

I N D E X

VOLUME 3

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

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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

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?

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

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

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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?

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?

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.

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

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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.

0) 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.

(10) 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?

(20) 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.

(30) 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?
- 10) 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."
- 20) 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?
- 30) 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
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- 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

*Edwards
P...
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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.

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?

(20) 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.

- 111 - MOTION BY MR. EDWARDS, RULING

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.

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DONNA ELAINE EBSARY, being called and duly sworn, testified as follows:

BY MR. ARONSON: Direct Examination

Q. Could you state your full name to the Court, please?

A. My name is Donna Elaine Ebsary.

Q. Where do you live?

A. I reside at 180 River Street, Apartment 5A, Waltham, Mass.

Q. When were you born?

A. June 16th, 1957.

Q. What education do you have?

A. I'm sorry?

Q. What education do you have?

A. I have three years of college at the College of Cape Breton.

Q. What is your marital status?

A. Single.

Q. Are you employed or otherwise occupied?

A. I'm employed.

Q. And what are you doing?

A. I'm manager of a furniture company in the States.

Q. How long have you lived in Waltham?

A. I have been living in Waltham approximately three months.

Q. Prior to that time, where did you live?

A. Prior to that I was living in Boston where I stayed for approximately three years.

Q. And before then?

A. Before then I was residing at 46 Mechanic Street, Sydney.

Q. And who resided with you at that particular address?

A. Residing there was my father, my mother, my brother, his wife and two children.

Q. Could you tell us the names of your father and brother?

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A. My father's name is Roy Newman Ebsary. My brother's name is Gregory Allan Ebsary.

Q. Now prior to living at that address, had you lived anywhere else?

A. We lived at 126 Rear Argyle Street in Sydney.

Q. And for what period of time did you live at that particular address at Rear Argyle?

(10) A. Approximately sixteen years. Not that long. When we moved down, I was about five so it would be about eleven years.

Q. And when did you move from that residence?

A. We moved from there when I was in about grade eleven so the year -- I don't know. Do you want a date that we moved from there?

Q. A rough year.

A. Rough year. '73.

Q. Okay. So you were living at Rear Argyle on May of 1971?

(20) A. Yes, we were.

Q. Now who lived with you at that particular address?

A. My father, my mother, my brother.

Q. Can you say whether your father was employed at that time?

A. Off and on.

Q. What occupation?

A. He was a chef.

Q. Where?

A. At the Isle Royale and also at a grill on the Esplanade.

(30) Q. I see. You would have been almost fourteen years old in May of 1971? _____

A. Closer to thirteen.

Q. Thirteen. Can you recall hearing of the murder of Sandy Seale in May of 1971?

A. Yes, I can.

Q. When did you hear of the murder?

A. I started hearing stories about it probably the day after it happened. Stories that I recognized.

Q. Okay. Are you able to recall any of the events which took place the night before you heard of the murder?

(10) A. The night before I was at home. I was with my Mom and my father was out. He was out drinking with a friend which wasn't uncommon for him. We were sitting at home just kind of waiting for him to arrive. Late in the evening or I guess late in the night he arrived home with a friend. The two of them -- no, his friend was kind of excited and my father was trying to get his friend to quiet down. The two of them went into the kitchen where I followed them into the kitchen. My father had a knife in his hand. He put the knife in the sink and he washed it and that was -- that was the night prior to me hearing any stories about any murder taking place.

(20) Q. Okay, now, how late at night? You said it was late. Can you say approximately what time it would have been?

A. It may have been ten o'clock or later. It was just late. I know that I was up late so --

Q. Okay, so could it have been twelve o'clock?

A. It could have.

Q. You referred to the fact he came in with a friend. Do you know who that particular individual was?

(30) A. His name was Jimmy. MacNeil, I think.

Q. Okay. Had you ever seen Jimmy MacNeil prior to that time?

A. Yes, I had.

Q. How frequently?

A. I'd seen him a couple of times. He'd come to the house

with my father and at one point I had been with Jimmy and the two of us had gone somewhere together.

So I knew him to see him.

Q. Okay, now you've indicated that you saw your father come into the house with Jimmy MacNeil and go to the kitchen sink and wash a knife off. Is that right?

A. Yes, sir.

(10) Q. Can you describe the knife?

A. The knife is a small knife. It had a short blade and a brown handle with tape around the bottom of the handle.

Q. How certain are you of that?

A. I'm as certain as I am that I'm sitting here right now.

Q. Okay. Can you recall how your father was dressed on that particular evening?

A. He had on his blue coat, had it kind of draped over his shoulders. He wore dark clothes. That's just about it.

(20) Q. Can you recall how Jimmy MacNeil was dressed on that particular night.

A. I don't recall that Jimmy was dressed.

Q. Can you recall whether any conversation took place? I'm not asking you to say what was said but can you recall if any conversation took place between --

A. Yes, Jimmy and my father were talking when they came in.

Q. Okay. Were you able to overhear that conversation?

(30) A. Jimmy and my father came through the front door and they turned, stare into the living room where my Mom and I were. Jimmy turned to my father and said: "That's a good job...".

Q. Please. No indications as to what they said. I'm concerned as to whether they had a conversation.

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A. Okay.

Q. Now you've indicated your father was washing a knife off at the sink. Can you indicate to the Court what reason he would have for doing that?

THE COURT:

She can say what she saw.

BY MR. ARONSON:

(10) Q. Can you say whether you saw anything on that particular knife?

A. There was definitely something on the blade of the knife. I have -- It seems to me there was blood on the blade of the knife.

Q. I'm sorry?

A. I said there was blood on the blade of the knife.

Q. How certain are you of that?

A. I'm not as certain as I am of the fact that I'm sitting here but I'm pretty certain that that is what it was.

(20) Q. What happened after you saw your father washing the knife off?

A. My father took the knife, he turned from the kitchen, he went upstairs and he put the knife in his room.

Q. Do you know what ever became of that particular knife?

A. I looked for the knife for a long time after that because I felt that if I could find it, somebody would listen to what I had to say about this case and I could never find it. I can only say that maybe he hid it somewhere, but I could not find it after that.

(30) Q. How old was your father in 1971?

A. Around sixty years old.

Q. Could you describe him as he was in 1971?

A. He was a very difficult man to be around. He completely ruled the household he lived in and there was no lives for his family --

THE COURT:

It's his physical appearance.

BY MR. ARONSON:

Q. I had intended his physical appearance.

A. I'm sorry. He was a small man. He was maybe five-two, kind of slight. He didn't have any amount of meat on him so he was like, I say very slight. He looked kind of -- let's see, how can I picture how he looked? Well, he looked like an average little old man, I guess. That's all I ever pictured him as.

Q. I see. Are you able to describe whether or say whether your father had any particular interests in 1971 or in those years?

A. Interests in what way?

Q. Hobbies, things like that.

A. Yeh, he liked to drink and he liked to read a lot and he liked to play with knives a lot.

Q. How can you say that he liked to play with knives? What do you mean by that?

A. Well he always had a lot of knives in the house. In his room. He owned canes that he had hollowed out and fitted knives into the handles of. He had a lot of knives in the basement where he kept a grinding stone where -- like, I'd come home from school in the afternoon and he'd be grinding them. Things like that, I guess, is how I base that.

Q. Can you at all describe -- did you ever have occasion to tell the police what you have said in Court today subsequent to May 28th, 1971?

THE COURT:

When?

MR. ARONSON:

I asked her -- the question is whether she ever had occasion

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to speak to the police concerning the incident that occurred on May 28th.

BY THE WITNESS:

A. I myself did not speak with the police but I spoke with a friend who suggested that I --

Q. Okay, that's all.

A. -- go to the police.

(10) Q. Did you ever see Jimmy MacNeil after May 28th, 1971?

A. I did not.

Q. Can you give any reason as to why you would or would not have seen him after that particular time?

THE COURT:

No, no.

MR. ARONSON:

All right.

BY MR. ARONSON:

(20) Q. After May of 1971, can you say whether or not your father's behaviour changed in any way?

A. Yes, I would say that it did.

THE COURT:

I don't see the relevance of that.

MR. ARONSON:

(30) Well, with respect, My Lord, I believe the evidence is admissible and in support of it, I would put forward the MacMillan case where we're speaking of a third party -- the potential of a third party for the commission of this particular offence and --

THE COURT:

That's not what is on trial here.

MR. ARONSON:

Well, I appreciate that but as I say the case is -- certainly indicates that evidence offered by friends and relatives of

a particular person to the effect that that person was capable of violence is certainly admissible. The Queen and MacMillan, 1975 --

THE COURT: (Justice Macdonald)

That's the Ontario Court of Appeal.

MR. ARONSON:

That's correct.

10) THE COURT: (Justice Macdonald)

It goes to the credibility of those witnesses like Mr. MacNeil.

MR. ARONSON:

In part, it does, yes.

THE COURT: (Justice Macdonald)

In part, that's right.

MR. ARONSON:

Shall I state the question again?

THE COURT:

20) Well you may ask a few questions.

MR. ARONSON:

Okay

BY MR. ARONSON:

Q. What can you say as to whether or not there were any changes in your father's behaviour subsequent to May 28th, 1971?

THE COURT: (Justice Pace)

She never said that there was any changes. You'd better establish --

30) MR. ARONSON:

All right, the question should be rephrased.

THE COURT:

Excuse me just a moment.

MR. ARONSON:

I'll withdraw that question, My Lord. I'll try a different

attack.

BY MR. ARONSON:

Q. What can you say as to your father's potential for physical violence?

A. He had a great potential for physical violence.

Q. In what sense? Are you able to support that with any particular instance or incident?

A. Can I say it from the past or does it have to be after 1971? Can it be prior to that?

Q. Just generally if you can site a particular instance.

A. Well my father was very easily enraged by things and at which point he would not stop at just like beating up the house. He would kill -- he would kill things and he would -- he had on occasions been stopped from going out and killing people.

Q. Now when you say killing things, what are you referring to when you're talking about things?

A. Well, when I was younger, I was more or less to myself and the only thing that I really related to were animals and he on one occasion came into the house, grabbed a budgie I had and ripped the head off it. And on another occasion I had a cat that I would relate to and he killed that. I had on several occasions had to leave home because of the violence that was going on and I didn't feel safe around him then.

MR. ARONSON:

I have no further questions.

THE COURT:

Mr. Edwards.

MR. EDWARDS:

My Lords, this time, just referring to what I was saying before the witness came in, I would like leave of the Court to elicit from the witness the conversation that she over-

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heard between MacNeil and Ebsary when they came in the house. As I stated, it's not -- it's not for the truth of what was stated but surely it would be a great assistance to this Court --

THE COURT:

Does it go to the credibility of Mr. MacNeil?

MR. EDWARDS:

Yes.

THE COURT: (Justice Macdonald)

How does it? He didn't give any evidence about a statement.

MR. EDWARDS:

Yes, he did, My Lord. With respect, as I recall he did say that: "You shoulda given him the money. You didn't have to kill him."

THE COURT: (Justice Macdonald)

When did -- he said that?

MR. EDWARDS:

Yes, that's what my notes show, My Lord.

THE COURT: (Justice Pace)

That was never -- it may be in your notes but it wasn't before this Court.

MR. EDWARDS:

I have in my notes, My Lord, that "that fellow died". This is what he told him. "You should have given him the money. You didn't have to kill him." But that -- that particular conversation, that's --

THE COURT:

That wasn't that night?

MR. EDWARDS:

No, I'm sorry, that was the next day.

THE COURT:

Yes, it wasn't that night.

MR. EDWARDS:

But it does -- you know, she was going to tell us about a

conversation they had that night. Surely that has a bearing on Mr. MacNeil's believability about what was said. I really -- my submission, I guess, I suppose is that really I don't see the harm or the prejudice of it and in fact I can see where it would be of a very great assistance to the Court to allow that in. Now a very rigid application of the hearsay rule --

10) THE COURT:

We're not talking about that. We're talking about -- carry on and ask the question on the basis of exploring Mr. MacNeil's credibility --

MR. EDWARDS:

Thank you, My Lord.

THE COURT:

-- at a closely related time.

BY MR. EDWARDS: Cross-Examination

20) Q. Now, Miss Ebsary, you stated that you overheard some conversation on the night of the stabbing when Mr. MacNeil and your father came into the house. Is that correct?

A. That is correct.

Q. Can you recall that in as much detail as you can for the Court please?

30) A. When Jimmy and my father came in, Jimmy turned to my father and said: "You did a good job back there." My father turned around and said: "Shut up, be quiet, don't say anything." And from there the two of them just proceeded into the kitchen.

Q. I see. What was Mr. MacNeil's demeanour like at the time if you understand what I mean by --

A. He was like a kid with a new toy, sort of. He looked very elated. He looked very excited about something, like. His eyes were big.

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Q. How did that compare with his behaviour as you had observed it on prior occasions?

A. Jimmy was usually very placid, just, you know, he was there and that was all. He, like, didn't really affect one way or the other. Just to see him normally --

THE COURT:

Have you finished that question?

MR. EDWARDS:

Yes, My Lord.

BY MR. EDWARDS:

Q. How do you feel about your father right this day?

THE COURT:

That's not relevant. What's the relevancy of that?

MR. EDWARDS:

Well the relevancy is, My Lord, to establish whether the witness has any motives for implicating her father in the stabbing. I submit it bears directly on her credibility. I mean, like if the witness -- I hesitate to say too much in the presence of the witness lest she be influenced in her answer by what I say. But obviously if she has a grudge against her father, that bears on the believability of what she's saying. I submit --

THE COURT:

All right, one question.

MR. EDWARDS:

Yes. I don't think I can ask it in one, My Lord.

THE COURT:

You've already asked her a question. Perhaps she could answer it.

MR. EDWARDS:

Yes.

BY MR. EDWARDS:

Q. What -- how do you feel about your father now?

A. I don't -- I just -- there isn't any real feeling. It's just something I'm doing. I don't -- I think if anyone has asked me about him, I might tell somebody he was dead rather than admit he was my father. It's kinda the way I feel about him.

Q. I'm sorry, I didn't follow you.

A. I said that if someone was to ask me right now about my father, I'd probably sooner tell them I didn't know him or that he was dead rather than have to go through these things all over again with him. I just don't really acknowledge him anymore.

Q. Okay. At the time in 1971 you indicated that you wished you could have found the knife so that you could have gotten somebody to listen to you. Is that what you said in your evidence?

A. That is what I said, yes. No, not in 19 -- yeh, in 1971, yes.

Q. Yes, so you said that you wished you could find the knife so you could get somebody to listen to your story.

A. Yes.

Q. Is that what you said?

A. Yes, I said that, yes.

Q. And the reason you wanted to do that, you wanted the authorities to know that your father had done the stabbing. Is that correct?

A. Yes, that is correct.

Q. So even at that time, there was no love lost between you and your father. Is that correct?

A. I grew up being afraid of my father. I wanted a stop put to him and I was tired of people telling me if I wait long enough something will happen and I won't have to put up with him any longer. I was a

little bit tired of the misery he caused in our household and in other ones. I think -- I thought then and I think now that I deserved a life I never got.

Q. Okay. Did you bring this matter to the attention of any person or persons?

(10) A. I had occasion on several times to speak with people about my knowledge about what had happened. I spoke with a very close friend of mine about it, Dave Ratchford, who brought it to the Mounties and we were going to try to do something at that --

Q. Well, no, you can't -- okay. You told David Ratchford about it for one?

A. Yes, I did.

Q. What was your relationship with him at the time?

A. He was my teacher.

Q. And when was that?

(20) A. Maybe 1974.

Q. About 1974. Okay. Did you have any discussions with Elizabeth Boardmore about it?

A. I discussed it indirectly with Liz Boardmore.

Q. And what was her relationship with you?

A. She was an English professor of mine at the College where I went and we were discussing criminal justice at one point.

Q. I see. Now do you -- do you have an uncle, Uncle Bob Ebsary?

A. Yes, I do.

(30) Q. Do you recall him visiting you in 1975?

A. Yes, I do.

Q. Do you recall conversation between -- without getting into the conversation now -- between your Uncle Bob and your father at that time?

A. Yes.

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MR. EDWARDS:

My Lords, here again I would like to elicit from the witness about that because the -- maybe we could ask the witness to leave for a moment, My Lord, lest she be influenced?

THE COURT:

Yes.

MR. EDWARDS:

(10) This is, I submit, of significance. It bears on the credibility.

THE COURT:

Credibility of whom?

MR. EDWARDS:

Well, again, MacNeil primarily.

MR. ARONSON:

(20) I have no reason to object because insofar as the case we are attempting to put before the Court in my view, it's not hurting the case. The difficulty I have is not altogether relevant to Jimmy MacNeil's credibility. I do not see that, where it has any relevance to the credibility but as I say, I leave it to the discretion of the Court.

THE COURT: (Justice Macdonald)

Where is Uncle Bob? Where is he?

MR. EDWARDS:

Well Uncle Bob is in Newfoundland now. I know what you're getting at, My Lord, and in view of my learned friend's objection, I'll drop it.

MR. ARONSON:

(30) I didn't object.

MR. EDWARDS:

Well, --

THE COURT:

Are there any other questions for this witness?

MR. EDWARDS:

Yes, My Lord, if I could just have a second please?

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If I could just have a moment, My Lord.

THE COURT:

Well would you like to -- if there's more than one or two questions, we'll --

MR. EDWARDS:

No, My Lord, I haven't got much left. I'm just looking for a picture that's buried in the papers here.

THE COURT:

You'll probably be some time. We'd better adjourn until ten o'clock. We'll adjourn until ten o'clock tomorrow morning.

COURT RECESSED: 4:00 p.m.

NOTE: Miss Ebsary advised not to discuss case during the recess.

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COURT RECONVENED: 10:03 o'clock in the forenoon on
the 2nd day of December, A.D., 1982

DONNA E. EBSARY, resumes testimony as follows:

BY MR. EDWARDS:

(10) Q. When we left off yesterday, I was about to show you a photograph but before we get to that I'd like to ask you a few other questions. When did you stop residing in the family residence, Miss Ebsary?

A. About four years ago.

Q. About four years ago?

A. Yes, sir.

Q. So some time in 1978?

A. Yes, sir.

Q. All right, so you would have been present in or still been a part of the family unit when the move was made from Argyle Street to Mechanic Street. Is that correct?

(20) A. That is correct.

Q. Yes, and you recall in what year that was? Approximately.

A. Might have been '74, '75. I'm not sure.

Q. So it would be three, maybe four years after the Seale stabbing. Is that correct?

A. Yes, sir.

Q. And in that period between the time of the stabbing and the time of the move to Mechanic, were you aware of any knives around the house?

A. Yes, sir.

(30) Q. Yes. Belonging to your father?

A. Yes, sir.

Q. Yes. And were those knives kept in any one particular place in the house or were they at various locations?

A. My father had knives at various locations in the house.

Q. And would he keep several together in each of those locations or would there be one knife say in the -- in

his bedroom --

A. No, he had special areas for different knives.

Q. Yes. Can you describe some of those special areas for us?

(10) A. Some of his favorite knives he'd keep up in his bedroom mounted on a wall plaque. Or longer knives he kept in canes that he used for walking sticks. He had other knives that he had redesigned and kept in the kitchen for his own use and he had a group that he was in the process of redesigning he kept just like in a hall area, where he was in the process of changing them around.

Q. And would you recognize those knives if you saw them again?

A. I believe so.

Q. Can you describe in any detail any of the -- the types of knives that he kept around?

(20) A. Well he kept some long narrow ones that he had specially filed to fit inside a cane and so they were like kind of long and narrow type of knife. The ones that he had in the kitchen were ones that he had -- that were older knives that he had taken, like, the handles off them and put, like, brass-fitting handles on them with tape around them and then like a garden hose hooked onto that and the other knives he kept were for when he worked so they were like very large carving knives with wooden handles that had three steel pegs through them to hold the handles on.

(30) Q. I see, okay. Now around the time of the move from Argyle Street to Mechanic Street, did you witness the packing of the knives and the shipment of the knives from one location to another?

A. No, I did not.

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Q. After you moved to Mechanic Street, did you see any of the same knives that you had seen on Argyle Street in the Mechanic Street location?

A. Yes, sir.

Q. And can you say with any certainty whether or not they were --

A. They were from Argyle -- that they were my father's and they were from Argyle Street, yes.

10) MR. EDWARDS:

My Lords, yesterday I had a photograph marked as an exhibit and it was a photograph of approximately ten knives. After considering the matter last night, I felt that it would be preferable to actually show the witness the knives so with the Court's leave, I'd like to mark those knives now and they -- their relevance will be established through subsequent witnesses.

THE COURT: (Justice Hart)

20) Are we up to R-4 now?

MR. EDWARDS:

Yes, My Lord.

THE COURT: (Justice Hart)

Perhaps you could mark them R-4, a,b,c,d,e, and so on.

BY MR. EDWARDS:

Q. Miss Ebsary, as I put the knives there beside you, would you just examine them closely and I'll ask you a few questions on them in a moment. All right, Miss Ebsary, displayed before you are exhibits --
 (30) -- knives marked exhibits marked R-4a through to and including R-4j. Have you looked carefully at the knives?

A. Yes.

Q. Now what if anything can you say about the similarity between those knives and the knives you saw while

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residing in the family home at Argyle Street and then later at Mechanic Street in Sydney?

A. These are all knives from my father -- that belonged to my father.

Q. You're sure about that?

A. Yes, I'm sure about that.

Q. Are there any distinguishing characteristics or marks on the knives that would indicate to you that they are definitely your father's?

A. Well from being around them and knowing them, I know that this --

Q. All right, let's identify them. You're pointing now to exhibit R-4g?

A. Okay, R-4g, h, j, and a are from the kitchen.

Q. Now how can -- how can you tell that, Miss Ebsary?

A. I know them from the brass handles that they are knives that were in the kitchen of the house. I mean they're not marked "kitchen". I just know that that's where they're from.

Q. The brass handles seem to be rather make-shift or home-made design.

A. He put them on himself.

Q. Did you ever witness him putting them on himself?

A. On one -- on a couple of occasions I saw him putting knives together.

Q. Yes, where would he have done that?

A. On Argyle Street he would have done it either in the kitchen or in the back yard or up in his room.

Q. I see. Did your father have any particular favorite knife or any knife that he carried with any more frequency than any others if in fact he carried knives?

A. Exhibit R-4i and exhibit whatever this is.

Q. Exhibit R-4i?

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A. He had on his long blue I guess you'd call it a trench coat that he had hung over his shoulders when he went out --

Q. You say he had it hung over his shoulders?

A. He didn't put his arms in his sleeves. He kept it hung over his shoulders as if he was playing a captain or if he was something like that. He never put his arms in his -- in that jacket or in that long coat.

Q. You say as if he was playing a captain. What did he wear on his head? Did he have anything on his head that night?

A. I don't remember him wearing anything on his head that night.

Q. You may have described his facial features yesterday. I don't recall, but did you -- did you mention yesterday what colour hair he had at the time?

A. Probably had gray or white hair but it might have been green the night he went out.

Q. Okay, did he wear a beard or a goatee or anything?

A. He had a goatee, a little goat whisker, just a little chin whisker.

Q. And did he wear eye glasses?

A. He does wear glasses but he didn't wear them out. Like he'd have them in his pocket and he'd put them on if he had to read or something. He wore them on and off.

Q. Do you recall what he was wearing under the blue trench coat?

A. I don't remember the colour of the shirt he had on. I know he had a shirt on and that he was wearing dark pants but --

Q. You recall the period immediately following the stabbing very well, do you?

A. Fairly well.

Q. Were you aware of the preliminary inquiry and the trial?

A. Yes, I was. I was aware of it.

Q. Even at that age? You were thirteen years old at the time now.

(10) A. I was aware of it going on. It was a prime topic around the town and it was unusual to have detectives coming to my home so I was aware of them coming.

Q. Yes, now that's what I want to focus on. Between the time of the stabbing and the time of the trial, did any detectives come to your home, or was it after the trial?

A. I think it was after the trial the first time I saw a detective come to my house.

Q. So to the best of your recollection you -- no detectives or police of any kind came to your home before the trial?

(20) A. I don't recall any being there at that time.

Q. Okay, thank you, Miss Ebsary, I have no further questions.

MR. EDWARDS:

Thank you, My Lord.

MR. ARONSON:

No questions arising out of that, My Lord.

(WITNESS WITHDREW)
EXCUSED

(30) MR. ARONSON:

The next witness, Patricia Harriss.

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PATRICIA ANN HARRISS, being called and duly sworn, testified as follows:

BY MR. ARONSON: Direct Examination

Q. Would you state your full name to the Court please?

A. Patricia Ann Harriss.

Q. And how old are you?

A. I'm twenty-six.

Q. And what was your date of birth?

A. November 15th, '56.

Q. Where are you presently living?

A. 5 Kings Road, Sydney.

Q. And how long have you lived at that particular address?

A. Close to twenty years.

Q. What education do you have?

A. I finished grade ten at Sydney Academy.

Q. And are you presently employed?

A. No, I'm not.

Q. Can you recall what year you finished school in?

A. Around '75, I think.

Q. And after 1975 when you had finished school, what did you do by way of employment or further education?

A. I worked various jobs, as a waitress. I took an aesthetic course; various things.

Q. Now in 1971 would you have been living at 5 Kings Road?

A. Yes.

Q. Did you testify at the trial of Donald Marshall Jr. in 1971 for the murder of Sandy Seale?

A. Yes, I did.

Q. Have you ever been convicted of a criminal offence?

A. Yes.

Q. Could you say what offence?

A. A shop-lifting offence.

Q. And can you recall when that occurred?

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A. I'm not quite sure in what year it was. I think it was --

THE COURT:

What's the relevance of that?

MR. ARONSON:

I'll leave it, My Lord.

BY MR. ARONSON:

Q. Can you recall whether or not you attended a dance in Sydney on Friday, May 28th, 1971?

A. Yes.

Q. Where was that dance?

A. St. Joseph's on George Street in Sydney.

Q. Is there a more lengthier description of St. Joe's?

A. St. Joseph's Parish Hall, I think.

Q. And where is that located?

A. On George Street.

Q. I see. How old were you when you attended that dance?

A. Around fourteen years old.

Q. Where -- do you recall how long you were at the dance for?

A. No, but I know I left before it was over.

Q. Can you say approximately what time you left?

A. I'm not too sure on the time. I just know that it was before the dance was over.

Q. Did you leave alone or in the company of anyone?

A. I was with my boyfriend.

Q. And what was your boyfriend's name?

A. Terrance -- Terry Gushue.

Q. And where did the two of you go from the dance?

A. We left the dance and proceeded to Wentworth Park.

Q. Can you say whether or not you had been drinking, that particular evening?

A. Terry might have been. I don't really recall.

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- Q. And what about yourself? Can you recall whether you had been drinking that night?
- A. I don't think so.
- Q. You say you went to Wentworth Park?
- A. Yes.
- Q. How far is Wentworth Park from St. Joseph's Parish Hall?
- A. Oh, my. Maybe two blocks.
- 10) Q. Can you say what time you would have arrived at Wentworth Park?
- A. For sure, no. I'm not sure of the time.
- Q. What did you do after going to the park?
- A. We sat on a bench and smoked a cigarette.
- Q. Are you able to say where that bench was in the park?
- A. Close to the bandshell.
- Q. If I could show you exhibit -- I believe it's marked R-2. Can you say where the bandshell is located with reference to exhibit marked R-2?
- 20) A. The bandshell is there.
- Q. Is it marked -- do you see any markings on the map that would indicate where it is?
- A. No.
- Q. Do you want to mark on the map with the letter "p" where you were sitting?
- A. Approximately?
- Q. Approximately. The witness has placed the letter "p" -- I think it would be probably easier if you could take a look at it, My Lords. And what happened after you sat down at that park bench?
- 30) A. We stayed for awhile. We smoked a cigarette and then we left.
- Q. And then what happened?
- A. We proceeded across the bandshell to Crescent Street on our way home.

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- Q. I see. Had you up to that point in time -- can you recall whether or not you saw anyone?
- A. I remember Robert Patterson. He was sick, vomiting in the woods and grass.
- Q. And subsequent to that time and as you were walking down Crescent Street on your way home, did you see anyone else?
- A. In the park?
- Q. Yes.
- A. No.
- Q. Okay, what happened after you started walking down Crescent Street towards home?
- A. We ran into Donald Marshall and asked him for a match to light a cigarette.
- Q. Do you see Donald Marshall in the court room today?
- A. Yes, I do.
- Q. Would you point him out please? For the record let it be noted that the witness pointed to the appellant. After you saw Donald Marshall, what happened?
- A. We just asked for a match, Terry and I, and then we left to go home.
- Q. Are you able to say from what direction Junior Marshall was coming, or from where he came?
- A. He was -- I don't think he was walking. He was more or less standing.
- Q. Now are you able to say whether or not there was anyone with Donald Marshall?
- A. I can say there was someone there but who, no.
- Q. Okay. Now you say there was someone there. Can you say how many were there?
- A. At the time I was saying two men.
- Q. Is that what you're saying today?

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A. Yes.

Q. Where were these two men standing or where did you see these two men relative to where you were standing with Donald Marshall?

A. One was on each side of Donald.

Q. And are you able to give a description of either one of those individuals?

A. At this time, no.

Q. Have you had the opportunity of reading over any of the statements you gave in this matter prior to testifying?

A. Yes, I have.

Q. Have you -- would you like to take a look at one of your statements in terms of refreshing your memory?

A. No.

Q. Would that assist you at all in terms of recalling
--

THE COURT:

You're on direct examination but one question that you perhaps overlooked, would you ask her where she was on Crescent Street when she saw Marshall and the other two men?

MR. ARONSON:

All right.

BY MR. ARONSON:

Q. Could you tell the Court with reference to exhibit R-2 where you saw Donald Marshall?

A. Okay, I'm not too sure really just where.

Q. Could you say approximately?

A. I would say approximately here.

Q. Would you put a P-2 at that location? For the record the witness has indicated -- placed the marking "P-2" on Crescent Street across a building above which are

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the words: "Green building, Crescent Apartments".
Had you seen Donald Marshall at all prior to seeing him in the park on that particular evening?

A. I recall seeing him at the dance.

Q. And did you see anyone else at the dance that evening besides Donald Marshall that you can name?

A. I met Sandy Seale at the dance.

Q. You met Sandy Seale. Had you known Sandy Seale prior to that particular night?

A. No.

Q. So in other words you're saying here that you first met him at the dance?

A. Yes.

Q. How did you come to meet him?

A. I remember he was trying to lick my hand and get the stamp off my hand to get in the dance.

Q. How certain are you that you saw Donald Marshall at the dance?

A. How certain am I? At this point, I can't really say I'm positive that he was there.

Q. And how long would you say you were with the -- Donald Marshall and these two other people on Crescent Street?

A. Just to light a cigarette and leave.

Q. Do you recall anything else that happened while you were with Mr. Marshall?

A. No.

Q. Was there a conversation?

A. Not that I remember, no.

Q. After -- after that what happened? What did you do?

A. I just went to Kings Road and went home.

Q. How far is your home from Wentworth Park?

A. Not too far.

Q. In terms of distance what would you put it at?

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Or putting it another way, how long would it have taken you to walk from the point you've marked P-2 on exhibit R-2 to your home?

A. No more than ten minutes if that.

Q. Now you've already indicated that you testified at Donald Marshall's trial in 1971. How did you come to be a witness at the trial?

A. I don't really understand your question.

THE COURT:

How would she know? She was presumably subpoenaed.

BY MR. ARONSON:

Q. Can you recall if you had any occasion to be interviewed or speak to Sydney City Police?

A. My mother had -- I guess they went to the house and asked my mother for me and my mother went and got me. I was going to the show and she brought me down to the police station for questioning.

Q. Do you recall when that occurred?

A. No, I don't.

Q. And what happened after you were called down to the police station?

A. I was brought in for questioning.

Q. Can you recall the length of time over which the questioning took place?

A. It was a long time.

Q. And can -- can you put it in terms of hours or?

A. At this point, no. I just know it was a long time.

Q. Do you recall generally the testimony that you gave at Donald Marshall's trial?

A. Yes.

Q. Are there any differences in your own mind as to what you've said in court today and what you said at his trial in 1971?

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A. Yes, I didn't mention the two men that I had seen with Marshall on Crescent Street.

Q. And how do you account for the difference between what you've just indicated you said at Marshall's trial in 1971 and what you're saying in court today?

A. Would you repeat the question please?

Q. How do you account or how do you explain the difference between the testimony which you've just indicated you gave at Donald Marshall's trial in 1971 and the testimony which you are giving in court today?

A. Through the long hours of being in the police station, my statement was changed and I was scared and didn't want to mention it.

Q. Mention?

A. The two gentlemen I had seen.

Q. Why were you afraid?

A. There was long hours of going over it and the word "perjury" was brought up a lot and they didn't seem to believe that I had seen these two characters.

Q. Yeh, now when you're saying "the word 'perjury' was brought up", who brought up that particular word?

A. The detectives.

Q. Do you recall who those detectives were?

A. I recall Sergeant Urquhart. The other I don't.

Q. You've also indicated fear. Can you account for your feeling of fear?

A. I was young. I didn't understand and it was a long time of going over and over what had happened that night.

Q. Can you recall on how many occasions you gave statements to the Sydney City Police?

A. No.

Q. Can you recall how many statements you gave to the Sydney City Police?

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A. I remember a lot of writing and starting over again but how many statements, I don't know.

Q. Going back to your meeting with Marshall in the park, can you say how far or at what distance Marshall was from where you were standing?

THE COURT:

Is this on Crescent Street?

MR. ARONSON:

On Crescent Street, yes.

BY THE WITNESS:

A. How far? He was standing a bit off the street and I was practically on the grass going towards home.

Q. Okay, can you recall the location of the two individuals you've indicated you saw relative to where Marshall was standing?

A. They -- he -- they were along side Marshall.

Q. Can you say whether or not you would have recognized Sandy Seale if you would have seen him in the park that night?

A. I think I would have recognized him, yes.

Q. Can you say whether or not you saw Sandy Seale in the park on the night of Friday, May 28th, 1971?

A. No, I did not see him.

MR. ARONSON:

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

THE COURT:

Mr. Edwards.

MR. EDWARDS:

Yes, thank you, My Lord.

BY MR. EDWARDS: Cross-Examination

Q. Now, Miss Harriss, the night in question, May 28th, 1971, you've told my learned friend that you don't think you were drinking that night.

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A. No.

Q. But you're not sure you weren't drinking that night?

A. I don't think I was drinking at that time, no.

Q. When you were fourteen years of age, did you take a drink on occasion?

A. I might have had a drink of beer or something like that. It wasn't hard drinking or anything.

Q. I see. But would it be fair to say that you did take a drink from time to time?

A. Oh, yes.

Q. So that if you had something to drink that night, it wouldn't have been unusual, would it, particularly?

A. No.

Q. You mentioned when my learned friend asked you about the number of men you saw in the area where you were talking to Junior Marshall that night or Donald Marshall, and I believe you said that at the time you said two men. Now what time do you mean? Is that your first contact with the police or some other time?

A. The reason I mainly remember is from reading my statements and going over it so much with the police at that time. At this time, I really -- I don't remember.

Q. I see. So what you're saying is that you now have no independent recollection of how many men were there. You're just going by your statement. Is that --

A. I -- from reading my statement it helps me remember. That's what I'm saying.

Q. Okay, well, you indicated to my learned friend that you -- you gave different versions at the time. So which -- which statement helps your memory best; the one where you said that there were two men there or when you said at the trial that there was only one other

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person there?

A. My first statement, the written statement.

Q. The original statement?

A. Yes.

Q. But you cannot now recall from your own memory without looking at the statements what those two men looked like?

A. No, I don't know what they looked like.

Q. Can you recall whether they were young or old or anything about them?

A. Older men.

Q. Older men? What do you mean by that?

A. At -- that they weren't young. They weren't from the dance or young people.

Q. You mean they weren't teenagers?

A. Right. Yes.

Q. But on the other hand, they weren't senior citizens either, were they or were they?

A. In my mind they were just older men.

Q. Do you recall whether or not you had any discussion with any of those other persons?

A. No, I didn't.

Q. Was Terry Gushue with you at that particular time?

A. Yes.

Q. And you say that he might have had something to drink that night?

A. Terry?

Q. Yes.

A. Yes.

Q. But you can't recall how much or what condition he was in, can you?

A. Well he wasn't in any drunk condition or -- he was fine.

Q. You're sure about that?

A. But he -- he used to drink.

Q. Yes. How old was he at the time?

A. I'd say he was around maybe nineteen, twenty years old.

Q. And he was five or six years older than you were at the time?

A. Yes.

Q. And you say he was your boy friend at the time?

(10) A. Yes.

Q. And how long had you been going out with him?

A. I knew Terry maybe two years or so.

Q. Two years? You were dating him since you were twelve years old?

A. No, no. I knew him for that long. I knew him for quite awhile. Not really dating. I was fairly young.

Q. Yes, but when did you start dating him? You referred to him as your boy friend. I assumed from that that you were dating.

(20) A. Well we went to dances together and that and at that time I would call him my boy friend, yes.

Q. Yes, and how long did that relationship --

A. My, I'm not sure really how long.

Q. Well was it over a year or less than a year?

A. Over a year.

Q. Over a year. I see. Were you a fairly big girl, tall girl, I should say, for --

A. Yes.

Q. -- for fourteen?

(30) A. Yes.

Q. Do you recall your height at the time? _____

A. No, I don't.

Q. You told my learned friend first that you recalled seeing Donald Marshall at the dance and then when he questioned you on that further, you said you're not -- you're not

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really sure.

A. I think it was Donald Marshall who was with Seale outside the dance when he tried to get the stamp from me.

Q. But you're not -- you're not really sure of that?

A. I'm not sure who introduced me to him, no.

Q. I see. Now you filed an affidavit with this Court, Miss Harriss, and -- well, the date of the affidavit is the 22nd day of July, 1982. Is that correct?

A. Yes.

Q. And it has attached to it copies of the statements that you gave to the various police authorities.

A. Yes.

Q. The two statements you gave to the Sydney City Police in 1971?

A. Yes.

Q. Right?

A. Yes.

Q. And also the statement that you gave to the R.C.M.P., Inspector or Staff-Sergeant Wheaton on the first of March, 1982?

A. Yes.

Q. Now my learned friend asked you to account for the discrepancy between your first statement where you said that you saw two other people there with Donald Marshall and your testimony on the trial where you said there was only one other person. Do you recall him asking you that?

A. Who is that?

Q. Mr. Aronson. He just asked you to account for the discrepancy in your testimony.

A. Yes. I don't understand.

Q. You will agree that there is a significant difference between your first statement to the police where you

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said there was two -- two men with Donald Marshall at the time and what you said at the trial when you said there was only one other person there.

A. Yes.

THE COURT:

We do not know and does she know what she said at the trial?

MR. EDWARDS:

I'll explore that with her now, My Lord.

BY MR. EDWARDS:

Q. Do you recall what you said at the trial?

A. Pertaining to who was --

Q. How many people were with Donald Marshall at the time in question.

THE COURT:

Read the transcript because it's --

MR. EDWARDS:

I'll refer her to the transcript, My Lord, yes.

BY MR. EDWARDS:

Q. Miss Harriss, I'm going to refer you to the trial transcript, page 78, the question which begins at line 20. I'll read you the question and then the answer, and the question and the answer pertaining to that particular time; that is, when you met Donald Marshall on Crescent Street. All right? The question:

Was there more than one person with Mr. Marshall?

The answer was yes. Question:

How many were there?

I really don't know but there wasn't many there.

Do you recall giving that particular -- those questions and answers?

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A. Do I recall it?

Q. Yes.

A. Yes, I sort of.

Q. That's what you said when you were asked about it first. Then --

THE COURT:

You're going to go on?

MR. EDWARDS:

Yes. Yes, My Lord. I just want to be fair to get all her references in there.

BY MR. EDWARDS:

Q. Page 79, line 15 --

THE COURT:

But she goes on on page 78, Mr. Edwards.

MR. EDWARDS:

Yes, all right, perhaps that's a fair thing to do. I'll read that whole passage.

BY MR. EDWARDS:

Q. I'll just read you about half page of the transcript, Miss Harriss, and then I'll ask you some questions on it. All right:

Q. Was there more than one person with Mr. Marshall?

A. Yes.

Q. How many were there?

A. I don't know really but there wasn't many there.

Q. I beg your pardon?

A. There wasn't many there.

Q. What?

A. There wasn't many there.

Q. Now what do you mean by that?

A. Well, there wasn't a crowd of people.

Q. How many people that you know were there?

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A. *Just Junior*

Q. *Just Junior?*

A. *Yes.*

Q. *I may have confused you. Miss Harris, you saw Donald Marshall and did you see anyone else there?*

A. *Yes.*

Q. *Who was it? Do you know?*

There was a pause there, no response.

Q. *Answer me please.*

A. *No.*

That was the reply to the question: "Who was it? Do you know?", and you answered: "No".

Q. *And how many people did you see there with Donald Marshall?*

A. *One.*

Q. *The one person?*

A. *Yes.*

Okay. Now do you recall that passage?

A. *Not vividly, no.*

Q. *Do you recall the ultimate answer there?*

A. *I can't --*

Q. *After you were questioned -- well, after a few questions were put to you about the number of people with Donald Marshall where you ultimately answered one person.*

Do you recall saying that at the trial?

A. *No, not really, no.*

Q. *Would you disagree that that's what you said?*

A. *No.*

Q. *Was your recollection without being referred to the testimony -- did I understand your evidence to Mr. Aronson correctly that you recall saying at the trial that there was only one other person with Donald Marshall?*

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A. I don't understand your question again.

Q. Do you recall just being questioned by Mr. Aronson before I started questioning you?

A. Yes.

Q. Do you recall telling him that you thought you testified on the trial that there was only one person with Donald Marshall?

A. No, I don't remember saying that.

MR. EDWARDS:

My Lord, is the original affidavit filed with the Court there in reference to her?

THE COURT:

This has not been received. It has not been filed, none of the affidavits.

MR. EDWARDS:

No, My Lord, but I'd like to use it for the purposes of a Section 10 cross-examination. It is a previous statement by her in writing, and I'd like to use it to test her credibility.

THE COURT:

Contrary to what? I think you should put to her the rest of her examination on the question of who she was -- who was with her. Cross-examination.

MR. EDWARDS:

Okay, My Lord.

BY MR. EDWARDS:

Q. At page 80, line 29, this is when you were being cross-examined by Mr. Rosenblum at the trial. Do you remember Mr. Rosenblum asking you questions at the trial?

A. Yes, I do.

Q. Okay. And he -- he asked you the following:

THE COURT:

Line 29?

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MR. EDWARDS:

Yes, I'm just seeing where it starts, My Lord.

BY MR. EDWARDS:

Q. Line 22 I suppose or 23, Mr. Rosenblum asked you:

Q. Now can you say under oath that there was anybody at all with Junior Marshall that time or if there were other people around but you can't say if they were with him?

You answered that by saying:

Well, someone was there but I never paid any attention -

Mr. Rosenblum then asked you:

No, you couldn't say if it was a woman, a man, a child?

A. No.

Q. So you really are not sure if there was anybody with Junior Marshall at all, are you

A. I knew he was there.

Q. Pardon?

A. Sort of knew he was there.

Q. Knew who was there?

A. The person.

Q. You can't say if it was a man, woman or child, can you?

A. No.

Q. You say you knew there was somebody around.

The answer was inaudible to that.

Q. You will have to answer so we can get it down.

A. Yes.

So just to clarify that, your answer "yes" was to the question: "You say you knew there was somebody around."

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Q. *And that other person that you're speaking about, they never had any conversation with you or with Terry Gushue?*

A. No.

Q. *Or with Junior Marshall while you were there?*

A. No.

Q. *And so the sum net result is that you and Terry Gushue went to a dance, you left the dance, you went to the bandshell for a cigarette, a smoke, whatever it was; then you started to walk towards your home over there on Kings Road, and on the way you met Junior Marshall who gave Terry Gushue a match. Is that right?*

A. Yes.

Q. *And that's all. Isn't that it?*

A. Yes.

Q. *Anything else?*

A. No.

Do you have any recollection of being asked those questions --

A. Yes, I do.

Q. -- and giving those answers to Mr. Rosenblum?

A. Yes, I do.

Q. All right, and would you agree that the unmistakable impression from that passage is that you were saying in effect there was only one other person with Junior Marshall at that time on Crescent Street?

A. Do I remember saying that?

Q. Yes.

A. Is that what you're asking me?

Q. Yes.

A. Yes.

Q. Okay. And are you now saying that you have a different

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recollection from that? In other words, are you now saying that there was more than one person with Junior Marshall at that particular time?

A. I wanted to say it at that time in Court only I was scared to. I wanted -- I wanted to say that I saw the two people. That's what I'm saying now.

Q. You wanted to say that then?

A. Yes.

Q. So the short answer to my question of whether you are now saying that there was more than one person with Junior Marshall is yes.

A. Yes.

Q. And you're absolutely sure of that?

A. Yes.

Q. Now you've hesitated in your answer there when I asked you if you're absolutely sure.

A. I hesitate because I want to make sure that I feel that inside and that's the way I feel, that there were two other men with Marshall.

Q. Two other. You're sure it wasn't three or four?

A. I remember two as one on each side.

Q. But there could have been others or can you say that there definitely was no more than two?

A. There was no more than two alongside him.

Q. Were there other people in that general vicinity --

A. There --

Q. -- that you noticed?

A. There could have been but not that I noticed.

MR. EDWARDS:

Now, My Lord, may I now proceed with the affidavit?

THE COURT:

What's the purpose of it?

MR. EDWARDS:

Well, under Section 10, My Lord, to test her credibility.

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Perhaps just for clarity, I'll refer to the Section; Section 10:

Upon any trial...

Well, we're not on trial but I would assume the same rules apply.

...a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him;...

I would refer Your Lordships to the annotated case in Martin's 1981 edition, CORMIER v THE QUEEN, and the case is cited after that. What Cormier --

THE COURT:

That's not necessary. What do you want to contradict?
What is the contradictory statement?

MR. EDWARDS:

Well, My Lord, right on the --

THE COURT:

What the witness has said today?

MR. EDWARDS:

Well, yes, in part what the witness says today contradicts not only I submit what she gave in evidence but also what she gave in the statement she gave to the City Police on June 18th, 1971, which is attached as an exhibit to her affidavit. I would like to explore with her in order to test her credibility the reasons -- well, the fact that there are discrepancies in her testimony and the reasons for those discrepancies.

THE COURT:

Statements that contradict what she said today?

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MR. EDWARDS:

Well, yes, in part but my submission is that Section 10 with great respect does not restrict me to merely contradicting her. Like there may be parts left out of a statement, there may be things said in the statement that require qualification. I submit that is the big difference between Section 9 where you go after your own witness and Section 10 which is used to cross-examine the other side's witness, because it -- the scope of Section 10, if I can put it that way, is very much broader than Section 9 and the latitude for cross-examination, I submit, corresponds therewith.

THE COURT:

Carry on.

MR. EDWARDS:

Thank you, My Lord. Could I have her affidavits marked for the record?

THE COURT:

Yes. Just the statement. Not the affidavit.

MR. EDWARDS:

Well, is -- are Your Lordships ruling that my cross-examination will be limited only to --

THE COURT:

What you asked for was about the statement.

MR. EDWARDS:

No, My Lord. I'm sorry, My Lord. Maybe I didn't make myself clear but I'm asking to cross-examine her not only on the statement but on the affidavit and all the exhibits. I would like to conduct a general cross-examination. I submit that it is imperative to test the credibility of this witness to have that scope of cross-examination.

THE COURT: (Justice Hart)

You didn't ask for that. You're now asking for that, are you?

MR. EDWARDS:

Yes, My Lord. I'm sorry I didn't make that clear.

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THE COURT:

Carry on.

MR. EDWARDS:

Thank you very much, My Lord.

BY MR. EDWARDS:

Q. Miss Harriss, I'm not showing you exhibit marked R-5.
Would you have a look at that please?

THE COURT:

Would you describe it for the record?

MR. EDWARDS:

Yes, My Lord.

BY MR. EDWARDS:

Q. That is the affidavit you filed with the Court -- if
I could just check the date, or you swore on the 22nd
day of July, 1982 --

THE COURT:

It is not filed with the Court. It's not filed with the
Court.

MR. EDWARDS:

No, I corrected that, My Lord, and said that she swore,
which was sworn on the 22nd day of July, 1982.

BY MR. EDWARDS:

Q. Do you want a chance to read it over?

A. Yes.

MR. EDWARDS:

Perhaps, My Lord, this would be a convenient time to take
five minutes so the witness can go over that?

THE COURT:

Very well.

COURT RECESSED: 11:03 a.m.

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COURT RECONVENED: 11:21 a.m.

MR. ARONSON:

10) If it please the Court during the recess and I might indicate Patricia Harriss is represented by other counsel and I had been informed during the recess that she had been asked to make a statement to the Court prior to giving any of her testimony and I would ask if with the Court's permission she might be permitted to read that particular statement now.

THE COURT:

I don't think it's necessary. What's that?

MR. ARONSON:

With respect to Section 5 of the Canada Evidence Act.

THE COURT:

She doesn't need to under the Canadian Charter.

MR. ARONSON:

20) Well I had gotten that impression but as I say it had been put to me by counsel that I should make that request to the Court. I would agree that Section 13 is a positive right. One does not have to take the right to have it.

THE COURT:

It doesn't need to be claimed specifically.

MR. ARONSON:

That's right, thank you.

BY THE COURT:

Q. You understand, Miss Harris?

30) A. Yes, I do.

THE COURT: (Justice Pace)

It doesn't protect her for perjury anyway.

MR. ARONSON:

Oh, I would agree with that as well, My Lord.

THE COURT:

Mr. Edwards.

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MR. EDWARDS:

Thank you, My Lord.

BY MR. EDWARDS:

Q. Miss Harris, now before the adjournment, you --

THE COURT:

How long do you expect to be on this line? Where -- the Court has difficulty in seeing just what you're objective is.

MR. EDWARDS:

Well, I guess the objective is, My Lord, generally speaking to test her credibility. She is saying now --

THE COURT:

Well, she said -- at the trial she said several different things about the people that she met and she said several different things now. Now is there any point in belabouring that? That's obvious.

MR. EDWARDS:

Well, My Lord, with respect she -- the bottom line to what she said at the trial was that there was only one person with Mr. Marshall at the time in question.

THE COURT:

Yes.

MR. EDWARDS:

And that -- now if you read the whole transcript and in particular the addresses to the Jury, it was one of the very significant features, I submit, that lead to the conviction of Donald Marshall. She is now saying that there was more than one person there at the time. Not only is she saying that now but she gave a statement on June 17th, 1971, where she said there was more than one person and then on June 18th, she gave a different statement where she said there was only one person. July 5th --

THE COURT:

She's explained all that so why do we have to go --

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MR. EDWARDS:

Well with respect My Lord --

THE COURT:

What does it add to the Crown's case or to the Appellant's case?

MR. EDWARDS:

(10) Well, My Lord, I submit that the references to the statements and I intend to cross-examine her on the basis upon which he made the statement, what were the sources of her information in the -- that she gave in the statement.

THE COURT:

She told us. She was there. From the point of view of the Crown, what's the Crown's position on this? What's your objective in this? What's your position on this?

MR. EDWARDS:

(20) Well my position on it, My Lord, is that as it stands now there is really no way of determining without further cross-examination whether she was telling the truth then or whether she's telling the truth now as to the number of people and hopefully through cross-examination, I can elicit information which will assist the Court in determining which is the correct version. That is my function. It's I suppose more inquisitorial than adversarial in nature if I could characterize it that way.

THE COURT: (Justice Pace)

Well, that can't be if you're using the Evidence Act. Section 10 --

(30) THE COURT:

Well, Mr. Edwards, would you carry on but let's keep it within bounds, eh, because we frankly can't see the relevancy of it. It's already established that she told two different stories and she's explained it today and to go into a lot of details on other things but if you feel

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it's necessary, carry on. Keep it brief, will you.

MR. EDWARDS:

Okay, My Lord, I'll try to keep it brief.

BY MR. EDWARDS:

Q. Miss Harriss, you had the opportunity during the adjournment to read the affidavit which I believe is marked exhibit R-5?

A. Yes.

Q. That would be your affidavit of July 22nd. Now I want to refer you first to paragraph eleven in the affidavit where you say:

That as referred to in my statement marked Exhibit "A" hereto, I did, on the night of May 28, 1971, at or near Wentworth Park, see Donald Marshall, Jr. and two other men - one of whom was gray or white-haired, short and wearing a long coat.

Right? You recall that in your affidavit?

A. Yes.

Q. Now what I would like to know is whether or not that paragraph was based on your reading your prior statement or whether as you say here now -- I'm sorry, or whether you do actually recall those two men?

A. I recall the two men but I don't recall what they looked like or what they were wearing.

Q. So that reference in your affidavit, that information came from your statement and not from your memory. Is that correct?

A. From reading my statement, yes.

Q. Now you have as I mentioned attached as exhibits to your affidavit a statement that you gave to the Sydney City Police on June 17th, 1971?

A. Yes.

Q. Is that correct? And that was the statement in which you referred to the old gray-haired man?

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A. Yes.

Q. Now did you know Mary Katherine O'Reilly at the time?

A. Yes, I did.

Q. And did you know her sister?

A. Yes.

10) Q. And prior to giving that statement on June 17th, did you have any conversations with the -- either of the O'Reilly sisters concerning the events of the night of May 28th?

A. Not that I remember.

Q. Not that you remember?

A. No.

Q. Is it possible that you could have?

A. Well I knew them and I know they knew Junior Marshall, so --

Q. Were they friends of yours? Did you have contact --

20) A. Yes, they were friends of mine.

Q. You had contact with them on a regular basis during that period of time?

A. Well, I went to school with them. I wasn't -- I didn't hang around with them or anything.

Q. And they were friends of Donald Marshall?

A. Yes.

Q. Were you a friend of Donald Marshall's at the time?

A. I knew him at the dances and from the dances, yes.

Q. Would you dance with him on a regular basis?

30) A. No.

Q. And would it surprise you to know that Mary Katherine O'Reilly --

MR. ARONSON:

With respect, My Lord, I believe I know in which direction my friend leads and he may be referring to a statement which

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(10) is not on file or has been filed with the Court but has not been admitted in evidence. The particular person who gave that statement is not present, has not had anything to do with these particular proceedings and I believe that it is impossible to test the accuracy of that statement which my friend may be referring to with the O'Reilly girl and I would therefore object to him following that particular line of questioning.

MR. EDWARDS:

If I may speak to the objection, My Lord, surely it is legitimate to put to the witness a question about whether or not she got the information in question from -- from Miss O'Reilly when as my learned friend knows --

THE COURT:

What information?

MR. EDWARDS:

(20) The information about the descriptions of the men she gave, when there is in existence a statement -- I submit, it's not in evidence but that is immaterial but there is in existence a statement given on the same day that Miss -- on June 18th, 1971, at around the same time Miss Harriss gave her statement where O'Reilly says that she in fact told Harriss to give the police the description of the two old men. It seems obviously very relevant to credibility.

THE COURT:

Are you going to call O'Reilly?

MR. EDWARDS:

(30) I would be prepared to call her if that is necessary. I could say what I was going to do after the cross-examination or I could indicate it now I suppose -- it's -- it rather destroys the effectiveness of the witness's testimony to have this conversation in her presence. May she be excused for a moment?

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THE COURT:

Yes.

MR. EDWARDS:

My Lord, there is a statement, June 18th, 1971, from Mary Patricia O'Reilly. I was saying Mary Katherine but it's Mary Patricia.

THE COURT:

That's not before us and she hasn't testified today about the description of the men.

MR. EDWARDS:

No.

THE COURT:

She specifically said she didn't -- wasn't able to describe them.

MR. EDWARDS:

Yes, but I was going to put to her the fact that Miss O'Reilly -- we're on a voir dire so I assume it's all right to speak. I was going to put to her the fact that Miss O'Reilly gave a statement in which she said in part:

Q. *Did you discuss this matter with Patricia O'Reilly?*

A. Yes.

Q. *Did you tell her about the gray-haired man?*

A. *I told her there was supposed to be a gray-haired man there. I told her if she was questioned by the police she should tell about the gray-haired man that Junior told me about.*

THE COURT: (Justice Hart)

Whose statement is this?

MR. EDWARDS:

This is Mary Katherine O'Reilly. Now I should also say that I am aware that the police have contacted Miss O'Reilly who is now out in Calgary and she denies any recollection of

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that but there's no -- there's no question that she did give a statement to that effect at the time. She also was thirteen or fourteen years old.

THE COURT:

She has said she hasn't talked to O'Reilly just now.

MR. EDWARDS:

Yes, My Lord.

(10)

THE COURT:

Is that not the end of the matter as far as the question of today testing her credibility on this matter in which you're going?

MR. EDWARDS:

Well my concern is whether or not she would stick to that if she was confronted with what O'Reilly actually said in the statement. If she says: "No, I did not say that.", then I would submit that would be the end of the matter.

THE COURT:

(20)

You can't assure us that statement's going to be proved?

MR. EDWARDS:

Oh, I could assure you, yes, My Lord, that the statement could be proved, yes, by calling Sergeant of Detectives John F. MacIntyre.

THE COURT:

Are you prepared to call O'Reilly from Calgary?

MR. EDWARDS:

(30)

And I could call O'Reilly from Calgary although in fairness I would expect her to say: "No, I didn't give that statement." but we have the Chief of Police of Sydney on one side with the statement. He has signed it as a witness saying she did. It would be a question of fact for the Court at that time whether she did or she didn't.

THE COURT: (Justice Pace)

Can you cross-examine one witness on the statement of another?

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MR. EDWARDS:

I submit that that's legitimate, My Lord, in cross-examination. Not on direct.

THE COURT:

The Court really can't see -- you can question her on her credibility. You've done that.

MR. EDWARDS:

Yes, My Lord.

THE COURT:

You now propose to go far afield which would involve opening these proceedings on matters that are not before us. So I don't know how you can be permitted to carry on this.

MR. EDWARDS:

If that's Your Lordship's ruling, I accept it.

Could we have Miss Harriss back?

THE COURT:

Call Miss Harriss.

BY MR. EDWARDS:

Q. Miss Harris, I'd like you to recall if you will the night when you were questioned by the Sydney City Police, June 17th, 1971.

A. To recall it?

Q. Yes.

A. All I can say is that it was a good many of hours, a lot of going over what I had seen that night. It was very unpleasant.

Q. All right, and you had been there from approximately eight p.m. until almost two a.m. when you completed giving your second statement. Is that correct?

A. Yes.

Q. Now during that time your mother was at the police station, was she not?

A. Yes, she was.

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Q. And you were allowed out to see her at least once?

A. Yes.

Q. Did you request at any time to have her in the interview room with you?

A. No, I didn't.

Q. You didn't. You felt -- you didn't feel that intimidated that you wanted your mother there, did you?

10) A. Well, I was very young. I didn't think -- think of it maybe. I didn't know but maybe it would have helped.

Q. And Mr. Gushue, your boyfriend, he was at the police station at the same time, wasn't he?

A. Yes, he was.

Q. Yes. And in fact you and he were allowed to be together during parts of the interview, were you not?

A. Once, yes.

Q. So when you gave your second statement on the morning of June 18th, 1981, would it be fair to say that you gave that statement because you were tired and you wanted to get out of the police station?

A. Yes.

Q. Not because anybody told you that you had to give that statement in that way?

A. The statement that I gave wasn't the statement that I started off with and that I wanted to -- that I tried while I was there for so long and wanted to say.

Q. Yes. But the statement that you did give, the second statement, the one which is marked as exhibit B in your affidavit, that's the statement you gave because you were tired. Is it not?

30) A. The statement that was taken at one-twenty a.m.; that was my last statement.

Q. Yes.

A. Yes.

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Q. And that's the one that you're saying you gave because you were tired and you wanted to get out of there?

A. Yes.

Q. Nobody told you that evening that you had to stay there until you gave another statement, did they?

A. No.

10) Q. So that was on June 18th. Now you recall that you testified at the preliminary inquiry on July 5th?

A. Yes.

Q. Of that same year, 1971?

A. Yes.

Q. So that was about three weeks after you had given that second statement?

A. Yes.

Q. Yes. I want to refer you to page 19 of the preliminary inquiry to a sequence of questions beginning at line five or line one, rather:

20) Q. —

That first question is the continuation of another. You were asked who you saw at the time and you said Junior Marshall.

Q. *Donald Junior Marshall, the accused in this case?*

A. *Yes.*

Q. *And where was he standing?*

A. *By the green apartment building on Crescent Street.*

Q. *Was there anybody with him?*

30) A. *Yes, I think so. I am not sure.*

Q. *Did you see another person there with Donald Marshall?*

A. *Well there was somebody there. I didn't pay any attention.*

Q. *Was there more than one person with him?*

A. *No.*

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So that's what you said on the preliminary inquiry. You stuck to your story that there was only one person with Donald Marshall at the time. Correct?

A. Yes.

Q. Why didn't you if you believed at that time that there was more than one, why didn't you tell the Court then that there was more than one person with Junior Marshall?

A. Because I knew the statement that I signed, I was told this is what to say in Court and if I didn't, I would be charged with perjury.

Q. Who told you that?

A. Through the investigation.

Q. Do you remember who?

A. No. Just one of the detectives.

Q. And that was told to you when?

A. The time I was down for so many hours trying to get the statement done.

Q. But as I stated, three weeks elapsed between that night and your giving evidence at the preliminary inquiry.

A. Yes.

Q. So at the preliminary inquiry, did your mother attend?

A. Yes.

Q. Yes. Had you sought any legal advise in the intervening period on what to do?

A. Yes, I did. Yes, I did.

Q. But you still stuck to that story?

A. Yes.

Q. But now you're coming here today and you're saying that you're absolutely sure that despite your testimony in the preliminary inquiry and the trial that there was more than one person there?

A. Yes.

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- Q. Did you know Maynard Chant prior to the night of the stabbing?
- A. I know Maynard Chant now. I don't know if I knew him prior.
- Q. Did you see him that night at all?
- A. No.
- Q. You're sure?
- A. Not that I remember, no.
- Q. Not that you remember?
- A. No.
- Q. Okay, thank you very much, Miss Harriss.

MR. ARONSON:

Nothing arising out of that, My Lord.

(WITNESS WITHDREW)
EXCUSED

THE COURT:

Next witness.

MR. ARONSON:

Maynard Chant.

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Q. Is that where the bus station is located?

A. Yes.

Q. Continue.

A. I started down Bentinck Street and towards the park area. I was gonna cross over on the park side. That was when I met up with Mr. Marshall, Donald, and he explained to me that him and his friend had been -- should I say, his friend was stabbed and if I could give him some help.

Q. Okay, do you recall if I showed you a plan numbered, I believe it's R-2 -- would you take a look at that plan, Mr. Chant? Have you ever seen that plan before?

A. Yes, I have.

Q. Okay, do you want to take a look at it and see if you are able to mark where on that particular plan or if it's on that plan at all you bumped into or met Donald Marshall Junior? If you'd like, you could just put your initials. Again, if I could indicate, the witness has marked the letters MC on Byng Avenue near the intersection of Byng and Bentinck. Now you've indicated to the Court you had a conversation --

A. Yes.

Q. -- with Mr. Marshall? Can you say what the conversation concerned?

A. Well the conversation was mostly concerning Marshall's friend which would be Mr. Seale and it was mostly concerning of getting an ambulance or getting help to help his friend because of what had happened to him.

Q. Okay. Now did you know Donald Marshall prior to that night?

A. No, I -- no.

Q. You've mentioned the name Sandy Seale. Did you know Sandy Seale on that particular night?

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A. No.

Q. Now can you say what if anything you noticed about Marshall's appearance on that particular night when you met him?

A. He had one -- he had both sleeves rolled up and he had a rather large gash on his arm inside of his arm, his forearm.

(10) Q. Now you've indicated he had his sleeves rolled up. What was he wearing? Do you recall?

A. He was wearing a jacket, like a parka.

Q. Do you recall the colour of the jacket at all?

A. All I knew -- all I know is that it was a light colour, really.

Q. With respect to the gash that you've described, what do you say as to whether or not that there was blood in or around that gash?

A. I didn't see any blood at the time.

(20) Q. You didn't. Are you saying that there was no blood or are you saying that you don't remember?

A. Well basically what I'm saying is what I met Donald, there was no blood and as we proceeded down the road, we met up with a girl and her boyfriend, another boy and her girl friend and that's I guess when his arm started to bleed because the young girl had given him a handkerchief for his arm.

Q. Now if we can go back to the point where you had met Marshall, what happened after you met Marshall and after you had your conversation with him?

(30) A. Well we proceeded down Byng Avenue, I believe. I'm not sure and -- to get help for his friend.

Q. And did you -- can you say whether or not you saw anyone as you were trying to get help?

A. Yes, we met up with two couples and just at that time

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there was a car coming by and we had flagged that over and they took us over to where Mr. Seale was laying.

Q. I see. And what happened after that?

A. We had got out of the car. We went over to where Sandy was laying and I believe Donald ran up to call an ambulance at a nearby house. And he had come back and was rather behind the body about maybe fifteen feet on his shoulder side, I would imagine, and the ambulance was taking a little long so I went up to see if they had called the ambulance. They had reassured me that they had called the ambulance and that was when I went back to the body or to the --

Q. Can you show us on the survey if you're able to, the plan or survey, R-2?

A. It's right here.

Q. Can you recall approximately where you saw Seale's body on that particular night? Possibly you could mark it with "S.S.". For the record, the witness has marked the initials "S.S." on the plan or survey marked R-2 on Crescent Street approximately between the green apartment building and the house above which is written the words, "Gray house, D. W. Campbell". Now can you recall what happened after the ambulance arrived?

A. Yes, I can.

Q. What happened?

A. After the ambulance had come and they had got Mr. Seale safely into the ambulance, I had took my shirt and I proceeded to continue to hitch-hike to Louisbourg. Just as I got onto George Street, the police had stopped me and they saw the blood on my shirt and they asked me where was I. And I told them that where I was and they

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asked me did I see anything and I said, yes, I'd seen everything.

Q. I don't know. I don't believe the Court wishes to go into any conversation concerning what was said to you.

A. Okay.

Q. Did you on that occasion provide the police with any statements at all?

A. Yes.

Q. Can you recall how many statements you provided the police with?

A. That night?

Q. All together.

A. Two.

Q. And can you recall when those statements were given?

A. One the night it happened and one -- one three days later.

Q. Are you sure?

A. No, I'm not.

Q. Can you recall at what location those statements were given?

A. Yes.

Q. Where was the first statement you've referred to given?

A. In Sydney at the police station.

Q. And the second statement?

A. Louisbourg at the Town Hall.

Q. Do you recall who was present while the second statement was being given?

A. My probation officer.

Q. What was his name?

A. Larry Burke. My mother, Beulah Chant; Chief of Police Wayne Magee. That's it.

BY THE COURT:

Q. That's of Louisbourg?

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A. Yes.

BY MR. ARONSON:

Q. Now do you recall giving testimony at the trial of Donald Marshall Junior in 1971?

A. Yes.

Q. Do you recall generally what you said at the trial in 1971?

A. Yes.

Q. Are there any differences between what you said at that trial in 1971 in your testimony then and the testimony that you have given today in Court?

A. Yes, there is.

Q. What are the differences?

A. The differences are in that I recall witnessing the murder in '71 and the statement which I am now giving I did not witness the murder.

Q. How do you account for this particular discrepancy?

A. Excuse me, I don't understand.

Q. How do you account for the difference in the testimony that you gave at Donald Marshall's trial in 1971 and the testimony you have given today in Court?

A. First of all I was -- I was scared. The second of all, I felt pressured into giving a statement that I didn't normally want to give which caused me to give the different statement to what I'm giving today.

Q. I have some difficulty in following you. Could you please try and explain it a little better?

A. The statement that I gave in '71 --

Q. Now what statement are you referring to now?

A. The statement that I've given in '71, the first statement of the trial or the trial statement pertaining to seeing the murder was -- the reason why I said that was because as I have said I was scared and I was

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pressured into giving a statement that I -- when I was being questioned at the town hall in Louisbourg I didn't want to give. And the statement that I'm giving today is actually or exactly what I saw pertaining that I didn't see the murder take place.

Q. Okay, so what you're saying it that you did not see Donald Marshall stab Sandy Seale. Is that correct?

A. That's correct.

Q. And can you provide any other reasons for your failure to give the testimony that you have said today in Court and the testimony that you gave at the trial in 1971? Are there any other reasons?

A. When I had tried to begin to tell the truth, that I didn't see anything, the people that were taking the statements or that -- that I had given, wouldn't believe me so I didn't know what to do and resulting, I had given a false statement.

Q. Can you say who those individuals were who -- I think I have your words correct, pressured? Who were the people who you say here today pressured you?

A. All I know is that they were two policemen. I don't remember their names.

BY THE COURT:

Q. This was in Louisbourg?

A. Yes.

Q. At Louisbourg?

A. Yes.

BY MR. ARONSON:

Q. Subsequent to the trial in 1971 and Donald Marshall's conviction, did you ever have any occasion to tell anybody about the difference in your testimony?

A. No.

Q. Can you say when if ever you told someone about any

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discrepancy in your testimony?

A. Four years ago.

Q. Can you say who you said that to or who you indicated that to?

A. My parents.

Q. Anyone else?

A. About a year and a half later I told it to my pastor. That was it.

Q. Can you give any reason for having waited for such a length of time in indicating that you did not witness the Seale stabbing?

A. All that was going on and the talk, even though I didn't witness the murder, I -- I figured he was guilty because of what was -- what had been told to me and what I had acquired through friends that were doing time in the Correctional Centre the same time Donald Marshall was doing time.

Q. I see. Now can you give any reason to the Court today why you should be believed as to your testimony that you have given in Court today as opposed to the testimony you gave in Court in 1971?

A. Roughly four and a half years ago, I became a Born-Again Christian. I accepted Jesus Christ as my Lord and personal Saviour. And this book that is being or used today to swear truth I hold very sacred in my life and I vow my life to it and I act the will that is in the Bible according to the commandments that Jesus Christ has given. That's why I speak the truth today.

Q. Do you know an individual by the name of John Pratico?

A. Yes.

Q. When did you come to know him?

A. At the trial.

Q. Did you know him prior to the trial?

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A. No.

Q. Had you ever seen him prior to the trial?

A. No.

MR. ARONSON:

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

BY MR. EDWARDS: Cross-examination

(10) Q. Mr. Chant, you say that the Court should believe you now because you're a Born-Again Christian. Is that what you've just finished saying?

A. Yes, it is.

Q. And isn't it true, didn't you also say that you were coming from church on the night of the stabbing?

A. Yes, I had skipped church.

Q. You had skipped church that night.

A. Just as soon as the service had ended, I had skipped church.

Q. But you were a church-goer at that time?

(20) A. Only because my parents made me go.

Q. I see. You really didn't believe in the teachings of Jesus Christ at that time?

A. Well, I really -- I believed in the teachings of Jesus Christ but I hadn't submitted myself to them.

Q. I see. Okay, so you are now saying with absolute certainty that you did not witness the stabbing.

A. Yes, I am.

Q. You're sure about that?

A. Yes.

(30) Q. You're sure you didn't know Donald Marshall before then?

A. No. Not personally, no.

Q. Did you know of him?

A. Not really.

Q. Well --

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A. No, excuse me.

Q. Did you know him to see him then?

A. No.

Q. Do you recall giving evidence at the preliminary inquiry on July 5th, 1971?

A. Yes.

Q. You were being asked about the incident in question, about the stabbing. You were asked this question:

You saw him what?

A. Haul a knife out of his pocket.

And from the context, it's obvious you're referring to Donald Marshall at that time.

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

A. Drove it into the stomach of the other fellow.

Q. What?

A. He drove it in the stomach of the other fellow.

Do you recall giving that testimony?

A. Yes, I do.

Q. You were pretty definite at that time about what you had seen. Would you agree with that?

A. No.

Q. Well anyone reading those words would get the impression you were pretty definite, wouldn't they?

A. They probably would, yes.

Q. And you recall -- you may not recall the precise date but you recall that the preliminary inquiry was in July of '71?

A. Yes.

Q. And you recall that the night of the stabbing was May 28th, almost six weeks earlier?

A. I remember the incident.

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Q. Well, if I suggested to you that it was May 28th, 1971, you wouldn't disagree with that?

A. No.

Q. And you told my learned friend that you gave a statement on the night in question?

A. Yes.

Q. And I suggest to you that you gave the next statement on the fourth of June, a few days later?

A. Yes.

Q. In 1971. So that after you gave that second statement you had about a five week period between that statement and the preliminary inquiry. Right?

A. Yes.

Q. And you thought about what you had said in the statement. You're nodding your head yes.

A. Yes, oh, excuse me.

Q. And you thought what -- about what you were going to say at the preliminary inquiry?

A. Yes.

Q. But yet you got on the stand at the preliminary inquiry and gave that evidence I just referred to?

A. Yes.

Q. And did you give that without any hesitation at all at that time?

A. No.

Q. You did hesitate? When did you hesitate?

A. At the last of it. When I was -- as I was all through the testimony, I knew I was doing wrong and --

Q. Now are you referring to the testimony at the preliminary inquiry or the trial --

A. The trial -- both.

Q. Direct your comments to the preliminary inquiry for a moment.

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A. Okay.

Q. So you were saying -- you were telling me that you had hesitated at that time. Did you express that hesitation to anybody?

A. No, I never.

Q. No. I see. You were more nervous about having to get on the witness stand than anything at the time, weren't you?

A. I don't know.

Q. I mean you told my learned friend that you believed Mr. Marshall was guilty at the time. Right?

A. Yes.

Q. So you didn't really believe that your statement was the crucial factor in deciding what fate he was going to meet, did you?

A. Yes, I -- I thought my statement that I was giving was a very damaging piece of evidence pertaining to Donald Marshall.

Q. Right, but you believed he was guilty anyway?

A. Yes, I did.

Q. Okay. And the second, the second statement you gave when you changed your first one -- well, do you remember the differences between the two statements or do you wish me to refresh your memory on it?

A. No, I do remember them.

Q. Yes, and could you just tell --

A. Could I give you the difference?

Q. Yes.

A. Okay, they had -- could I start from the beginning or do you just want the two statements or --

Q. Just answer the question, Mr. Chant, as best you can.

A. The difference between the two statements are that the first statement that I had given in the police

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10) station, I had given the story that Marshall or Donald had told me pertaining to what had happened to him in the park. The reason for this when the policemen had picked me up and I -- they asked me what I had seen, I said I seen everything. I was referring to the wound on Sandy Seale's stomach. They took me to the hospital first. Then they took me from the hospital to the police station where I was to give the statement. Just as I had arrived, Donald was coming out of the questioning room, came over towards me and stated: "There was two of them, wasn't there?" I was very afraid and I said yes. That's why I gave the story to what Donald had told me. My parents came in and picked me up. They took me home. A couple of days later two policemen came out. They took me in a room in the Town Hall along with my mother and a gentleman that I've just mentioned or previous and they began to question me. As a matter of fact they told me that I had committed perjury pertaining to the statement that I'd given that night in the cop station and that they had a fellow or a young man that said that he saw me there and I had seen -- that he said I had seen everything that he had seen and --

20) Q. Who were they referring to at that point, do you know?

A. At that point I didn't know but now I know.

Q. Would that have been John Pratico?

A. Yes.

Q. Okay.

30) A. And that's when they -- just after that, they put my mother out of the room where I was being questioned and they begin -- my probation officer was there and they begin to tell me my record of probation and the trouble that I was into and they told me again about the young fellow that had seen me there. I told them

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I -- that's when I opened up and begin to tell them I never seen nothing. One of the men leaned over and said: "You had to see something. Tell us what you saw." I told him again I didn't see nothing. It went on like that. Then they -- I said: "What did the other fellow see?" I don't remember if they told me what the other fellow seen but I remember somehow or another getting a statement -- giving a statement concerning what the other fellow had seen to correspond with the statement that I had given falsely that day.

10) Q. So to summarize, your first statement given on the night of the stabbing, that statement -- the gist of it is that you didn't see the stabbing. Right? And the gist of the second one is that you did see Donald Marshall do the stabbing. Now this conversation at the Louisbourg Town Hall, you said that your mother was there, your probation officer was there, Wayne Magee was there. He was then the Chief of Police of Louisbourg. Is that correct?

20) A. Yes.

Q. Yes. The two policemen whose names you don't know, do you know what police department they were from?

A. City.

Q. They were City -- Sydney City Police Detectives, weren't they?

A. I would imagine.

30) Q. And isn't it fair to say that what they were trying to tell or what they told you at the time was they communicated to you the seriousness of telling lies about what you had seen? They were after your true statement, weren't they?

A. They were after the truth.

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Q. Yes, there's no question about that. They were after the truth, right?

A. Yes.

Q. And so you gave them that second statement. You stuck to that at the preliminary inquiry and then

--

A. Yes.

10) Q. -- at the trial, do you recall the sequence of events at the trial?

A. Not really.

Q. Do you recall that you were declared a hostile witness?

A. Yes.

Q. And your preliminary inquiry was put to you?

A. Yes.

Q. The part that I just read?

A. Yes, yes.

Q. Right. So --

20) THE COURT:

Excuse me, Mr. Edwards. You referred to the first statement, the one on May 30th. I think you suggested to the witness that in it he said he didn't see anything. I think you'd better clarify --

MR. EDWARDS:

Yes, a point well taken, My Lord.

THE COURT:

-- just what he did say there.

MR. EDWARDS:

Yes.

30) BY MR. EDWARDS:

Q. I'll just read you from your statement of May 30th, 1971, which is attached as exhibit "B" to the affidavit you swore on July 14th, 1982, Mr. Chant.

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Friday night I was in town and I left the bus terminal on Bentinck Street about 11:40 p.m. I walked down Bentinck Street. I came over Byng Avenue and started to cross the tracks. I got half way across the tracks - first I seen two fellows walking and two more were walking kind of slow talking. The two fellows who stabbed Donald Marshall and Sandy Seale - they talked for a few minutes over on Crescent Street. One fellow hauled a knife from his pocket and he stabbed one of the fellow - so I took off back across the tracks to Byng Avenue....

So in fact in your first statement, you were saying that you saw someone other than Donald Marshall do the stabbing. Right?

A. Is this referring to the statement that I had given at the police station, the first?

Q. Yes. Would you like to look at it?

A. I don't recall saying anything like that.

Q. Perhaps I should show it to you, then.

A. Okay, yeh.

Q. You recognize that statement?

A. Yes.

Q. And that is the one you gave on the night of the stabbing to the police?

A. Yes.

Q. Yes, so just to clarify and I'm sorry I misdirected you before, --

A. That's okay.

Q. -- but you said at that time you saw someone other than Donald Marshall do the stabbing?

A. The story that I had given at that time was one that I had gathered from what Donald had told me or Donald had explained to me when I had met him what happened and that's where I got that story at.

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Q. I see so when you gave that statement, you were repeating what Donald Marshall had told you?

A. Yes.

Q. But you didn't say that in the statement, did you?

A. No, sir.

Q. And then on June 4th, that's when you gave this statement which is attached as exhibit "C" to your affidavit, and on page two of that statement, you were asked:

Could you hear what they were talking about?

A. No. I just...

...I just heard a mumbling or swearing. I think Marshall was the one who was doing doing most of the swearing. Then I seen Marshall haul a knife from his pocket and jab the other fellow with it in the side of the stomach.

Do you recall saying that in your second statement at the Louisbourg Town Hall on June 4th?

A. I don't recall saying it at Louisbourg. I recall saying it at the trial. A lot of it has slipped away from me.

Q. I'll show you exhibit "C" on your affidavit, page two, the second question on the page.

A. Still, I don't remember saying -- giving that statement. Not that particular -- not --

BY THE COURT:

Q. I'm sorry, would you speak up please?

A. Oh, I'm sorry. I -- I don't remember saying that. I don't know why.

BY MR. EDWARDS:

Q. Okay, but you do remember giving a statement on June 4th at the Louisbourg Town Hall?

A. Yes.

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Q. And you do remember that in that statement you said that Donald Marshall did the stabbing. You remember that much?

A. Oh, yes.

Q. So are you denying that this is the statement or are you simply saying that you just don't remember whether this is --

10) A. Oh, I don't deny that that isn't the statement. I'm just saying that I --

Q. You don't recall --

A. Yeh.

Q. -- those exact words?

A. Yeh.

Q. So just to conclude, Mr. Chant, would it be fair to say that when you gave that statement on June 4th and when you testified as you did on the preliminary inquiry and then the trial, that you were doing it because you thought it was the right thing to do?

10) A. I knew what I was saying wasn't right. I don't know why I said it, probably because I was scared. I don't -- I don't know what to say. Excuse me.

Q. You can't go beyond that. Thank you, Mr. Chant.

MR. ARONSON:

Nothing arising out of that, My Lord.

THE COURT:

I'd like to ask a couple of questions, please.

BY THE COURT:

30) Q. In your first statement of May 30th, 1971, you were asked:

Did you know Donald Marshall?

And your answer:

I knew him to see him.

• That isn't what you said today. Today you've said you

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didn't know, if I understood your evidence earlier.

A. Yeh, I didn't know either Seale or Donald.

Q. But you did know Donald Marshall to see him at that time.

A. I used to do a lot of hanging around in Sydney. I used to --

Q. So you -- I'm just asking about your statement there that you said that you knew him to see him.

A. I knew of them but I didn't know them. I knew the Marshall -- I used to -- well, --

Q. The statement of May 30th which you made to the police, not the one in Louisbourg but the one before that which Mr. Edwards has just read to you, that is not -- you say that is not a true statement?

A. It's -- it's true -- well, it's true up until the part where I had said that I had witnessed the stabbing of another man stabbing Seale.

Q. It was not true there. Why did you not tell the truth to the police at that time?

A. Well, I was -- I told them what Donald was telling me about what had happened. I don't know. I was -- I guess I was sort of scared then. Donald came out of -- when Donald came out of the questioning room, I guess, he -- he come over to me and he sort of -- I shouldn't -- yeh, I guess he was mad and he said: "There was two of them, wasn't there?" I didn't know what to say so I said yes. When he had said there was two of them, that's the reason why I give the statement that he had told me when we met up with one another on Byng Avenue.

Q. But in that statement, you didn't say that that was what Donald Marshall told you. You said it was what you saw?

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A. Yes.

Q. That was not true?

A. Yes, sir.

Q. What did you see that night when you were in the park?

(10) A. The only thing that I did see -- I didn't see nothing pertaining to the murder, the actual murder. The only thing that I seen was Donald, when I met Donald on Byng Avenue. We went over. He -- me and him both tried to help Seale, get to the or get an ambulance for him. That was all I seen, Your Honour.

THE COURT:

Any questions arising out of that?

MR. ARONSON:

Nothing arising out of that, My Lord.

(WITNESS WITHDREW)

(20) COURT RECESSED: 12:32 p.m.

COURT RECONVENED: 2:00 p.m.

MR. ARONSON:

I believe the next witness is Gregory Ebsary.

(30)

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GREGORY ALLAN EBSARY, being called and duly sworn, testified as follows:

BY MR. ARONSON: Direct Examination

Q. Would you state your full name to the Court?

A. My name is Gregory Allan Ebsary.

Q. And what do you do, Mr. Ebsary?

A. Currently I'm employed as a taxi driver in the City of Sydney.

Q. How long have you been doing that kind of work?

A. Just a couple of months.

Q. And how old are you?

A. I'm twenty-eight years old.

Q. And when were you born?

A. 1953.

Q. What's the last grade in school that you completed?

A. I completed grade twelve in Sydney Academy.

Q. And did you have any subsequent education after that?

A. No, sir, I did not.

Q. And are you married?

A. Yes, I am. I'm married and I have two children.

Q. Where do you presently live?

A. I reside at 46 Mechanic Street in Sydney.

Q. And how long have you resided at that particular address?

A. Nine years.

Q. And prior to that residence, prior to your present residence, where did you live?

A. We lived at 126 Rear Argyle Street, Sydney.

Q. When did you move from Rear Argyle Street? Can you recall the year you moved from Rear Argyle Street to Mechanic Street?

A. I'm pretty sure it was in the middle of 1973.

Q. Now with respect to your residence at Rear Argyle, can

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you say how far that is from Wentworth Park?

A. On Rear Argyle Street?

Q. Yes.

A. In terms of mileage or in terms of walking distance or?

Q. Walking distance.

A. Three minutes, maybe.

Q. Who was living with you on Rear Argyle Street?

A. On Rear Argyle Street, it would have been my sister, Don; my mother and my father and myself.

Q. And what is your father's name?

A. My father's name is Roy.

Q. Are you able to recall what he looked like in 1971?

A. Well he was -- height-wise, he was about five foot three. He was -- he had white hair. He wore his -- he had a little mustache, a little goatee beard.

Q. Did he -- can you say how old he is at present?

A. He's seventy years old as of June 2nd past.

Q. Can you say whether or not he had any particular mode or manner of dressing in 1971?

A. He always dressed if he was going out some place, he always liked to dress up kind of fancy. He'd come home from work and change his clothes and when he did, he'd wear dark, dark pants, he'd wear a white nylon shirt, t-shirt underneath and he'd wear a white silk scarf around his neck and flipped over once like an ascot and then he'd wear a blazer, something like the one I'm wearing and then he'd wear a top coat, probably a blue Burberry or a blue reversible top coat and he'd just have that put over his shoulders. That's pretty well the way he always dressed.

Q. Is your father presently living with you?

A. No, my father hasn't been living with me since 1979.

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Q. Is there any particular reason why your father's not living with you?

A. Well he started -- he started drinking again in 1979 and we -- for a few other reasons besides, we saw fit to ask him to move out.

Q. What do you say as to whether your father had any particular hobbies or interests in 1971?

10) A. My father's biggest hobby was to see how much alcohol he could consume and how many taverns he could visit. That was his biggest hobby.

THE COURT:

What are you asking? Ask him the direct question on this.

MR. ARONSON:

I'm sorry?

THE COURT:

You are leading up to something. Go ahead and ask him the direction question.

20) MR. ARONSON:

I was going to ask him if he had any other hobbies or interests aside from drinking. That was going to be my next question, My Lord.

THE COURT:

Well ask him about the knives.

MR. ARONSON:

Well I think we are just about to get into that.

THE COURT:

Well how about doing it.

30) BY MR. ARONSON:

Q. What can you say as to whether or not your father had any particular interest in knives?

A. My father had a special interest in sharp instruments, especially knives. He'd use them for screw drivers.
He'd use them for -- if he had to cut kindlings, he'd

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use a knife to cut kindlings with; and around that time, he started making sword canes. He started taking any knife he could find and sharpening both sides of it down to a point. Like a butter knife which would usually be rounded and sharp -- only -- not even sharp, he'd take it and he'd put it on the wet stone like that and he'd make it down into like a stelletto kind of --

0) Q. And did he have any particular use that he put these knives to?

A. He used them for everything. He had -- like I said, he made sword canes with them. That is, he'd have a walking stick and he'd hollow it out and he'd make the knife into a kind of a handle for it and then the blade, of course, would go down inside the sword cane. Like I said, he used knives for everything. Anything he had to do. He used them for letter openers, paper weights, anything. It was a knife or like that.

0) Q. What can you say as to the source of these knives generally?

A. The source of the knives, they were kitchen knives. They were all kitchen knives that he had. Some of them he obtained them from the Isle Royale Hotel where he worked. They were discarded meat cutting knives and stuff and he'd bring them -- he'd bring those home and the rest of them were just regular kitchen knives that you'd buy at the local hardware store or whatever. He'd just take them out of the drawer and he'd sharpen them and put them back in the drawer like that.

0) Q. I'd like to show you something --

BY THE COURT:

Q. What was his occupation at that time?

A. He was a cook at the Isle Royale Hotel, sir.

BY MR. ARONSON:

- 10) Q. I was to lay before you a group of ten knives, I believe, marked exhibits R-4a to R-4j.
- A. Okay.
- Q. What can you say as to your knowledge of those particular items?
- A. All these knives at one time or other belonged to us as a family. They belonged in our home. These ones here for instance with the copper handles on them, these were bone-handled steak knives before he decided to take the handles off them and put the copper on them.
- Q. Now what -- now this last description of your accounting take in which of these knives? Can you say?
- A. Which ones, the steak knives?
- Q. Yes.
- 20) A. All right, the steak knives were these ones that I'm saying here with the copper handles. Okay, that would take in to account four of these knives here, the serrated edged ones. These two here --
- Q. Now which?
- A. These two larger ones.
- Q. Those would be, if I could for the record, say exhibit R-4e and exhibit r-4f.
- 30) A. Okay, these are two knives that he -- I'm pretty sure he got these at the Isle Royale Hotel. They were discarded kitchen knives at the hotel and he took those home so that's where they came from and that's how we came into possession of them. These two here, this one for sure, now this one here was just a regular table knife, like a butter knife, something you'd use to butter your bread with.
- Q. And would I be correct in saying you're referring to

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exhibit R-4c?

(10) A. I believe you would. That's right and the same with this one here. That would just be a knife that you'd use to butter your bread with. Now he took those and these are the ones that I was saying before that he started sharpening both sides because there's an edge -- there's an edge on either side of that and it's sharpened down to a point and before this knife -- this knife had a round point -- not a round point but it had a round edge on it so that it wasn't sharp.

BY THE COURT:

Q. That's exhibit number what?

A. This is R-4i. And the same with this one here, it was -- it had a round end on it and he took it and he sharpened it on both sides and he sharpened it down to a point.

(20) Q. Now you're speaking of exhibit R-4c. Is that correct?

A. This is R-4c, yes. And this one here and this one here, they're just two bread knives that were -- that were in the drawer.

Q. And the last two you've referred to are exhibits R-4d?

A. This is d and that's b. Those are just two bread knives.

Q. Now how long can you say that you had been familiar with those particular knives?

(30) A. Well those knives were in the house on Argyle Street for sure because I know that because I moved these knives from Argyle Street up to Mechanic Street when we moved in 1973, so they were in the house prior -- quite a while prior to 1973. They were there for -- for as long as I can remember.

Q. How far back can you remember those knives?

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A. Well those two there, the two that he brought home from the hotel, I couldn't be specific on those but these were in the house. These are -- these are easily --

Q. Would you refer to the exhibit numbers?

A. Okay. This R-4d and R-4b, these are about maybe twenty years old and these, this would be the first set of knives that they had, steak knives, which would make these at least fifteen years old and this R-4j, h, g, and a, so those are about fifteen years old and these are butter knives. They might have had these before I was born but they've been in the house that long because they were there since I can remember and that's R-4i and R-4c.

Q. Can you say over the period of time that you've been familiar with these knives where they were located prior to your moving to Mechanic Street?

A. Okay. Most of the time -- there were six of these --

Q. Now which ones are you referring --

A. The ones that are indicated by R-4c and R-4i, there were at least six of these and over the period of years a few of them have become misplaced. I have -- I have maybe two of these at home as well right now. When we moved -- 1973 when we moved, before that, they were -- some of them were in the drawer and a couple of them he, Mr. Ebsary, had upstairs for letter openers and paper weights and the rest of them were in the kitchen drawer on Argyle Street. Now after 1973 when we packed up, everything was packed in boxes and I moved it to our new residence on Mechanic Street where they went into the kitchen drawer --

Q. Before you bring it up, when you say you packed up and moved, what are you referring to when you say you packed

up and moved?

A. Well we packed up everything.

Q. Yeh.

(10) A. We moved all our furniture and then we took all the kitchen utensils and then we moved like room by room. We moved everything out of the kitchen first and then like everything out of the front room, like that, so a couple of these knives came out of different boxes when we got down to Mechanic Street. We found a couple of those knives come out of different boxes because he had, like I say he had some of them for letter openers and more of them were in the kitchen.

Q. Now prior to your move to Mechanic Street, what can you say as to whether persons other than your father had access to or made use of those knives?

(20) A. Okay, most of these knives, anybody that came into the house could have had access to them. They were only in the kitchen drawer, the same as any kitchen drawer. You open the drawer and you want a knife to butter your bread or whatever, you just take the knives out of the drawer so if anybody could have had access to them.

Q. Now specifically with respect to exhibit, I believe, it's R-4i, what can you say as to the use of that particular knife prior to your moving to Mechanic Street?

(30) A. I don't -- I really -- I really don't know what to say. It could have been -- it could have been one of the ones he used as a letter opener because these are the ones he had sharpened for himself, these two, like c and i. He had those sharpened for letter openers and whatever so more than likely I'd have to say that maybe those two were upstairs in his bedroom and he used them for letter openers or whatever.

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Q. With respect again to exhibit R-4i, what can you say as to whether or not there have been any changes in the condition of the knife over the period of time with which you've been familiar with?

A. Well besides having the handles replaced, the -- it's kind of a little more raggedy now than when I -- when I saw it the last time.

10) Q. You referred to the handles being replaced, what can you tell us about that?

A. Okay, this one here with the handle on it, he took these and he put --

Q. Which one are you referring to?

A. All right, this one here is exhibit R-4i. He took this one and after he sharpened it, he put these -- well I don't even know what to call it; they're a plastic. I call it holes I guess but he put that on and you can't see it I guess but it's cut down there where he put it on and he put this tape around the handle of it. I guess he thought he was decorating it or something but he put this tape on it to keep the handle in tact so that it wouldn't fall off. But before like there was a handle on that, so like that's the only changes. He changed the handles and sharpened them.

Q. Are you able to say when that particular change took place?

A. No, I'm sorry, I'm not.

30) Q. Would you remember that knife in that condition over what period of time?

A. I'm sorry?

Q. Over what period of time do you remember that particular exhibit in the condition as you see it today?

A. As I see it today, it's like that -- it's like that at

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least ten years. At least ten years, longer perhaps.

Q. Do you recall the Seale murder in Sydney in 1971?

A. Certainly, yes, I do.

Q. Subsequent or after the time of the Seale murder, did you have any involvement with the Sydney City Police concerning that particular knife?

A. After the murder I was called in and asked -- I was questioned by John MacIntyre.

Q. Concerning what?

A. He wanted to know if I had overheard my parents talking about the murder and I did not and he wanted to know if I thought my father had done it and I couldn't tell him if I -- I didn't think he had but just questions in that line.

Q. I see. Can you recall when you became involved with the police?

A. I would have to say I'm pretty sure it would be around November, I think.

Q. And in what year?

A. 1971, I guess. 1971.

Q. Can you say whether anyone -- whether any other members of your family were involved in the police investigation?

THE COURT:

You can't get into that, can you?

BY MR. ARONSON:

Q. What can you say as to your father's potential for violent behaviour?

A. My father was an alcoholic and a bad one and in a state of -- if he'd get a few drinks in him, anything that came into his mind and do it, he'd do it. He was a very violent person. If he had an argument with me or one of the members of the family, he'd beat the furniture up with a hatchet or something like that or

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throw things around. I remember one particular incident and I think my sister repeated that yesterday where the bird was singing in the kitchen and he didn't like it and he just -- he tore the head off the bird and anything that crossed his path that he didn't like it, he would -- he would take the violent approach to having it stopped.

10) MR. ARONSON:

I haven't got any further questions of this witness, My Lord.

BY MR. EDWARDS: Cross-Examination

Q. Mr. Ebsary, do you know whether or not your father was in the habit of carrying knives on his person?

A. My father carried knives constantly.

Q. How do you know that?

A. Because the man is my father. I see what he does every day. The man carries those sticks with them all the time, those walking sticks?

20) Q. Yes.

A. They all have knives in them. He has knives in his pocket. He has knives in his belt -- in his belt like a dagger would be. Constantly.

Q. And did he have that habit around the time of the stabbing in 1971?

A. He carried -- he carried knives constantly at that time.

Q. Did you see him before he left the house on that particular day?

A. No, sir, I did not.

30) Q. Did you see him at all on that day?

A. I did not.

Q. Where were you that day, Mr. Ebsary?

A. I was -- a friend of mine was building a home and I was with him. We were putting up some gyproc so I wasn't home all that day and I wasn't home when he

came home either.

Q. You're referring to when he came home that night?

A. I am.

Q. Did you -- did you know James MacNeil?

A. I was familiar with James because he came around with my father a few times at the house and they were drinking. That's how I -- I knew him to see him kind of thing but I wasn't friendly with any of my father's drinking partners.

Q. Did you see him at the house at any -- around the time of the stabbing, a few days before or a few days after?

A. He was at the house a few times, yes, before the stabbing.

Q. How -- how long before the stabbing?

A. I really couldn't say. A couple of days perhaps.

Q. What about after the stabbing?

A. I remember he was there the day after the stabbing and I don't really recall after that.

Q. James MacNeil testified in this Court that he had told you what had happened in the park on the night in question. Is that correct?

A. I don't recall that.

Q. You don't recall?

A. I don't recall him telling me what happened in the park.

Q. Is it possible that he could have?

A. He could have but if he did, I certainly don't recall it.

Q. I see. Okay. My learned friend asked you several questions about the knives and you gave evidence about the changing of the handles and the knives by your father?

A. That's right.

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Q. Did you actually see him change the handles on the knives?

10) A. He'd be doing that in the kitchen. That's -- this became a common occurrence with him that if the knife was in the drawer; one of these knives here was in the drawer and he decided he wanted to change the handle on it, he'd just do it. There was no other -- there was no work shop in our home so if he decided to do it, he'd just -- he'd just take it out and do it.

Q. And you were actually present on some of those occasions where --

A. I saw him change the handles on these for instance.

Q. Now you're referring to what knives now?

A. I'm referring to exhibit R-4h and that series of knives. I saw him change the handles on those for instance.

20) Q. What about the knife, R-4i, the one with the rubber hose on it? Did you see him change that one?

A. No, I didn't see him change it but he changed it.

Q. You're assuming that he changed it.

A. No, sir, I'm not assuming. I know he changed it.

Q. Well you didn't see him. You didn't see him actually change it, did you?

A. No, sir, indeed I didn't.

Q. No. Were any of those knives particular favourites of his?

30) A. The smaller ones. Like I said this R-4c and even these ones here, R-4h and like that, he liked those because they'd fit right into his pocket.

Q. Now again you're making assumptions. He never -- he never told you that he liked those because they fit --

A. Well he never come out and said -- he never come out and

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said: "Well, Greg," he said, "I like this one because it'll fit into my pocket.", sir.

Q. Of course. Now you mentioned that most of those knives were kept in a drawer in the kitchen?

A. That's right.

Q. That's on Argyle Street?

A. That's right.

(10) Q. But you've mentioned a couple that he would have kept up in his room with him.

A. That's right.

Q. Which were they again, Mr. Ebsary, please?

A. I'd say that they were R-4c and R-4i and as well there's a couple of more of these in my Mechanic Street residence now.

Q. Yes.

A. The same ones with the plastic handles on them.

(20) Q. Okay. Now at the time of the move from Argyle Street to Mechanic's Street, you say that you moved them.
Yes.

Q. You moved the knives?

A. Yes, I moved them, yeh.

Q. Yeh. Who --

A. I moved them all.

Q. -- actually packed the knives?

(30) A. Well I'm sure you're familiar with moving. Anybody that's in the house would pack something. The -- Mr. Ebsary would be upstairs in his bedroom. He'd pack what was in his room. My mother packed her stuff and I packed mine and Donna packed hers but I moved it all.

Q. Specifically with relation to the knives, Mr. Ebsary, did anyone person pack the knives or were they packed by various individuals?

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A. Anything that was in the kitchen, my mother would have packed it. Any knives that were upstairs --

Q. Did --

A. Yes.

Q. All right, did you see your mother pack any of those knives?

A. I saw her packing in the kitchen and my father did not pack in the kitchen.

Q. All right, do you recall when you moved the knives from Argyle Street to Mechanic Street? Were all those knives in one container or were they in --

A. No, sir, they were not.

Q. They were in various containers.

A. The ones that came out of the kitchen would be in a box marked "kitchen" stuff. Anything that was in the upper bedrooms would be marked "bedroom", like.

Q. Okay, so when you get the knives over to Mechanic Street, what happened to them then?

A. Okay, most of these knives with the exception of the ones with the green handles and maybe one of these, the green handled ones and R-4c, R-4i, and a couple of these, I don't know which ones, --

Q. All right, you're referring to what?

A. R-4j; R-4h. Pick your choice on those. Most of them went in the kitchen drawer because that was the utensils that they used to eat with.

Q. Where did the other knives go?

A. All right, the ones that were marked in his bedroom would have gone upstairs to his room. Anything that was in the box marked for him would have gone up there.

Q. All right, so at some point after the time you moved to Mechanic Street, did you or anyone in your presence collect all the knives?

A. Yes. After the move to Mechanic Street and -- some time thereafter, after the old man moved out --

Q. This would have been in 1979?

A. This would have been in 1979. The ones with the green handles, that's R-4i and R-4c, anything -- any other knives that were up in his room, there were a few of them. I can't say which ones, but there was a few with the green handles and there was a few with the copper handles, like R-4j, were in that room. They were taken downstairs.

Q. By whom?

A. By me. I did all the moving.

Q. Yes.

A. And they were put into a drawer in the dining room where they used to put all the old kitchen utensils and before that, I had collected a bunch of these copper handled ones and a few of these rubber handled ones. And I had moved those along with the bread knives and those two knives there.

Q. Which are marked as?

A. They're marked R-4f and R-4e. I have moved them into the drawer in the dining room because they had got some new knives and stuff and we just took all the old stuff and we put it in there.

Q. All right, so all the knives then were put in a drawer in the dining room some time in '79?

A. Some time in '79. That would be around the time that the old man moved out and my wife and myself moved back in because we had kitchen utensils of our own and they were all newer so and none of them had those kind of handles on them. So we put all our stuff in the kitchen drawer and we moved all the old stuff into the dining room drawer.

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Q. Now how long did all the knives remain in the dining drawer?

A. I can't really say for sure. A year perhaps, maybe longer, maybe a little less.

Q. That's not where they were when you turned the knives over to Staff-Sergeant Wheaton.

A. No, sir.

(10) THE COURT:

He hasn't said anything about that yet.

MR. EDWARDS:

No, My Lord.

BY THE WITNESS:

(20) A. I took the knives from that drawer and we were cleaning out all the old stuff and we were putting a lot of it in the garbage. I had those knives and I had them ear-marked for going to the dump but only that they're sharp and I wouldn't put them in the garbage. I put them in a peach basket and I put them down up above my work bench in the basement. That's where they stayed until Mr. Wheaton came.

BY MR. EDWARDS:

Q. All right, now let's try to get the time frame. When would you have put the knives in the peach basket and put them in the cellar?

A. I'd have to say some time between maybe 1981 and when Mr. Wheaton came to the house.

Q. And when was that?

(30) A. Oh, I'm not really sure. October of last year, I guess, or something like that. I'm not sure.

Q. Would it have been in April of this year?

A. It could have been. I'm not sure.

Q. But in any event until the time that Staff-Sergeant Wheaton took possession of the knives, they were in the

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peach basket --

A. In the peach basket up above my work bench in the rafters.

Q. And the peach basket and the knives were turned over to Staff-Sergeant Wheaton at the same time --

A. Yes, sir.

Q. -- or separately?

(10) A. I took the peach basket -- it was up above the bench and I took it down. He was asking about if there was any knives around --

Q. Well I don't want to get into what he was asking you.

A. Okay, I gave him the peach basket and the knives at the same time.

Q. Thank you, Mr. Ebsary.

MR. ARONSON:

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

(20)

(WITNESS WITHDREW)

MR. ARONSON:

The next witness is A. J. Evers.

Before I ask this witness any questions, I'd like to indicate that I propose to tender Mr. Evers as an expert in the science of hair and fibre comparison and with the ability to provide an opinion on that particular subject.

(30)

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ADOLPHUS JAMES EVERS, being called and duly sworn, testified as follow:

BY MR. ARONSON: Direct Examination

Q. What's your name, sir?

A. Adolphus James Evers.

THE COURT:

Was he not qualified at the trial?

MR. ARONSON:

He was qualified at the trial. If it has to be done again, I'm prepared to do it.

THE COURT:

Any objection from the Crown?

MR. EDWARDS:

Well, My Lord, I submit for the record since the evidence he's giving now has to do with the tests that he performed both then and now, perhaps we should hear something.

THE COURT:

If he was qualified before, there would be no need to hear --

MR. EDWARDS:

I submit it would be helpful just to hear something of his qualifications. I'm not going to oppose it --

THE COURT: (Justice Hart)

Are they not in the record already?

MR. EDWARDS:

Pardon me?

THE COURT: (Justice Hart)

Are they not in the record?

MR. ARONSON:

They are in the 1971 record.

MR. EDWARDS:

Yes, but he's far more experienced now and perhaps we could bring that out.

THE COURT:

Are you challenging him or are you trying to support him?

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MR. EDWARDS:

No, My Lord, I'd just like to hear about his experience since.

MR. ARONSON:

I tender him as an expert witness, My Lord.

THE COURT:

I beg your pardon?

MR. ARONSON:

(10) I tender him as an expert witness.

MR. EDWARDS:

No objection.

THE COURT:

All right.

BY MR. ARONSON:

Q. Could you state your name, sir?

A. Adolphus James Evers. Surname spelled E-v-e-r-s.

Q. And what is your present occupation?

(20) A. I am in charge of the Hair and Fibre Section at the R.C.M.P. Crime Detection Laboratory, Sackville, New Brunswick,

Q. Now did you testify at the trial of Donald Marshall, Jr., in November of 1971?

A. I did.

Q. Can you recall the general nature of the testimony you were asked to give?

A. I examined two articles of clothing, one a jacket and one a coat, for the presence of any separations being fresh cuts or tears.

(30) THE COURT:

Could you -- I would suggest you tie them in with the exhibits that were --

MR. ARONSON:

I had just intended to do that.

BY MR. ARONSON:

Q. Do you know the exhibit numbers, whether those items

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were introduced as exhibits in 1971?

A. I know they were introduced as exhibits. I do not know the exhibit number.

Q. Can you describe just very briefly the two particular items that you've indicated you examined?

A. Yes. The first article was a brown coat, wool. It had a brown belt present. It also had a white pile lining. The second article was a yellow nylon jacket. It had a white lining and white trim.

Q. I see.

MR. ARONSON:

I believe, My Lord, that the brown coat that's being referred to by the witness was exhibit number four at the 1971 trial of Donald Marshall, Jr. The yellow jacket was exhibit number three at the 1971 trial of Donald Marshall.

THE COURT:

That was shown -- that's in the transcript.

MR. EDWARDS:

The Crown is prepared to admit that.

BY MR. ARONSON:

Q. Do you know the whereabouts of those particular items now?

A. No, I do not.

Q. Now you had occasion to examine the two exhibits you've referred to?

A. Yes, I did. I examined the brown coat for the presence of any fresh appearing cuts or tears. I found one cut present on the brown coat. It was on the left salvaged edge approximately five and one half inches from the bottom. The cut was two and three-quarter inches in length on the front of the coat. The cut continued through the inner lining, interfacing, and into the salvaged edge on the back. The opening on the back was

approximately thirteen-sixteenths of an inch in length.

Q. I'd like to show you one exhibit if I might. Would you take a look at exhibit number R-4i?

A. I identify court exhibit R-4i by my initials, date and case number appearing on the knife and on the red laboratory tag.

Q. Have you ever seen that particular exhibit before?

(10) A. Yes, I received this from Mr. MacAlpine of the Serology Section in Halifax on the 17th of March, 1982. I examined the article and returned it to Mr. MacAlpine on the 18th of March, 1982.

Q. Do you have an opinion as to whether that particular exhibit, R-4i, was capable in terms of blade size of causing the cut that you've referred to in the brown jacket, exhibit number four of the 1971 trial?

(20) A. I cannot state that this particular knife caused the cut present in the brown jacket. I did examine the dimensions of this knife. The depth which I termed the depth of the knife was two centimeters in length. This equates to approximately thirteen-sixteenths of an inch in length and the cut present in the coat was caused by a sharp object.

Q. Okay. Now you've also indicated you examined a yellow jacket, I believe?

A. I did.

Q. And what can you say concerning the condition of the yellow jacket or your observations concerning the condition of the yellow jacket?

(30) A. The yellow jacket had several separations. The separations were on the left arm, on the -- what I term the inside surface. That is that they were away from the wear on the elbow side. There was one separation approximately one inch in length. It was

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a cut and it was fresh in appearance. Directly below this was a second separation which again continued through the shell and into the lining, through the lining. This separation was eight inches in length, six and one half inches being a fresh-appearing cut, one and one half inches being a tear. This cut or -- and tear was very irregular; that is that it was not one smooth stroke but made up of a number of irregular strokes. Also present on the jacket were four superficial cuts. These were next to the two separations. They did not continue through the lining or the shell.

(10) Q. Do you have any opinion as to what caused those types of cuts you've just described on the yellow jacket?

A. I cannot say what caused the cuts. I can state that -- that they are cuts, that they are fresh or were fresh in appearance and that they were not one stroke. This was because of the irregular cut, the tearing, and also the second cut above the long one.

(20) Q. Now subsequent to your receiving these exhibits; that is to say, exhibits number three and number four of the 1971 trial, did you have occasion to take any samples?

A. I did.

Q. And did you bring those samples to Court today?

A. Yes, I do.

MR. ARONSON:

(30) If it please the Court, it's not necessary if he could speak of what he compared with respect to his opinion. He's going to be able to compare or discuss the comparison between certain objects and certain fibres and other fibres. The exhibits or the slides that I've spoken of could be introduced as exhibits and I'm wondering whether that would be required to show what he compared them to. They would be of no use to look at or to see.

THE COURT:

Oh, yes, of course.

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BY MR. ARONSON:

Q. What form did the samples take that you took from those items?

A. The samples from the brown coat. I had no knife or any other article to compare the fibres to. I simply removed a small tuft of fibre from the outer brown area of the coat and from the interfacing or interlining of the coat. I put these on a slide simply to determine what type of fibre they were. No other means. So that the standard is very limited.

Q. May I have the slides?

A. The sample from the yellow coat, I simply cut a small swatch out of the jacket. I noted that it was next to my initials, where it was from on the jacket.

THE COURT:

Is he producing the sample?

MR. ARONSON:

Yes, he is producing the sample.

BY MR. ARONSON:

Q. And you're saying this particular sample or the last sample you spoke of comes from the yellow jacket which you examined?

A. It did, yes.

MR. ARONSON:

If I could introduce these as exhibits?

THE COURT: (Justice Hart)

You should have it marked, yes.

BY MR. ARONSON:

Q. Now what can you say as to exhibit number R-6? Can you tell us what that is?

A. R-6 is the small swatch of material I removed from the yellow jacket which was given to me on the 16th of June, 1971.

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Q. Can you tell us what exhibit R-7a is?

A. R-7a is a small sample of the interfacing or pellow of the brown coat which I received on June the 16th, 1971.

Q. And can you tell us what exhibit R-7b is?

A. R-7b is a small sample of the brown wool of the brown jacket I received on June the 16th, 1971.

Q. And what exhibit R-7c is?

A. R-7c is a small sample of the yellow jacket I removed on June the or I received on June the 16th, 1971.

Q. Is there any difference between the sample in exhibit R-7c and exhibit R-6?

A. R-7c would be a small amount of R-6 that I put on to a slide and examined.

Q. Now since you took the samples that you've last referred to, those four exhibits, where have these items been located since then?

A. They were in my possession.

Q. Until when?

A. Until today.

Q. In March of this year did you have occasion to examine any other items?

A. Yes, on March 17th, 1982, I received a total of ten knives. I examined these articles and returned them to Mr. MacAlpine on the 18th of March, 1982.

Q. I show you one more item which I would ask you to describe.

A. This appears to be a piece of black tape. I cannot identify it. The envelope on which I received the ten knives did contain a small piece of black tape.

Q. And what is this item I've passed you now?

A. I identify the envelope by my initials, date and case number. This is the envelope that contained the small

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piece of black tape as well as the ten knives which I received from Mr. MacAlpine.

Q. I see. Could I have those items marked?

THE COURT:

Mark these.

BY MR. ARONSON:

10) Q. So if I'm correct, the ten knives marked from exhibits 4 -- R-4a to R-4j, are they the same as the exhibits you -- that were contained in the envelope which has been introduced as an exhibit?

A. May I have a look at them?

Q. Go right ahead.

A. Yes, these are the ten knives which I examined on March 17th, 1982.

Q. How are you able to identify those as being the exhibits you examined?

20) A. All of the knives have red laboratory tags on them. I notice that a number of the knives have my initials, date and case number as well. I could -- I also note my initials, date and case number appearing on each of the knives as well.

Q. Now what did you do with the exhibits?

30) A. I examined the ten knives and the contents of the brown envelope for the presence of any fibres. I compared the fibres present to the small pieces of material I'd removed from the jackets in 1971. I examined the knives for the presence of any fibres consistent with the fibres present from the -- consistent with the fibres present on the slides and in the swatch from the brown and yellow jackets. I noted that the envelope contained two light brown wool fibres consistent with the brown jacket. The piece of tape present in the envelope contained two synthetic fibres consistent with the inner

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lining of the brown jacket. Knife number -- knife number one contained one synthetic fibre consistent with the inner lining of the brown jacket.

Q. Could you identify it by the exhibit numbers?

(10) A. R-4g. Exhibit R-4h contained one synthetic fibre consistent with the inner lining of the brown jacket. Exhibit R-4b contained four synthetic fibres consistent with the inner lining of the brown jacket. Exhibit R-4e contained two synthetic fibres consistent with the inner lining of the brown jacket. Court exhibit R-4f contained two synthetic fibres consistent with the inner lining of the brown jacket and Court exhibit R-4i contained eight synthetic fibres consistent with the inner lining of the brown jacket. Also from Court exhibit R-4i, I removed one light brown wool fibre consistent with the brown jacket and contained three light acetate fibres consistent with the lining of the yellow jacket which I received in 1971.

(20) Q. Did you make a written report of the results of your examination as you've just described?

A. I did.

Q. Could we tender that as an exhibit? Could we have it and tender it as an exhibit if that would be helpful to the Court?

A. It is my hand-written copy of which I have -- it is the only copy.

Q. All right. What other items did you examine?

(30) A. That is all of the articles which I examined. I did examine four knives which I found to be negative for the presence of any fibres.

Q. In terms of the tape, did you have occasion to examine that piece of tape marked exhibit number R-9?

A. I did examine a piece of black tape present in the

envelope. From the piece of black tape, I removed two synthetic fibres. These synthetic fibres were similar to the lining or inter-lining of the brown jacket which I received in 1971.

Q. Are you able to say where that particular piece of tape comes from, exhibit R-9?

A. I cannot.

(10) Q. When did you first see that particular exhibit?

A. It was loose in the envelope when I opened it.

Q. And the --

A. And the envelope was sealed.

Q. And the envelope you're referring to?

A. The envelope I'm referring to is Court exhibit R-8. From this envelope I removed two light-brown wool fibres consistent with the brown jacket I received in 1971.

Q. Did you examine any other items in March of this year?

(20) A. Yes, I did.

Q. And what was that item?

A. There was a basket, a wooden basket which I examined.

MR. ARONSON:

And my friend and I have just had a discussion. It was requested that I introduce that particular evidence without introducing the actual exhibit as it was not our intention to use that exhibit. We've agreed that it will be provided to the Court if necessary. Maybe my friend has something to say on that.

(30) MR. EDWARDS:

My Lords, just on the continuity aspect of it, counsel have agreed that the cardboard basket that he just referred to is the same cardboard basket containing the knives which was referred to in the evidence of Gregory Ebsary. The cardboard basket with the knives turned over to Staff Sergeant Wheaton

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who in turn forwarded it on separate occasions the knives and then the basket to Mr. Evers. So unfortunately the basket is still in Sydney but it is -- it is obviously relevant to the proceedings as I expect Mr. Evers will talk about some fibres he examined from the basket. So with the Court's permission, that will go on the record as agreed facts.

(10) BY MR. ARONSON:

Q. You've indicated you examined a cardboard basket. What were the results of your examination of the basket?

A. May I refer to my notes? They're --

Q. Please. The notes were taken at the time of the examination?

(20) A. Yes, they were. On the 26th of March, 1982, I received a cardboard basket from Constable Arsenault. I examined the basket for the presence of any fibres consistent with the brown coat or the yellow jacket. From the cardboard basket I removed four synthetic fibres consistent with the interlining or the interfacing of the brown coat. I then returned the basket by registered mail on April 6th, 1982.

Q. Now we're here speaking of fibres. In terms of size can you compare these fibres to any particular object that the average person might understand?

(30) A. The fibres which I removed from the knives, out of the envelope, and from the piece of tape were very minute. I had to use a stereo-microscope in order to see them. I also had to use a stereo-microscope in order to put them on the microscopic slide. The fibres ranged in length from approximately point three five millimeters which might be the thickness of your finger-nail to approximately four millimeters in length which

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is approaching a quarter of an inch. Once the fibres were put on to a slide, using the stereo-microscope, I then put them on to a compound comparison microscope which I could examine the internal features of the hair and do an identification.

10) Q. I see. Now based on your observations and comparisons, do you have an opinion as to whether one particular knife is more significant than any of the other knives in terms of the exhibits which are there today?

THE COURT:

No, no.

MR. ARONSON:

I think the question is a straight-forward question in terms of significance. He's already indicated the number of fibres that he found in each of the knives.

MR. EDWARDS:

20) I'd have to object to my learned friend's question. I don't think it's for the witness to comment on the significance. He can say what he saw and observed.

THE COURT:

How many fibres and what they were.

BY MR. ARONSON:

Q. Now do you have an opinion as to the relationship between the fibres found on the knife marked exhibit R-4i and the samples of fibre which are marked as the microscopic slides, three microscopic slides and the swatch of material?

30) A. The knife, Court exhibit R-4i, contained or had adhering to the handle -- the blade was free of fibres -- adhering to the handle twelve fibres which I found to be consistent with the two articles of clothing. The twelve fibres were made up of five fibre groups of which there was seven different types consistent with the two articles

of clothing, the brown coat and the yellow jacket.

Q. How strong is your opinion --

THE COURT: (Justice Macdonald)

Perhaps he might repeat that answer again just to make sure that I have it.

BY MR. ARONSON:

Q. Could you repeat your answer?

(10) THE COURT: (Justice Macdonald)

Just as to what the knife contained.

BY MR. ARONSON:

Q. What did the knife contain?

A. The knife contained twelve fibres which I found to be consistent with the fibres composing the brown coat and the yellow jacket. The twelve fibres were made up of five fibre groups; that is, wool, acetate, viscose, acrylic and polyester. There were seven types of fibres; that is that there were two types of polyester or two types of acrylic. And I found the five groups and the seven types present in the jacket and the brown coat.

(20) BY THE COURT:

Q. How many in each?

A. Three -- three acetate fibres from the knife were consistent with the yellow jacket, nine fibres were consistent with the brown coat.

BY MR. ARONSON:

Q. And can you say what your opinion is as to the relationship between the fibres you've referred to which you located on the exhibit R-4i and the fibre samples which you compared the former fibres to?

(30) A. The relationship were that they were a similar type of fibre.

MR. ARONSON:

I have no further questions.

THE COURT:

Mr. Edwards.

MR. EDWARDS:

Thank you very much, My Lord.

BY MR. EDWARDS: Cross-Examination

10) Q. Mr. Evers, I don't want to labour this but I'm not sure that I followed you all the way on your breakdown of the fibres that were on R-4i. Now there were twelve fibres on that knife altogether, right?

A. There were more than twelve fibres on the knife.

Q. I see.

A. There were twelve fibres which I found to be consistent with the articles of clothing.

Q. With the brown jacket and the yellow jacket?

A. That is correct.

Q. The other fibres, they -- no relationship at all?

20) A. I -- I should state that the samples which I am using as standards are not the usual standard that I would com -- use in ordinary laboratory practices. For examine, if I were comparing fibres from a knife to articles of clothing, I would have that article of clothing to go back to and remove more standard. The standard which I am working with is very limited. It was taken simply because I wanted to see what type of fibre was present in the jackets. There was no requirement to take the standard. I cannot go back to the articles; for example, the brown coat and examine the
30) white pile lining or the sewing threads making up the coat so I'm working with a very limited standard. So that when you state there can be no relationship, there is no relationship at this point, no.

Q. No relationship as far as the standard you had to work with was concerned?

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A. That is correct.

Q. I see, so that would affect the weight of any opinion that you would be able to give --

A. Yes.

Q. -- on the consistency between the items involved. Is that correct?

A. Yes.

(10) Q. All right, now, just getting back to that breakdown again, I understood you to say that three of the twelve fibers were consistent with the fibres from the yellow jacket. Is that correct?

A. Yes.

Q. And the other nine consistent with the fibres from the brown jacket?

A. Yes.

Q. All right. Now where I'm having a bit of difficulty is with the five fibre groups of seven different types. Could you briefly just relate that to the nine and three?

(20) A. Yes, when one examines fibres, there are a large number of fibres produced. There are many types of fibres produced. The fibres which I examined off the knife were made up of five different groups, all different from each other. There were acrylic, viscose, polyester, wood and acetate fibres. I found all of these different groups present in the two articles of clothing.

Q. The five different types were present in each of the brown jacket and the yellow jacket?

(30) A. No. No, the acetate fibres were present in the yellow jacket in the lining. The wood, acrylic, viscose and polyester were present in the brown jacket.

Q. And notwithstanding the fact that you've had a small standard to work with, what can you say as to the likelihood that those fibres could have come from a source other

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than the brown jacket and the yellow jacket; that is, the fibres found on the knife?

A. I would say that the chances of them coming from another source would be fairly remote.

Q. Fairly remote. Can you be at all any more specific than that?

(10) A. I cannot put a probability or a number to it. In order for these fibres from Court exhibit R-4i to come from other sources; that is, contamination, other articles, I would think that it would be very, very remote.

That is they are not there because of contamination.

In order for them to come from another article, they would have to come from an article or two or three articles that were composed pretty well of the five groups that I've already identified. That is, they could have come from another source but that other source would have to be limited or sources would have to be limited to basically the five groups that I've identified.

(20) Q. When you mention the word "contamination", are you referring to the knives or the jacket?

A. The knives.

Q. The knives and what are you suggesting, that the knives were uncontaminated?

(30) A. Yes, the knives were virtually uncontaminated. For example, the knife, Court exhibit R-4i contained only two synthetic fibres which I was not able to associate with the two articles of clothing. Court exhibit numbers -- court exhibit numbers R-4d, R-4j, and R-4a contain no fibres whatsoever. There was -- there was very little contamination present on the knives and one would expect some contamination because a knife is usually wiped. Each time it is wiped one can leave

fibres, for example your white or your cotton tea towelling. I found very few fibres other than those that I could identify.

Q. You're not able to draw any conclusions or inferences because of the absence of contamination. That is not significant, is it?

A. Yes, I've just explained that because of the limited contamination present on the knives --

Q. Yes, I know that but the fact that the knives weren't -- weren't contaminated.

A. No.

Q. That's not unusual in itself?

A. No.

Q. Is R-4i the only one of the exhibits which has fibres consistent with the fibres in both jackets on it?

A. Yes.

Q. So the other items, the other knives that you examined and the basket, the fibres on such of those that had fibres are consistent with either the yellow coat or the brown coat?

A. No, the fibres on all of the knives, other than R-4i, the piece of tape and the envelope are all consistent with only one jacket, the brown wool jacket.

Q. I see. So R-4i is the only one that bears any relation whatever to the yellow jacket?

A. That is correct.

Q. The type of material involved here, do you remember having independent recollection of the types of coats, the style of the coat or the brand of the coats?

A. I did not note the brand of the coat. The yellow coat was a nylon coat which is very slippery. It was more like the shells that we wear today except that it had an inter-white acetate lining.

Q. Would it be fair to suggest that there was really nothing unusual about the coats themselves, that they were coats that were worn by many people of the age group of say Mr. Marshall and Mr. Seale at the time?

A. I would think, yes.

10) Q. Does that fact make you qualify your opinion in any way as to the probabilities of the sources of the fibres?

A. No.

Q. Why wouldn't that? Like if there were thousands of coats -- say for example if there were thousands of coats such as the one worn by Mr. Marshall and the same as the one worn by Mr. Seale, then wouldn't that decrease the probability that the fibres in question came from those specific jackets?

20) A. Not really. I have stated that the fibres present on for example the knife, R-4i, the chances of them coming from another article would be fairly remote. I did state that they could have come from another article or articles providing those articles were composed of fibres of the four or the five fibre groups. That's exactly a good example of where they could have come from. They could have come from another nylon yellow jacket with a white acetate lining. They could have come from another brown wool jacket with an inter -- with a pellow interfacing.

30) Q. Right. But that's -- that's my point. You can't say that they absolutely didn't come from another jacket of the same kind?

A. No, sir.

Q. But you stick to your opinion that that possibility is very remote?

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A. I didn't say very remote. I said the changes were fairly remote.

Q. Fairly remote. Thank you, Mr. Evers.

MR. EDWARDS:

No further questions, My Lord.

BY THE COURT:

(10) Q. Mr. Evers, you say fibres are consistent -- the fibres which you found were consistent with the samples that you had -- the fibres in the samples you had. Would you define what you mean by consistent?

A. My Lord, when I --

Q. In terms of probability and that sort of thing.

(20) A. When I state that a fibre is consistent, a layman may use the term identical. Since I am using a microscope at approximately four hundred magnification, I am dealing with the actual internal structure of the fibres. In order for a fibre to be identical, it would have to be identically the same in each and every respect. If you were to compare two cars, one may appear to be identical to another car but there has to be basically some small difference. Perhaps one may be dirtier than the other, it may have a small ding which you don't notice at first glance, perhaps the mirror is in a small -- is in a different place. One may say that the car is identical to the second car. I would say that the car is consistent or similar with the second car.

(30) Q. I take it from your -- please correct me if I'm wrong, I take it that these fibres are not distinctive. You cannot say they come from only one source as you could say an animal fibre or a human fibre, coming from only one man. You'd have to say, I take it, that it could

come from any jacket of a similar type?

A. Yes, or the fibres could have come from another article, perhaps a pair of pants that were composed with a similar type of fibre.

Q. The white acetate lining, for example, that could be white acetate material in any clothing or cloth?

10) A. Yes, that white acetate was very popular back in the '60's. We don't find as much white acetate now. In fact it is fairly remote to find white acetate. The polyesters have taken over.

Q. Were you able to identify the colour of the -- of the object from which any particular fibre came?

A. The acetate which I identified off the knife was a white acetate. The only fibres with any colour were the three brown wool fibres.

Q. They were wool?

A. Yes, there were three brown wool fibres.

20) Q. No yellow?

A. No.

THE COURT:

Okay.

MR. ARONSON:

I have no further questions arising out of that.

MR. EDWARDS:

No.

(WITNESS WITHDREW)

MR. ARONSON:

That's all the evidence the Appellant has brought forward at this particular time.

MR. EDWARDS:

10) My Lord, perhaps it should be just stated for the record I don't believe that exhibit R-9 has been tied in. The agreed fact between counsel that R-9, the piece of tape, was in the basket referred to by Gregory Ebsary turned over to Staff-Sergeant Wheaton and it was with -- with the knives. Continuity is admitted right through to Mr. Evers.

THE COURT:

Does that complete the evidence?

MR. ARONSON:

That completes the witnesses at this point in time, My Lord.

THE COURT:

I asked does that complete the evidence you wish to have tendered?

20) MR. ARONSON:

No, it does not. I should still like to have some clarification on the evidence relating to John Pratico, My Lord. If it's taken, I'm quite prepared with my friend to agree that he's not a credible witness if that's acceptable to the Court. If it's not, I would suggest that something be done either by way of admitting certainly affidavits which support the opinion with respect to his credibility or that he himself be called as a witness if that's not sufficient.

THE COURT:

30) Yes, is there any other evidence that you wish -- that you're applying to have adduced?

MR. ARONSON:

No, My Lord.

THE COURT:

Mr. Edwards?

MR. EDWARDS:

(10) My Lord, I had indicated in my application that I was seeking to have the members of the City Police Department, Messrs. MacIntyre, Urquhart and Sheriff Wayne Magee called but after hearing the evidence, I am not -- I submit there's no need to hear from them however I would ask that their affidavits and those paragraphs dealing with their questioning of Mr. Chant and Miss Harriss, that they be tendered. What I would propose to do would be to take the affidavit, take those paragraphs out, put them in an abbreviated affidavit if you wish and have that one filed with the Court unless my learned friend wishes to have them here for cross-examination. I'll make the available but really I -- the witnesses have been subjected to cross-examination and to call the police officers would really add nothing to the proceedings.

THE COURT:

What have you to say, Mr. Aronson, at this time?

(20) MR. ARONSON:

Well if as my learned friend said it would add nothing to the evidence, I don't frankly see any reason why they should be admitted at all with respect to matters that have gone on before the Court in the last two days.

THE COURT:

He's applying to permit those paragraphs in the affidavits.

MR. ARONSON:

I appreciate that but what I'm --

THE COURT:

(30) You're objecting to that?

MR. ARONSON:

Yeh, I'm objecting to that because I can't see the relevancy.

THE COURT:

If they are admitted, do you wish to have them cross-examined?

MR. ARONSON:

If they are admitted, we would wish the opportunity to have

those witnesses cross-examined, yes, My Lord.

THE COURT:

I see. We shall not admit the affidavits. You've applied for leave to produce Mr. Pratico?

MR. ARONSON:

The point I'm making, My Lord, and I think we had some --

THE COURT:

10) Are you asking that he be produced?

MR. ARONSON:

No.

THE COURT:

Very well. Then that completes the evidence. When the transcript of evidence has been completed, sent to counsel, counsel will be expected to prepare factums in the usual way for the hearing of the -- for the continued hearing of this appeal. After the transcript is available, counsel can apply to have a date for the resumption of the hearing.

(20)

MR. ARONSON:

Thank you, My Lord.

COURT CLOSED: 3:24 p.m.

(30)

- 234 - COURT REPORTER'S CERTIFICATE

I, Judith M. Watson, a Supreme Court Reporter, do certify that the transcript of evidence hereto annexed is a true and accurate transcript of the appeal hearing held at Halifax, in the County of Halifax, Province of Nova Scotia on the 1st and 2nd days of December, A.D., 1982, in the matters between DONALD MARSHALL, JR., and HER MAJESTY THE QUEEN, S.C.C. 00580, recorded on tape, transcribed and checked by me.

Judith M. Watson
Supreme Court Reporter
Registered Professional Reporter

Halifax, N. S.
December 16, 1982

LIST OF EXHIBITS

- Exhibit R-1 Statement of Donald Marshall, Junior
taken at Dorchester Penitentiary in
March, 1982.
- Exhibit R-2 Plan of Wentworth Park, Sydney, Nova
Scotia.
- Exhibit R-3 Photograph of the knives.
- Exhibit R-4 (a-j) Ten (10) knives.
- Exhibit R-5 Affidavit of Patricia Harriss.
- Exhibit R-6 Swatch of yellow material.
- Exhibit R-7(a-c) Slides of fibres(3).
- Exhibit R-8 Large envelope.
- Exhibit R-9 Piece of black tape.