reason for John MacIntyre to have waited a week before securing the statement accusing Marshall. The alternative interpretation is, we submit, the more reliable as Maynard Chant himself explained at this Commission:

> Q. Do you have any recollection at all of why you changed your route when it came to this [June 4] statement?
>
> A. Well, in order for me to - in order to witness the - the - the - the thing that was committed on that evening I would - by being down at the - this part of the tracks I wouldn't be able to see anything that was happening up over the other side.
>
> Q. Did you figure that out for yourself?
>
> A. Probably. (T. v. 5, p. 872)

As to Pratico hiding in the bushes:

> I remember the day that I was there and they were pointing out the evidence. They were pointing out the scene and the way it happened. I remember Mr. Pratico being there. And him being there crouched down beside a bush pretending to do what he was doing there. And I don't know if I gained recollection from that at that time to give this statement the way it is or it was something that I had just - you know, thought up myself. (T. v. 5, pp. 874-875).

However, the most thorough evidence on this point was the following:

> Q. Can you tell us to the best of your recollection what took place during this visit [to the Park]?
>
> A. They had said that they wanted to go over the incident or what had happened in the park that night, so I

went with them and when we got there there was some dress-policemen in uniform marking it out - marking out the distance of where I was on the tracks or approximately where I was on the tracks. They were looking at the lighting situation.

Q. How were they getting the information as to where you were on the tracks?

A. From me.

Q. You were telling them?

A. Well, I wasn't really telling them. I was just there viewing for a few moments and then they'd asked me, "Where would you have been standing at?" I seen that they were going through something with Mr. Pratico and he showed them where he was bent down at. Then there was some implication to say, "Maynard, if you were standing here, you couldn't see very well". I said, "well, I can't really remember if it was this side or down farther or anything like that". I just remember following along with them.

Q. Well, when you say you don't remember whether it was this side or that side, did you at any time suggest to these Officers that you weren't there at all?

A. No.

Q. Did you give the Officers the impression that you were, in fact, there?

A. Yes, I did. (T. v. 5, pp. 897-898).

...

Q. ...Before we leave this visit to the park you indicated, I believe, in a statement that you gave to the R.C.M.P. that you felt that the police were trying to help you rather

than to pressure you during this visit at the park. Is that accurate?

A. Yes. I felt that I was being helped. I don't feel that I was being actually told what to do or where to stand or anything like that, but, you know, the suggestions that were offered, "Could you have been standing here"? "You would have seen it more clearly". Something like that - to that effect was given, and not to the point that you must have been standing here or anything like that but I felt that they were trying to help me just review what had happened. (T. v. 5, pp. 900-901).

250. John Pratico has this recollection of the walk-through at the Park:

> We went by the bushes and they said, "would this be about where you at?", you know. So we point out the spot and showed to me where the body was laying. Which I did not know where the body was laying; but it was showed to me...They described, you know, the scene and where Mr. Seale's body was laying, whereabouts Mr. Marshall would be that type of thing, you know what I mean. (T. v. 12, pp. 2128-2129).

The police also apparently played a trick on him by claiming to have his fingerprints on a beer bottle (T. v. 12, pp. 2130-2131) but Pratico knew that was incorrect (T. v. 12, pp. 2175-2176). Pratico testified that by the time he left Wentworth Park, it was clear in his mind what he was supposed to be saying and what the police wanted him to say:

> ...What they wanted and actually and persisted on and they intended on it (T. v. 12, pp. 2129-2130).

If John Pratico's evidence is correct about what happened at

Wentworth Park, none of it seems to have appeared in John Pratico's statement of May 30, 1971. Again, as with Maynard Chant, the reliable inference appears to be that the visit to Wentworth Park occurred between noon and 5:00 p.m. on May 30, 1971. That visit to the Park was not used in any way to impress Chant and Pratico with Donald Marshall, Jr.'s guilt.

Other Evidence

251. Murray Wood's notes (Exhibit 40) have been relied upon by counsel as proof that the Sydney City Police and John MacIntyre had their minds made up about Donald Marshall, Jr. on Saturday morning, May 29, 1971. However, Wood's notes contain a further reference on June 3, 1971 which would have been redundant if the May 29, 1971 note is to be taken as a concluded opinion. On June 3, 1971 Murray Wood wrote that:

> Four p.m. to six p.m., local athletic club, Pier, contacting informant, Re: Seale murder. Discussion with Sydney City Police Detectives accompanied with Constable Ryan, named Marshall as suspect (Emphasis added).

Wood was unable to say from the note whether it was the informant or the Detectives who named Marshall as a suspect (T. v. 10, p. 1810).

252. There are other significant items of evidence which indicate that John MacIntyre could not have had his mind made up about Donald Marshall, Jr.'s responsibility for the stabbing of Sandy Seale early in the investigation. First, there is the evidence considered in detail above with respect to the initiatives which John MacIntyre was responsible for making in

relation to the involvement of a white Volkswagen. Leo Mroz, and therefore no doubt other constables, and the R.C.M.P. would not have been directed to seek out a white or light-coloured Volkswagen with foreign plates if MacIntyre had decided that Marshall was responsible (Section E, supra).

253. There is also the evidence of Debbie MacPherson who, while being interviewed on Thursday, June 3, 1971 in the presence of her brother and uncle found that John MacIntyre was "suggestive" (T. v. 4, p. 714). MacIntyre interviewed her for an hour or an hour and a half. The points about which MacIntyre was being suggestive were "things that I didn't see that maybe I should have seen or something" (T. v. 4, p. 714):

> Well, for instance a man in a trench coat which I had no recollection of at all but it was suggested more or less that I did see him, but I didn't.... (T. v. 4, p. 714).

MacPherson also claims to have signed a statement that afternoon (T. v. 4, pp. 715-716), and obviously this statement would not have included any confirmation about seeing the man in a trench coat. The "trench coat" reference compares with the "topcoat" reference in the statement of George Wallace MacNeil and Roderick Alexander MacNeil (Exhibit 16 - R. v. 16, pp. 26-27), a "suitcoat" in Maynard Chant's May 30, 1971 statement (Exhibit 16 - R. v. 16, p. 18-21), and a "long blue coat" in Donald Marshall, Jr.'s statement (Exhibit 16 - R. v. 16, p. 17). Thus, Debbie MacPherson's evidence shows John MacIntyre pressing a witness as late as June 3, 1971 to confirm at least a portion of Donald

Marshall, Jr.'s story - and indeed a central portion given that it involved ~~an~~ attempt to identify the actual suspected perpetrator of the offence.

254. Despite all the suppositions and inferences one might make based upon nothing but the available documentation and John MacIntyre's recollection, the argument that John MacIntyre knew from the start that Donald Marshall, Jr. would be his quarry cannot withstand this evidence of Debbie MacPherson. If John MacIntyre had been so negatively directed and motivated as some counsel have suggested during the course of the Commission hearings, any definitive statement by Debbie MacPherson that she saw no man in a "trench coat" in or near the Park on Friday night, May 28, 1971, would certainly have been speedily written down and the written record of it not lost or mislaid as appears may have been the case.

255. There is further evidence about John MacIntyre's state of mind with respect to this investigation on June 3, 1971. Murray Wood's partner, Joseph Terrance Ryan, testified specifically on the question of whether he recalled John MacIntyre as having had his mind made up about this stabbing. Ryan went with MacIntyre but without Wood to New Waterford on June 3, 1971 between 8:00 p.m. and 12:30 a.m. (Exhibit 41). The trip to New Waterford was "to determine if there was anyone in New Waterford who may be able to give him information as to the identity of someone in the Park that evening" (T. v. 11, p. 1861). Ryan pursued this task on his own again the next day (T.

v. 11, p. 1862 - Exhibit 41). In conjunction with the information that he and his partner Murray Wood had received earlier in the week with respect to the investigation of a white or light coloured Volkswagen, Ryan had not been of the view that John MacIntyre was working on this investigation with a closed mind (T. v. 11, pp. 1885, 1894). Ryan also considered, in conveying his recollection, the Sunday morning telex (Exhibit 16 - R. v. 16, p. 90).

The Basis for Marshall Becoming a Suspect:

A Lack of Confirmatory Evidence

256. As has been discussed elsewhere (Sections E and G, supra), the first days of the investigation were taken up with attempting to determine who was in the Wentworth Park and Crescent Street area on the Friday night/Saturday morning when the stabbing occurred, searching the Park and Crescent Street area for a weapon or other real evidence which could be connected with the crime, interviewing such witnesses as did appear (Exhibit 16 - R. v. 16, pp. 15, 17-40), and seeking R.C.M.P. co-operation with respect to the description, related occurrences, and the light coloured Volkswagen (Exhibits 40 and 41). Other than the May 30, 1971 statement of Maynard Chant and the May 30, 1971 statement of Donald Marshall, Jr., there was nothing, in Staff Sergeant Harry Wheaton's words, by which Marshall "would be eliminated" (T. v. 43, p. 7860). No trace of the two men described by Donald Marshall, Jr. or by George Wallace MacNeil (Exhibit 16 - R. v. 16, pp. 2627) had been discovered. There was

no trace of the men described by Chant or Pratico. Even if they existed, the only witness who connected the two particular men described by Marshall to the stabbing was Donald Marshall, Jr. (Exhibit 16 - R. v. 16, p. 17).

Donald Marshall, Jr.'s Story

257. Donald Marshall, Jr. was known to the police through a number of matters (Exhibit 16 - R. v. 16, pp. 106-108). Donald Marshall's story was bizarre in the sense that it had priests from Manitoba stabbing Seale because he was black after a friendly conversation about cigarettes, women, and bootleggers.

258. There is evidence before this Commission that during his contact with John MacIntyre after the stabbing, Donald Marshall, Jr. had not been entirely forthcoming (T. v. 7, pp. 1134-1136). Marshall himself was not even forthcoming to Ambrose MacDonald about why he had not been forthcoming to Chief MacIntyre (T. v. 7, p. 1177). While Ambrose McDonald had not been aware of any animosities between "the boys on the Reserve" and John MacIntyre (T. v. 7, p. 1134), Bernard Francis who was present at the time apparently stated that:

> The boys out here won't tell MacIntyre anything. They don't like him. (T. v. 7, p. 1133).

259. It is respectfully submitted that it would be reasonable for this Commission to conclude that given John MacIntyre's familiarity with Donald Marshall, Jr.'s involvement with the law in the months preceding this event that John MacIntyre would have averted to the possibility that Donald

Marshall, Jr. was not being completely forthcoming about the events of the Friday night/Saturday morning. That this is a reasonable consideration for this Commission is based on evidence of two persons who knew Donald Marshall, Jr. in 1971 as well as anybody.

260. Bernard Francis testified that when he sat in on Donald Marshall, Jr.'s first interview with his lawyers that Donald Marshall, Jr. acted typically for a native person by saying nothing more than was absolutely necessary and the responses which were given were not even satisfying to Bernard Francis (T. v. 22, pp. 3966-3968). Could it have been any different for John MacIntyre on May 30, 1971? Francis also advised this Commission in relation to a comment attributed to him in a later Parole Report that although he had never called Donald Marshall, Jr. "an excellent liar":

> I thought that in this particular case, he wasn't telling the whole truth. I felt that way, in all honesty, - ...that he wasn't telling the full truth. (T. v. 22, p. 3987, but see T. v. 22, pp. 4009-4010).

261. Roy Gould also described Donald Marshall, Jr. in 1971 as so quiet that you would "have to almost dissect information from him":

> He's not the person that would divulge a lot of information or even talk about incidents. (T. v. 21, p. 3802).

When asked whether Donald Marshall was a secretive person, Gould would only say that Marshall was "quiet", but then offered:

> I could put it to you this way, he was

never that honest with me about everything. (T. v. 21, p. 3857).

262. Simon Khattar candidly expressed the position that when Marshall related to him for the first time essentially the same story which Marshall had given to John MacIntyre (Exhibit 16 - R. v. 16, p. 17), it struck Khattar strange and:

> Q. Did you believe him?
>
> A. I had my doubts. I didn't say, "I don't believe you". I had my doubts. (T. v. 25, p. 4691).

Khattar advised that Rosenblum had a similarly sceptical reaction to the story related by Donald Marshall, Jr. (T. v. 25, p. 4695).

263. It is respectfully submitted that in the absence of spoken words, police investigators must deal with impressions gained through experience of dealing with citizens in the course of their daily work. All the police officer has besides the words used by a witness speaking to him, and the tone in which they are expressed, is the experience of assessing the story for reliability according to the police officer's experience. It is respectfully submitted that in this case the objective impressions which would have been given by Donald Marshall, Jr. throughout the weekend of May 29-30, 1971, were sufficient to give John MacIntyre reason to consider that Donald Marshall, Jr. had not been completely forthcoming and honest with him. Yet John MacIntyre pursued the leads given to him by Donald Marshall, Jr. and the other weekend witnesses. The objective impression given to MacIntyre initially would have been a reasonble factor for him to have reconsidered later in the week when the

information given by Marshall was not being supported through any other evidence.

264. Staff Sergeant Harry Wheaton also considered this aspect of the matter:

> Q. The Chief Justice asked you what steps you would have followed had you been confronted with that situation that night. Would the steps that you would have taken been any different had you known about the robbery?
>
> A. Yes, I, to me, then, it would seem more, I suppose, Marshall would have been more credible to me. His story would have been more credible. (T. v. 43, pp. 7880-7881; and at pp. 7968-7969).

265. The Courts admit evidence today as they did in 1971 of an accused person's pre-charge statement as to alibi, lack of involvement or identity. When tendered by the Crown, such evidence may be used for the purpose of demonstrating an accused person's consciousness of his own guilt by proving the assertions false. This is common in circumstantial cases. How a jury deals with such evidence is, of course, up to the jury.

266. Mr. Justice Brooke in R. v. Burdick (1975), 27 C.C.C. (2d) 497 (Ont. C.A.), at pp. 505-506 explained that:

> It is contended that it was wrong to tell the jury in effect that if you find the evidence of identification by the Rilett family to be true, then it follows that the accused lied and so the jury was entitled to draw the inference of guilt from that lie.
>
> It is, I think, important to realize that in the passage under consideration, the learned trial Judge did not say or imply

to the jury the fact that they rejected the alibi or preferred to believe the evidence of the Rilett's witnesses to that of the other witnesses, particularly Wilson and Ryder, as to the accused's movements at the specified time was the basis upon which they could draw an inference of guilt. The specific instruction was with respect to the denial that he was at the Rilett home, which denial was made by the appellant to Mrs. Rilett and others shortly after the deceased's departure.

Certainly, if the jury were satisfied beyond a reasonable doubt that the appellant was at the Rilett home that evening, they must have also been satisfied to the same degree that the appellant had deliberately lied when he denied that fact to Mrs. Rilett and others. In these circumstances it was important to instruct the jury as to the evidentiary value, if any, of that fact.

In my view, they should have been told that if they had a reasonable doubt that the appellant had made a false statement as to his identity because of youthful embarrassment or fear of adult authority, the fact that he made the false statement as to his identity was of no probative value. On the other hand, if they were satisfied beyond a reasonable doubt that he had made the false statement as to his identity not because of such or similar causes but rather deliberately and to conceal his identity from authority, then the fact of his so doing could be treated as evidence of his consciousness of guilt.

Accordingly, I think the charge was not incorrect in the circumstances but it was incomplete to the extent that I have stated. ...

The importance of this evidence and the direction by the learned trial Judge is plain. The fact, if viewed as evidence of consciousness of guilt, was a significant link in the case against the

> appellant, particularly as there was no evidence of motive whatsoever. (Emphasis added).

Mr. Justice Dubin pointed out in the same case at p. 516:

> In my respectful opinion, the learned trial Judge's instruction to the jury that they could treat the accused's denial as evidence of his guilt was too badly stated. It was a question of fact for the jury and not a question of law. Before the jury could draw an inference of guilt, a careful instruction was required as to the circumstances under which such inference could validly be made. Regard would have to be had to the age of the accused, and the occasion upon which he denied his presence at the residence of the deceased. It is also to be observed that his denial was supported by the evidence of two Crown witnesses, whose evidence was unshaken.
>
> It was only if the jury were satisfied that having regard to all the circumstances, the accused deliberately lied, and that they were satisfied that his lie was indicative of his sense of guilt, that they could infer from the lie a consciousness of guilt and consider it as evidence of guilt.

267. Mr. Justice Houlden also commented at p. 518:

> Proof of a lie told out of Court may be direct evidence amounting to affirmative proof of guilt: R. v. Chapman et al., [1973] 2 All E.R. 624 at p. 629. If an accused makes a false statement on a vital issue such as his whereabouts at the time of the commission of an offence, "a lie of that kind is cogent evidence of guilt": per Davey, J.A., in R. v. Sigmund, Howe, Defend and Curry, [1968] 1 C.C.C. 92 at p. 101, 60 W.W.R. 257. If the jury were satisfied that the appellant was the caller, then they might (not must) have treated his denial as evidence of guilt.

268. Mr. Justice Martin in the earlier decision of R. v.

Davison, DeRosie and MacArthur (1974), 20 C.C.C. (2d) 424 (Ont. C.A.), at p. 430 perhaps stated the matter most succinctly after reference to White v. The Queen, [1956] S.C.R. 709, 115 C.C.C. 97:

> The learned trial Judge did not, in my opinion, in the passages in the charge referred to above, make clear to the jury the distinction between proof that the alibi advanced is false in the sense of being concocted and the mere rejection by the jury of the evidence of alibi because they believed that evidence to be untruthful, although not proved to be false. Proof of the falsity of the alibi may constitute affirmative evidence of guilt. The mere rejection of the evidence of alibi because it is disbelieved is not affirmative evidence of guilt and has only the effect of removing it from consideration as a barrier to the acceptance of the case for the prosecution.

269. This law existed in 1971 as it exists today. In the gathering of evidence it would be appropriate for a police officer to consider the possibility that a statement recounting an innocent presence at the scene of a crime might not be true and that some inference should be taken from that. Although Donald Marshall, Jr.'s statement taken on May 30, 1971 was never used for the purpose does not alter the fact that it was a reasonable ground for consideration in 1971, particularly if John MacIntyre had some sense that Donald Marshall had not been totally forthcoming to him. It is not any fault of John MacIntyre that this kind of evidence is investigated and produced from time to time in the Courts of this country. It was permissible evidence to consider pursuing in 1971 given all the

other circumstances.

Grounds for Suspicion

270. It is respectfully submitted that by the end of June 3, 1971 there were several matters directing John MacIntyre's attention back toward Donald Marshall, Jr., and appropriately so. Nothing had come to the attention of the police which could confirm that the two men described in the MacNeils' statements were involved in the particular stabbing. No other leads from information supplied by other witnesses were pointing in any direction with respect to Donald Marshall, Jr.'s involvement or non-involvement. Donald Marshall, Jr. had been in difficulties or conflicts with the law over the previous several months. Donald Marshall, Jr.'s disposition was probably such that it conveyed the impression to John MacIntyre that the whole recounting of events had not been given. Ultimately, Donald Marshall, Jr. was the only other known person to have been involved in the incidents surrounding the stabbing. Thus, what faced John MacIntyre on June 3, 1971 was that it would be appropriate to consider Donald Marshall, Jr. as a suspect who, after a week of investigation, had not been eliminated as a suspect as one might have expected. It is respectfully submitted that even Staff Sergeant Harry Wheaton in those circumstances would have had to continue to consider that Donald Marshall, Jr. was possibly the person responsible (T. v. 43, p. 7860).

June 4 - John Pratico

271. Neither John Pratico nor Maynard Chant stated

positively that there was any further contact with the police between being in Wentworth Park and giving statements on May 30, 1971, and June 4, 1971 when both were interviewed again. With respect to his statement on June 4, 1971 John Pratico was either taken to the police station or went there himself (T. v. 12, p. 2061) and recalls that after being at the police station only a few minutes he was taken in to give his second statement (T. v. 12, p. 2062) to John MacIntyre and William Urquhart. In summarizing what happened, John Pratico stated:

> They got me to go to the police station. I went up there and we sat and there was Sergeant MacIntyre and we were talking. He asked a few questions and we - I answered to the best of my ability. I felt a little like the heat was put on me a bit. (T. v. 12, p. 2061).

When asked to be more specific, Pratico indicated to this Commission that he was twice told by John MacIntyre that all the police wanted was the truth (T. v. 12, pp. 2064-2065). Between these two requests for the truth Pratico says that it was mentioned that he "could be going to gaol", and that he discussed with MacIntyre what had happened in Wentworth Park (T. v. 12, pp. 2064-2065).

272. John Pratico now claims that he then gave his statement of June 4, 1971 and signed it (Exhibit 16 - R. v. 16, pp. 43-45) because he was scared, his mind was not clear, he had emotional problems, and he felt that he could not take the pressure (T. v. 12, p. 2066). However, despite close questioning by Commission counsel and counsel for Donald Marshall, Jr. it is

not clear that the police ever identified Donald Marshall, Jr. for him as having done the stabbing (T. v. 12, pp. 2066, 2129). Indeed, as questioning by counsel for Donald Marshall, Jr. established, John MacIntyre did not even suggest that a knife was involved (T. v. 12, p. 2129) but that certainly appears in the statement that John Pratico signed.

273. Another point to consider from John Pratico's evidence is that he considered that he had been spoken to "kind of roughish" as if "like I wasn't being believed", and being threatened with jail, at the time of his first statement on May 30, 1971 (T. v. 12, pp. 2056, 2180, 2191). John Pratico does not associate any requests for the truth at the time of the first statement, even though he specifically remembers two incidents during the course of the second statement. Still, Pratico did say that he felt the second interview was twice as rough as the first (T. v. 12, pp. 2180-2181).

274. It is respectfully submitted that John Pratico's assertions about the interview with John MacIntyre on June 4, 1971 can not be accepted as credible for various reasons. As evidenced by Exhibit 47, John Pratico experienced difficulties with his perceptions in 1971 - particularly with respect to being victimized by the Native population. John Pratico now says that what he told John MacIntyre was not true (T. v. 11, p. 2033). However, he did not tell his mother in 1971 that the statement was not true (T. v. 12, p. 2068), nor did he tell Oscar Seale that it was untrue (T. v. 12, pp. 2161-2162), and indeed told the

Seales that what he had told the police in 1971 was true. John Pratico also did not tell John Butterworth that the story he had told to MacIntyre on June 4, 1971 was untrue (T. v. 12, pp. 2082-2083, 2204). Even since Pratico has recanted, he has resiled from that recantation, although he would not admit to that directly at these Commission hearings (Exhibit 21 - R. v. 21, p. 75; T. v. 12, pp. 2165-2167; Exhibit 17 - R. v. 17, p. 6). John Pratico made no complaint of threats and pressure from the police until it appeared that the investigation was being re-opened (Exhibit 99 - R. v. 34, p. 50)

275. John Pratico's threats of jail, and the fact that John Pratico states that he was under pressure by the heat being put on him a bit, are not credible to the extent that it suggests any positive wrongdoing by John MacIntyre. John Pratico had given a written statement to the Sydney City Police and signed it on May 30, 1971, but now claims that it is not the same statement that appears with his signature in the Commission documents (Exhibit 16 - R. v. 16, pp. 22-23; T. v. 11, pp. 2051-2053). Pratico did acknowledge that at the time his mind was not "all that good" and that he was "shook up over the whole thing" and:

> Possibly I didn't know what I was signing. (T. v. 11, pp. 2052-2053).

Earlier he had been confident enough to tell this Commission that he had signed a statement on May 30, 1971 which said that he did not know anything (T. v. 11, p. 2051).

276. It is respectfully submitted that in any situation where John Pratico is challenged to take responsibility for

particular events or happenings he refuses to do so and will attempt to attribute blame to some other party. In effect, John Pratico seeks always his best interest first. He refused to be embarrassed with his own unreliability and attempted to claim to this Commission that counsel for John MacIntyre himself should be blamed for pressuring John Pratico during a very restrained cross-examination (e.g., T. v. 12, pp. 2150-2151, 2181, 2212-2214, 2215-2216). There is no independent basis to consider that the blame which John Pratico attributes to John MacIntyre with respect to the giving of the second statement is true in any respect.

June 4 - Chant

277. Once John Pratico had identified Donald Marshall, Jr. as having stabbed Sandy Seale in his June 4, 1971 statement, the Sydney City Police were in possession of sufficient evidence to lay a charge of murder against Donald Marshall, Jr. with respect to the death of Sandy Seale: Criminal Code, supra, s. 212. MacIntyre believed Pratico (T. v. 33, pp. 6141-6142), as did Urquhart (T. v. 52, p. 9523). However, in order to test the reliability of Pratico's statement, the Sydney City Police needed to speak again with Maynard Chant who had proffered himself as an eyewitness to the stabbing as committed by someone other than Donald Marshall, Jr. Both Chant's May 30, 1971 statement and Pratico's June 4, 1971 statement could not stand together. One of them at least had to be unreliable.

278. John MacIntyre could not honestly decide that he

had reasonable and probable grounds to swear an information of murder against Donald Marshall, Jr. until he had checked to determine that what Maynard Chant was saying was the truth. John MacIntyre was not entitled at any time to simply disregard either Pratico's or Chant's statement because, as was stated in Chartier v. Attorney General for Quebec, supra, at p. 26:

> For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him. He is entitled to disregard only what he has good reason for believing not reliable....

It is respectfully submitted that this is why John MacIntyre went to Louisbourg on June 4, 1971 to speak with Maynard Chant again.

279. Chant's June 4, 1971 statement is crucial to this Commission as it was to the 1971 investigation of the death of Sandy Seale because it is this statement which confirmed Pratico's identification of Marshall, given by the witness who had claimed each previous time he had spoken with the police that he had seen everything (Exhibit 16 - R. v. 16, pp. 6-7, 18-21). We have dealt elsewhere in this Brief (Section H, supra) with who was present at the Maynard Chant statement in Louisbourg. Here it is appropriate to deal with the substance of the discussion which occurred on June 4, 1971 at Louisbourg.

280. The way Maynard Chant recalled the June 4, 1971 interview at Louisbourg was that in the presence of himself and MacIntyre and another police officer and Wayne Magee and Larry Burke and his mother, MacIntyre explained that the statement

given on May 30, 1971 by Maynard was believed not to be true, and did Maynard know anything else (T. v. 5, pp. 852-856). MacIntyre asked Maynard whether he had seen "anything" (T. v. 5, p. 856). Maynard replied that:

> I didn't see anything. (T. v. 5, p. 856)

MacIntyre must have known from the occurrence reports (Exhibit 16 - R. v. 16, pp. 6-7) that even if Maynard had lied in his first formal statement on May 30, 1971, that he had asserted some involvement on the night of the offence and had actually been in touch with Constable Walsh at the scene. Quite properly then MacIntyre again asked, according to Chant:

> You must have saw something (T. v. 5, p. 856).

Chant says that he and MacIntyre went back and forth with this, with MacIntyre being very persistent and loud while Maynard maintained his refusal "more or less to say that I just didn't want anything to do with it anymore and I didn't see anything" (T. v. 5, pp. 856, 858-859).

281. Chant states that the following things were told to him by John MacIntyre:

> (a) Maynard was on probation and by lying was in serious trouble and could go to jail as a result of lying the first time (T. v. 5, p. 856);
>
> (b) Maynard could get two to five years by not telling the truth (T. v. 5, pp. 860-861);
>
> (c) Maynard was told that the police had a witness who had told a story and said that he saw Chant there (T. v. 5, p. 855).

Chant testified that as a result of these things he was so upset that he had begun to cry, and his mother had seen him cry (T. v. 5, pp. 862-863).

282. Beudah Chant testified that she was with Maynard in the Town Hall when the interview began (T. v. 20, p. 3537), and confirmed nothing of what Maynard Chant has told this Commission about what happened up to the time she left the room:

> I know we went in the room and they had talked to him for a bit, but they thought they weren't getting anywheres with him; so they asked me if I would leave. (T. v. 20, pp. 3535; also 3538).

Beudah Chant did not remember any two to five years (T. v. 20, p. 3541), and in fairness to Maynard's recollection he believed that that reference may have come up after she left (T. v. 5, p. 862). In response to a leading question from Commission Counsel, Beudah Chant did state that it was mentioned that Maynard could be charged "if he was lying" (T. v. 20, pp. 3541-3542). Beudah Chant did testify that while it was not mentioned in her presence she now attributes Maynard's delay in recanting to a fear of perjury impressed upon Maynard at the Town Hall. (T. v. 20, p. 3555). That would have to be based on something that she has been told since. Maynard testified before this Commission that the actual word "perjury" had not been literally said at all by the police at the time of the second statement (T. v. 5, p. 865), despite allegations which have been made to the contrary.

283. What Beudah Chant does remember from both before going to the Town Hall and at the Town Hall was admonishing her

son to tell the truth and impressing upon him the seriousness of the matter ~~with~~ which he had become involved. Indeed, Maynard himself testified that both of his parents were showing real concern with him and his involvement in this matter by June 4, 1971 (T. v. 5, pp. 848-849). Beudah Chant testified that she herself discussed the fact with Maynard that he was on probation in relation to this incident:

> I remember telling him "Well, Maynard, if you're not telling the truth, you'd better tell the truth because this is very serious and, you know, you might get in trouble yourself if you - " because he was on probation and he said he was telling the truth. (T. v. 20, p. 3532).

Beudah Chant said that this comment of hers was made on Sunday, May 30, 1971. We leave it to the Commissioners to determine how concerned she would have been then when the matter raised itself again on June 4, 1971.

284. It is respectfully submitted that there is no cogent support in Beudah Chant's evidence for anything that Maynard Chant asserts was done that afternoon up to the point of his mother leaving the room. Indeed, Beudah Chant did not even confirm Maynard's assertion that he had begun to cry and that his mother had seen him cry (T. v. 5, pp. 862-863; T. v. 20, p. 3541). With respect to any question about raising of voices, John MacIntyre walking around, or any acts of an intimidating nature at all, Beudah Chant has no recollection at all (T. v. 20, pp. 3555-3556). So far as Maynard being told that there was another witness, the only thing that Beudah Chant could relate

this to was the advice of the police officer who picked her and Maynard up at home (T. v. 20, p. 3534) - Wayne Magee (T. v. 20, p. 3628).

285. Wayne Magee's recollection indicates that MacIntyre began the June 4, 1971 interview by advising Beudah Chant that he wanted the truth from Maynard, and this prompted Beudah to exhort her son to tell the truth (T. v. 20, pp. 3630-3631). Magee recalls no raising of voices by anyone (T. v. 20, pp. 3635, 3644-3645). Magee does not recall any mention of probation, jail, or the two to five years (T. v. 20, pp. 3650-3651). Magee could not recall Maynard crying at any time, and indeed Maynard Chant appeared co-operative throughout (T. v. 20, pp. 3637-3638, 3646). Magee's evidence relates to the whole time of taking the statement.

286. It is respectfully submitted that up until the time when Beudah Chant may have left the room, there were no threats or other instances of intimidation of Maynard Chant. Beudah Chant would not have left if she believed that the police were scaring Maynard into telling a story (T. v. 20, pp. 3555-3556). Wayne Magee does not recall Beudah Chant leaving after being there at the start of the statement (T. v. 20, pp. 3633-3634, 3644). Beudah Chant is positive that she left (T. v. 20, pp. 3539-3540, 3547), as was Maynard (T. v. 5, p. 857).

287. Chant makes no new allegation about intimidation arising after his mother left the room, except perhaps with respect to the "perjury" which he later said had not been

literally said by the police at the time of the second statement (T. v. 5, ~~pp.~~ 862, 865). Chant says that MacIntyre repeated to him that Maynard was in an awful lot of trouble, the statement given the first time was not true, he was on probation, and that Maynard could do time as a result of that (T. v. 5, p. 866). It will be recalled that all of these things, according to Maynard, had been mentioned when his mother was in the room, and were things which his mother on at least one occasion had herself impressed upon him - except in relation to doing time. It is significant that Beudah Chant's only sense about jail in relation to the Louisbourg Town Hall statement was that Maynard could be charged "if he was lying", and both MacIntyre and Beudah Chant both made plain that they were seeking the truth from Maynard on that day.

288. For these reasons, it is respectfully submitted that any allegation that Maynard Chant's June 4, 1971 statement was given as a result of improper pressure by John MacIntyre is simply not supported by credible evidence. Whether or not perjury and two to five years may have been mentioned by the Crown Prosecutor or some other person at some other time during the course of 1971 is not important. What is important from John MacIntyre's point of view and the reasonable and probable grounds which he was seeking to develop with respect to the Seale murder investigation, is that it is not possible for this Commission to conclude in our submission that such threats were made before or during the June 4, 1971 statement. Maynard Chant adverted to

this himself under examination by Commission Counsel:

> I didn't want to make any implications that it - that the things that were done, were done in a, in a concealed way to try to - for the police department in Sydney to try to conceal something. As far because there was a lot of opposition that time to say that it was the police's, they were totally responsible for the action and I didn't want to give any reference to that....(T. v. 5, pp. 861-862).

commenting on his 1984 C.B.C. Discovery evidence that he could not remember if the police actually mentioned two to five years. Indeed, if, as some counsel allege, John MacIntyre has his mind made up on Saturday, it is extremely strange that he did not pressure Chant to this conclusion on Sunday instead of waiting until there were five people to observe his pressure.

289. It is respectfully submitted that the appropriate conclusion of this Commission with respect to Maynard Chant's evidence of intimidation and improper pressure would be the same as the conclusion reached with respect to Maynard Chant's evidence during the 1982 Appeal Division Reference:

> Mr. Chant has by now changed his story so many times that, in our opinion, no weight can be placed upon his evidence either at the trial or now. To the extent that his testimony cannot be relied upon to support the position taken by the appellant, however, it can no longer be of much assistance to the Crown should a new trial on the original charge ever take place. (Exhibit 4 - R. v. 4, p. 129).

290. The final point worth considering with respect to Maynard Chant's June 4, 1971 statement is how the statement was

actually taken down and what information it was based upon. If Beudah Chant left while Maynard Chant was still claiming to have seen nothing, John MacIntyre had less than half an hour to take Maynard Chant's June 4, 1971 statement which, so far as substance is concerned, is a little more than three legal size pages long (Exhibit 16 - R. v. 16, pp. 50-53; T. v. 20, p. 3453). This is consistent with Chant saying that the statement went reasonably quickly once he decided to begin recounting a story.

291. Turning to how the material in the statement appeared there, Chant says that he asked the police what the person in the Park had said that Maynard had seen (T. v. 5, p. 866). Chant is unable to remember any response from the police to this question of his (T. v. 5, p. 870), and the police never showed Maynard anything (T. v. 5, p. 866).

292. Chant essentially wanted to give a statement following along the lines of his first statement (T. v. 5, pp. 871-873) and he introduced material such as knowing the dark-haired fellow from dances in Louisbourg "to make the story believable" (T. v. 5, p. 878), which he was in the habit of doing (T. v. 6, p. 999). Chant could not be specific but indicated that detail could have been dreamed up, gathered from observations at the Park, on some issues he might have sought some help and on other details he just has no idea of where it came from (T. v. 5, pp. 846-847, 878, 880-882, 884; T. v. 6, pp. 967ff).

293. Wayne Magee testified that John MacIntyre did

supply Maynard Chant with assistance with respect to locations, but this did not involve suggestions about what Maynard had seen (T. v. 20, pp. 3639-3650). The one crucial point on which Maynard Chant has been consistent since 1971 is that at no time did the Sydney City Police ever tell him that the person who actually stabbed Sandy Seale was named Donald Marshall (T. v. 6, pp. 934-935; Exhibit 1 - R. v. 1, [Trial Transcript, p. 36]).

294. The suggestion was made that the Sydney City Police, and John MacIntyre in particular, suggested facts to Chant which would give his statement a ring of truth. It is respectfully submitted though that the questions were asked of him on the basis that if Chant could not recall any other source for the information it must have come from the police (e.g., T. v. 6, pp. 967ff). However, and this is instructive for this Commission, Chant was not to be driven to that excuse. On some issues Chant did not recall where the information came from and would not go further than that (e.g., T. v. 6, p. 968), on other issues that the information came from observation in the Park area when there with the police and Pratico (T. v. 6, pp. 969-970) and which we know was probably on May 30, 1971 - in plenty of time for Maynard Chant to have the details in his mind on Friday, June 4, 1971. Chant acknowledged that some details in the statement could have been made up (T. v. 6, p. 973). As to the knowledge about John Pratico hiding in the bushes, Chant testified that he saw that with his own eyes when he went to the Park (T. v. 5, pp. 874-875). However, Chant guessed and then

agreed that the police had told him that "that particular dark haired fellow" had been in the Park hiding behind a bush (T. v. 6, pp. 970-974). It is respectfully submitted that such an answer is not compelling or persuasive.

295. What John MacIntyre did find compelling and persuasive on June 4, 1971, were the similarities in the story which came from Chant and the identification of Donald Marshall, Jr. as the perpetrator of the murder (T. v. 33, pp. 6177, 6179). John MacIntyre did not believe that these witnesses had been prompted, and they certainly had not been prompted by him (T. v. 33, pp. 6177-6178). The other alternative, as put by Commission counsel, was that John MacIntyre believed that the witnesses were telling the truth (T. v. 33, p. 6177). John MacIntyre did not rise to the suggestion that perhaps Pratico and Chant got together on their stories without MacIntyre's knowledge (T. v. 33, p. 6181):

> Yeh, I didn't know of any, you know.

Reasonable and Probable Grounds

296. Reasonable and probable grounds involve a logical, deductive thought process where the steps taken are not unreasonable. The steps taken in the thought process must be fair, honest, and not capricious or arbitrary. It is respectfully submitted that the evidence clearly demonstrates that John MacIntyre had an honest belief in the guilt of Donald Marshall for the death of Sandy Seale based upon the full conviction, based upon reasonable grounds, of the existence of a

state of circumstances which, assuming them to be true, would lead a prudent and cautious man to the conclusion that the person charged was probably guilty of the crime imputed to him. Given that both Chant and Pratico had told him that they had seen Donald Marshall, Jr. stab Sandy Seale, and John MacIntyre had an honest belief that this was their true recollection of the events as they occurred on May 28-29, 1971, on their face they indicate that Donald Marshall, Jr. was guilty of murder. Indeed, John MacIntyre would not have been permitted under law to disregard those statements from Chant and Pratico unless there was some valid reason for concluding at that time that Chant and Pratico were unreliable. It is respectfully submitted that on the whole of the evidence it cannot be said that John MacIntyre drew a conclusion as to Donald Marshall's guilt without any evidentiary justification. This final point was dealt with by Judge Matheson in his evidence:

> Q. Did you question at all the process whereby two young people would initially give statements which did not implicate Mr. Marshall, and then on a later date both gave statements which implicated Mr. Marshall?
>
> A. I believe we had - we had - we asked the officers about it and in particular Sergeant MacIntyre, and I don't recall that we quizzed him about the process but he assured us that he had questioned them on one occasion and got one answer when he questioned them on the second occasion he got another and a different answer and I'm - I sincerely believe to this day that Detective MacIntyre believed that his second answer was true, MacNeil did, and I did. (T. v. 26, p. 4947).

K. Conducting of Interviews with Young Persons Involvement Prompting, Threats, Intimidation, and Even Physical Violence For the Purpose of Influencing their Evidence

Pratico and Chant

297. In the previous section (Section J, supra) we have dealt at length with the June 4, 1971 statements of John Pratico and Maynard Chant. We have respectfully submitted to the Commissioners that the threats of imprisonment which both Chant and Pratico refer to have not been established upon all the evidence as having occurred. Certainly if the threats had been made and were the only reason why Chant and Pratico gave statements to the Sydney City Police with information provided by the Sydney City Police on material points, then there may have been no claim that reasonable and probable grounds existed to believe that Donald Marshall, Jr. had committed the offence of murder in the death of Sandy Seale. However, as has been submitted, reasonable and probable grounds did exist for John MacIntyre to lay the charge. The accusations of Chant and Pratico about a threat of jail have not been supported by cogent or other evidence.

Robert Patterson

298. Robert Patterson's name, and the fact that he was drunk, was mentioned in two statements taken in the course of this investigation (Exhibit 16 - R. v. 16, pp. 17, 64), and in one other statement was named as a person with some information

about people running and screaming in the Park (Exhibit 16, R. v. 16, p. 22). Patterson's name appears on a list of people to be interviewed (Exhibit 16, R. v. 16, pp. 135-136, 139), but the evidence of John MacIntyre and William Urquhart was that the Sydney City Police were unable to locate Patterson in 1971 (T. v. 33, pp. 6010-6021; T. v. 52, pp. 9548-9563; 9565-9567).

299. Patterson testified before this Commission and confirmed that he was "pretty loaded" on the night of the stabbing, fell asleep on one of the benches in the Park, and had seen nothing (T. v. 55, pp. 10014, 10016). Robert Patterson did not know about the stabbing until after Donald Marshall, Jr. was charged a week later (T. v. 55, p. 10018), despite the fact that he was apparently working for a grocery store in Sydney at that time and spending most of his free time at Wentworth Park or at the pool hall (T. v. 55, pp. 10009, 10012-10013). He and Donald Marshall, Jr. were friends.

300. Robert Patterson testified at this Commission that the Sydney City Police, and in particular William Urquhart and John MacIntyre, did indeed find him in 1971 (T. v. 55, p. 10019). Patterson says that John MacIntyre handcuffed him to a chair and then MacIntyre began questioning (T. v. 55, p. 10020). Patterson appeared unsure as to whether one or two sets of handcuffs had been used (T. v. 55, pp. 10062-10064). When Patterson denied seeing what happened in the Park, MacIntyre started screaming, came around the desk and pulled Patterson's hair, pushed Patterson's chair up against the wall, and started

slapping Patterson around in the head and face for ten or fifteen minutes, stopping from time to time to say:

> Now, do you admit it? (T. v. 55, pp. 10020-10021).

On cross-examination the ten minutes became twenty, the chair was "kicked across the room", Patterson's head was banged on the desk, and he was punched with a closed fist in the stomach, side and rib cage (T. v. 55, pp. 10054-10056). Patterson meanwhile was screaming but "not really" loudly (T. v. 55, p. 10056).

301. William Urquhart, who had left, returned to the office with a typed three page statement. MacIntyre and Urquhart attempted to secure Patterson's signature but Patterson refused. As a result, both MacIntyre and Urquhart left and then returned again. MacIntyre "started slapping me around again" for anywhere from two to three hours, "maybe a little longer" (T. v. 55, p. 10022). On cross-examination, "It could have been four hours" (T. v. 55, p. 10060). However, Patterson says that over the whole course of the interview he was manhandled for "maybe fifteen minutes", which was pretty well all the time that Urquhart was out of the room the first time (T. v. 55, p. 10061).

302. Cross-examination further established according to Patterson that he was actually interviewed for an hour or an hour and a half prior to Urquhart leaving the room for the first time (T. v. 55, p. 10062). The only other significant point in Patterson's narration was that he described the Detective Office as one room without a stenographer (T. v. 55, p. 10052).

303. Eventually the handcuffs were undone and Patterson

was told to "get the hell out" (T. v. 55, pp. 10022-10023). Patterson complained to no one (T. v. 55, pp. 10023, 10025-10026, 10066-10067), even though this had been an absolutely unique experience in his life up to this time.

304. Patterson's allegation is also startlingly unique at these Commission Hearings. We submit that his evidence should be given no weight:

> Q. Had you ever before been interrogated by the Sydney Police or any police and been physically abused?
>
> A. Not that I can remember. (T. v. 55, p. 10023). (Emphasis added)

However, Patterson also testified as follows:

> Q. Had you ever been manhandled at any other time by the Sydney Police other than that occasion?
>
> A. No.
>
> Q. Or by any other police?
>
> A. Oh, yes.
>
> Q. Have you been manhandled on many occasions by police?
>
> A. Many occasions.
>
> Q. Many occasions?
>
> A. Many occasions. That's why there's so many people in jail in Ontario. (T. v. 155, pp. 10046-10047).
>
> ...
>
> Q. Against the Toronto Police although you say you were manhandled on virtually every occasion on which you were charged in the Toronto area?
>
> A. Ninety-five per cent of the time,

yes. (T. v. 55, p. 10051).

These included severe manhandlings (T. v. 55, p. 10047). Patterson added that MacIntyre and Urquhart had a reputation for this kind of thing (T. v. 55, p. 10072). According to Michael Whalley there has never been a complaint about this or any other kind of misconduct by MacIntyre or Urquhart (T. v. 62, pp. 11123-11124), and Whalley also indicated that complaints were effective (T. v. 62, p. 11194). Patterson had no marks on his face or chest from this encounter with MacIntyre and Urquhart, and while he said his hands were red from the handcuffs the skin was not broken (T. v. 55, p. 10065).

305. It is respectfully submitted that Robert Patterson's evidence as given to this Commission should not be believed. Patterson has a lengthy criminal record for dishonesty (Exhibit 120). Some of the offences in his record relate to contacts that he would have had with the Sydney City Police when first embarking upon his criminal career. Patterson was reluctant before this Commission to discuss the depth of his current or more recent criminal career (T. v. 55, pp. 10043, 10068). It is respectfully submitted that Patterson is an unsavoury character whose evidence should not be trusted - particularly when it itself is internally inconsistent despite the vigour with which the allegations are made.

306. It is respectfully suggested also that the story about attempting to get Patterson to sign the statement that had already been typed out is inconsistent with all other statements,

original or typed version, taken by John MacIntyre or William Urquhart and which appear in the documents before this Commission. That would make a statement stand out. What possible advantage could MacIntyre and Urquhart expect to gain from a typewritten statement that could not be gained from a handwritten one? Patterson himself recalled that there was no stenographer present in the Detective Office at the time.

307. We would ask the Commissioners to give Patterson's evidence close scrutiny, on guard about accepting any evidence from a person with Patterson's lengthy history of dishonesty, and we submit that this Commission will come to the conclusion that Robert Patterson's evidence can not be accepted, even in the absence of any opportunity for answer by John MacIntyre.

Patricia Harriss

308. Patricia Harriss was interviewed on June 17, 1971 and June 18, 1971 (Exhibit 16 - R. v. 16, pp. 63-68). Considerable stress was laid upon her evidence by some counsel as proof that John MacIntyre would refuse to accept evidence or statements from witnesses which would tend to exculpate Donald Marshall, Jr. It is respectfully submitted in response that such assertions go beyond, and indeed far beyond, the actual evidence given by Patricia Harriss at these Commission hearings. It is also respectfully submitted that when this Commission assesses the whole of her evidence the only real complaint and difference of opinion which Patricia Harriss and her mother have with John MacIntyre is that Patricia Harriss feels that the procedures used

in obtaining a statement from Patricia were not proper.

309. Patricia Harriss' recollection of the events of June 17-18, 1971 is highly selective and therefore this Commission must rely more on Eunice Harriss. Eunice Harriss testified that the Sydney City Police contacted her and she brought Patricia to the Sydney Police Station, at which time they were interviewed by John MacIntyre and William Urquhart (Section H, supra; T. v. 16, pp. 2796, 2951-2955, 3000). Both MacIntyre and Urquhart were present while Harriss was giving her first 8:15 p.m. statement (T. v. 16, pp. 2924, 2954). If this is so, it is the only statement which is in evidence before this Commission which had John MacIntyre present but not actually transcribing the statement which was being taken.

310. Eunice Harriss says that for the first hour or hour and a half that she and Patricia were at the police station William Urquhart was attempting to take a statement from Patricia Harriss. However whenever Patricia related that part of her recollection involving "two men" (Exhibit 55), William Urquhart would crumple the notepaper, toss it to the floor, and start again saying:

> "There wasn't two men there, Patricia";
> or
>
> "Come on now you didn't see two men"; or
>
> "Tell us now, who else did you see"; or
>
> "Well, you didn't; you couldn't have" (T. v. 16, pp. 2957-2958).

The starting of a statement, crumpling it up and starting again

was a sequence which occurred about twelve times (T. v. 16, pp. 2955, 2957, 2959). Patricia Harriss' recollection of this portion of the evening was that the police officers told her that the two men story was not proper:

> Patricia, you didn't see that. There wasn't two men there, was there, Patricia. (T. v. 16, p. 2799; see also 2875).

311. Patricia Harriss felt that she was under a lot of pressure throughout the evening:

> I remember being very frustrated, upset, going over a lot of facts, a lot of names, a lot of statements being taken and torn up and starting all over again. (T. v. 16, p. 2797).

Whenever a statement got to the two men "we would have to start over again because that wasn't proper, that wasn't right...It wasn't correct." (T. v. 16, pp. 2798-2875). At some point a fist was pounded on the desk - though not as loudly as Commission counsel demonstrated (T. v. 16, pp. 2800-2801). Harriss claims that in 1971 she was a very confused 14 year old (T. v. 16, p. 2926). Harriss recalls giving what is now regarded as the first statement (Exhibit 55; T. v. 16, p. 2798). Patricia Harriss says this was a true statement (T. v. 16, p. 2937).

312. Despite the efforts of the Sydney City Police, and "mainly...the two police officers" - Urquhart and MacIntyre (T. v. 16, pp. 2817-2818), Harriss kept up for quite a few hours saying that there were two men but she was crying and "very frightened, very, very frightened", and:

> I think I got a little angry. I remember

> being allowed out for a moment, my mother being there, and she offered me a kleenex - -and I was very upset. I was angry with my mom as well...I think I was angry at the world having to go through such a - such a time....I had no idea. I went down there thinking well there must be some - I really didn't know what it was all about. (T. v. 16, p. 2799).

Harriss recalls that at some point during the evening she may have met with Terry Gushue, her boyfriend, and both spoke for a moment (T. v. 16, pp. 2819, 2865, 2913). This contact lasted for a couple of minutes and they were alone, and this is the only time that Patricia Harriss recalls discussing the night of the stabbing with Terry Gushue (T. v. 16, pp. 2862-2865).

313. Eventually after virtually continuous questioning, Patricia Harriss says that she departed from the statement which she originally gave (Exhibit 55) and gave a statement which would satisfy the police (T. v. 16, p. 2937). Harriss places the responsibility for her agreeing with things that she shouldn't have agreed on MacIntyre and Urquhart (T. v. 16, pp. 2817-2818).

314. Eunie Harriss confirmed to this Commission that she observed Patricia being questioned, and notes being made on pages which were not as large as the statement forms (e.g., Exhibit 55) which Eunice Harriss had in front of her while testifying (T. v. 16, pp. 2959-2960). Eunice Harriss also confirms the persistent back and forth about the two men. Eunice Harriss confirmed that Patricia eventually began to cry and break down from the tension and pressure of the situation (T. v. 16, pp. 2956, 2959, 2991-2992). The sobbing may well have been going on for half an hour

when Detective MacIntyre asked Eunice Harriss to step outside the room. During this time Eunice Harriss had not seen any pounding of the table - though Urquhart may have had his hand come down on the table (T. v. 16, p. 2991).

315. Eunice Harriss sat outside the interview room where Patricia was and observed Terry Gushue arrive at the police station and observed him go into the interview room with Patricia alone for a few minutes as both Urquhart and MacIntyre had left the room (T. v. 16, pp. 2961-2962, 2964). This Honourable Commission will note that there was no soundproofing of the interview rooms in the Detective Office of the old Sydney City Police Station (T. v. 17, pp. 3059-3060).

316. It is respectfully submitted that Patricia Harriss' evidence is not reliable. Harriss claims now to be able to recall and identify that John MacIntyre questioned her in 1971 (T. v. 16, pp. 2796, 2829). In 1984 Patricia Harriss sat through a Discovery examination in the presence of John MacIntyre and was unable to recall him as involved (T. v. 16, pp. 2829-2833; Exhibit 13 - R. v. 13, pp. 146,166). In 1987 Patricia Harriss could not recall counsel for John MacIntyre who had questioned her at the Discovery (T. v. 16, p. 2850). Indeed, Patricia Harriss could not even recall how long the questioning for the Discovery had taken (T. v. 16, p. 2852). Harriss did not know John MacIntyre in 1982 when she spoke with Frank Edwards (T. v. 17, p. 5). She did not know who John MacIntyre was in 1971 either (T. v. 16, p. 2796). Patricia Harriss does not know which

officers were present at the time of the last interview of the night (T. ~~v.~~ 16, p. 2930). Patricia Harriss cannot even recall signing her own statement that night although her signature does appear on it (T. v. 16, p. 2802).

317. With respect to events in 1971, Harriss' recall was hazy as well. Harriss could not recall when she first started going out with Terry Gushue (T. v. 16, pp. 2856-2857). Harriss did not find that thing "too important myself" (T. v. 16, p. 2859). At the same time, even though the events at the police station on the night of June 17, 1971 had been important to her, she could not recall talking to her boyfriend about it (T. v. 16, pp. 2860-2862). Patricia Harriss says she did not recall and did not know that Terry Gushue had given a written statement that night (T. v. 16, p. 2862). Harriss does not recall going to the police station or even walking in the door of the police station (T. v. 16, p. 2866).

318. Harriss did not recall much of the second statement and offered that she wasn't "too responsible" when she "sort of gave up" and gave that statement (T. v. 16, pp. 2869-2870). Patricia Harriss also could not recall how Sandy Seale's name got into the statement because she did not know him at all and had never seen him before (T. v. 16, p. 2870), even though she has given sworn evidence to the complete opposite effect (Exhibit 13 - R. v. 13, p. 111). Patricia Harriss' explanation of this was that the facts to which she swore at the Reference were really "more like a dream to me" - even though she was, so she says,

telling the truth to the best of her ability (T. v. 16, pp. 2871-2872).

319. Patricia Harriss could not recall her mother being present with her while she was being interviewed (T. v. 16, p. 2879). When asked whether the fist on the table or raising of voices occurred from the moment she went to the police station Harriss stated:

> A. No, I don't imagine, no.
>
> Q. When you say you don't imagine, do you really recall?
>
> A. No. (T. v. 16, p. 2880).

320. Harriss could not recall giving evidence at the Preliminary Hearing (T. v. 16, p. 2882). Her evidence at the Preliminary Hearing did not refresh her memory at all (T. v. 16, pp. 2882-2885). Harriss had no recollection either of any other interviews with the police other than on June 17-18, 1971 but even so:

> I have said before that I wasn't quite sure how many times. I was never quite sure why I was saying that. But today, I really couldn't say. I do remember this quite vaguely because it was a hard time. (T. v. 16, p. 2886).

Harriss had no idea why she gave evidence at Trial about holding Donald Marshall, Jr.'s hand.

321. Patricia Harriss told Staff Sergeant Harry Wheaton in 1982 that Terry Gushue had been "browbeaten by the police" (Exhibit 13 - R. v. 13, p. 102). When asked why she signed a statement which contained that sentence she stated that:

A. Maybe because that short, brief moment that we had together where I was upset.

Q. Are you suggesting that Terry Gushue told you that he was browbeaten by the police at that time?

A. I'm not saying that he told me that. I might have - I think what I'm saying that he was also upset.

Q. He was also upset?

A. Yes.

Q. You - is that what you believe he told you, that he was also upset?

A. Not that he had told me, that I could - I could see that he was upset.

Q. And you translated what you observed into the fact that he was browbeaten by the police?

A. Well, more than if I - The reason why I was upset was probably the same reason for him being upset.

Q. Yes. But you just interpreted that upset as being due to a browbeating by the police?

A. Yes. (T. v. 16, p. 2896).

322. Patricia Harriss was examined about her criminal record:

Q. ...Have you ever had occasion to be in difficulty with the police?

A. No, nothing of any importance or anything.

Q. Have you ever been charged yourself?

A. Again years ago for a small shoplifting charge.

Q. And by years ago, can you help me on

that? What does that mean?

A. Oh, dear, I don't know how many years ago. It's awhile back.

MR. MACDONALD:

My Lord, we might as well take just about a five minute break to check some back-ground information.

...

BY MR. MACDONALD:

Q. Now I'd asked you if you had had difficulty with the police and you said "yes, there was a shop-lifting charge." and that was in July of 1978, was it not?

A. I have no idea.

Q. But it was some time ago.

A. Yes.

Q. And you were fined for that offence.

A. Yes.

Q. Now were you also in around the same time charged with driving a motor vehicle -

A. Yes.

Q. - while impaired?

A. Yes.

Q. And you were fined for that?

A. Yes.

Q. And approximately a month later charged with - still driving or driving a motor vehicle while you were disqualified.

A. Yes.

Q. You recall - and you were fined with that?

A. Yes.

Q. And within the last year, were you also charged with a Possession charge?

A. Yes.

Q. And you were convicted or -

A. Yes.

Q. - you were fined for that?

A. Yes.

Q. Thank you....(T. v. 16, pp. 2827-2829).

Patricia Harriss was questioned further as to her reasons for not admitting her criminal record:

Q. He [Mr. MacDonald] asked you what difficulties you had with the law and it's my recollection that you only acknowledged one problem before and that was an incident of some shoplifting some years ago and you could not recall when?

A. Yes.

Q. Mr. MacDonald then requested an adjournment?

A. Yes.

Q. And there was a fifteen minute adjournment and did anyone talk to you during that fifteen minute adjournment?

A. My mother.

Q. Did she discuss your evidence with you?

A. No, it was just that we felt it was

kind of a shame that I have to bear [sic] my soul about incidents that I'd rather not talk about.

Q. And did your mother tell you or bring to your attention that there were other incidents that you had not told Mr. MacDonald about?

A. No.

Q. I see. Do you have any explanation as to why you did not tell Mr. MacDonald about these other incidents?

A. No.

Q. None at all. Okay. Had you forgotten about them?

A. No.

Q. They were in your mind, were they?

A. Yes. (T. v. 16, pp. 2853-2854).

...

Later, by other counsel:

Q. Miss Harriss, I show you a piece of paper with your name appearing at the top and it indicates section 235-2 CC June 3rd, 1978, and it recites "two hundred dollars in [sic] costs, in default thirty days." And then goes on and lists three other matters.

A. Yes.

Q. That is an accurate record of your involvement with the Law to date?

A. Yes, I would imagine.

MR. MURRAY:

My Lords, if that may be marked as an exhibit - 57. (T. v. 16, pp. 2934-2935).

And yet later again, on re-examination by Commission counsel:

> Q. Just a couple of questions, Miss Harriss, and very briefly to do with your minor skirmishes with the Law. I think the questions that were directed to you were perhaps directed to your involvement in the Sydney area. Did you have any difficulties with the Law outside Sydney?
>
> A. No.
>
> Q. The reason for the questioning is that I have an indication that there was a minor theft charge in Toronto in 1976; does that assist your recollection?
>
> A. In '76.
>
> Q. Yes, in August of 1976?
>
> A. In Toronto - yes, I think that was with Sharon Newman, yes. A friend of mine.
>
> Q. And that did involve you?
>
> A. Yes. (T. v. 16, pp. 2943-2944).

323. It is respectfully submitted that these references are conclusive that the sworn evidence of Patricia Harriss is not a reliable basis upon which to make firm findings about others and other events. Miss Harriss' treatment of her criminal record, which she was quite aware of but decided that she did not want to talk about even though under oath is, we submit, direct evidence of her unreliability when it comes to matters of substance. This Commission can not know what other matters Patricia Harriss did not wish to talk about and so remove by omission from her evidence.

324. It is respectfully submitted that while Patricia

Harriss may have been persistent with respect to the two men, she ultimately-signed a statement which indicated that she had not seen the two men, consistent with the statement of Terry Gushue who had also been with her on May 28, 1971 at all relevant times (Exhibit 16 - R. v. 16, pp. 69-73). Harriss now claims that the first statement she gave (Exhibit 55) was the truth. However, at her mother's suggestion Patricia Harriss in 1971 went to see a lawyer for advice about what to do and the lawyer asked if Patricia was telling the truth and she agreed. Patricia understood the question from the lawyer to be whether she had told the police the truth. The lawyer advised her that if she told the truth there was nothing to worry about. The lawyer also discussed perjury with her. Despite being sworn at the Preliminary Hearing, the Trial and since at the Appeal Division Reference, she has admitted telling untruths each time. (T. v. 16, pp. 2897-2901). It is respectfully submitted that Patricia Harriss' evidence is of too uncertain truth that this Commission can not rely upon it.

L. Failures to Disclose and Misrepresentations to Representatives of the Defence With Respect to Material Which Could Have Been of Assistance to the Defence; and Including Failures to Disclose to the Crown

Disclosure in 1971

325. This Commission heard some conflicting evidence with respect to disclosure to Defence Counsel in 1971. This Commission heard from one of the lawyers who represented Donald Marshall, Jr. at the Preliminary Hearing and Trial in 1971 - Simon Khattar, Q.C. Khattar's experience as a Crown Prosecutor and as a Defence Counsel was that he did not expect disclosure of statements, let alone contradictory statements from the Crown (T. v. 26, p. 4783). Khattar also indicated that approaches were certainly not made to the Police officers directly (T. v. 26, pp. 4791, 4794):

> Q. And as the Commissioners brought to your attention this morning, there was certainly no discussion - direct discussion between Defence Counsel and the police officers.
>
> A. That's correct.
>
> Q. They didn't come to you and you didn't go to them.
>
> A. That's correct....We didn't go to the police. (T. v. 26, pp. 4831-4832).

Earlier Mr. Khattar explained in response to a question from Commissioner Evans:

> Q. Do you know - Quite apart from your own office practice, were you aware of any practice in the - those who operate in the Criminal Bar in Sydney as to whether they would consult with

> the Police or with the Crown to obtain statements?
>
> A. My - My recollection, and I checked this with Mr. Rosenblum within a month before he died to try and get our best recollection, was that it was the practice and I also must say that I checked with other lawyers who have been in practice at the same time with respect to that practice of not getting statements from the Police or checking with the Prosecuting officers and they agreed that at the time of the Marshall trial that was the practice that you did not get statements from the Police or the Prosecutor.
>
> Q. So you stayed some distance away from both the Crown and the Police and the Crown witnesses?
>
> A. Yes. That's right....(T. v. 26, p. 4794)

326. Arthur Mollon is a Sydney lawyer practising with Nova Scotia Legal Aid who was articling during the time that the Marshall trial was ongoing (T. v. 29, p. 5418). Mollon and the late Vincent Morrison were defending a murder case at the time which was being prosecuted by Donald C. MacNeil. Mollon indicated with respect to disclosure that:

> ...even when I was articling with the late Mr. Justice Morrison and - because he did extensive criminal work as well. My practise has been that anything I wanted from the Crown if I was defending someone that I called the Crown Prosecutor and indicated to them that I was defending a person, they would provide - if they had the material there they'd provide me with what they had. They would give me the background or statements if I requested statements, I got them. It was complete cooperation is what - how I would describe it with the

Crown. (T. v. 29, p. 5421).

In particular, in the murder case that Mollon was discussing:

> We knew what the case was and we had no problems with the Crown. They told us - we knew exactly what the Crown was going to - who they were going to call. Pretty well what they were going to say and what the theory of the Crown would be. (T. v. 29, p. 5422).
>
> ...And I always made it a practise to find out from the Crown everything that I could find from them. And I had absolutely no problem with Mr. MacNeil. If I'd call them - no there wasn't a situation where [sic] Mr. MacNeil would call me and offer stuff; but any time I asked him for other things or went to his office, it was always full cooperation. (T. v. 29, p. 5423).

Mollon had no difficulty approaching Crown witnesses, but did not do so in every case (T. v. 29, p. 5424). Certainly copies of the statements - typewritten - were provided on request, and if counsel wanted to see the handwritten one that would be made available as well (T. v. 29, p. 5439), including unsigned statements (T. v. 29, p. 5440).

327. It is respectfully submitted that it is clear from Simon Khattar's evidence and from Arthur Mollon's evidence that any issues of disclosure were resolved with the Crown and not by direct contact with the police. However, Arthur Mollon did testify that he would, on occasion, interview Crown witnesses, which may have included police officers from time to time. Neither counsel suggested any burden upon the police to initiate contact with Defence Counsel to make disclosure.

328. Judge Matheson testified that contrary to Simon

Khattar's evidence Mr. Rosenblum as a matter of practise would ask "what was coming and I would disclose appropriately", making statements of witnesses available to him on request (T. v. 26, pp. 4948-4949). The Crown would not volunteer information unless they felt it was of significance to the Defence - such as "something a police officer told me confidentially in the Crown office" (T. v. 26, pp. 4926-4927). This was Donald C. MacNeil's practise as well (T. v. 26, p. 4925).

329. It is respectfully submitted that upon all of this evidence there can be no conclusion that there was any expectation in 1971 that the Police would initiate disclosure to Defence Counsel, but neither is there any evidence that Defence Counsel would approach the police directly for information about the case. That would be done through the Crown, although certainly the Defence Counsel would not have been precluded from interviewing a police officer if the police officer was willing to be interviewed. Thus, if it was a matter of having had information about John Pratico's mental situation, or knowing about the conflicting statements given by the witnesses, it appears that that may have been disclosed if Defence Counsel had asked and there was in fact information to give.

330. Of course, the realistic and practical limitations on disclosure in 1971 would not justify misleading information being given to representatives of the Defence either by the Crown or by the police. The only suggestion that this may have happened was referred to in the evidence of Bernard Francis.

Francis was apparently told by Roy Gould (but Gould could not confirm this) in about June, 1972, that the knife used in the stabbing of Sandy Seale had been found (T. v. 22, p. 3973). Francis called the City Police and asked for MacIntyre (T. v. 22, p. 3974). Despite being familiar with MacIntyre's voice (T. v. 22, p. 4013) Francis could not state that he had been speaking with MacIntyre. Francis asked if there were any new developments in the case and Francis was told that there were not (T. v. 22, p. 3974). Francis had identified himself (T. v. 22, p. 3974). It is respectfully submitted that none of this evidence given with respect to disclosure or perhaps misleading disclosure can be considered a fault attributable to John MacIntyre.

Police Disclosure to the Crown

331. Obviously any safe guards in the criminal justice system served by disclosure as between the Crown and the Defence would be nugatory if there was incomplete disclosure by the Police to the Crown. Counsel for Donald Marshall, Jr. has asserted without a basis in the evidence that the first John Pratico statement:

> ...that was the statement that was suppressed, that never received the light of day at the trial. (T. v. 29, p. 5409).

Counsel for Donald Marshall, Jr. also suggested that John MacIntyre concealed the first statement of Patricia Harriss from the R.C.M.P. in 1971 (T. v. 31, pp. 5711-5712):

> Q. Well, surely that's not the mark of an honest man, to conceal the evidence that would support MacNeil's statement and confirm to you the

truth of the task you were investigating, is it?

332. Simon Khattar, Q.C. and Judge Matheson both had experience working as prosecutors with John MacIntyre. Simon Khattar was a part-time Crown Prosecutor in Richmond County in the 1950's for five years, and then in Cape Breton County during an illness of the regular Crown (T. v. 25, p. 4684). In relation to the Marshall matter, Khattar was asked to comment on matters based upon his experience of having been a Crown working with John MacIntyre:

> Q. ...Now, when you heard the evidence of people like Chant and Pratico and knowing that Sergeant MacIntyre was the investigating officer would you have assumed that he would have taken statements from those people?
>
> A. Yes.
>
> Q. But you didn't ask for copies of those?
>
> A. That's correct.
>
> Q. Thank you. And further you would have assumed that Sergeant MacIntyre would have given those statements to the Prosecutor?
>
> A. Prosecutor. Yes. In my practise, I got statements from the police all the time and <u>everything that they had</u> (Emphasis added) (T. v. 25, p. 4715).

Khattar expanded on this later:

> Q. When you were working as Crown in the - in the 1960's, was your experience - You said on Friday you got the full - all the statements when you were working as a Crown?
>
> A. The police provided me as the

Prosecuting officer with all of their information, all their statements.

Q. Now when you say "all their information", what else did they give you? Was it occurrence reports?

A. Yes.

Q. And would they give you oral briefings?

A. In addition to their statements, they'd say "We've talked with them, and over and above what you have here, this is what took place."

Q. There were no formal Crown sheets in those days, I take it.

A. No. (T. v. 26, p. 4832).

333. Commission Counsel spent considerable time with Judge Matheson on the matter of disclosure from police to Crown:

A. ...The police officer in charge of the investigation would keep the - would keep the main file. By that I mean, if there was a statement of the accused, if there was a statement of a witness, if there were pieces of evidence, he would bring them to the office and we would review them. Usually when he came, he came prepared with copies that he could leave with us. We would review them and when we had done so, the copies would be placed in our files and the originals and any exhibits would go back with the officer in charge of the file to the police station from which he had come.

Q. Do I take it from what you said, that you would, in fact, review the original statements in the police file?

A. Yes. (T. v. 26, p. 4914).

Specifically with respect to the Sydney City Police, the

following was said:

> Q. Do you recall if there was any difference in the degree of disclosure, the type of information that would be provided to you by the different police forces?
>
> A. No. Generally speaking, I would say no. Naturally, the Sydney City Police Force had a larger Detective Unit. I think that - I think that perhaps we considered that as compared to some of the Town Units, we perhaps got - had things in better shape coming from them then [sic] we might have from Sydney Mines or one of the out-of-town places. (T. v. 26, p. 4915).

The Crown might first receive the police file at various times, and with respect to a more serious charge there would be opportunity for the Crown to review the file before the information was laid. Statements and evidence obtained after a charge was laid would routinely be brought to the Crown without request (T. v. 26, pp. 4916-4917). Liaison with the police was primarily through the responsible Detective (T. v. 26, p. 4917).

334. Commission Counsel asked specifically about disclosure in connection with John MacIntyre (T. v. 26, p. 4918). Matheson of course had had contact with John MacIntyre from both Defence and Crown points of view since 1957 (T. v. 27, p. 5101). Commission Counsel asked:

> Q. Still talking generally, sir, and we'll get to the Marshall case a little later. In your experience as a Prosecutor, did you have occasion to prosecute cases, and I'm thinking again of major cases, in which Detective MacIntyre was the investigating officer?

A. I guess I'm sure of that, sir, yeh.

Q. Do you remember, sir, the type of disclosure that Detective MacIntyre would make to you as a Prosecuting Officer in respect to the police file?

A. I never had occasion to think that - that there was any lack of disclosure form Sergeant MacIntyre. (T. v. 26, p. 4918)

Indeed, Matheson was satisfied that on the occasions that he worked with John MacIntyre full disclosure of all materials taken by him was given to the Crown during the course of his investigation (T. v. 27, p. 5101). Matheson could not recall a case of inadequate or incomplete disclosure by the police to himself or other prosecutors in the area (T. v. 26, pp. 4918-4920).

335. With respect to the Marshall case in 1971, Matheson was out of the Crown Prosecutor's office from May 19 until June 22, 1971 (T. v. 26, pp. 4939-4940). When he returned to the office he immediately became involved in the Marshall matter as an assistant to Donald C. MacNeil and read the file (T. v. 26, p. 4941). Matheson recalls from reading the file that Chant and Pratico had given statements "which were not consistent with what we came to believe as the truth of the matter" (T. v. 26, p. 49, 43). Matheson had several other concerns as well, and pursued them with Donald MacNeil and the police (T. v. 26, pp. 4945 ff). After some initial uncertainty as to his recollection, Judge Matheson referred to his notes from the Preliminary Hearing

(Exhibit 16 - R. v. 16, p. 155) and stated that:

> Now, having seen that, I think that my comments in the notes refreshes my mind enough that I'd now say I probably was aware that Patricia Harriss had made inconsistent statements, and if I used the words "good witness today," that would probably indicate that she had given the story that was the most recent one she had given us and the one we had expected her to give (T. v. 26, pp. 4960-4961).

Matheson was shown the first Patricia Harriss statement (Exhibit 55), but that did not assist his recollection:

> My own note refreshes my memory...the statement itself doesn't. (T. v. 26, p. 4962).

Since Matheson had not interviewed or been present when Patricia Harriss was interviewed he felt that the only way he could express the opinion he did in the Preliminary Hearing notes "would be in relation to some statement that I had read" (T. v. 26, p. 4963).

336. Matheson also indicated that he had been aware that John Pratico had been at the Nova Scotia Hospital after the Preliminary but prior to trial, and he heard this from Donald C. MacNeil (T. v. 26, p. 4972). Indeed, Matheson believes that Pratico's hospitalization was "commonly known" and certainly the Crown office made not attempt to keep it a secret (T. v. 26, p. 4973).

Conclusion

337. It is respectfully submitted that upon the whole of this evidence there has been no proven failure to disclose on the

part of anyone, and certainly not any failure to disclose on the part of John MacIntyre to the Crown at any stage prior to the trial in 1971 of Donald Marshall, Jr. There was no expectation that John MacIntyre or any other police officer would take it upon himself to make disclosures directly to the Defence, particularly in view of the fact that the Crown retained a discretion not to dislcose if disclosure of the information could harm the public interests or lead to interference with a witness (T. v. 26, pp. 4920-4943; T. v. 27, pp. 5102-5104). There is no evidence that the disclosure given by John MacIntyre to the Crown in 1971 was anything other than full and complete disclosure. There can also be no suggestion that John MacIntyre ever made any misleading disclosure to the Crown, Defence or indeed to Mr. Francis. Thus, we respectfully submit that this allegation is unfounded.

M. Failure to Interview Donna Ebsary

November, ~~1971~~ Re-investigation

338. After Donald Marshall, Jr. was convicted by the Nova Scotia Supreme Court on November 5, 1971, John Joseph MacNeil persuaded his brother Jimmy to go to the Sydney Police for the purpose of relating the fact that Jimmy had been present at the time of the stabbing of Seale and that it had not been done by Donald Marshall, Jr. but rather by Roy Ebsary (Exhibit 16 - R. v. 16, p. 171; T. v. 3, pp. 456-457). A third brother, David, also went to the Sydney City Police Station (Exhibit 16 - R. v. 16, pp. 174-175; T. v. 28, pp. 5313-5314, 5317). All three brothers gave written statements (Exhibit 16 - R. v. 16, pp. 171-180).

339. While the MacNeil brothers were still at the Sydney City Police Station, Assistant Crown Prosecutor Lew Matheson had been notified of the developments in the case. Matheson arrived at the Police Station within five minutes of the notifying telephone call (T. v. 27, pp. 5008, 5009). Matheson was given the Jimmy MacNeil statement and sat down alone with Jimmy MacNeil to confirm the new eyewitness account of the stabbing (T. v. 27, pp. 5010-5014). Matheson did not believe Jimmy MacNeil but did feel that what Jimmy MacNeil had related to the police "could be true" (T. v. 27, pp. 5014-5015), and therefore the matter could not rest:

> ...what was most compelling at the time was people were in and out. The fact that James MacNeil had come forward and made a statement was known, at that

> point, to my knowledge among enough people that I feared that somebody would get to...Ebsary family and - alert them that they were going to be confronted with this. I didn't want to - them to have time to prepare a story that wasn't true. And I felt that the quicker they were confronted the better and I felt that had to be regardless of anything else that had to be done that night. (T. v. 27, pp. 5015-5016).

Matheson therefore asked the police, including John MacIntyre, to "go and round-up the Ebsary family wherever they were. To isolate them and to confront them with MacNeil's story and to record their answers." (T. v. 27, p. 5016, also 5017).

340. Matheson remained at the Police Station:

> And eventually the police came back in and they said that they had talked to the Ebsarys' and presumably all of them, and that they had said that MacNeil's story was untrue. And at that point it was getting quite late and I felt that it was absolutely essential that I communicate to the office in Halifax what had transpired. (T. v. 27, p. 5017).

341. By this point in time, Deputy Chief Norman MacAskill had also become involved. When Matheson asked about Roy Ebsary's wife, MacAskill:

> ...described her as, I think, the anchor of the household and he didn't think that she would be a party to involving her children in covering up an offense of this magnitude. (T. v. 27, p. 5018).

341. The Sydney City Police had taken statements from Roy Ebsary, his wife Mary Ebsary, and their son Greg Ebsary (Exhibit 16 - R. v. 16, pp. 181-194). In none of those statements is there any reference to the daughter Donna Ebsary.

The evidence before this Commission was that so far as Mary Ebsary knew, her daughter Donna had already gone off to bed by the time her husband Roy had come home on the night of the stabbing (T. v. 24, p. 4555).

342. When Mary Ebsary went down to the Police Station on November 15, 1971 she had no indication prior to being interviewed about what the Police wanted (T. v. 25, pp. 4568-4569). Mary Ebsary had come from work and did not know that Donna Ebsary was in a car parked outside the Police Station (T. v. 25, pp. 4578-4579). When Mary Ebsary talked with her daughter later, Donna made no mention of the particular incident which had been under discussion at the Police Station (T. v. 25, p. 4579), and indeed, Mary Ebsary has not had any discussions with her daughter Donna as to what Donna may have seen the particular night of the stabbing of Seale (T. v. 25, p. 4614).

343. Greg Ebsary testified before this Commission that in 1971 he was more of an acquaintance than a brother to Donna Ebsary (T. v. 25, p. 4630). On the night of November 15, 1971 Greg and Donna went to pick up Mary Ebsary at work and discovered that she had been taken to the Police Station, so drove there (T. v. 25, pp. 4640-4641). Greg Ebsary went into the Police Station and ended up giving a statement, leaving Donna outside (T. v. 25, p. 4646). Greg Ebsary had no idea whether the police were aware that Donna Ebsary was outside (T. v. 25, p. 4646). Unless Greg Ebsary told them that Donna Ebsary was outside the Sydney City Police on the night of November 15, 1971 would have had no idea

where Donna Ebsary was. Greg Ebsary did not even come into contact with his mother at the Police Station, and the family never discussed it later (T. v. 25, pp. 4646-4647). Donna Ebsary never confided in Greg about what she allegedly saw on the night of the stabbing of Sandy Seale (T. v. 25, p. 4650).

Involving the RCMP

344. After the three Ebsary statements were taken, Lew Matheson contacted Robert Anderson in Halifax as his next superior (T. v. 27, p. 5019). Matheson related to Anderson what had occurred and that both Roy Ebsary and Jimmy MacNeil were willing to take polygraphs (T. v. 27, pp. 5019-5020). Matheson also mentioned to Anderson the concern that the investigation should be done by another police department (T. v. 27, p. 5020). Matheson indicated that Anderson's response was that:

> ...he didn't have any further suggestion as to what might be done that night. He told me that he would get back to me about the other matters that I put to him. I don't recall receiving a call the next day. But early the next day I was aware, how I became aware I don't know, that - that Inspector Marshall of the R.C.M.P. and a polygraph operator were coming, I think, the following week to - to do an investigation (T. v. 27, p. 5020).

Matheson fully expected that this investigation would go beyond Roy Ebsary and Jimmy MacNeil (T. v. 27, pp. 5020-5022). Robert Anderson has a generally consistent recollection, but much less specific than Matheson (T. v. 50, pp. 9136-9138).

345. The fact is indisputable that the R.C.M.P. were directed to reinvestigate the Marshall case on the basis of the

MacNeil allegation, and that this assignment was made sometime after the evening of November 15, 1971 but before November 17, 1971 - because Inspector E. A. Marshall was already on the scene in Sydney on November 17, 1971 (Exhibit 16 - R. v. 16, p. 196). The direction to Inspector Marshall from Donald Wardrop was to "go and look into it" (T. v. 37, p. 6745), which meant going into the whole matter, talking to everyone involved and "of course" acting entirely independently of the Sydney Police Department (T. v. 37, pp. 6745-6746, 6765-6768, 6773-6774, 6776). E. Alan Marshall confirmed these points of Wardrop's evidence (T. v. 30, pp. 5606-5607). Marshall agreed that he had in fact gone to Sydney on November 16, 1971, as is indicated in his report (Exhibit 16 - R. v. 16, p. 204; T. v. 30, p. 5610). At that point the Seale murder investigation had passed out of the hands of the Sydney City Police into the hands of the R.C.M.P.

Conclusion

346. There does not appear to be any evidence before this Commission that in 1971 the Sydney City Police were aware of Donna Ebsary's existence, except for a passing reference in Jimmy MacNeil's statement (Exhibit 16 - R. v. 16, p. 176). Mary and Greg Ebsary testified that they never knew that Donna Ebsary knew anything about what had happened on the night of the Seale stabbing at the Ebsary home, so there is no reason for the Police to have known or had any suspicion. One could speculate the Sydney City Police did informally ask about Donna - the daughter - and Mary Ebsary told them, as she told this Commission, that

Donna had already gone to bed by the time that Roy came home that night.

347. In any event, the directions received by the Sydney City Police from Crown Prosecutor Matheson were to interview the Ebsary family before the Ebsarys had a chance to develop some story which would avoid the thrust of Jimmy MacNeil's allegations. In addition to the allegation that Roy Ebsary had stabbed Sandy Seale, MacNeil had suggested that Mary and Greg Ebsary had pressured him not to talk about the events of that evening - itself indicating a possible criminal offence and thus justifying the warnings which appear on all Ebsary statements (Exhibit 16 - R. v. 16, pp. 183, 188, and 193). Jimmy MacNeil had not included Donna Ebsary in these latter allegations.

348. If Donna Ebsary ought to have been discovered and interviewed in the course of re-investigating the Seale stabbing, it was not the primary responsibility of the Sydney City Police to ensure that this was done. It is respectfully submitted that the only reason that John MacIntyre took the investigation as far as he did, by interviewing the Ebsarys, was that Matheson directed that speedy action be taken that night instead of delaying those inteviews until the R.C.M.P. could arrive on the scene and take the investigation over.

349. We respectfully submit that the evidence of what happened from the time of the MacNeils arrival at the Sydney City Police Station on November 15, 1971, until the R.C.M.P. investigator arrived on the scene November 16, 1971, placed no

obligation upon John MacIntyre or anyone else with the Sydney City Police to search out and find Donna Ebsary to discover what she knew. The daughter had not been implicated in any of the threats related by Jimmy MacNeil, and no one has suggested that her evidence became stale because she was not interviewed on November 15, 1971 when Inspector Marshall could have interviewed her as early as the next day. Interviewing Donna Ebsary and all the other Ebsarys was a job for Alan Marshall to pursue in any event, regardless of John MacIntyre taking a statement from her or not (T. v. 31, p. 5673). Thus, it is respectfully submitted that there can be no criticism of John MacIntyre in relation to the 1971 re-investigation for any failure to interview Donna Ebsary on November 15, 1971, or at any other time.

N. Interference with the 1971 Re-investigation and Failure to Disclose Information Received During the Investigation to Representatives of the Accused.

The Allegations

350. The suggestion has been made before this Commission that John MacIntyre failed in his duty as an honest and competent police officer by not disclosing to Defence counsel information which prompted the re-investigation in 1971, or any information which came to light as a result of the re-investigation in 1971. It is respectfully submitted that no such positive obligation existed on John MacIntyre, or indeed on any other police officer, to take active steps to keep Defense counsel informed of new information with respect to the case. Indeed, it is respectfully submitted that the evidence discloses a directive of the Crown to the Sydney Police to not disclose this information at the same time as the re-investigation was being turned over to the R.C.M.P.

351. A further suggestion has been made that John MacIntyre exercised some undue influence over the direction of the 1971 re-investigation and thereby made a substantial contribution to its inadequacy. It is respectfully submitted that John MacIntyre's involvement in Inspector E. A. Marshall's re-investigation was minimal and at all times well within the bounds of propriety. Any failures to disclose what Jimmy MacNeil and Roy Ebsary had said must rest with the Crown. Any failures to conduct a full and proper re-investigation in 1971 must rest

with judgments made by Inspector E. A. Marshall, and the weight which was attributed by Marshall and others to the results of Eugene Smith's polygraph testing. We will deal with the second allegation first.

The 1971 Re-investigation

352. As indicated in the previous section of this Brief, Inspector E. Alan Marshall arrived in Sydney on November 16, 1971, having been directed to look into the Seale murder case by Donald Wardrop (T. v. 30, p. 5610). Wardrop encouraged Marshall to take all the time he needed with the re-investigation, expecting that Marshall would do a thorough investigation (T. v. 37, p. 6745), talking to everyone involved, acting independently of the Sydney City Police, and even including a walk-through in Wentworth Park with Jimmy MacNeil (T. v. 37, pp. 6745-6746, 6756, 6773-6774). This was Inspector E. A. Marshall's understanding as well (T. v. 30, pp. 5607-5610; 5615-5617; T. v. 31, pp. 5704-5706, 5708-5709). To the extent that Marshall testified that he was only doing a review, he had to acknowledge that a review would have become a re-investigation had he adverted to a number of issues which were apparent as a result of information which came forward after the conviction of Donald Marshall, Jr. (T. v. 30, pp. 5607, 5609; T. v. 31, pp. 5704-5705).

353. The first thing that E. Alan Marshall did was to meet with John MacIntyre and have a discussion about the case (T. v. 30, pp. 5610-5611). MacIntyre provided a transcript and some statements, and appeared confident that he had the right man (T.

v. 30, p. 5611). Marshall feels sure that he received the statements which are referred to in his 1971 Report (Exhibit 16 - R. v. 16, pp. 204-207; T. v. 30, pp. 5612-5613), but today is unable to speak with any precision as to what he received (T. v. 31, p. 5752). In addition, Marshall would have received a copy of the Preliminary Hearing transcript and some trial evidence as quoted in Judge Dubinsky's jury charge (T. v. 30, pp. 5613-5615). Marshall did not ask for the entire file at that time (T. v. 30, pp. 5615-5616). Marshall explained that he thinks he really had it in his mind at that time to "try the polygraph", "...rather than go full-bore into a total review of the case" (T. v. 30, p. 5616):

> I thought that by using the polygraph it would knock the thing on the head pretty quick.

Inspector Marshall had some personal concern that his re-investigation of the case be "most expeditious" (T. v. 31, p. 5736).

354. Marshall testified that he accepted the materials from MacIntyre and MacIntyre's word that what was being conveyed was "the crucial material related to the eyewitnesses" (T. v. 30, pp. 5615, 5617). Marshall was made aware by MacIntyre that there had initially been some difficulty with Chant and Pratico (T. v. 30, p. 5618; T. v. 31, pp. 5683-5685). Marshall did not think too much about that because "it has been my relatively common experience - relatively common experience, to experience people who are initially not forthcoming or not ingenuous and as a

matter of fact I think it was not more than two years before this that Corporal Smith and I were involved in a murder case when the exact same thing happened...." (T. v. 30, p. 5618). Marshall is sure that he discussed Jimmy MacNeil with MacIntyre (T. v. 30, pp. 5621, 5623-5624). MacIntyre may have told Marshall about Roy Ebsary's conviction (T. v. 30, pp. 5627-5629) but most definitely Ebsary was discussed (T. v. 30, p. 5642). MacIntyre showed Inspector Marshall the jacket that Donald Marshall, Jr. had been wearing [this would have had to occur at the Courthouse (T. v. 32, pp. 5810-5812)] and they discussed the possibility of Donald Marshall, Jr.'s wound having been self-inflicted (T. v. 30, pp. 5629-5631).

355. Inspector Marshall also visited Wentworth Park with John MacIntyre, but could not recall whose car was taken and thinks it was daytime (T. v. 30, p. 5620). Marshall has no other recollection about that visit to the Park except that having been stationed in Sydney a few years previously, he felt familiar with the "focus of the place" and only wanted to check the lighting standards (T. v. 30, pp. 5620-5621).

356. Inspector Marshall testified that after his initial meeting with John MacIntyre, he neither spoke nor saw MacIntyre until after the polygraph examinations had been conducted. This next meeting would not have taken a long period of time (T. v. 31, p. 5731), and would have consisted in dropping materials back off with the Sydney City Police before going to Halifax to write his report (T. v. 30, pp. 6559-6560).

Allegedly Influencing the Re-investigation

357. In addition to John MacIntyre, Inspector Marshall consulted during his re-investigation with Sergeant McKinley who was the officer in charge at Sydney's R.C.M.P. General Investigation Section, Eugene Smith who did the polygraph, and to some extent with Crown Prosecutor Donald C. MacNeil. Inspector Marshall's recollection was such that even though certain things must have been discussed with MacIntyre, Marshall did not always recall exactly what he had been told (T. v. 31, p. 5687).

358. Commission Counsel insinuated that John MacIntyre in his discussions with Inspector Marshall had promoted the theory that Marshall and Seale entered the Park bent on robbing someone - words which eventually appeared in Marshall's 1971 report as a "consensus of opinion" (Exhibit 16 - R. v. 16, p. 206). Inspector Marshall explained:

> I can't find the - Jesus, I wrote that and I must have wrote it for a reason.
>
> Q. If it's not in the material - If it's not in the material that you have, sir -
>
> A. Yeh.
>
> Q. - could it be that it's just as a result of a discussion with John MacIntyre?
>
> A. Undoubtedly.
>
> Q. Again, you've told this many times that you took what John MacIntyre said at his word?
>
> A. Yes, sir. (T. v. 31, pp. 5695-5696).

A number of other points from Inspector Marshall's 1971 Report

were attributed by Inpsector Marshall to John MacIntyre (T. v. 31, pp. 5697-5703) in a similar manner.

359. The point was made by Commission Counsel (T. v. 31, p. 5676-5678) that the theory of a robbery and altercation was much more plausible and therefore attractive to Inspector Marshall than what had been presented at trial and in the May 30, 1971 statement by Donald Marshall, Jr. Inspector Marshall attributed this theory to John MacIntyre and Roy Ebsary's November 15, 1971 statement (T. v. 31, pp. 5694-5695). This point was also established by counsel for Oscar Seale, but in somewhat different terms:

> Q. Did John MacIntyre tell you that in his view Sandy Seale and Marshall were down in the Park intent on robbing somebody?
>
> A. Well, we - we - my report says we came to that consensus and I think that's probably what happened.
>
> Q. He would have given you that information?
>
> A. I believe so (T. v. 31, p. 5773)

The point of Commission Counsel was that there was no basis to say that Marshall and Seale had entered Wentworth Park with the idea of robbing someone, whether or not a robbery eventually occurred. This was obviously, we submit, a matter of inference taken from Roy Ebsary's November 15, 1971 statement in conjunction with what Jimmy MacNeil had to say (Exhibit 16 - R. v. 16, pp. 178-180, 188-190).

360. After Inspector Marshall's initial meeting with

John MacIntyre there was no further consultation with John MacIntyre. Inspector Marshall did have contact and discussions with Sergeant McKinley, Eugene Smith and Donald C. MacNeil, in addition to both Ebsary and MacNeil. Inspector Marshall now attributes the robbery theory and inferences based on a robbery theory to John MacIntyre because in Inspector Marshall's report he speaks of "the consensus of opinion" (Exhibit 16 - R. v. 16, p. 206).

361. It is respectfully submitted that a "consensus" is not something which is descriptive of Inspector Marshall accepting John MacIntyre's word as to what the inferences should be from the evidence available. Therefore, for Inspector Marshall to attribute the inference to MacIntyre and MacIntyre alone is not reliable.

362. Counsel for Donald Marshall, Jr. took the opposite tack, emphasizing points which that counsel alleges MacIntyre did not show or tell Inspector Marshall about (T. v. 31, pp. 5711-5715), proffered by this counsel as evidence of concealment. Counsel for Donald Marshall, Jr. also suggested through questioning that John MacIntyre had knowingly misrepresented the evidence and thereby mislead Inspector Marshall (T. v. 31, pp. 5715-5729). However, Inspector Marshall's evidence elsewhere conclusively suggests that he was not interested in having the full file given to him to peruse, and so never asked for it.

363. Inspector Marshall testified that he was not blaming John MacIntyre for his own failure to carry out a

thorough review of the case - instead the fault lies on the shoulders of Inspector Marshall himself (T. v. 31, pp. 5729-5730). Marshall did not feel that he was in Sydney to rubberstamp MacIntyre's investigation and did not expect that MacIntyre's opinions as a result of the jury verdict less than two weeks previously would have been changed as a consequence of seeing Jimmy MacNeil (T. v. 31, p. 5734).

364. We respectfully submit that the R.C.M.P. were expected to conduct an independent investigation - independent of the Sydney City Police Force. While some consultation would be appropriate with the officers doing the initial investigation, conclusions and inferences from the evidence were Inspector Marshall's and the R.C.M.P.'s alone. Any "consensus" would reasonably have been consensus among R.C.M.P. officers involved such as McKinley and Smith. This was emphasized by Inspector Marshall's own counsel at these hearings - that McKinley, Smith and Marshall did not disagree among themselves as to the assessment and opinion of the people that Inspector Marshall had seen (T. v. 31, pp. 5795-5796, 5804-5805).

Appropriate Involvement

365. There can be no doubt that when Jimmy MacNeil came forward in 1971 that John MacIntyre and the Sydney City Police had an obligation to receive what information he claimed to be able to give, and this was done. John MacIntyre and the Sydney City Police also had an obligation to take the direction of the Assistant Crown Prosecutor and pursue the securing of information

from the Ebsary family as soon as possible so as to protect against the Crown's reasonable concern that the Ebsary family would have a chance to develop some explanation of Jimmy MacNeil's accusation unless immediately confronted. As indicated in the previous section of this brief (Section M, supra) this further investigation was conducted in the context of a direction from the Crown not to disclose this sudden turn of events to anyone. That direction appears to have been communicated to David William MacNeil (T. v. 28, p. 5317).

366. Douglas James Wright is a highly qualified investigator who had done a number of re-investigations himself (T. v. 28, p. 5263). Wright expressed the opinion that the only way to do a re-investigation would be to approach it like a brand new investigation and do all of the various things that one would hope had been done in the first place (T. v. 28, p. 5265). However, the re-investigator would also appropriately discuss the initial investigation with the police officers who had carried it out:

> I have, you know. And I again, I've done quite a few of them myself in my day and going back quite a few years, yes, you'd discuss it with them. You don't get carried away too much with what they tell you sometimes because you're re-investigating it. You should go into it with an open mind. You would certainly discuss it with them, by all means, yes.
>
> Q. Would you do that before or after you carried out your own investigation?
>
> A. You'd probably have a chat with them before and maybe even during and after, eh. (T. v. 28, pp. 5266-5267).

367. As this Commission well knows, the procedure discussed by Douglas Wright was in fact the approach followed by Staff Sergeant Harry Wheaton - whose first step in the 1982 re-investigation was to have a "rather lengthy" meeting with John MacIntyre (T. v. 41, pp. 7514, 7517 ff). Significantly, Wheaton explored with MacIntyre at this meeting what MacIntyre's impression of the potential new information was (T. v. 41, p. 7519), just as Inspector Marshall had explored MacIntyre's impression of Ebsary and MacNeil. Therefore, this Commission may conclude that there was nothing inappropriate in MacIntyre discussing the case with Inspector Marshall in November, 1971, and indeed that would be expected. What the outside investigator takes away from such a discussion is the responsibility of the outside investigator, not John MacIntyre's responsibility at all except perhaps that there should be no intentional misleading of the outside investigator. There is no evidence of sufficient cogency, given Inspector Marshall's uncertainty in recollection, to assert that there was any active and knowing misrepresentation by John MacIntyre of the case which he had investigated.

Discussion With Defence

368. It is now an appropriate stage to return to the first alleged complaint about John MacIntyre in relation to the 1971 re-investigation. It has been suggested that if John MacIntyre were honest and competent he would have taken it upon himself to disclose to the Defence the startling information which had been received on November 15, 1971. John MacIntyre had

caused the Crown to become involved to give direction on the night of November 15, 1971, before Roy Ebsary had been interviewed. From the arrival of Prosecutor Matheson, the case was under the direction of Matheson, who was in turn concerned about getting direction from his own superiors. Matheson did make a direction that the Ebsarys be interviewed, and made a direction that Jimmy MacNeil's report not be disclosed at that time (T. v. 27, pp. 5015-5016).

369. It is respectfully submitted that direct communication about the investigation between the Sydney City Police and Defence Counsel initiated by the Sydney City Police would not have been appropriate, nor expected.

370. One of the defence counsel at Donald Marshall, Jr.'s trial in November, 1971, and who was no longer retained after that date apparently, stated that from his experience as a Crown Prosecutor and as a Defence Counsel, he did not even expect disclosure of contradictory statements given by witnesses from the Crown (T. v. 26, p. 4783). Approaches certainly were not made to the Police Department directly (T. v. 26, pp. 4791, 4794). This point was hammered home:

> Q. We've already gone over this ground a number of times and I don't wish to tire you with it but I take it from your extensive experience with the criminal law in Cape Breton, that in your experience both as a Crown and as a defence, there was no disclosure between the two sides in a criminal case.
>
> A. At - during the 1971 period, right.

Q. And as the Commissioners brought to your attention this morning, there was certainly no discussion - direct discussion between defence counsel and the police officers.

A. That's correct.

Q. They didn't come to you and you didn't go to them.

A. That's correct.....

Q. ...Any access you had to the police or any information in the file would be through Donald MacNeil, in 1971?

A. Any?

Q. Any access that you had to information was through Donald MacNeil?

A. That would be the only source, yes. I don't recall getting any information period. But you asked any information that I would obtain would be through Donald MacNeil, I -

Q. He was in charge.

A. - Wanted to qualify it by stating that I don't recall getting any information.

Q. Yes, and he was in charge? He was the one in charge.

A. Yes. We didn't go to the police. (T. v. 26, pp. 4831-4832).

It is respectfully submitted on the basis of this evidence that there was certainly no expectation on the part of Defence counsel for initiative disclosures by the Police. Given the state of the law with respect to Crown disclosure in 1971, this should scarcely be surprising: e.g., R. v. Lalonde (1974), 5 C.C.C. (2d) 168 (Ont. H.C.J.). Consider also: Todosichuk v. MacLenahan,

[1946] 1 D.L.R. 557 (Alta. S.C.). No complaint against John MacIntyre ~~can~~ be sustained on this ground.