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VOL. II

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

HER MAJESTY THE QUEEN
v. DONALD MARSHALL JR.

BEFORE: DUBINSKY, J. & JURY

SYDNEY, N.S.

NOVEMBER 2nd to 5th, 1971

VOL. II

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

v.

DONALD MARSHALL JR.

BEFORE: DUBINSKY, J.

SYDNEY, NOVA SCOTIA
NOVEMBER 2, 3, 4, 5, 1971.

COUNSEL:

D. C. MacNEIL, Q.C. and
D. L. MATHESON, Esq. for the Crown

C. M. ROSENBLUM, Q.C.
and S. J. KHATTAR, Q.C., for the Accused

2:00 P.M. NOVEMBER 4, 1971, JURY POLLED, ALL PRESENT

MR. ROSENBLUM:

Your Lordship, Mr. Foreman, gentlemen of the Jury:

As you heard my learned friend, Mr. MacNeil, state before we adjourned for lunch, the Prosecution has proved its case in his opinion and completed the calling of witnesses. I intend to call the accused on the witness stand and you will hear from him the events of that night, May 28, which resulted in the death of

(10) Sandy Seale. You will hear from Mr. Marshall here, a boy seventeen years of age, that he had been away for some time prior to that particular date; that he returned to Sydney at about half past nine on that evening; that he spent the evening at the home of a family by the name of Tobin; and that eventually he came down to the park. He had not been at the dance at St. Joseph's Parish Hall. In the park he met Sandy Seale walking towards him. He had been friends with Sandy Seale for about two years. They had no argument in the park whatsoever. They were talking to each other.

While they were talking, two men came along - two men whom he

(20) did not know. He will describe these two men to you except that he can't tell you their names. He will tell you that they asked Sandy Seale and himself for two cigarettes which the accused gave to them. And then they asked him for matches which he gave to them. And then they asked where they could find some women to which Marshall replied that "lots of women here in the park right now." Then one of these men said, "I don't like niggers! I don't like Indians!" and he pulled out a knife and he slashed it into Sandy Seale and also slashed Marshall on the left arm. You will hear from Marshall that he himself - that he himself

(30) is left-handed, not right-handed as you have heard from some of the witnesses here today and that when this occurred he ran for help. He ran down Byng Avenue and who did he bump into but Maynard Chant and said, "Look what they did to me up there!" And he immediately flagged the first car that came along looking

for help; and directed the driver, "take us back to Crescent Street" and stayed there with the deceased Seale until the police came along -until the ambulance came along and prior to their arrival, he had gone to a house to call the police and to call an ambulance. He stayed there until the ambulance and the police came along. His wound was bleeding and he went to the hospital and then home. He was questioned by the police and he will tell you about that when he is on the witnessstand.

(10) And so in brief, you will hear from the accused that he did not lay a hand on Sandy Seale let alone stab him; that he caused him no harm; that there was no argument between them; and that this fatal incident which resulted in the death of young Seale was caused by a man, one of the two men, whom they met in the park - this meeting place for people late at night and about which he will tell you; that he did everything possible to apprehend the men and to render assistance to Seale; that he had no part in it whatsoever.

I call the accused, Donald Marshall Jr.

C.S.

-186- DONALD MARSHALL JR., Dir. Exam.

DONALD MARSHALL JR., being called and duly sworn, testified as follows:

BY MR. ROSENBLUM: Dir. Exam.

Q. Now Donald, I'm going to stay back here so that you have to speak up loud enough for me to hear and by so doing, every juryman here will hear you. Your name is Donald Marshall, Jr?

A. Yeah.

Q. Now speak out loud. Are you right-handed or left-handed?

(10) A. Left-handed.

Q. Just take your hand down. Now did you know the late Sandy Seale?

A. Yeah.

Q. How long did you know him before he was stabbed on the night of May 28, 1971?

A. Three years.

Q. Three years. Did you use to go places with him?

A. Yeah.

Q. Were you good friends with him?

(20) A. Yeah.

Q. On the night of May 28, 1971 where were you the early part of the evening?

A. Home of Tobin's.

Q. Home of Tobin's - what street do they live on?

A. Intercolonial.

Q. Intercolonial Street. And you stayed there until about what time?

A. Uh -

Q. Roughly?

(30) A. About 11:00 o'clock.

Q. About 11:00 o'clock at night. Now had you been in Sydney or Cape Breton for a few days before May 28?

A. No.

Q. Where were you?

A. Trying to think of the name -

Q. Take your hand down Donnie.

A. Bedford.

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-187- DONALD MARSHALL, JR., Dir. Exam.

Q. In Bedford. Who were you with?

A. Roy Gould.

Q. Roy Gould. And you borrowed this jacket, this yellow jacket from Roy Gould?

A. Yes.

Q. And you were wearing it on the night of May 28 of this year?

A. Yes.

10) Q. All right. Now had you been drinking on the night of May 28 when you were at the home of Tobin's?

A. No.

Q. And where did you go after you left Tobin's home?

A. Down the park.

Q. Down to Wentworth Park. And did you go in the park?

A. Yeah.

Q. Were there people in the park?

A. No.

Q. Did you meet anybody in the park?

20) A. Sandy Seale.

Q. Sandy Seale. Did you have any argument with him?

THE COURT:

Will you kindly ask the witness to tell the story? Don't lead him.

MR. ROSENBLUM:

Thank you.

BY MR. ROSENBLUM:

Q. What happened when you met Sandy Seale?

A. Talking for -

30) THE COURT:

Speak up, Mr. Marshall, please.

BY MR. ROSENBLUM:

Unfortunately it is very difficult for him to do. I have instructed him to do it and I am standing back for him to do that very thing. Take your hand down, Donnie, and speak loud.

BY MR. ROSENBLUM:

Q. Now when you met Sandy Seale, what happened when you met him in the park?

A. We were talking for a couple of minutes and Patterson come down -

Q. What's that?

A. Patterson come down.

Q. You met a fellow by the name of Patterson?

A. Yes.

Q. What condition was he in?

A. Drunk.

Q. He was drunk. What happened then when you met Patterson?

A. Put him on the ground. Walked up to the bridge.

Q. Who walked up to the bridge?

A. Me and Seale.

Q. Will you put that hand down Donnie. We want to see and hear you. Yes, you and Seale walked up to the bridge. Go ahead.

A. Two men called us up Crescent Street.

Q. Two men what?

A. Crescent Street.

Q. Crescent Street, yes. What happened when you met these two men up there?

THE COURT:

I appreciate your problem, Mr. Rosenblum, but you must try to whatever extent you can not to lead. You're doing it all right now.

MR. ROSENBLUM:

Thank you, my Lord.

BY MR. ROSENBLUM:

Q. Yes, you met two men. You'll have to take that hand down, Donnie. I will tell you that repeatedly. You met two men and you walked up towards Crescent Street. Go ahead.

-189- DONALD MARSHALL, JR., Dir. Exam.

A. Bummed us for a cigarette.

Q. Umm?

A. A cigarette.

Q. What?

A. Smoke.

Q. What about them?

A. Asked for a cigarette.

Q. What?

(10) A. And a light.

Q. When they asked you for the cigarettes and the light, what did you do?

A. I gave it to them.

Q. Go ahead.

A. I asked them where they were from. Said Manitoba. Told them they looked like priests.

Q. Told them what?

A. Looked like priests.

(20) Q. Why did you make that remark to them? Take your hand down, Donnie.

A. Looked like it.

Q. In what way?

A. Dressed.

Q. Umm?

A. Dress.

Q. What kind of dress? How were they dressed?

A. Long coat.

Q. What colour?

A. Blue.

(30) Q. What religion are you yourself?

A. Catholic.

Q. So when you asked them if they were priests, did you get an answer?

MR. MacNEIL:

No, no, my Lord. I don't think he said he asked them if they were priests. At least not that I could hear. He said they looked like priests. He didn't say that he asked them.

MR. ROSENBLUM:

I'm very grateful for your interruption but please, it is

-190- DONALD MARSHALL, JR., Dir. Exam.

MR. MacNEIL:

Just one minute, if Your Lordship pleases, I take an objection to my learned friend leading the witness. I am suggesting that he is putting words into the mouth of this witness that he never uttered.

THE COURT:

Now gentlemen -

MR. ROSENBLUM:

10) It is very harsh language, My Lord, with the accused on the witness stand. I resent that. However -

BY MR. ROSENBLUM:

Q. What did you say to these men?

A. They looked like priests.

Q. Yes, go ahead. Did you get an answer to that?

A. Yeah.

Q. Tell us.

A. The other guy, the younger one, said, "We are".

Q. Go ahead.

20) A. They asked me if there were any women down the park. Told them there were lots of them down the park. And any bootleggers. I told them I don't know.

Q. Take your hand down, Donnie, please. Go ahead.

A. Told us, don't like niggers or Indians.

MR. MacNEIL:

Can't hear the witness, My Lord.

THE WITNESS:

We don't like niggers or Indians. Took the knife out of his pocket -

30) BY MR. ROSENBLUM:

Q. Who did?

A. The older fellow.

Q. What did he do?

A. Took the knife out of his pocket.

Q. Yes.

-191- DONALD MARSHALL, JR., Dir. Exam.

A. Drove it into Seale.

Q. What part of Seale?

A. Here.

Q. Are you referring to the stomach?

A. Yeah.

Q. Yes. And then?

A. Swung around me, moved my left arm and hit my left arm.

Q. Hit your left arm? Just roll back your sleeve, please.

10) Is there a scar now visible from the slash of the knife?

A. Yes.

Q. Just show it please.

A. (Witness complied.)

Q. Is that the scar that the doctors described?

A. Yeah.

Q. Show it to His Lordship as well. On what arm is that slash?

A. Left arm.

Q. On your left arm. Yes, after that happened what did you do?

20) A. Ran for help.

Q. Where did you run?

A. Byng Avenue.

Q. Take your hand down Donnie. Did you meet anybody on Byng Avenue?

A. Yeah.

Q. Who did you meet?

A. I don't know his name.

Q. Take your hand down.

A. Don't know his name.

30) Q. Take your hand down, please. Did you see him on the witness stand here?

A. Yeah.

Q. May I suggest the name, My Lord? May I suggest the name of the person he met on Byng Avenue? He can't recall his name. Was it Mr. Maynard Chant?

A. Yeah.

-192- DONALD MARSHALL, JR., Dir. Exam.

Q. All right. And that was by Mr. Mattson's home, the man who gave evidence here this morning.

A. Yes.

Q. And when you met Chant what did you do?

A. Stopped the car.

Q. You stopped a car and where did you go with this car?

A. To Crescent Street.

Q. Who went with you? Did Chant go with you?

A. Yeah.

Q. When you got up to Crescent Street, what did you see there?

A. Sandy Seale, laying on the ground.

Q. Yes.

A. I went to Doucette's house.

Q. Where was this house?

A. Crescent.

Q. On Crescent Street, what did you do there?

A. Told them to call for an ambulance for me.

Q. Called an ambulance, yes.

A. And the cops.

Q. What's that?

A. And the cops.

Q. And the cops, yes. And did you stay there until the ambulance and the police arrived?

A. Yeah.

Q. How many police arrived, do you know?

A. No.

Q. Where did you go after that?

A. To the City Hospital.

Q. And you were treated by a doctor and a nurse as they have told us. And then where did you go after you were treated at the hospital?

A. Went home

Q. You went home. When did you next see the police?

A. The next morning.

-193- DONALD MARSHALL, JR., Dir. Exam.

Q. Where at?

A. Home. Took me down the police station.

Q. Did you visit the police station very often that week?

A. Yeah.

Q. How often?

A. All week.

Q. What lengths of time did you stay there on these days that you went to visit the police? Do you understand my question?

A. Yeah.

Q. How long did you stay there on these particular days?

A. About five hours.

Q. Five hours on each day that you were there?

A. I don't know.

Q. Who were you talking to there in the police station?

A. MacIntyre.

Q. Sgt. MacIntyre. Sgt. MacDonald -

A. Yeah.

THE COURT:

Stop for a minute. What has this got to do -

MR. ROSENBLUM:

I'm not going to bring out conversation.

THE COURT:

There was nothing brought out -

MR. ROSENBLUM:

Yes, the police officer testified that Marshall was there at the police station. That's all. I'm leaving it at that.

BY MR. ROSENBLUM:

Q. Now did you stab Sandy Seale?

A. No.

Q. Or lay hands on him of any kind?

A. No.

BY MR. MacNEIL: (Cross-Exam.)

Q. Mr. Marshall, were you up around St. Joseph's Dance that evening?

A. No.

Q. Were you up around in the area of the hall?

A. No.

Q. Do you remember meeting Mr. Pratico?

A. No.

Q. You don't remember meeting him?

A. Didn't see him.

Q. You didn't see him on George Street?

A. No.

Q. Did you at the corner of Argyle Street and George Street invite him to go down into the park?

A. No.

Q. Didn't see him at all?

A. No.

Q. And did you know Mr. Pratico?

A. Yeah.

Q. How long had you known him?

A. Six months.

Q. Tell me, did you have any dispute with Mr. Seale in the vicinity of the dance hall, St. Joseph's hall, that night?

A. I wasn't there.

Q. You weren't anywhere near there. So therefore you didn't have any dispute with him that night?

A. No.

THE COURT:

Where is this?

MR. MacNEIL:

St. Joseph's Hall or in the vicinity of the hall.

BY MR. MacNEIL:

Q. Now tell me, sir, you say you went down into the park and you were standing at the footbridge of the park?

A. Yeah.

Q. And you heard these two men call out?

-195- DONALD MARSHALL, JR., Cross-Exam.

A. Yeah.

Q. And up you went to Crescent Street right above the footbridge there?

A. Yeah.

Q. Is that right?

A. Yeah.

Q. There is where this incident took place with these two men?

A. Yeah.

(10) Q. And then you ran for help?

A. Yeah.

Q. Tell me, didn't Miss Harris see you on Crescent Street?

A. I met them somewhere there.

Q. No, that's not my question. My question is this, didn't Miss Harris - you know Miss Harris, the lady who gave evidence here in court, and Mr. Gushue -

A. Yeah.

Q. Did you hear him in court here today?

A. Yeah.

(20) Q. Did you hear him say they were walking along Crescent Street and they saw you?

A. Well I might have meet them there.

Q. Are you telling me now that you were called up to these two men from the footbridge?

A. Yes.

Q. And that is when the incident took place?

A. Yeah.

Q. Well all right, how could you have met Miss Harris -

A. I don't know where I met - my mind blacked out on me.

(30) Q. Oh, now, there is a blackout in your mind is there? When did this blackout take place?

A. After he stabbed me.

Q. After he stabbed you. All right, after he stabbed you, but you were not injured when Miss Harris was talking to you?

A. No.

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DONALD MARSHALL, JR., Cross-Exam.

Q. All right then, when did Miss Harris and Mr. Gushue talk to you on Crescent Street? Can you explain that? Take your hand down from your mouth and explain that.

A. I met them on the road.

Q. Pardon?

A. I met them on the road.

Q. I'm sorry.

A. I met them on the road.

0)

Q. You met them on the road. Well then these two men - you were up on Crescent Street before these two men called you up from the footbridge, is that so?

A. Pardon.

Q. You were on Crescent Street before these two men called you up on Crescent Street?

A. No.

Q. Well what road did you meet Miss Harris on?

A. I'm not sure.

Q. You're not sure. Do you know where Crescent Street is?

0)

A. Yeah.

Q. Are you familiar with Crescent Street?

A. Yeah.

Q. Was it on Crescent Street that you met them?

A. Yeah.

Q. Pardon.

A. Yeah.

Q. Well all right now, what I'm trying to drive at - take your hand down from your mouth, please - what I'm trying to drive at is this, you and Sandy Seale took a walk to the creek and you got to the footbridge which separates the creek that is down in the middle of the park - you know where that is?

0)

A. Yeah.

-197- DONALD MARSHALL, JR., Cross-Exam.

Q. And that is where you were when these two men called you up onto Crescent Street?

A. Yeah;

Q. Now had you been up on Crescent Street before that with Sandy Seale?

A. No.

Q. All right, then. As you walked up to these two men that called you when did Miss Harris see you?

(10)

A. Well there were four of us there I guess.

Q. Did you hear Miss Harris say that there was one other person? You heard her giving evidence in court yesterday?

A. Pardon.

Q. Did you hear her giving evidence in court yesterday?

A. Yes.

Q. Pardon?

A. Yeah.

Q. Did you hear her say that you were alone except for one other person and didn't know whether it was a man or a woman, because they were standing back away from you.

(20)

A. Did she say one?

Q. Yes. My recollection is that she said there was one other person there. Take your hand down from your mouth and answer my question. Now tell me, did you give a light to Mr. Gushue?

A. Yeah.

Q. All right then. Where were these two men that you're talking about that looked like priests at the time you gave the light to Miss Harris?

A. They were on the sidewalk.

Q. Near you?

A. Well from where we were at and the two men.

Q. Well tell me, sir, you didn't mention it to my learned friend. You said that these two men called you up from the bridge up on to Crescent Street?

A. Yeah.

(30)

-198- DONALD MARSHALL, JR., Cross-Exam.

Q. And that is the first time you went up to Crescent Street?

A. Yeah.

Q. And they asked you for a match, cigarettes, something, and then they said, "is there any women around" and said, "yes, there's lots of them in the park" and this is when the knife came out and the action took place?

A. Yeah.

(10)

Q. You didn't mention anything about Miss Harris, meeting Miss Harris on the road or Mr. Gushue? You can't explain that away can you.

A. I met them.

Q. I know, but when?

A. I can't remember.

Q. You can't remember. All right, now would you look at Exhibit 5 - can you read a plan?

A. I don't know.

(20)

Q. Well you take a look at Exhibit 5. This is a plan of the creeks in Wentworth Park. Now I will show you an area called the southern corner of the map or southern end of the drawing, a marking called, Bandshell. You see that there?

A. Yeah.

Q. Do you know where that is?

A. Yeah.

Q. All right. At the other end of the creek there is, between the words Wentworth and Creek, there is a bridge is there not?

A. Yeah.

Q. That is the footbridge?

(30)

A. Yeah.

Q. And that is the footbridge on which you were standing when these two men called you from up on Crescent Street?

A. Yeah.

Q. Pardon.

A. Yeah.

-199- DONALD MARSHALL, JR., Cross-Exam.

THE COURT:

He is not talking loud enough.

MR. MacNEIL:

All right, I'm sorry. You will have to speak up much louder.
You hold on to that plan. I will get another one.

BY MR. MacNEIL:

10) Q. Now, sir, these two men called you up from that footbridge, which is between the two creeks, one mentioned Wentworth and the other creek - there is a portion there called bridge, this is a footbridge that you say you and Seale were standing on?

A. Yeah.

Q. And these two men called you up to Crescent Street?

A. Yeah.

Q. And as you walked up from Crescent Street, you took the walk leading onto Crescent Street away from that bridge?

A. Pardon.

20) Q. You took the walk away from that bridge, the portion - you took the walk, the gravelled walk, up to Crescent Street did you?

A. Yeah.

Q. All right, that would put you up on Crescent Street on the position of the map where it is marked 21 feet in width - the road is marked 21 feet in width - is this not true?

A. Yeah.

THE COURT:

I didn't hear his answer.

THE WITNESS:

Yes.

0) BY MR. MacNEIL:

Q. That is where it is and that is where the slaying or stabbing took place, is it?

A. Yes.

Q. Now can you tell me, sir, - would you mark that map with an "S" where you came on to Crescent Street from the bridge and where this event took place? Would you put an "S" there?

-200-DONALD MARSHALL, JR., Cross-Exam.

A. (Witness complies).

(Shown to the Court and Jury)

Q. This is where the stabbing took place?

A. Around there.

Q. Around there?

A. Yes.

Q. Whereabouts did you meet Miss Harris?

A. Around there some place. I don't remember.

Q. Pardon?

A. I don't remember. Around that street somewhere.

Q. Well now you just went up to the top of the street to the point where you marked "S" did you not and this is where the event took place?

MR. ROSENBLUM:

He didn't say that.

BY MR. MacNEIL:

Q. That is where the two men were and the events took place, is that not so?

A. I said around there.

Q. Around there. It certainly wasn't up on the map which is marked "X" - where the letter "X" appears. The "X" is there. All right, Mr. Marshall.

A. (No response.)

THE COURT:

I didn't get an answer.

MR. MacNEIL:

I didn't get an answer. I gave him lots of time. Are you going to answer?

THE WITNESS:

What?

BY MR. MacNEIL:

I will withdraw the question, My Lord.

Q. Is that where the stabbing occurred where you marked the exhibit with the letter "S"?

A. I said around there.

Q. In that area right into the path where the path joins Crescent Street and your memory is blank as to your meeting with Mr. Gushue and Miss Harris ?

A. Yeah.

-201- DONALD MARSHALL, JR., Cross-Exam.

- Q. Do you remember holding Miss Harris by the hand, while Mr. Gushue lit his cigarette?
- A. No.;
- Q. You don't remember that. Do you remember giving Mr. Gushue a match?
- A. Yeah.
- Q. Pardon.
- A. Yeah.
- Q. And where were you when you gave him the match?
- A. I was with him.
- Q. With him where on the plan?
- A. I forget.
- Q. You forget?
- A. I was on the street.
- Q. It was on the street but the only place that you came up to the street is where you marked "S" is it not?
- A. Right there, I said around there.
- Q. Around there, I realize that, but that is where the path joins on the street. That is where you met these two men?
- A. Yeah.
- Q. Pardon.
- A. Yeah.
- Q. And you didn't go up the street or down the street after meeting these two men before the foray took place, did you?
- A. I met Terry Gushue. I gave him a light.
- Q. Where did you meet him?
- A. I don't know. Can't remember. On the street.
- Q. Whereabouts on the street? Would you care to mark on that plan where you met Mr. Gushue and Miss Harris?
- A. Don't remember.

THE COURT:

He said he didn't know.

-202-DONALD MARSHALL, JR., Cross-Exam.

MR. MacNEIL:

He said around there. I'm sorry, maybe I missed that.

BY MR. MacNEIL:

Q. You don't know where you met them. Now sir, did Sandy Seale fall immediately to the ground when he was stabbed in the stomach?

A. Yeah.

Q. And was he still there when you came back in this car?

A. Yeah.

Q. Where he fell?

A. I'm not sure.

Q. You're not sure of that. Why aren't you sure of it?

A. Well he put the knife in him and got me. I had to run.

Q. I know. Take your hand down, please. When you came back to find Seale - you saw Seale fall?

A. Yeah.

Q. When you came back was Seale still where he fell?

A. No.

Q. Pardon?

A. No.

Q. Where was he?

A. On the middle of the road.

Q. On the middle of the road in the vicinity of the area you marked "S"?

A. Around there.

Q. Around the area on which you marked "S"?

A. Yes.

Q. Could it possibly have been up in the area opposite the building marked Green Building Central Apartments?

A. Wait a minute -

THE COURT:

What's that? Mr. Marshall, what did you say? You were asked could it possibly have been around the place called, Green Building, Crescent Apartments. What is your answer?

-203- DONALD MARSHALL, JR., Cross-Exam.

A. Yes.

BY MR. MacNEIL:

Q. Your answer is yes, it could have been. So these men they called you up to Crescent Street and you went to where they called you from -

A. Pardon.

Q. These two men beckoned to you or called to you from the park and what did they say to you? How did they call your attention?

A. They said, "Oh you guys, got a cigarette."

Q. They hollered that down to you?

A. Yeah.

Q. Now were they in front of the apartments, Green Apartments?

A. Apartment house -

Q. Apartment house, Green Building, Crescent apartment house, when they hollered this to you?

A. No.

Q. Where were they?

A. Around here.

Q. On the point marked "S", is that it?

A. Around here.

Q. Did you walk anywhere with them?

A. We were walking around, moving around,

Q. Moving around and the conversation took place there, moving around the vicinity of the position marked "S"?

A. Yeah.

Q. And all the time you were on Crescent Street, those two strange men that you hadn't seen before were in your presence?

A. Yeah.

Q. And Sandy Seale was in your presence?

A. Yeah.

Q. So there were four of you there?

A. Yes.

-204- DONALD MARSHALL, JR., Cross-Exam.

Q. And you can remember that Miss Harris came along?

A. - Pardon.

Q. You can remember that Miss Harris came along?

A. I met them on the road somewhere.

Q. But the four men would be with you, the other three men would be with you, the four of you together?

A. Yeah.

(10) Q. Did you hear them say anything in their evidence here in court yesterday that they were aware of only one other person with you and that they didn't take any particular notice of that person so as to tell whether it was a man or a woman - did you hear them give that evidence?

A. Yeah.

Q. What?

A. Yeah.

Q. Did you hear her give evidence that you held her hand?

A. Yeah.

Q. So this all took place before the stabbing, did it?

(20) A. No. Yeah.

Q. After you finished this, when did you have the conversation with the men who looked like priests?

A. Pardon.

Q. When did you have the conversation with the men that looked like priests?

A. We were talking to them and met them two and gave them a light and came back.

Q. Do you see on the plan Exhibit No. 5, the letter "B"?

A. Yeah.

(30) Q. Written on the road and it is next to the figure 21 - "B". "B" is here and "S" is here. (Mr. MacNeil shows to the Jury)

MR. MacNEIL:

I'm going to have to rely on my recollection, My Lord, but I believe I am correct and say that "B" is marked on the plan where the body was located. (Markings on plan checked)
(Discussion between Counsel)

-205- DONALD MARSHALL, JR., Cross-Exam.

MR. MacNEIL:

Sorry, My Lord, I am now advised by Mr. Pratico that he put the "B" on the plan indicating where he walked, turned off and walked up to the railroad and walked along to the point marked "X". "X" is the bush behind which Mr. Pratico says he was hiding, My Lord.

BY MR. MacNEIL:

(10) Q. Let me see that arm again. Pull your sleeve up. That is where you see the wound is about three inches. Just let the jury have a look at that please.

A. (Witness complies).

Q. Would you turn your arm around and see if there is any other wound on your arm?

MR. ROSENBLUM:

I object to that, My Lord. The witness is being asked to show a specific part of his body and I don't think he has to expose any other part of his body except that which has relevance to this case.

(20) MR. MacNEIL:

That's an arm that has been put into exhibit, if Your Lordship pleases.

MR. ROSENBLUM:

No, it hasn't -

MR. MacNEIL:

(30) It has been referred to and on exhibit. It has been referred to by my learned friend. If he is entitled to refer to one portion or a particular part of the arm, surely it is within the right of cross-examination to look at the whole arm to see whether there are any other cuts or bruises or marks of any kind.

MR. ROSENBLUM:

There's been no suggestion, My Lord, of any other bruises or marks. We've had medical testimony from two nurses, from three doctors and from other witnesses and the accused himself and he has shown the part that he says was wounded

-206- DONALD MARSHALL, JR., Cross-Exam.

and which has been referred to by the medical people. He doesn't have to expose any other part of his body at all.

THE COURT:

Well the rule with regard to body, physical matter, is different from verbal as you know and he has answered your question. Perhaps you will limit yourself to that.

MR. MacNEIL:

Thank you, My Lord.

BY MR. MacNEIL:

10) Q. Tell me, Mr. Marshall, were you wearing jacket, exhibit No. 3, on the night in question?

A. Yes.

Q. Is it true that when you got down to Brookland Street or Byng Avenue, after running that distance that you showed your arm to the people down there and there was no blood in it?

A. There was blood on my arm.

20) Q. There was blood in it. Did you hear Mr. Chant say there was not any blood in it, when you showed it to him?

MR. ROSENBLUM:

That's not borne out by the evidence, My Lord. Mr. Chant - and I challenge a reference to the court reporter that Chant said very shortly after he first looked at the wound, blood was seeping from the wound. That's what Chant said.

MR. MacNEIL:

I asked the witness if when he first showed his arm to Mr. Chant - I forget my wording now - no blood in the wound at all.

BY MR. MacNEIL:

30) Q.—Did you hear Mr. Chant say that in his evidence?

A. He said a couple minutes later.

Q. Now did you hear the nurse, Mrs. Harris, I believe, Mrs. Davis, the nurse who admitted you to the hospital say there was no signs of blood in the wound?

A. Yes.

-207- DONALD MARSHALL, JR., Cross-Exam.

Q. Pardon?

A. Yeah.

Q. Did you hear the doctor say there was no sign of blood in the wound?

A. Yes.

Q. That it didn't bleed?

A. Yeah. It bled.

Q. Pardon.

(10) A. But when I got down the hospital it wasn't bleeding.

Q. Well wouldn't the doctor be able to see - was there any reason why the doctor couldn't see where it had bled if there was any blood there?

MR. ROSENBLUM:

This is argumentative, My Lord.

MR. MacNEIL:

No, it's not. I'm asking him if there is any reason why the doctor couldn't see the blood, if there was any in the cut.

(20) MR. ROSENBLUM:

That's for the doctor to say, not the witness. This is argument, My Lord, for the jury.

THE COURT:

Mr. Rosenblum, he has considerable leeway on cross-examination. Let him go ahead.

BY MR. MacNEIL:

Q. Will you answer my question?

A. A girl gave me a handkerchief.

Q. Pardon.

(30) A. A girl gave me a handkerchief to wipe it off.

Q. A girl gave you a handkerchief?

A. Yes.

Q. Where did this girl give you the handkerchief?

A. On Byng Avenue.

-208- DONALD MARSHALL, JR., Cross-Exam.

Q. What did you do with the handkerchief?

A. I don't know.

Q. Now tell me when you came back up to Byng Avenue with Mr. Chant and the other man, the driver of the car who was unknown, did you keep to the back of Mr. Seale as he lay on the ground?

A. Yes.

(10) Q. You stood there where he couldn't see you, when you went back to the scene?

A. He was all curled up.

Q. Yes, that's right, and you stood in such a position that he could not see you, isn't that correct?

A. Well there was nobody else there so I ran to a house.

Q. I thought Mr. Chant was there administering to the deceased?

A. There were people there.

Q. Pardon?

A. There were a few people there.

Q. Was Mr. Chant with you?

(20) A. Yeah.

Q. Was anyone else there?

A. The driver.

Q. Did the driver get out of the car?

A. I don't know.

Q. Take your hand down, please. Who was there besides you and Mr. Chant?

A. The driver.

Q. Did the driver get out of the car?

A. I don't know.

(30) Q. Didn't he just drive on after you got out of the car?

A. I went to a house, called the ambulance -

Q. You went directly to a house did you?

A. Yeah.

Q. You didn't go around Mr. Seale?

A. I ran up where he was and -

-209-DONALD MARSHALL, JR., Cross-Exam.

Q. Tell me - I want you to think of something Mr. Marshall. Isn't it a fact that after the stabbing you started to run towards Argyle Street?

A. No.

Q. That's not so?

A. No.

Q. Did these men attempt to follow you?

A. I started running.

(10) Q. You started running?

A. Yes.

Q. Did they attempt to follow you?

A. Well I looked back. They ran behind the house.

Q. They ran behind the houses. Why did you not go to a house to seek aid, assistance?

A. Well I wasn't going to take a chance going back.

Q. No, but there were plenty of houses between the portion where you marked "S" - there is 1-2-3-4-5-6-7-8-9- houses along that street.

(20) A. If I'd went to the house they would've come after me.

Q. Who would have come after you?

A. The two men.

Q. Were they following you along the street as you were running?

A. A few feet.

Q. They were running after you were they?

A. Well a few feet, you know.

Q. How far?

A. Just across the street.

Q. Across the street and then they stopped?

(30) A. Yeah.

Q. And you had run from across the street to the position where you marked "S" - you had 1-2-3-4-5-6-7-8-9 houses, that you could have gone to seek assistance?

A. I couldn't run into a house.

Q. Well, run into a house and knock on the door. I don't mean smash it down.

-210- DONALD MARSHALL, JR., Cross-Exam.

A. By the time somebody comes up, I'm liable to be dead.

MR. ROSENBLUM:

What was that answer, please? I didn't hear the answer,
My Lord.

THE COURT:

What did you say? Take your hand down and keep it down.

THE WITNESS:

I told him I didn't run to a house because they would
have come after me.

BY MR. MacNEIL:

Q. Then sir, there are a number of houses on Byng Avenue?

A. Yeah.

Q. You didn't go to any one of those?

A. No.

Q. Pardon?

A. No.

Q. And tell me, these stitches that the doctor put in your
arm, who removed them?

A. I did.

Q. Why?

A. They were on there too long.

Q. They were on there too long?

A. Yeah.

Q. And whose opinion was that, that your opinion they were on
too long?

A. Yeah.

Q. What?

A. Yeah.

Q. I can't hear.

A. Yes.

Q. How long did you leave them in there?

A. Fifteen days.

Q. Did you ask to see a doctor in that time in order to get
the stitches removed?

A. He said he was coming up but he didn't come up.

-211- DONALD MARSHALL, JR., Cross-Exam.

Q. Did he eventually come up?

A. Didn't come up. They were coming out anyway - falling off.

Q. Do you remember Dr. Virick saying that he did go to the hospital or up to the County Jail to remove the stiches?

A. Yeah.

Q. When he got there you had already removed them?

A. Yeah.

Q. Tell me - no, I won't ask that question.

(10) The next day did you go down to the home of Mr. Pratico?

A. No.

Q. Saturday morning?

A. No.

Q. Sunday morning?

A. No.

Q. You didn't go down to his home on Saturday or Sunday?

A. No.

Q. Do you know where he lives?

A. Yeah.

(20) Q. When did you go down after this incident? Take your hand down please.

A. Sunday evening.

Q. Sunday evening and you hadn't seen Mr. Pratico since when, before that Sunday evening?

A. Saturday?

Q. Since Saturday, well Saturday after the events took place -

A. Yeah.

Q. The day after - well I understood you a moment ago to say you didn't see him Saturday?

(30) A. You said Saturday morning.

Q. I said Saturday morning.

A. I saw him Saturday afternoon.

Q. You saw him Saturday afternoon?

A. Yeah.

Q. Did you see anyone on the railway tracks that evening?

-212- DONALD MARSHALL, JR., Cross-Exam.

A. What evening?

Q. The evening of the 28th day of May, 1971, when the stabbing was taking place?

A. No.

BY THE COURT:

Q. Did you say you went to see Pratico on Saturday?

A. I went by his house. I met him on the step.

Q. On Saturday?

(10) A. Yeah, and Saturday.

Q. And Sunday?

A. Yeah.

Q. You say, "I went by Pratico's house Saturday afternoon"?

A. Yeah.

Q. And Sunday?

A. And Sunday evening.

Q. And you say "I met him" - where?

A. Over his house. His place.

Q. On Saturday where did you meet him?

(20) A. His place.

Q. Were you inside?

A. No.

Q. And on Sunday where did you meet him?

A. His house.

Q. Inside?

A. No.

Q. Outside?

A. Yes.

BY MR. MacNEIL:

(30) Q. Now I show you exhibit No. 3. Do you see a small cut approximately half an inch long on that sleeve?

A. Yeah.

Q. How did that get there?

A. I don't know.

Q. Do you see a number of superficial cuts on this sleeve referred to by the Royal Canadian Mounted Police - would you look at it please?

3- DONALD MARSHALL, JR., Cross-Exam.

A. Where?

Q. Pardon.

A. Here.

Q. No, that's not a superficial one. That's a lengthy one. There.

A. He said cuts or what.

Q. Cuts, yes.

A. I don't see no cuts there.

0) Q. Ragged or sharp slits or something. All right, never mind. Now tell me do you see where this sleeve was cut?

A. Yeah.

Q. And then it was ripped? Not cut but ripped.

A. It was cut right around here. My cousin cut it right here.

Q. With what?

A. A knife at Membertou.

Q. Up at Membertou?

A. Yes.

Q. Tell me, did you hear the R.C.M.P. officers saying that that bottom portion of the sleeve was not cut but that it was torn?

A. It was cut.

Q. I know there was a cut there. I realize that but getting down to the last inch of it, it was torn.

A. He might have torn it. It was hurting my wrist.

Q. Tell me, was there blood on the front of this jacket?

A. Yeah.

Q. Were you near Sandy Seale after Seale was stabbed -

A. Pardon.

Q. Were you near Sandy Seale after he was stabbed?

A. I was near him.

Q. Pardon.

A. I was near him.

Q. Were you near enough to him to get blood on your clothing?

A. No.

-214- DONALD MARSHALL, JR., Cross-Exam.

Q. Of course you have never seen these gentlemen before or since?

A. Who?

Q. These two gentlemen you talked about that looked like priests?

A. No.

BY THE COURT:

Q. Mr. Marshall, I didn't get what you had said. You saw two men. Two men and one asked for a cigarette?

A. Yeah.

Q. Speak up.

A. Yes.

Q. "I gave them a cigarette and light."

A. Yeah.

Q. Now they were from Manitoba?

A. Yeah.

Q. Who said that? How did you know?

A. I asked them where they were from.

Q. And they said one or two of them was from Manitoba?

A. Yes. The old fellow.

Q. The old fellow, said they were from Manitoba. Then I have here, "I said you look like priests."

A. Yeah.

Q. Is that correct?

A. Yeah.

Q. Then what did the younger man say?

A. "We are".

Q. "We are." Now then, then what?

A. I don't understand.

Q. The younger man said, "We are," and who spoke then, the same one?

A. Pardon.

Q. Who went on to say that they didn't like -

A. Coloured -

Q. The younger or the older?

A. The older.

-215- DONALD MARSHALL, JR., Cross-Exam.

Q. The older man said what?

A. We don't like niggers.

Q. We don't like niggers or Indians. That's the older man said that?

A. Yeah.

Q. And then what happened?

A. He took a knife and he drove it into Seale's stomach.

Q. He took a knife from where?

A. His pocket.

Q. Out of his pocket and drove it into Seale's stomach.

A. And turned on me.

Q. "Turned around to me" -

A. Swung the knife at me.

Q. "Swung the knife at me" -

A. I moved my left arm. He cut me in the left arm.

3:05 P.M. COURT RECESSED TO 3:15 P.M.

3:15 P.M. JURY POLLED, ALL PRESENT

BY THE COURT:

Q. Mr. Marshall, there is one question I want to put to you. You say that you were at Pratico's home on Saturday afternoon and Sunday evening.

A. Yeah.

Q. Did you know on Saturday that Pratico had been in the park the night before? The night, May 28, did you know when you were over at Pratico's home that Pratico had been in the park the night before, did you know that?

A. You mean on Friday night.

Q. Yes.

A. No.

Q. On Saturday when you were over at his home, at that time did you know that this man had been in the park on Friday night?

A. No.

Q. You didn't?

A. No.

-216- DONALD MARSHALL, JR., Cross-Exam.

Q. You didn't know on Saturday, nor did you know on Sunday that he had been there?

A. No. ;

Q. But you were over to his place on Saturday and Sunday?

A. Yeah.

Q. And you were talking to him on each occasion?

A. Yeah.

(THE WITNESS WITHDREW)

(10) MR. ROSENBLUM:

May it please Your Lordship, that's the case for the Defence.

3:18 P.M. COURT RECESSED

C.S.

3:30 P.M. JURY POLLED, ALL PRESENT

MR. ROSENBLUM:

May it please Your Lordship, Mr. Foreman, gentlemen of the Jury:

The evidence has been concluded. We are now at the stage where you are obliged to endure speeches from the Crown Prosecutor and myself. At the outset, let me say this to you, that I haven't many complaints about the state of the law but one complaint I do have and that is, that the law is, as His Lordship will tell you, that

(10) when the Defence in a criminal case calls witnesses, counsel for the Defence must address the jury first and the crown Prosecutor afterwards. Now I feel that that is a disadvantage because Defence Counsel, as I am, is placed in the position of having to anticipate what my learned friend will say and he is quite capable of covering all the necessary points and he has a fertile mind, and perhaps more fertile than my own, but I have to try to anticipate what he is going to say to you and try to meet the argument that he advances to you. So it is a disadvantage to the Defence because he has the advantage of hearing what I am saying to you and he can meet by

(20) argument what I am saying to you.

In the final analysis, His Lordship will address you after the speeches by counsel have been made to you.

Whether that is a disadvantage or not depends upon you gentlemen; whether you yourselves with the awesome responsibility that you have under the oath that you have taken as jurors to render a fair, a just verdict, based upon the evidence; whether your recollection of the evidence and of my remarks to you will be lasting and will stay with you until you reach the jury room for the discussion between yourselves as to what the verdict will be and what the evidence was

(30) that you heard.

At the outset also, I wish to say this to you, that the only evidence gentlemen upon which you will base your verdict, I know, will be evidence which you feel is worth believing; that is, reliable evidence; believable evidence; evidence from witnesses who impressed you as telling the truth. Any other kind of evidence

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I am sure that you gentlemen will reject. So I say to you gentlemen, then, that before you can under the law make a finding of guilty against this young man, you have to be convinced by witnesses whom you feel are worthy of belief, whom you feel are worthy of belief, and convinced beyond a reasonable doubt, that you have no reasonable doubt in your minds before you can come to a conclusion of guilty. Because the law is, as you will hear from His Lordship, that the accused comes into this court room (10) with a presumption of innocence in his favour. He is presumed to be innocent! When he comes into this court room and he sits along the jailer, and he sits alongside the policeman or sheriff or anybody else, there is no stigma attached to him by reason of that! There is no stigma attached to him because he has been arrested and charged with this crime!

On the other hand, conversely, he is clothed with a presumption that he is innocent.

And so your approach to the problem that you have to deal with is, have I heard in the conduct of this case such believable and (20) reliable, convincing evidence that convinces me beyond a reasonable doubt that the accused is guilty before you can find a verdict of guilty. Keep in mind, gentlemen, that from the beginning of this case until your verdict, until you come to a conclusion, he has that presumption that he is innocent and it can only be swept aside by you being convinced, by each and every one of you, by the twelve of you, collectively, individually, that that presumption is swept aside because of evidence that you heard adduced here at this trial that convinced you beyond a reasonable doubt that he is guilty!—Otherwise, you find that he is not guilty. This I (30) think, gentlemen, you will hear from His Lordship in better language than I am giving to you. But I submit that that is the law and I think that is what you will hear from His Lordship.

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Now these are preliminary remarks, gentlemen. These are preliminary remarks but they go to the whole foundation of our law; they go to the whole case that you have been hearing and you mustn't lose sight of the principles of law which are involved. And the principles of law His Lordship will tell you and you are bound by every statement of law that His Lordship gives you. You must accept his statement of law! There have been questions of law which arose in the conduct of this case which made it necessary (10) for you gentlemen to file back and forth from the court room. That wasn't by-play! There was a reason for it. Questions of law were discussed between counsel and the judge in your absence and when a ruling on law was made by His Lordship, you gentlemen were brought back to the court room to hear evidence based upon the admissibility of evidence which was allowed by the judge. And so, the judge will tell you what the law is, and you will accept his statements of law.

But gentlemen it is a question of fact - a question of fact that you're going to deal with! Nothing about questions of law (20) but it is a question of fact that you are going to deal with in the jury room. Gentlemen, on questions of fact, I tell you that you, and you alone, are the sole judges of the facts! You and you alone are going to decide what are the facts in this case and reach a conclusion on your findings of fact! You will reach a conclusion of guilty or not guilty based upon your findings of fact governed by the law. And so gentlemen, you're on your own on questions of fact. You are the judges! You are the jury, you are the judges of the facts and the sole judges!

Now gentlemen, we started this case Tuesday morning. I'm not (30) being hypocritical when I say that I have remarked to many people how attentive each and every one of you were to this case, to every witness who went on the witness stand; that you gave them your undivided attention. You paid close attention to the evidence and I'm sure that your recollection of what the evidence was, is

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as good as my own recollection, and I will go over with you the evidence in the case. Now if I am mistaken in any statement I make concerning the evidence, don't stand up and contradict me gentlemen, but keep it in the back of your mind. Because it is your recollection of the facts and of the evidence which counts. And if my learned friend makes a similar mistake, you will also bear in mind that you, and your recollection, is what counts. So if I do make a mistake in stating the facts to you, gentlemen,

(10) as to what the evidence was, take my word for it, it will be an unintentional mistake. I will not try to mislead. I will try to tell you what I believe to be the evidence which was brought forward in this case.

Now we heard, I think it was eighteen witnesses for the crown. Now don't be impressed by the fact that there was a long list of witnesses! If there was thirty-five witnesses or if there was twenty witnesses or eighteen as there was in this case, don't be impressed by that. You're not going to decide this case on the question of numbers. Because the Crown called eighteen witnesses and only the

(20) accused gave evidence for himself, don't think that it is a question of a balance of numbers that decides the result in the case. It isn't!

I want to tell you that in my opinion, and you will either accept it or reject it, but as far as I am concerned, there were only two witnesses for the Crown. There were only two witnesses for the Crown! They were Mr. Pratico and they were Maynard Chant. And they are the two witnesses upon whom the case for the Crown depends in its entirety! They're the only witnesses who my learned friend can suggest to you that you can base a verdict of guilty. Only

(30) these two witnesses! Who are the other witnesses? Well, we had three doctors. We know that the poor unfortunate Sandy Seale died as a result of being stabbed. We know that. It had to be proved

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before you. So we heard three doctors. It had to be proved before you that the accused wore a yellow jacket and Sandy Seale wore this brown coat. So we heard witnesses from the crime laboratory in Sackville and also from the parents of the deceased. We had evidence from nurses concerning whether or not the wound on Marshall bled, or it didn't bleed, and how many stitches were put in it, and how long after were the stitches removed. You saw the wound. That takes care of about twelve witnesses, doesn't

(10) it. It was all essential now! Don't misunderstand me! It was all essential. We heard from Miss Harris; her boyfriend, Mr. Gushue, who walked through the park and got a cigarette after being at the bandshell and going home to Kings Road. All right! We heard from Mr. Mattson who lives on Byng Avenue who told us about hearing some conversation outside his home. He called the police right away! Well, we don't know what he got alarmed about. Nobody was bothering him. He called the police. And who was there in front of his home but Mr. Chant and the accused. That's another witness. You put them all together and you've got

(20) sixteen witnesses whom you can, in my opinion, ignore as far as the main point in the case - the main point in the case! You know what the main point in the case is. Has the Crown proven beyond a reasonable doubt that Donald Marshall Jr. stabbed Sandy Seale. That's the case! That's the point! That's the only point you're going to decide! And it is upon your verdict that the life of this young man depends! Upon your verdict his-

MR. MacNEIL:

Oh now, My Lord!

THE COURT:

(30) Mr. Rosenblum-

MR. ROSENBLUM:

Yes, I know; excuse me. Very good, his future life.

It's his future life, I meant, your verdict depends.

This will be one point you're going to have to decide! Has the Crown proven beyond a reasonable doubt?

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Well, now, I said to you, and I'll say it again, the Crown has produced two witnesses. Now you saw them. I saw them. Were you impressed by either Pratico or Chant? Let me take up your time as I am bound to do in fairness to the accused, in fairness to my own responsibility; let me deal with them.

Maynard Chant, fifteen years old. He's in grade seven. He has failed in grade two, five and six. He says that he's walking along and saw a man behind a bush and he looked to see what he was
 (10) looking at. You remember gentlemen, what he said, in response to questions by me. When I asked him, in the presence of God, under oath as he was, could he say that he saw Marshall stab Seale and he said, "No, I couldn't. I couldn't say that." But you see, Chant is the fellow whom Marshall met on Byng Avenue when Marshall was running away from these two men. Marshall said, "Look what they did to me!" And he flagged a car; "take us back to the scene!" Is this the man who is running away, trying to hide; trying to escape? "Take me back to the scene!" They get to the scene. He goes into the house across the street. "Call
 (20) the police! Call an ambulance!" And he stays there! He's not running away. Chant was there. Chant was there. Now gentlemen, did Chant say to the ambulance driver, to any of the police, to anybody at all - the man was laying there stabbed - "there's the fellow who did it; he's standing alongside of me; arrest him?" -did he say that? No. He started for home. He was brought back by the police. "Did you tell the police that Marshall stabbed Seale?" "No, I didn't." "I didn't do that." "The next day did you go back to the police station? Yes, I was summonsed back there. Did you tell the police that Marshall stabbed
 (30) Seale? No, I didn't. Did you tell them at any time that week?" Did you tell them any time that week, the whole week - Marshall was arrested a week later! A week later! And here are supposedly two eye-witnesses standing there in the presence of the police, ambulance driver - "don't go looking for the fellow who did it. He's standing right here alongside of me." Chant saw Mr. Marshall

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on Byng Avenue and they got into a car which Marshall flagged down to take him back to the scene and did he say, "Boy, it's a terrible thing you did." Did he accuse Marshall? Did he say anything to him which would indicate that he saw Marshall do anything wrong? Nothing! Nothing! Not only did he not accuse Marshall, he did not tell the police that he saw anything involving Marshall at all, either that night or later. He said, "I lied to the police". This is what Chant says, this fifteen (10) year old boy who failed three grades and is in grade seven.

Well, why would he lie to the police? Is there any suggestion and the evidence is to the contrary - Chant didn't know Marshall. He didn't know Seale. He had no interest in the matter. And if he was an eye-witness such as he tried to tell us on the witness stand, well then, I can tell you gentlemen that he gave a lot of evidence which would discredit him in my opinion and I hope in your opinion, that his evidence was such that you will reject it because of his action. Now what were his actions? His actions were exactly to the contrary of what you would expect an eye- (20) witness to do. Don't forget, gentlemen, up there on Crescent Street, Chant is there! He went there with Marshall! There are a number of people including police officers. Not a word out of him! Not a word out of him! Did he go over and whisper to a policeman, "There's the fellow who stabbed the man who is laying on the ground." Not a word! No! Neither that night, the next day, the following day, nothing like it. Well gentlemen, did his evidence appeal to you as being a truthful - a truthful person - man who came here and gave evidence which would convince you beyond a reasonable doubt? Gentlemen, the verdict in this case, (30) meaning so much as it does to the accused, would you find against the accused on the evidence of Chant? But you see, the Crown says, we not only have Chant, his evidence being as weak as it is, we have Pratico! We have Pratico! There's the second witness I told you about!

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- Disregard the other sixteen! Let's come to Pratico! Would you gentlemen like to be judged on what's going to happen to you by the evidence of Chant or Pratico or both of them? Would you? Here's Pratico for you! Here's a fellow who was drinking the day before the fateful day of May 28, May 29; drunk on May 28! He's drunk on May 29! He said so! I wasn't with him. You weren't with him. He told us on the witness stand. "Well what were you drinking to get drunk? Quarts of beer; pints of beer; half a
- (10) bottle of wine. I got sick in the dance hall. And I had wine in my pocket besides that." Here's a man who's drunk! Tell me, did anybody else that you heard on the witness stand besides Chant, say that Pratico was in the park? Did anybody else say it? That's why I'm saying to you gentlemen, you've got two witnesses. You've got two witnesses! Gentlemen, were you impressed by the fact that a map of this kind was stuck in the hands of Donald Marshall, seventeen years old, and says, take a pencil and mark where you were? A plan! I have difficulty following it myself! A seventeen year old boy! Uneducated! Untutored! And he comes
- (20) here before a crowded court room and this is stuck in his hands - "Show me where you walked! Show me where you stood!" A plan, gentlemen which a professional engineer makes! Well, gentlemen, if you feel that you're going to draw inferences against the accused because of his inability to say more than, "Look we were up in this area, this area." This is a scale. Maybe he should have been provided with a ruler to say, now look, don't forget, don't say right here, now measure it with a ruler; you know, half an inch is five hundred yards or whatever it is. Putting this in his hands, gentlemen -
- (30) All right, we come to Pratico. We come to Pratico. I said he was drunk. I said it because he swore to it. He started to drink around Stephens Lumber Yard. I didn't know they sold liquor down there. He was drunk around there. Earlier in the day - and he told you what he was drinking - beer, quarts and pints! And he drank a half a bottle of wine. Now gentlemen,

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if you don't think that that combination wouldn't make a young man drunk, why I don't know what would. He was drunk.

- Now we're going to be asked here today - you're going to be asked here today to take the word of this drunken man - take his word! Take his word! Take his word! What did he do afterwards, Pratico? What did he do afterwards? "Well I told a number of people, you know, that Marshall didn't do the stabbing! Oh yes, I admit that! I told them that! I told -" I don't
- (10) want to misquote the evidence. "I told Tom Christmas that Donnie Marshall didn't stab him." And yesterday in this courthouse, in the barristers' room, he calls out Mr. Khattar - Pratico does - Mr. Khattar wouldn't speak to him; he calls the sheriff. "Anything you have to say to me you'll say in the presence of the sheriff." What did he tell Mr. Khattar in the presence of the sheriff? "Marshall didn't do the stabbing! Marshall didn't do the stabbing." What did he say a few minutes later in the presence of my learned friend, Mr. MacNeil; in the presence of Sgt. MacIntyre; in the presence of Sgt. Michael MacDonald -
- (20) "Marshall didn't do the stabbing!" And then ten minutes later, he comes in here on the witness stand and says, "Marshall did the stabbing. Oh yes, I said to other people that he didn't and I said it here in the courthouse there in the barristers' room because I was afraid." Well, why would he be afraid in the barristers' room yesterday? I don't think that there were any gunmen there. I don't think there was anybody there that he should have been afraid of, in the presence of the Crown Prosecutor, in the presence of the sheriff, in the presence of policemen, and he tells them, "Marshall didn't do the stabbing." Well
- (30) you have a drunken man. You have a man who is contradicting himself all over the lot, who gave previous contradictory statements to what he said on the witness stand. All right! You know what he said also, "I was so drunk that I don't know if there was anybody in the park. I don't know if there was any people in the park at all. I don't know." But I will tell you a very

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significant thing that he said, he said, Marshall whipped out a knife or a sharp object with his right hand. That's what he said! Little did he know - little did he know Marshall is left-handed. Marshall is left-handed and he swore it on the witness stand! Do you think that Marshall could have inflicted that wound on himself on his own left hand when he is left-handed? Do you think he did that himself?

Well, we asked the doctor. I asked the doctor! I said,
 (10) "Dr. Virick, tell me, in your opinion, was this wound on Marshall's left hand self-inflicted?" My recollection of his answer is, "It was possible. I don't know." Well, that's not much help because anything is possible. If he did, he'd have to do it with his right hand which is contrary - contrary - to the fact that he is left-handed.

Well, a lot of talk about whether there was blood - whether there was blood emanating from his wound. I'll tell you why I'm stressing this in a minute. Marshall said, under oath, that these two people in the park, called him up by Crescent Street, and
 (20) these two people who were dressed in long black garments, not a lawyer's robe I assure you, but an overcoat of some kind, coat or some long garment, that they asked him for cigarettes, matches. And then one of them said, "I don't like niggers. I don't like Indians." And he whipped out a knife and he stabbed Seale and slashed Marshall on the arm. Marshall ran. "I wouldn't run into a house. These fellows were following me," he said. "I ran down towards Byng Avenue and I met Chant."

Gentlemen, has that story been proven to be false? Has that story been proven to be false? Has it been contradicted in any
 (30) way? Has it been contradicted? Not by any witness that I heard and I was paying as close attention to the evidence as you were; not by any witness that I heard. Marshall swears to this on the witness stand. Now gentlemen, don't be influenced by the fact that if you acquit Marshall that the crime of Seale is unsolved! Please, don't make a finding on that basis. We have many unsolved

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crimes. The fact that the police didn't get the person who stabbed Seale is no concern of yours. None! But they were desperately trying! They were desperately trying and it took them ten days or a week at least to lay a charge against Marshall. All week - all week! And that very night standing talking to the police, Pratico, Chant!

They arrested Marshall. On what evidence? On the evidence, on statements which were highly contradictory by Chant because (10) he told them different stories. Chant says so. And Pratico, the drunken man - the drunken man. Well the question is, gentlemen, as I asked you before, would you convict a human being, any human being, on the evidence of Pratico or Chant or both of them. I'm suggesting that you shouldn't, that the evidence is unreliable; that it's untruthful; that it's not believable; that it shouldn't convince you beyond a reasonable doubt that they're telling the truth, either of them. But instead, I ask you, gentlemen, that having heard the evidence of Donald Marshall - now he doesn't speak clearly, that's unfortunate; he doesn't speak (20) clearly. He has an unfortunate habit of putting his hand up to his mouth and he had to be cautioned all the time. I had that difficulty with him for months. Some people have habits that they just can't control. He puts his hand up to his mouth. He said, "I did not meet Pratico that night at all. I was away with my friend, Gould, Roy Gould; we were away for a number of days. I came back home that night, Friday night, May 28. I was up at Tobin's, my friend. I came down after eleven and walked into the park and I met my friend, Sandy Seale and I have known him for three years and I had no argument with him that night what- (30) soever. We were standing talking. I didn't meet Pratico! I didn't walk down with him or with anybody else from St. Joseph's dance hall, from the parish hall. He didn't speak to me. I didn't see him that night." Frankly speaking, gentlemen, there's only one person that says Pratico was in the park that night. It's Pratico himself. He's the only one! Chant says, "I saw a man lurking

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"behind the bushes." And Pratico says, "I was there drinking beer." Of course the bushes were in full foliage, some as high as five and a half feet. You know the distance away, across to Crescent Street. Isn't it doubtful that what they say they saw that they actually did? Isn't there a reasonable doubt in your mind on that score alone, aside from their character, aside from their contradictory evidence, aside from the fact that they have to convince you beyond a reasonable doubt that what they're saying

(10) is true. Well, these are the two witnesses that are brought here by the Crown. These are the two witnesses upon whose evidence they expect you to bring in a verdict against Marshall. These are the only two - the only two! I'm not concerned about the fact that Mr. Marshall met Miss Harris and her boyfriend Gushue and gave them a match or where he met them, or what time he met them; they saw nothing which would be helpful to this case whatsoever! They had been to the dance together! They walked along! They met Marshall whom they knew. Marshall knew Miss Harris so well that he held her hand. No complaint. He did nothing wrong.

(20) Gushue didn't object. "Give me a match. Give me a cigarette." - whatever it was, and then they carried on, walked to her home on Kings Road. What's significant about their evidence and the fact that Marshall can't say, "Oh look, on this plan here I can take a pencil and I can put a point, I can make a point: I met them right there." Do you find fault with Marshall that he can't do that? I wouldn't. I wouldn't expect you to do so, gentlemen. I wouldn't expect that. I wouldn't.

Gentlemen, I'm sure that this is an unnecessary remark on my part. I know that you will have no part of any consideration

(30) which would involve any intolerance, any discrimination by reason of colour, race, creed or anything of that kind. This I know, that you will deal with the accused as you would deal with yourselves, as a human being, as a young man who has been accused of a most serious crime - of a most serious crime, and that you are going to deliberate on his guilt or innocence. And I repeat, that in

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- order for you gentlemen to find a verdict of guilty, you have to say to yourselves, every one of you, that you are convinced beyond a reasonable doubt that what Pratico, and what Chant, said, is true and that you believe them implicitly and that you have no reasonable doubt in your minds. How can you say that? How can you come to that conclusion? Has not the evidence of Marshall impressed you? In his own way, in his own way, he's not fluent! He's not highly educated! He has unfortunate
- (10) mannerisms of putting his hand up to his mouth. I thought he acquitted himself well. He told you that he didn't see Pratico that night. And when he met Pratico the next day when he walked by his house, and the day following, Pratico never mentioned anything to him that he had been in the park that night. Not a word! Not a word, that he never threatened Pratico or threatened anybody else and what does he say, "I was in the park. I met my friend Sandy Seale. I had no argument with him! None! I had no knife! I didn't stab him! I know who did!" The police haven't been able to find those fellows. That's not our responsibility
- (20) Not at all! "And I ran for help." Would you think that Marshall's actions are the actions of a guilty man? As soon as he gets on Byng Avenue, he says to Chant, "Look what they did to me! Come on, let's get up there!" Flagged the first car down! This is what Marshall does! They get up to the scene and he runs into the house and gets the police! Here's a man that the Crown says stabbed Seale and he is looking for the police! He's looking for an ambulance. And he stays there. He doesn't run away. He stays there. Are those the actions of a guilty man, gentlemen, are they? Would this man act that way?—Is Marshall such an
- (30) actor? Does he look the part? Did he act the part? Is he so clever that he could conduct himself in that way? I doubt it! I doubt it!

Well gentlemen, I have reviewed the evidence with you. I have told you who the witnesses are. I've told you that the Crown produced a large number of witnesses, none of whom are

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important as far as the guilt or innocence of the accused except Pratico and Chant. Chant, I told you about! He lied! He's of an inferior mentality! He lied to the police! He never accused Marshall! Never! Pratico was drunk! And who said he was in the park except himself and he contradicted himself all over the place! And he told people before he came to court, "Marshall didn't do the stabbing." He told that to people! He told it yesterday, as recently as yesterday, in the presence (10) of the sheriff, in the presence of the Crown Prosecutor, in the presence of sergeants of the police force! When are you going to believe him? Now! Five minutes later! Ten minutes later! Whenever he changes his mind! Well! Gentlemen, when a man makes contradictory statements, when do you know how to believe him. What time do you believe him. When can you believe him.

Gentlemen, I ask you this. I ask you to render a verdict, gentlemen, finding the accused not guilty of the crime. I ask you to bear in mind, gentlemen, not to find a verdict just (20) because you want to favour the Crown, to favour the Crown Prosecutor, nor to find a finding of not guilty to favour the accused and myself! I want you to go on the evidence! I want you to go on the credibility of the witnesses! I want you to know who did we believe! Tonight when you go home if you render (25) a verdict tonight, did I do wrong by believing Pratico! by believing Chant! Would you trust them in your everyday life! Would you! Would you! On less important matters than the future of the accused! Would you? I leave that with you.

Thank you, My Lord, Gentlemen.

C.P.

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MR. MacNEIL:

If it pleases Your Lordship, Mr. Foreman, gentlemen of the Jury:

My learned friend opened his remarks by saying he was at a disadvantage in having to go to the jury first. Now that he has completed a very eloquent speech for which I pay tribute to him, do you think he was at any disadvantage, had any handicap? He addressed you for the last forty-three minutes, I make it. I congratulate him on his speech and I think he did a very, very good job and I'm in the unfortunate position of having to follow such an eloquent address. I do not intend to match his ability in front of you gentlemen here today. What Mr. Rosenblum has said, I'm going to differ with a great deal of it. I made notes on it - on what he has said and what hasn't been said.

The accused is charged, Donald Marshall Jr., that he did at Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May, 1971, murder Sanford William (Sandy) Seale, contrary to s.206 of the Criminal Code of Canada. My learned friend quite properly pointed out to you that His Lordship will be addressing you after counsel, that is after Mr. Rosenblum and myself and that he will tell you what the law is in relation to what this charge of murder means. He will tell you what murder is under the law and you are bound, whether you like it or not, to accept his interpretation of the law. The facts on the other hand are yours. You are the gentlemen who decide the facts.

Now my learned friend, Mr. Rosenblum, closed off his speech with remarks that - he said, "Gentlemen don't find a conviction so you will find favour with the Crown Prosecutor." Is there any one of the twelve of you men who would give that a passing, fleeting thought, that you would find a conviction in order to get favour from the Crown Prosecutor or anybody else? I would certainly hope not. I hope that you gentlemen, and you were chosen very carefully, are representatives in this community of the law-abiding citizens who took an oath before God that you will execute a duty at the present

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time and that duty - it is your duty to find on the facts of this case and that you are to find in your consciences - in your own conscience - what you are to decide, whether he is guilty or not guilty.

Now Mr. Rosenblum said to you, and I repeat to you, that when I refer to the evidence of any individual given witness, that I will give you my recollection of what has been said. I agree with Mr. Rosenblum. I would never think that he would intentionally misquote a witness to the best of his recollection but sometimes I question his recollection as, indeed, I question my own. Where there is a conflict between what I tell you what a witness said and what a witness didn't say, then I urge you to take your recollection or in the alternative, ask His Lordship's permission to come back and have the record of the court straighten you out on any particular point.

Now Mr. Rosenblum also discussed the fact that we called a number of witnesses and he was inferring that you should not decide this case by counting heads and that I agree with. I don't think that you should. You see, the burden is upon the Crown to prove that the accused is guilty beyond a reasonable doubt and we have to call a lot of evidence which may not be necessary and it may not be important in the final analysis but if we didn't call that evidence, it would be extremely important. For example, the identification of the deceased, Mr. Seale. Gentlemen, if we didn't call Dr. David Gaum, the family doctor, who assisted Dr. Naqvi in his attempts to save Sandy Seale, we wouldn't have identified the man that Dr. Naqvi had. How would we know it was the same man that Dr. Naqvi had that was found on Crescent Street? Very simply, we had to call the ambulance driver. The ambulance driver doesn't add anything to this case as to how this man got the wound or who did it, or who is the accused, or who were witnesses or anything else, but he had to be called so that we could pick the man that was found with the stab wound in his abdomen on Crescent Street up to the hospital, where he remained with that man until Dr. Naqvi

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came up and he helped him to do something or other, set up something or other. I don't know. He used a medical term and that's not my field. That's when Dr. Naqvi took over. Dr. Naqvi was then joined by Dr. David Gaum. That is when the identification was made because Dr. David Gaum is a family doctor and has known and administered to Mr. Seale for many, many years. Now these witnesses, my learned friend says are not necessary: they go by the board; shouldn't consider their evidence. But, you would consider their evidence if we didn't call it and if we didn't have it here.

(10)

Now, we also had to have a number of witnesses and the one that sticks in my mind is Det. Sgt. Michael MacDonald. He is the man who these exhibits were given to and they were taken up to the Crime Laboratory in Sackville, New Brunswick - the R.C.M.P. Crime Laboratory. Now if we didn't prove that, the continuation of the possession of these exhibits, the first question that would be asked, is how do you know that is the same coat that Sandy Seale was wearing; how do you know that the R.C.M.P. in Sackville, New Brunswick examined the proper clothing and that this isn't a jacket from some fellow who got in a scrape down in Yarmouth. These are all essential witnesses that have to be called in order that there can be no doubt and the case can be proven beyond a reasonable doubt. Much of it goes by the board, I agree, when the accused takes the stand because now when he takes the stand - first of all, we had to get him in company with Mr. Seale. We had to prove that he was with Mr. Seale because obviously if he was to stab Mr. Seale, he would have to be with him or within arm's length. We had to call witnesses for that purpose.

(20)

Now gentlemen, before dealing with the witnesses individually, I would like first of all to deal with the evidence given by the accused. I'm going to reverse the pattern. I've reversed the order of calling witnesses all throughout this case to accommodate doctors, technicians and many other things, other courts in other parts of this province and everything else so I just might as well continue on that pattern now. You heard Mr. Rosenblum very capably examine

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the accused, Donald Marshall, Jr., on the stand. Donald Marshall Jr. said on the stand to my learned friend, Mr. Rosenblum, that he and Sandy Seale were standing on the footbridge. I presume most of you gentlemen know where the footbridge is in Wentworth Park over here, separating a couple of the creeks. And two men called him up on Crescent Street. This was in direct evidence and when they got up to Crescent Street, these two men that looked like priests asked for matches and cigarettes and they gave them a match and a cigarette. You also remember that the accused in his evidence said that there was no one else in the park when he walked through it besides himself and Seale. So when these two men said, "Are there any women", "There's all kinds of them down in the park." The park that he was in and just left and said that he saw no one in the park. And anyway, with that, with that - and there's no time lapse, one of them said, "I don't like niggers and I don't like Indians" and made a lunge, made a stabbing motion. All right, that's fine. He went to defend himself and got cut on the inside of the arm. That's fine, gentlemen. That was his direct examination. It was a pretty good story! And he continued on running down the street and we'll get to that in a few minutes.

There's only one little detail that Mr. Marshall forgot and that is the passing of Miss Harris and Mr. Gushue. Now, when I asked him about this, you saw how vague he got on the stand. You heard him use the word - "Well I blacked out." He used the word "black-out" in his evidence. He was stumbling for an explanation as to how he could get around the fact that Miss Harris and Gushue came along and talked to him. He held the hand of Miss Harris while Gushue lit his cigarette. Now gentlemen, that's where the key comes in testing the credibility of his story. His story was trimmed unquestionably by the fact that he cannot account for the encounter with Miss Harris. Now my learned friend says that this is one of the sixteen or eighteen witnesses - sixteen witnesses or so - that he wants you to forget. There's really only two witnesses called. Gentlemen, there's a very important witness that just took the legs

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right clean out from under the story and the alibi that's given to you by the accused! You heard him on the stand! I have not and I heard him on the stand and paid very close attention to him - I have not as yet heard his explanation that could be acceptable as to how he had this encounter with Miss Harris and Mr. Gushue and be in accordance with the story that he gave when questioned by my learned friend. He said the man called him up from the footpath. Gentlemen, and you're not experts, at least I don't think you are, on the plans, and I don't hold out that I am an expert in it either but you don't have to be an expert to see on the plan the footbridge that they were mentioning and they were called up to Crescent Street. They went up to Crescent Street and - there's supposed to be an "S" marked there - this isn't the original - (Original exhibit shown to Counsel) - gentlemen, you don't have to be an expert in plans to know where the footbridge is here. Now Seale walked from the footbridge up to where they were called at Crescent Street and this is where the accused himself said they went, right up from the bridge to Crescent Street. If they were hailed - if they were hailed, when they were on this bridge, they would normally and naturally walk up a walk there to where these two men were and then, according to the evidence of the accused, that's where the action took place. But gentlemen, that is not where the action took place! The action took place up here in the vicinity of the station marked "X" where Pratico was behind a bush.

Now the fact that Pratico was behind that bush cannot be disputed because it is corroborated by the evidence of Mr. Chant. Mr. Chant saw him there; saw him crouched behind the bush, saw him watching over at something on the other side of Crescent Street. He continued on down a few feet away from Chant or from Pratico and looked back to see what Pratico was watching. Now, my learned friend tries to discredit Mr. Chant by saying that he failed grade two, three and six - whatever it was. Well, I'm sorry, gentlemen; I'm sorry for that but there were no Ph.D's

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that we know of in the park that night! These are the men - there's nothing wrong with the man's eyes! My learned friend didn't say that there was anything wrong with his eyesight. This young man, and remember his tender years, comes into a court room and you gentlemen with your experience in life, how would you feel on that witness stand with two very capable defence lawyers prepared to cross-examine you! There's nothing wrong with Chant's eyes. There's nothing wrong with what he said. You don't have to be a doctor! You don't have to be a lawyer! You don't have to be an engineer! - to see a man on the street getting stabbed and plunged in the abdomen, whether he passed grade six or not is unimportant. It has nothing to do with it! That is an attempt to try to discredit Mr. Chant. This, of course is the duty of my learned friend. But now, if he was saying, Mr. Chant, you wear glasses; you know, how far can you see, are you far-sighted or near-sighted or anything like that: no! nothing like that! No question about that! The only way he can discredit Chant, only possible way he can discredit Chant is by the fact that he failed three grades. But gentlemen, that does not discredit him from coming into this court and telling you the truth.

Now, to jump around a little bit. My learned friend deals with Mr. Pratico. Mr. Pratico gave evidence in the court below which was to my knowledge exactly identical to what he gave in court here today. What my learned friend said is true, that yesterday afternoon, I believe it was in the afternoon if my memory serves me correctly, Chant - Pratico did walk out in that hall, when ordered by His Lordship to get out of this room; at that time there was nothing wrong with Pratico at all. But gentlemen, my learned friend Mr. Rosenblum forgot to mention to you a little conference that Pratico had with Donald Marshall Sr.! Now, what was that conference? What was that conference? Immediately thereafter, defence counsel was sent for. And then, gentlemen, this is when the statement was made. You heard Pratico on the stand, himself - and remember his age too, gentlemen. A man who is trying to match wits with Mr. Rosenblum and Mr. Khattar - remember his age when he said, "I said

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"that. I made that statement or those statements I have made that are inconsistent with my evidence." He didn't use these words and I can't give you the words that he said but I can give you his meaning. "I made those statements simply because I was scared of my life!" "I was scared for my life!" And he also said to you the names of the people whom he spoke to or spoke to him before this trial and before the Preliminary Hearing. I believe their names to be, if my notes serve me correctly, a Mr. Thomas Christmas, Miss Paul and another man whose name escapes me at the present time. I didn't write it down in my notes. Gentlemen, these two young youths were scared to death. He admitted he was scared. He admitted that is why he told the statement. But gentlemen, he was in here. He was not under oath when he made those other statements. He came in here and after a very close examination by His Lordship that he knew what an oath was and the consequences of taking an oath, the penalty for lying under an oath, that he could be convicted of perjury and sent to jail, and he went on that stand and he gave his evidence. The evidence is exactly the same as he gave at the Preliminary Hearing.

Now my learned friend makes a great deal, in fact he exaggerates it in saying the man was drinking. He admits that! If he was a liar, wouldn't it be the easiest thing in the world for him to say, "No, I had a pint of beer. I had a pint of beer and that's all." He told you to the best of his recollection and honestly - if he was going to lie, he could have cut down on his consumption of liquor to any degree that he wanted to because there was no way to dispute him. He could have said, "No, I had nothing to drink" or "The pint of beer that I was having behind this bush over here at the park was the first pint I had that night". He didn't say that! He gave to you an honest recollection of what he had to drink. He then said that he came down to - from the dance - he left the dance. He apparently got sick at the dance. This I suppose isn't unusual for a - how old is Pratico, sixteen -

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fifteen or sixteen - isn't unusual for a man who is indulging in the finer spirits. But in any event, he did get sick. But he remembered leaving the dance. He wasn't that drunk! My learned friend worked him into a drunk. If he was drunk, he wouldn't have remembered leaving the dance. He says he remembers meeting Sandy Seale and the accused up on George Street and he walked to Argyle Street with them and that's when he separated company with them. He remembers walking up Argyle Street. There's no question in his mind about that and there's been no doubt placed before this court as to that. He was not that drunk that he didn't know where he was walking. He went up Argyle Street, cut across Crescent. He walked to a position on Crescent Street that he marked with a "B" which is beside the figure "21". There he moved up, he says, to the railway track; walked down the railway track to the point behind the bush marked "X" and that is where he crouched. And that is where he observed what he related in court here today.

Now gentlemen, my learned friend is right. These two men, Chant and Pratico, did not know each other before the police action in this case. Then how is it they would come up with identical stories? At different times - one in Louisbourg and one in the city of Sydney and they had no communication between each other. There's no evidence whatsoever that these men got together and cooked up a story. They gave their evidence as they saw it. Pratico said that he saw the argument developing or heard the argument developing between these two men. He says that he saw the accused, Donald Marshall, whom he knew and who he says he saw earlier in the evening, take a long shiny thing from his pocket and plunge it into the stomach of Sandy Seale, and Seale went down on the street. He said with that, he got scared. As you know and I know, the number of cases in today's society where people say, we don't want to get involved. He had but one thought in mind. He was scared. He got out of there. And he went up Bentinck Street to his home. He didn't stop and talk it over with Chant. He didn't even see Chant! Chant saw him but

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didn't know who he was at that time. Then gentlemen, through hard work, through long hours of labour, the police department, the City of Sydney Police Department, Detective Division, worked on this case day and night - day and night - until they finally came up with the evidence that they have here and presented in court here today.

(10) Mr. Pratico, I agree, had been drinking. But he did not get in cahoots with Chant and make up a story! If they were both living in the same house, if they knew each other, if there was any evidence that they corroborated or got together and made up this story, then I would say it was an entirely different composition! But this statement on which they do not conflict with one another in any way, shape or form - those statements were given to the police at Louisbourg and at Sydney! There's no communication between the two men.

(20) Now, Pratico - my learned friend tried to work him into a drunk. As he referred to him in his evidence, he was a drunk. I admit he was drinking! I admit that! While he was drinking, he was not drinking to the extent that he didn't know where he was! He said he was over behind the bush and Chant saw him there behind the bush. And where was Chant? Chant wasn't out drinking that night! Chant was in church that night! He came in from Louisbourg to go to a church service. Then after that he went down to visit a friend at the Pier or with a friend at the Pier. On getting down to the Pier, he waited for his friend and then went to the house to - my recollection of the evidence - to get his friend to come on, let's get going, get out of here and go home, get the bus to Louisbourg, and he went to the house and his friend had left. So he walked or ran from Whitney Pier over to the bus terminal which is, I presume all you gentlemen know, the Acadia Bus Line at Bentinck Street. There he found out that he was too late for his bus and that he missed it. He then walked down Bentinck Street, came down what he called over a bridge at Bentinck Street. If you look at the map you can see on Bentinck

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Street where the bridge is there between the two creeks, the creeks that follow along the westerly direction from the bridge and walked up to the railway tracks. And he started down the railway tracks. And he said in his evidence when he looked back, he saw these two men arguing, two - not four - these two Manitobians weren't there when Seale and Marshall were standing on Bentinck Street and he stopped and he watched. And he saw him drag a knife out - Marshall drag a knife out of his pocket and plunge it into the body of Seale. You heard that evidence, gentlemen! That evidence is here! With that, now, as my learned friend says, that his client, the accused, wasn't trying to escape! But Chant was trying to escape! He was scared! And he wanted to get out of there. So he ran down the railway track to a walk which leads from the railway tracks over to Byng Avenue. And he got to Byng Avenue and he started to walk along Byng Avenue. Then he saw Marshall coming, running down Bentinck Street. And he turned around. He didn't want to face Marshall! He didn't want to see Marshall! He turned around while Marshall was still running on Bentinck Street and he started towards George Street. Then Marshall caught up to him and this is where the conversation took place - "Look what they did to me! My friend is up there with a knife in his stomach." Of course there was no knife in his stomach. There was no knife in his stomach - his friend. Anyway, this conversation took place outside Mr. Mattson's house. You heard him: he was the last witness. This is a witness that corroborates, you see. Up to the point of hearing the accused, Chant could have been lying but this is what is known as corroborating evidence, gentlemen, when you call a man like Mattson, to prove that the conversation took place outside his house. This is exactly where Mr. Chant said it did take place. That's corroborating proof of Chant's statement. Mr. Mattson heard part of the conversation, whatever that may have been, but it was enough to cause him to go to the telephone and telephone the police, whatever that conversation was. And then, they go back over to the scene and you will notice that I was

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asking Mr. Chant where the accused stood when they went over to where Marshall was lying - don't know whether I was going to say unconscious - I don't know whether that was in evidence - Seale, I'm sorry - where Seale was lying on the street. I don't know whether he was conscious or not at that time. But in any event, Marshall made sure that Seale didn't see him. He stayed back of Seale away from Seale's face.

And then of course you get the other men arriving, other people arriving on the scene. There is no evidence as to him calling an ambulance, who went to a house or something to get them to call an ambulance. By that time the police had arrived. They were summonsed, I presume as a result of the call by Mr. Mattson. And you know, you can take it from there. The case from there is unimportant except in certain details..

But there can be no question, no question, of the death of Sandy Seale. You don't have to decide that. He died. You heard the doctors giving a description how he died or what caused his death: a pointed instrument into his abdomen, cutting the organs and the main aorta, I think it was called if I recollect the doctor properly, and internal bleeding and so on, hemorrhaging. Gave him something like - I don't know if the doctor said it, I believe he said in excess of seventeen pints of blood to try to save him, but their efforts were fruitless.

Now gentlemen, we come to the jacket! The importance of this jacket and as I say, until the accused came on the stand, we had to rely on other evidence, the evidence of his father, the evidence of Roy Gould, and so on, which now go by the board once the accused goes on the stand. But the accused did not have to go on the stand and we have to present our case to you in chronological order. This is the jacket that Roy Gould loaned to the accused. The accused in his evidence admitted that he wore this jacket. Gentlemen, you heard evidence here from the admitting nurse at the Sydney City Hospital. You heard her say that she examined the wound of Sandy Seale - I'm sorry, the arm

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of Marshall. It was a superficial laceration which means in everyday language a very mere cut, a mere slice. I asked her, and she is a professional, this is her business, was there any blood on that cut and her answer, is "No, there was not." I put the same question to Dr. Virick who came and stitched up the arm and the reason why he put the stitches in it. He said to make it a more equal healing so that there would be no scar left and to prevent fraying at the edges or something. But he said, and it's his job to examine it closely, he said that there was no blood or bleeding in the arm! My learned friend said, well couldn't it be that the blood congealed and he said, well, blood could congeal or words to that effect. I said, "Was there any congealed blood there?" "Was there any sign of blood in that cut?" "No!" Well gentlemen, if that is so, where did the blood come from that's on this exhibit, the yellow jacket? If there was no blood coming from the arm of the accused, where did the blood come from that is on his jacket, that was identified by Mrs. Mrazek of the R.C.M.P. Crime Laboratory as being human blood - where did that blood come from?

Now gentlemen, we also had in the area found another exhibit, a piece of kleenex with blood on it, what appeared to the officer who was searching the area, what appeared to be blood. That blood was type "O". The same type of blood that Sandy Seale had. Do you know what blood type the accused has? Do you know? What gentlemen do you say - perhaps I better not say that. My ice is getting a little thin I guess.

Gentlemen, you also heard from my friend, Mr. Rosenblum and from the accused, that he spent the evening down at Tobins' - and arrived home at 9:30, and he goes down to Tobins'. Did you hear any one from Tobins' corroborating that evidence? Did you hear anybody being called from the Tobin house that was with him on that evening to say that he was there? You have no corroboration for that! The accused's story is completely uncorroborated! Completely uncorroborated in all details except the one where he

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met Mr. Chant down in front of the house of Mr. Mattson and that corroborates the statement of this poorly educated man, Mr. Chant, according to my learned friend. But once again I repeat to you gentlemen that at quarter after twelve at night you won't find very many Ph.D.'s in Wentworth Park. But there is nothing wrong with a twelve year old with average intelligence or intelligence enough to be in grade seven to see and observe a man being stabbed in the stomach with a knife - there can be no question about that!

The identification is positive! You have two eye-witnesses to this murder! Two completely unrelated men! Two men that there has not been the slightest suggestion that there was any communication between the two of them at any time to make up a story and yet they give identical stories, corroborated stories in two areas, Louisbourg and in Sydney! Now gentlemen, how many more witnesses do you want the Crown to present to you? How many more witnesses? You've got two eye-witnesses! You've got their evidence corroborated! Mr. Rosenblum suggests to you, how would you feel tonight if you went home and found this man guilty on the evidence presented by the Crown? Well, I'll tell you gentlemen, that you've got the evidence of two eye-witnesses that were corroborated and I agree - I agree entirely that as Crown Prosecutor if I had my opportunity of putting witnesses on that stand, I would not pit a fourteen year old against Mr. Rosenblum or Mr. Khattar! In fact, if the truth were known, and I've been in the practice of law for twenty-three years, that my knees would be shaking if I had to go on the stand knowing the quality and capabilities of the defence lawyers, no matter what I was saying and supposing what I was saying was the absolute gospel truth! I would still be nervous! I don't think that any person has ever taken the stand in a court room and particularly a Supreme Court room that isn't nervous. But when you get witnesses of tender age, fourteen and sixteen years of age, you can imagine how nervous they are on the stand! And they in fact admit - they're not ashamed of the fact. They admit

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that they are nervous, that they're frightened, that they were scared. And what would give Mr. Pratico the impression as he told you, the explanation for that remark yesterday, after consultation with Donald Marshall Sr., that he was scared for his life! That was his explanation. Now gentlemen if you believe that, if you believe that this young youth was in fear of his life and there is no reason to dispute that because he has said it - there's been no arguments against it - he was scared for his life. I don't blame him one bit for trying to do what he could to get off the proverbial hook. After that conference took place, and I admit what my learned friend said is true and accurate, I walked from the barristers' room down there and I came into this court room - after consultation with my learned friend, Mr. Matheson, and after the remark of Mr. Pratico, I said, "All right, now where do we stand?" They said, "You stand in one place." They said, "The boy will be put under oath, put him on and let him tell his story under oath and if he says what he said in the barristers' room to you under oath, then that's an entirely different matter." He came into this court room and took that bible in his hand and after a very careful examination by his Lordship, acknowledging that he understood what he was doing and that he was under oath, he got on that stand and he told the truth! That's what he told! He told the absolute truth! And the absolute truth that's verified by a completely independent witness, Mr. Chant!

Now, gentlemen! Do you wonder why of the thirty-three thousand citizens in the city of Sydney that the accused, Mr. Marshall goes visiting Mr. Pratico if he didn't know he was in the vicinity of the park that night? Why would he pick Mr. Pratico to go to? I'll tell you why! Because Mr. Pratico saw he and Sandy Seale up on George Street and going into the park! That's why! He knew that he was seen by Mr. Pratico going into Wentworth Park with Sandy Seale and that when they found Sandy Seale dead or wounded and eventually dead in the hospital, Mr. Marshall knew that one of the witnesses was Mr. Pratico who could place him in

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the presence of Mr. Seale. Why was there this display of brotherly love and going back on Sunday if it wasn't to get some kind of message across to Mr. Pratico! Wonder about that, gentlemen. Why didn't he go to your house? Why didn't he go to your house? Why didn't he go to any one of your houses? But he picked the man who saw him going into Wentworth Park with the deceased to spend some time with him - and spend considerable time with him.

Then you have the other man that were named and girl that was named, coming to Pratico and seeing Pratico. And after these people had spoken to Pratico, Pratico told you on the stand yesterday that he was scared of his life. He was fear - I think he used the word "fear" or "scared". I think I phrased the question - we had considerable time phrasing it. I'll have to see if I can remember it. Why did you make this contradictory statement and my recollection, my Lord, gentlemen of the jury, is, fear or I was frightened - one of the two - of my life. Now gentlemen, if that isn't reason enough for a man to act out of the ordinary! A fourteen year old youth who is coming into a court room like you see before you now wouldn't be nervous and wouldn't be upset, wouldn't be, as the expression goes, uptight under the circumstances. But now my learned friend, Mr. Rosenblum, doesn't call Mr. Chant a drunk! Mr. Chant came in here to go to church! He didn't say very much about that when he was talking about Mr. Chant! And any man that would go to church on Friday evening can't be all bad! He was in here for the purpose of going to church and he did go to church. That's where he spent the evening. The only thing he can attack Mr. Chant on is to try to leave with you the impression that he hasn't got the intelligence to tell what he sees. Well this man is in grade seven and that does not make him stupid! And he related to you what he saw.

Now we have other witnesses that were called, that we had to call. We had to prove that the blood type of Sandy Seale was "O" in order to have any connection with the exhibits that you had

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before you. We have no evidence of any other blood types in this case. If, if, Mr. Donald Marshall was blood type "O", what do you think the first question the defence lawyer would have asked him? If you were the defence lawyer and you had on the exhibits right here before you evidence that a cut did not bleed, but then there was some suggestion that there was blood - couldn't be seen by a professional doctor or professional nurse, what would be the first question you as a defence lawyer would ask in order to cover the evidence of the Crown that blood type "O" is on these exhibits?

(10) You know perfectly well what it would be and you have no such evidence before you.

Now my learned friend also, and once again, he said, you'll have to use your recollection of the evidence - my learned friend in his attempt to justify the word "drunk" when referring to Mr. Pratico said that Mr. Pratico said he was so drunk - what I put down in my notes here - that he was so drunk that he could not see people in the park. That is not what Mr. Pratico said! He said he didn't see anybody in the park. He wasn't looking for them. He didn't say he was so drunk that he couldn't see them but this is what my learned friend said to you, typical of the exaggeration that he was using in his speech towards you in order to try to completely discredit the two eye-witnesses to a murder and that is the barrier that the defence must try to get over and try to get around. The only evidence that they called was the accused himself and I again repeat, because it bears repeating and it is of the utmost importance, you gentlemen tell me how you can justify what the accused said in his direct evidence to my learned friend and the evidence of Miss Harris and Mr. Gushue! How can you do it? They were called up from the bridge to where these two men were. There was no talk in direct examination about an interruption by Miss Harris and Mr. Gushue - "We want a cigarette, we want a match; are there any girls around here." "Oh yeah, there's lots of them down the park." And as I say, he just come through the park and saw no one, down at the park. And then with this, the

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man said, without provocation, without anything else, "I don't like niggers and I don't like Indians" and started to stab.

Now gentlemen, I draw to your attention most earnestly and most sincerely and I say to test the credibility of the accused, you have what Mr. Rosenblum refers to as unimportant witnesses, Miss Harris and Mr. Gushue. And their evidence became extremely important once the accused took the stand! That's what triggered it! That's what trapped him!

(10) Now, my learned friend also mentioned about the fact of this cut being superficial. The doctor called it a superficial laceration. That's a fancy name for a cut which is not deep enough to draw blood. How would any of you gentlemen like to take a chance on doing that? The cut was a long even cut, three inches long, even. If a man was being stabbed, I'm suggesting to you, that the cut would not be even. The arm would ^{be} either coming or going and the knife would be either coming or going so that there would be a different depth on that cut on that arm somewhere along the line. The doctor gave you evidence that such was not the case, that this was a nice even slit along the arm.

(20) Now gentlemen, you get to the point, another important point, of the sleeve of this jacket, that it was cut - fresh cut. But it was also torn - also torn. Now I asked the accused, testing his credibility, how come this was right down to the end of the sleeve here, beyond this cut - "A cousin of mine cut it out at the reservation." That is contrary to the evidence of one of these unimportant witnesses that my learned friend referred to from the R.C.M.P. Crime Laboratory in Sackville, New Brunswick. He said it was torn, it was ripped! You don't have to be from British Columbia or trained in Harvard University to take a look at that and to see that the last inch or so of this jacket was ripped rather than cut! You can see the frayed edges on it. Gives the appearance of the section that was cut but then when he looked at it again, and I brought this to his attention, "Oh well, I guess he must have ripped it." The only explanation he could

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give for it.

Now gentlemen, have you any explanation for the blood on that jacket? Have you any explanation? If you believe the story of the accused, he was not close enough to Sandy Seale to get his blood on it! He took to his scrapers and never went near Seale! If you believe the evidence of the doctor, if you believe the evidence of the nurse, there was no blood from that cut on Sandy Seale's arm - on the accused's arm, Mr. Marshall. There was no blood. There was no blood which started to bleed and dried. I clarified that with the doctor. There was no blood. Where did this blood come from? Gentlemen, where did this human blood on the front of this jacket come from? Have you an answer for that? Has Mr. Rosenblum supplied you with an answer for that? Has the accused supplied you with an answer for that?

My learned friend, Mr. Rosenblum, suggested to you, do you think that the accused is a good actor, good enough actor to do what he did. I am suggesting to you that he is just exactly that. He was a good enough actor to do what he did. That when you go into that jury room, you have taken an oath - do you recall the oath, gentlemen? Have you got the oath there? You took the following oath, gentlemen, two days ago - now let me refresh your memory - you shall well and truly try, and true deliverance make, between our Sovereign Lady the Queen and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God. Now you gentlemen took that oath and you've got a duty and I will tell you what that duty is. You have to decide - and I will tell you what the duty of the Crown is. The duty of the Crown is to prove beyond reasonable doubt in your mind - His Lordship will explain what a reasonable doubt is. My learned friend is quite correct, the Crown has on its shoulders a burden of proving the accused guilty beyond a reasonable doubt. This I submit to you gentlemen the Crown has done. They have done it through eye-witnesses at

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the scene of the offence, completely destroyed the credibility of the accused, Mr. Marshall, with Miss Harris and Mr. Gushue. Recall how he gave that explanation when you go into that jury-room and you're trying to decide whether to believe Chant, Pratico or the accused. They were the three that were in the area. You see if you can justify and work into the story of the accused the interruption by completely independent witnesses, people who have nothing to do with this case and only wish that they were twenty miles away when it happened - Miss Harris and Mr. Gushue. Fit that piece into the jig saw puzzle if you can and if you can't, then that completely discredits the evidence of the accused. Then find out where in the evidence of Mr. Chant who was in church, not drinking, evidence of Mr. Chant, anything that is inconsistent - anything that he lied about, anything that he twisted, the slightest, the smallest dent in his evidence! It's all there.

Now I'm - before - I was going to quit.

My learned friend made great play about why didn't these boys come forward and tell the truth. My answer to that is quite simple and I am submitting it to you, fear. And secondly, not wanting - which is a great menace to our society today in the United States of America and in Canada, of not wanting to get involved. That is why they did not tell the police for a week until, what I would say, brilliant police work brought this whole matter out in the open. I'm suggesting to you gentlemen to take your oath seriously. You have a duty that if the Crown has not proven beyond a reasonable doubt that this accused man, Mr. Marshall, stabbed Sandy Seale in the stomach which wound caused the death of Mr. Seale, then if we have not proven that beyond a reasonable doubt, acquit the accused. You are charged and you are bound to do so by your oath. But you are equally - you are equally bound by your oath if you know perfectly well, if you are satisfied beyond a reasonable doubt, and this isn't a fanciful doubt, this

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isn't a television program where at the commercial at five to eight they come on and clean up the program in three minutes which they took fifty-five minutes to present to you, and have something in the wings which surprises everybody. That's not a reasonable doubt. It's not a fanciful doubt. That's not what is meant by a reasonable doubt. If you can say, well, I really am not clear in my mind or I'm not satisfied beyond a reasonable doubt, acquit him. If you are satisfied that you know and the Crown has presented to you through evidence the facts of this case and you are satisfied on that evidence that you know what happened on Crescent Street in Wentworth Park that night, then you are duty-bound to convict the accused. And I am submitting to you gentlemen that the Crown has in the only possible way except if they had a movie camera set up on Crescent Street that night, they have given you the best evidence that you could possibly get and that's an eye-witness. Not one eye-witness, but two eye-witnesses and I suggest to you that the Crown has discharged its obligation and it is your duty - bound under the oath that you took for office, to find the accused guilty as charged.

Thank you.

Thank you, my Lord.

THE COURT:

Mr. Foreman and gentleman of the jury, it is now past five and my direction to you in this very important case will necessarily be somewhat extensive because I have to cover, as counsel have said, I have to cover the law, all the legal points that are involved in this case as I see them. So I think that in the circumstances that it will be better that you come back tomorrow because otherwise the moment I finish talking to you, then you are closeted in the jury room subject to lunch and dinner until your decision. I don't think it would be well to start away at this hour tonight.

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Therefore, Mr. Foreman and gentlemen, I ask you to come back tomorrow morning at ten. I don't have to repeat my admonition of care that must be exercised by all of you to let no one talk to you about the case. You realize now we are at a very crucial point in the case and you must let no one talk with you.

5:10 P.M. NOVEMBER 4, 1971 COURT ADJOURNED

10:00 A.M. NOVEMBER 5, 1971 COURT PROPERLY OPENED

10:00 A.M. NOVEMBER 5, 1971, JURY POLLED, ALL PRESENT

C.S.

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DUBINSKY, J.:

Mr. Foreman, and gentlemen of the Jury:

I am sure that we are all pleased that we have come near the end of this case. I should like to join with Messrs. Rosenblum and MacNeil in thanking you for the very keen way in which you have followed the proceedings of this case from the very beginning.

It seems to me, Mr. Foreman and gentlemen of the Jury, that as long as jurors will give that sort of attention which you twelve men have given to the matters that came before you these past couple of days, so long will the jury system retain the confidence and the respect of our fellow citizens and so long will they the more easily resist any attempts that are made to alter or do away with this great institution. If we are to resist those who criticize and question the value of the jury system, let me say to you, Mr. Foreman, that the answer lies in the fact that men and women when called come and do their duty, not for the little emolument that is involved here, but because jurors are connected with a heritage of justice and freedom. So long as jurymen and jurywomen approach their task without weakness, without misplaced sympathy, so long as they comply with the oath that they have taken before God, so long will this jury system endure.

Now in this case as in many others, things have been said about it in the news media. On my instructions, you have separated during overnight adjournments and you have separated during luncheon hours. If you have read or heard anything about this case outside this courtroom, it is your duty to banish it from your minds. You must decide whether the accused is guilty or not guilty solely upon the evidence which you have heard in this court room during the trial of this case. In that way, Mr. Foreman, and in that way alone, can you discharge your very heavy responsibility. In this way and in this way alone, can you discharge your duty, a duty which you owe equally to your country, as well as to the accused man, Donald Marshall Jr.

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Now the very first thing that I want to say to you, and it has been very well said by Mr. Rosenblum, is that the fact that a man is charged and brought into this court does not mean that he is guilty. The Crown must prove to you by legal and competent evidence that convinces you beyond a reasonable doubt that the accused is guilty. As he said, a man accused of a crime is presumed to be innocent until he is proven guilty, and as both counsel, both Mr. Rosenblum and Mr. MacNeil fairly said to you, the burden of proof rests upon the Crown and it rests upon the Crown from the very beginning of the trial until the end. Now I shall make reference to this later as I go along.

Counsel for the Crown have called a number of witnesses whose evidence, Mr. MacNeil submitted to you yesterday afternoon, went to prove that the accused, Marshall, was guilty of the crime of non-capital murder. On the other hand, counsel representing the accused, by the cross-examination of the Crown's witnesses and by calling the accused himself, endeavoured to establish - to point out to you, according to Mr. Rosenblum, that the evidence for the Crown does not have the weight - that weight and that sufficiency necessary to discharge the onus upon the Crown. You heard Mr. Rosenblum and Mr. MacNeil summarizing the evidence and submitting their views to you. I would like to say in passing, Mr. Foreman, that we should, all of us, you and I, be very indebted to these four members of the Bar of Nova Scotia, who appeared before us during this trial and who represented the very highest ethical standard of the legal profession in this province. Mr. Rosenblum, in his submission to you, made a very forceful plea on behalf of the accused. His plea marks Mr. Rosenblum, in my humble opinion, I may say in passing, as a leading member of the Bar of Nova Scotia. Mr. MacNeil in his submission to you showed you that he is a highly-regarded prosecutor in this province of Nova Scotia and he has also made a forceful submission on behalf of the Crown. But these two men, Mr. Foreman, would be the first to say to you that this is not a contest between them - between two lawyers. You who are the jury and I the judge must remember that our duty is to look at the evidence and from that source

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alone to arrive at the conclusions which are required by justice and by law, not being entirely unmindful, of course, of what I said were the very good arguments, presented to you yesterday afternoon by these two men.

Now it is my duty, Mr. Foreman, to make clear the law that is applicable in this case. I will try as best as I can to do that and as simply as I can to enumerate the legal principles that are involved in this very serious case. A judge speaking to a group of lay people, such as you are, must keep in mind that it is not always
10 easy for them to comprehend and to follow the principles of law that are involved in cases. It is up to the judge to try to make those principles understandable to the jury so that they will be the better able to apply the law as given to them by the judge to the facts of the case.

Now I intend, of course, to deal with matters of law. That has been pointed out by both counsel, but I am also going to deal, to some extent, with the facts in this very important case. In a very well known murder trial some nineteen years ago, Azoulay v. The Queen, (1952) 2 S.C.R. 495, Mr. Justice Taschereau, who later became the
20 Chief Justice of Canada, pointed out that in a jury trial the presiding judge must - note he said "must" - except in very rare cases where it would be needless to do so, review the substantial parts of the evidence. He must present to the jury the case for the prosecution and the theory of the defence so that they, the jury, may appreciate the more the value and the effect of the evidence and the law that is to be applied to the facts as they, the jury, find them. It is not sufficient for the whole evidence to be left simply to the jury by the judge and say, "There, you have heard the facts; go ahead and
30 decide upon them and render your verdict." The Azoulay case has been followed by many other cases in the past nineteen years in Canada. What I am getting at, Mr. Foreman, is that the pivotal points on which the prosecution bases its case and the pivotal points on which the defence stands must be clearly presented to the jury's mind by the judge. Now it is understandable that I don't have to,

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and certainly I could not, review all the facts. I don't intend to do it. Indeed the facts have been very carefully looked into and developed by the two counsel who spoke to you yesterday and they have lessened a great deal of my work and duty for me.

But there is a very important distinction which you will remember and which was also referred to yesterday. When I speak to you on matters of law, it is your duty, Mr. Foreman and gentlemen, as counsel said, to act on my instruction as being absolutely correct in every respect. When you are inside in your room deliberating, any question
10 of the law that may have come up, you will take as having been correctly stated by the judge in the way that I have done it. The rule then, in short, is that the law is for the judge. If I make a mistake in the interpretation of the law or in anything touching upon the law - by the way, you understand, you know that whatever I am saying here this morning is being reported by our court reporter and will, if necessary, be scrutinized later. If I make a mistake - where is the human being who has not made a mistake or who does not make a mistake, but if I do so here today, there is a remedy open to the party that is aggrieved by my mistake. As far as you gentlemen are concerned today,
20 you will follow the law implicitly as I give it to you.

But when I speak about the facts, I am in my own way endeavouring to assist you in coming to a conclusion. As I mentioned, The Supreme Court of Canada has laid down that it is the duty of the judge to deal with the facts. But I stress, Mr. Foreman, I am saying it now and I will repeat it as I go along perhaps a number of times, you do not have to agree with me on the facts - you do not have to agree with me on the facts. It is your duty to decide what the facts are in
— this case from the evidence which you have heard. During my remarks, consciously or otherwise, I may express an opinion with regard to
30 the evidence which has been given by one or more witnesses. And if I do that, I want to merely say that you - to emphasize that you are not in any way bound by my opinions as to the facts concerned. Evidence upon which I may comment may have left on your mind a very different

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impression; from the impression it has left on my mind. It is your duty to place your own interpretation upon the evidence. It is your duty to weigh the evidence and to come to your conclusion as to what you believe and what you do not believe. If there should be evidence which I don't mention, yet which you recall, that doesn't mean for one moment that the evidence which I omit or failed to discuss is unimportant. No, Mr. Foreman and members of the jury, all the facts are before you, whether I mention them or not. And when I speak of the facts, you will have noticed that I have been jotting down, through
10 the trial hurriedly, the evidence and making my own notes. However, I did ask our capable court reporter to transcribe a couple of parts of the evidence for me which I intend to read to you later. But when I quote from my own notes - from my own notes - if you are in any doubt as to the accuracy of my notes, you will take your recollection rather than what I have given to you. Of course, it is understandable that if I make a mistake on the evidence, it will not have been done intentionally.

Now if at any time during your deliberations you require something to be read back to you, if you are not clear on some piece
20 of evidence, you come back here and we will have it read back by the reporter or played back in the machine. You will listen to that portion which you wished to have read over again. That will be your privilege to make known to me that you wish to have certain portions of the evidence heard again.

As the facts are for you, so are the inferences from the facts. You can draw inferences from the facts and I'll come back to that later. You can draw inferences from the facts provided that the inferences are founded upon evidence that has been properly established and which are the logical results of the evidence - the
30 logical consequence. The inference flows logically from the evidence that has been presented to you and which you accept. Don't make any inference, Mr. Foreman, gentlemen, against the accused, Marshall, unless in your good judgment it is the only reasonable and rational inference open on the facts.

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Now, in considering the facts, naturally you have to decide what witnesses that you heard here the past few days - what witnesses you are going to believe; how much of their evidence you are going to believe; what part you will have listened to more carefully than some other part. You will have to sift through the evidence in this case. That's your responsibility! You are twelve men with common sense, with normal ability and normal intelligence. You have seen all the witnesses come before you. You have heard their evidence. You have seen their demeanour on the stand. It is up to you to assess

10 the credibility of what they said, the degree or the extent to which you believe they have been telling the truth. People speaking of the events of some months past may have forgotten some details, may be uncertain as to the exact time or the exact spot or place, as to where and when something happened and it may be that they are perfectly honest when they tell you of their recollections as they remember them at that time. Now then, you may believe all the evidence given by a witness, a part of the evidence given by a witness or, indeed, none of the evidence given by a witness. When

20 deciding upon the credibility of a witness, of the weight you are going to give to the evidence of a witness, you should consider what chance the witness had to observe the facts to which he or she testified and how capable the witness is of giving an accurate account of what he or she saw or heard. You must also decide, Mr. Foreman, whether the witness is biased or prejudiced, whether the witness has any interest in the case. These are some of the factors which must be considered when deciding upon the credibility or the truthfulness of a witness or the weight that is going to be attached by you to the evidence of a witness. There is always the possibility that a witness may be prejudiced or biased and in such circumstances may

30 be giving a coloured account of what he saw or heard. Also, there is the possibility that a witness may have been discussing the case with others and has gradually built up an account of what took place which the witness may believe to be true, but which is more the result

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of rationalizing as to what took place rather than what the witness actually heard or saw with his or her own eyes. If you have any reasonable doubt as to the accuracy of the evidence given by any witness or the weight that you should give to such evidence, I charge you to give the benefit of the doubt to the accused and not to the Crown. If you have any doubt as to the accuracy of any witness, I charge you to give the benefit of that doubt to the accused.

In approaching this case, you must be entirely impartial. You must banish from your mind all prejudices and preconceived
 10 notions. Indeed, I am not suggesting that you have any, but it is my duty to tell this jury and any other jury that such has to be done. You must decide, and I know you will decide, the guilt or innocence of the accused man, Donald Marshall Jr., without fear, without favour, without prejudice of any kind, but in accordance with the oath that you have taken before God.

I will now deal with what is known as the presumption of innocence. This presumption is woven into the fabric of our law in Canada, in England and in all freedom loving countries. It
 20 means that an accused person is presumed to be innocent until the Crown has satisfied you beyond a reasonable doubt of his guilt. It is a presumption which remains from the beginning of the case until the end and the presumption only ceases to apply if, as was said by defence counsel yesterday - it only ceases to apply if, having considered all of the evidence, you are satisfied that the accused is guilty beyond a reasonable doubt.

I said before that I would deal with the question of onus or burden of proof. The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts.
 30 There is no burden on an accused person to prove his innocence. I repeat, there is no burden on an accused person to prove his innocence. Let me make that abundantly clear. If during the course of this trial, from beginning to end, during anything that may have been said by

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counsel during their speeches, that might in the slightest way be considered as suggestive of any burden on the accused to prove anything, let me tell you that there is no burden on the accused. The Crown must prove beyond a reasonable doubt that an accused is guilty of the offence with which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused committed the offence of non-capital murder, the offence with which he is charged, then it is your duty to give the accused the benefit of that doubt and to find him not guilty. In other words, if after considering all the evidence, the addresses of counsel and my charge to you, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused, Marshall, committed the offence of non-capital murder, it is your duty to give this accused the benefit of the doubt and to find him not guilty. The words "reasonable doubt" are difficult to define. Perhaps it is because there are certain expressions which defy definition, But yet, Mr. Foreman, the moment you hear these words, "reasonable doubt", you understand what they mean. I would say that the words, "reasonable doubt" mean an honest doubt, not an imaginary doubt conjured up by a juror to escape perhaps the responsibility of his conscience. It must be a doubt which prevents a juror from saying, "I am morally certain that the accused committed the offence with which he is charged." In other words, that is the sort of doubt which would prevent you from saying, "I am morally certain that the accused committed the offence with which he is charged." In other words, that is the sort of doubt which would prevent you from saying, "I am morally certain that he committed the offence." I am repeating myself, of course, because I consider it to be so very important. If after hearing all the evidence, the addresses of counsel, my charge, you will say to yourselves, or ^{any} of you, "I am not morally certain that he committed the offence", then that would indicate to you - that would indicate there is a doubt in your mind and it would be a reasonable doubt which prevents you from arriving at the state of

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mind which would require you to find a verdict of guilty against this man. If, however, you can say? "I am morally certain that what the Crown contends is what happened here in this case", then you have no reasonable doubt and your duty, your responsibility, is to find him guilty of the offence of non-capital murder.

The matter of motive requires a word or two from me, Mr. Foreman. You may ask yourselves, has there been any proof of motive in this case? Proof of a motive for an alleged crime is permissible and often valuable but I direct you that it is not essential. Evidence
 10 of motive may be of assistance in removing doubt and completing proof -you follow me - evidence of motive may be of assistance in removing doubt and completing proof. Motive is a circumstance but nothing more than a circumstance to be considered by you. The absence of a motive is a circumstance which must be equally considered by you on the side of innocence tending to substantiate or to support the presumption of innocence and to be given such weight as you deem proper. But if after consideration of all the evidence you believe it has been proven beyond a reasonable doubt that the accused committed the crime with which he is charged, the presence
 20 or absence of motive becomes unimportant.

Now intent - intent! In the crime that is charged here, it is necessary that in addition to the act which characterizes the offence, the act must be accompanied by a specific intent and must in this case, in the crime of murder, be a necessary element in the mind of the perpetrator of a specific intent to kill, or as I will explain in detail later, to do other things. And unless such intent so exists, the crime is not committed. The intent with which an act is done is manifested by the circumstances attending the act - the circumstances how the act is done, the
 30 manner in which it is done, and the state of mind of the person committing the act. While you may proceed, Mr. Foreman and gentlemen, on the common sense proposition that most people usually intend the natural consequences of their act - most people usually intend the natural consequences of their act - nevertheless, you

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must consider the state of mind of the accused at the material time and decide whether he intended the natural consequences of his act. I will say that what a man does, surely is one of the guides as to what he intends and sometimes it is the only trustworthy guide.

Now you have also heard in this case the evidence given by experts - expert witnesses. I will merely say that they are duly qualified experts who gave opinion evidence on questions in issue in this trial. You will consider the opinions they expressed
10 in the evidence they gave. You are not bound to accept the opinion of an expert as conclusive but you should give to the evidence of these experts the weight that their testimony deserves. You remember Miss Mrazek and Mr. Evers of the R.C.M.P. They are experts. They have been accepted as experts. Miss Mrazek, the serologist - the lady who talked about blood. Mr. Evers, the hair and fiber expert; Dr. Naqvi; Dr. Virick; Dr. Gaum - they were all experts. Miss Meryl Faye Davis, the nurse - an expert. Give to the expert testimony the weight that you feel it deserves. These people have been called here to give evidence because they are skilled in particular
20 fields and we take advantage of their skills to tell us something about what they did, their opinions. But you, Mr. Foreman and gentlemen, are the ones who must decide even on the testimony of experts.

Now just a brief word about your duties in the jury room. It is your duty to consult with one another in there, to deliberate with a view to reaching a just verdict according to law. Each of you must make your own decision whether the accused is or is not guilty. You should do so only after consideration of all the evidence with your fellow jurors and you should not hesitate to
30 change your mind if you are convinced that you were wrong - in your first impression. After discussion and going over the matter, your original view you may find perhaps was wrong and you should not hesitate to change your view if the facts warrant same.

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Since this is a criminal trial it is necessary that you should all be unanimous in your verdict. In other words, it is necessary that each and all of you should agree on whatever verdict you may see fit to return. Unless you are unanimous in finding the accused not guilty, you cannot acquit him. Nor can you find a verdict of guilty, unless you are unanimously agreed that he is guilty. If after some considerable careful consideration you are unable to agree, then of course you will report to me. I urge you, however, to try to reach a conclusion one way or another.

10 Now in this case, Mr. Foreman, the indictment reads that,

"The Jurors for Her Majesty the Queen present that Donald Marshall Jr. at Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May, 1971, did murder Sanford William (Sandy) Seale, contrary to s.206(2) of the Criminal Code of Canada."

I intend to read to you certain portions of the Criminal Code. The Criminal Code is the statute of this country which governs
20 all criminal matters coming within the jurisdiction of Canada. As I proceed with my charge, it will become necessary to refer to other sections. But now let us turn to s.206(2) and to that much of it as concerns you:

"Every one who commits non-capital murder is guilty of an indictable offence ..."

Every one who commits non-capital murder is guilty of an indictable offence! Now we turn to s.194 and we find this:

30 "(1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide."

I will come back to this section later but at this moment let us turn to one more for a moment, 202A:

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"(1) Murder is capital murder or non-capital murder."

Now let me close out any thoughts about capital murder because by a very unintentional slip yesterday, Mr. Rosenblum said something which compels me to make very clear - I know it was unintentional - this case is not a case of capital murder for which the penalty is death. This case is not the case of capital murder for which the penalty is death. So capital murder does not concern you. I may tell you that a capital murder case exists where a person kills one of a certain class, a class of which Sanford William (Sandy) Seale was not one. This class will refer to police officers, police constables, members of any police force, someone in charge of a jail, warden or such type of a person. Causing the death of one of this type, a person may be guilty of capital murder. There is not the slightest evidence in this case that the late Sanford William (Sandy) Seale was a policeman or any one of that class. If there is murder in this case at all, then it is what we call non-capital murder. That's the charge that has been laid and I repeat again, the charge we are dealing with is non-capital murder.

Now as I said before, culpable homicide is murder - in our case, non-capital murder; or it is manslaughter or it is infanticide. Let me finish off with the last part, infanticide, so we won't have to worry about that. Under s.204, Mr. Foreman and gentlemen, you will find the law regarding infanticide and as you all may probably know it deals with the case of a female person who causes the death of her newly-born child. So we have nothing to do with that in this case.

We come back to the simple statutory provision, culpable homicide is murder or manslaughter. Now the next question you have a right to ask me is, what is the meaning of culpable homicide, what is culpable homicide, what does it mean. Well, once again, last evening I looked up the word in the dictionary here, and while you may have your own definition or explanation, let me say to you that the word "culpable" - C-U-L-P-A-B-L-E - culpable, suggests or infers the meaning of blameworthiness, deserving of punishment.

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Anything that is culpable is deserving of punishment. So homicide, the killing of a human being, is deserving of punishment, is blameworthy or it isn't blameworthy. Homicide is culpable or is not culpable. The killing of a human being may be blameworthy or it may not be blameworthy. You know, Mr. Foreman and gentlemen, I don't have to tell you, I'm sure that some of you have served in the Armed Forces. There were two world wars; there was the Korean Conflict and the wars that are taking place in the world even at this moment and we may bemoan the futility of war but that does happen in man's history from time to time. But in wartime while people kill, soldiers kill, they are not committing murder unless perchance, they go to all sorts of atrocities. But as a rule, the average soldier in battle though he kills, is not committing murder. Let us take another illustration more at home, closer to home. You are driving down George Street; there is a school at the corner of George and Dorchester. You are driving past that school, Mr. Foreman, and suddenly a little child will run out from the school grounds into the path of your car and is struck by the car and is killed. That's homicide! That's homicide, a child has been killed; a person has been killed; a human being has been killed. But certainly not by any stretch of the imagination or by law can it be said that in those circumstances you or I or anyone to whom that unfortunate event would have happened would be guilty, would be deserving of punishment criminally. Indeed, indeed, whoever to whom it happened would not be deserving of having to pay any civil damages. It would undoubtedly be an unfortunate accident in every sense of the word. There would be nothing blameworthy about the killing of this child. Culpable homicide is homicide that is deserving of punishment!

Now when we come to what is murder we turn to s.201 and we find,

"Culpable homicide is murder

- (a) where the person who causes the death of a human being
 - (i) means to cause his death, or
 - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;"

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That's murder! That's culpable homicide, Mr. Foreman, where the person who causes the death of a human being, one, means to cause his death or two, means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not. That's murder! That's murder! I think that's pretty clear, Mr. Foreman. I don't think I have to enlarge upon that.

Now let's go for a moment to s.205 of the Code, just briefly and we find here, 205, the following:

"Culpable homicide that is not murder or infanticide is manslaughter."

Well I've said that in another way before. Culpable homicide that is not murder or infanticide is manslaughter. I've dealt with what is murder. I've explained to you what is infanticide and now I have read to you s.205.

Now Mr. Foreman, in a few moments I will instruct you why as a matter of law, my instructions to you, is that in this case you do not have to consider the question of manslaughter but in order that you will have the completed picture before you, let me give you an example of the difference between non-capital murder and the crime of manslaughter. Suppose that two farmers are neighbours and they quarrel over the location of the boundary between their two farms - not a very common event but yet not entirely uncommon as I'm sure most of you probably have heard - the bitter argument that may occur over the boundary between the two farms. Now one day Farmer A sees Farmer B moving the survey posts that he had put down and in anger, he takes his gun, his rifle, and he shoots B and kills him. In such a case, Farmer A committed culpable homicide when he caused the death of Farmer B by an unlawful act, that is by shooting Farmer B and since he meant to cause the death of Farmer B, he meant to shoot him, he meant to kill him, or he meant to cause him bodily harm which could have caused death and he was reckless as to whether death ensued or not, he committed non-capital murder. On the other hand, suppose that on this occasion when Farmer A saw Farmer B removing the survey posts, Farmer A lifted his gun, intending to shoot over the head of Farmer B, not to strike him, not to kill him, but to frighten him

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and as he lifted the gun he stumbled and the direction of the gun went from pointing upwards to straight ahead and the bullet struck and killed Farmer B. In such a case Farmer A commits culpable homicide. He committed culpable homicide when he caused the death of Farmer B but because Farmer A did not mean to cause the death of Farmer B, he didn't mean to cause him bodily harm which might have resulted in death and he was not reckless as to whether death ensued or not, Farmer A committed manslaughter. In short, even though the killing in that case was culpable homicide, it was not murder but manslaughter, 10 since the all important intent, the all important element of intent, do you follow me - the all important element of intent, was absent.

Now, let me turn for a moment to the evidence of the two doctors, Dr. Naqvi and Dr. Gaum. I have taken this from the official record, excerpts, not the full report. I'm not giving you the full report of their testimony but what I am reading to you is from the official record which I have taken with the assistance of the court reporter. Dr. Naqvi said that "the victim was a coloured teenage boy who has had his bowel outside his abdomen and an opening into the abdomen approximately three inches to four inches wide and his clothes 20 were filled with blood. He himself was in a state of shock; very critical, no pulse; no blood pressure and he was on the verge of death. His bowels were torn; his vessels were torn and he had massive bleeding inside and his major vessel was cut. Sharp pointed object that has penetrated through the abdomen and all the way down to the back. Kidneys were shut down; his respiration was shut down. Cause of death, injuries to his bowel, his vessels." Dr. Gaum, came in later and was speaking about the second operation and he said that, "after exploration the wound to the aorta was found. The aorta runs from up around this region of the chest and curves right down. 30 It's the major blood vessel that originates from the heart to supply the rest of the body. It was punctured as I recall it about one-half inch or so. Condition continued to deteriorate. Was brought back to the OR again to deal with his continued hemorrhage and after re-exploration, the wound in the aorta was found. He did have other

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"injuries to the vascular supply of his bowel which had been dealt with at the previous operation and he continued to have quite a bit of hemorrhage from the mesentery of the bowel, the tissue which carries the blood vessels to supply the bowel and he did have a lot of bowel which was deprived of its blood supply and it was becoming gangrenous." That is the description of the injuries which William Sanford (Sandy) Seale received.

You will remember that Leo Curry, the ambulance operator, took the injured man to the hospital - the injured man there on the road, he took him to the hospital. And he was with him until Dr. Naqvi arrived. Dr. Gaum assisted Dr. Naqvi and Dr. Gaum identified the injured man, the man who died, as being William Sanford (Sandy) Seale. There is therefore no doubt in the world that the person who sustained the wounds described by the doctors was William Sanford (Sandy) Seale. There is no doubt that it was he who received the wounds. There is no doubt in the world, Mr. Foreman, that Mr. Seale died as a result of these wounds. In my opinion, and please remember, as I told you before and I will tell you again and again, that you do not have to accept my opinion - in my opinion, you will decide yourselves - my opinion, the nature and the extent of the wounds inflicted on the late Mr. Seale are such that whoever caused these wounds intended to kill him, or intended to do him bodily harm that he, the person who did it, knew was likely to cause his death, Seale's death, and he, the person who did it, was reckless whether death ensued or not. In short, whoever committed these wounds on William Sanford (Sandy) Seale, committed non-capital murder. That's my opinion! You do not have to accept my opinion! You are the sole judges of the facts. You will decide yourselves. You do not have to accept my opinion. My opinion is that whoever caused these wounds committed non-capital murder. The facts in this case, in my opinion, do not give rise - the facts in this case as they came before you, gentlemen of the jury, from beginning of the case to the end, do not give rise to your having to consider the crime of manslaughter and therefore, I charge you that

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your verdict in this case is to be either guilty or not guilty of murder - guilty or not guilty of murder. The important question therefore for you is whether or not the Crown has established beyond a reasonable doubt that it was Donald Marshall Jr. who committed the murder of William Alexander (Sandy) Seale.

Now I have spoken for some considerable time and I'm going to pause to give you a chance to go in your room. But inasmuch as I am continuing with the charge, you will please, gentlemen, remain in your room. Do not go out in the corridor under any circumstances. 10 Remain there! I will stay in my room alone. In about ten minutes time, I will come back and I will continue with my charge after all of us have had a chance to refresh ourselves.

(11:10 A.M. COURT RECESSED TO 11:30 A.M.)

11:30 A.M. JURY POLLED, ALL PRESENT)

Now Mr. Foreman, gentlemen of the jury, I told you that I would deal with the facts to a certain extent. I think it is clear that the Crown's case is based principally upon the evidence of two witnesses, Maynard Chant and John Pratico. There are of course a couple of other witnesses too to whose evidence I will refer. But 20 the case for the Crown, in my opinion, rests principally upon these two witnesses. So I have had the court reporter transcribe for me from the evidence of these witnesses. For the time being I am going to talk about the case for the Crown and I will turn, of course, to the case for the Defence. I may not have all that he said. I may not read you back all that he said but what I am reading is from the official record.

Maynard Chant - this is in direct examination - that is examination by the Crown -

- 30 "Q. Did you notice anything as you walked along the railway tracks?
 A. I noticed a fellow hunched over into the bush.
 Q. Good and loud now.
 A. I noticed a fellow hunched over into a bush.
 Q. Where would that be on this plan?
 A. Right there.

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"Q. You're pointing to a bush that is opposite -
(Court directs to mark plan)

A. Witness marks plan."

Q. The bush that you have marked with the letter X is the tenth bush from Bentinck Street when counting in an easterly direction along the railway tracks: that is the bush in front - between the houses marked MacDonald and M. A. McQuinn, is that correct, the tenth bush?

...

X 10 Q. When you observed this man, did you recognize him?

A. No sir.

Q. Beg your pardon?

A. No sir.

Q. What did you do?

A. Oh, I kept on walking down a little farther. I walked down a little farther and looked back to see what he was looking at. He was looking over towards the street. So I looked over and saw two people over there."

I pause now to repeat, he said he saw two people over there.

20 X Q. Did you recognize either of these people?

A. No. And I guess they were having a bit of an argument.

Q. Why do you say that?

A. I don't have no reason why.

Q. Could you hear what they were saying?

A. No.

Q. What took place?

A. Well one fellow, I don't know, hauled something out of his pocket anyway - maybe - I don't know what it was. He drove it towards the left side of the other fellow's stomach.

30 Q. What took place, what then?

A. Fellow keeled over and I ran.

Q. You ran from the scene?

A. Yes.

Q. Can you describe these two men, what they were wearing?

A. The fellow that had keeled over, he had a dark jacket and pants and that on. The other fellow had, I thought it was a yellow shirt at first but after a while he caught up to me and it was a yellow jacket.

40 X Q. Tell me, sir, before you ran from the scene did you recognize either of these two gentlemen?

A. No sir.

Q. Then what did you do?

A. I ran down the tracks and cut across the path right onto - I don't know the name of the street ... towards bus terminal and I saw a fellow running towards me. I turned around and started to walk up the other way. He caught up to me and by

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that time I recognized him and it was Marshall - Marshall fellow.;

Q. Donald Marshall?

A. Donald Marshall.

Q. That's the accused in this case here. Do you see him in court here today?

A. Yes.

Q. Would you point him out ... (Then the question -)

Q. Whereabouts did he catch up to you?

10 A. I guess it was about two houses down, maybe three.

Q. Can you point out on exhibit 5 where he met you on Byng Avenue?

A. Right there.

Q. Around the area in which is noted what?

A. Red house, Mattson?

Q. The area of the house shown as Mr. Mattson's on Exhibit 5, now what took place there, sir?

20 A. He caught up to me and I stopped and waited. He said, 'Look what they did to me.' He showed me his arm. Had a cut on his arm and I said, 'Who' and he told me there was two fellows over the park. By that time another couple, like two girls and two boys came along and he stopped them and asked them for their help, you know. They said, 'What could we do to help?' and the girl gave him a handkerchief to put over his arm. He showed his arm and it was bleeding. So they kept on going. A car come along and he flagged that down-

Q. Who flagged it down?

A. Marshall. And we got in the car and drove over to where the fellow was at.

Q. Where what fellow was at?

30 A. Over - the body on Crescent Street, I guess, and the fellow was at Crescent Street.

Q. Was this where you had seen the action you had described earlier in your evidence?

A. Yes sir.

Q. About the two men that were there and then one man keeling over and so on, this area in which this took place?

A. Yes sir.

Q. Were there any street lights in the area?

A. There might have been one or two. I think at least one, as far as I know of.

40 X Q. Tell me, did you recognize Mr. Marshall as being the man- ...

(That was objected to by Mr. Rosenblum)

Q. You say you recognized Donald Marshall on Byng Avenue when he came up and talked to you?

A. Yes.

Q. What was he wearing?

A. Yellow ...

Q. When Marshall caught up to you on Byng Avenue - I'm sorry, did you give us what he said? 'Look what they did to me' - did

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- he say anything else?
- A. He said; that his buddy was over at the park with a knife in his stomach.
- Q. Then you say, sir, that Marshall flagged down a car and you went where?
- A. Over to Crescent Street on the other side of the park.
- Q. Back to Crescent Street?
- A. Yes.
- Q. Is this in the area in which you marked an "X" on exhibit 5?
- 10 A. Yes.
- Q. What did you find there?
- A. There was a fellow keeled over on the street. He was laying down on the street. It was on this here street on the side where the tracks was at.
- Q. Tell me, how long would this be after you saw the man keel over that you mentioned, before you ran from the scene? How much time would have passed?
- A. About ten minutes, fifteen minutes.
- Q. What did you do?
- 20 A. I got out of the car, ran over to where the fellow was lying on the ground and jumped down beside him.
- Q. Did you recognize that man?
- A. No sir.
- Q. You didn't know him before?
- A. No.
- Q. What took place?
- A. Well Donald Marshall got out of the car and come over near the body and at that time, he stood there for a minute; another fellow came over - I don't know if he or the other fellow went up and called the ambulance -
- 30 Q. Where did Marshall go when he came back? Did he go near the body?
- A. No.
- Q. Where did he stand?
- A. He stood behind the body for a minute and then he flagged a cop car down. ..."

It was at that point that you gentlemen were excluded. Later on, before you, Chant on answer to a question from me, said, this time it is according to my own notes - remember you have to take your recollection if what I have noted in my notes is different from

30 your recollection - according to my notes, Maynard Chant said, "the clothing worn by the accused whom I saw and to whom I talked after the incident on Prince Street was the same clothing as that worn by the man whom I saw pulling out a long shiny object which I thought was a knife."

Now you will remember, Mr. Foreman, that Maynard Chant said before you when he was talking about the fellow who hauled something out of his pocket - "maybe, I don't know what it was" - he said, "I don't know what it was." Because of that, the Crown counsel, Mr. MacNeil, because of that and some other answers that he gave, Crown Counsel requested that Maynard Chant be declared adverse and that he, Crown Counsel, be given the right to cross-examine. I will read you s.9(1) of the Canada Evidence Act -

10 "9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such a statement."

20 I ruled that Mr. Chant was adverse and I permitted the Crown to cross-examine him in the case. He was questioned on what he had said in the Court below and I will just refer you to that. He was questioned,

"Q. Tell me, what did you see take place?

A. The only thing I saw - I saw them talking. I guess they were using kind of profane language. Donald said something to the other fellow and the other fellow said something back to Donald and I saw Donald haul a knife out of his pocket.

30 X Q. That's Donald Junior Marshall who you see in court here today. Would you point him out to the court, please?

Witness points to the accused.

You saw him what?

A. Haul a knife out of his pocket.

Q. What if anything did he do with the knife?

A. He drove it into the stomach of the other fellow."

Now I should read you also what should be the instruction of the judge to the jury in such a case and such a situation. The word adverse - I had to find him adverse - means hostile, not simply unfavourable. Once a witness is declared hostile and cross-examined upon a previous statement, the jury should be instructed - which I

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am doing to you - that they are only to consider the previous statement in relation to the witness's credibility and not as relevant to the proof of any fact in the case, unless adopted - unless adopted. In other words, you ask a witness - the witness says something today and you draw to his attention that he made a statement that was inconsistent with what he is saying today, and he agrees, he acknowledges that he made an inconsistent statement, you only look at that previous statement to determine whether or not this witness is a credible witness. You do not accept the statement that he made previously

10 as being the truth. You look at it for the purpose of deciding whether or not such a fellow can be believed, a fellow who says something one day and something else the next day. But the law is too, that you can accept what he said before if it is adopted by him. Now my recollection is, and you will go by your recollection, not mine; my recollection is that when Mr. MacNeil was cross-examining him and reading from the prior testimony, he would ask him a question, "did you say such and such," and the witness said, "yes." "Is it true," and the witness said "yes," and the same right along. Now that's my

20 recollection. You will, of course, take your recollection of that question and answer. My recollection is that he adopted here before you the previous statements that he had made in the court below. But the main attack on Mr. Chant's testimony by the Defence is two-fold. First of all, he failed to tell the police at the time of the incident what he told the court here. He failed to tell it that night. Secondly, he lied to the police and he said that in cross-examination according to my notes. He said that, "They, the police didn't tell me what to say." This was on cross-examination of Maynard Chant. "I told them the untrue story Sunday afternoon. I told them the true story afterwards." I think the criticism strictly speaking is justified.

30 Strictly speaking, it's justified. It's a fair criticism to make, that he failed to tell the police at that particular time when he saw - when the police came, he didn't say, "There's your man who did this thing." He didn't say it there at the scene. He didn't say

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it at the hospital. He didn't say it at the police station. He didn't say it later. How much more credible would have been his story if indeed he had told that story at the time it happened. And he lied to the police for a while. He said they didn't coerce him into telling the story. He later told them the true story. Mr. Rosenblum says, "you can't believe a thing that this fellow says." Mr. Foreman, he says you can't believe - the Defence urges you to disregard the evidence of Maynard Chant, because of his inconsistencies and because of the fact that he lied and he didn't tell the story
10 at the time.

Mr. MacNeil, on the other hand, urges you to accept his story completely as finally told. Well I told you before that it is up to you to assess the credibility of every witness. You don't have to believe everything a witness said. You can believe a part; you can believe some; you can reject - you can disregard the whole of that witness's testimony. It is up to you to determine the credibility of the witness and, of course, in this case you will have to be, in my opinion, I would instruct you, to be most careful of the evidence. You are looking at his evidence and you have to be most
20 careful. But in assessing his evidence, Mr. Foreman and gentlemen, you will keep in mind the circumstances in which this boy came to be there that night. He had been to a church meeting in the Pier I think. He missed his ride. He came over town to try to get a bus to go to Louisbourg, his home, and he was too late for the bus. So he started to walk from the bus depot, down in this direction, presumably to hitch-hike a drive to his home in Louisbourg. Then he becomes involved, becomes a witness to a very serious matter - becomes a witness to a very serious matter. In discussing his testimony, you will ask yourselves, did Maynard Chant exhibit the tendency that
30 as reasonable people you might feel many people would have of desperately not wishing to become involved in a very serious matter. You will keep in mind the age of this boy. You will ask yourselves what possible motive, what motive, would Maynard Chant have, in telling

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the story implicating the accused, Donald Marshall. It seems to me - now, that's my opinion and I caution you; you do not have to accept my opinion; you do not have to accept my opinion. In my opinion there is not the slightest suggestion in this case that Maynard Chant was in collusion with John Pratico, that they acted in cahoots, together, to concoct a story. There's not the slightest suggestion that these two people were anywhere near one another prior to the events of that night or around that time up to the time when Chant saw Pratico, and that afterwards they got together to

10 tell a story implicating the accused, Donald Marshall, Jr. He says that he saw Marshall and this other man arguing. Pratico said that they were arguing. He said, what he said here first, that he saw him haul out something; later he acknowledged it was a knife or as he put it, "he hauled out something which I thought was a knife, something shiny." Pratico said the same thing. Is he a liar? Or is there some consistency in his story which in spite of the events which were properly laid before you, he was declared adverse -

is there something there which can lead you to consider that he is a credible witness. It is up to you, gentlemen. I am just putting

20 the picture before you.

Now we come to John L. Pratico. And again, I read from the official record. Again in the direct examination -

"Q. Do you know Donald Marshall Jr.?"

A. Yes sir.

Q. Do you see him here in court today?

A. Yes.

Q. Would you point him out to the court, please. Let the record indicate the witness points to the accused. Did you see him on the 28th day of May, 1971?

30 A. Yes.

Q. Where?

A. By Wentworth Park.

Q. And where did you first see him that evening?

A. Up by St. Joseph's Hall.

Q. Up by St. Joseph's Hall?

A. Around that area.

Q. Who was with him?

A. Sandy Seale.

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- Q. Did you know Sandy Seale?
 A. Yes, I did.
- Q. Tell me, Mr. Pratico, what did you do when you joined up with Seale and Donald Marshall Jr.?
 A. Walked down the road as far as, like around the park.
- Q. Do you know the streets in the city of Sydney?
 A. Yes.
- Q. There's a drugstore there on what corner?
 A. Corner George and Argyle.
- 10 Q. George and Argyle. Tell me, sir, what took place there if anything
 A. They went down in the park. I went the other way.
 Q. Which way did you go?
 A. Argyle to Crescent.
 Q. You went up Argyle Street to Crescent Street?
 A. Yes sir.
 Q. Then where did you go?
 A. I went over Crescent, down Crescent Street, as far as the railway tracks, there on the railway tracks and went up behind a bush and I stayed there and I went and sat down in a squat position, kind of behind the bushes where I was sitting.
- 20 Q. What time of the day or night would this be?
 A. I wouldn't know.
 Q. I beg your pardon.
 A. I wouldn't know. What I'm thinking, it would be 11:30, quarter to twelve. I wouldn't know for sure.
 Q. What were you doing behind the bush?
 A. Drinking.
 Q. Tell me, sir, what did you observe if anything?
 A. Well soon as I observed Donald Marshall and Seale talking, it
- 30 seemed like they were arguing -
 (I told him, "I can't hear you" and he repeated it.
 "It seemed like they were arguing.") By Mr. MacNeil -
 Q. Where was this?
 (You understand this is all Mr. MacNeil's questioning. This is direct examination.)
 A. On Crescent Street.
 Q. I'll show you plan, exhibit No. 5. Are you familiar with this plan?
 A. Yes.
- 40 Q. Would you point out please where on the exhibit 5 that you saw the two gentlemen?
 A. There ...
 Q. You'll have to speak up loud now.
 A. This would be the drugstore here-
 Q. Louder, please?
 A. I went down this way here.
 Q. Down Argyle Street?
 A. Down Argyle to Crescent and come up here and stopped around here.

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Q. Stopped in the area marked "X" on the plan?

A. In that area.

Q. Stopped in the area marked "X" on the plan. (Plan shown to the jury.) Tell me, before this evening did you know Donald Marshall?

A. Yes.

Q. How long did you know him?

A. Known him ever since last summer.

Q. Did you know Sandy Seale?

10 A. Yes sir.

Q. How long did you know Sandy Seale?

A. A couple of years.

Q. When you got behind the bush you say you were at in the park there, that you pointed out at approximately the point marked "X" on the plan, what did you observe if anything?

A. I seen Sandy Seale and Donald Marshall talking, more or less seemed like they were arguing.

Q. Did you recognize them at that time?

A. Yes.

20 Q. Were there any street lights in that area?

(There was no audible response.)

Q. Take your hand down.

A. Yes sir.

Q. And you could recognize them at that time?

A. Yes.

Q. What if anything did you see them do?

A. Well they stood there for a while talking and arguing and then Marshall's hand came out, his right hand come out like this-

30 Q. What do you mean, out this way?

A. Come out like that you know and plunged something into Seale's like it was shiny and I-

Q. Pardon me. You're confusing me. The hand came out of his pocket and you said something about shiny. Now how does that connect in there?

A. Well it looked like a shiny object. Come out this way, you know.

Q. What did he do with the shiny object?

A. Plunged it towards Seale's stomach.

40 Q. Into whose stomach?

A. Seale's.

Q. What did Seale do?

A. He fell. And that's the last I seen.

Q. What did you do?

A. I started running. I run up Bentinck Street."

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Now in cross-examination and this time, again according to my notes - you remember, according to my notes - that's my notes - you take your own recollection; you do not have to go by my notes - according to my notes, Pratico said in cross-examination, "Only two I noticed were Seale and Marshall. Seale was facing me. Marshall facing the other direction. They were standing at arm's length."

Now Mr. Foreman, the Defence understandably attacks Mr. Pratico's evidence because of his drinking which he related, the extent of which he related to you that night and because of the
 10 fact that he, Pratico, told other people that Donald Marshall did not stab Sandy Seale. You are pretty well aware now from what was brought before you of the incident that occurred outside here in this very court house. You saw John L. Pratico on the stand. You heard his testimony and you saw his demeanour. And as I said before and repeat, it is up to you, you are the judges of the fact and you alone must decide the credibility of the witnesses. I may say that he was a nervous witness. That's my opinion. You don't have to accept that. He was a nervous witness. There's no doubt about that in my mind. And he explained why at times he had told the story that
 20 Donald Marshall did not stab Sandy Seale. His explanation was, "I was scared of my life; I was scared of my life." He had spoken to a man by name of Christmas he told you. He had spoken to a man by name of Paul - Artie or Arnie, I don't know; I've just forgotten, Artie Paul. He spoke to a woman too but he did say that there was nothing as far as this woman was concerned. He had spoken to Christmas to Artie Paul and the day of the incident, he spoke to Donald Marshall Sr., the father of the accused, after which he approached Mr. Khattar one of the defense counsel who very properly and correctly in
 30 accordance with the best tradition, would not talk to him unless there was somebody there as a witness. He told Mr. Khattar, brought the sheriff out, that Donald Marshall did not stab Sandy Seale. Why did he tell that story? He said, "I was scared, scared of my life." "I was scared, scared of my life." That's what a witness tells you here in this court. He drank that night, disgracefully - drank

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disgracefully. It certainly is a sad commentary on the authorities in this community that a young man of that age would be able to arrange to have liquor from the liquor store or wherever he got it. He drank wine and beer and whatever else he could get his hands on. In determining his credibility, however, you must ask yourselves - you will ask yourselves, and you are the judges, as you will in assessing the evidence of Maynard Chant, what motive - what possible motive could this young man, Pratico, have to put the finger of guilt on the accused, Marshall. What motive would he have? What motive 10 would Maynard Chant have to say what he said here in court to you that Donald Marshall was the one who stabbed Sandy Seale? He was asked for example, "Where did you see Marshall first that evening?" He said, "Up at St. Joseph's Hall." The accused - and I will come to the accused's testimony later - read you his testimony too - the accused said he was not in the vicinity of St. Joseph's Hall. John L. Pratico said, "I saw him first that evening up by St. Joseph's Hall." Who was with him? Sandy Seale! The accused said Sandy Seale was with him. Later Pratico said that he noticed only the two and they were arguing. Chant said the same thing, the two, and they were 20 arguing.

At one time, and this is my recollection and you need not take it; you will rely on your own - my impression is that Pratico said at one time that Seale had his fists up. They were arguing and Seale had his fists up. That's the impression I got. I think it's right but you will rely upon your own.

Now Mr. Foreman, the defence in this case is not self-defence. This is not a case of self-defence. This is a complete denial. The defence is, I didn't do it - complete denial! Not self-defence but even if it were self-defence, I would have to 30 instruct you that if that were the evidence, the late Mr. Seale put up his fists, then to strike him with an instrument and stab him was something that would go far, far beyond the right of self-defence. That sort of defence would not be commensurate with the

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other man's act. That issue does not arise here because as I said, the defence here is a complete denial. Pratico said that they were arguing. Chant said they were arguing. Pratico told of the shiny object in Marshall's right hand which he plunged into Seale's stomach. The other man said the same thing. What motive would lead this young man to concoct a story, a dreadful story if untrue, to place the blame of a heinous crime on the shoulders of an innocent man? What possible motive would Pratico have to say that Donald Marshall stabbed Sandy Seale? He had been drinking.

10 In assessing his evidence you will have to ask yourselves, is this a drunken recital or is it a recital of a drunken man, or is there a consistency which appears between the story of two eye-witnesses that night to this tragic event, eye-witnesses as to whom there is no evidence by the Crown that they got together, were in collusion to concoct the story.

I said to you before that that's the main case of the Crown. They also have Patricia Ann Harris. Patricia Ann Harris, a young girl; she said there was someone with the accused. Remember, she is the young lady who was with her companion, Terry Gushue and
 20 coming from the dance. They stopped for a smoke in the bandshell. She says there was someone with him, with the accused. "I saw someone else there." One person! "I don't know who that person was." She says that Junior, the accused, held her hand that night. By the way, that's according to my notes. Again I caution you, you don't have to take my version. You will decide and again from my notes, and again I caution you, according to my notes, Terrence
 30 Gushue said that it was about ten to eleven when they were on Crescent Street going towards Kings Road where Miss Harris lives. They met Junior Marshall and he borrowed a match; Junior spoke to Patricia for a moment. According to my notes, Gushue said in cross-examination that he saw him, the accused, by the Green apartment building. This was on Crescent Street. "I saw just one with him", he said. Then he was pressed in cross-examination, properly checked, and he said,

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"I thought, there was only one" and he ends up, "I think there was only one." Patricia Harris says there were two people there. Gushus says there were two people. Maynard Chant says there were two and so does John Pratico.

That in essence is the case for the Crown, Mr. Foreman and gentlemen.

I come now to the evidence of the accused. I'm coming pretty close to the end. I'm not going to keep you all day, Mr. Foreman. I'm coming close to the end of my charge. Once again I
 10 have the direct examination, word for word, from the record as given here in court. He was questioned by defence counsel -

"Q. ...Had you been drinking on May 28 while you were at the home of Tobin's?

(I have left out a few preliminary questions.)

A. No.

Q. Where did you go after you left Tobin's home?

A. Down Wentworth Park.

Q. Were there people in the park?

A. Yeah.

20 Q. Did you meet anybody in the park?

A. Sandy Seale.

Q. Did you have any argument with him?

...

Q. What happened when you met Sandy Seale?

A. We were talking for a couple of minutes and Patterson came down-

Q. You met a fellow by name of Patterson?

A. Yes.

Q. What condition was he in?

30 A. Drunk.

Q. What happened then when you met Patterson?

A. Sat him on the ground. And went up to the bridge.

Q. Who went up to the bridge?

A. Me and Seale.

Q. You and Seale walked up to the bridge?

A. Two men called us up to Crescent Street.

Q. Two men what?

A. Called us up Crescent Street.

Q. What happened when you met these two men up there?

40 A. Bummed us for a cigarette.

Q. Pardon.

A. A Smoke.

Q. What about?

A. Asked for a cigarette and a light.

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- Q. When they asked you for a cigarette and the light, what did you do?
- A. I gave it to them.
- Q. Go ahead.
- A. I asked them where they were from. And they said Manitoba. Told them they looked like priests.
- Q. You told them what?
- A. They looked like priests.
- Q. Why did you make that remark to them?
- 10 A. Looked like their dress.
- Q. How were they dressed?
- A. Long coat.
- Q. What colour?
- A. Blue.
- Q. What religion are you yourself?
- A. Catholic.
- Q. So when you asked them if they were priests did you get an answer?
- A. Yes.
- Q. What did you say to these men?
- 20 A. They looked like priests.
- Q. Did you get an answer to that?
- A. The young guy, the younger one said, 'We are'.
- Q. Go ahead.
- A. They asked me if there were any women in the park. I told them there were lots of them down the park. And any bootleggers - I told them, I don't know.
- Q. Take your hand down, Donnie and go ahead.
- A. He told us, we don't like niggers and Indians.
- Q. I didn't hear you.
- 30 A. We don't like niggers and Indians. He took a knife out of his pocket.
- Q. Who did?
- A. The older fellow.
- Q. What did he do?
- A. Took a knife out of his pocket and drove it into Seale.
- Q. What part of Seale?
- A. The side here.
- Q. Are you referring to the stomach?
- A. Yes.
- 40 Q. And then?
- A. Swung around me, and I moved my left arm and hit my left arm.
- Q. Hit your left arm?
- A. Yes.
- Q. Roll up your sleeve -

(And he did and you recall he showed the scar to you gentlemen of the jury.)

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"Q. After ^{that} happened, what did you do?

A. Ran for help. ..."

I recall, I don't know whether it was - I think you can take it that Mr. Rosenblum asked him, "Did you lay a hand - did you do anything to Sandy Seale that night" and the answer was, "No."

Now gentlemen, you have to give very careful consideration to the story of the accused. I'm sure you will. As was his absolute right, he has gone on the stand and has given his version of the events that took place on that fateful night. Now contrary to what
 10 Pratico said, he said he was not in the vicinity of St. Joseph's Hall. And although he was with Mr. Seale, he had no dispute with him - those are the words I think - and he did not lay a hand on him. I repeat, he had no dispute with him and he did not lay a hand on him. And he told you how Seale came to get the injuries that he did receive. And I remind you, Mr. Foreman, that although the accused was subjected to a very vigorous and rigorous cross-examination, he adhered to his story that he told throughout. Now if you believe the version of the events that was told by Donald Marshall Jr., then it goes without saying that you must acquit him of this charge. Having gone on the
 20 stand he has become another witness in this case. You have the right to determine the credibility of him as a witness as you have the right to determine the credibility of any other witness. But you will bear in mind, Mr. Foreman - and I repeat, you will bear in mind - that Donald Marshall does not have to convince you of his innocence. He does not have to convince you of his innocence. It is the Crown, as I said over and over again, that must prove his guilt beyond a reasonable doubt. He does not have to convince you of his innocence!

The Crown, of course, understandably, has attacked this story.
 30 There was some considerable discussion among counsel as to the nature of the wound that he had on his left arm, the depth of it, whether there was bleeding. Mrs. Davis said there was no bleeding, it's true. The doctor at the time - but Maynard Chant said that

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at first there was no bleeding but later there was bleeding. You saw the mark on his arm there. It's a pretty prominent mark even today after a number of months. In assessing his evidence, it seems to me - this is my opinion and you do not have to take my opinion - you have to look at it in two ways, it seems to me. On the one hand you keep in mind the fact that he stood up, as I said before, to a very rigorous cross-examination by a very capable crown prosecutor. You will bear in mind that he at the time showed Maynard Chant, "Look what they did to me." It was then and there at that time he told

10 Chant what was done to him. At that time he managed to stop a car and got into a car and went back to Crescent Street. I think it was Maynard Chant - your recollection would be better - who said that it was he, Donald Marshall, the accused, who flagged down a police car. And it was Donald Marshall who went to the hospital and to the police station with the police. I think you have to ask yourselves on the one hand, is that the action of a man who has just committed a crime, who will flag down a police car, who will go with the police, who will do the things that he did and who maintains the consistency of his story. Keep in mind, as I said, that he

20 does not have to prove his innocence.

On the other hand, Mr. Foreman, gentlemen, on the other hand - in my opinion, you will have to assess very carefully the story that he told - two strangers who he says looked like priests, because they wore long coats and blue. He asked them, he said, whether they were priests and one of them said they were and said they were from Manitoba. They asked for cigarettes, smokes; they gave him the smokes. He and Seale gave smokes to these people, or he did. Then the man, one of these men asked him if there were any women and they said yes, there were lots of them in the park. And out of the blue comes

30 this denunciation against blacks and Indians: "I don't like niggers and I don't like Indians."

Now Mr. Foreman and gentlemen, we all know that prejudice has been rampant in this world for many, many years. We hope and pray that in our country we have reached a time in the progress of

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our country, that the hatreds and the bigotries and the suspicions of the past will no longer be with us and it seems that there is great hope in the youth of the country today who mingle and get to know more and more about one another. But that there still exists discrimination and bigotry and hatred for different ethnic groups, religions - there are those who do not like the blacks, or the Indians or the Catholics or the Jews, or the Protestants, or the Greeks, and so on - but in assessing the evidence of this witness, the accused, you ask yourselves the question, it seems to me, my opinion, at that hour - at that hour - these two men, one of them comes out suddenly with this denunciation of blacks and Indians. If you come to the conclusion that yes, it could be that there might have been somebody there that night who had that prejudice in him against - as he put it - niggers and Indians, you have to go on and ask yourselves the question, why - why. Donald Marshall and Sandy Seale who met these two strangers, who gave them cigarettes, smokes, who talked to them in a friendly way, asked them where they were from - according to Mr. Marshall's, the accused, story - where they came from; told they were from Manitoba; what were they, they were priests. Why, without the slightest gesture, without the slightest verbal attack or physical gesture, without the slightest provocation, would one of these so-called priests take out a knife and make a murderous attack on Sandy Seale, and on the accused himself. Why, one would ask in assessing the credibility of the story that he told, keeping in mind at all times that there was no obligation on him to tell anything at any time. There is no obligation on an accused person to say anything, to prove anything. But he has gone on the stand, has given the story and you have the right to judge the credibility of the story and keeping in mind at all times that the burden - the burden - of proving that he was guilty beyond a reasonable doubt must lie upon the prosecution.

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Mr. Foreman and gentlemen, I have taken a long time in this case. I have humbly tried to discharge my duty in this proceeding. This has been a tragic event in the life of our communities here in this Island of Cape Breton, a tragedy that is beyond description. A young man in the prime of his life has been swept to eternity; a young man is on trial for that charge. We have to discharge our duty, Mr. Foreman; our duty in accordance with our oath that we have taken, you and I, before God to give to this case our fullest attention and ability, the ability that we possess. I have tried

10 humbly to discharge the onerous responsibility that rests upon the judge. I know that you will discharge yours. I know that you will discharge yours. No matter who an accused person is in this country, be he the poorest or humblest citizen or be he the richest and most powerful individual in the country, any person charged with an offence will and must be given a fair and impartial trial without any sympathy, without any misguided sentimental feeling but one that is based on the evidence and on the evidence alone and with the proper application of the law as given by the judge. The oaths you have taken, each of you, is that you will well and

20 truly try, and true deliverance make between Our Sovereign Lady the Queen and the prisoner at the bar, so help you God. Mr. Foreman and gentlemen of the jury, I am satisfied that you can be relied upon to discharge this heavy duty conscientiously and to the fullest.

(12:35 P.M. CONSTABLES SWORN)

Now from this moment on you gentlemen must remain together. Lunch will be provided you by our very capable sheriff and his assistants. You will come back to your room. You don't have to come back here. You will go directly to your room. All the exhibits will be given to you. The constables will be at your constant

30 attendance. Again, should you wish any of the evidence read over to you or played back, you will indicate, send word to me. I hope that I have covered all the legal points but if you wish me

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to touch upon any matter of law again, be free to do so, Mr. Foreman and gentlemen. Now you don't enter into any discussion with the constable. You merely say, "I wish to have something to say." You say it in court. If you want further instructions or anything you come in and ask me.

I can only apologize for the length of time but I think you will perhaps be the first to say in this serious matter, no apology from me is necessary. I want to thank you, each and every one of you, again for the care that you have given to the whole case.

10 12:40 P.M. JURY WITHDREW

THE COURT:

Mr. Rosenblum, Mr. Khattar, is there anything that I have omitted that you wish me to give to the jury?

MR. ROSENBLUM:

No, My Lord, I have no suggestions.

THE COURT:

Mr. MacNeil and Mr. Matheson?

MR. MacNEIL:

Yes, My Lord, I throw out two or three suggestions to you and
 20 one of which I think is extremely important is in weighing the
 credibility of the accused, his complete lack of explanation for
 his encounter with Miss Harris and Mr. Gushue in his direct exam-
 ination and I believe the word "black-out" is what he used in his
 defence if my recollection is right when he tried to explain it.
 And also the fact that both of these witnesses state that they
 saw him up by the Green Apartment House which is a considerable
 distance from the area in which the accused says that the stabbing
 took place. I also suggest to you that these four witnesses place
 him well up the road away from the top of the bridge there where
 30 he said the stabbing took place. I also draw to Your Lordship's
 attention to the fact that Mr. Chant said the cut wasn't bleeding
 but later on it started to bleed. Two professional people, a
 nurse and doctor who examined him, saw no signs of blood or blood
 having been coming from that wound. That's my recollection. But
 I think that is most important on the credibility of the accused

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the evidence of Miss Harris and Mr. Gushue that they saw him up the Green Apartment House and also the accused was unable to explain - didn't explain in direct-

THE COURT:

Mr. MacNeil, I think I've indicated quite clearly to the jury that there is no obligation on the accused to explain anything.

MR. MacNEIL:

Once he takes the stand, my Lord?

(10)

THE COURT:

No obligation on him to explain anything! You can't ask the jury - you cannot suggest to the jury for an instant there is any obligation on him to give any explanation-

MR. MacNEIL:

Oh no, I don't suggest that, but I say once he goes to the stand, My Lord-

THE COURT:

Yes, I know. The underlying principle is that the burden lies on you. Anything like that would raise immediately the suggestion that the court by what it said left the impression with the jury that there was something the accused had to do. I think it would be highly dangerous, something that you would not want, and I think that on the whole I have covered the Prosecution's case fairly adequately as well as, I trust, the case for the Defence.

(20)

MR. MacNEIL:

Oh, I agree with that, My Lord. I was making these suggestions only as it goes to the credibility of the accused.

THE COURT:

(30)

With all due respect, Mr. MacNeil, you will of course undoubtedly have any right, should you have cause for it, to take issue with anything that I said, at a later time. For the time being I am satisfied in my humble opinion that I have endeavoured to do justice between the two sides.

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MR. MacNEIL:

Oh, no question about that.

THE COURT:

That I would ask you gentlemen to agree unreservedly would be much, much, to be hoped for. But I am satisfied that based upon my experience on the Bench and the cases I have read that the matter has been properly decided. I may of course some day find to my great surprise that it wasn't so.

(10) 12:45 P.M. COURT RECESSED

4:35 P.M. JURY POLLED, ALL PRESENT

THE CLERK:

Gentlemen, have you agreed upon your verdict?

FOREMAN:

Yes.

THE CLERK:

Do you find the Accused, Donald Marshall Jr., guilty or not guilty?

FOREMAN:

Guilty.

(20) THE CLERK:

Gentlemen of the Jury, hearken to your verdict as the court hath recorded it: you say you find the Accused, Donald Marshall Jr. guilty, as one says, so you all say?

JURY:

(Indicate affirmatively.)

THE COURT:

(30) Mr. Foreman, gentlemen of the jury, I want to express my sincere thanks to you as I did earlier before you went out, for the care and the concern and the attention that you gave to this case from the beginning until this morning. It has been a very serious case. It has been one that has taxed your every moment's attention. I am expressing on behalf of the Court to you, Mr. Foreman and gentlemen, my appreciation for your dedicated discharge of your duty. You may sit here for a few moments because, Mr. Crown Prosecutor, I propose to sentence the accused.

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THE COURT:

In the light of the statute, it is my intention to proceed with the sentencing of the accused at this time.

MR. MacNEIL:

As Your Lordship pleases.

THE COURT:

Mr. Donald Marshall, have you anything to say before the sentence of the Court is imposed upon you?

(10) MR. MARSHALL:

No.

(DEFENCE AND CROWN COUNSEL INDICATE THEY HAVE NO COMMENTS)

THE COURT:

Gentlemen of the Bar, the sentence of the Court, of course, is prescribed by the statute. There is no discretion in this matter left with the Court on the finding of the verdict. Before I do pass sentence, I would merely wish to say to counsel for the defence particularly that they have discharged their responsibility to the accused and have represented him in as capable a manner as I have seen anywhere in the province since I have come to the Bench of Nova Scotia. He has been well and properly defended. The attitude of the Crown in this case has been equally in the best tradition of the profession of law. There is no sentence, Mr. Rosenblum and Mr. Khattar, that I can pass upon the accused which can equal the personal anguish that he must carry with him throughout his life that he has taken the life of a fellow human being. This act has brought tragedy to two families in this community. All I can hope, that out of this tragedy there will come a lesson to others that will tell people that violence, use of arms, and so forth, can only end in heartache and sorrow and tears for the one who commits the offence, for the one upon whom the offence is committed. What the future will be for the accused is not for me to speculate at this time. The institution to which I will send him will be one where his conduct in the future will be looked upon and much will depend upon himself in the years ahead.

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At this moment I can only pass the sentence which is prescribed by the statute, the Criminal Code. This I propose to do.

Mr. Marshall, will you please stand up!

The sentence of the Court is that you, Donald Marshall Jr., shall be imprisoned in Dorchester Penitentiary, in Dorchester, New Brunswick, subject to the rules and regulations of that institution for life.

MR. MacNEIL:

Thank you, My Lord.

THE COURT:

The Court will now recess while we proceed with the other case.

(4:45 P.M. NOVEMBER 5, 1971 COURT RECESSED)

C.A.

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I, Camilla Sutherland, Supreme Court Reporter, hereby certify that the transcript of evidence hereto annexed is a true and accurate transcript of the evidence given in this matter, THE QUEEN v. DONALD MARSHALL JR., recorded on the STENOMASK and transcribed by me.

C. Sutherland.....

Camilla Sutherland
Official Reporter

HALIFAX, N.S.

DECEMBER 16, 1971

3- CANADA

PROVINCE OF NOVA SCOTIA

TO WIT:IN THE SUPREME COURTAPPEAL DIVISION - CROWN SIDEHER MAJESTY THE QUEENRESPONDENT

VERSUS

DONALD MARSHALL, JR.APPELLANT

WHEREAS I, DONALD MARSHALL, JR., was tried in the Supreme Court of Nova Scotia, Trial Division, at Sydney, Nova Scotia, on the 2nd, 3rd, 4th and 5th days of November, A.D. 1971, before His Lordship Mr. Justice J.L. Dubinsky with a Jury on the charge that I did at Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about May 28th, 1971, murder Sanford William (Sandy) Seale contrary to Section 206(2) of the Criminal Code of Canada;

AND WHEREAS I was convicted in the said Supreme Court of Nova Scotia, Trial Division, at Sydney, Nova Scotia, on the 5th day of November, A.D. 1971, before His Lordship Mr. Justice J.L. Dubinsky with a Jury on the said charge of non-capital murder, and was for the said offence sentenced on the 5th day of November, A.D. 1971, by His Lordship Mr. Justice J.L. Dubinsky to life imprisonment in the Federal Penitentiary at Dorchester, in the Province of New Brunswick;

TAKING NOTICE that I intend to appeal or in the alternative apply for leave to appeal to the Appeal Division of the Supreme Court against my conviction on the following grounds:

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1. THAT the Learned Trial Judge erred by not adequately instructing the Jury on the defence evidence;
2. THAT the Learned Trial Judge erred by his charge to the Jury in that he gave his own opinion on certain aspects of the evidence which opinion was highly prejudicial to the accused;
3. THAT the Learned Trial Judge misdirected the Jury on the meaning of "reasonable doubt";
4. THAT the evidence did not establish beyond reasonable doubt the guilt of the accused;
5. THAT the Learned Trial Judge erred in asking the Jury to draw certain inferences from evidence which was not presented;
6. THAT the Learned Trial Judge misdirected the Jury that it was their duty and his duty to look at the evidence and from that source alone to arrive at the conclusions which are required by justice and by law;
7. THAT the Learned Trial Judge misdirected the Jury in that the charge of the Learned Trial Judge was capable of being understood by the Jury as being prejudicial to the accused;
8. THAT the conviction is against the evidence, the weight of the evidence and the proper application of the evidence and is perverse;
9. THAT the address to the Jury by the Prosecuting Officer was highly inflammatory and included remarks in which he expressed his personal opinion that I was guilty of the charge on which I was being tried;
10. THAT the Learned Trial Judge erred in admitting inadmissible evidence;
11. THAT the Learned Trial Judge improperly permitted the Prosecuting Officer to cross-examine the witness, Maynard Chant, before ruling that such witness was adverse;

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12. AND such other grounds as may appear when I or my Counsel obtain a transcript of the evidence at the trial and the Judge's address to the Jury.

I desire to present my case and arguments orally through Counsel.

IF a new trial is directed, I desire that such new trial be before a Jury.

MY ADDRESS for service is c/o C.M. Rosenblum, Q.C., 197 Charlotte Street, Sydney, Nova Scotia.

DATED at Sydney, in the County of Cape Breton, Province of Nova Scotia, this 16th day of November, A.D. 1971.

Sgd. Donald Marshall, Jr.

Donald Marshall, Jr.

TO:

The Honourable The Attorney
General of Nova Scotia,
Halifax, Nova Scotia.

Daniel B. Morrison, Esq.,
The Registrar,
Supreme Court, Crown Side,
Halifax, Nova Scotia

IN THE SUPREME COURT OF NOVA SCOTIA

APPLAL DIVISION

ON APPEAL FROM

THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

DONALD MARSHALL JR.

APPELLANT

C A S E O N A P P E A L

CASE NO.

VOLUME NO.

PAGE

1971

S. C. No. 17800

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

- CROWN SIDE -

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

DONALD MARSHALL, Jr.

Appellant

HEARD

January 31, 1972, at Halifax, before
the Honourable Chief Justice McKinnon,
the Honourable Mr. Justice Coffin and
the Honourable Mr. Justice Cooper of
the Appeal Division

OPINION

September 8, 1972

COUNSEL

C. M. Rosenblum, Q.C.

Appellant

M. J. Veniot, Esq.

Respondent

non-capital murder

section 9 (1), (2), Canada Evidence Act

1971

S. C. No. 17809

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

- CROWN SIDE -

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

DONALD MARSHALL, Jr.

Appellant

OPINIONMcKINNON, C.J.N.S.:

The appellant Donald Marshall, Jr., was charged in an indictment, that he, on or about the 28th day of May, 1971, at Sydney, in the County of Cape Breton, Province of Nova Scotia, did murder Sanford William (Sandy) Seale, contrary to section 206 (2) of the Criminal Code [now 218 (2)].

After a trial by jury, presided over by Dubinsky, Jr., the appellant was found guilty and sentenced to serve a term of life imprisonment in Dorchester Penitentiary.

The grounds of appeal relied on by the appellant may be summarized as follows:

(1) that the learned trial Judge erred in law in not adequately instructing the jury on the defence evidence, and in expressing opinions which were highly prejudicial to the accused;

Pratico behind the bush. Pratico appeared to be watching something, and Chant decided to see what had drawn Pratico's attention.

They saw two men standing together and arguing in loud tones. One of the men, whom Pratico identified as the appellant Marshall, reached in his pocket and pulled out a "long shiny object" which he plunged into the "stomach" of the other, whom Pratico identified as Seale. Seale then collapsed.

Both Pratico and Chant fled the scene, but not together. In a nearby area, Chant was approached by the appellant Marshall who said, "look what they did to me" and displayed a cut on the inner part of his left forearm. M. D. Mattson, who lives at 103 Byng Avenue, overheard the conversation referred to, and called the police.

The appellant Marshall flagged down a car, and he and Chant had the operator drive to the spot where Seale was lying on the pavement of Crescent Street. Seale was taken to the Sydney City Hospital where he died as a result of ^{his} injuries on the following day, despite two surgical operations and massive blood transfusions.

According to the evidence of the appellant Marshall, he and Seale, who was a friend, were standing on the footbridge which spans two creeks in the park, when they were called to by two men who were on Crescent Street, and who wanted cigarettes or matches. The appellant and Seale walked up to the street and were met by two men dressed in long blue coats who identified themselves as priests from Manitoba. The strangers wanted to know if there were girls in

(2) that the learned trial Judge misdirected the jury on the meaning of reasonable doubt; that the evidence did not establish guilt beyond a reasonable doubt, the conviction was against the weight of evidence and was perverse;

(3) ground 3 relates to the evidence of the witnesses Pratico and Chant; also that the trial Judge did not make proper inquiry as to whether or not they understood the nature of an oath;

(4) that the learned trial Judge permitted the prosecuting officer to cross-examine the witness, Maynard Chant, before ruling that he was adverse; that the trial Judge permitted the prosecuting officer, in the absence of the jury, while the witness Chant was on the witness stand, to read the evidence he gave at the preliminary hearing, thereby conditioning him for the evidence he would give before the jury;

(5) that the trial Judge erred in instructing the jury they did not have to consider the question of manslaughter.

Briefly, the facts are that one, John Pratico, aged 16, was in the company of the deceased Seale and the appellant Marshall a very short time before Seale was stabbed. Pratico left the two men and stationed himself behind a bush in Wentworth Park, which is adjacent to Crescent Street, in Sydney, where he proceeded to consume a bottle of beer; while behind this bush, he observed Marshall and Seale.

Maynard Chant, aged 15, was in Wentworth Park at the same time, but not in the company of Pratico. Chant had attended church in Sydney and was attempting to get home to Louisbourg after having missed his bus. He was taking a shortcut through Wentworth Park when he noticed

"Now I intend, of course, to deal with matters of law. That has been pointed out by both counsel, but I am also going to deal, to some extent, with the facts in this very important case. In a very well known murder trial some nineteen years ago, Azoulay v. The Queen, (1952) 2 S.C.R. 495, Mr. Justice Tzschereau, who later became the Chief Justice of Canada, pointed out that in a jury trial the presiding judge must - note he said 'must' - except in very rare cases where it would be needless to do so, review the substantial parts of the evidence. He must present to the jury the case for the prosecution and the theory of the defence so that they, the jury, may appreciate the more the value and the effect of the evidence and the law that is to be applied to the facts as they, the jury, find them. It is not sufficient for the whole evidence to be left simply to the jury by the judge and say, 'There, you have heard the facts; go ahead and decide upon them and render your verdict.' The Azoulay case has been followed by many other cases in the past nineteen years in Canada. What I am getting at, Mr. Foreman, is that the pivotal points on which the prosecution bases its case and the pivotal points on which the defence stands must be clearly presented to the jury's mind by the judge."

A careful reading of the charge convinces me that the trial judge followed closely the principles laid down in the Azoulay case.

The only issue before the Court at trial in relation to the charge against the appellant was whether or not he had committed the murder with which he was charged. His sole defence was a denial of that act, and the theory of the defence was based on his own evidence that the murder was committed by one of two strangers, who claimed to be priests from Manitoba.

the park and asked where they could find a bootlegger. According to the appellant, the older of the two men then made an unprovoked attack with a knife on Seale and the appellant, which resulted in Seale's fatal injury and the appellant being slashed on the arm.

According to the appellant Marshall, at the time of the attack, the man with the knife said that he did not like niggers or Indians. The appellant is an Indian while the deceased was a negro. The appellant said that he then fled, being in fear of his life.

Unexplained by the appellant was the meeting on Crescent Street between himself and two young people returning from a dance at the time when, according to the evidence of the appellant, the two strangers were present with him and Seale. Patricia Harris and Terrance Gushue, on their way home from the dance stopped and talked with the appellant on Crescent Street, Gushue having asked him for a light for his cigarette. Both Miss Harris and Gushue said they recognized the appellant, and there was only one other person in the vicinity, whom they could not recognize and were unable to tell whether the person was a man or a woman.

It is contended by counsel for the appellant that the whole tenor of the trial Judge's address to the jury was most favourable to the evidence presented by the Crown, and that he dealt very briefly with the evidence for the appellant, and indicated disbelief of this evidence.

Shortly after commencing his address to the jury, the learned trial Judge observed as follows:

In reviewing the evidence for the defence, the learned trial Judge read fairly extensively from the testimony of the appellant, and commented on that evidence as follows:

"Now, gentlemen, you have to give very careful consideration to the story of the accused. I'm sure you will. As was his absolute right, he has gone on the stand and has given his version of the events that took place on that fateful night. Now contrary to what Pratico said, he said he was not in the vicinity of St. Joseph's Hall. And although he was with Mr. Seale, he had no dispute with him — those are the words I think — and he did not lay a hand on him. I repeat, he had no dispute with him and he did not lay a hand on him. And he told you how Seale came to get the injuries that he did receive. And I remind you, Mr. Foreman, that although the accused was subjected to a very vigorous and rigorous cross-examination, he adhered to his story that he told throughout. Now if you believe the version of the events that was told by Donald Marshall Jr., then it goes without saying that you must acquit him of this charge. Having gone on the stand he has become another witness in this case. You have the right to determine the credibility of him as a witness as you have the right to determine the credibility of any other witness. But you will bear in mind, Mr. Foreman — and I repeat, you will bear in mind — that Donald Marshall does not have to convince you of his innocence. He does not have to convince you of his innocence. It is the Crown, as I said over and over again, that must prove his guilt beyond a reasonable doubt. He does not have to convince you of his innocence!

The Crown, of course, understandably, has attacked this story. There was some considerable discussion among counsel as to the nature of the wound that he had on his left arm, the depth of it, whether there was bleeding. Mrs. Davis said there was no bleeding, it's true. The doctor at the time —

but Maynard Chant said that at first there was no bleeding but later there was bleeding. You saw the mark on his arm there. It's a pretty prominent mark even today after a number of months. In assessing his evidence, it seems to me - this is my opinion and you do not have to take my opinion - you have to look at it in two ways, it seems to me. On the one hand you keep in mind the fact that he stood up, as I said before, to a very rigorous cross-examination by a very capable crown prosecutor. You will bear in mind that he at the time showed Maynard Chant, 'Look what they did to me.' It was then and there at that time he told Chant what was done to him. At that time he managed to stop a car and got into a car and went back to Crescent Street. I think it was Maynard Chant - your recollection would be better - who said that it was he, Donald Marshall, the accused, who flagged down a police car. And it was Donald Marshall who went to the hospital and to the police station with the police. I think you have to ask yourselves on the one hand, is that the action of a man who has just committed a crime, who will flag down a police car, who will go with the police, who will do the things that he did and who maintains the consistency of his story. Keep in mind, as I said, that he does not have to prove his innocence.

On the other hand, Mr. Foreman, gentlemen, on the other hand - in my opinion, you will have to assess very carefully the story that he told - two strangers who he says looked like priests, because they wore long coats and blue. He asked them, he said, whether they were priests and one of them said they were and said they were from Manitoba. They asked for cigarettes, smokes; they gave him the smokes. He and Seale gave smokes to these people, or he did. Then the man, one of these men asked him if there were any women and they said yes, there were lots of them in the park. And out of the blue comes this denunciation against blacks and Indians: 'I don't like niggers and I don't like Indians.' "

The trial Judge then spoke of the bigotry and hatred for different ethnic groups which still exists, and said:

" . . . but in assessing the evidence of this witness, the accused, you ask yourselves the question, it seems to me, my opinion, at that hour - at that hour - these two men, one of them comes out suddenly with ^{this} denunciation of blacks and Indians. If you come to the conclusion that yes, it could be that there might have been somebody there that night who had that prejudice in him against - as he put it - niggers and Indians, you have to go on and ask yourselves the question, why - why. Donald Marshall and Sandy Seale who met these two strangers, who gave them cigarettes, smokes, who talked to them in a friendly way, asked them where they were from - according to Mr. Marshall's, the accused, story - where they came from; told they were from Manitoba; what were they, they were priests. Why, without the slightest gesture, without the slightest verbal attack or physical gesture, without the slightest provocation, would one of these so-called priests take out a knife and make a murderous attack on Sandy Seale, and on the accused himself. Why, one would ask in assessing the credibility of the story that he told, keeping in mind at all times that there was was no obligation on him to tell anything at any time. There is no obligation on an accused person to say anything, to prove anything. But he has gone on the stand, has given the story and you have the right to judge the credibility of the story and keeping in mind at all times that the burden - the burden - of proving that he was guilty beyond a reasonable doubt must lie upon the prosecution."

In my opinion, the foregoing passages afford an adequate answer to the ground of objection that the learned trial Judge did not adequately instruct the jury on the defence evidence and the theory of

the defence. I am satisfied that he did so adequately, fairly and in a manner that was not capable of being understood by the jury as prejudicial to the accused.

The defence at trial, along with a denial of commission of the act, involved an attack on the testimony and credibility of the two eyewitnesses, Pratico and Chant. Counsel for the appellant took exception to the address of the trial Judge in respect to the following:

(a) that he emphasized repeatedly that Pratico and Chant were not in collusion with each other and they could not possibly have any motive for trumping up a story to implicate the appellant;

(b) that the trial Judge did not make mention in his address to the jury that the appellant was left handed, notwithstanding the fact that Pratico stated that the appellant had stabbed Seale with his right hand;

(c) that the trial Judge stated, "I think the criticism strictly speaking is justified", in referring to the attack on the credibility of Maynard Chant, indicating that the cross-examination of Chant did not weaken his testimony to any appreciable extent.

With respect to there being no collusion between the witnesses Pratico and Chant, the trial Judge referred to this twice during the course of his charge.

He said (at p. 274 of the transcript):

"You will ask yourselves what possible motive, what motive, would Maynard Chant have, in telling the story implicating the accused, Donald Marshall. It seems to me - now, that's my opinion and I caution you, you do not have to accept my opinion; you do not have to accept my opinion.

In my opinion there is not the slightest suggestion in this case that Haynard Chant was in collusion with John Pratico, that they acted in cahoots, together, to concoct a story. There's not the slightest suggestion that these two people were anywhere^s near one another prior to the events of that night or around that time up to the time when Chant saw Pratico, and that afterwards they got together to tell a story implicating the accused, Donald Marshall, Jr. . . . is there something there which can lead you to consider that he is a credible witness. It is up to you, gentlemen. I am just putting the picture before you."

and at p. 280:

"Pratico said that they were arguing. Chant said they were arguing. Pratico told of the shiny object in Marshall's right hand which he plunged into Seale's stomach. The other man said the same thing. What motive would lead this young man to concoct a story, a dreadful story if untrue, to place the blame of a heinous crime on the shoulders of an innocent man? What possible motive would Pratico have to say that Donald Marshall stabbed Sandy Seale? He had been drinking. In assessing his evidence you will have to ask yourselves, is this a drunken recital or is it a recital of a drunken man, or is there a consistency which appears between the story of two eye-witnesses that night to this tragic event, eye-witnesses as to whom there is no evidence by the Crown that they got together, were in collusion to concoct the story."

It was quite proper for the trial Judge, in the circumstances, to address the above remarks to the jury. Two very important and independent eye-witnesses, with no apparent motive for collusion, and with no evidence to give the slightest support to any such suggestion,

had given to the Court mutually corroborative testimony that had a direct bearing on the very issue to be decided by the jury. It was the duty of the trial Judge to recite these facts to the jury in order to assist them in their deliberations, and as he repeatedly instructed them, the findings of fact, opinions based on facts and findings of credibility were theirs only to decide.

I am satisfied that exception cannot be taken successfully to the foregoing remarks of the learned trial Judge.

Regarding the objection that the trial Judge did not make mention to the jury the appellant was left handed, the only evidence indicating this was by the appellant himself. Whether or not he was left handed was irrelevant to the defence raised, which was a total denial of the act, and it may have confused the issue. Furthermore, under ordinary circumstances, man has effective use of both hands, whether he is right or left handed, except for such specialized tasks as writing, painting, et cetera.

As Halloran, J.A., said in the case of Rex v. Hughes et al., (1942), 78 C.C.C. 1, at pp. 15, 16:

"The jury have a right to expect from the Judge something more than a mere repetition of the evidence. They have a right to expect that his trained legal mind will employ itself in stripping the testimony of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decision, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits."

In my opinion, under the circumstances existing, the matter of the appellant's left handedness was irrelevant and did not require comment by the trial Judge.

Counsel for the appellant also objects to that part of the Judge's charge where he said, "I think the criticism strictly speaking is justified", referring to the attack on the credibility of the Crown witness, Maynard Chant, indicating that the cross-examination of Chant did not weaken his testimony to any appreciable extent.

What the trial Judge had to say in this regard is as follows:

"But the main attack on Mr. Chant's testimony by the defence is twofold. First of all, he failed to tell the police at the time of the incident what he told the court here. He failed to tell it that night. Secondly, he lied to the police and he said that in cross-examination according to my notes. He said that, 'They, the police didn't tell me what to say.' This was on cross-examination of Maynard Chant. 'I told them the untrue story Sunday afternoon. I told them the true story afterwards.' I think the criticism strictly speaking is justified. Strictly speaking, it's justified. [Emphasis added.] It's a fair criticism to make, that he failed to tell the police at that particular time when he saw — when the police came, he didn't say, 'There's your man who did this thing.' He didn't say it at the scene. He didn't say it at the hospital. He didn't say it at the police station. He didn't say it later. How much more credible would have been his story if indeed he had told that story at the time it happened. And he lied to the police for a while. He said they didn't coerce him into telling the story. He later told them the true story. Mr. Rosenblum says,

'you can't believe a thing that this fellow says'. Mr. Foreman, he says you can't believe — the Defence urges you to disregard the evidence of Maynard Chant, because of his inconsistencies and because of the fact that he lied and he didn't tell the story at the time.

Mr. MacNeil, on the other hand, urges you to accept his story completely as finally told. Well I told you before that it is up to you to assess the credibility of every witness. You don't have to believe everything a witness said. You can believe a part; you can believe some; you can reject — you can disregard the whole of that witness's testimony. It is up to you to determine the credibility of the witness and, of course, in this case you will have to be, in my opinion, I would instruct you, to be most careful of the evidence. You are looking at his evidence and you have to be most careful."

In my opinion, the above instruction of the learned trial Judge to the jury set out fully and fairly the evidence elicited from Chant on cross-examination. At the same time, he warned the jury to be careful in the assessment of that evidence, and repeated his instructions, with emphasis, that the question of credibility was for the jury alone. I am satisfied that this part of his charge was fair to the accused and that the trial Judge was not in error.

As to ground No. 2, counsel for the appellant contends that while the trial Judge stated a number of times that the charge must be proved beyond a reasonable doubt, in other parts of his address, he used the words "satisfied" and "to your satisfaction" and this was misdirection. Further that he did not instruct the jury that if the evidence

created a reasonable doubt, this would entitle them to acquit the accused.

The use of the words "satisfied" and "to your satisfaction" are found in the transcript pages 258 and 259, and they should be placed in proper context with the Judge's instructions immediately after his use of the words "you are satisfied that the accused is guilty beyond a reasonable doubt" and preceding the words "to your satisfaction". This part of his charge reads as follows:

"I said before that I would deal with the question of onus or burden of proof. The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden on an accused person to prove his innocence. I repeat, there is no burden on an accused person to prove his innocence. Let me make that abundantly clear. If during the course of this trial, from beginning to end, during anything that may have been said by counsel during their speeches, that might in the slightest way be considered as suggestive of any burden on the accused to prove anything, let me tell you that there is no burden on the accused. The Crown must prove beyond a reasonable doubt that an accused is guilty of the offence with which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused committed the offence of non-capital murder, the offence with which he is charged, then it is your duty to give the accused the benefit of that doubt and to find him not guilty. In other words, if after considering all the evidence, the addresses of counsel and my charge to you, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused, Marshall, committed the offence of non-capital murder, it is your duty to give this accused the benefit of the doubt and to find him not guilty."

The learned trial Judge then proceeded to define "reasonable doubt" as an "honest doubt", a doubt which causes you to "say to yourselves, or any of you, 'I am not morally certain that he committed the offence', then that would indicate to you - that would indicate there is a doubt in your mind and it would be a reasonable doubt which prevents you from arriving at the state of mind which would require you to find a verdict of guilty against this man".

Placing the instructions of the trial Judge in their proper context, the jury could not, and were not, misled as to the proper application of the law regarding the "burden of proof".

Counsel for the appellant has cited Rex v. Megill, (1929), 51 C.C.C. 377, in support of his argument. It is my opinion, however, that this case has no application to the issue here.

Ground three relates to the evidence of the witnesses Pratico and Chant, counsel for the appellant contending that the trial Judge did not make proper inquiry as to whether either witness understood the nature of an oath.

The record indicates that the trial Judge declared himself satisfied that both Pratico, aged 16, and Chant, aged 15, understood the nature of an oath, and they were sworn without objection by the defence. This was a question of fact to be decided by the trial Judge and I can see no good reason, under the circumstances, to interfere with that finding.

Counsel for the appellant also objects to the quality and sufficiency of the evidence given by Pratico and Chant.

Pratico testified that he saw the deceased Seale and the appellant Marshall at the scene of the crime and he gave direct evidence that he saw Marshall stab Seale. He was acquainted with both men. Under a rigorous cross-examination, he admitted to drinking on the night of the stabbing. The learned trial Judge in his address to the jury reviewed this evidence and in clear language related Pratico's drinking to his credibility and left it for the jury to decide.

Regarding a conflict in his statements before and during trial, this is explained by the record which discloses that Pratico's life was threatened if he testified that the appellant stabbed Seale. The difficulty at trial was that this evidence involved conversations addressed to the witness by third parties not before the court, and the trial Judge refused to allow such questions. However, the record on the voir dire indicates that such threats were made to the witness Pratico.

This issue of the conflicting statements by Pratico was also placed fully before the jury by the trial Judge and the determination of credibility in view of this evidence was expressly left to them.

Chant's evidence corroborated in every material particular that of the witness Pratico. He testified that he saw a person crouched in the bushes at the place where Pratico said he witnessed the stabbing. Chant, at first, declined to swear that the man who did the stabbing was the appellant Marshall, but this was inconsistent with a previous statement under oath made by him

at the preliminary hearing, which gives rise to the next ground of objection by the appellant. The Crown contends that the evidence of Pratico and Chant comprises a complete and accurate description of the crime and the circumstances under which it was committed.

Chant admitted under cross-examination that he told the police an untrue story. As referred to above, this was commented on at length by the trial Judge in his charge, and after proper instruction, the issue was left to the jury to consider.

I am satisfied that the objections under this ground should be dismissed.

Under ground No. 4, counsel for the appellant contends that when the jury was absent, the Crown prosecutor was permitted, while Chant was on the witness stand, to read the evidence he gave at the preliminary hearing, thereby conditioning him for the evidence he would give when the jury would return, this being highly improper and prejudicial to the appellant.

An examination of the trial transcript indicates that in the course of Chant's direct examination by the Crown, the prosecutor repeated several questions to which he had already received answers from the witness. On proper objection by counsel for the defence, Crown counsel indicated that he was preparing the way for an application under section 9 of the Canada Evidence Act on the ground that the witness had given a previous inconsistent statement. Directed by the Judge, the jury withdrew and the Judge heard evidence and argument which resulted in his granting permission for the Crown to cross-examine Chant on his previous inconsistent statement.

Section 9. (1) and (2) of the Evidence Act reads as follows:

9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

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

As appears from a reading of this section, the right to cross-examination appears to be much broader under section 9. (1) than under 9. (2).

To show that the witness Chant had made a previous inconsistent statement, Crown counsel read from the transcript of the preliminary hearing to indicate that his evidence there was inconsistent with the evidence he was giving at trial.

At the conclusion of the recital of evidence taken at the hearing and argument, the trial Judge said:

"I have to satisfy myself, Mr. Rosenblum, if this witness in my opinion proves adverse - by leave of the court may prove that the witness made at other times a statement inconsistent with his present testimony. Has he made a statement inconsistent with his present testimony?

Mr. Rosenblum:

Not in my opinion, no!

The Court:

I regret that I differ with you.

. . .

I will allow you to draw - in the presence of the jury when they return - to draw the testimony that this witness gave in the court below, read it to him and then ask him if he said that, and if it is true."

It will be noted that although the trial judge did not expressly state the witness was adverse, there can be no doubt that, in his opinion, the witness had been proven to be adverse.

This is substantiated by the judge's remarks at the conclusion of the Crown prosecutor's examination and before cross-examination. He said:

"I would not have permitted Mr. MacNeil to read these questions if I did not in my opinion consider that by his contradiction, . . . from the evidence that he gave previously with the evidence that he gave in the court below that to that extent he was adverse and I gave leave to the Crown to prove that the witness made at other times a statement inconsistent with the testimony he gave this afternoon, but before such last mentioned proof can be given, circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such a statement. And that's my ruling!"

If by the above remarks of the trial Judge, he indicated that he did not make his finding of adversity until after hearing him cross-examined on the witness's previous statement, then it would appear that his finding was not in accord with section 9. (1) of the Evidence Act. Under section 9. (2), it is not required that the witness should be found adverse, and where it is claimed that the witness has made an inconsistent statement, cross-examination may be permitted, but Crown counsel is limited to cross-examination on the inconsistent statement in accordance with the provisions of section 9. (2). In the instant case, the cross-examination remained within the limits prescribed by section 9. (2), and if there was an error in the application of the section, no substantial wrong or miscarriage of justice resulted, and I would apply the provisions of section 613 (1) (b) (iii) of the Code.

The appellant's counsel also contends that it was improper for the prosecuting officer to read Chant's evidence, taken in the Court below, to the Judge in the presence of Chant, but in the absence of the jury.

The purpose of reading the prior testimony of Chant by the Crown prosecutor was to support the Crown's contention to the trial Judge that the witness had given inconsistent testimony at the preliminary hearing. The jury had been sent out of the courtroom during this exercise, and at no time was there any suggestion by counsel for the appellant that the witness Chant should be removed from the courtroom or that the Judge read from the preliminary transcript in silence until the issue was determined. It does not appear to me that the appellant suffered any prejudice through Chant hearing the evidence

he had previously given, for when the jury returned, the same evidence was read to him question by question.

Accordingly, I am of the opinion that the objection under ground 4 should be dismissed.

The final ground of appeal is that the trial Judge advised the jury their verdict was limited to "guilty" or "not guilty" of murder, and that they did not have to consider a verdict of manslaughter, although there was evidence that the deceased Seale had put up his fists.

In his instructions to the jury, the trial Judge included the following:

"My opinion is that whoever caused these wounds committed non-capital murder. . . . the facts in this case as they came before you, gentlemen of the jury, from beginning of the case to the end, do not give rise to your having to consider the crime of manslaughter . . .

Now Mr. Foreman, the defence in this case is not self-defence. This is not a case of self-defence. This is a complete denial. The defence is, I didn't do it - complete denial! Not self-defence but even if it were self-defence, I would have to instruct you that if that were the evidence, the late Mr. Seale put up his fists, then to strike him with an instrument and stab him was something that would go far, far beyond the right of self-defence. That sort of defence would not be commensurate with the other man's act. That issue does not arise here because as I said, the defence here is a complete denial."

There was no suggestion at any time during trial by counsel for the appellant that the verdict of manslaughter should be left with the jury. I accept the Crown's contention that what the appellant now seeks is to completely discard the line of defence followed at the trial and argue that the trial Judge should have told the jury that they might disbelieve substantially the whole of the evidence tendered by the Crown; that they might also disbelieve the appellant's evidence and find that the appellant stabbed Saale, but did so, in self-defence or as a result of provocation.

I am satisfied that the instruction of the learned trial Judge excluding manslaughter from consideration by the jury was, on the evidence, a proper direction to place before them.

It is my opinion that the appeal should be dismissed.

DATED at Halifax, Nova Scotia, this 8th day of September, A. D., 1972.

C.J.N.S.

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

— CROWN SIDE —

BETWEEN:

THE QUEEN

v.

D. MARSHALL, JR.

)

) OPINION OF

) MCKINNON, C.J.N.S.

W.L. J.
B.S.G.A.

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

HER MAJESTY THE QUEEN

RESPONDENT

- and -

DONALD MARSHALL, JR.

APPELLANT

FACTUM OF APPELLANT

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Sydney, N. S.
Solicitor for Appellant

Gordon S. Gale, Esq.
Attorney General's Dept.
Halifax, N. S.
Solicitor for Respondent

STATEMENT OF FACTS

The Appellant, Donald Marshall, Jr., was charged with murdering Sanford William (Sandy) Seale on May 28th, 1971, at Sydney, Nova Scotia, contrary to Section 206 (2) of the Criminal Code of Canada.

The trial was held before His Lordship, Mr. Justice J. L. Dubinsky, with a Jury, on November 2nd, 3rd, 4th and 5th, 1971, and the Jury brought in a verdict of "Guilty" after deliberating four hours, following which the Appellant was sentenced to serve life imprisonment at Dorchester Penitentiary.

The case for the Crown depended practically entirely upon the evidence of Maynard Chant, age 15 years, and John L. Pratico, age 16 years, both of whom testified that they were in Wentworth Park, but not in each other's company, late in the evening of May 28th, 1971, and observed Donald Marshall, Jr., and Sandy Seale standing and arguing with each other, with their hands up, and that Marshall pulled a shiny object out of his pocket and plunged it into the stomach of Seale, following which Seale collapsed to the ground.

The Appellant, an Indian, in his testimony, stated that he was in Wentworth Park on the occasion in question with Sandy Seale, a Negro, when they were met by two men

unknown to them, and that after some conversation with them, one of the men stated that he did not like Indians or niggers and that he stabbed Seale, and slashed Marshall's arm. The Appellant testified that he had no quarrel of any kind with Seale and following the incident he ran for help and met Chant on Byng Avenue, a short distance from the Park, where Marshall told Chant what had happened to his friend, Seale, and showed Chant the wound on his arm, which was then bleeding. The Appellant then succeeded in stopping a motorist who took him and Chant back to the scene, at which time the Police and others, including the ambulance driver, arrived. Maynard Chant did not accuse the Appellant of having committed the crime, nor did he make any such accusation to any of the numerous other people he met that evening, including the Police, and he says he lied to the Police when they questioned him for days afterward, such falsehood being apparently that Marshall did not commit the offence.

Maynard Chant, age 15 years, was attending Grade VII in school at Louisbourg. He failed in Grades II, V and VI and repeated these years in school (see line 1, page 107). No inquiry was made by the Trial Judge as to whether or not he understood the nature of an oath, though

such an inquiry was made before Patricia Harris was sworn (see pages 74 and 75).

John L. Pratico, age 16 years, was permitted to be sworn although on page 118 of the Evidence it is noted that the Court questioned Mr. Pratico before he was sworn. There is no record of the questions put to the witness by the Judge. Pratico told a number of people, including Mary Paul and Tom Christmas, that the Appellant did not commit the crime, and before being called to the witness stand, he repeated this remark in the presence of Sheriff James MacKillop, Detective Sgt. John MacIntyre and associate Defence Counsel, S. J. Khattar, Q.C.

Other witnesses called by the Crown included Dr. M. Naqvi and Dr. David Carr, who attended the deceased at the hospital; Sandra Brazek and Adolphus J. Evers, of the Crime Laboratory of the R. C. N. Police, who testified concerning blood found on a jacket worn by the Appellant; Dr. M. S. Virick and Mrs. Merle F. Davis, who examined the slash on the Appellant's arm; Patricia Harris and Terrance Gushue, who met the Appellant in the Park when they were walking from the dance at St. Joseph's Parish Hall to Miss Harris' home. Sgt. Michael MacDonald, of the Sydney Police Force, also testified concerning his meetings with the Appellant and with Maynard Chant.

BRIEF OF ARGUMENTAs to Crowds of Appeal 1, 2 and 7:

The whole tenor of the Judge's address to the Jury was most favourable to the evidence presented by the Crown and dealt very briefly with the evidence of the Appellant, and indicated his disbelief of the evidence given by the Appellant (See Page 285).

It is submitted that the Trial Judge in his address to the Jury emphasized repeatedly that Pratico and Chant were not in collusion with each other and that they could not possibly have had any motive for trumping up a story to implicate the Appellant (See Pages 273 and 279).

The Trial Judge did not make mention in his address to the Jury that the Appellant is left handed (See Page 186) notwithstanding the fact that Pratico stated that the Appellant stabbed Seale with his right hand (See Page 123).

On Page 273, the Judge stated, "I think the criticism strictly speaking is justified", in referring to the attack on the credibility of Maynard Chant, indicating

that the cross-examination of Chant did not weaken his testimony to any appreciable extent.

As to Ground 3:

The Judge stated a number of times that the charge must be proved beyond a reasonable doubt; but he also used the words "satisfied" (See Page 258) and "to your satisfaction" (See Page 259); and it is submitted that this is misdirection causing substantial injustice (See R. vs. Megill 51 C.C.C. 377) (See Pages 258 and 259).

Although the Judge stated that the Appellant did not have to convince the Jury of his innocence, he did not state that if such evidence created a reasonable doubt, that this would entitle the Jury to find a verdict of acquittal (See Page 283).

As to Grounds 4 and 5:

The Crown evidence depended entirely on the testimony of Pratico and Chant.

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Dealing with Pratico, age 14, and who was permitted to be sworn following questioning by the Judge, but there is no record of such line of questioning.

Pratico commenced drinking early in the morning (See Page 138) and continued drinking all day and evening (See Page 139), so that he became sick at St. Joseph's Hall (See Page 140) as a result of drinking a mixture of wine and beer. He was drinking beer when he was hiding behind a bush in the Park when he allegedly saw the crime being committed (See Page 121). He told a number of people, including Mary Paul and Tom Christmas, before the date of trial that the Appellant did not commit the crime (See Page 148) and on the day of the Trial before being called to the witness stand, he told the same thing to S. J. Khattar, Q.C. and Sheriff James Mackillop (See Page 143).

As to Maynard Chant, age 15, there was no inquiry as to whether or not he understood the nature of an Oath, (See Page 86), but there was such an inquiry by the Judge before Patricia Harris, age 14 years, was sworn (Page 74).

Chant, 15 years of age, was in Grade VII in school and had repeated Grades II, V and VI. He met the Appellant on Byng Avenue after Seale was stabled, and

and accompanied him in a car with other people to return to the scene of the crime. He did not make any accusation against the Appellant, to the Appellant, or to anyone else, including the ambulance driver, Leo Curry, the Police and the others who were present at that time. (See Page 109-111-114). He did not make any such accusation to the Police for three days following the night of the fatality; and on Page 100, he was not certain that the Appellant was the man that he saw stab Seale.

Pratico's reason for making statements to the effect that the Appellant did not commit the crime was that he was in fear, and Chant gives the same reason, though there is no evidence to substantiate any such fear.

As to Ground 11:

(See Pages 96-102) When the Jury was absent, the Prosecuting Officer was permitted, while Chant was on the witness stand, to read the evidence he gave at the Preliminary Hearing, thereby conditioning him for the evidence he would give when the Jury would return. It is submitted that this was highly improper and prejudicial to the Appellant.

IN THE SUPREME COURT
APPEAL DIVISION - CROWN SIDE

HER MAJESTY THE QUEEN

RESPONDENT

versus

DONALD MARSHALL, JUNIOR

APPELLANT

FACTUM OF THE RESPONDENT

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I N D E X

Part I	-	Statement of Facts
Part II	-	Points in Issue
Part III	-	Brief of Argument
Part IV	-	Conclusion

STATEMENT OF FACTS

The Appellant was convicted on November 5, 1971 of the non-capital murder of one Sanford (Sandy) Seale, after a trial before His Lordship Mr. Justice J.L. Dubinsky with a jury at Sydney, Nova Scotia.

Seale received the wound from which he died on the 28th of May, 1971.

The case against Marshall turned on the evidence of Maynard Chant and John Pratico. Pratico, aged 16, was in the company of Seale and Marshall a few minutes before Seale was stabbed. Pratico left the couple and stationed himself behind a bush in Wentworth park just off Crescent Street in Sydney, where he proceeded to consume a bottle of beer. While he was behind the bush, Marshall and Seale came into his view. His identification of both was positive.

Chant, aged 15, was in Wentworth Park, at the relevant time, but not in the company of Pratico. Chant was attempting to get home to Louisbourg after having missed his bus, and took a short cut through the park, when he noticed Pratico behind a bush. Since Pratico appeared to be watching something, he too, stopped to observe.

Two men, Seale and Marshall were standing together talking in loud tones. One of the men whom the witness Pratico identified as Marshall, reached in his pocket and pulled out something long and shiny and plunged it into the abdomen of the other, identified by Pratico as Seale. Seale then collapsed.

Both witnesses fled the scene. Chant, a few minutes later was approached by Marshall, in an area close to the incident, who said

"Look what they did to me" and displayed a cut on his arm. The accused then flagged down a car, and Chant and Marshall accompanied the driver to the spot where Seale was lying on the pavement. Seale was taken to Sydney Hospital where he died as a result of his injuries the following day, despite surgery and massive blood transfusions.

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Marshall's evidence was to the effect that he and Seale were friends, that he had no quarrel with Seale, and that he did not harm him in any way. His explanation of what had occurred was that he and Seale were approached by two men they had never seen before. Some conversation then occurred during which the two men identified themselves as priests from Manitoba; indicated that they were interested in knowing if there were any girls in the park, and asked where they could find a bootlegger. The older of the two men, according to Marshall then made an unprovoked knife attack on Seale and the accused, which resulted in Seale receiving his fatal injury and in the accused being slashed on the arm. The attack was accompanied or preceded by an assertion by the unidentified man wielding the knife that he did not like niggers or Indians. Marshall is an Indian; Seale was a Negro. At this point, Marshall fled.

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From this point there appears to be no major conflict between defence and crown evidence.

POINTS IN ISSUE

The Attorney General appears on behalf of Her Majesty the Queen and says that the points in issue on this appeal are those raised in the notice of appeal on file herein.

For the sake of convenience, certain of the grounds of appeal are argued together. Argument on certain others will be presented orally at the hearing of the appeal if the court so desires.

BRIEF OF ARGUMENT

ARGUMENT ON THE FIRST, SECOND, SEVENTH AND TWELFTH GROUNDS OF APPEAL

First Ground of Appeal:

"THAT the Learned Trial Judge erred by not adequately instructing the Jury on the defence evidence".

Second Ground of Appeal:

"THAT the Learned Trial Judge erred in his charge to the Jury in that he gave his own opinion on certain aspects of the evidence which opinion was highly prejudicial to the accused".

Seventh Ground of Appeal:

"THAT the Learned Trial Judge misdirected the Jury in that the charge of the Learned Trial Judge was capable of being understood by the Jury as being prejudicial to the accused".

These grounds of appeal are dealt with together since they relate to the treatment accorded the evidence offered by or for the Appellant.

Under ground 12, the Appellant also raises the question of the exclusion of the verdict of manslaughter, and implies that this was a verdict which should have been left to the jury. Since this, it is submitted relates to the theory of the defence, it is dealt with here.

The only evidence called by the defence was that of the accused Marshall. The direct examination of Marshall is reproduced at pages 186-193 of the case on appeal. The cross examination is found at pages 193-216.

The theory of the defence was a simple denial of having committed the act. It consisted entirely of the Appellant Marshall's testimony that he and the deceased, Seale, had encountered two men on Crescent Street in Sydney. According to Marshall, a brief conversation followed (see pp. 189, 190 of the Case), at the end of which the older of the two men produced a knife from his pocket and "drove it into Seale", and, swinging around to Marshall, slashed Marshall's left arm.

This unprovoked attack, according to Marshall, was accompanied by, or immediately preceded by (it is not clear from the transcript - see p. 190-191) an assertion from the man holding the knife that he didn't like "niggers or Indians". Marshall is an Indian; Seale was a Negro. Following this, Marshall ran for help (see p. 191).

From this point, there is not much conflict between the evidence of Marshall and that of the Crown witnesses. The case turns on what happened on Crescent Street and in nearby Wentworth Park.

The law on the duty of a trial judge to properly instruct the jury on the theory of the defence seems reasonably clear.

In the leading case of Leon Azoulay v. Her Majesty the Queen (1952) S.C.R. 495, Taschereau, J. said at p. 499:

The Rule which has been laid down, and consistently followed is that in a jury trial, the presiding Judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them ...

The same principle was stated in a slightly different fashion by Kellock, J. in the case of Henderson v. The King (1948), 91 C.C.C. 97 (Sup. Ct. Can.) at page 112:

It is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury ...

The theory of the defence of necessity will qualify the nature of the charge to the jury. In this case it is clear from all the evidence that Seale was unlawfully slain. The Crown's case depended to a large degree on the testimony of two eyewitnesses, Chant and Pratico. They

testified that they had seen Marshall commit the crime. See case at pp. 90,97,99, 101 (questioned by the Court) 103-107, 108, 109, 117 for the evidence of Chant on this matter; see pp. 122-123, 135-138, 146-148 for the evidence of Pratico on this point).

The defence rested solely on a denial of the actus of the crime, and was developed along two main lines of approach.

10 The first was an attack on the testimony and credibility of the witnesses Chant and Pratico; the second consisted of direct testimony by the Appellant which, under any reasonable construction of its effect, could not stand with the evidence of Chant and Practico. The two versions of what happened are irreconcilable.

It was unquestionably the duty of the trial judge to instruct the jury on the evidence of the defence on the issues raised in relation to the charge. In the case of Kelsey v. The Queen (1953), 105 C.C.C. 97; Fauteaux, J. (as he then was) said at p. 103:

20 It is, of course, unnecessary that the jury's attention be directed to all of the evidence, and how far a trial Judge should go in discussing it must depend in each case upon the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial. In the words of Goddard L.C.J. in Clayton-Wright (1948), 33 Cr. App. R. 22 at 29: 'The duty of the Judge ... is adequately and properly performed ... if he puts before the jury clearly and fairly the contentions on either side, omitting nothing from his charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give ... a fair picture of the defence, but that does not mean to say that he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given by experts or anyone else'.

30 The rule is simple and implements the fundamental principle that an accused is entitled to a fair trial, to make a full answer and defence to the charge, and to these ends, the jury must be adequately instructed as to what his defence is by the trial Judge ... (emphasis in original)

It is respectfully submitted that only one issue arose in relation to the charge against Marshall and that was whether or not he had committed the act with which he was charged. His sole defence was a denial of that act. It is further submitted that the trial judge properly addressed himself to the defence offered (see p. 279) and properly instructed the jury thereon.

In the case of Chant, at pp. 268-271,272 of the case of the trial judge read back to the jury portions of Chant's evidence. At page 273-274, the trial judge in his charge fully and fairly set out the information elicited from Chant on corss examination, and related this directly to the credibility of the witness. At the same time, however, the learned trial judge repeatedly instructed the jury that the question of credibility was for the jury alone.

With respect to the evidence of the witness Pratico, it is submitted that the trial judge charge was unexceptionable in law. As in the case of Chant, His Lordship read back portions of the direct examination of Pratico to the jury. (See pp. 275-277). There followed immediately an accurate summary of the evidence on cross examination, bringing to the attention of the jury the condition of the witness at the material times, his statements subsequent to the event, some of which were inconsistent with his testimony before the Court, and the necessity for jury to come to their own decision with respect to the credibility of the witness.

Counsel for the Appellant submits that the trial judge "emphasized repeatedly that Pratico and Chant were not in collusion", and that therefore there could not be a motive for concocting a story to implicate the Appellant.

The Attorney General says that this occurred in only two places in the charge (see pp. 275, 279) and that it was plain from the evidence that the two were independent observers of the incident that gave rise to the charge since they were not in each other's company when they witnessed the incident. It is further submitted that it was proper in these circumstances for the trial judge to direct the attention of the jury to the fact that two vitally important and independent eyewitnesses with no apparent motive for collusion, had provided the court with mutually corroborative testimony that had a direct bearing on the very question to be answered by the jury. The trial judge did nothing more than this.

Having told the jury, as he repeatedly did throughout the charge, that they were to be the judges of fact, the trial judge as part of his function should put the facts in such a way as to assist the jury in coming to its conclusion. See Rex v. MacKenzie (1932) 58 C.C.C. 106 at 115 (B.C.C.A.); The Queen v. Henry Dowsey (1865) 6 N.S.R. 93 (N.S. Sup. Ct. in banco).

This principle, it is submitted, has added force in this case, since the sole defence raised was a complete denial of the act and the evidence in question was that of two eyewitnesses to the act. His statements expressed something which was apparent from the evidence of the two witnesses and it is submitted that taken in the context in which they appeared, the statements were fair and proper and in no way prejudicial to the Appellant.

The evidence of the Appellant was considered at length by the trial judge. The charge to the jury occupies some thirty five pages, from page 252 of the case until page 287. His Lordship commenced a

consideration of the evidence in the trial at page 266. Of the 21 pages of the charge devoted to a consideration of the evidence, five were concerned directly with the evidence of the Appellant. Approximately two pages are given over to a reading of the testimony of the Appellant on direct examination. The remainder is devoted to a consideration of this evidence.

His Lordship in this pursuit, generally set forth the effect of the evidence in a full and fair manner, and specifically

- (a) pointed out that the story of the accused had withstood a "very vigorous and rigorous cross examination" (p. 283, lines 15-17, p. 284, lines 5-9);
- (b) told the jury that if they accepted the version of the events told by Marshall that they "must" acquit him of this charge (p. 283, lines 17-19);
- (c) told the jury that they must evaluate the credibility of the Appellant, but that the accused bore no burden of proving his innocence (p. 283, lines 20-28);
- (d) indicated to the jury that they might well find that his actions, which were enumerated, following the stabbing of Seale were actions that were inconsistent with the actions of a man who had just committed murder (p. 284, lines 5-20).

In addition to this, the trial judge pointed out the other inferences that might be drawn from the same statements, referring repeatedly to the duty of the jury to find on facts and credibility against the background of the presumption of innocence, and the rule that the burden of proof beyond a reasonable doubt rests always on the Crown.

It is submitted specifically by Counsel for the Appellant that the trial judge indicated his disbelief of the evidence given by the Appellant (at page 285).

The Attorney General says that this is a misreading of that portion of the charge and further says that even if it were not, that the trial judge is entitled to comment on the evidence in such a manner.

After referring to the responsibility of the jury to determine credibility, and to assess the evidence of the Appellant, His Lordship pointed out to the jury the obvious questions which would arise on a consideration of the version of events given by the Appellant and indicated that they should be considered by the jury in assessing the credibility of the Appellant. There is nothing expressed in the charge that can be construed as an expression of personal opinion on the part of the trial judge to the effect that he disbelieved the evidence of the Appellant. When the charge as respects the evidence of the Appellant is taken as a whole, it is submitted that it displays a balanced approach to a clearcut issue and is unobjectionable in law.

At most, if the passage referred to at p. 285 by the Appellant is considered out of context, it might be said that the trial judge was in so many words expressing an opinion that the Appellant's story was an unlikely one. This, however, is a proper function for the trial judge to assume. In the case of Leo George O'Donnell (1917) 12 Cr. App. R. 219, Lord Reading said at p. 221 with respect to a contention that the trial judge had indicated so strongly his view of the case that it could not be said that he left those facts to the jury:

... it is sufficient to say, as this court has said on many occasions, that a judge when directing a jury is clearly entitled his opinion on the facts of the case provided that he leaves the issue of facts to the jury to determine. A judge obviously is not justified in directing a jury or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way in which he indicates; but he may express a view that the facts ought to be dealt with in a particular

way, or are not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, but that it differs from accounts which he has given of the same matter on other occasions.

10 It is submitted that there is nothing in the charge of the trial judge which can be construed as a direction to find the facts as the trial judge indicates. In words that occupy almost four pages (pp. 255-258) of the charge, the trial judge repeatedly charged the jurors that the facts and inferences from facts, credibility and assessment of witnesses, were their responsibility and theirs alone. They were further instructed in clear terms to use and prefer their own judgement and recollection to that of the judge and not to be bound by opinions or facts expressed by the Judge.

It is further objected by Counsel for the Appellant that the trial judge did not mention in his charge that the Appellant was left handed notwithstanding the fact that Pratico stated (p. 123) that the Appellant stabbed Seale with his right hand.

20 In the case of Rex v. Hughes et al. (1942) 78 C.C.C. 1, (B.C.C.A.) O'Halloran, J.A. said at p. 15-16:

30 Allied to this phase of the appeal is a question which arose during the argument concerning the Judge's duty in directing the jury's attention to the evidence and in placing defences before the jury. It must be exceedingly rare indeed where it is the Judge's duty to refer to all the evidence of every witness. As was said in R. v. Roberts, each Judge should be left to sum up a case in his own way so long as he does not misdirect the jury in law or in fact. But that does not absolve the Judge from presenting to the Jury the material evidence related to the case for the prosecution and the defence respectively.

The jury have a right to expect from the Judge something more than a mere repetition of the evidence. They have a right to expect that his trained legal mind will employ itself in stripping the testimony of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decision, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits...

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Reference should also be made to the passage from Kelsey v. The Queen, supra in this connection. The evidence to which the attention of the jury is drawn must in the words of Fauteaux, J., "depend in each case on the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial".

There was no necessity that the trial judge mention the fact that Marshall was left handed. In point of fact, the matter was completely irrelevant to the defence raised and might in fact have confused the issue.

Since Marshall denied the act, the fact that he was right or left handed is irrelevant. It was clear from the evidence of Chant and Pratico (see pp. 90 and 122-23, 146 respectively) that only two men were involved in the incident they witnessed. If their evidence had been to the effect that Seale had been stabbed by one of several men assembled, then the fact that the knife welder had used his right hand, taken in conjunction with Marshall's self-professed left-handedness, might have some significance if identity were a problem. This however, is not the case.

The issue of the identity of the person who committed the crime is raised solely by the testimony of the accused. The evidence of Chant and Pratico is that they witnessed the stabbing of Seale and that Marshall was the man who stabbed him. Their evidence does not raise the issue of identity. The fact that Seale was stabbed by a person using his right hand in these circumstances, is of no consequence, and need not have

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concerned the trial judge.

The Appellant assumed the risk of explaining away the death in relating what according to him, had taken place, for the advancement of his defence of denial.

If the issue was properly left to the jury, these grounds of appeal have no merit and should be dismissed.

Counsel for the Appellant further submits however, that the trial judge should have left the verdict of man-slaughter to the jury, and should not have ruled it out as he did.

It is the duty of the trial judge to put to the jury every defence raised by a person charged. See Henderson v. The King, supra; Rex v. Hewston and Goddard (1930) 55 C.C.C. 13 (Ont. Sup. Ct. App. D.) per Mullock, C.J.O. at p. 16; Regina v. Nelson, (1968) 2 C.C.C. 179 (B.C.C.A.) per Norris, J.A. for the court at p. 181; Kelsey v. The Queen, supra, per Fauteaux, J. at p. 102.

The trial judge however, is not bound to direct the jury as to every possible defence if that defence has not been raised by the accused. See Rex v. Krawchuk (No. 2), (1941) 3 W.W.R. 563 (B.C.C.A.).

This issue was directly before the court in the Krawchuk case, supra. This was a murder case in which the accused took the stand and gave a version of events that would have been a complete defence if the jury had accepted his evidence, exactly as it would have been in this case.

What the Appellant now seeks is to completely discard the line of defence followed at the trial and argue that the trial judge should have told the jury that they might disbelieve substantially the whole of the evidence tendered by the Crown; that they might also disbelieve Marshall's

story and might at the same time find that Marshall unlawfully stabbed Seale but did so, presumably, in self-defence or as a result of provocation.

It is submitted that a verdict of manslaughter, which the Appellant now contends might have been found if the question had been left open, was excluded by the evidence of the Appellant himself. (See page 193 of the Case - the Appellant denied stabbing Seale or even touching him.)

In the Krawchuk case, supra, MacDonald, J.A. who gave the judgement of the court said at p. 565-66:

In the present case counsel did not at any stage suggest manslaughter. It is all very well to rely on remarks made by learned judges as to the duty of a trial Judge to put such questions to the jury as arise on the evidence even if counsel has not suggested such questions; but such remarks must be read as generally guiding principles and in regard to the case to which they have relation. They cannot, I think, be taken to mean that a Judge is required to conjure up some fantastic defence inconsistent with substantially the whole of the evidence offered in the case.

See also the comments of Sloane, J.A. at p. 564; and the cases of J.G. Wu (alias Wu Chuck) v. His Majesty the King, (1934) S.C.R. 609 per Lamont, J. at p. 616; Rex v. Flett, (1943) 1 W.W.R. 672 (B.C.C.A.) applying Mancini v. The Director of Public Prosecutions, (1942) A.C. 1 (H.L.) at pp. 678, 679; and Regina v. Nelson, supra, at p. 182.

It is submitted that this line of cases is authority for the proposition that the duty of the trial judge to direct the jury on alternative defences is limited to these defences of which the foundation of fact appears in the record.

the matter as follows at p. 102:

The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.

10 It is submitted that the record discloses nothing to convey "a sense of reality" in the argument that manslaughter should have been left to the jury. No jury properly instructed could have found such a verdict on the evidence in the record.

It is finally submitted that the Judge's charge must be regarded as a whole, and not subjected to minute scrutiny by the Appellate Court. See James Ryder (1913), 9 Cr. App. R. 100 (C.C.A.) at p. 104, per Bray, J. The question to be answered is not whether there were errors in the charge, for a charge without error would be rare but rather the effect of any errors in the light of the evidence, and whether or not the jury would be misled by them. See Regina v. Hay, (1959) 125 C.C.C. 137 (Man. C.A.), per Shultz, 20 J.A. at pp. 184,186.

Third Ground of Appeal:

"THAT the learned trial judge misdirected the jury on the meaning of reasonable doubt".

Section 7(3) of the Criminal Code preserves and continues certain rules and principles of the common law that many amount to justification, excuse or defence to a charge. Reasonable doubt is such a principle. In the leading case of Woolmington v. The Director of Public Prosecutions, (1935) A.C. 462 (H.L.), Viscount Sankey, L.C. said at p. 481:

Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... If, at the end of and on the whole of the case there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Although the principle may be stated in simple form its application to particular cases has often been difficult. Some of the case law relating to the obligation to charge the jury as to the meaning and import of this principle is set out below.

The rule springs from, and has developed collaterally with, the presumption of innocence until guilt be proven. This presumption of innocence is not rebutted until it is proved that the accused committed the crime, that he is "guilty" in the sense that the evidence offered excludes to a moral certainty the defences arising from the evidence, that are inconsistent with guilt.

In the case of Rex v. Sears (1947), 90 C.C.C. (Ont. C.A.), Roach, J.A. said at p. 163-64:

By reasonable doubt as to a person's guilt is meant that real doubt - real as distinguished from illusory - which an honest juror has after considering all the circumstances of the case and as a result of which he is unable to say: "I am morally certain of his guilt." Moral certainty does not mean absolute certainty. Absolute, that is demonstrable, certainty is generally impossible and juries might well be told that in discharging their serious responsibility their consciences need not be racked and tortured because of the fact that absolute certainty is impossible. They do their full duty when they bring to bear upon all the evidence presented to them all the mental faculties with which Divine Providence has endowed them. No more is expected and if, after applying themselves to the best of their ability, they are, in a criminal trial, morally certain of the guilt of the accused, then it is their duty to return a verdict of guilty. It might even turn out later that they were wrong but they need not be mentally tormented by that possibility provided that they presently use their best judgement and are presently morally certain of the prisoner's guilt.

The necessity is that the jury act in determining guilt on moral certainty, not on probability, and that the jury be so instructed.

Lord Goddard, C.J. in the case of R. v. Kritz, (1949) 2 All E.R. 406 (C.A.A.0 said at p. 410:

It would be a great misfortune, in criminal cases especially, if the accuracy or not of a summing-up was to depend on whether or not the judge or the chairman had used a particular formula of words.

See also Alfred Summers (1952), 36 Cr. App. Rep. (C.C.A.) at p. 15; and Rex v. Labine, (1937). 69 C.C.C. 151 (Alta. Sup. Ct. App. D.) per McGillivray, J.A. for the court at p. 153, where it is suggested that the jury must be told in appropriate words that because of the presumption of innocence, the burden is on the prosecution and that the standard for the burden is that of proof beyond a reasonable doubt. See also Boucher v. The Queen (1954), 110 C.C.C. 263 (Sup. Ct. Can.).

The judge in his charge must further direct the jury that there is no onus on the accused in connection with a defence; no onus to satisfy

the jury of his innocence. See Rex v. Hrynyk (1948), 93 C.C.C. 100 (Man C.A.) at pp. 102-03, 104-05, 107-08. The jury must have it brought home to them by the charge that the accused has merely to raise a reasonable doubt in the minds of the jury as to his guilt and that if he does he must be acquitted. See Woolmington v. The Director of Public Prosecutions, supra, at p. 481-82; Regina v. Kilian (1952), 102 C.C.C. 241 (Ont. C.A.); Rex v. Arnold (1947), 87 C.C.C. 236 (Ont. C.A.).

It now remains to examine the charge of the trial judge with respect to his directions as to reasonable doubt.

The trial judge commenced his charge on reasonable doubt at page 258 of the case. Commencing at line 19 on page 258 the trial judge stated in clear language

- (a) that the accused was to be presumed innocent until proven guilty beyond a reasonable doubt (lines 19-26).
- (b) that the burden of proof beyond a reasonable doubt rests on the Crown and never shifts (lines 28-29).
- (c) that there was no burden on the accused to prove his innocence (lines 30-33, p. 259, lines 1-5.)
- (d) that the jury had a duty to acquit if they had a reasonable doubt as to whether the accused committed the crime (p. 259, lines 9-14).
- (e) that "reasonable doubt" meant an "honest doubt" not an imaginary doubt", a doubt which prevented a juror from saying "I am morally certain that the accused committed the offence with which he is charged". (page 259, lines 15-28)
- (f) that if they were morally certain that what the Crown contended happened did happen it would be their duty to convict. (p. 260, lines 2-5)

See also p. 268, lines 2-5; and particularly the following passage, which occurs at p. 283, immediately following, the trial judge comments on the

evidence of the accused:

Now if you believe the version of the events that was told by Donald Marshall Jr., then it goes without saying that you must acquit him of this charge. Having gone on the stand he has become another witness in this case. You have the right to determine the credibility of him as a witness as you have the right to determine the credibility of any other witness. But you will bear in mind - that Donald Marshall does not have to convince you of his innocence. He does not have to convince you of his innocence. It is the Crown, as I said over and over again, that must prove his guilt beyond a reasonable doubt. He does not have to convince you of his innocence.

The only issue raised by the Appellant in his defence was the identity of the assailant. The Attorney General repeats the argument made under the 1st, 2nd and 7th grounds of appeal with respect to the treatment of the defence evidence and says that the jury was clearly directed to acquit if his evidence or any of the evidence raised a reasonable doubt in the mind of the jury.

At page 285, the trial judge said

Why, one would ask in assessing the credibility of the story that he told, keeping in mind at all times that there was no obligation on him to tell anything at any time. There is no obligation on an accused person to say anything, to prove anything. But he has gone on the stand, has given the story and you have the right to judge the credibility of the story and keeping in mind at all times that the burden - the burden - of proving that he was guilty beyond a reasonable doubt must lie upon the prosecution.

The Attorney General says that the charge complies, in its general tenor, and also in its particulars, with the requirements of the authorities on this point.

Counsel for the Appellant relies on the use of the word "satisfaction" which occurs at line 21 of page 258. The Attorney General submits that in view of the comments following, the word refers to the

moral certainty required by the minds of the jury after the evidence rather than to the burden of proof on the Crown. Even if it did not, it is submitted that the use of this word in the context could not have misled the jurors.

Reference is also made to the use of the words "to your satisfaction" at lines 11-12 on page 259. Here, however, the full sentence is

...if after considering all the evidence, the addresses of Counsel and my charge to you, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused, Marshall committed the offence of non-capital murder, it is your duty to give the accused the benefit of the doubt and to find him not guilty.

The Attorney General says that this passage is regular and proper on its face and constitutes no misdirection.

The case of Rex v. Megill (1929) 51 C.C.C. 377 (Sask. C.A.) relied upon by Counsel for the Appellant is outside the line of authority which governs this case.

That case involved a murder charge in which the defence of insanity was raised. The defence of insanity is a statutory exception to the rule regarding the question of a reasonable doubt. By section 16(4) of the Criminal Code a rebuttable presumption of sanity is set up, and there is a legal burden on the accused to prove he is insane. The proof required is that of proof on a balance of probabilities. See Cartwright, C.J.C. (as he then was) at p. 270 in the case of Regina v. Borg, (1969) 4 C.C.C. 262 (Sup. Ct. Can.).

The difficulty in Megill, supra, was that the trial judge failed to distinguish clearly enough between the burden on the Crown to prove

guilt beyond a reasonable doubt and the burden on the accused to
prove his statutory defence of insanity on a balance of probabilities.

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This is not the present situation. At no time was the
defence of insanity raised, either by counsel or by the evidence, and
it was made abundantly clear by the trial judge at various points in
his charge that there was no burden on the accused to prove anything.

Fourth Ground of Appeal:

"THAT the evidence did not establish beyond reasonable doubt the guilt of the accused;"

Eighth Ground of Appeal:

"THAT the conviction is against the evidence, the weight of the evidence and the proper application of the evidence and is perverse;"

10 These grounds of appeal have the same basis, that is, that evidence offered was not capable of establishing the guilt of the accused beyond a reasonable doubt. They are therefore dealt with together.

It is respectfully submitted that these grounds of appeal are without merit.

The question to be answered by the Court is whether the verdict is in itself unreasonable, and whether a jury properly instructed and acting judicially could find the verdict of guilty that they did find. See MacQuarrie, J. in the case of Taggart v. The Queen, (1956), 114 C.C.C. 274 (N.S. Sup. Ct. in banco) at p. 280, giving the judgement of the court, and again further at p. 280-81.

20 In view of the argument addressed to us in the present case, it is well to draw attention to what was said by Harris, C.J. speaking for the Court of Appeal in R. v. M. (1926), 46 Can. C.C. 80 at p. 84, 58 N.S.R. 512: "The tribunal that must be convinced beyond a reasonable doubt is the trial Judge where there is no jury or the jury where there is one." (Cf. Holmes v. The King (1950), 98 Can. C.C. 224). And to Taschereau, J. (Sir Lyman P. Duff C.J.C., Rinfret, crocket, Kerwin and Hudson JJ. concurring) in Cote v. The King, 77 Can. C.C. 75, (1942) 1 D.L.R. 336, where he said:

30 "It may be, and such is very often the case, that the facts proven by the Crown, examined separately have not a very strong probative value; but all the facts put in evidence have to be considered each one in relation to the whole, and it is all of them taken together, that may constitute a proper basis for a conviction.

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"When the circumstantial evidence is such that the inference of guilt of the accused might and could legally and properly be drawn, this Court will not intervene. As to whether 'guilt ought to have been inferred in the premises' is a question to be determined by the Jury (Reinblatt v. The King, 61 Can. C.C. 1, (1934); D.L.R. 648, (1933) S.C.R. 694). When it has been found that there is some evidence, from which the jury could properly infer the guilt of the accused, it is not within our jurisdiction to retry the case and alter their findings."

It will be apparent on perusal of the case that the case for the Crown did not depend on circumstantial evidence, but on the direct evidence tendered by two witnesses. It is submitted that there was ample direct evidence upon which the Appellant could be convicted.

See also the case of The King v. M. (1926), 58 N.S.R. 512 (N.S. Sup. Ct. in banco) per Harris, C.J. at p. 518-20 and particularly the excerpt cited therein from the case of Arthur Fred Hancock, 8 Cr. App. Rep. at p. 197, and other cases collected therein.

The evidence of the Crown most closely connected with the stabbing of Seale was that of the witnesses Chant and Pratico.

Pratico was questioned by the Court and satisfied the trial judge that he understood the nature of an oath. He was then sworn with no objection from defence counsel. (See p. 118). It is submitted that this is a question of fact for the trial judge and that counsel for the Appellant has provided no reason why the decision of the Appeal Division should be substituted for the decision of the trial judge.

Pratico placed Seale and Marshall at the scene of the crime and gave direct evidence of having seen Marshall stab Seale. He was acquainted with both Seale and the Appellant and made a positive identification of both. (See p. 121, 122, 146). He was cross-examined most carefully and fully by defence counsel. The fact that he had been

drinking a substantial amount the night of the stabbing was the subject of detailed cross-examination, and the trial judge (at pp. 278-79) commented on this in clear language, relating his drinking to his credibility and leaving the matter for the jury to decide.

With respect to his statements before and during the trial to the effect that Marshall did not stab Seale, it is submitted that good and sufficient reason was shown for this inconsistency at p. 173, 174 of the transcript - the witness was in fear of his life being taken if he testified that Marshall had stabbed Seale.

These issues were placed fully before the jury by the trial judge (see p. 278) and the determination of credibility in the light of this evidence was expressly left to the jury (see p. 279).

The witness Chant was another observer of the incident. His evidence corroborates in every material particular that of the witness Pratico. His testimony also places a person crouched in the bushes from where Pratico said he had witnessed the scene (p. 95). Chant declined under oath to swear that the man who did the stabbing was Marshall (see p. 100, 108, 109), but this was inconsistent with a previous statement made under oath at the preliminary hearing. (See p. 100 and pages 103-105). His testimony, taken with that of Pratico, provides a complete picture of what the Crown says occurred.

Counsel for the Appellant objects that there was no inquiry as to whether or not he understood the nature of an oath. With respect, the case at p. 86 indicates that such an enquiry was made and that the

court was satisfied that the witness did understand the nature of an oath. The Attorney General repeats the arguments made on this point with respect to the witness Pratico.

The witness admitted under cross-examination that he had told the police an untrue story, as indicated by Counsel for the Appellant. However, an explanation was given (at p. 116) on re-direct examination. The point was commented on at length by the trial judge in his charge, (see p. 272-273) and after appropriate instruction the issue was left to the jury to consider.

Chant gave no explanation for his fear, possibly because the Crown considered that in the light of the objection which followed immediately from defence counsel, such questioning would not be permitted. The case (p. 116,117) provides some basis for this.

With respect to Pratico, it is submitted that there was ample evidence tendered to substantiate Pratico's fears. The difficulty is that it involved conversations addressed to the witness by third parties not before the court. The trial judge refused to permit these questions. The Appeal Division has the entire record before it and can come to its conclusions on the whole of the record. Reference should be made to pages 163-165 of the case.

The Attorney General says that these grounds of Appeal are without merit and should be dismissed. Such argument as may be required by the court on any or all of these points will be made orally at the hearing of the appeal.

Eleventh Ground of Appeal:

"THAT the Learned Trial Judge improperly permitted the Prosecuting Officer to cross-examine the witness, Maynard Chant, before ruling that such witness was adverse".

The argument presented in the factum of Counsel for the Appellant under this ground of appeal does not appear to arise from the language of this ground of appeal, which relates to cross-examination of Chant prior to a finding of adversity. The argument in the factum relates to the reading of evidence by the prosecutor (in the absence of the jury) which had been given by Chant at the preliminary hearing.

The attention of the court is drawn to this apparent inconsistency only for the purpose of distinguishing the arguments to be made on one point from those on the other.

As regards the cross-examination of the witness Chant which the Appellant alleges took place prior to a finding by the trial judge that he was adverse. The Attorney General says that there was no such cross-examination.

The direct examination of Chant commenced at p. 87 of the case. This examination proceeded in proper fashion and without any objection from defence Counsel which related to alleged cross-examination. Defence Counsel interrupted the direct examination at three points, (pp. 89,92,95) but these would appear to relate to other matters.

The court recessed (see p. 95) and upon reconvening, the direct examination continued. At pp. 95-96 Crown Counsel repeated several questions to which he had already received answers in earlier portions of the direct examination (see pp. 89-90). Counsel for the defence quite properly objected

to this line of questioning and the prosecuting attorney indicated that he was preparing the way for an application under section 9 of the Canada Evidence Act. At this point, the jury withdrew, and the court heard evidence and argument which resulted in the court granting permission to the Crown to cross-examine Chant on his previous inconsistent statement.

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The questions objected to by Defence Counsel were repetitive and in other circumstances might have been improper since they covered ground already covered earlier in the direct examination. However, they elicited no new information, were not leading or suggestive, and, it is submitted, do not constitute cross-examination.

From the words of section 9 of the Canada Evidence Act and from the cases of Regina v. Milgaard, (1971), 2 C.C.C. 206 (Sask. C.A.); Her Majesty the Queen v. Calvin Douglas Polley, S.C. No. 16182 (N.S. Sup. Ct. App. D., as yet unreported) and Regina v. Cooper, (1970) 3 C.C.C. 136 (Ont. C.A.)' the law appears to contemplate two kinds of cross-examination where a previous inconsistent statement is concerned.

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The right to cross-examination under section 9(1) appears from the cases to be much broader than that under section 9(2), and requires a finding of adversity by the court before it can commence. The permission given under section 9(2) is much narrower and appears to require that the examination be restricted to the statement. It requires no finding on the part of the court that the witness is adverse.

In the result, permission was given for the Crown to examine the witness on his previous statement. It is not clear whether or not this involved a finding by the court that the witness was adverse. The last statement by the court at page 102 would indicate otherwise, but the remarks

by the court at p. 106 might be taken to mean that the trial judge had either found the witness to be adverse at the close of the voir dire (p. 102) or that he had so found after hearing him cross-examined on his previous statement.

It is submitted that whether the finding of the court amounted to a finding of adversity or merely to permission to cross-examine on the previous statement Crown Counsel stuck strictly within the limits of the lesser right to cross-examine under section 9(2) (see pp. 103-105). It would seem to follow in the result, therefore, that there has been no substantial wrong or miscarriage of justice.

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In the result, therefore, it is submitted:

- (a) that no cross-examination occurred before the witness was declared adverse, if he was declared adverse.
- (b) that it was not necessary in any event that he be declared adverse in order to permit the type of cross-examination that did in fact occur.
- (c) that in any event, there was no substantial wrong or miscarriage of justice.

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The Appellant's Counsel submits in his brief of argument that the reading of Chant's evidence by the prosecuting officer had the effect of conditioning Chant, who remained on the witness stand, for the evidence he would give on the return of the jury.

It is submitted that the most important consideration in the exercise was to determine whether or not the testimony given by Chant at the preliminary hearing was inconsistent with the testimony at trial.

This being the case, it was necessary for a certain amount of discussion to take place. The evidence had all been transcribed, and

the question of voluntariness was not at stake in this voir dire.
 The only issue was of inconsistency with present testimony. Defence
 Counsel could therefore have interrupted at any time to request
 either that Chant be removed or that the trial judge read from the
 preliminary transcript in silence until he had determined the issue.
 Since he chose not to do either of these things, it does not lie
 with him now to question the proceedings.

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In any event, it is submitted that there has been no
 substantial wrong or miscarriage of justice in this instance. The
 substance of Chant's testimony was that he did not recognize
 Marshall at the time he was alleged to have stabbed Seale. This
 came out both in direct (p. 90,95) and cross-examination (p. 108,
 109) and it is further submitted that if Chant's testimony at the
 preliminary in this respect is examined carefully the same conclusion
 is obtained.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the charge to the Jury when read as a whole is a fair and proper one; that the Jury's verdict is supported by the evidence and is a proper one and that the appeal should be dismissed.

All of which is respectfully submitted.



Milton J. Veniot
Solicitor for the Respondent
Attorney General

Halifax, Nova Scotia
January 24, 1972

DUBINSKY, J.:

Mr. Foreman, and gentlemen of the Jury:

I am sure that we are all pleased that we have come near the end of this case. I should like to join with Messrs. Rosenblum and MacNeil in thanking you for the very keen way in which you have followed the proceedings of this case from the very beginning.

It seems to me, Mr. Foreman and gentlemen of the Jury, that as long as jurors will give that sort of attention which you twelve men have given to the matters that came before you these past couple of days, so long will the jury system retain the confidence and the respect of our fellow citizens and so long will they the more easily resist any attempts that are made to alter or do away with this great institution. If we are to resist those who criticize and question the value of the jury system, let me say to you, Mr. Foreman, that the answer lies in the fact that men and women when called come and do their duty, not for the little emolument that is involved here, but because jurors are connected with a heritage of justice and freedom. So long as jurymen and jurywomen approach their task without weakness, without misplaced sympathy, so long as they comply with the oath that they have taken before God, so long will this jury system endure.

Now in this case as in many others, things have been said about it in the news media. On my instructions, you have separated during overnight adjournments and you have separated during luncheon hours. If you have read or heard anything about this case outside this courtroom, it is your duty to banish it from your minds. You must decide whether the accused is guilty or not guilty solely upon the evidence which you have heard in this court room during the trial of this case. In that way, Mr. Foreman, and in that way alone, can you discharge your very heavy responsibility. In this way and in this way alone, can you discharge your duty, a duty which you owe equally to your country, as well as to the accused man, Donald Marshall Jr.

Now the very first thing that I want to say to you, and it has been very well said by Mr. Rosenblum, is that the fact that a man is charged and brought into this court does not mean that he is guilty. The Crown must prove to you by legal and competent evidence that convinces you beyond a reasonable doubt that the accused is guilty. As he said, a man accused of a crime is presumed to be innocent until he is proven guilty, and as both counsel, both Mr. Rosenblum and Mr. MacNeil fairly said to you, the burden of proof rests upon the Crown and it rests upon the Crown from the very beginning of the trial until the end. Now I shall make reference to this later as I go along.

Counsel for the Crown have called a number of witnesses whose evidence, Mr. MacNeil submitted to you yesterday afternoon, went to prove that the accused, Marshall, was guilty of the crime of non-capital murder. On the other hand, counsel representing the accused, by the cross-examination of the Crown's witnesses and by calling the accused himself, endeavoured to establish - to point out to you, according to Mr. Rosenblum, that the evidence for the Crown does not have the weight - that weight and that sufficiency necessary to discharge the onus upon the Crown. You heard Mr. Rosenblum and Mr. MacNeil summarizing the evidence and submitting their views to you. I would like to say in passing, Mr. Foreman, that we should, all of us, you and I, be very indebted to these four members of the Bar of Nova Scotia, who appeared before us during this trial and who represented the very highest ethical standard of the legal profession in this province. Mr. Rosenblum, in his submission to you, made a very forceful plea on behalf of the accused. His plea marks Mr. Rosenblum, in my humble opinion, I may say in passing, as a leading member of the Bar of Nova Scotia. Mr. MacNeil in his submission to you showed you that he is a highly regarded prosecutor in this province of Nova Scotia and he has also made a forceful submission on behalf of the Crown. But these two men, Mr. Foreman, would be the first to say to you that this is not a contest between them - between two lawyers. You who are the jury and I the judge must remember that our duty is to look at the evidence and from that source

alone to arrive at the conclusions which are required by justice and by law, not being entirely unmindful, of course, of what I said were the very good arguments, presented to you yesterday afternoon by these two men.

Now it is my duty, Mr. Foreman, to make clear the law that is applicable in this case. I will try as best as I can to do that and as simply as I can to enumerate the legal principles that are involved in this very serious case. A judge speaking to a group of lay people, such as you are, must keep in mind that it is not always easy for them to comprehend and to follow the principles of law that are involved in cases. It is up to the judge to try to make those principles understandable to the jury so that they will be the better able to apply the law as given to them by the judge to the facts of the case.

Now I intend, of course, to deal with matters of law. That has been pointed out by both counsel, but I am also going to deal, to some extent, with the facts in this very important case. In a very well known murder trial some nineteen years ago, Azoulay v. The Queen, (1952) 2 S.C.R. 495, Mr. Justice Taschereau, who later became the Chief Justice of Canada, pointed out that in a jury trial the presiding judge must - note he said "must" - except in very rare cases where it would be needless to do so, review the substantial parts of the evidence. He must present to the jury the case for the prosecution and the theory of the defence so that they, the jury, may appreciate the more the value and the effect of the evidence and the law that is to be applied to the facts as they, the jury, find them. It is not sufficient for the whole evidence to be left simply to the jury by the judge and say, "There, you have heard the facts; go ahead and decide upon them and render your verdict." The Azoulay case has been followed by many other cases in the past nineteen years in Canada. What I am getting at, Mr. Foreman, is that the pivotal points on which the prosecution bases its case and the pivotal points on which the defence stands must be clearly presented to the jury's mind by the judge. Now it is understandable that I don't have to,

and certainly I could not, review all the facts. I don't intend to do it. Indeed the facts have been very carefully looked into and developed by the two counsel who spoke to you yesterday and they have lessened a great deal of my work and duty for me.

But there is a very important distinction which you will remember and which was also referred to yesterday. When I speak to you on matters of law, it is your duty, Mr. Foreman and gentlemen, as counsel said, to act on my instruction as being absolutely correct in every respect. When you are inside in your room deliberating, any question of the law that may have come up, you will take as having been correctly stated by the judge in the way that I have done it. The rule then, in short, is that the law is for the judge. If I make a mistake in the interpretation of the law or in anything touching upon the law - by the way, you understand, you know that whatever I am saying here this morning is being reported by our court reporter and will, if necessary, be scrutinized later. If I make a mistake - where is the human being who has not made a mistake or who does not make a mistake, but if I do so here today, there is a remedy open to the party that is aggrieved by my mistake. As far as you gentlemen are concerned today, you will follow the law implicitly as I give it to you.

But when I speak about the facts, I am in my own way endeavouring to assist you in coming to a conclusion. As I mentioned, The Supreme Court of Canada has laid down that it is the duty of the judge to deal with the facts. But I stress, Mr. Foreman, I am saying it now and I will repeat it as I go along perhaps a number of times, you do not have to agree with me on the facts - you do not have to agree with me on the facts. It is your duty to decide what the facts are in this case from the evidence which you have heard. During my remarks, consciously or otherwise, I may express an opinion with regard to the evidence which has been given by one or more witnesses. And if I do that, I want to merely say that you - to emphasize that you are not in any way bound by my opinions as to the facts concerned. Evidence upon which I may comment may have left on your mind a very different

impression from the impression it has left on my mind. It is your duty to place your own interpretation upon the evidence. It is your duty to weigh the evidence and to come to your conclusion as to what you believe and what you do not believe. If there should be evidence which I don't mention, yet which you recall, that doesn't mean for one moment that the evidence which I omit or failed to discuss is unimportant. No, Mr. Foreman and members of the jury, all the facts are before you, whether I mention them or not. And when I speak of the facts, you will have noticed that I have been jotting down, through the trial hurriedly, the evidence and making my own notes. However, I did ask our capable court reporter to transcribe a couple of parts of the evidence for me which I intend to read to you later. But when I quote from my own notes - from my own notes - if you are in any doubt as to the accuracy of my notes, you will take your recollection rather than what I have given to you. Of course, it is understandable that if I make a mistake on the evidence, it will not have been done intentionally.

Now if at any time during your deliberations you require something to be read back to you, if you are not clear on some piece of evidence, you come back here and we will have it read back by the reporter or played back in the machine. You will listen to that portion which you wished to have read over again. That will be your privilege to make known to me that you wish to have certain portions of the evidence heard again.

As the facts are for you, so are the inferences from the facts. You can draw inferences from the facts and I'll come back to that later. You can draw inferences from the facts provided that the inferences are founded upon evidence that has been properly established and which are the logical results of the evidence - the logical consequence. The inference flows logically from the evidence that has been presented to you and which you accept. Don't make any inference, Mr. Foreman, gentlemen, against the accused, Marshall, unless in your good judgment it is the only reasonable and rational inference open on the facts.

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Now in considering the facts, naturally you have to decide what witnesses that you heard here the past few days - what witnesses you are going to believe; how much of their evidence you are going to believe; what part you will have listened to more carefully than some other part. You will have to sift through the evidence in this case. That's your responsibility! You are twelve men with common sense, with normal ability and normal intelligence. You have seen all the witnesses come before you. You have heard their evidence. You have seen their demeanour on the stand. It is up to you to assess the credibility of what they said, the degree or the extent to which you believe they have been telling the truth. People speaking of the events of some months past may have forgotten some details, may be uncertain as to the exact time or the exact spot or place, as to where and when something happened and it may be that they are perfectly honest when they tell you of their recollections as they remember them at that time. Now then, you may believe all the evidence given by a witness, a part of the evidence given by a witness or, indeed, none of the evidence given by a witness. When deciding upon the credibility of a witness, of the weight you are going to give to the evidence of a witness, you should consider what chance the witness had to observe the facts to which he or she testified and how capable the witness is of giving an accurate account of what he or she saw or heard. You must also decide, Mr. Foreman, whether the witness is biased or prejudiced, whether the witness has any interest in the case. These are some of the factors which must be considered when deciding upon the credibility or the truthfulness of a witness or the weight that is going to be attached by you to the evidence of a witness. There is always the possibility that a witness may be prejudiced or biased and in such circumstances may be giving a coloured account of what he saw or heard. Also, there is the possibility that a witness may have been discussing the case with others and has gradually built up an account of what took place which the witness may believe to be true, but which is more the result

of rationalizing as to what took place rather than what the witness actually heard or saw with his or her own eyes. If you have any reasonable doubt as to the accuracy of the evidence given by any witness or the weight that you should give to such evidence, I charge you to give the benefit of the doubt to the accused and not to the Crown. If you have any doubt as to the accuracy of any witness, I charge you to give the benefit of that doubt to the accused.

In approaching this case, you must be entirely impartial. You must banish from your mind all prejudices and preconceived notions. Indeed, I am not suggesting that you have any, but it is my duty to tell this jury and any other jury that such has to be done. You must decide, and I know you will decide, the guilt or innocence of the accused man, Donald Marshall Jr., without fear, without favour, without prejudice of any kind, but in accordance with the oath that you have taken before God.

I will now deal with what is known as the presumption of innocence. This presumption is woven into the fabric of our law in Canada, in England and in all freedom loving countries. It means that an accused person is presumed to be innocent until the Crown has satisfied you beyond a reasonable doubt of his guilt. It is a presumption which remains from the beginning of the case until the end and the presumption only ceases to apply if, as was said by defence counsel yesterday - it only ceases to apply if, having considered all of the evidence, you are satisfied that the accused is guilty beyond a reasonable doubt.

I said before that I would deal with the question of onus or burden of proof. The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden on an accused person to prove his innocence. I repeat, there is no burden on an accused person to prove his innocence. Let me make that abundantly clear. If during the course of this trial, from beginning to end, during anything that may have been said by

counsel during their speeches, that might in the slightest way be considered as suggestive of any burden on the accused to prove anything, let me tell you that there is no burden on the accused. The Crown must prove beyond a reasonable doubt that an accused is guilty of offence with which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused committed the offence of non-capital murder, the offence with which he is charged, then it is your duty to give the accused the benefit of that doubt and to find him not guilty. In other words, if after considering all the evidence, the addresses of counsel and my charge to you, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused, Marshall, committed the offence of non-capital murder, it is your duty to give this accused the benefit of the doubt and to find him not guilty. The words "reasonable doubt" are difficult to define. Perhaps it is because there are certain expressions which defy definition, But yet, Mr. Foreman, the moment you hear these words, "reasonable doubt", you understand what they mean. I would say that the words, "reasonable doubt" mean an honest doubt, not an imaginary doubt conjured up by a juror to escape perhaps the responsibility of his conscience. It must be a doubt which prevents a juror from saying, "I am morally certain that the accused committed the offence with which he is charged." In other words, that is the sort of doubt which would prevent you from saying, "I am morally certain that the accused committed the offence with which he is charged." In other words, that is the sort of doubt which would prevent you from saying, "I am morally certain that he committed the offence." I am repeating myself, of course, because I consider it to be so very important. If after hearing all the evidence, the addresses of counsel, my charge, you will say to yourselves, or ^{any} of you, "I am not morally certain that he committed the offence", then that would indicate to you - that would indicate there is a doubt in your mind and it would be a reasonable doubt which prevents you from arriving at the state of

mind which would require you to find a verdict of guilty against this man. If, however, you can say! "I am morally certain that what the Crown contends is what happened here in this case", then you have no reasonable doubt and your duty, your responsibility, is to find him guilty of the offence of non-capital murder.

The matter of motive requires a word or two from me, Mr. Foreman. You may ask yourselves, has there been any proof of motive in this case? Proof of a motive for an alleged crime is permissible and often valuable but I direct you that it is not essential. Evidence of motive may be of assistance in removing doubt and completing proof - you follow me - evidence of motive may be of assistance in removing doubt and completing proof. Motive is a circumstance but nothing more than a circumstance to be considered by you. The absence of a motive is a circumstance which must be equally considered by you on the side of innocence tending to substantiate or to support the presumption of innocence and to be given such weight as you deem proper. But if after consideration of all the evidence you believe it has been proven beyond a reasonable doubt that the accused committed the crime with which he is charged, the presence or absence of motive becomes unimportant.

Now intent - intent! In the crime that is charged here, it is necessary that in addition to the act which characterizes the offence, the act must be accompanied by a specific intent and must in this case, in the crime of murder, be a necessary element in the mind of the perpetrator of a specific intent to kill, or as I will explain in detail later, to do other things. And unless such intent so exists, the crime is not committed. The intent with which an act is done is manifested by the circumstances attending the act - the circumstances how the act is done, the manner in which it is done, and the state of mind of the person committing the act. While you may proceed, Mr. Foreman and gentlemen, on the common sense proposition that most people usually intend the natural consequences of their act - most people usually intend the natural consequences of their act - nevertheless, you

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must consider the state of mind of the accused at the material time and decide whether he intended the natural consequences of his act. I will say that what a man does, surely is one of the guides as to what he intends and sometimes it is the only trustworthy guide.

Now you have also heard in this case the evidence given by experts - expert witnesses. I will merely say that they are duly qualified experts who gave opinion evidence on questions in issue in this trial. You will consider the opinions they expressed in the evidence they gave. You are not bound to accept the opinion of an expert as conclusive but you should give to the evidence of these experts the weight that their testimony deserves. You remember Miss Mrazek and Mr. Evers of the R.C.M.P. They are experts. They have been accepted as experts. Miss Mrazek, the serologist - the lady who talked about blood. Mr. Evers, the hair and fiber expert; Dr. Naqvi; Dr. Virick; Dr. Gaum - they were all experts. Miss Meryl Faye Davis, the nurse - an expert. Give to the expert testimony the weight that you feel it deserves. These people have been called here to give evidence because they are skilled in particular fields and we take advantage of their skills to tell us something about what they did, their opinions. But you, Mr. Foreman and gentlemen, are the ones who must decide even on the testimony of experts.

Now just a brief word about your duties in the jury room. It is your duty to consult with one another in there, to deliberate with a view to reaching a just verdict according to law. Each of you must make your own decision whether the accused is or is not guilty. You should do so only after consideration of all the evidence with your fellow jurors and you should not hesitate to change your mind if you are convinced that you were wrong - in your first impression. After discussion and going over the matter, your original view you may find perhaps was wrong and you should not hesitate to change your view if the facts warrant same.

Since this is a criminal trial it is necessary that you should all be unanimous in your verdict. In other words, it is necessary that each and all of you should agree on whatever verdict you may see fit to return. Unless you are unanimous in finding the accused not guilty, you cannot acquit him. Nor can you find a verdict of guilty, unless you are unanimously agreed that he is guilty. If after some considerable careful consideration you are unable to agree, then of course you will report to me. I urge you, however, to try to reach a conclusion one way or another.

Now in this case, Mr. Foreman, the indictment reads that, "The Jurors for Her Majesty the Queen present that Donald Marshall Jr. at Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May, 1971, did murder Sanford William (Sandy) Seale, contrary to s.206(2) of the Criminal Code of Canada."

I intend to read to you certain portions of the Criminal Code. The Criminal Code is the statute of this country which governs all criminal matters coming within the jurisdiction of Canada. As I proceed with my charge, it will become necessary to refer to other sections. But now let us turn to s.206(2) and to that much of it as concerns you:

"Every one who commits non-capital murder is guilty of an indictable offence ..."

Every one who commits non-capital murder is guilty of an indictable offence! Now we turn to s.194 and we find this:

- "(1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
- (2) Homicide is culpable or not culpable.
- (3) Homicide that is not culpable is not an offence.
- (4) Culpable homicide is murder or manslaughter or infanticide."

I will come back to this section later but at this moment let us turn to one more for a moment, 202A:

"(1) Murder is capital murder or non-capital murder."

Now let me close out any thoughts about capital murder because by a very unintentional slip yesterday, Mr. Rosenblum said something which compels me to make very clear - I know it was unintentional - this case is not a case of capital murder for which the penalty is death. This case is not the case of capital murder for which the penalty is death. So capital murder does not concern you. I may tell you that a capital murder case exists where a person kills one of a certain class, a class of which Sanford William (Sandy) Seale was not one. This class will refer to police officers, police constables, members of any police force, someone in charge of a jail, warden or such type of a person. Causing the death of one of this type, a person may be guilty of capital murder. There is not the slightest evidence in this case that the late Sanford William (Sandy) Seale was a policeman or any one of that class. If there is murder in this case at all, then it is what we call non-capital murder. That's the charge that has been laid and I repeat again, the charge we are dealing with is non-capital murder.

Now as I said before, culpable homicide is murder - in our case, non-capital murder; or it is manslaughter or it is infanticide. Let me finish off with the last part, infanticide, so we won't have to worry about that. Under s.204, Mr. Foreman and gentlemen, you will find the law regarding infanticide and as you all may probably know it deals with the case of a female person who causes the death of her newly-born child. So we have nothing to do with that in this case.

We come back to the simple statutory provision, culpable homicide is murder or manslaughter. Now the next question you have a right to ask me is, what is the meaning of culpable homicide, what is culpable homicide, what does it mean. Well, once again, last evening I looked up the word in the dictionary here, and while you may have your own definition or explanation, let me say to you that the word "culpable" - C-U-L-P-A-B-L-E - culpable, suggests or infers the meaning of blameworthiness, deserving of punishment.

Anything that is culpable is deserving of punishment. So homicide, the killing of a human being, is deserving of punishment, is blameworthy or it isn't blameworthy. Homicide is culpable or is not culpable. The killing of a human being may be blameworthy or it may not be blameworthy. You know, Mr. Foreman and gentlemen, I don't have to tell you, I'm sure that some of you have served in the Armed Forces. There were two world wars; there was the Korean Conflict and the wars that are taking place in the world even at this moment and we may bemoan the futility of war but that does happen in man's history from time to time. But in wartime while people kill, soldiers kill, they are not committing murder unless perchance, they go to all sorts of atrocities. But as a rule, the average soldier in battle though he kills, is not committing murder. Let us take another illustration more at home, closer to home. You are driving down George Street; there is a school at the corner of George and Dorchester. You are driving past that school, Mr. Foreman, and suddenly a little child will run out from the school grounds into the path of your car and is struck by the car and is killed. That's homicide! That's homicide, a child has been killed; a person has been killed; a human being has been killed. But certainly not by any stretch of the imagination or by law can it be said that in those circumstances you or I or anyone to whom that unfortunate event would have happened would be guilty, would be deserving of punishment criminally. Indeed, indeed, whoever to whom it happened would not be deserving of having to pay any civil damages. It would undoubtedly be an unfortunate accident in every sense of the word. There would be nothing blameworthy about the killing of this child. Culpable homicide is homicide that is deserving of punishment!

Now when we come to what is murder we turn to s.201 and we find,

"Culpable homicide is murder

- (a) where the person who causes the death of a human being
 - (i) means to cause his death, or
 - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;"

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That's murder! That's culpable homicide, Mr. Foreman, where the person who causes the death of a human being, one, means to cause his death or two, means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not. That's murder! That's murder! I think that's pretty clear, Mr. Foreman. I don't think I have to enlarge upon that.

Now let's go for a moment to s.205 of the Code, just briefly and we find here, 205, the following:

"Culpable homicide that is not murder or infanticide is manslaughter."

Well I've said that in another way before. Culpable homicide that is not murder or infanticide is manslaughter. I've dealt with what is murder. I've explained to you what is infanticide and now I have read to you s.205.

Now Mr. Foreman, in a few moments I will instruct you why as a matter of law, my instructions to you, is that in this case you do not have to consider the question of manslaughter but in order that you will have the completed picture before you, let me give you an example of the difference between non-capital murder and the crime of manslaughter. Suppose that two farmers are neighbours and they quarrel over the location of the boundary between their two farms - not a very common event but yet not entirely uncommon as I'm sure most of you probably have heard - the bitter argument that may occur over the boundary between the two farms. Now one day Farmer A sees Farmer B moving the survey posts that he had put down and in anger, he takes his gun, his rifle, and he shoots B and kills him. In such a case, Farmer A committed culpable homicide when he caused the death of Farmer B by an unlawful act, that is by shooting Farmer B and since he meant to cause the death of Farmer B, he meant to shoot him, he meant to kill him, or he meant to cause him bodily harm which could have caused death and he was reckless as to whether death ensued or not, he committed non-capital murder. On the other hand, suppose that on this occasion when Farmer A saw Farmer B removing the survey posts, Farmer A lifted his gun, intending to shoot over the head of Farmer B, not to strike him, not to kill him, but to frighten him

and as he lifted the gun he stumbled and the direction of the gun went from pointing upwards to straight ahead and the bullet struck and killed Farmer B. In such a case Farmer A commits culpable homicide. He committed culpable homicide when he caused the death of Farmer B but because Farmer A did not mean to cause the death of Farmer B, he didn't mean to cause him bodily harm which might have resulted in death and he was not reckless as to whether death ensued or not, Farmer A committed manslaughter. In short, even though the killing in that case was culpable homicide, it was not murder but manslaughter, since the all important intent, the all important element of intent, do you follow me - the all important element of intent, was absent.

Now, let me turn for a moment to the evidence of the two doctors, Dr. Naqvi and Dr. Gaum. I have taken this from the official record, excerpts, not the full report. I'm not giving you the full report of their testimony but what I am reading to you is from the official record which I have taken with the assistance of the court reporter. Dr. Naqvi said that "the victim was a coloured teenage boy who has had his bowel outside his abdomen and an opening into the abdomen approximately three inches to four inches wide and his clothes were filled with blood. He himself was in a state of shock; very critical, no pulse; no blood pressure and he was on the verge of death. His bowels were torn; his vessels were torn and he had massive bleeding inside and his major vessel was cut. Sharp pointed object that has penetrated through the abdomen and all the way down to the back. Kidneys were shut down; his respiration was shut down. Cause of death, injuries to his bowel, his vessels." Dr. Gaum, came in later and was speaking about the second operation and he said that, "after exploration the wound to the aorta was found. The aorta runs from up around this region of the chest and curves right down. It's the major blood vessel that originates from the heart to supply the rest of the body. It was punctured as I recall it about one-half inch or so. Condition continued to deteriorate. Was brought back to the OR again to deal with his continued hemorrhage and after re-exploration, the wound in the aorta was found. He did have other

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"injuries to the vascular supply of his bowel which had been dealt with at the previous operation and he continued to have quite a bit of hemorrhage from the mesentery of the bowel, the tissue which carries the blood vessels to supply the bowel and he did have a lot of bowel which was deprived of its blood supply and it was becoming gangrenous." That is the description of the injuries which William Sanford (Sandy) Seale received.

You will remember that Leo Curry, the ambulance operator, took the injured man to the hospital - the injured man there on the road, he took him to the hospital. And he was with him until Dr. Naqvi arrived. Dr. Gaum assisted Dr. Naqvi and Dr. Gaum identified the injured man, the man who died, as being William Sanford (Sandy) Seale. There is therefore no doubt in the world that the person who sustained the wounds described by the doctors was William Sanford (Sandy) Seale. There is no doubt that it was he who received the wounds. There is no doubt in the world, Mr. Foreman, that Mr. Seale died as a result of these wounds. In my opinion, and please remember, as I told you before and I will tell you again and again, that you do not have to accept my opinion - in my opinion, you will decide yourselves - my opinion, the nature and the extent of the wounds inflicted on the late Mr. Seale are such that whoever caused these wounds intended to kill him, or intended to do him bodily harm that he, the person who did it, knew was likely to cause his death, Seale's death, and he, the person who did it, was reckless whether death ensued or not. In short, whoever committed these wounds on William Sanford (Sandy) Seale, committed non-capital murder. That's my opinion! You do not have to accept my opinion! You are the sole judges of the facts. You will decide yourselves. You do not have to accept my opinion. My opinion is that whoever caused these wounds committed non-capital murder. The facts in this case, in my opinion, do not give rise - the facts in this case as they came before you, gentlemen of the jury, from beginning of the case to the end, do not give rise to your having to consider the crime of manslaughter and therefore, I charge you that

your verdict in this case is to be either guilty or not guilty of murder - guilty or not guilty of murder. The important question therefore for you is whether or not the Crown has established beyond a reasonable doubt that it was Donald Marshall Jr. who committed the murder of William Alexander (Sandy) Seale.

Now I have spoken for some considerable time and I'm going to pause to give you a chance to go in your room. But inasmuch as I am continuing with the charge, you will please, gentlemen, remain in your room. Do not go out in the corridor under any circumstances. Remain there! I will stay in my room alone. In about ten minutes time, I will come back and I will continue with my charge after all of us have had a chance to refresh ourselves.

(11:10 A.M. COURT RECESSED TO 11:30 A.M.)

11:30 A.M. JURY POLLED, ALL PRESENT)

Now Mr. Foreman, gentlemen of the jury, I told you that I would deal with the facts to a certain extent. I think it is clear that the Crown's case is based principally upon the evidence of two witnesses, Maynard Chant and John Pratico. There are of course a couple of other witnesses too to whose evidence I will refer. But the case for the Crown, in my opinion, rests principally upon these two witnesses. So I have had the court reporter transcribe for me from the evidence of these witnesses. For the time being I am going to talk about the case for the Crown and I will turn, of course, to the case for the Defence. I may not have all that he said. I may not read you back all that he said but what I am reading is from the official record.

Maynard Chant - this is in direct examination - that is examination by the Crown -

Q. Did you notice anything as you walked along the railway tracks?

A. I noticed a fellow hunched over into the bush.

Q. Good and loud now.

A. I noticed a fellow hunched over into a bush.

Q. Where would that be on this plan?

A. Right there.

Q. You're pointing to a bush that is opposite -
(Court directs to mark plan)

A. Witness marks plan.

Q. The bush that you have marked with the letter X is the tenth bush from Bentinck Street when counting in an easterly direction along the railway tracks: that is the bush in front - between the houses marked MacDonald and M. A. McQuinn, is that correct, the tenth bush?

...

Q. When you observed this man, did you recognize him?

A. No sir.

Q. Beg your pardon?

A. No sir.

Q. What did you do?

A. Oh, I kept on walking down a little farther. I walked down a little farther and looked back to see what he was looking at. He was looking over towards the street. So I looked over and saw two people over there."

I pause now to repeat, he said he saw two people over there.

Q. Did you recognize either of these people?

A. No. And I guess they were having a bit of an argument.

Q. Why do you say that?

A. I don't have no reason why.

Q. Could you hear what they were saying?

A. No.

Q. What took place?

A. Well one fellow, I don't know, hauled something out of his pocket anyway - maybe - I don't know what it was. He drove it towards the left side of the other fellow's stomach.

Q. What took place, what then?

A. Fellow keeled over and I ran.

Q. You ran from the scene?

A. Yes.

Q. Can you describe these two men, what they were wearing?

A. The fellow that had keeled over, he had a dark jacket and pants and that on. The other fellow had, I thought it was a yellow shirt at first but after a while he caught up to me and it was a yellow jacket.

Q. Tell me, sir, before you ran from the scene did you recognize either of these two gentlemen?

A. No sir.

Q. Then what did you do?

A. I ran down the tracks and cut across the path right onto - I don't know the name of the street ... towards bus terminal and I saw a fellow running towards me. I turned around and started to walk up the other way. He caught up to me and by

" that time I recognized him and it was Marshall - Marshall fellow.

- Q. Donald Marshall?
 A. Donald Marshall.
 Q. That's the accused in this case here. Do you see him in court here today?
 A. Yes.
 Q. Would you point him out ... (Then the question -)
 Q. Whereabouts did he catch up to you?
 A. I guess it was about two houses down, maybe three.
 Q. Can you point out on exhibit 5 where he met you on Byng Avenue?
 A. Right there.
 Q. Around the area in which is noted what?
 A. Red house, Mattson?
 Q. The area of the house shown as Mr. Mattson's on Exhibit 5, now what took place there, sir?
 A. He caught up to me and I stopped and waited. He said, 'Look what they did to me.' He showed me his arm. Had a cut on his arm and I said, 'Who' and he told me there was two fellows over the park. By that time another couple, like two girls and two boys came along and he stopped them and asked them for their help, you know. They said, 'What could we do to help?' and the girl gave him a handkerchief to put over his arm. He showed his arm and it was bleeding. So they kept on going.
A car come along and he flagged that down-
 Q. Who flagged it down?
 A. Marshall. And we got in the car and drove over to where the fellow was at.
 Q. Where what fellow was at?
 A. Over - the body on Crescent Street, I guess, and the fellow was at Crescent Street.
 Q. Was this where you had seen the action you had described earlier in your evidence?
 A. Yes sir.
 Q. About the two men that were there and then one man keeling over and so on, this area in which this took place?
 A. Yes sir.
 Q. Were there any street lights in the area?
 A. There might have been one or two. I think at least one, as far as I know of.
 Q. Tell me, did you recognize Mr. Marshall as being the man- ...

(That was objected to by Mr. Rosenblum)

- Q. You say you recognized Donald Marshall on Byng Avenue when he came up and talked to you?
 A. Yes.
 Q. What was he wearing?
 A. Yellow ...
 Q. When Marshall caught up to you on Byng Avenue - I'm sorry, did you give us what he said? 'Look what they did to me' - did

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- Q. he say anything else?
- A. He said that his buddy was over at the park with a knife in his stomach.
- Q. Then you say, sir, that Marshall flagged down a car and you went where?
- A. Over to Crescent Street on the other side of the park.
- Q. Back to Crescent Street?
- A. Yes.
- Q. Is this in the area in which you marked an "X" on exhibit 5?
- A. Yes.
- Q. What did you find there?
- A. There was a fellow keeled over on the street. He was laying down on the street. It was on this here street on the side where the tracks was at.
- Q. Tell me, how long would this be after you saw the man keel over that you mentioned, before you ran from the scene? How much time would have passed?
- A. About ten minutes, fifteen minutes.
- Q. What did you do?
- A. I got out of the car, ran over to where the fellow was lying on the ground and jumped down beside him.
- Q. Did you recognize that man?
- A. No sir.
- Q. You didn't know him before?
- A. No.
- Q. What took place?
- A. Well Donald Marshall got out of the car and come over near the body and at that time, he stood there for a minute; another fellow came over - I don't know if he or the other fellow went up and called the ambulance -
- Q. Where did Marshall go when he came back? Did he go near the body?
- A. No.
- Q. Where did he stand?
- A. He stood behind the body for a minute and then he flagged a cop car down. ...

It was at that point that you gentlemen were excluded. Later on, before you, Chant on answer to a question from me, said, this time it is according to my own notes - remember you have to take your recollection if what I have noted in my notes is different from your recollection - according to my notes, Maynard Chant said, "the clothing worn by the accused whom I saw and to whom I talked after the incident on Prince Street was the same clothing as that worn by the man whom I saw pulling out a long shiny object which I thought was a knife."

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Now you will remember, Mr. Foreman, that Maynard Chant said before you when he was talking about the fellow who hauled something out of his pocket - "maybe, I don't know what it was" - he said, "I don't know what it was." Because of that, the Crown counsel, Mr. MacNeil, because of that and some other answers that he gave, Crown Counsel requested that Maynard Chant be declared adverse and that he, Crown Counsel, be given the right to cross-examine. I will read you s.9(1) of the Canada Evidence Act -

"9.(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such a statement."

I ruled that Mr. Chant was adverse and I permitted the Crown to cross-examine him in the case. He was questioned on what he had said in the Court below and I will just refer you to that. He was questioned,

"Q. Tell me, what did you see take place?

A. The only thing I saw - I saw them talking. I guess they were using kind of profane language. Donald said something to the other fellow and the other fellow said something back to Donald and I saw Donald haul a knife out of his pocket.

Q. That's Donald Junior Marshall who you see in court here today. Would you point him out to the court, please?
Witness points to the accused.

You saw him what?

A. Haul a knife out of his pocket.

Q. What if anything did he do with the knife?

A. He drove it into the stomach of the other fellow."

Now I should read you also what should be the instruction of the judge to the jury in such a case and such a situation. The word adverse - I had to find him adverse - means hostile, not simply unfavourable. Once a witness is declared hostile and cross-examined upon a previous statement, the jury should be instructed - which I

am doing to you - that they are only to consider the previous statement in relation to the witness's credibility and not as relevant to the proof of any fact in the case, unless adopted - unless adopted. In other words, you ask a witness - the witness says something today and you draw to his attention that he made a statement that was inconsistent with what he is saying today, and he agrees, he acknowledges that he made an inconsistent statement, you only look at that previous statement to determine whether or not this witness is a credible witness. You do not accept the statement that he made previously as being the truth. You look at it for the purpose of deciding whether or not such a fellow can be believed, a fellow who says something one day and something else the next day. But the law is too, that you can accept what he said before if it is adopted by him. Now my recollection is, and you will go by your recollection, not mine; my recollection is that when Mr. MacNeil was cross-examining him and reading from the prior testimony, he would ask him a question, "did you say such and such," and the witness said, "yes." "Is it true," and the witness said "yes," and the same right along. Now that's my recollection. You will, of course, take your recollection of that question and answer. My recollection is that he adopted here before you the previous statements that he had made in the court below. But the main attack on Mr. Chant's testimony by the Defence is two-fold. First of all, he failed to tell the police at the time of the incident what he told the court here. He failed to tell it that night. Secondly, he lied to the police and he said that in cross-examination according to my notes. He said that, "They, the police didn't tell me what to say." This was on cross-examination of Maynard Chant. "I told them the untrue story Sunday afternoon. I told them the true story afterwards." I think the criticism strictly speaking is justified. Strictly speaking, it's justified. It's a fair criticism to make, that he failed to tell the police at that particular time when he saw - when the police came, he didn't say, "There's your man who did this thing." He didn't say it there at the scene. He didn't say

it at the hospital. He didn't say it at the police station. He didn't say it later. How much more credible would have been his story if indeed he had told that story at the time it happened. And he lied to the police for a while. He said they didn't coerce him into telling the story. He later told them the true story. Mr. Rosenblum says, "you can't believe a thing that this fellow says." Mr. Foreman, he says you can't believe - the Defence urges you to disregard the evidence of Maynard Chant, because of his inconsistencies and because of the fact that he lied and he didn't tell the story at the time.

Mr. MacNeil, on the other hand, urges you to accept his story completely as finally told. Well I told you before that it is up to you to assess the credibility of every witness. You don't have to believe everything a witness said. You can believe a part; you can believe some; you can reject - you can disregard the whole of that witness's testimony. It is up to you to determine the credibility of the witness and, of course, in this case you will have to be, in my opinion, I would instruct you, to be most careful of the evidence. You are looking at his evidence and you have to be most careful. But in assessing his evidence, Mr. Foreman and gentlemen, you will keep in mind the circumstances in which this boy came to be there that night. He had been to a church meeting in the Pier I think. He missed his ride. He came over town to try to get a bus to go to Louisbourg, his home, and he was too late for the bus. So he started to walk from the bus depot, down in this direction, presumably to hitch-hike a drive to his home in Louisbourg. Then he becomes involved, becomes a witness to a very serious matter - becomes a witness to a very serious matter. In discussing his testimony, you will ask yourselves, did Maynard Chant exhibit the tendency that as reasonable people you might feel many people would have of desperately not wishing to become involved in a very serious matter. You will keep in mind the age of this boy. You will ask yourselves what possible motive, what motive, would Maynard Chant have, in telling

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the story implicating the accused, Donald Marshall. It seems to me - now, that's my opinion and I caution you, you do not have to accept my opinion; you do not have to accept my opinion. In my opinion there is not the slightest suggestion in this case that Maynard Chant was in collusion with John Pratico, that they acted in cahoots, together, to concoct a story. There's not the slightest suggestion that these two people were anywhere near one another prior to the events of that night or around that time up to the time when Chant saw Pratico, and that afterwards they got together to tell a story implicating the accused, Donald Marshall, Jr. He says that he saw Marshall and this other man arguing. Pratico said that they were arguing. He said, what he said here first, that he saw him haul out something; later he acknowledged it was a knife or as he put it, "he hauled out something which I thought was a knife, something shiny." Pratico said the same thing. Is he a liar? Or is there some consistency in his story which in spite of the events which were properly laid before you, he was declared adverse - is there something there which can lead you to consider that he is a credible witness. It is up to you, gentlemen. I am just putting the picture before you.

Now we come to John L. Pratico. And again, I read from the official record. Again in the direct examination -

- Q. Do you know Donald Marshall Jr.?
 A. Yes sir.
 Q. Do you see him here in court today?
 A. Yes.
 Q. Would you point him out to the court, please. Let the record indicate the witness points to the accused. Did you see him on the 28th day of May, 1971?
 A. Yes.
 Q. Where?
 A. By Wentworth Park.
 Q. And where did you first see him that evening?
 A. Up by St. Joseph's Hall.
 Q. Up by St. Joseph's Hall?
 A. Around that area.
 Q. Who was with him?
 A. Sandy Seals.

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- Q. Did you know Sandy Seale?
 A. Yes, I did.
 Q. Tell me, Mr. Pratico, what did you do when you joined up with Seale and Donald Marshall Jr.?
 A. Walked down the road as far as, like around the park.
 Q. Do you know the streets in the city of Sydney?
 A. Yes.
 Q. There's a drugstore there on what corner?
 A. Corner George and Argyle.
 Q. George and Argyle. Tell me, sir, what took place there if anything?
 A. They went down in the park. I went the other way.
 Q. Which way did you go?
 A. Argyle to Crescent.
 Q. You went up Argyle Street to Crescent Street?
 A. Yes sir.
 Q. Then where did you go?
 A. I went over Crescent, down Crescent Street, as far as the railway tracks, there on the railway tracks and went up behind a bush and I stayed there and I went and sat down in a squat position, kind of behind the bushes where I was sitting.
 Q. What time of the day or night would this be?
 A. I wouldn't know.
 Q. I beg your pardon.
 A. I wouldn't know. What I'm thinking, it would be 11:30, quarter to twelve. I wouldn't know for sure.
 Q. What were you doing behind the bush?
 A. Drinking.
 Q. Tell me, sir, what did you observe if anything?
 A. Well soon as I observed Donald Marshall and Seale talking, it seemed like they were arguing -

(I told him, "I can't hear you" and he repeated it.

"It seemed like they were arguing.") By Mr. MacNeil -

Q. Where was this?

(You understand this is all Mr. MacNeil's questioning. This is direct examination.)

- A. On Crescent Street.
 Q. I'll show you plan, exhibit No. 5. Are you familiar with this plan?
 A. Yes.
 Q. Would you point out please where on the exhibit 5 that you saw the two gentlemen?
 A. There ...
 Q. You'll have to speak up loud now.
 A. This would be the drugstore here-
 Q. Louder, please?
 A. I went down this way here.
 Q. Down Argyle Street?
 A. Down Argyle to Crescent and come up here and stopped around here.

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- Q. Stopped in the area marked "X" on the plan?
 A. In that area.
 Q. Stopped in the area marked "X" on the plan. (Plan shown to the jury.) Tell me, before this evening did you know Donald Marshall?
 A. Yes.
 Q. How long did you know him?
 A. Known him ever since last summer.
 Q. Did you know Sandy Seale?
 A. Yes sir.
 Q. How long did you know Sandy Seale?
 A. A couple of years.
 Q. When you got behind the bush you say you were at in the park there, that you pointed out at approximately the point marked "X" on the plan, what did you observe if anything?
 A. I seen Sandy Seale and Donald Marshall talking, more or less seemed like they were arguing.
 Q. Did you recognize them at that time?
 A. Yes.
 Q. Were there any street lights in that area?
 (There was no audible response.)
 Q. Take your hand down.
 A. Yes sir.
 Q. And you could recognize them at that time?
 A. Yes.
 Q. What if anything did you see them do?
 A. Well they stood there for a while talking and arguing and then Marshall's hand came out, his right hand come out like this-
 Q. What do you mean, out this way?
 A. Come out like that you know and plunged something into Seale's like it was shiny and I-
 Q. Pardon me. You're confusing me. The hand came out of his pocket and you said something about shiny. Now how does that connect in there?
 A. Well it looked like a shiny object. Come out this way, you know.
 Q. What did he do with the shiny object?
 A. Plunged it towards Seale's stomach.
 Q. Into whose stomach?
 A. Seale's.
 Q. What did Seale do?
 A. He fell. And that's the last I seen.
 Q. What did you do?
 A. I started running. I run up Bentinck Street."

Now in cross-examination and this time, again according to my notes - you remember, according to my notes - that's my notes - you take your own recollection; you do not have to go by my notes - according to my notes, Pratico said in cross-examination, "Only two I noticed were Seale and Marshall. Seale was facing me. Marshall facing the other direction. They were standing at arm's length."

Now Mr. Foreman, the Defence understandably attacks Mr. Pratico's evidence because of his drinking which he related, the extent of which he related to you that night and because of the fact that he, Pratico, told other people that Donald Marshall did not stab Sandy Seale. You are pretty well aware now from what was brought before you of the incident that occurred outside here in this very court house. You saw John L. Pratico on the stand. You heard his testimony and you saw his demeanour. And as I said before and repeat, it is up to you, you are the judges of the fact and you alone must decide the credibility of the witnesses. I may say that he was a nervous witness. That's my opinion. You don't have to accept that. He was a nervous witness. There's no doubt about that in my mind. And he explained why at times he had told the story that Donald Marshall did not stab Sandy Seale. His explanation was, "I was scared of my life; I was scared of my life." He had spoken to a man by name of Christmas he told you. He had spoken to a man by name of Paul - Artie or Arnie, I don't know; I've just forgotten, Artie Paul. He spoke to a woman too but he did say that there was nothing as far as this woman was concerned. He had spoken to Christmas, to Artie Paul and the day of the incident, he spoke to Donald Marshall Sr., the father of the accused, after which he approached Mr. Khattar one of the defense counsel who very properly and correctly in accordance with the best tradition, would not talk to him unless there was somebody there as a witness. He told Mr. Khattar, brought the sheriff out, that Donald Marshall did not stab Sandy Seale. Why did he tell that story? He said, "I was scared, scared of my life." "I was scared, scared of my life." That's what a witness tells you here in this court. He drank that night, disgracefully - drank

disgracefully. It certainly is a sad commentary on the authorities in this community that a young man of that age would be able to arrange to have liquor from the liquor store or wherever he got it. He drank wine and beer and whatever else he could get his hands on. In determining his credibility, however, you must ask yourselves - you will ask yourselves, and you are the judges, as you will in assessing the evidence of Maynard Chant, what motive - what possible motive could this young man, Pratico, have to put the finger of guilt on the accused, Marshall. What motive would he have? What motive would Maynard Chant have to say what he said here in court to you that Donald Marshall was the one who stabbed Sandy Seale? He was asked for example, "Where did you see Marshall first that evening?" He said, "Up at St. Joseph's Hall." The accused - and I will come to the accused's testimony later - read you his testimony too - the accused said he was not in the vicinity of St. Joseph's Hall. John L. Pratico said, "I saw him first that evening up by St. Joseph's Hall." Who was with him? Sandy Seale! The accused said Sandy Seale was with him. Later Pratico said that he noticed only the two and they were arguing. Chant said the same thing, the two, and they were arguing.

At one time, and this is my recollection and you need not take it; you will rely on your own - my impression is that Pratico said at one time that Seale had his fists up. They were arguing and Seale had his fists up. That's the impression I got. I think it's right but you will rely upon your own.

Now Mr. Foreman, the defence in this case is not self-defence. This is not a case of self-defence. This is a complete denial. The defence is, I didn't do it - complete denial! Not self-defence but even if it were self-defence, I would have to instruct you that if that were the evidence, the late Mr. Seale put up his fists, then to strike him with an instrument and stab him was something that would go far, far beyond the right of self-defence. That sort of defence would not be commensurate with the

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other man's act. That issue does not arise here because as I said, the defence here is a complete denial. Pratico said that they were arguing. Chant said they were arguing. Pratico told of the shiny object in Marshall's right hand which he plunged into Seale's stomach. The other man said the same thing. What motive would lead this young man to concoct a story, a dreadful story if untrue, to place the blame of a heinous crime on the shoulders of an innocent man? What possible motive would Pratico have to say that Donald Marshall stabbed Sandy Seale? He had been drinking. In assessing his evidences you will have to ask yourselves, is this a drunken recital or is it a recital of a drunken man, or is there a consistency which appears between the story of two eye-witnesses that night to this tragic event, eye-witnesses as to whom there is no evidence by the Crown that they got together, were in collusion to concoct the story.

I said to you before that that's the main case of the Crown. They also have Patricia Ann Harris. Patricia Ann Harris, a young girl; she said there was someone with the accused. Remember, she is the young lady who was with her companion, Terry Gushue and coming from the dance. They stopped for a smoke in the bandshell. She says there was someone with him, with the accused. "I saw someone else there." One person! "I don't know who that person was." She says that Junior, the accused, held her hand that night. By the way, that's according to my notes. Again I caution you, you don't have to take my version. You will decide and again from my notes, and again I caution you, according to my notes, Terrence Gushue said that it was about ten to eleven when they were on Crescent Street going towards Kings Road where Miss Harris lives. They met Junior Marshall and he borrowed a match; Junior spoke to Patricia for a moment. According to my notes, Gushue said in cross-examination that he saw him, the accused, by the Green apartment building. This was on Crescent Street. "I saw just one with him", he said. Then he was pressed in cross-examination, properly checked, and he said,

"I thought there was only one" and he ends up, "I think there was only one." Patricia Harris says there were two people there. Gushus says there were two people. Maynard Chant says there were two and so does John Pratico.

That in essence is the case for the Crown, Mr. Foreman and gentlemen.

I come now to the evidence of the accused. I'm coming pretty close to the end. I'm not going to keep you all day, Mr. Foreman. I'm coming close to the end of my charge. Once again I have the direct examination, word for word, from the record as given here in court. He was questioned by defence counsel -

"Q. ...Had you been drinking on May 28 while you were at the home of Tobin's?

(I have left out a few preliminary questions.)

A. No.

Q. Where did you go after you left Tobin's home?

A. Down Wentworth Park.

Q. Were there people in the park?

A. Yeah.

Q. Did you meet anybody in the park?

A. Sandy Seale.

Q. Did you have any argument with him?

...

Q. What happened when you met Sandy Seale?

A. We were talking for a couple of minutes and Patterson came down-

Q. You met a fellow by name of Patterson?

A. Yes.

Q. What condition was he in?

A. Drunk.

Q. What happened then when you met Patterson?

A. Sat him on the ground. And went up to the bridge.

Q. Who went up to the bridge?

A. Me and Seale.

Q. You and Seale walked up to the bridge?

A. Two men called us up to Crescent Street.

Q. Two men what?

A. Called us up Crescent Street.

Q. What happened when you met these two men up there?

A. Burned us for a cigarette.

Q. Pardon.

A. A Smoke.

Q. What about?

A. Asked for a cigarette and a light.

- Q. When they asked you for a cigarette and the light, what did you do?
- A. I gave it to them.
- Q. Go ahead.
- A. I asked them where they were from. And they said Manitoba. Told them they looked like priests.
- Q. You told them what?
- A. They looked like priests.
- Q. Why did you make that remark to them?
- A. Looked like their dress.
- Q. How were they dressed?
- A. Long coat.
- Q. What colour?
- A. Blue.
- Q. What religion are you yourself?
- A. Catholic.
- Q. So when you asked them if they were priests did you get an answer?
- A. Yes.
- Q. What did you say to these men?
- A. They looked like priests.
- Q. Did you get an answer to that?
- A. The young guy, the younger one said, 'We are'.
- Q. Go ahead.
- A. They asked me if there were any women in the park. I told them there were lots of them down the park. And any bootleggers - I told them, I don't know.
- Q. Take your hand down, Donnie and go ahead.
- A. ~~He told us, we don't like niggers and Indians.~~
- Q. I didn't hear you.
- A. We don't like niggers and Indians. He took a knife out of his pocket.
- Q. Who did?
- A. The older fellow.
- Q. What did he do?
- A. Took a knife out of his pocket and drove it into Seale.
- Q. What part of Seale?
- A. The side here.
- Q. Are you referring to the stomach?
- A. Yes.
- Q. And then?
- A. Swung around me, and I moved my left arm and hit my left arm.
- Q. Hit your left arm?
- A. Yes.
- Q. Roll up your sleeve -

(And he did and you recall he showed the scar to you gentlemen of the jury.)

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Q. After ^{that} happened, what did you do?

A. Ran for help. ..."

I recall, I don't know whether it was - I think you can take it that Mr. Rosenblum asked him, "Did you lay a hand - did you do anything to Sandy Seale that night" and the answer was, "No."

Now gentlemen, you have to give very careful consideration to the story of the accused. I'm sure you will. As was his absolute right, he has gone on the stand and has given his version of the events that took place on that fateful night. Now contrary to what Pratico said, he said he was not in the vicinity of St. Joseph's Hall. And although he was with Mr. Seale, he had no dispute with him - those are the words I think - and he did not lay a hand on him. I repeat, he had no dispute with him and he did not lay a hand on him. And he told you how Seale came to get the injuries that he did receive. And I remind you, Mr. Foreman, that although the accused was subjected to a very vigorous and rigorous cross-examination, he adhered to his story that he told throughout. Now if you believe the version of the events that was told by Donald Marshall Jr., then it goes without saying that you must acquit him of this charge. Having gone on the stand he has become another witness in this case. You have the right to determine the credibility of him as a witness as you have the right to determine the credibility of any other witness. But you will bear in mind, Mr. Foreman - and I repeat, you will bear in mind - that Donald Marshall does not have to convince you of his innocence. He does not have to convince you of his innocence. It is the Crown, as I said over and over again, that must prove his guilt beyond a reasonable doubt. He does not have to convince you of his innocence!

The Crown, of course, understandably, has attacked this story. There was some considerable discussion among counsel as to the nature of the wound that he had on his left arm, the depth of it, whether there was bleeding. Mrs. Davis said there was no bleeding, it's true. The doctor at the time - but Maynard Chant said that

Creates
a
reasonable
doubt!

at first there was no bleeding but later there was bleeding. You saw the mark on his arm there. It's a pretty prominent mark even today after a number of months. In assessing his evidence, it seems to me - this is my opinion and you do not have to take my opinion - you have to look at it in two ways, it seems to me. On the one hand you keep in mind the fact that he stood up, as I said before, to a very rigorous cross-examination by a very capable crown prosecutor. You will bear in mind that he at the time showed Maynard Chant, "Look what they did to me." It was then and there at that time he told Chant what was done to him. At that time he managed to stop a car and got into a car and went back to Crescent Street. I think it was Maynard Chant - your recollection would be better - who said that it was he, Donald Marshall, the accused, who flagged down a police car. And it was Donald Marshall who went to the hospital and to the police station with the police. I think you have to ask yourselves on the one hand, is that the action of a man who has just committed a crime, who will flag down a police car, who will go with the police, who will do the things that he did and who maintains the consistency of his story. Keep in mind, as I said, that he does not have to prove his innocence.

On the other hand, Mr. Foreman, gentlemen, on the other hand - in my opinion, you will have to assess very carefully the story that he told - two strangers who he says looked like priests, because they wore long coats and blue. He asked them, he said, whether they were priests and one of them said they were and said they were from Manitoba. They asked for cigarettes, smokes; they gave him the smokes. He and Seale gave smokes to these people, or he did. Then the man, one of these men asked him if there were any women and they said yes, there were lots of them in the park. And out of the blue comes this denunciation against blacks and Indians: "I don't like niggers and I don't like Indians."

Now Mr. Foreman and gentlemen, we all know that prejudice has been rampant in this world for many, many years. We hope and pray that in our country we have reached a time in the progress of

our country that the hatreds and the bigotries and the suspicions of the past will no longer be with us and it seems that there is great hope in the youth of the country today who mingle and get to know more and more about one another. But that there still exists discrimination and bigotry and hatred for different ethnic groups, religions - there are those who do not like the blacks, or the Indians or the Catholics or the Jews, or the Protestants, or the Greeks, and so on - but in assessing the evidence of this witness, the accused, you ask yourselves the question, it seems to me, my opinion, at that hour - at that hour - these two men, one of them comes out suddenly with this denunciation of blacks and Indians. If you come to the conclusion that yes, it could be that there might have been somebody there that night who had that prejudice in him against - as he put it - niggers and Indians, you have to go on and ask yourselves the question, why - why. Donald Marshall and Sandy Seale who met these two strangers, who gave them cigarettes, smokes, who talked to them in a friendly way, asked them where they were from - according to Mr. Marshall's, the accused, story - where they came from; told they were from Manitoba; what were they, they were priests. Why, without the slightest gesture, without the slightest verbal attack or physical gesture, without the slightest provocation, would one of these so-called priests take out a knife and make a murderous attack on Sandy Seale, and on the accused himself. Why, one would ask in assessing the credibility of the story that he told, keeping in mind at all times that there was no obligation on him to tell anything at any time. There is no obligation on an accused person to say anything, to prove anything. But he has gone on the stand, has given the story and you have the right to judge the credibility of the story and keeping in mind at all times that the burden - the burden - of proving that he was guilty beyond a reasonable doubt must lie upon the prosecution.

Mr. Foreman and gentlemen, I have taken a long time in this case. I have humbly tried to discharge my duty in this proceeding. This has been a tragic event in the life of our communities here in this Island of Cape Breton, a tragedy that is beyond description. A young man in the prime of his life has been swept to eternity; a young man is on trial for that charge. We have to discharge our duty, Mr. Foreman; our duty in accordance with our oath that we have taken, you and I, before God to give to this case our fullest attention and ability, the ability that we possess. I have tried humbly to discharge the onerous responsibility that rests upon the judge. I know that you will discharge yours. I know that you will discharge yours. No matter who an accused person is in this country, be he the poorest or humblest citizen or be he the richest and most powerful individual in the country, any person charged with an offence will and must be given a fair and impartial trial without any sympathy, without any misguided sentimental feeling but one that is based on the evidence and on the evidence alone and with the proper application of the law as given by the judge. The oaths you have taken, each of you, is that you will well and truly try, and true deliverance make between Our Sovereign Lady the Queen and the prisoner at the bar, so help you God. Mr. Foreman and gentlemen of the jury, I am satisfied that you can be relied upon to discharge this heavy duty conscientiously and to the fullest.

(12:35 P.M. CONSTABLES SWORN)

Now from this moment on you gentlemen must remain together. Lunch will be provided you by our very capable sheriff and his assistants. You will come back to your room. You don't have to come back here. You will go directly to your room. All the exhibits will be given to you. The constables will be at your constant attendance. Again, should you wish any of the evidence read over to you or played back, you will indicate, send word to me. I hope that I have covered all the legal points but if you wish me

to touch upon any matter of law again, be free to do so, Mr. Foreman and gentleman. Now you don't enter into any discussion with the constable. You merely say, "I wish to have something to say." You say it in court. If you want further instructions or anything you come in and ask me.

I can only apologize for the length of time but I think you will perhaps be the first to say in this serious matter, no apology from me is necessary. I want to thank you, each and every one of you, again for the care that you have given to the whole case.