

I N D E X

VOLUME 3

MARSHALL REFERENCE-----PAGES 1 - 235
December, 1982

MEDIA POOL COPY

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1982

HER MAJESTY THE QUEEN

VS

DONALD MARSHALL, JR.

Attorney General of Canada / Le Procureur général du Canada
2
June 16, 1982

The Honourable Harry W. How, Q.C.
Attorney General of Nova Scotia
1723 Hollis Street
Halifax, Nova Scotia
B3J 2L6

Dear Mr. How:

I am pleased to enclose an originally signed copy of the Reference to the Nova Scotia Court of Appeal in the Donald Marshall, Jr. case.

I have refrained from specifically raising the issue of possible compensation to Marshall at the request of your Department on the grounds that the question of whether compensation is appropriate in this case and if so, its nature and quantum, is a matter for you and your government to decide.

I have arranged for delivery of this Reference to the Chief Justice of Nova Scotia and also to Mr. Aronson, counsel for Donald Marshall.

John M. Bentley, Q.C., General Counsel and Director of our Atlantic Regional Office in Halifax will be available to assist the Court in this matter to whatever extent seems appropriate. I understand, however, that your officials intend to meet with Mr. Aronson and make available the necessary information to enable the appropriate evidence and witnesses to be brought before the Court in an effective manner.

Yours sincerely,


Jean Chrétien

cc G. L. Gale, & C

IN THE MATTER OF A REFERENCE PURSUANT TO SECTION 617 OF THE CRIMINAL CODE BY THE HONOURABLE JEAN CHRETIEN, MINISTER OF JUSTICE, TO THE APPEAL DIVISION OF THE SUPREME COURT OF NOVA SCOTIA UPON AN APPLICATION FOR THE MERCY OF THE CROWN ON BEHALF OF DONALD MARSHALL, JR.

WHEREAS Donald Marshall, Jr. was convicted on 5 November, 1971 by a court composed of Mr. Justice J. L. Dubinski and a jury that he, on or about 29 May, 1971 at Sydney, in the County of Cape Breton, Province of Nova Scotia, murdered Sandford William (Sandy) Seale and was on the same date sentenced to a term of life imprisonment.

AND WHEREAS an appeal from that conviction to this Honourable Court was dismissed on 8 September, 1972.

AND WHEREAS evidence was subsequently gathered and placed before the undersigned which appears to be relevant to the issue whether Donald Marshall, Jr. is guilty of the crime of which he stands convicted.

AND WHEREAS application for the mercy of the Crown has been made on behalf of Donald Marshall, Jr., pursuant to section 617 of the Criminal Code.

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2.



Justice

IN THE MATTER OF A REFERENCE
PURSUANT TO SECTION 617 OF THE
CRIMINAL CODE BY THE HONOURABLE
JEAN CHRETIEN, MINISTER OF
JUSTICE, TO THE APPEAL DIVISION
OF THE SUPREME COURT OF NOVA
SCOTIA UPON AN APPLICATION FOR
THE MERCY OF THE CROWN ON BEHALF
OF DONALD MARSHALL, JR.

The Honourable Jean Chretien
Minister of Justice
Justice Building
239 Wellington Street
Ottawa, Ontario
K1A 0H8

DONALD MARSHALL, JR.,
and HER MAJESTY THE QUEEN
1982 S.C.C. 00580
heard December 1 and 2, 1982
at Halifax, Nova Scotia
CASE ON APPEAL

1982

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S. C. C. 00580

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

BETWEEN:

DONALD MARSHALL, JR.,

Appellant-
Defendant

- and -

HER MAJESTY THE QUEEN,

Respondent-
Crown

Before The Honourable Chief Justice of Nova Scotia,
I. M. MacKeigan, presiding

The Honourable Mr. Justice G. L. S. Hart
The Honourable Mr. Justice M. C. Jones
The Honourable Mr. Justice L. L. Pace
The Honourable Mr. Justice A. L. Macdonald

At Halifax, Nova Scotia

On December 1 and 2, 1982

Counsel Stephen J. Aronson, representing the appellant
Frank C. Edwards, representing the respondent

Court Reporter Ms. Judith M. Watson, RPR

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COURT OPENED: 10:00 o'clock in the
forenoon on the 1st
day of December, A.D., 1982

THE COURT:

Donald Marshall and the Queen. Mr. Marshall is present?

MR. ARONSON:

If it please the Court, I had expected him. I might say he was taking a driver's test this morning. He may be slightly delayed as a result of that. It was supposed to be at 8:30. In fact, he may be here in the next few minutes. He should have been here a few minutes ago actually.

THE COURT:

I think we should wait. We must wait for him. He's entitled to be here.

MR. ARONSON:

Yeh, I'd appreciate it if the Court would consider waiting until he does arrive as he will be the first witness who's going to be called before the Court.

THE COURT:

We'll recess until he arrives.

COURT RECESSED: 10:03 a.m.

COURT RECONVENED: 10:10 a.m.

THE COURT:

Mr. Aronson, is Mr. Marshall present now?

MR. ARONSON:

He is present, My Lord.

THE COURT:

Where is he?

MR. ARONSON:

Sitting in the back. Do you want to stand up?

THE COURT:

I think he should come forward in one of the blue seats or

wherever you wish, Mr. Aronson.

MR. ARONSON:

If it please the Court, I have no opening statement to make. I'd just like to indicate that --

THE COURT:

I think the only statement that we --

MR. ARONSON:

Pardon?

THE COURT:

The only indication we've had is what order do you propose -- do you propose to call all the witnesses that were authorized to be called, which ones and in what order?

MR. ARONSON:

The order of the witnesses will be Donald Marshall, Jr., James MacNeil, Donna Ebsary, Patricia Harris, Maynard Chant, Greg Ebsary and A. J. Evers.

THE COURT:

Very well, call your first witness.

MR. ARONSON:

If I may make a motion to exclude witnesses not otherwise giving evidence?

THE COURT:

Yes, all the witnesses will be excluded. Please leave the room and wait until you are called to give evidence.

MR. ARONSON:

I call Donald Marshall, Jr.

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

BY MR. ARONSON: Direct Examination

Q. Your name is Donald Marshall, Jr., and you're the appellant in this matter?

A. Yes.

Q. Could you speak up a bit, Donald?

A. Yes.

Q. How old are you?

A. I'm 29.

Q. What's your date of birth?

A. September 13th, 1953.

Q. And where do you presently live?

A. In Halifax.

Q. Are you working?

A. Yes.

Q. Where do you work, Donald?

A. Department of Indian Affairs.

Q. And how long have you worked there?

A. Since July, about six months.

Q. What education do you have?

A. Grade eleven and upgrading.

Q. Now prior to 1971, what education did you have?

A. Grade six.

Q. And when did you complete grade six?

A. In June '69.

BY THE COURT:

Q. Mr. Marshall, just speak right up. Try to make the people at the back of the room hear you.

A. Yes.

BY MR. ARONSON:

Q. Would you speak up please. In 1971, you were convicted of the murder of Sandy Seale. Is that correct?

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A. Yes.

Q. What was your sentence?

A. Life imprisonment.

Q. And parole eligibility?

A. After ten years.

Q. How long did you actually spend in prison?

A. Ten years and ten months.

10) Q. Do you recall the date you first entered prison?

A. June 20th, 1972.

Q. And do you recall the date you actually left the penitentiary?

A. August 29th, 1981.

Q. Now prior to going -- prior to being charged with the murder of Sandy Seale, had you been employed?

A. Yes.

Q. And what were you doing?

A. I was a labourer for my father in the dry-wall work.

20) Q. I see, and how long had you been doing that?

A. It would be three years.

Q. Prior to your conviction for the murder of Sandy Seale, had you been convicted of any criminal offences?

A. Yes, I was charged for theft under two hundred dollars in 1970.

BY THE COURT:

Q. Please speak up, Mr. Marshall. You have to speak right up.

MR. ARONSON:

30) Q. In?

A. In 1970.

Q. And do you recall the sentence you received for that offence?

A. Received one day in gaol.

Q. Do you recall the night that Sandy Seale was stabbed?

A. Yes, I do.

Q. Do you recall what day of the week it was?

A. It was on a Friday night.

Q. Do you recall the date?

A. May 28th, 1971.

Q. Had you been in Sydney all that day?

A. No. I was in Halifax two days before I came to Sydney and I got home at 9:30 Friday night, May 28th.

Q. I'm sorry, Friday night?

A. May 28th, '79.

Q. Where did you go when you returned to Sydney?

A. I went to the Reservation and I met a friend, Artie Paul and we headed to go in town and we were picked up by Roy Gould. And we asked him to take us to the liquor store. From the liquor store, we walked to Intercolonial Street in Sydney to some friend's home.

Q. And whose home was that?

A. Terrance Tobin.

Q. Can you recall how long you spent at Tobin's house on Intercolonial Street?

A. Well, I would say about an hour and a half.

Q. Do you recall how you were dressed on that night?

A. I had a yellow jacket on and blue jeans.

Q. What time did you leave the Tobin's house?

A. Roughly I'd say eleven-thirty.

Q. Where did you go from Tobin's?

A. We went down to the liquor store, then Tobin's and then Keltic Tavern in Sydney.

Q. And where is the Keltic Tavern in Sydney?

A. I think it's on Dorchester Street in Sydney.

Q. How long were you at the Keltic Tavern?

A. About five minutes.

Q. Were you with -- in the company of anyone at the time?

- 7 - DONALD MARSHALL, JR., by Mr. Aronson

A. Yes, I was in the company with Terry Tobin and Frankie French.

Q. And how long did you remain at the Keltic?

A. About five minutes I was there. I dropped in and just left after I lost contact with --

Q. Now up to this point, and again I'd ask you to try and speak up if you can, if you could speak up.

Prior to --

THE COURT:

Mr. Aronson, if Mr. Marshall won't speak up, you'll have to move over to a farther stance. Speak louder yourself and he'll have to speak.

BY THE COURT:

Q. We have to get you speaking up, Mr. Marshall, otherwise it's not going to be recorded. There won't be a record of it.

A. Okay.

BY MR. ARONSON:

Q. Prior to leaving the Keltic Tavern, had you have anything by way of alcoholic beverages to drink that night?

A. Yes, I had a drink out of the bottle we bought at the liquor store.

Q. Where did you go from the Keltic then?

A. I was going to the St. Joe's dance and I ended up in the Wentworth Park right after the St. Joe's dance.

Q. Okay, now, you've referred to St Joe's dance, where is that dance take place -- where does that dance take place?

A. It's on George Street and turning up Cottage Road.

Q. What -- is there a particular building or site that you could put a name to that the dance took place in?

A. Are you asking for the building? It's a red building. It's on the corner of George and Cottage Street.

Q. How far is that from Wentworth Park?

- 8 - DONALD MARSHALL, JR., by Mr. Aronson

A. About -- when you walk, I don't know the distance.
It's about a two-minute walk.

Q. I see. Now you mentioned Wentworth Park. What happened at the point when you arrived at Wentworth Park? What did you do?

A. I took a short cut through the park off George Street by the railroad tracks. There's a path going down to the park and I proceeded down there and I got into the park --

Q. Before we get into the park, Jr., if I might ask --

MR. ARONSON:

There are certain plans which are filed with the case on appeal. Now it's my understanding from Mr. Edwards that the original exhibit is on its way from Sydney. It already has markings on the map which were used or put on it during the 1971 trial. Now what Mr. Edwards and I have done or made is miniatures of this particular survey which was the same exhibit --

THE COURT:

Where is the original exhibit?

MR. ARONSON:

I believe it's on its way from Sydney by Purolator Courier.

MR. EDWARDS:

That's correct, My Lord. It's supposed to arrive here at any time.

MR. ARONSON:

Prior to last evening, I had not even been aware that that exhibit still existed. We had made a search for the exhibits and that appears to have been the only one that's been located. I'm wondering if it would please the Court if we could use the photocopy or miniature of that plan.

THE COURT:

Yes, carry on, Mr. Aronson.

MR. ARONSON:

Would the Court like each to have a copy?

THE COURT:

Thank you.

MR. ARONSON:

The only other point I might mention, does the Court wish this to be marked itself as an exhibit?

THE COURT:

No. What was the exhibit number?

MR. ARONSON:

It was exhibit number five at the 1971 trial.

BY MR. ARONSON:

Q. Donald, I show you a plan of Wentworth Park and I'll hand you a pencil. Could you indicate by putting an "M" on that plan at what point you entered Wentworth Park on Friday night.

THE COURT:

Have him describe in words what he's put on the plan. You describe, Mr. Aronson.

MR. ARONSON:

Pardon?

THE COURT:

You describe.

BY MR. ARONSON:

Q. The "M" marked on that plan, what does that indicate?

A. Are you talking to me?

Q. Yes.

A. It's my initial.

Q. And what does that mean? What does that signify --

THE COURT: (Justice MacDonald)

Just tell us yourself where it is.

MR. ARONSON:

The "M" is on the intersection of the railway tracks and

- 10 - DONALD MARSHALL, JR., by Mr. Aronson

George Street.

THE COURT:

That's all.

BY MR. ARONSON:

Q. What happened after you entered the park, Donald?

A. I proceeded to walk down the path I was going to
and I --

0) Q. I would again ask you if you could please speak up,
Donald.

A. I'm dry, excuse me. I'm dry.

THE COURT:

Mr. Aronson, I think we'll have to ask you to move. It's
the only way to solve this problem.

BY MR. ARONSON:

Q. What happened after you entered the park, Donald?

0) A. After I entered the park, I met four people on my
right-hand side by a bridge. Before you get to the
bridge, there's a park bench and a big tree there and
I met -- I seen four people there talking and I just
walked past them.

Q. Now you've mentioned a bridge. I'd again like to show
you the plan and if you would indicate where that bridge
is that you speak of. Is it marked on the plan itself?

A. Yes.

Q. What does it say? Can you read that?

A. It says "bridge".

Q. What happened after that?

0) THE COURT:

There's several bridges, Mr. Aronson. Have him mark it with
some sort of a letter and you tell us where he marked it on
the plan.

BY MR. ARONSON:

Q. Do you want to mark the bridge with the letter "B".

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MR. ARONSON:

Mr. Marshall has marked the bridge which separates two bodies of water; one of which has the word "Wentworth" on it and the other one which has the word "Creek" on it.

BY MR. ARONSON:

Q. Now after you crossed that bridge, Donald, what happened?

10) A. Excuse me. I didn't cross the bridge at that time. I made a mistake by saying bridge there. I meant park bench in the trees.

Q. Okay, what happened then?

A. After I passed them four people, I met up with Sandy Seale in the centre part of the park and I asked him where he came from and he said from the dance hall, St. Joe's. And we had a little talk. I can't recall what we were talking about when we first met and I asked him if he would like to make some money with me one way or the other somehow.

20) Q. Now when you say make some money with you, what did you mean by that?

A. Nothing. Nothing in particular. I was looking for money from somewheres. I didn't have a plan how we were to make the money. I just asked him if he wanted to make some money with me.

Q. Could you give any example of how you might have considered making money?

30) A. Bumming it, breaking in a store probably, take it off somebody.

Q. Do you recall how Sandy Seale was dressed that night when you met him?

A. He had a brown corduroys on and he had a brown jacket on.

Q. Now during your conversation with Seale, were you standing

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or sitting? What were you doing?

A. I was standing.

Q. And how long would you say this particular conversation you had with Seale lasted?

A. I would say not more than ten minutes.

Q. I see. How long had you known Sandy Seale?

A. Approximately three years.

10) Q. And how did you come to know him?

A. I used to meet him at the dance halls. I seen him at the dance halls a lot. I seen him hanging around the streets sometimes with other people. I played -- went to the hockey practice with him with other guys before.

Q. Now after you had your conversation with Seale, what happened?

20) A. We met another fellow, Robert Patterson. He came down behind the bandshell area and he met up to us where we were standing and he told me that he was on chemicals and he was drinking. I asked him if he knew who I was and who Sandy Seale was and he said yes, and I told him to go sit down by a tree or we sat him down in case somebody would pick him up on the street for his drinking.

Q. I see. What happened after you put Patterson down and put him to rest?

A. We -- I guess we ended up at the bridge, that bridge I pointed out.

30) Q. Is that the bridge that's marked, if you can recall, with the letter "B" between the two bodies of water; one of which has the word "Wentworth" on it and one of which has the word "Creek" on it?

A. Yes.

Q. And you say you walked across that bridge?

A. We got on top of the bridge.

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Q. Okay, then what happened?

A. When we got to the bridge, I don't recall what we were talking about at that time.

Q. Who is we?

A. Sandy Seale and I. Somebody called us up from Crescent Street asking us for a cigarette and a light, so we decided to go up there and give him a cigarette and a light. And half way between the bridge and Crescent Street, I was called by another party to give them a match.

Q. And do you know who this latter party you've referred to is?

A. The people that called me the second time?

Q. Yes.

A. It was Patricia Harriss and Terry Gushue.

Q. And what happened concerning Patricia Harriss and Terry Gushue?

A. I went up and I met them two and I gave them a light and I stood there for approximately five minutes talking to them, asked them where they came from and they said they came from the dance. We just had a five minute chat and then they left.

Q. Now who was with you during that conversation with Harriss and Gushue?

A. Just myself.

Q. And do you know where Sandy Seale was at that point in time?

A. I believe he was with the other two men that called us up earlier to borrow a cigarette and a light.

Q. Now after you completed your conversation with Harriss and Gushue, what happened then?

A. I proceeded to go to the company that called me first, the two men that called me up the first time. I joined

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up with them.

Q. Now are you able to describe either of those two men?

A. Yes.

Q. Could you describe them please?

A. Yes.

Q. Could you speak up a bit again, Donald? I'm having a bit of difficulty hearing you.

10) A. Yeh. The older guy, shorter guy, he was about five-eight. He had white hair, black rimmed glasses on, a top coat, a navy blue coat, I guess. It was dark. He had some kind of a sweater inside it or scarf or something under his coat.

Q. Could you place an age or estimated age for this particular person?

A. I'd say that he was about fifty-five anyway.

Q. Okay. And the other individual who you saw with this older man, can you describe him please.

20) A. He was younger. He was about I would say thirty, in his thirties and he was five-ten, about five-ten, five-nine and he had a brown corduroy coat on.

Q. Are you able to say how old you thought he might have been?

A. I would say he was about thirty years old.

Q. Had you ever seen these men before that particular occasion?

A. No.

Q. Now what happened after you went back to Seale and these two men you've just described?

30) A. Well when we first met them -- when I joined up with them, they -- I introduced myself to them. They introduced themselves to me and we shook hands and we just had a conversation. I was talking more to the older guy first when we first met. And I asked him where he

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was from and he -- what he did for a living and well, I asked him if he was a priest because he looked like a priest to me. He asked where the bootlegger's were and if there was any women in the park. I told him yes because I was familiar with the park and every time I'm there, there is females there. And at that time he invited us to his house. He pointed to his house where he lived and he invited us to his house for a drink. We told him no.

- 10) Q. Did he give you a specific address as to where the house was located?
- A. He pointed to a house. He never give me an address only he pointed to a house. He told me he lived there.
- Q. Now are you able to say where this particular conversation between yourself, the two gentlemen you've described, and Seale took place?
- 20) A. I'm not sure.
- Q. Was it in Wentworth Park?
- A. No, it wasn't in Wentworth Park.
- Q. Was it near Wentworth Park?
- A. Yeh, the street by Wentworth Park, Crescent Street.
- Q. Now did the conversation take place on the street itself or at some other location near the street?
- A. It was on the street.
- Q. I see. Now how long did you speak with these two men?
- A. Approximately I'd say about fifteen to twenty minutes.
- 30) Q. Then what happened after that?
- A. After our conversation, we -- that's just before they were leaving, that's when they asked us to come to their house for a drink and we told them no and they walked away and they almost got to the end of the street. I wouldn't know the distance. Either Sandy Seale or I

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called them back. I don't know who called them back but one of us did.

Q. Okay, now before you continue, Donald, in what direction were they walking?

A. Walking in the direction of Bentinck Street.

Q. And you've indicated that you believe you had this conversation on Crescent Street. Is that correct?

10) A. Yes.

Q. Can you explain why you or Sandy Seale as you say called the two -- these two men back?

A. I don't know. I don't know why we called them back.

Q. Can you say with any certainty which of you or Sandy Seale called them back?

A. I'm not certain who called them back.

Q. Then what happened?

20) A. They were walking -- when we called them back, they -- they did come back and they joined up with us and the younger guy, the taller guy, walked on my right-hand side and then he was having -- I guess he had a few drinks that night because when they did come back, he had his head down, he had his hands in his pocket and to me he looked like he was ready to pass out or he was too drunk or something. And the curb of that road, the street, the sidewalk, he slipped off that and I grabbed him and at the same time -- at the same time, I heard the older guy, the shorter guy, telling Sandy Seale if he wanted everything he had. And at the same time, he had him hoist up with his arm and this is within five seconds of the whole thing.

30) Q. Okay, now just to go back to when the two men -- you called them back, they returned to rejoin you. Where were you standing when they rejoined you?

A. We were standing on the pavement.

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Q. And did -- how were you facing the man you've described you were with?

A. I was facing not directly to him but almost directly to him at a forty-five degree angle to him.

Q. Now were you able to observe Sandy Seale and this other gentleman you've described?

A. Yes, I was looking directly at them two.

Q. And what --

BY MR. EDWARDS:

Q. I'm sorry, I didn't catch that.

A. I was looking directly at them two, Sandy Seale and the older guy.

BY MR. ARONSON:

Q. And what did you see happen?

A. The older guy had Sandy Seale hoist up with his -- I don't know if it was his right hand or left hand but he had him hoisted up and told him -- he -- the older guy told him did he want everything I want to Sandy Seale and he had him hoist up and he said, "I got something here." He called him a nigger, and at the same time -- this is within five seconds, the whole thing -- let's see now, I had the taller guy, the older guy hoisted up and when I turned around the older guy let go of Sandy Seale and he come after me and I let go of the other guy. I blocked his arm with my arm and --

Q. Now when you say he came at you, what do you mean by that?

A. He came at me with his arm coming towards me. I don't know what he had in his hand but he hit me and that's when I started running.

Q. Now you mentioned that the older man had Sandy Seale hoisted up. I believe those were the words you used.

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What do you mean by hoisted up?

A. He had his arm under his stomach in his mid-section and holding him up by the shoulder.

Q. And in what position was Sandy Seale?

A. He was hunched over.

Q. During the time you observed this happening right after the two men rejoined you and Seale on Crescent Street, did you have any conversation with the younger fellow that you've described who was with you?

A. Excuse me, I don't understand.

Q. Okay. During this incident that you've just described, did you have any conversation with the younger fellow?

A. Before or after they came back?

Q. After they came back.

A. I don't recall.

Q. Can you say what caused Sandy to hunch over?

A. The older guy had him hoisted up with his arm. I don't know whether he was hitting him or doing something to him and I didn't realize that he was stabbed until I started running.

Q. What happened after the older fellow came at you?

A. When he came at me, he took a swipe at me. He went to hit me in the stomach and I blocked him with my left hand and after I blocked him, I ran. I ran towards Bentinck Street.

Q. Now can you say where or what happened to these two men?

A. No, I don't know.

Q. Okay. Can you say what happened to Sandy Seale, what he did?

A. I don't know.

Q. Okay, now in which direction did you run away from the scene, this particular incident you've just described?

A. I ran to Bentinck Street, towards Bentinck Street.

Q. Is that in -- you're on Crescent Street and you're running in the direction of Bentinck Street?

A. Bentinck Street. That's going to the Court House direction.

Q. I see. And then what happened?

A. After I got off Crescent Street, I ran down Bentinck. There's a bridge there on Bentinck Street and I met a young guy standing there and told him -- I ran to him and he turned around. I told him, "Look what they did to me." I told him, I said, "My friend is down the road there." I said, "He's got a knife in his stomach." And --

Q. Now before we get to the conversation, could we go back just a moment to the bridge that you've indicated you crossed over on Bentinck Street. I'd just like to show you the plan so we can see which bridge you're talking about here. Could you mark that particular bridge that you're referring to on Bentinck Street with the letter "B"?

THE COURT:

We already have a "B".

BY MR. ARONSON:

Q. "B-2". Mr. Marshall has marked with the letter "B" bridge on the right-hand side of the map just below the word "Bentinck" reading up and down. Now you indicated you bumped into somebody or met someone as you ran to that bridge or over that bridge?

A. Yes, I met a young fellow standing there.

Q. And do you know who that young fellow was?

A. At the time?

Q. Yes.

A. No.

Q. Do you know who he is now?

A. Yes, I know.

Q. What is his name?

A. Maynard Chant.

Q. Did you know Maynard Chant prior to that night?

A. No.

Q. What happened after you met Maynard Chant?

A. After I explained that I was stabbed and Sandy Seale was stabbed or something, I told him gather up some help and he said okay and we proceeded down to Byng Avenue. That's going off Bentinck Street and we met two girls and two guys on Byng Avenue and I asked them if they would help me, come back with me and help me to where the accident happened and they were kind of worried, scared to go back so this girl gave me a handkerchief for my arm and a car come up to Byng Avenue. I stopped it and I told -- the people in the car I knew. I told them that Sandy Seale is at the park, he was hurt, and then I asked them to help me. They offered their help to me and we went back to the scene.

Q. Now you've indicated you were somehow injured. Now did you realize what had happened to Sandy Seale before you were injured?

A. No.

Q. And what explanation can you now give for what happened to Sandy Seale? What do you believe happened to Sandy Seale?

A. At the time?

Q. Yes.

A. No, I didn't know until after.

Q. What happens then after you start looking for help with Maynard Chant and you see some people?

A. After I got the help, we went back -- back on to Crescent

Street.

Q. And what happened after you got back on to Crescent Street?

(10) A. I don't know who was with me at the time but we all got out of the car. Sandy Seale was laying on the road and I ran up anywheres three or four feet from him and I don't know if it was me that indicated that we better get an ambulance but I went to a house and I called an ambulance for him.

Q. And then what happened after the ambulance?

A. After I called the ambulance, I went back to the scene and somebody pointed to me saying -- telling the City Police that I was injured too and the City Police threw me in a car and took me to the hospital.

Q. Okay. Now when you indicated that you saw Sandy Seale laying on the ground, are you able to say where on the ground?

(20) A. I don't know for sure.

Q. Now subsequent to the events of that night, you were charged ultimately with the murder of Sandy Seale?

A. Yes. That night?

Q. Pardon?

A. That night?

Q. No, not that night. After that night.

A. Yes.

Q. Did you testify at your own trial?

A. Yes.

(30) Q. Did you indicate in your testimony in 1971 what you've told the Court today?

A. No, I didn't.

Q. What if any differences can you say there is between what you've said already today and what you said at your trial in 1971?

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A. I don't understand you.

Q. Pardon?

A. I don't understand you.

Q. Well in what way does your testimony differ in 1971 to today?

A. In 1971 I did not mention anything about hitting somebody or robbing somebody or something like that. I did not mention that.

Q. Why didn't you speak of that?

A. The robbery didn't happen. It wasn't even an attempt of a robbery. I wasn't dealing with a robbery and I was afraid that one way or the other they would put the finger at me saying -- one way or the other they would have found a way -- in my opinion, they would have found a way to put it on me whether I told them or not.

Q. To put what on you?

A. Attempted robbery. Maybe the murder probably -- the robbery would have probably tried to cover up for the murder.

Q. Do you recall who the solicitors were who or the lawyers who acted for you at the 1971 trial?

A. C. M. Rosenblum and Simon Khattar.

Q. And were they aware of what -- at the time in 1971, were they aware of what you said in court today?

A. No.

Q. Now are you familiar with the names of some of the witnesses who testified in 1971 at your trial?

A. Yes.

Q. Do you know the name "John Pratico"?

A. Yes.

Q. Now was he a witness at your trial in 1971?

A. Yes.

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Q. Now prior to the night that Sandy Seale was stabbed, did you know John Pratico?

A. Yes.

Q. Did you see him at all on May 28th, 1971?

A. No.

Q. Did you see him subsequent to that time?

A. That means after?

Q. Yes.

A. I seen him the next morning and on a Sunday afternoon two days after.

Q. How did you come to see him?

A. I was on my way home from the police station. I was on police protection at the police station for a whole week and in order to go home, I had to go down Bentinck Street past Johnny Pratico's home. While I was doing that, I met him on the stop twice. Saturday and Sunday.

Q. Did you have any conversation at all with him?

A. He indicated that some guys were going to get together and go look for them guys tonight whoever did it.

Q. And did you speak to him at all about these guys who did it?

A. No, I just shook my head. I said okay, you know.

Q. After your conviction for the murder of Sandy Seale in 1971, did you ever become aware of any subsequent investigations into that conviction?

A. After I was sentenced?

Q. Yes.

A. When I was in prison, no, I didn't.

Q. When did you first become aware of any investigations into your conviction?

A. The spring time last year.

Q. What year is that?

A. 1981.

- Q. I see. And up to that point in time, what efforts if any had you made to have your conviction examined?
- A. I contacted -- before I contacted the outside, I went to the people in prison and they kept on me to go deal with the people outside and I contacted the two Prime Ministers, the Mayor of Sydney, M.L.A. for Cape Breton the Human Rights Commission, and I escaped one time.
- Q. Okay, now, you're aware of the witnesses you are going to testify in court during this particular hearing?
- A. Yes.
- Q. Have you had any communications with any of them?
- A. It wasn't really communication. I walked in someone's house one afternoon and one of the witnesses were there and --
- Q. Would you speak up, Donald? I'm sorry.
- A. I went to a house one afternoon and I met Patricia Harriss at this house and we just said hello.
- Q. Yeh. Do you recall approximately when that occurred?
- A. Approximately? A little over a month.
- Q. Now you've indicated that you spent ten years and ten months in the penitentiary. During the course of the time you were there, did you ever think about or consider the events relating to your conviction?
- A. I think I thought about it every day.
- Q. What do you say as to whether or not your recollections of the night that Seale was stabbed?
- A. I think I remember plenty good.
- Q. Are there certain things that you are more sure of as to what happened than other facts that you've referred to?
- A. The only thing I'm not sure of is -- I had a problem with it before when I went to court is where and when I met Harriss and Gushue. I don't know.

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Q. On the night of May 28th, 1971, did you stab or otherwise injure Sandy Seale?

A. No, I didn't.

MR. ARONSON:

I have no further questions of the witness at this time, My Lord.

THE COURT:

Mr. Edwards.

MR. EDWARDS:

Thank you, My Lord.

BY MR. EDWARDS: Cross-Examination

Q. Now, Mr. Marshall, you say that on the night of May 28th, you had been drinking. Is that correct?

A. I had a mouthful of hard liquor.

Q. A mouthful?

A. I had one drink from it.

Q. You're sure you didn't have any more to drink than that that evening?

A. No.

Q. What kind of liquor was it? Rum?

A. Yes, it was rum.

Q. Could you speak up a little louder, Mr. Marshall? Did you have anything to drink prior to that evening during the day?

A. That afternoon? I don't recall. I don't know.

Q. You don't recall?

A. No.

Q. Is it possible you could have?

A. I don't know. I can't say. I don't know. I -- when we were leaving from Halifax, I -- I don't remember whether I was drinking or not. We were driving home so I don't remember.

Q. You were seventeen years old at the time?

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A. Yes.

Q. Could you describe what your drinking habits were generally around that time?

A. I was a heavy drinker.

Q. You were a heavy drinker?

A. Not too heavy but heavy.

Q. So it wouldn't have been unusual if on that day you did have a lot to drink?

A. No, I think I can -- I can hold my liquor whether I want it or not.

Q. No, that's not the question. The question is: would it have been unusual for you to have had a lot to drink that day?

A. Unusual?

Q. Yes.

A. I get drunk pretty fast. I wouldn't have too much anyway.

Q. It was a Friday night?

A. Yes.

Q. Your initial intention after getting home from Halifax after the visits was to go to a dance?

A. Yes.

Q. Did you usually drink before you went to a dance?

A. Yes.

Q. Okay. Mr. Marshall, you say that prior to that particular evening you had known Sandy Seale approximately three years?

A. Around three years.

Q. How well how you known him?

A. Like the rest of them, I didn't just really know them. I mean I knew them. They would be friends of mine. Coloured guys and the indian guys were always together at dance halls and everything so I took them on as good

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people.

Q. Would you describe him as a close friend of yours at the time?

A. Like I said, I was close to a lot of them. As close as I was close to the other people, coloured people that I hung around with.

Q. But were you and Sandy Seale good friends? Can you specify as far as he is concerned?

A. I can say he was a friend of mine.

Q. He was a friend of yours?

A. Yes.

Q. Did you ever go to his home?

A. I worked there once.

Q. You worked there once?

A. Yes, I was working with my father at the time.

Q. Installing drywall in the Seale residence?

A. Yes.

Q. How long would that have been prior to the night in question?

A. I don't know. I don't -- I don't know.

Q. Would it have been the same year?

A. Could be.

Q. So you were there as an employee of your Dad at that time, not as a friend of Sandy Seale, right?

A. Yes, right.

Q. And isn't it true that you and Sandy Seale never really hung around very much together, did you?

A. I don't know. Like I say, it doesn't matter who we hung around with. I think it was all of us in general. It didn't matter who the individual was or who your best friends were. I think we were all together.

Q. Are you saying that you would meet him at some of the same places you'd go to like the rink or the dances?

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- A. Yes.
- Q. He'd be there?
- A. Not most of the time. He'd be there --
- Q. At times he would be one of the persons in the crowd?
- A. Yes.
- Q. All right. You didn't go to those functions with him on a regular basis; that is, meet him at some place and then go there with him, did you?
- A. No.
- Q. No. What about the other persons who were witnesses? Let's take Patricia Harris. Had you known her well before?
- A. I seen her at the dances like Sandy Seale or anybody else.
- Q. You'd never dated her, had you?
- A. No.
- Q. Is it true that on the night in question when you were talking to her and Gushue you held her hand for awhile?
- A. Yes.
- Q. And was that the first time you two had ever been that friendly?
- A. I don't know. I just kind of --
- Q. Pardon me?
- A. I had no reason -- I can't explain why I held her hand. I don't know why I held her hand.
- Q. The question was: is that the first time you and she had been that friendly?
- A. Yeh, I guess so. Yeh, you could say that.
- Q. You had been out of school for a few years at that time, had you?
- A. Two years.
- Q. Did you ever attend school with Patricia Harriss?
- A. No.

- Q. What about Maynard Chant? Did you know him casually before that evening?
- A. No.
- Q. Are you sure?
- A. Yes, I'm sure.
- Q. Had you ever seen him before? You're shaking your head no.
- A. No.
- Q. John Pratico, you did know him?
- A. Yes.
- Q. And in fact you told my learned friend that you spoke with John Pratico on the Saturday and the Sunday following the stabbing. Isn't that correct?
- A. Yes.
- Q. Now the conversation you had with him at the time -- I believe you told my learned friend that Pratico told you that some fellows were going to get together to go look for the two who did it. Is that right?
- A. Yes.
- Q. Are you sure there wasn't any other conversation?
- A. I'm not sure.
- Q. You're not sure?
- A. I wasn't in what you call I think a normal state at the time. I think I was under the impression he was awful nervous. He was pretty nervous. I don't remember him, me talking to him and the conversation with him.
- Q. Is it possible you could have told him your version of what had happened at the stabbing?
- A. I don't recall.
- Q. Then it's possible, is it not?
- A. I don't recall. I don't know.
- Q. You don't know if you did or not?
- A. No. I didn't -- I did not go directly to his house and

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talk to him. I walked past his house.

Q. Now you're not -- you knew John Pratico pretty well at that time, right?

A. Not too well. He started hanging around with the indian fellows at the park, and I don't know, I just -- I didn't really get close to the guy.

Q. He lived not far from where you lived, Is that right?

A. About a mile.

Q. About a mile. Would you see him quite frequently, say, in the year before the stabbing?

A. I don't know. I seen a lot of people. I don't know. I don't recall meeting him frequently.

Q. You don't recall if you saw him or not?

A. No, I don't. I don't know what you're trying to get to ask me.

Q. I'm just asking you the question, whether or not you had seen him in the year before.

A. The year before?

Q. Yes.

A. I don't think so.

Q. What was your impression of John Pratico at the time?

A. The impression I got and I talked about it, I talked to other people about it, he needed some friends, I guess.

Q. Pardon me?

A. He needed friends.

Q. He needed friends?

A. He was alone.

Q. Yes.

A. And he didn't come from a wealthy family or -- he used to have to come up on the Reserve and eat with us sometimes. I took him occasionally some time and took him home and fed him.

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Q. So you had these discussions about John Pratico before the stabbing?

A. No. One time he -- somebody was beating him up at the park and me and a friend of mine told them to cut it out and they did. I don't know, the impression I got from Johnny Pratico, I don't even know why he hung around with us.

Q. But he did hang around with you prior to the stabbing?

A. Yes. Yes.

Q. And this beating that he had taken in the park, that was prior to the stabbing?

A. What do you mean prior, before?

Q. Before.

A. Yes, somebody indicated that he was working for the City Police at the time.

Q. I'm sorry?

A. Somebody indicated to us that he was working for the City Police at the time.

Q. So you were wary of him because you thought he might be a stooge for the police?

A. I didn't care.

Q. You didn't care.

A. I didn't care because I had nothing to do with him. I had my own gang I hung around with. I didn't bring him in the park. Somebody else brought him in the park. So I had nothing to do with him.

Q. Were you aware at the time that he was -- that he had any type of mental problems?

A. No.

Q. You weren't? Are you aware now that that was in fact the case with John Pratico?

A. No, I'm not aware yet. I don't know what they decide about him. Some people say he's -- something wrong and

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some people say he's not wrong, so I don't know. I can't answer that.

Q. Okay. When did you first become aware that John Pratico was going to testify against you?

A. I don't know.

Q. You don't know.

A. I think it was on a Friday night. I know --

Q. How long after the stabbing was that?

A. It was a week after.

Q. It was a week after and you knew then he was going to testify against you?

A. When I was told -- when I was arrested was when I was told.

Q. Okay. And did you know then at that time where John Pratico had gotten the story that he was going to relate in court?

A. No.

Q. But you do concede that it could have come from you?

A. I don't think it could come from me. I doubt it.

Q. You doubt it?

A. Yeh.

Q. You're not absolutely sure?

A. I'm sure I didn't tell him anything.

Q. Did you know two O'Reilly sisters at the time?

A. Yes.

Q. Do you remember their first names?

A. Mary and Margie.

Q. Mary?

A. And Margie.

Q. And Margie. Are you sure it wasn't Marion -- Mary and -- Mary Patricia and Katherine, called Kate?

A. Kate, no, that's the older one. Are you talking about twins or --

- 33 - DONALD MARSHALL, JR., by Mr. Edwards

Q. No, I'm talking -- you did know of a person by the name of Kate O'Reilly, did you?

A. Yes.

Q. And you knew Mary Patricia O'Reilly?

A. I knew Mary O'Reilly. I don't know her last name.

Q. I see.

A. Her middle name.

Q. Did you have discussions with them immediately after the stabbing?

A. I don't remember.

Q. Is it possible that you telephoned them?

A. It's possible but I don't remember.

Q. Is it also possible that you related to them your version of what had happened in the park on May 28th?

A. I told -- I told a lot of people a lot of things concerning the case. I don't know who I told.

Q. Okay. So you could have told Mary Patricia O'Reilly?

A. I could have.

Q. And you could have told Kate O'Reilly?

A. I could have.

Q. All right, and you could have told John Pratico?

A. I don't think I told John Pratico.

THE COURT:

Mr. Edwards, the Court will rise for ten minutes.

BY THE COURT:

Q. Mr. Marshall, do not talk to anyone during the recess about the case.

COURT RECESSED: 11:15 a.m.

COURT RECONVENED: 11:30 a.m.

DONALD MARSHALL, resumes testimony as follows:

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BY MR. EDWARDS:

- Q. Now Mr. Marshall, before the adjournment I was asking you about your prior acquaintances with the various witnesses involved in this case. Now just skipping ahead a bit to the two gentlemen who called you up -- called you and Sandy Seale up from Crescent Street. I believe you indicated to my learned friend that you didn't know who they were at the time. Is that correct?
- A. No.
- Q. No that's not correct or no you didn't know who they were? You know who I'm referring to?
- A. Yes. I could add I met them in the park by the tree when I entered the park. That's -- I didn't -- I didn't know it was the two guys that were on Crescent Street that I met earlier.
- Q. Oh, I see, but you had met them earlier when you first went in the park, did you?
- A. Yes.
- Q. Was that before you met Sandy Seale?
- A. Yes.
- Q. Before you met the four people who you met when you first went in the park?
- A. No, that's the four people, the two men --
- Q. Oh, I see, they were two of the four people who you met when you first went in the park?
- A. Yes.
- Q. Do you remember who the other two were?
- A. There's only one person I knew in the crowd was -- I didn't know his name but I think he was a sergeant in the air cadets when I was in it.
- Q. I see, and they were talking to these two men who you later saw on Crescent Street?
- A. Yes.

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- Q. And did you stop and have any conversation with them at that time?
- A. No.
- Q. You did not?
- A. No.
- Q. Did you get a good look at the four of them at that time?
- A. Yes.
- Q. You got a sufficient look to know that those two were the same two you saw later?
- A. Yes, I can say that.
- Q. Did they say anything to you as you went by?
- A. No.
- Q. Could you overhear any of the conversation among those four?
- A. No.
- Q. Are you sure you had never seen these two men prior to that evening?
- A. No, I never seen them.
- Q. You're sure of that?
- A. Yes.
- Q. And you didn't know their names that evening?
- A. No.
- Q. Well you told my learned friend that after you had finished talking to Patricia Harriss and Terry Gushue, you went up and rejoined Sandy Seale who was talking to the two men on Crescent Street. Is that correct?
- A. Yes.
- Q. And if I recall your evidence, you said that you introduced each other at that point?
- A. You could say that, yeh.
- Q. Yes?
- A. Yes.

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Q. You did say that?

A. Yes.

Q. So you told them, "I'm Donald Marshall."?

A. I didn't put it that way. I don't recall -- I don't recall what I said.

Q. I see but you remember that introductions were made at that time?

A. Yes.

Q. Do you recall if Sandy Seale told them his name?

A. I don't recall.

Q. Do you recall if either of the two gentlemen said their names?

A. No, I only shook hands with the older guy.

Q. You shook hands with the older guy?

A. Yes.

Q. So when you say that introductions were made, can you recall anything that was said at that point?

A. As far as giving names go?

Q. Yes.

A. No.

Q. Well what sort of introduction was it if no names were given?

A. There might have been names given but I don't recall. I don't remember them. They didn't mean nothing.

Q. They didn't mean anything?

A. No.

Q. And you couldn't recall later that night and the next day when you spoke to the police?

A. About the names?

Q. About the names, could you?

A. No. They weren't important to me.

Q. They weren't important to you?

A. They weren't at the time.

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Q. At the time you met them?

A. Yes.

Q. But they were important to you the next day.

A. Yeh, I didn't know who it was.

Q. But you told police that they were -- you thought they were priests?

A. Yes, they -- he indicated he was a priest.

Q. Did he indicate that after you asked him whether he was a police -- priest or did he volunteer that?

A. No, jokingly I told him -- I asked him if he was a priest because he dressed like one and he told me he was.

Q. What was unusual if anything about his dress that led you to believe that he was a priest?

A. Nothing unusual. I thought he was off a ship or something at the time.

Q. I'm sorry?

A. He was off one of the foreign boats, ships that come in.

Q. He told you that?

A. No, that's what I assumed.

Q. You assumed he was?

A. Yes.

Q. Yes. So then you thought he was a sailor, not a priest.

A. Well whatever he told me. It didn't mean nothing to me anyway, whatever he was, a priest or a sailor or whatever. It didn't matter.

Q. Now you didn't know their names then. Do you know their names now?

A. Yes, I do.

Q. And who was the older fellow?

A. Roy Esbury.

Q. Roy Ebsary?

A. Ebsary.

- Q. Yes, and who was the younger fellow?
- A. James MacNeil.
- Q. James MacNeil?
- A. Yes.
- Q. And James MacNeil in fact has filed an affidavit in this court. Is that correct?
- A. Yes.
- Q. You're aware of that?
- A. Yes.
- Q. You've read that affidavit?
- A. Yes.
- Q. You read what he said happened on that night?
- A. Yes.
- Q. You say that you and Sandy Seale had a conversation with these fellows for how long?
- A. I'd say about fifteen to twenty minutes.
- Q. Fifteen to twenty minutes?
- A. Yes.
- Q. And during that time, there was some discussion about bootleggers?
- A. Yes.
- Q. Did you tell them about any bootleggers in the area at that time?
- A. Yes, I told them one. I told him one.
- Q. You told him one?
- A. Yes.
- Q. And I believe you told my learned friend that there was conversation about women in the park?
- A. Yes.
- Q. Was there also discussion about money?
- A. Yes.
- Q. And how did that conversation go?
- A. I brought up the conversation.

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Q. You brought up the topic of money?

A. Yes.

Q. And what is the gist of what you said at that time about money?

A. I asked Sandy Seale if he wanted to make some money with me.

Q. No, no. I don't mean -- I think you're answer -- you're referring to when you first met Sandy Seale?

A. Yes.

Q. I'm asking you about when you and Sandy Seale were talking with these two fellows that you thought were priests. Was the topic of money brought up at that time?

A. No.

Q. Are you sure about that?

A. Yes, I'm sure.

Q. Neither you nor Sandy Seale hinted around for money?

A. I wasn't with Sandy Seale for the first five minutes. He wasn't with me so I don't know what -- we didn't -- we didn't talk about money when we were with other people.

Q. The first five minutes. You mean while you were down talking to Gushue and Harriss?

A. Yes.

Q. So of course you didn't know what Sandy Seale and the other two were talking about then?

A. No, and the only time money was indicated when I first met him.

Q. So there was no -- just to get this clear after you left Gushue and Harriss and rejoined Sandy Seale and the two men, you're saying there definitely was no conversation of money?

A. No.

Q. No hints about money even?

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A. No.

Q. You're indicating no to both of those questions, are you?

A. That's true.

Q. Pardon me?

A. Yes.

Q. Okay. Now you also indicated to my learned friend that one or both, I don't recall which, indicated where he lived. Is that correct?

A. Yes.

Q. Do you recall which -- which one it was, the younger fellow or the older fellow who indicated where his home was?

A. The older fellow.

Q. The older fellow?

A. Yes.

Q. And he pointed with his -- with his hand, did he?

A. Yes. He didn't point directly to the house. He just told me he lived up there.

Q. He said he lived up there.

A. The way he told it to me he just lived a short distance.

Q. Yes. So you're -- for the record, you're pointing with your right hand in the air. Is that the gesture he made at the time?

A. About what hand he pointed with or just the -- just the direction?

Q. Did he in fact raise his arm as you did and say: "I live up there."?

A. Yes.

Q. A short distance?

A. He just -- he said, "I live over there", and he asked us if we wanted to come up in for a drink.

Q. And was he pointing in the direction of Argyle Street at

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the time?

A. No. He was pointing down Bentinck Street.

Q. He was pointing down Bentinck Street way?

A. Yes.

Q. You're sure of that?

A. Yes, I'm sure.

Q. Is it possible he was pointing over the Argyle Street way?

A. No.

Q. Okay. And he invited you to his house. Is that correct?

A. Yes.

Q. Yes. Do you recall how you responded to that invitation?

A. Yes. I just said no.

Q. You said no?

A. No.

Q. I see and what was his response to that?

A. I think that's the time they left.

Q. That's the time they left?

A. Yes.

Q. Okay. And I believe you said in your evidence it was at that point they started walking up Crescent Street toward Bentinck Street. Is that correct?

A. Yes.

Q. And they got a short distance away from you and Sandy Seale.

A. I don't know. I can't say it was a short distance. He went quite aways.

Q. He went quite aways.

A. Yes.

Q. Can you give us an idea by gauging distances between objects in this courtroom how far away they got from you?

A. The courtroom is not big enough, I don't think.

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- Q. Would it be twice the length of this courtroom away from you?
- A. About that, yeh.
- Q. Around that?
- A. Yes.
- Q. So they would have gotten what, a hundred feet from you?
- A. Seventy-five anyway.
- Q. In any event they were still within shouting distance?
- A. Yes.
- Q. And you said in direct examination that you don't recall whether it was you or Sandy Seale that called them back?
- A. When I gave my statement, I said it was me.
- Q. Pardon me?
- A. When I gave my statement, I said it was me. I don't recall whether --
- Q. You're referring to the statement you gave on March 9th, 1982, at Dorchester Penitentiary?
- A. To the R.C.M.P.?
- Q. Yes.
- A. Yes.
- Q. So you said -- you're telling us you said in that statement that it was you that called them back?
- A. I could say it was me. I could say it was Sandy Seale. I don't know.
- Q. All right. Do you remember what was said when they were called back?
- A. Just we asked them to come back.
- Q. We asked them?
- A. Yes.
- Q. Are you suggesting now that both of you may have shouted for them to come back?
- A. I'm not saying that. It was one of us. I don't know

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who it was.

Q. But you knew that you wanted them back at that time whether it was you that shouted or not, right?

A. Me? Not only me.

Q. You wanted them to come back whether it was you that shouted or not.

A. We. We wanted them to come back. Not me. We.

Q. All right, so including you.

A. Including me.

Q. And do you recall what tone of voice was used to get them back by either you and Seale? Was it a loud shout?

A. I don't know.

Q. You don't know. Do you recall if it was a couple of sentences or did somebody just say: "Get back here."?

A. Let me think for a minute.

BY THE COURT:

Q. Speak up please.

BY MR. EDWARDS:

Q. Pardon me?

A. Let me think for a minute.

Q. Sure. You're shaking your head no, you don't remember?

A. I don't know, yeh.

Q. But the two that were walking away, they got the message, didn't they? They came back.

A. Got the message concerning what?

Q. The call back.

A. Yes.

Q. Now did they come back -- did they turn around and come back or did you and Sandy Seale proceed from where you were to where they were?

A. I think they came back.

Q. You think they came back.

A. I'm sure they came back.

Q. And when they came back you say that that's when you noticed that the younger fellow was a little bit unsteady on his feet?

A. Yes.

Q. Had you noticed that before?

A. Not really. I didn't notice.

Q. So when you talked to the two of them the first time --

A. I knew he was drinking.

Q. You knew he was drinking?

A. Yes.

Q. What about the old fellow? Did he appear to be drunk?

A. Hard to say. I didn't know.

Q. It's hard to say. You don't know.

A. I couldn't tell.

Q. Did he appear to be staggering when he came back?

A. No.

Q. Do you recall if he was carrying a cane?

A. No, he wasn't carrying a cane.

Q. He wasn't? When he came back, did he have anything in his hands?

A. No, he had his hands in his pocket.

Q. He had his hands in his pocket at that time?

A. Yes.

Q. Both hands?

A. I don't know.

Q. I'm sorry. Speak up please.

A. I don't know.

Q. You don't know if there was one hand or two hands in his pocket?

A. I think -- I'm going to say two hands. I'm more sure because he come up --

Q. Well let's take it step by step. You're sure he had at least one hand in his pocket?

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Q. Yes. But you're disputing what Mr. MacNeil says on that point?

A. Yes.

Q. You said yes?

A. Yes.

Q. At any point while you had hold of MacNeil did you put his arm up behind his back?

A. No.

Q. No.

A. No.

Q. Did you do more than merely support him to keep him from falling at any point?

A. I don't remember. I just grabbed him. That's all I remember.

Q. Did you not wrestle with him a little bit?

A. No.

Q. You're indicating no?

A. No.

Q. And in the meantime there was conversation between Sandy Seale and Ebsary. Is that correct?

A. Yes, they had a conversation going.

Q. I'm sorry?

A. They had a conversation going.

Q. Yes. Do you remember anything at all that Sandy Seale said to Ebsary at that point?

A. I never -- the only thing that I recall was Ebsary asking Sandy Seale if he wanted everything he had.

BY THE COURT:

Q. If he wanted?

A. Everything he had.

BY MR. EDWARDS:

Q. Sandy Seale asked Ebsary --

A. No.

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Q. I'm sorry.

A. Ebsary asked Sandy Seale.

Q. Ebsary asked Sandy Seale if he wanted everything he had?

A. Yes.

Q. Had Ebsary spoken just before Ebsary said that?

A. Pardon me?

Q. Had Sandy Seale spoken just before Ebsary uttered those words?

A. I don't know. I didn't hear him.

Q. You didn't hear him because you were busy with MacNeil?

A. Yes.

Q. Is it possible that Sandy Seale could have said something to Ebsary at that point and you not heard it?

A. It's possible. I don't know.

Q. Isn't it true, Mr. Marshall, that when Ebsary and MacNeil were called back at least the intention in your mind -- you can't speak for Seale but in your mind, your intention was to role those fellows?

A. Intentions of -- was to get money regardless how I got it. These men, after they left us, they had a choice to keep going so -- they had the choice to leave when they left.

Q. They had a choice to leave when they left the first time?

A. Yes.

Q. All right. But then when they were called back, they knew you meant business then, didn't they?

A. Like I said, they had a choice to keep going. They were walking distance away from me. Nobody -- nobody cornered them, nobody pressured them. They had a choice to keep going. Nobody threatened their lives. I don't see why they came back. They lived a short distance where they said they lived.

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- Q. They came back because either you or Sandy Seale ordered them to come back. Isn't that correct?
- A. They had a choice. Nobody's ordered to walk back.
- Q. If they had not come back, isn't it probable that you and Sandy Seale would have gone after them?
- A. I don't think I could say that. When they walked -- when they were walking away, we should have went after them then if that's the case but nobody went after them. They were close to their home and when we asked them back, they come back. The intentions I don't think it was to get robbed, you know, --
- Q. I'm sorry. I can't hear you, Mr. Marshall.
- A. The intentions of them coming back was not to get robbed so they had a choice to leave and they picked to come back and do us evil.
- Q. When they came back -- what you're saying is they didn't intend to get robbed but your earlier testimony was that you intended to get money from them no matter what you had to do at that point. Isn't that what you're saying?
- A. I didn't do anything to get the money off them. The intentions of getting money was there. The attempt -- any other thing else that will indicate that I tried to rob these people, I didn't. There was no indication from me or Sandy Seale. When they left, they should have kept going.
- Q. You were seventeen at the time?
- A. Yes.
- Q. How tall were you? You were over six feet then, weren't you?
- A. I don't know. I don't know.
- Q. You don't know?
- A. No.

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Q. You were big for seventeen. Would you agree with that?

A. Tall.

Q. Yes. You were bigger than Sandy Seale, taller, anyway?

A. Yes, but he was bigger.

Q. And MacNeil was the taller and the younger as between him and Ebsary?

A. Yes.

Q. Right. So I suggest to you, Mr. Marshall, that you grabbed James MacNeil because you were the bigger and Seale was going to confront Ebsary because he was the smaller in order to get money from them. Isn't that right?

A. No, that's not right. Regardless -- it didn't matter who I grabbed if I did grab anybody. The point I'm doing -- getting at is them people walked away. Why did they walk back, you know.

Q. But the point is, Mr. Marshall, that when they did come back --

A. Why did they come back.

Q. You're staying with your testimony that you intended to get money from them no matter what you had to do. Isn't that right?

A. Off them. Off them or out of a store or anything else. My intentions was to get money regardless if I stole it off somebody, bummed it off somebody, or took it out of a store or someone's house.

Q. But at the time you had hold of MacNeil and Seale was having the conversation with Ebsary, you weren't thinking about any store at that point, were you?

A. No.

Q. No. At that point you were thinking about getting money from those two men. Isn't that right?

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A. I can't say.

Q. You can't say?

A. No.

Q. You can't deny it?

A. I can't deny it. I can't -- I don't know. I don't know your point.

Q. Now you told my learned friend that while you had hold of MacNeil and you heard the words coming from Ebsary that -- I believe you said: "The old guy had Sandy Seale hoisted up", and you couldn't remember whether it was with his right hand or his left hand. Right?

A. I don't remember now.

Q. That's what you said --

A. Yes, I remember.

Q. -- in testimony to my learned friend. Isn't that right?

A. Yes.

Q. Yes?

A. Yes.

Q. Could you see the knife at that point?

A. No.

Q. Because Seale was bent over?

A. Yes. I had MacNeil -- had MacNeil by the shoulders.

Q. You had MacNeil by the shoulders?

A. Yeh.

Q. You let him go at that point?

A. I threw him on the side when I was attacked by Roy Ebsary.

Q. The old man took a swipe at you. Ebsary took a swipe at you.

A. Yeh. His intentions was to stab me in the stomach.

Q. You saw the knife at that point?

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- A. Not really. Between -- within five seconds I guess I don't know whether I seen the knife or not. All I remember was I -- he threw a punch at me or took a swipe at me. I blocked it with my arm and I ran. And when I start running, I can feel blood coming down my arm.
- Q. Well, you're saying you didn't know there was a knife there until after you had run away?
- A. I don't know.
- Q. You don't know.
- A. No.
- Q. Well isn't it likely that if you didn't know there was a knife there you would have stayed to help Mr. Seale?
- A. When you look at it, it wasn't so unusual that it didn't -- I didn't think it was a knife or anything else, you know.
- Q. You knew that Sandy Seale was badly injured at that time.
- A. At the time he was stabbed right away?
- Q. Yes.
- A. I don't remember. I don't remember him --
- Q. Do you remember did he drop on the ground or if he tried to run?
- A. I don't -- no, I don't remember.
- Q. You don't remember that?
- A. No.
- Q. So then you ran away and you saw Chant?
- A. Yes.
- Q. You had conversation with Chant?
- A. Yes.
- Q. Now you heard Chant's testimony in 1971, of course.
- A. I heard so many I don't know who is who or which one is which. I don't know.

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- Q. Well during this past eleven years, did you have a transcript of the trial at any time?
- A. Yes, I had a transcript but I didn't have the preliminary hearing transcripts. I only had the Appeal's Division transcripts and my Supreme Court transcripts.
- Q. But you had the trial transcript?
- A. Yes.
- Q. How long have you had that?
- A. A long time. I don't know. Several years, a few years.
- Q. A few years. And you must have read that through a number of times?
- A. Yes.
- Q. And you must have read Chant's testimony?
- A. Yes.
- Q. And you're aware that Chant has filed an affidavit with this Court respecting these particular proceedings?
- A. Yes.
- Q. And you've seen statements given by Chant?
- A. Yes, I've seen a few statements.
- Q. And you're aware that the gist of what he says is that when you caught up to him, you said that your buddy was over there with a knife in his gut.
- A. Yes.
- Q. All right. Do you disagree that you said that? Is Chant wrong or are you wrong on that point?
- A. Nobody's wrong.
- Q. But you just finished saying that when you left you didn't know whether Sandy Seale had been stabbed or not?
- A. Until I started running after Sandy Seale was stabbed after the -- I blocked that man's arm. When I start running, that's when I knew he was stabbed. Not when

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I met Maynard Chant.

Q. I see. But you have no independent recollection of what that knife looked like?

A. No.

Q. You can't describe the length of the blade or anything about it?

A. No.

Q. After May 28th you were questioned by the police?

A. Yes.

Q. Pardon me?

A. Yes.

Q. And I believe you said earlier that you in fact stayed at the police station for a week for protection?

A. Yes.

Q. Now did you make any inquiries or did anyone make any inquiries on your behalf about Ebsary and MacNeil or persons like that?

A. What do you mean?

Q. Did you ask anybody to do any investigation on your behalf to verify your story about the two priests?

A. Are you -- is it that the City Police here talking about or is it somebody --

Q. No, I'm asking you if you told anybody to go out and try to find out who those two fellows were, to check around that neighbourhood?

A. I went down myself.

Q. You went down yourself?

A. Yes. And I took my cousin with me.

Q. Pardon me?

A. I took my cousin with me.

Q. Who was your cousin?

A. Stewart Marshall.

Q. And what did you do, go from house to house asking about

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these two fellows?

A. No, we just got on Crescent Street and the City Police drove in and picked me up and told me they were told to go pick me up or something. It wasn't safe for me to walk the streets up there.

Q. How long was this after May 28th?

A. Oh, I don't know. Just a couple of days after.

Q. In any of your discussions with your friends after this before the trial, did any clues ever come up about the identity of Ebsary or MacNeil?

A. No.

Q. Do you know where Ebsary lived at the time? Do you know now where he lived at the time?

A. I know now but I didn't know before.

Q. So it's fair to say you know now that he lived on Rear Argyle Street, right?

A. At the time --

Q. Yes.

A. -- of the accident? Well, he told me lived there so I assumed he lived there.

Q. Well at the time if I've understood your evidence correctly before, you said that he -- he just motioned and said he lived over in that direction?

A. Yes.

Q. Are you now saying that he actually told you that he lived on Rear Argyle Street?

A. He just indicated he lived on that street somewhere.

Q. But when I questioned you on that point, you said he pointed toward Bentinck Street, not up toward Argyle?

A. You're getting me confused then. You're getting me confused.

Q. I'm sorry.

A. It's Bentinck.

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Q. Well all I'm asking you, Mr. Marshall, was whether or not he mentioned the name of the street he lived on when you spoke to him that evening?

A. No, he didn't.

Q. He didn't, okay. But were you -- you now know that he lived on Rear Argyle. You agreed with me on that point, right?

A. He lived at that direction, yes.

Q. Pardon me?

A. He lived at that direction, pointed in that direction. I don't know if it was the rear of Argyle, up Bentinck or inside behind the other houses. I don't know.

Q. Is it fair to say that Argyle Street is not much more than a stone's throw from where the stabbing actually took place?

A. I don't know.

Q. Pardon me?

A. I don't know. I don't think so.

Q. Well, Mr. Marshall, you lived in Membertou, right?

A. Yes.

Q. You had lived your full seventeen years there?

A. Yes.

Q. Up to that point in time?

A. Yes.

Q. And you went to school where?

A. St. Anthony Daniel School.

Q. And you were going on a regular basis down to St. Joseph's Hall for dances?

A. Well other dances, too, right. Not only St. Joe's. We went to other dances every weekend.

Q. What I'm getting at, Mr. Marshall, is that you were entirely familiar with that whole area, weren't you?

A. Yes.

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- Q. So that when I ask you about Rear Argyle Street or Alexander Street or Bentinck Street, you know where all those streets run, don't you?
- A. Yes.
- Q. And you know that they're all in the same general area, don't you?
- A. Yes, but Argyle and Bentinck are quite aways a part. They're park length.
- Q. Yes. But they're in the same general area?
- A. Yes.
- Q. The point is, Mr. Marshall, isn't it true that if you had made some efforts you could have discovered who those two fellows were? It's likely you would have discovered who they were?
- A. On my own, I probably would have.
- Q. But you really weren't interested in finding out who they were at the time, were you?
- A. I was scared to death. It's not -- I'm not a policeman. It's not my job to investigate. I told them who they were. I wasn't sure where they lived. It wasn't up to me to go look for them.
- Q. Isn't it true, Mr. Marshall, that the reason you didn't go look for them or have anybody go look for them was because you were scared of being charged with robbery?
- A. Robbery, no, I wasn't. I did go look for them.
- Q. You never believed you were going to be convicted of the murder, did you?
- A. No.
- Q. So believing that, you felt that there'd be no problem keeping a secret about the robbery or the attempted robbery. Isn't that correct?
- A. It didn't -- it's not important because there was no attempt made. We weren't after two particular people.

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We were looking for money.

Q. Mr. Marshall, you were talking to those two gentlemen. You told us in testimony that you were going to do anything you could to get money from them. You were wrestling with one of them.

A. I didn't wrestle with one of them. I held one up.

Q. You merely supported his weight?

A. Yes.

Q. Mr. Marshall, prior to the night of May 28th, had you ever rolled anyone before? Are you familiar with that term, first of all?

A. Yes, I'm familiar with it.

Q. Yes. And to roll somebody means to --

MR. ARONSON:

I object with respect to that question. I don't think it's particularly relevant as to what he did prior to this particular night. The charge that he's concerned with here is one of murder, not whether or not he had or had not rolled anybody prior to that particular night.

THE COURT:

It's very relevant having regard to the evidence he's already given. It's a line of cross-examination. Proceed Mr. Edwards.

MR. EDWARDS:

Thank you, My Lord.

BY MR. EDWARDS:

Q. So we were just making sure we had our terms straight, Mr. Marshall. When you -- when you use the term, "to role somebody", that means to beat them or grab a hold of them for the purpose of forcing money from them. Isn't that what it means?

A. Yes.

Q. Right. Now had you ever rolled anyone prior to that

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night?

A. I can't answer that.

Q. You can't answer that?

A. No, because whether I did or not I don't think it's anybody's business what I did as far as me rolling anybody before or after because the night we met Ebsary and MacNeil, our intention was to get money and the intentions were there but the attempt -- as far as me grabbing MacNeil or Sandy Seale grabbing Ebsary, nothing like that happened. He said I jumped him from behind. I don't think I jumped him from behind.

BY THE COURT:

Q. You were asked a question, Mr. Edwards. You haven't answered it.

A. I did. I have no answer.

Q. Mr. Marshall.

A. I don't think. I don't know how to answer it.

BY MR. EDWARDS:

Q. Mr. Marshall, you just stated that you didn't think it was anyone's business whether you had rolled anyone before or not?

A. Yes.

Q. You realize that you're in Court and you're under oath, don't you?

A. Yes, but I'm not dealing with if I robbed anybody before.

Q. And you realize that unless one of their Lordships say that you do not have to answer the question that you have to answer the questions put to you. Do you realize that?

A. Yes, I do.

Q. Yes. Then I will ask you once again. Prior to the night of May 28th, 1971, had you ever rolled anyone before?

A. I give you an answer. It's nobody's business.

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Q. You're saying that that's no one's business. It's not the Court's business?

A. It's my business. I was not caught for it so why do I have to deal with it. I wasn't -- I wasn't summonsed for it. I don't have to deal with it.

BY THE COURT:

Q. You've been asked now, Mr. Marshall. You've been asked the question now. You must answer it.

A. I might have. I may have not. †

BY MR. EDWARDS:

Q. You might have. Mr. Marshall, you realize that to roll somebody or to rob them, to use the legal term, is very serious business. Do you realize that?

A. Sure it is.

Q. Yes. And would it also be fair to say that unless you were doing it on a daily basis you would remember it?

A. Yes, but I didn't do it on a daily basis.

Q. No. Exactly the point so therefore you should remember whether you had ever rolled anyone before? Is it possible that you did?

A. It's possible.

Q. Yes. Is it possible that you did more than once before?

A. It's possible I robbed somebody. I don't know whether it was once or not.

Q. Is it possible you may have rolled five or six people prior to that night?

A. I don't know.

Q. You don't know so then it is possible?

A. It's possible.

Q. Yes. So is it fair to say that on the night of May 28th, this wasn't a brand new venture for you? You knew what you were doing that night?

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A. I can't say I was. I don't know.

Q. You said that you hadn't had much to drink so there's no reason why you can't remember, is there?

A. I wasn't concerned about no robbery after I ran or after I talked to the police. There was no robbery committed. They dealt with a murder. The murder was pointing to me regardless how you put it. It wasn't me that they were worried about. In my books they were worried about themselves, their reputation or anything else.

Q. Did you have any blackouts that night?

A. No, I mentioned blackout. I got a chance to explain why I mentioned it.

Q. Now let's just for clarification, you mentioned during the trial --

A. Yes.

Q. -- that you had a blackout?

A. Yes.

Q. Your -- you know that transcript off by heart, don't you?

A. Yes, I do.

Q. So there's no need for me to refer you to the exact page or time where you did mention the blackout?

A. Yes.

Q. Okay, and you mentioned the blackout when the Crown Prosecutor at the time was asking you about Patricia Harriss and where she was on that evening. Is that right?

A. At the time when he asked me -- when I told him I had blackouts -- I had a blackout, what I meant was not a blackout but you say like if you faint or something. What I meant was everything and whoever I met earlier or before or any other time, that's what I meant by a

blackout. They didn't exist. Some people did but some people didn't. I was in a situation where I had to run. I was at a point of dying so it didn't matter where I met Harriss or Gushue or anybody else.

Q. So just to clarify you've never received any medical treatment or psychological treatment for blackouts, have you?

A. No.

Q. And when you say you can't recall when I ask you some questions, there's no medical reason why you can't recall, is there?

A. I'm just tired of it.

Q. Pardon me?

A. I just -- I'm just tired of ask -- answering these questions and everything else. I'm just you can call burnt out, I guess. Mentally burnt out.

Q. Mr. Marshall, just another point I'd like to clarify with you; that is, at the point where you had met Maynard Chant and you say that after that you met two guys and two girls, was it?

A. Yes.

Q. Right. Were either of those girls Patricia Harriss?

A. No.

Q. No. Okay.

MR. EDWARDS:

If I could just have a moment, My Lords. My Lords, at this point I would like to have leave of the Court to cross-examine Mr. Marshall under Section 10 of the Canada Evidence Act with respect to the written statement he referred to in his evidence given at Dorchester Penitentiary on March 9th, 1982. I didn't go right into it because my learned friend had indicated to me that he would be opposing any such cross-examination. In anticipation of that objection, I'd

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just like to outline the Crown's position.

THE COURT:

On what basis would you be doing that? Is that on the basis -- we -- that statement has not been -- it's not in evidence?

MR. EDWARDS:

No, on the basis of Section 10 of the Evidence Act, My Lord, which --

THE COURT:

Any inconsistency.

MR. EDWARDS:

Well if I can paraphrase it as I understand Section 10, it's actually a double-barrel section. The first part of the section says he may be cross-examined on the statement without the statement being shown to him and then it goes on to say, and I am paraphrasing, but if it is intended to contradict him, then his attention must be drawn to those parts that I intend to contradict him on. So my interpretation with respect of the section is that: number one, it allows a general cross-examination on the statement and number two, it allows his credit to be impeached with -- specifically on the statement. Now there's two parts of the problem when, as here, you have the appellant as the witness. Ordinarily, of course, if it was just a witness, the requirements of section 10 would be relevant and none other but where we have Mr. Marshall on the stand, there is the possible additional problem with the fact that he was at one time in any event an accused person. The Crown's submission is that at this point in time, he is the appellant and therefore it is not incumbent upon the Crown to prove the voluntariness of the statement in a voir dire. If we were in a trial situation, I submit that the law is pretty clear that at this point in time if the accused was on the stand and I wished to cross-examine him on the

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statement and the statement had not been introduced by the Crown in its -- as part of its case, then the procedure would be that we would have to break at this point, hold a voir dire and I would have to prove the voluntariness of the statement as I would with any statement by the accused. It's my submission at this point that we're not in the situation where he is an accused person and therefore it should not be necessary for the Crown to prove the voluntariness of the statement. He is here not only the appellant but this of course is a reference under Section 617, an investigation initiated by him resulting in us being here today. Now by virtue of my learned friend's objection to my examining Mr. Marshall on his statement, he is in effect saying, well, I'm going to tell the truth but you're just going to use those parts of the investigation in these proceedings that I say you're going to. He's not in jeopardy. We're not in a trial situation. Permission to do so, i.e., cross-examine him on the statement, would not in any way, I submit, prejudice his position in any subsequent proceedings if there are any. So on those bases, I would ask Your Lordships to grant me permission to cross-examine him on that statement.

THE COURT:

What do you have to say, Mr. Aronson?

MR. ARONSON:

I would object to him being cross-examined on the statement if I -- there's no law that I've been able to find where a statement given by a person convicted of an offence made subsequent to the conviction has been used in Court. The principle would seem to be and the law seems to apply to persons accused. There's no question he is not presently in jeopardy in the sense that things could not get any worse for him than they presently are but the fact of the matter is that that statement could be used in evidence against

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him. It may assist the court in some respects and hypothetically it may assist the court in resolving the matter then and there if the statement is admitted. I would therefore submit that the burden is on the Crown to establish that the statement which was given to police officers was a free and voluntary statement.

THE COURT:

0) What is your position on the voluntariness?

MR. ARONSON:

We would say that the burden lies with the Crown. We do not concede that the statement was free and voluntary.

THE COURT:

Are you suggesting that the statement was not taken voluntarily?

MR. ARONSON:

I beg your pardon?

THE COURT:

You're suggesting the statement was not a voluntary statement?

0) MR. ARONSON:

I'm suggesting that, without trying to get into specifically the events that occurred, that there were circumstances which might lead to believe that an inducement was held out and as a result the statement would not be considered a free and voluntary statement.

MR. EDWARDS:

0) On that point, My Lord, if I may just to be perfectly honest with the Court, in a trial situation, I would agree that it is not completely straight forward that we would get the statement in. There is an inducement argument which I would of course oppose but I submit that we don't even have to get to that in these proceedings, that the statement can be taken for what it's worth to test the credibility of the accused. After all, we're here to get at the truth and my submission is that we want all of it, not just part of it.

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THE COURT:

Court will rise until two o'clock. Mr. Marshall, you will not talk to anyone during the recess about the case.

COURT RECESSED: 12:30 p.m.

COURT RECONVENED: 2:05 p.m.

THE COURT:

Your motion is granted, Mr. Edwards.

MR. EDWARDS:

Thank you, My Lord.

THE COURT:

You may proceed.

DONALD MARSHALL, resumes testimony as follows:

BY MR. EDWARDS:

- Q. Now, Mr. Marshall, this morning in your evidence you referred to the statement of March 9th, 1982, that you gave to the R.C.M.P. at Dorchester Penitentiary. Is that correct?
- A. Yes.
- Q. I'll ask you to speak up again, Mr. Marshall. And do you recall the circumstances under which that statement was taken?
- A. Under -- circumstances?
- Q. Okay. Do you recall whether you were in an interview room at the time the statement was taken?
- A. It's a court house in the prison.
- Q. Pardon me?
- A. It's a court house and it's an interview room for a lot of things, court and parole hearings and everything.
- . An interview room.

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Q. Right, and it's right in the institution, is it?

A. Yes.

Q. Okay. There's a table and chairs there?

A. Yes.

Q. Okay. And present during the taking of the statement was Sergeant Harry Wheaton -- Staff-Sergeant Harry Wheaton. Is that correct?

A. Yes.

Q. And Corporal James Carrole of the R.C.M.P.?

A. Yes.

Q. There were just the three of you in the room?

A. Yes.

Q. Nobody else asked you any questions about the statement at that time?

A. No.

Q. Do you recall how the conversation started just prior to your giving the statement?

A. Yes.

Q. What do you recall about that, Mr. Marshall?

A. The R.C.M.P. investigators told me to tell them everything and not to hide anything and --

Q. They told you they wanted the truth. Isn't that right?

A. Yes.

Q. And in fact, March 9th, 1982, was the second visit those two gentlemen had made to the institution. Isn't it?

A. I don't know the date but they were up again.

Q. Yeh. Well, they had been there about two weeks before. Is that correct? Around February 18th?

A. I don't know the dates.

Q. No, but I know you can't recall the dates but do you recall that they had been to see you about two weeks prior to the day when they gave you the statement, or .. when you gave them the statement?

A. Yes.

Q. Yes. All right, and as a matter of fact on that first occasion you had started to give them a statement but it had to be stopped because there was some sort of problem in the institution.

A. Yes.

Q. Is that right?

A. There was a problem there. I don't know what it was.

Q. Yes, oh, it had nothing to do with you but for security reasons, the present -- the prison personnel had asked them to leave. Is that correct?

A. Yes.

Q. All right. You had started giving a written statement at that time?

A. Yes.

Q. So they come back two weeks later on March the 9th and that's when you gave them the written statement. Right?

A. Yes.

Q. So the point is you had had two weeks to consider what you were going to tell them in the statement. Right?

A. I didn't have two weeks. I don't think I even thought about it.

Q. No, but you thought about it.

A. I've been thinking about it ever since I've been in there so it didn't matter regardless how I put it, I put it to the point where they understood.

Q. Well the point is you knew that Staff-Sergeant Wheaton and Corporal Carrole were going to come back to see you again after the first visit.

A. Yes, they told me they'd be back.

Q. Yes. So you must have thought about why they were coming back. You knew they were coming back to take a statement. Right?

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A. Yes.

Q. Yes, and you must have thought about what you were going to tell them when you gave that statement. Right?

A. I didn't really think about it. I guess I probably knew what I had to tell them.

Q. You were going to tell them the truth.

A. Yes, I tried.

Q. Yes. You tried to tell them the truth.

A. Yes, I tried to tell them the truth.

Q. So that statement you gave them on March 9th was as close to the truth as you could come on that -- at that time. Isn't that right?

A. Yes.

Q. And therefore it's -- it's a reliable statement. Well let me rephrase that, Mr. Marshall. Therefore when one reads that statement one can take it as being truthful. Is that right?

A. Yes.

Q. Yes. Okay. Have you had the opportunity to read the statement over recently?

A. I read them all.

Q. Before I ask you some questions on it, would you like to read it now?

A. No.

Q. No?

A. You can ask.

Q. Pardon me?

A. You can ask me.

Q. Okay.

MR. ARONSON:

With respect, he might take that opportunity just briefly to review it. I appreciate the fact that he doesn't want to see it but it is fairly significant and it may be

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appropriate for him just to take a look at it.

THE COURT:

Yes, I think you might show it to him, Mr. Edwards.

MR. EDWARDS:

By all means, My Lord. (Witness peruses statement)

Perhaps, My Lord, it should be marked.

THE COURT:

(10) Yes. Have you asked -- you haven't asked him to identify it.

MR. EDWARDS:

I was going to as soon as it was marked, My Lord.

THE COURT:

That would be marked, R-1?

MR. EDWARDS:

Exhibit 1.

THE COURT:

Let's make it exhibit R-1.

(20) BY MR. EDWARDS:

Q. Okay, Mr. Marshall, I'm showing you this statement which is now marked exhibit R-1. That is the statement you just read over?

A. Yes.

Q. And that is the statement that you gave to Staff-Sergeant Wheaton and Corporal Carrole at Dorchester Penitentiary on March 9th, 1982. Is that correct?

A. Yes.

Q. And your signature appears on that statement?

(30) A. Yes.

Q. As a matter of fact your initial -- well, your signature appears on every page of the statement, doesn't it?

A. Yes.

Q. And before signing it, did you have the opportunity to read over the statement?

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A. Yes.

Q. And before you signed it, you read it over and you agreed with the contents in the statement?

A. Yes.

Q. Did you make any corrections? As them to change anything?

A. I don't think so.

Q. So exhibit R-1 is the unaltered statement given at that time?

A. Yes.

Q. Now perhaps I'll just stay here. Mr. Marshall, I'd like to --

THE COURT:

If you possibly can, I think it would be much better for the transcription, for the recording if you'd stand farther away.

MR. EDWARDS:

Yes, okay, My Lord. I was just going to show him the part I'm going to direct him to.

THE COURT:

I wish to remind Mr. Marshall again to speak up so we could get a better recording.

BY MR. EDWARDS:

Q. Okay, Mr. Marshall, I want to direct your attention to the paragraph, I believe it's right about in the middle of page two of the hand-written copy you have or the hand-written original, exhibit R-1, the paragraph that starts:

I asked Sandy if he wanted to make some money.

Do you see that paragraph?

A. Yes.

Q. Okay. So just to read it:

*I asked Sandy if he wanted to make some money.
He asked how and I explained to him we would roll someone.*

A. Yes.

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Q. Pardon me?

A. Yes.

Q. All right, now that is what you told the police at that time. Right?

A. Yes.

Q. And would you agree with me that that differs quite markedly from what you said in this Court today?

10) A. No, not in general it doesn't. Rolling somebody whether it's on the street or if it's in his store, his home, right, -- I didn't really pick out -- I didn't pick out my target. I just wanted to make some money regardless who I took it off or where I got it from.

Q. All right. But you did or you said in the statement that you explained to him that you would roll someone.

A. Yes.

Q. Is that your evidence now?

20) A. Yes.

Q. Okay, so you did in fact explain to Sandy Seale at that time that the way you would get the money would be by rolling someone. Is that fair to say?

A. It's fair to say but you can put it in different phrases too if you want.

Q. You didn't mention anything about a store, getting money from a store in that -- at that time?

A. I never mentioned about getting them two men that I seen earlier either.

30) Q. Okay. The next sentence in that same paragraph, you said:
I had done this before myself a few times.

A. Yes.

Q. Okay, so now this morning when I asked you about that, you said you couldn't recall whether you had or not.

A. I said it was nobody's business.

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Q. That's what you said first.

A. Yes.

Q. And then when pressed, I believe you said that you couldn't recall whether you had or not. Isn't that right?

A. I wasn't going to answer yes.

Q. Pardon me?

10) A. I wasn't going to answer you yes.

Q. Okay. But the thing is you did tell the police on March 9th that you had rolled people on prior occasions. Prior to the stabbing night, right?

A. Yes, I did.

Q. Pardon me?

A. Yes, I did.

Q. Okay. And from your words, it says:

I had done this before myself a few times.

20) Do I take it from there -- from that that you meant that you had never rolled anyone with Sandy Seale before?

A. No.

Q. And as far as you knew Sandy Seale had never rolled anyone before, had he?

A. No.

Q. Okay, so the next sentence follows on from that:

I don't know if Sandy had ever rolled anyone before.

Well that's what I just asked you.

We agreed to roll someone so we started to look for someone to roll.

30) So when you and Sandy met in the park and had this little conversation, you set out from there to find somebody to roll.

A. Find somebody or find something. That's what I was saying.

Q. All right, that's what you told the police at the time. Do you adopt that statement now? Is that what you're

saying now that you set out to find somebody to roll?

A. To find somebody or some place or somehow. That's what I'm saying. Not specifically somebody. Something.

Q. Okay. May I see the statement a moment, Mr. Marshall? Referring you now, Mr. Marshall, to the top of page three of the statement, the paragraph that begins:

I then walked down Crescent Street to Sandy and the two guys.

Do you see that paragraph?

A. Yes.

Q. I'll read the whole paragraph. It's not too long.

We talked about everything, women, booze, about them being priests, and hinted around about money. The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them. I got in a shoving match with the tall guy. Sandy took the short old guy. I don't remember exactly what was said but I definitely remember Ebsary saying I got something for you and then stabbing Sandy.

All right?

A. Yes.

Q. So you recall -- you recall telling the police to put that in your statement on March 9th?

A. Yes. Yes.

Q. Is that how it happened?

A. I'm not denying the fact that I was out for money. This is what happened but as far as I'm concerned I never ever heard anybody mention anything about money when I was with them.

Q. Okay, so you're sticking to what you told me this morning when I asked you if you had hinted around about money?

A. Yes.

Q. So you're contradicting what's in the statement.

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A. I think everything's contradictory around here. I can't understand. I don't understand what's the difference.

Q. Well let's take the next sentence, Mr. Marshall. If you need time to think about it, just say so.

*The two guys started to walk away from us
and I called them back.*

Now that's different from what you said this morning. Isn't that right?

A. Yes, and I thought about it. I felt I had to take responsibility for my behalf anyway of whatever happened. I don't think Sandy Seale can come up and tell you people that he called them back or I called them back or who called them back or who said what when we were all together and I just took the responsibility for his death because if I hadn't a met him, I think he would be alive today.

Q. Okay, let's deal with the specifics here, Mr. Marshall. This morning if I recall correctly you said you couldn't remember who called them back. In your statement you said that you called them back. Which is it?

A. Well I just put the blame on myself I guess but I didn't. I now say I didn't.

Q. Well are you saying you did or are you saying that you remember that you did?

A. I'm saying I did. I don't remember.

Q. The next sentence was:

They then knew we meant business about robbing them.

And then it says:

I got in a shoving match with the tall guy.

Do you agree that that is different than what you told us this morning?

A. No, it's not different.

Q. It's not different?

Q. Go down to the next paragraph, Mr. Marshall, please.
It begins:

*I let go of the guy I had and Ebsary came at
me.*

A. That's what I just said.

Q. Yes.

*He swung the knife at me and I held the knife
off with my left hand.*

A. Yes.

Q. Now that would give any reader the impression that you saw the knife at that time.

A. Well I didn't know what it was. I didn't know what it was.

Q. Mr. Marshall, when you gave this statement to the police, the police had already been there two weeks ago. You thought about what you were going to tell them. Did you not?

A. I thought about telling a lot of people a lot of things. I just had mixed feelings, mixed stories and everything. Generally I can talk about my case but as far as being questioned about it, I don't think I can answer a lot of things in it.

MR. EDWARDS:

I have no further questions, My Lord.

THE COURT:

Mr. Aronson.

MR. ARONSON:

Just a couple of questions.

BY MR. ARONSON: Redirect Examination

Q. In my friend's cross-examination at the commencement of it, he indicated to you -- he used the word "priest", that one of the men was dressed like a priest. Can you say which of the two men who was with you was dressed like a priest or who you can describe as being dressed

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like a priest?

A. The older guy, the shorter man.

Q. Are you able to say where Sandy Seale's hands were located when you looked over and he was hunched over or hoisted up by Ebsary?

A. I was looking directly at Ebsary and Sandy Seale and just before the murder happened, I know that Sandy Seale had his hands in his pocket at the time he was talking to Ebsary.

Q. Okay, now my friend has put a great many questions to you concerning the particular incident as to whether or not a robbery was or was not taking place at that particular time when as you say Seale was stabbed. Can you really say or can you really remember precisely what happened at that particular point in time?

A. At what time?

Q. At the point in time prior to Seale being stabbed and after the two men rejoined you when they had been called back.

A. Yes, --

THE COURT:

Mr. Aronson, you're transgressing the rules on re-examination.

MR. ARONSON:

I think it's a matter that has been raised by Mr. Edwards as to precisely what happened. He's trying to construe it in a particular way and I'm trying to get at the issue as to whether he -- how good his recollection of that particular point in time is.

THE COURT:

I think you've covered that pretty thoroughly in direct examination, did you not?

MR. ARONSON:

If it pleases the Court, another question that had been asked

by my friend.

BY MR. ARONSON:

Q. You indicated in direct examination that you -- that Ebsary had been pointing in the direction of Bentinck Street?

A. I don't understand you.

Q. Okay, let's go back to set the scene a bit. Ebsary and MacNeil invite you and Seale for a drink.

A. Yes.

Q. Okay, is that correct as to what you said?

A. Yes.

Q. Ebsary pointed in a direction as to where he lived.

A. Yes, he pointed towards Bentinck Street.

Q. Okay, now subsequent to that time you found out or you are aware that, as my friend says that Ebsary lived at Rear Argyle?

A. No, I didn't know. I just took his word that he lived around there.

Q. Now assume for a moment that you were going to go from where you were standing with Seale and the two other gentlemen on Crescent Street to Rear Argyle Street, how would you get there? What would be the shortest route to take?

A. To Argyle?

Q. To Rear Argyle.

A. I'd have to look at a map. I don't know what you're saying.

Q. I'll leave that.

MR. ARONSON:

I have no further questions, My Lord.

(WITNESS WITHDREW)

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JAMES WILLIAM MacNEIL, being called and duly sworn, testified as follows:

BY MR. ARONSON: Direct Examination

Q. Mr. MacNeil, could you please state your full name and address?

A. My full name is James MacNeil. I live at 222 Mount Pleasant Street, Whitney Pier.

10) Q. And where is that? Is that in the City of Sydney?

A. That is in the Sydney of Sydney.

Q. And are you employed?

A. Right now I'm laid off.

Q. I see, what trade do you have?

A. I have like maintenance, just labour like. I have a document here. This is the -- I don't know if you care to see it or not --

Q. That's all right. I don't think --

A. This is the last place I worked, okay. This is my document for the last place, Keddy's Motor Inn.

20) Q. Okay, thank you. Now what's the last grade in school that you completed?

A. Grade six.

Q. How old are you now?

A. I am thirty-seven years old.

Q. And were you born in Sydney?

A. Yes, I was. I was born in Sydney.

Q. And you lived in Sydney all your life?

A. All of my life, yeh.

30) Q. Are you married?

A. No, I'm single.

Q. I see. Do you --

A. No, I have to -- I'm living common law. Like, I'm living with a woman.

Q. Can you recall at all the events which occurred on the

- 81 - JAMES W. MacNEIL, by Mr. Aronson

night of Friday, May 28th, 1971?

A. Well to my best of knowledge, I and Mr. Esabary were drinking at --

Q. Excuse me, before you start into it, I'm wondering if you might just indicate whether you recollect the events.

A. What do you mean by that like?

Q. Do you remember what happened?

A. Up to -- yes, I remember what happened. Yeh.

Q. Okay. Do you recall where you were around eight or nine on that particular evening?

A. I was at the State Tavern on George Street.

Q. And where is that located?

A. That is located on George Street.

Q. And that's in the City of Sydney as well?

A. In the Sydney of Sydney as well, yeh.

Q. Is that particular tavern still in operation today?

A. That tavern is closed down I believe. No, it is not in operation.

Q. Now can you say what time you arrived at the State Tavern?

A. I would say we arrived around eight o'clock in the evening. I would say.

Q. You say "we"?

A. Yeh, me and Roy. Oh, not me and Roy. I mean to say that's where I met Roy that evening.

Q. And you've indicated Roy. Roy who?

A. Roy Esabary.

Q. And when did you meet him?

A. Prior to that or like --

Q. Well did you meet him in the tavern or outside the tavern?

A. I met him in the tavern.

Q. I see. Had you known prior to that that you were going

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to be meeting him there or was it purely by accident?

A. Just purely by accident.

Q. Had you known Roy Ebsary prior to meeting him at the State Tavern?

A. Yeh. Yeh.

Q. How long had you known him for?

A. I guess I knew him for about two or three months before that.

Q. Had you met him at the State Tavern before that particular night?

A. Yes, I had met him there, yeh.

Q. And do you know where Roy Ebsary lived?

A. He lived on the rear of Argyle Street.

Q. And you ever been to his home before?

A. Yes, I had been to his home on a few occasions.

Q. Now while you and Ebsary were at the State Tavern on that particular Friday night, what were you doing?

A. We were just sitting down drinking, having a few glasses of beer and talking.

Q. How much would you say you had to drink?

A. I'd say about seven or eight glasses of beer.

Q. And over what period of time would you have had that quantity?

A. Oh, between around eight until around eleven or ten-thirty. Something like that.

Q. I see, and can you say how much Roy Ebsary had to drink?

A. I can't tell you how much he had to drink that night.

Q. Like I wasn't counting the glasses but I figure he had probably the same as I'd done. There might be a glass in the difference or something like that.

Q. Now had you had anything to drink prior to going to the State Tavern?

A. Prior to going to the State Tavern, no.

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Q. Can you recall what time you left the State Tavern?

A. I can recall -- I'd say around between ten-thirty and eleven o'clock or something like that. Like, you know, like --

Q. How certain are you about the time?

A. Well you know like I just -- I'd say about eleven o'clock. I would say.

10) Q. Could you have left a little later than that?

A. No, I don't believe, no. I don't think.

Q. Did you leave in anyone's company?

A. In Roy Esabary's company.

Q. And was there anyone else with you aside from Roy Ebsary?

A. Nobody, just the two of us.

Q. Now can you give us a physical description of what Roy Ebsary looked like around that time in May of '71?

A. Would you repeat that question there please?

Q. Could you describe Roy Ebsary as you recall him in 1971?

20) A. Well he's about kind of stocky and kind of like a hunch, like a little -- like a little hunchy back, kind of stocky. He's not real tall, you know. He's kind of like stocky and --

Q. Could you estimate how tall he was?

A. I'd say he's -- he's roughly about five foot seven, I guess, if that.

Q. And do you recall or can you say what age he was?

30) A. I guess he was in his -- wait now, I'm not very good at judging age. Let's see what age he was. Oh, he was about sixty or around sixty years or something like that, I would say roughly.

Q. Are you able to say how he was dressed on that particular night?

A. Well, I believe he was -- he had a white -- he was wearing like a shawl, eh, a shawl over his shoulders and

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I think he was wearing like a sports coat. You know like a jacket and I -- I can't remember the colour of pants that he had on, like, you know.

Q. Are you able to say what colour the shawl was that you've referred to?

A. It was black. I'm positive that it was black.

Q. Now what happened after you and Roy Ebsary left the State Tavern?

A. After we departed from the State Tavern, we went -- we walked down -- we took the shortcut about three blocks. We cut through the park and we went over the bridge in the park and when we come up -- you come up -- automatically you come up like on Crescent Street, eh. It's a street and we crossed over to the other side of the road.

Q. Okay, now, let's go back to your leaving the State Tavern.

A. Okay.

Q. How far would it have been from the State Tavern to where you entered the park?

A. What do you mean, like walking?

Q. Walking.

A. Walking distance. I would say it would be roughly around five, six, seven minutes. That's -- would be roughly.

Q. And after you arrived at the park and approached the bridge, what happened then?

A. Then we went up and we went up to like the top of the hill. Like I said we were crossing over the street and we were -- we were approached by this-coloured youth and this Mr. Marshall. At that time I remember I recall that Mr. Marshall put my hand up behind, my back like that, eh, and I remember I kinda like panicked because I -- in a situation like that, you get "stensafied"

or something like that but I remember the coloured fellow asking Roy Esabary for money. He said, like, "Dig, man, dig." and he said, "I got something for you." and then he -- I just heard the coloured fellow screaming and everything was so you know, like, "tensafied" and every darn thing and I seen him running and flopping. I seen him running and flopping.

Q. Okay. As you're walking through the park -- let's go back a bit to after you'd entered the park and bring you up to the scene. Did you see anyone else in the park or speak with anyone else in the park prior to meeting this indian fellow and black youth?

A. No, I never -- never spoke to anybody.

Q. Can you say from what direction you were approached by these two individuals?

A. I think I was approached from behind like, you know, and everything like happened so fast, eh, you know. You just -- you get one of them there "tensafied" like you know, you just -- a spear of the moment, like you know.

Q. Okay. How certain are you as to whether you were approached from behind as you said?

A. I can't answer you. How certain --

Q. Take your time.

A. Well when my arm was grabbed like this, so I mustta hadda been approached from behind, you know.

Q. Now did you have any conversation with the indian youth?

A. No, I had no conversation with Mr. Marshall at all, whatsoever, like.

Q. I see. How can you say that the individual you saw in the park that night was Mr. Marshall?

A. Well I -- just by -- well, I seen his face. I seen his face. I know -- I know a person's face. I seen his face.

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Q. Do you recognize him in Court today?

A. Yeh, I would.

Q. Can you point him out if you see him in this court room?

A. Yeh.

Q. Point him out. Do you see him, Mr. MacNeil?

A. I don't think I see him.

Q. Where are you looking at this point in time, now?

A. Pardon?

Q. I'm just asking where you're looking at this point in time.

A. I'm looking right here.

Q. Okay.

A. Oh, I -- there he is, right in front of me. Good heavens.

Q. You've indicated that there was no conversation as between yourself and Marshall?

A. No, there was no conversation.

Q. Okay, and you overheard a conversation between two other fellows next to you?

A. What two other fellows?

Q. Okay, you were with Roy Ebsary?

A. Yeh.

Q. You were approached by two other people. Is that right?

A. No, no, I was just approached by Mr. Marshall and the coloured person.

Q. Where was Mr. Ebsary at this particular point in time?

A. He was right next to me.

Q. And was anyone standing with or near him?

A. The -- Mr. -- the deceased, Mr. Seale.

Q. Can you describe what -- you say the deceased, Mr. Seale. What did he look like?

A. He's sort of like mulatte, like a light type face like.

. Like he was light, light-complected.

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Q. How tall would you say he was?

A. I'd say he was about -- probably about five foot seven or eight, something like that.

Q. And what happened again once you're -- what conversation did you hear between Ebsary and this other fellow?

A. I just heard -- conversation I just heard is that the coloured fellow asked him for money, told him to "Dig, man, dig.", and then Roy said: "I got something for you.", and bang-o, that was it.

Q. Now did you see this part where you say "bang-o, that's it"?

A. Yeh.

Q. What happened?

A. Well he took a knife and he just slit him up.

Q. Slit who up?

A. Slit up Seale.

Q. And who had the knife?

A. Esabary.

Q. At the time you saw these two fellows or you were approached by these two fellows in the park you've described or indicated were Seale and Marshall, had you ever seen them before?

A. I have never seen them before, no.

Q. Have you ever seen them since that point in time?

A. No, I've never seen them, no.

Q. Where were you standing, this small group, when the incident took place where you described the stabbing?

A. I was standing right in front of Mr. Marshall.

Q. In front of Mr. Marshall?

A. Yeh.

Q. I see. Where relative to the street were you standing?

A. Pardon?

Q. On what particular location were you standing when this

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incident took place?

A. What do you mean like what side of the street or to the left or the right or?

Q. Yeh.

A. The right.

Q. And you say you were on the street?

A. Yeh.

Q. Okay, and what street was that?

A. That's Crescent Street.

Q. Now you've indicated you saw a knife. Are you able to describe that knife in any way?

A. In any way, kinda dark that there night there too. Like I -- I didn't -- like I couldn't describe it, you know, like I couldn't describe the knife but like I said everything happened so darn fast.

Q. And after you say Seale was stabbed what did Seale do?

A. Well he ran for a piece and then he fell on the road like. I heard him screaming and he ran and he fell on the road.

Q. I'd like to show you a plan, Mr. MacNeil, if I might. Have you had an opportunity to see that plan before, sir?

A. Yeh.

THE COURT:

Is that a copy of exhibit number five?

MR. ARONSON:

That's right.

THE COURT:

Would you so indicate on the record?

BY MR. ARONSON:

Q. This is a copy of exhibit number five from the original trial in 1971 which I now place before you. Can you say where on that particular plan you saw Seale fall?

A. Well if you come through here, there's the bridge now.

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There's the bridge. Okay, up on Crescent -- we're up on Crescent so he would fall I would say down around here on the right hand side.

Q. Now when you're pointing to here, would you mark that particular location with the initial "S".

A. Okay. There.

Q. If I might say for the record the witness has marked the initial "S" approximately in the middle of the road directly across from a house numbered, I believe it's 130. I'd best show you the plan. I believe it's 130 Crescent Street. After the stabbing took place, what did you see Marshall do?

A. I noticed that Marshall tried to come at Mr. Esabary, like he tried to at -- come at him there but he -- then he just -- he ran himself. I don't know where he went but he disappeared out of the picture but I believe he tried to -- tried to help Mr. Seale at that there time.

Q. Now you've already indicated to the Court that you had been drinking at the tavern. Is that right?

A. Yes.

Q. What condition would you say you were in as you went through the park and took your walk from the State Tavern?

A. I would say -- I wouldn't say feeling good. Just well, not drunk that's for sure.

Q. Could you speak up a bit? I'm sorry.

A. I said not -- I wasn't staggering or nothing, eh. I was walking but I was -- I was feeling -- feeling pretty good like you know but I wasn't staggering like.

Q. Now what was the last you saw of Marshall on that particular night?

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A. Repeat that question, please.

Q. What was the last thing you saw of Marshall after the stabbing?

A. Just that he -- he just -- he vanished then.

Q. Could you say in which direction he vanished?

A. I couldn't -- I couldn't say. Everything happened so fast, like.

(10) Q. What happened after the stabbing?

A. Pardon?

Q. What happened after --

THE COURT:

Excuse me, Mr. Aronson. That exhibit, copy of exhibit number five which has now been introduced, have it marked as exhibit R-2 for this hearing.

MR. ARONSON:

(20) I might point out I think I had mentioned a map that had been in Sydney and I understand from Mr. Edwards that the map is no better than the one we have before us today so --

THE COURT:

We can't use that. You've got this one marked. We'll use that as the exhibit for this purpose. Mark it R-2.

MR. ARONSON:

All right.

BY MR. ARONSON:

(30) Q. Okay, just to go back to the stabbing incident you've described, how long -- over what period of time did it occur from the time as you put it that Marshall grabbed you by the arm until the time Marshall vanished from the scene?

A. Would you repeat that question there, please?

Q. How long would it have taken for the stabbing incident to take place?

A. Before Marshall disappeared from the scene, I would say

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about oh probably five minutes or seven minutes, something like that.

Q. Five minutes or seven minutes. What did you and Roy Ebsary do after the stabbing?

A. We automatically went to his home which is on the rear of Argyle Street. We went home.

Q. And how far is Rear Argyle Street from the location where the stabbing took place?

A. It would be about -- there's two ways to get there. We went around -- it would be about probably a block and a half or something like that.

Q. What are the two ways getting to Rear Argyle from that particular location?

A. Well you can go down like where I pointed out there on Crescent. You can go up on that side. That would take you up -- it would take you in up through to his back lane or you could go right up -- right out on the street. It would take you out to Argyle Street which if you turn right, you'd go up by -- there's a little store from -- not too far from -- about two blocks up and then there's a lane that goes down so you could go two ways there.

Q. Okay, possibly it might be best to use the map to describe what you're dealing with. Could you go using the street names as best as possible?

A. Okay, wait now. Okay, you could go up this way. When you come out here, you come out --

Q. What's this way?

A. Well when you come out on Crescent, the end of Crescent, there's a street that runs down. It's called South Bentinck, like, and runs right down, right down right to Charlotte like, right up to Charlotte.

Q. Do you see a street on there marked Bentinck Street?

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A. Wait now, yeh, I see Bentinck, yeh.

Q. Would that be the street you're referring to?

A. Bentinck, yeh, that's right, yeh, but that's Bentinck Street is farther down, farther down. The street that I'm talking about, it goes around the corner like. It's like -- when you come off a Crescent and you go up, like you know, you can go up this way like that, a short cut. Like that's the way --

Q. Well when you talk about taking a short cut, are you actually using streets or are you using a different method of getting there through back yards or alleys or things like that?

A. No, -- yeh, I could say in a sense like that. Like you can take the short cut like that one on the side there, like.

Q. Where did you -- did you end up at Roy Ebsary's home that night?

A. Yes, I did.

Q. Do you know approximately what time you might have arrived at his home?

A. Probably around eleven-thirty or twelve o'clock, something like that, I would say.

Q. And what happened after you arrived?

A. I didn't stay too long, I think. His daughter was home. I remember that. I didn't stay too long. I seen him. He was wiping the blood off the knife underneath the sink and I went home and -- took off home and then I heard the next day that the fellow died, eh, that this Mr. Seale died.

Q. Okay, now you indicated that after you arrived at Roy Ebsary's home, you saw Roy Ebsary wash a knife off at a sink?

A. Yeh.

Roy Ebsary

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Q. Describe that knife. Are you able to describe that knife?

A. Well it's only -- it was only his pocket knife. I think it's only about six inches long. I think -- just -- it was only a pocket knife.

Q. Are you able to explain why he was washing the knife?

A. I guess he just wanted to clean the, get it clean and get the, you know -- I suppose he just wanted the --

Q. Now you've mentioned that you saw Ebsary's daughter?

A. Yeh.

Q. Do you know her name?

A. It's been so long since I seen her. I forget her first name, like.

Q. Okay. Now did you tell anybody about what you had seen in the park that night subsequent to the date it occurred?

A. I never told anybody until after I heard -- I was in touch with Esabary's daughter's -- son came to see me and he told me, he said, well, "If you say anything about this here, you know, all of us would have to go to court." You know, --

THE COURT:

You can't go into this, Mr. Aronson.

BY MR. ARONSON:

Q. I don't think -- you're -- the question I'm trying to get is: did you after May the 28th tell anybody about the stabbing incident in the park?

A. No, no.

Q. Have you ever told anybody about that incident until you've come to Court today?

A. No, no. Well, the first one I told was Esabary's son, eh. His son. I told him about that. You know, I told him about that. The next day I went to Esabary's

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house and I told him that that fellow died, I said. I said: "You didn't have to kill him". You know, "You should have give him the money." You know, and I told -- I told his son that so his son just said, well, he said: "Well, if you say anything," well, he said --

THE COURT:

You can't get into that.

BY MR. ARONSON:

Q. Did you ever have occasion to communicate what had happened on the night of May 28th to the police?

A. Well I -- I -- first of all, I went and I like I told my family then about it, eh. Like, I couldn't sleep.

THE COURT:

Mr. Aronson, what is the relevancy?

MR. ARONSON:

I think part of the -- part of the issue that may arise, if I may say with respect, My Lord, is that the appellant, Donald Marshall, was not aware of what has been told today in Court by this particular witness and that it may arise as to -- with respect to arguments relating to admissibility of fresh evidence; that is, the accused could have withheld or not indicated that --

THE COURT:

Well, it's not relevant at this stage of the proceedings.

MR. ARONSON:

All right.

BY MR. ARONSON:

Q. Have you had any communication with Donald Marshall at all?

THE COURT:

Just a moment, Mr. Aronson. Pursue the fact that he went to

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the police.

MR. ARONSON:

Oh, I thought what you were --

THE COURT:

As to what he told.

BY MR. ARONSON:

Q. Did you ever have occasion to tell the police of the incident concerning the stabbing of Sandy Seale?

A. Yeh, I told the police in Sydney.

Q. Sir?

A. I told the police in Sydney after I -- after I heard that this fellow was in gaol, Mr. Marshall, for something he didn't do so I went and I told the police this and it bothered me because I wouldn't like to be in gaol for something I didn't do.

Q. And --

A. And so I went down and I made a statement to Sergeant MacIntyre and I just -- I don't know, is it Urquhart? There was another police -- what I remember was Sergeant MacIntyre. I made a statement to him and then I think a few days after that, --

Q. Okay, that's all.

THE COURT:

When was that?

MR. ARONSON:

I was just about to put that question.

BY MR. ARONSON:

Q. When can you recall having spoken to Sergeant MacIntyre concerning that event?

A. It was about a week after you were sentenced.

Q. Are you able to explain why you waited that length of time before going to the police?

A. Well because like, ah, Roy's son told me, he said: "The

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whole family would be in trouble there."

Q. Okay, that's all right.

MR. ARONSON:

I have no further questions, My Lord.

THE COURT:

Mr. Edwards.

MR. EDWARDS:

Thank you, My Lord.

BY MR. EDWARDS: Cross-Examination

Q. Mr. MacNeil, you told my learned friend that you were not drunk that evening, that you definitely were not -- well, you didn't use those words. That you were not staggering or nothing, I think you said. Is that correct?

A. Yeh, that's correct. I wasn't staggering.

Q. Mr. MacNeil, are you sure about that?

A. I'm positive I wasn't staggering.

Q. So your walk was steady?

A. My walk was steady, yeh. I wasn't staggering.

Q. At the time when you had contact with Mr. Marshall and Mr. Seale, did you stumble or trip on anything before Mr. Marshall got hold of you?

A. No, no, I never stumbled. I never tripped.

Q. Are you sure?

A. Positive.

Q. And you indicated to my learned friend that Mr. Marshall took hold of you and put your right arm, I believe you indicated, up behind your back. Is that correct?

A. Yeh.

Q. What would you say if it was suggested that he was simply trying to keep you from falling?

A. No, he wasn't keeping -- he wasn't trying to keep me from falling. No. No.

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Q. You'd disagree with that?

A. I disagree with it a hundred percent. I disagree with it.

Q. Okay. So he had hold of you by the right arm. Did he have hold of you anywhere else?

A. No, nowheres else.

Q. I didn't catch what you said next. You said you panicked at that point, did you?

A. Yeh, I -- I just frozed. I just -- I got "sensitized". I froze, like. You know, I -- I got scared but I just didn't move. I just stayed there. I was -- I was just scared. Like I, you know, you'd get a fright too if somebody come up and grabbed you, you know, and all of a sudden you're --

Q. Did you remain on your feet or did you fall down?

A. No, I was -- I still -- I remained on my feet. I was still on my feet but I just froze there. I sort of was just in a "sensitized" shock. I was just, you know, like I was -- it came as a shock to me there.

Q. You remember that clearly, do you?

A. Yes, I do, yeh, yeh.

Q. Are you sure you didn't start shoving with Mr. Marshall?

A. No. No. I did not. No, I did not.

Q. Did Mr. Marshall say anything to you?

A. Not that I can relect -- not that I can recall.

Q. Is it possible he could have said something and you just don't remember now, Mr. MacNeil?

A. Well I -- I can't say that because I never heard him say anything to me. You know, he never -- I never heard him mentioning anything to me at all whatsoever.

Q. All right. What would you say if it was suggested to you that you and Mr. Ebsary spoke with Marshall and Seale for about twenty minutes before -- before Marshall

grabbed you?

A. I would say it's in totally wrong. It's totally not true. It's totally not true.

Q. Just to clarify, do you remember any discussion that night with anybody about bootleggers?

A. No, I didn't not talk anything body about bootleggers.

Q. What about women in the park?

A. No, not women in the park neither.

Q. I believe you told my learned friend you heard Seale ask Ebsary for money. Is that correct?

A. Yeh.

Q. Yes. Do you recall exactly what words he used?

A. He said: "Dig, man dig."

Q. "Dig, man, dig."?

A. Yeh, right.

Q. But he didn't say the word money, did he?

A. No, he just said: "Dig, man, dig."

Q. How far was he from Ebsary when he said that?

A. He was just right in front of him. Right in front of him, yeh.

Q. Did either Marshall or Seale have anything in their hands?

A. They had no weapons in their hands whatsoever. I never seen them carrying anything.

Q. Do you recall whether or not you and Mr. Ebsary were walking away from Marshall and Seale and were called back?

A. No, I can't recall that.

Q. No?

A. I can't recall that.

Q. Is it possible that that could have happened before the scuffle actually started?

A. It could be possibly. It could possible but I -- I can't recall it though. I can't -- I can't relect that.

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- Q. I'm sorry, I didn't catch the last part?
- A. I said I can't reflect on that because I, you know, it could be possible but I don't believe it. I don't believe that ever happened like that. You know, I believe that we were never called back.
- Q. I see. Now you say you heard Seale say: "Dig, man, dig."?
- 0) A. Yes, I did, yeh.
- Q. What was it Mr. Ebsary said at that time?
- A. "I've got something for you."
- Q. He said: "I've got something for you."?
- A. Yeh.
- Q. Now where were Mr. Ebsary's hands at that time?
- A. They were right by the side of his pocket, like that, down by his side, like that.
- Q. Yes. And what did you see next?
- A. And the next thing I just seen like he -- a knife. I just seen a knife coming up and --
- 0) Q. You're indicating an upward motion with your --
- A. Yeh, an upward motion.
- Q. -- right hand?
- A. Yeh.
- Q. Yes, and that's when it made contact with Seale?
- A. Yeh.
- Q. But the point is you -- you did see the knife before it went into Seale, did you?
- 30) A. Not exactly because you know it was kind of dark, like, but I seen -- I seen it. I had a glimpse of it after that, like you know. It was only a pocket knife, not a dagger or nothing. It was only small.
- Q. What was the lighting like in that area, Mr. MacNeil?
- A. The lighting at that time was fair, I would say. Not really good. Fair.

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Q. Where was the light coming from?

A. It was -- it's changed so much. They've changed the park so much since then. I think the light was coming from a tree up above or like a pole up above but I can't just be quite sure just where it was coming from.

Q. But there was enough light so that you could recognize faces?

10) A. Yeh, yeh.

Q. Okay. Now you told my learned friend then that Mr. Marshall ran away.

A. Yes.

Q. Do you remember in what direction he went?

A. I didn't remember. I couldn't remember what direction he went in. I can't remember.

Q. And then you and Mr. Ebsary ran to Mr. Ebsary's house?

A. Right, yeh, we went to his house.

Q. And what would that have taken you, a couple of minutes?

20) A. Yeh, a couple of minutes, yeh.

Q. And when you got into Ebsary's house, you remember Ebsary's daughter was there?

A. Yeh, right. I remember that.

Q. Do you recall how old a girl she would have been at that time?

A. I guess she'd be around, maybe around sixteen at that time. She wasn't very old. Thirteen, sixteen or something like that.

Q. Now I don't want you to tell me what was said but I want you to tell me whether or not you and Mr. Ebsary said anything in the girl's presence about what had happened.

30) A. I believe that the girl heard us when we walked in. I think she heard us talking.

Q. What makes you think that?

Ebsary's daughter
n 62

- A. Because the next day there -- the next day there, I was told not to go back to the house.
- Q. I don't want to know what anyone told you.
- A. No. I was told not to go back to the house there so I figured --
- Q. Just hold there, Mr. MacNeil.
- A. Okay.
- 10) Q. All right, so did you in fact go back to the Ebsary house any more?
- A. Yes, I did.
- Q. You did. On how many occasions?
- A. Just the next day and that was it. I never went any more after that.
- Q. Now you mentioned something to my learned friend about Ebsary washing blood off the knife.
- A. Yes.
- Q. In the sink?
- A. Yeh, right.
- Q. How long was it after you got into the house before he did that?
- A. Right away. He just went right to the sink.
- Q. He went right to the sink?
- A. Yeh. He went right to the sink.
- Q. Now where were you when he was washing the knife? How far away from him were you?
- A. I was just sitting out by the dining room, like, just like a little living room like that and I was sitting on the side of the chair like that. I could see him washing the knife underneath the sink.
- 30) Q. Well in distances in this court room, how far would he have been from you when he was washing the knife?
- A. He would be about from here to where Mr. Marshall is sitting.

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Q. So you're indicating a distance of maybe ten feet?

A. Yeh, I would say, ten feet, yeh.

Q. And the lights were on in the kitchen at the time?

A. Yes, the lights were on, yeh.

Q. Now think carefully, Mr. MacNeil. Did you actually see any blood on the knife?

A. Yes, I did.

(10) Q. You're sure about that?

A. Positive. I did.

Q. So you must have gotten a good look at the knife at that time?

A. Yeh.

Q. Did you see the handle of the knife?

A. To my knowledge, like, thinking back, I think it had a brown handle on it, if I'm not -- to my knowledge now.

Q. And you said the knife was about six inches long?

A. Yeh.

(20) Q. Did I understand you correctly?

A. Just a -- just a small pocket knife.

Q. Yes, you used the term "pocket knife".

A. Yeh.

Q. Do you mean by that the type of knife with a blade that closes?

A. Yeh, right. Just opens and closes like that.

Q. Are you sure?

A. I'm pretty sure, yeh.

Q. You're pretty sure.

(30) A. I'm positive.

Q. You're not positive?

A. Yeh.

THE COURT:

Would you repeat that question? I couldn't quite hear.

MR. EDWARDS:

Yes, I asked him if he was sure it was a pocket knife and he

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(6)*

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said --

THE COURT:

I would like you to ask him the question again as to what he --

MR. EDWARDS:

I'm sorry.

BY MR. EDWARDS:

10) Q. Yes, I asked you if you were sure it was a pocket knife. What did you say to that?

A. I'm positive it was a pocket knife.

BY THE COURT:

Q. You are positive?

A. Yeh, it was a pocket knife.

BY MR. EDWARDS:

Q. But just a couple of seconds ago didn't you say that you weren't positive?

A. No.

20) THE COURT:

No.

MR. EDWARDS:

I'm sorry. I mis-heard it.

BY MR. EDWARDS:

Q. I take it you never saw that knife again.

A. No, I have never seen it again.

Q. After Mr. Ebsary finished washing it, what did he do with it then?

30) A. I do not -- I can't recall what he done with it. I can't recall what he done with it.

Q. Was there anyone else in the house at that time besides Ebsary's daughter?

A. I just think it was Esabary's daughter as far as I know. I just think it was his daughter.

Q. You don't recall his wife being there?

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A. No, I don't recall, no. I do not recall.

Q. Now, Mr. MacNeil, my learned friend asked you about statements you had given.

A. Yeh, right.

Q. Do you recall that you gave a statement to the R.C.M.P. this year?

A. Yes, I did.

Q. In February?

A. Yes, I did, yeh.

Q. And do you recall the names of the police you gave the statement to?

A. It's Wheatly, Staff-Sergeant Wheatly.

Q. Would it be Staff-Sergeant Wheaton?

A. Wheaton, yeh.

Q. And Constable MacQueen?

A. And Constable MacQueen, yeh.

Q. And that statement was taken where, at your home?

A. At my home, yeh.

Q. I see.

MR. EDWARDS:

My Lord, it would appear that we don't have the original here. I have a typed copy. If there's no objection, I would like to show him the typed copy.

MR. ARONSON:

No objection.

THE COURT:

You're proceeding under?

MR. EDWARDS:

Section 10 again.

THE COURT:

Under Section 10?

MR. EDWARDS:

Yes.

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THE COURT:

See if he can identify it.

MR. EDWARDS:

Yes.

THE COURT: (Justice Pace)

It's in the affidavits.

BY MR. EDWARDS:

(10)

Q. Mr. MacNeil, you recall that you signed an affidavit on July 15th of this year. Is that correct?

A. Yes, I recall it, yeh.

Q. Do you recall that attached to that affidavit there was a copy of a statement that you gave to Constable MacQueen and Staff-Sergeant Wheaton?

A. Yes, indeed, yeh.

Q. I'm now going to show you exhibit -- a copy of exhibit "B", your affidavit.

THE COURT:

(20)

Is there something contrary in this with his evidence? Is that why you're producing it?

MR. EDWARDS:

Yes, My Lord, there's -- well, it may be an inconsistency. He's less than certain on one of the points in the affidavit than he is in the evidence here. I'd like to question him on that, mindful again with respect that Section 10 allows for a general cross-examination on the statement.

THE COURT:

That is contradictory.

(30)

MR. EDWARDS:

No, My Lord. With respect, I think it's two-fold. It allows him to be cross-examined but if it is intended to contradict him on any part of it, then his attention must be drawn to those parts.

THE COURT:

The statement has to be different than his testimony, his

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testimony today.

MR. EDWARDS:

Well, if that's your ruling. The part that I would like to put to him is that he has given definite evidence that he saw the knife and the blood being washed. In the statement he says: "I'm pretty sure."

THE COURT:

10) Carry on.

MR. EDWARDS:

Thank you, My Lord.

BY MR. EDWARDS:

Q. Yes, Mr. MacNeil, I'm showing you now exhibit "B" in your affidavit.

A. Yeh, right.

Q. That's the statement.

A. Yes.

Q. Now you see the middle part of the --

20) A. Yes.

Q. -- second paragraph?

A. Yes, I see it.

Q. All right, and you say there: "I'm pretty sure...".

A. Yeh, I know. I know, yeh.

Q. Well let me read the whole sentence, okay?

A. Yeh, go ahead, yeh.

Q. *I'm pretty sure I saw him wash the knife off in the sink. I can't remember if he had any blood.*

A. Yes.

30) Q. All right?

A. I remember, right, making that statement.

Q. Okay.

A. I remember making it.

Q. So, Mr. MacNeil, you just finished testifying that you did in fact see him wash the knife and that you did

remember seeing blood.

A. Yeh, right.

Q. Now that is different than the statement. Which --

A. Yeh.

Q. Which is it, Mr. MacNeil?

A. Okay, if you'll allow me, if it please the court?

Q. Sure.

10) A. That morning when Sergeant -- Staff-Sergeant Wheatly come in and Constable MacQueen, I was -- I wasn't in -- I got in a "sensitized" state, like, you know, nervous, eh. And you know I got, you know, well, I didn't -- it's hard to explain it. I -- I -- you know I just wanted and then I thought --

BY THE COURT:

Q. Well you're just asked the question as to whether -- as to which statement --

A. But I was --

(20) Q. -- which statement is correct. Can you remember?

A. Yeh, the first one. That one there I was "sensitized" and I have like a little nervous condition since the last few years and --

Q. So you do remember that there was blood?

A. Yeh, I do remember the blood so I don't go -- that's -- that morning I was in a little nervous state of the condition.

BY MR. EDWARDS:

(30) Q. Just for clarity, you're absolutely sure you saw him wash blood off the knife.

A. I am positive. I am positive, yeh.

Q. Now was the knife or was the blood only on the knife or was there some blood on his hands, too?

A. There was blood on his hands, too.

Q. On both hands?

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A. As I can recall on -- on both hands. I remember I seen it on one. Yeh, on both hands. He had blood on both hands.

Q. I see. Before you gave that statement to Staff-Sergeant Wheaton and Constable MacQueen, had you read over any prior statements you had given?

(10) A. No, I have -- I did not. I did not but you know I -- I did not, no. Not over -- I never read any of them prior over to that.

Q. Have you had any communication with Mr. Marshall or his family since -- since 1971?

A. I had no comm -- no communication with his family or with Mr. Marshall until this morning. He come over and shook hands with me, his father.

(20) Q. At the time of the investigation, May 28th, 1971, and in the weeks just after that or the days and weeks just after that, did anybody ever speak to you about -- about the stabbing? Did any policeman ever ask you about it?

A. No. No way. No. Nobody asked about it.

Q. Where were you living at the time, Mr. MacNeil?

A. I was living up at 10-0-0-7 rear George Street.

Q. Rear George Street?

A. Yeh, at that time.

Q. How far would that have been from where the stabbing took place?

A. That would be about probably a quarter of a mile.

(30) Q. And you were living there with whom at the time?

A. With my mother and my father and my -- the rest of the family, my brothers.

Q. And you say that you had known Mr. Ebsary for about three months prior to that?

A. Yeh.

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Q. Yes?

A. Yes.

Q. Were you aware on the night of May 28th that he was carrying a knife?

A. I wasn't -- I wasn't aware of it at all. I was not aware. I was not aware of it at all. It surprised me.

(10) Q. It surprised you.

A. It surprised me because I wasn't aware of him because I've never seen him taking out a knife or showing me a knife or anything and I was surprised. I really was.

Q. So not only on that night, you're saying that on no prior occasion had you ever seen him with a knife?

A. No, I have never. No. I never seen it.

Q. You said that he was dressed -- he had a shawl on that night, a black shawl?

A. Yeh.

(20) Q. Is it possible that that was a black coat just slung over his shoulders?

A. No, I think it was a shawl. I would say it was a shawl. I would say.

Q. You would say?

A. Yeh.

Q. Thank you very much.

A. You're very welcome.

MR. ARONSON:

Nothing arising out of that, My Lord.

(30) BY THE COURT:

Q. Is your middle name William?

A. My middle name is William -- James William.

Q. James William?

A. Yeh.

Q. Thank you.

(WITNESS WITHDREW)

- 110 - MOTION BY MR. EDWARDS

MR. EDWARDS:

My Lord, if I may before the next witness comes in, just anticipating what's coming with several of these witnesses, it seems that we stray into the area of hearsay with some frequency.

THE COURT:

I think in the examination of Mr. Marshall, Mr. Aronson was given very considerable liberty. I think --

MR. EDWARDS:

My Lord, I wonder if we could ask the witness to stay outside so we can complete this discussion lest she be influenced. I'm sorry, My Lord.

THE COURT:

I think we should now stay fairly strictly to the ordinary rules of evidence as to both leading questions on direct and as to hearsay.

MR. EDWARDS:

The problem -- the problem is that this whole hearsay business, it inevitably gets into where you draw the line on the thing and there've been some recent writings on the topic. I'm not sure, I submit, that it's in the best interest of the Court to stick too rigidly to the rule. You know, like, you can get into well what isn't hearsay. You know, that's up and that's down.

THE COURT:

What is your submission, Mr. Edwards, in this --

MR. EDWARDS:

Well, just quoting from the Subramaniam case which is the one most --

THE COURT:

What are you seeking, that we let everything in or --

MR. EDWARDS:

No, My Lord.

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THE COURT:

-- or that we follow the rules. The Supreme Court of Canada said very clearly exactly this type of reference that the ordinary rules of admissibility shall be followed.

MR. EDWARDS:

(10) Oh, yes, no question about that. I guess what I'm looking for is some clarification on just what the rule is. It's my understanding that -- well, just to read Subramaniam:

It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but merely the fact that it was made.

(20) And therefore I'm not so sure that it's in the best interest of the proceeding to rule out the conversations, say, between MacNeil and the Ebsary's and what was said because they don't prove any facts. It's just the fact that there was conversation at the time may have some bearing on the credibility of the witnesses.

THE COURT:

You can make your objections to the questions when they arise and we expect you to -- both counsel to assist the Court to make sure that the rules are followed.

MR. EDWARDS:

Fine, My Lord.

MR. ARONSON:

(30) I call for my next witness, Donna Ebsary.