MR. EDWARDS:

My Lord, I ask the sheriff to leave the jury out. I just wanted to discuss one point that was raised at the very end of our discussion yesterday where Mr. Wintermans stated the proposition. If I recall correctly his words were that the: "The onus is upon the Crown to disprove the defence of self defence.".

I did a little research on that last night and I submit that that, those precise words rather, overstate the proposition and I just wanted to say for the record that the Crown does not agree with that wording. I don't know if that was the wording Your Lordship was intending to use or not but I just wanted to register my objection to that type of wording before the fact.

If Your Lordship pleases I would indicate to you the wording which is preferred and which I discussed with Mr. Wintermans this morning and to which he has indicated he has no objection. But if Your Lordship has already made up his mind on just exactly how you are going to address I will leave it with you.

MR. WINTERMANS:

Why don't you read that?

MR. EDWARDS:

Yes, I'll just read you this. This is not the whole instruction but this is on the crucial part as far as onus is concerned. I'm reading now from Kennedy Aids to Jury Charges. It states as follows:

"If when considering whether the accused was or was not acting self defence you come to the conclusion that the proponderence of credible evidence shows that he was acting in self defence it will be your duty to find him not guilty of the offence with which he is charged, or if you have a reasonable doubt whether he was acting in self defence it will be your duty to give the accused the benefit of the doubt and find him not guilty of the charge with which he is charged."

It may be semantic in a sense but that does not seem to go as far as Mr. Wintermans has suggested that there is an onus on the Crown to disprove the defence of self defence. I think that, as I say, is a little too blunt in its ascertion.

MR. WINTERMANS:

I think it is a matter of semantics in a way because it is still the -- ultimately the rule is that if there is a reasonable doubt even on the question of self defence that it has to be resolved in favour of the accused person. The quote that I made was from a book that it stated it perhaps in

MR. WINTERMANS:

a corollary manner; therefore, of course, the burden being on the Crown to prove the onus of the offence, I would submit that in a situation such as ours the defence of self defence would have to be disproved -- maybe that's not a word that my Learned Friend likes to use, but -- beyond a reasonable doubt. As I said, if there is a reasonable doubt upon self defence then the accused gets the benefit of it.

BY THE COURT:

The burden is not on the accused to defend himself, the burden continues on the Crown.

MR. EDWARDS:

Yes, My Lord. I'm agreeing with that but as I stated, I submit that that wording that I read best describes it. It still leaves the burden on the Crown in the sense that it cautions them that if at the end they still have a reasonable doubt they must acquit.

MR. WINTERMANS:

I don't see that there's a real difference, but.

MR. EDWARDS:

It doesn't state distinctly either that the Crown must disprove self defence.

BY THE COURT:

Anything else?

MR. EDWARDS:

No My Lord.

BY THE COURT:

Before the jury comes in I just want to say to the people in the audience that this has been brought to my attention by the sheriff's office that the jury found it a little disconcerning yesterday by the amount of - the flow of traffic going in and out the main door. So I ask you in the name of the jury, on their behalf, that unless you're confronted with an emergency, personal or otherwise, to exercise some fairness in the order of traffic.

MR. WINTERMANS:

My Lord, I wonder if I could address the Court on another problem. That is the media coverage of what took place yesterday in the court room. I heard a number of different accounts, one of which I found to be very negative and I thought slanted heavily against the accused and on this statement of what the evidence was. I would ask that Your Lordship caution the jury that they shouldn't pay attention to any news reports they may have heard of what transpired

MR. WINTERMANS:

here yesterday, but rather should rely on their own interpretation of the evidence. The one point that. . .

BY THE COURT:

I told them at the beginning Mr. Wintermans. . .

MR. WINTERMANS:

Right. There was one particular point that I found very distressing in a CBC report where it was simply stated that Mr. MacNeil testified that self defence, that it wasn't self defence. I think that that is a conclusion of a matter of law that Your Lordship should direct the jury to disregard. The thing that bothered me was that it was pulled out of the whole testimony and highlighted to such a degree that -- without any mention of the fact that the day, the night before Mrs. Ebsary testified that he was reported to say "Roy saved my life back there" over and over again. It was, I found, a very twisted, slanted and inappropriate report of what happened and if the jury heard it it could have the effect that, you know, they might have been sitting there themselves listening and then after hearing the report they may have had second thoughts on the accuracy of their own recollection or something like that. It might not have an effect but,anyway, I would ask that Your Lordship perhaps

MR. WINTERMANS:

mention something along those lines.

MR. EDWARDS:

I have no comment on that My Lord.

The Jury returns and is recalled.

BY THE COURT:

Mr. Foreman and Members of the Jury.

You have now heard all of the evidence and the addresses of counsel for the Crown and the accused. In their addresses, as you will recall from yesterday afternoon, both counsels set out their respective positions based upon the evidence of the witnesses which you have heard during the course of this trial.

The summations of counsel are not evidence. I indicated that to you at the commencing of the trial. Your opinion with respect to the facts and conclusions to be drawn from the facts may differ from those of counsel. You are not bound to accept their opinion on facts, you are not bound to accept my opinion on facts. You are under no obligation to accept interpretations placed upon the facts by either

BY THE COURT:

counsel or myself. It is your responsibility to determine what the facts are,based upon the evidence that you've heard in this court room and not based upon anything that you may have heard outside the court room in any respect whatsoever. Your decisions are to be based solely upon the evidence which you have heard in the court room since this case started.

And so it is now my duty to instruct you on the law and how it applies to the facts as you determine those facts to be. I have said several times, I keep repeating it I suppose, you are sole judges of the facts and I am the sole judge of the law and it is my duty to talk to you about the law and that's what I propose to do this morning.

You as members of the jury, you have to weigh the evidence you've heard, the submissions made by counsel and then the comments I make on the evidence. After you go through that process then you come to your individual determinations on the relavent facts. Nothing becomes a fact in this case until you find it to be a fact. Once you as a jury have decided a fact is a fact then it is difficult to correct even a mistake.

I mentioned to you when we opened this case that your attitude at the outset of the case was considerably important and I urged you not to form any early conclusions but to approach the case with a vast open mind. I repeat that as a

BY THE COURT:

general comment for whatever worth you may want to place in for it as you begin your deliberations after I have given you my remarks.

It seems to me that it may not always be a wise thing to take an early stand to form an opinion right off the bat and to make a determination to hold out for a certain verdict. The reason being that when one takes such a positive stand early in the deposition and you consider your verdict, it sometimes becomes difficult to shake that opinion or that position in the face of very good and persuasive arguments which may be defenced by or views of defence by your fellow jurors. So I ask you to approach the deliberations that you undertake as jurors with an open mind and engage in a discussion which I am sure in the meantime will lead you to a verdict.

As members of the jury,please remember that you are neither parsons nor are you advocates. You are judges as I told you yesterday and your contribution to the administration of justice is to render a just verdict. And so I ask you to approach your duties objectively with neither pity nor sympathy for the accused nor with any prejudice or animosity against him.

In determining the guilt or innocence of the accused you are to be governed solely by the evidence introduced in this

BY THE COURT:

trial and by the law. Absolutely nothing else, absolutely nothing else should enter into your deliberations.

Let me mention to you one situation where you have - after I've concluded my remarks to you and you've gone into the jury room, I will be asking counsel if they have any comments which they want to make which they feel may improve the charge which I have given you this morning. If they do and if there are any of them which I have set then I may very well call you back and give you an added instruction. If that happens I don't want you to think that what I called you back to say to you is to be highlighted more than what I am saying to you now. Rather, it will be a matter of saying something to you, if it does happen at all, it will be a matter of saying something to you which you should treat as though I overlooked it or forgotten it when I was making the general comments to you this morning and you should treat this as being a part of the comments which I am making to you now.

Under our law I am entitled to make some comments with respect to the evidence. As I have already indicated to you, if I do, and I shall make a few comments I think, you are not to give my comments on the evidence any greater weight because I happen to disagree with them. As I have already indicated to you, it is your opinion which prevails. You then, again, must consider all of the evidence and you must make your own

BY THE COURT:

decisions with respect to what you feel is important and persuasive in the evidence which you have heard during the course of this trial.

Another preliminary remark I want to mention in passing is that in determining the guilt or innocence of the accused, you should not speculate in any way upon the question of penalty or punishment. Penalty is a subject that concerns me alone in the event that you find the accused guilty.

Another preliminary comment is that all twelve of you must be in agreement in your decision in order to plea a verdict. A verdict is the unanimous expression of opinion of the entire jury. You must be unanimous in your verdict. Occasionally a unanimous verdict becomes impossible because one or more jurors have an honest and sincere difference of opinion which prevents them from joining in the majority. However, I urge you, as I do in all cases in which I am involved, to try your best to reach an unanimous verdict. I think that you will be able to do that.

Now I want to say a word to you about the presumption of innocence and the doctrine of reasonable doubt. You've heard those words, innocence and reasonable doubt, you've heard them in this court room during the course of this trial yesterday, on many occasions. In a criminal trial an accused person, the accused person, is presumed to be innocent

BY THE COURT:

until the trial has proved his guilt to you, beyond a reasonable doubt. It is not the responsibility of the accused to establish or demonstrate or prove that he is innocent. If the crown fails to prove guilt beyond a reasonable doubt, then you must acquit the accused.

I suggest to you, members of the jury, that proof beyond a reasonable doubt has been achieved when you, as a juror, feel sure of the guilt of the accused. It is that degree of proof which convinces the mind and satisfies the conscience so that you feel bound or compelled to act upon. It may happen that the evidence which you have heard leaves you with some lingering or nagging doubt with respect to the proof of some essential element of the offence. If that happens and you are unable to say to yourself that you are confident that the crown has proven guilty beyond a reasonable doubt, then your duty is to acquit the accused. When I'm talking about doubt, reasonable doubt, I am not talking about it in terms of a fancy or whimsical doubt, I'm talking about a real doubt.

Now I'm sure that you know, without me saying it to you, that people see and hear things differently. Discrepancies do not necessarily mean that such testimony or evidence should be discredited or ignored. Discrepancies on trivial matters may be and usually are quite unimportant. You are not

BY THE COURT:

obliged to accept everything a witness says. On the other hand, if you cannot accept a part of the evidence of a witness, you are not obliged to eject the whole of it. You are free to form your own conclusions, whether or not you will accept all or a part or none of that evidence which is given by a witness.

When I talk to you about discrepancies, I am talking to you about mere discrepancies which can easily and quite innocently occur to any one of us as human beings and likewise to any witness. But, a deliberate falsehood or lie is quite a different matter. This is always serious and may very well taint the entire evidence of a witness.

Now when you are weighing the impact of evidence which you have heard during this trial it is quite proper, I believe, for you to consider the human factors which may effect the giving of perfectly on this evidence. Questions which suggest these factors to you are alleged. But to give you an idea of the point which I am trying to make let me put these kinds of general questions to you as questions which you may want to take into account - as examples only of questions which you may want to take into account - when you are examining the evidence of any particular witness: Did the witness have any particular reason to assist him or her in recalling the precise event? Could the witness, because of the relevant

BY THE COURT:

unimportance of the event, be understandably in error with respect to its detail? What real opportunity did the witness have to observe the events? Has the witness any interest in the outcome of the trial or any motive for either favouring or injuring the accused? What is the apparent memory capacity of the witness? What was the appearance, the demeanor and the conduct of the witness while he or she was testifying? Was the witness forthright and responsive to questions or on the other hand do you have a witness who was evasive or hesitant or argumentative with counsel? Is the testimony of the witness reasonable and consistent with uncontradicted facts? Those are, as I have indicated to you, examples of questions which you may put to your minds when you are trying to assess the evidence of a particular witness on any particular point.

I suppose there may be other questions similarly which may come to your mind. You really are saying I suppose,in another way, does the evidence of this witness really stack up and the bottom line of your duty, I suggest to you, in weighing evidence given by a witness is perhaps as simple as saying that you are being asked to use your everyday experience and your good common sense in judging people in what they have to say.

BY THE COURT:

Now the evidence which comes before a jury may be either direct or circumstantial. The facts of the case may be established by direct evidence and by circumstantial evidence. In this case the crown is relying on both some direct evidence and some circumstantial evidence. I won't take a minute to try to explain the difference between direct evidence and circumstantial evidence.

The somewhat dictionary type meaning, I suppose,of the two within the framework of the law, is to say that direct evidence is evidence which accepted as the truth proves a fact and issue in a case, without the necessity of drawing an inference. Circumstantial evidence, on the other hand, is evidence which does not directly prove a fact in issue but which may give rise to an inference of the existence of a certain fact which is in issue. An inference from the circumstantial evidence must be based on the fact or facts which have been proven by the evidence and not on the near suspician or speculation.

Having said that, let me try to give you an example which may help to clarify the point which I am going to make. Let us suppose, for example, that a question arises in a trial as to whether a car went off the paved portion of the highway onto the unpaved shoulder and then back again on the highway. Suppose, for example, somebody is trying to prove that type

BY THE COURT:

of motion of a motor vehicle. Now if you have a witness who can give evidence that he saw the car do exactly that, that is to say steer off the road onto the shoulder and back on the road, then if the evidence of that witness is accepted we have a situation of direct evidence as to the way the car behaved. On the other hand, suppose there were no eye witnesses but evidence is given to the effect: Skid marks were shown on the paved portion of the highway and these skid marks matched the tire tread of the car in question. Also, that there were ruts in the unpaved portion and there was dirt from these ruts on the tires of the car. There we have a case of circumstantial evidence. In other words, given the facts of the skid marks and the matching tire treads and the mud on the tires, you as a jury would draw an inference that the car behaved in that fashion. There are situations in this evidence, in this case, where reliance is being placed by the crown on the circumstantial evidence.

For example, take the proposition that the crown, I think is relying upon, that the accused stabbed Seale with a knife or a weapon of some kind. There is no actual direct evidence of that. To do this the crown relies on the evidence of what witnesses say they heard, what witnesses say they heard the accused say, like: "I've got something for you."; "Blood spurting from Seale."; Donna Ebsary saying that her father

BY THE COURT:

washed blood from the knife in the kitchen in the home of the accused; James MacNeil saying "You did a good job back there."; Marshall's evidence about the cut in his arm; all that is an example of the kind of situation from which out of these circumstances and these pieces of evidence the crown is saying that you should draw an inference that such and such took place.

Can you, from evidence such as I have described, draw the inference then that the accused stabbed Seale with a knife or some instrument or weapon? This is the kind of thing that circumstantial evidence is about. It is important that you bear in mind that a fact can be proved just as effectively by using either direct or circumstantial evidence.

I have already explained that the burden is on the crown to prove that the accused was in defence and to prove it beyond a reasonable doubt. Where the crown relies on circumstantial evidence to discharge that burden of proof then you must be satisfied beyond a reasonable doubt that the guilt of the accused is the only real interest which may be drawn from the proven facts. Put another way, the guilt of the accused must be consistent with the facts and inconsistent with any other reasonable conclusion.

The fact that a witness has on a prior occasion made a

BY THE COURT:

statement or statements or given evidence that is contradictary of the evidence given by that witness at this trial goes to the credibility or truthfulness of a witness. The evidence of a witness may discredit in whole or part by showing that he or she previously made statements which are inconsistent with his or her present testimony. I mention this point to you because during the course of this trial you heard counsel for the defence ask several questions of some of the witnesses about evidence and or statements, or both, which they gave in earlier proceedings and which they made on other occasions. Questions of that nature, according to my notes, were directed to Donald Marshall Jr; James William MacNeil; and Dr. Naqvi. For example with Naqvi you will recall there were questions directed to him about evidence or statements he had earlier given as to the time of death of Sandy Seale in an effort to establish when did Sandy Seale die. The similar process and procedures were followed in the questioning and cross examination of MacNeil and Marshall on other subjects. It's to those instances in the evidence that I am speaking now, in giving you a general instruction concerning how they are to be considered by you. I want to make it quite clear that such statements cannot be used to prove the truth of the facts to which they relate unless, in your opinion, the witness has adopted that part of the statement as being

BY THE COURT:

true. It is up to you to decide if any of the statements have been adopted by the witness as true and the weight to be given to those parts. Any parts of the statements or evidence which were not adopted by the witness as being true cannot be relied upon you as proof of the facts stated. You can only use parts of the earlier evidence in statements in deciding the truthfulness of the witness. You are the sole judges if there has been a contradiction of an earlier statement or evidence by the witness and the effect, if any, of such contradiction on the witness' credibility which is another word for saying believability.

Ordinarily witnesses are permitted to give evidence of facts that they themselves have seen, heard or otherwise perceived with their senses. They are not allowed to give their opinions when testifying in court. However, duly qualified experts are permitted to give opinions on matters in controversy at trial. We have one such witness in this case and I refer to the evidence of Dr. Naqvi. He was qualified, as you will remember, by the consent of both counsel to give opinion evidence in the field of general surgery and the general practice of medicine. When he talks about what he did and what he saw, that is one thing, but here I am referring to that portion of his evidence which one would have to describe as his opinion. According to my notes,

BY THE COURT:

the doctor expressed the opinion that Seale died from abdominal injuries as a result of a blow from a sharp object. At least that's the note which I have made as best I could follow his evidence. He also said that the cause of death was loss of blood supply. To assist you in deciding the issues in this trial, you may consider the opinions given by such experts with the reasons for them. But just because they are given by an expert such as Dr. Naqvi happens to be, you are not bound to accept his opinion if,in your judgement, it is unsound.

Now I want to deal with the offence with which the accused is charged. The indictment of charge is the accused with manslaughter. The indictment says: "The jurors for Her Majesty The Queen present that Roy Newman Ebsary at or near Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the twenty-eighth day of May, nineteen seventy-one, did unlawfully kill Sandford Sandy Seale by stabbing him and did thereby commit manslaughter contrary to Section 217 of the Criminal Code of Canada." This indictment you will be taking with you Mr.Foreman when you and the jurors go in the jury room, you'll have the document with you.

Now the reference there is to Section 217 of the Criminal Code of Canada. 217 says that: "Culpable homocide that is not murder or infanticide is manslaughter." Now the crown

BY THE COURT:

is not suggesting that this was murder or infanticide, the charge is manslaughter. In Section 217 it says "Culpable homocide that is not murder or infanticide is manslaughter".

As I shall tell you in a minute, the word culpable means blame worthy. So one can say about 217 that blame worthy homicide is manslaughter.

Under the Criminal Code a person commits homocide when directly or indirectely by any means he causes the death of a human being, and so it says, Section 205 of the Criminal Code, subsection (1): "A person commits homocide when directly or indirectly by any means causes the death of a human being". Let me pause on the word causes so far as this case is concerned and mention to you Section 208 of the Criminal Code which says this:"That where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is the proper or improper treatment that is applied in good faith". So far as cause is concerned then, by Section 208, it does not matter whether the treatment at the City Hospital was proper or improper so long as it was applied in good faith on the subject of cause.

I come back to 205: "A person commits homocide when directly or indirectly by any means he causes the death of a human

BY THE COURT:

being". And then it goes on, Subsection (2), "homocide is culpable or not culpable" which is to say that homocide can be blame worthy or not blame worthy. Homocide that is not culpable, homocide that is not blame worthy, is not an offence. Culpable homocide, blame worthy homocide, is murder or manslaughter or infanticide.

I have already said to you as the Code reads, that homocide is culpable or non-culpable and the word culpable means blame worthy. Culpable homocide is the blame worthy killing of a human being. If homocide is not culpable it is not an offence. Let me give you an example of non-culpbale homocide. An example would be a case where a motorist driving slowly and carefully strikes and hits a child who has darted out from behind a parked truck. The motorist in that situation, caused the death of a human being and so he committed homicide. But in that case the killing is not culpable or blame worthy and, therefore, it is not an offence. In this case the defence sumbits that the homocide was not culpable because the death resulted from self defence. I will be dealing with self defence in greater detail in a moment but first I want to continue speaking with you about culpable homocide.

I go on to the next Subsection of 205: "A person commits culpable homocide when he causes the death of a human being

BY THE COURT:

by means of an unlawful act.

In this case the crown contends that the accused caused the death of the deceased, Seale, by the unlawful act of assaulting. Assault is committed when a person directly or indirectly applies force to the person of another without his consent or attempts or threatens by an act or gesture to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose. Thus, an assault may consist of the intentional application of force such as a blow or a punch without consent or threats of the application of force by acts or gestures under certain circumstances. A person is presumed to intend the natural and probable consequences of his actions. An assault, in the terms in which I have described, is an unlawful act. If you are satisfied beyond a reasonable doubt that the accused caused the death of Seale by stabbing him and that the deceased, Seale, did not consent to the stabbing by challenging the accused to do it, then the stabbing of the accused constituted an assault which was an unlawful act causing the death of the deceased, Seale. The accused would thus have committed culpable homocide because he caused the death of the deceased by an unlawful act. I will be speaking to you about self

BY THE COURT:

defence in a moment but I am talking to you about culpable homocide. The accused would thus have committed culpable homocide because he caused the death of the deceased by an unlawful act unless the crown, in these circumstances, failed to negatively argue self defence.

Culpable homocide that is not murder is manslaughter. The accused has not been charged with murder because it has not been suggested that the intent to kill Seale or to cause him bodily harm which he knew was likely to cause death and was reckless whether death persued or not. Such intent is a necessary part of murder. Murder is intentional killing. But a person commits manslaughter when he causes the death of another person by an unlawful act even though he did not intend to cause death or bodily harm that he knew was likely to cause death.

Did Mr. Ebsary, the accused, assault Seale? On that question you will have to consider the evidence of Donald Marshall, Jr. and James MacNeil. If you find that he did then you will have to consider the circumstantial evidence to decide if Ebsary wounded Seale and caused the wound in the abdomen. This is suggested by the circumstantial evidence. You will have to consider the evidence of Marshall and of MacNeil, Mrs. Ebsary, Donna Ebsary. You will have to

BY THE COURT:

determine from their evidence whether the accused assaulted Sandy Seale by stabbing him with a knife or some such weapon. Those are facts which you will have to determine from the evidence you heard yesterday. If you find them to be facts which have been proved to you beyond a reasonable doubt then you will ask yourselves whether the assault or contributed to Seale's death. Here the evidence of Dr. Naqvi is relevant.

Dr. Naqvi described the conditions he found and he gave that in considerable detail as evidence. He described the wound in the abdomen, the size, its nature. In spite of surgery, blood transfusions and the like, Seale ultimately died from the loss of blood supply, said Dr. Naqvi. Was his death caused or contributed to by the assault? If it was, then you must be satisfied that that has been proved to you beyond a reasonable doubt.

If you find that the accused committed the assault which caused the death of Sandy Seale, let me turn to discuss with you whether it was lawful. To this point I have been discussing with you the assault or an assault which is unlawful as an abbreviate of manslaughter.

I want to mention one Section which one counsel has mentioned to you. That is Section 27 of the Criminal Code. Section 27 says that "Everyone is justified in using as much force as is reasonably necessary to prevent the commission of

BY THE COURT:

an offence for which if it were committed the person who committed it might be arrested without warrant and that would be likely to cause immediate and serious injury to the person or property of anyone or" and that takes us back to the heading again "Everyone is justified in using as much force as is reasonably necessary to prevent anything of being done that on reasonable and probable grounds he believes would if it were done, to be an offense mentioned in paragraph (a)" which is the one I've just read to you.

Marshall says that he and Seale had the intention to roll one or more persons that night. I am not quite sure what the word roll means but I assume that it meant in effect, to steal, to deprive others of their money. Well, theft or robbery would be such an offence as Section 27 anticipates. For the purposes of Section 27"as much force as is reasonably necessary" those words call for an objective test depending upon your findings of fact in the evidence before you for Section 27. You weigh the facts to determine what force under the circumstances was reasonably necessary. That is the extent of the justification to prevent the commission of an offence.

The issue which the defence has clearly raised in this case is self defence. I want to spend a few minutes now talking to you about that issue.

BY THE COURT:

Even if it has been shown that the accused would otherwise be guilty, before he can be convicted you must be satisfied to the exclusion of any reasonable doubt that he was not acting in self defence according to law. If you conclude that he did kill or harm in self defence as I shall define and explain it, or if there be any reasonable doubt in your minds as to whether he did or not, then in either case you must acquit him.

The term self defence is often commonly understood as any measure employed to preserve one's self from threatening or actual physical attack regardless of the consequences of such employment or the extent of such means. However, this is not the legal meaning of the term and it is, of course, only with the legal significance that you are concerned in this case. In law self defence is not a lose term. It is defined by the Criminal Code of Canada at the conditions under which it may prevail are there rigidly laid down. Any defence which rests on the theory of self defence must come strictly within the provisions of the Code. There are a number of different definitions in the Code which apply in different factual situations.

I have discussed this matter with counsel and they have agreed that I will discuss with you the provisions of

BY THE COURT:

Section 34 of the Criminal Code, which is divided in two parts. I am going to talk to you first about the first part.

Section 34, Subsection (1), and it reads this way: "Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself". I'll read that again and then we'll talk: "Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself".

Now let us consider the evidence in this case in relation to each of the elements mentioned in the Section I have just read. First, was the accused unlawfully assaulted by Seale without having provoked the assault? Generally speaking, a person commits an assault when he applies force intentionally to the person of another, directly or indirectly without the consent of that other person. There does not seem to be any evidence of any physical assault by Seale on the accused. We do not know exactly, but you can not engage in speculation on this point. You will have to rely upon the evidence before you and make your own determination. However, even when no

BY THE COURT:

force is applied it is an assault to attempt or threaten by act or gesture to apply force to the person of the other if he has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose. We are told that Seale said to Ebsary "Dig man, dig". The defence that you can infer from this that Seale was threatening by act or gesture meaning something like give me your money or else; that sort of situation. Out of that, even though Seale applied no force, the defence is saying that the evidence is there of the assault on Ebsary. The crown is saying it's insufficient to be an assault. You have to decide.

Secondly, was the assault provoked by the accused? Everyone who is unlawfully assaulted without having provoked the assault. Second point, was the assault provoked by the accused?

Section 36 in the Code says that provocation includes, for the purpose of Section 34 and 35 - we're here dealing with 34 - provocation includes for the purposes of Section 34, provocation by blows, words or gestures. So provocation includes for this purpose, provocation by blows, words or gestures.

If you find that Seale's actions and gestures constitute an assault on the accused, it does not seem to me that there is any evidence that the accused provoked the assault. He and MacNeil appeared from the evidence to have been peaceable walking alone towards Ebsary's home.

BY THE COURT:

Next point. Was the force used by the accused not intended to cause death or grievous bodily harm? "Everyone who is unlawfully assaulted without having provoked the assault is justified in the repelling force by force if the force he uses is not intended to cause death or grievous bodily harm." Was the force used by the accused not intended to cause death or grievous bodily harm? On this point you will consider the evidence as to whether the death or grievous bodily harm sustained by Seale was caused by the accused and whether it was caused intentionally. If you find it was caused by the accused, then was it caused intentionally? The crown says it was. The defence says that when Ebsary was confronted with the situation presented by Seale he had to respond for his own protection in the emergency of the situation which was before him. You will have to decide.

Finally in 34(1), was the force used by the accused no more than was necessary to enable to defend himself? "Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to casue death or grievous bodily harm and is no more than is necessary to enable him to defend himself".

In considering, I am now focusing on those last words:"and is no more than is necessary to enable him to defend himself".

BY THE COURT:

In considering this question you will look at the nature of the assault by Seale and the risk to the accused that was involved. You will then consider whether the force used by the accused was no more than that which a reasonable man would regard as necessary to protect himself.

Now the test to be applied is not purely and entirely an objective one in the light of what you know the fact to have been. If the conduct of the accused in the light of the actual facts was no more than that which a reasonable man would regard as necessary for his protection then, of course, this requirement of self defence in the law will have been met. It will also have been met if the accused was genuinely mistaken as to the facts and did no more than a reasonable man would have regarded as necessary to detain himself on the facts as he genuinely believed them to be.

There is no definition of a reasonable man, it's safe to say "I suppose in these circumstances". How should an average ordinary man of the age and sex of the accused respond? In deciding whether the force used by the accused was more than necessary in self defence you must bear in mind that a person defending himself against an attack reasonably apprehended had ought to have expected to weigh to a nicety the exact measures of necessary defensive action. The evidence discloses the amount of force used by the accused. The crown

BY THE COURT:

has said to you that to respond with a knife to the abdomen when confronted with Seale saying "Dig man, dig" was more than necessary for his self defence, the accused's self defence.

The defence says that it was reasonable for Ebsary to be afraid; that it was reasonable to feel that he might be hurt seriously. Could he have expected Seale might be armed is asked by the defence. The defence says that the force used on the spur of the moment was no more than necessary faced with the gravity of the situation. You have those two opposite views, you will have to decide from the evidence.

I emphasize again that there is no burden on the accused to establish self defence. It means that you must acquit the accused unless you are satisfied beyond a reasonable doubt that there was not an unlawful, an unprovoked assault on the accused or that the accused intended to cause death or grievous bodily harm or that the accused used more force than was necessary to enable him to defend himself unless it was no more than a reasonable man would have considered necessary on the facts which the accused genuinely believed to exist. If the crown has proved any one or more of these circumstances than self defence under this subsection is not available to the accused as a defence.

BY THE COURT:

If you have any reasonable doubt as to whether the accused acted in self defence you will find the accused not guilty of manslaughter because then the crown would have failed to prove that the homocide was culpable.

Now, I must take some more of your time to talk to you about the second part of Section 34. I've been speaking to you about the first part of Section 34.

Even if the accused intended to cause death or grievous bodily harm, his actions may have been justified as self defence under Section 34, subsection (2) of the Criminal Code of Canada. I've been talking to you up to now about subsection (1) where the force used is not intended to cause death or grievous bodily harm. Now subsection (2).

Everyone who is unlawfully assaulted and causes death or grievous bodily harm in the kind the assault is justified if he causes it under reasonable apprehension of death or grievous bodily harm. Let me read this again. "Everyone who is unlawfully assaulted and it causes death or grievous bodily harm in repelling the assault is justified if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was orginally made or with which the assailant persues his purposes and he believes on reasonable and probable grounds that he cannot otherwise reserve himself from death or

BY THE COURT:

grievous bodily harm". "Everyone who is unlawfully assaulted and causes death or grievous bodily harm in repelling the assault is justified if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally laid or with which the assailant persues his purposes and he believes on reasonable and probable grounds that he cannot otherwise reserve himself from death or grievous bodily harm."

Now, here again subsection (2) you must first consider whether the accused was unlawfully assaulted by Seale. Generally speaking, as I have indicated, a person commits an assault when he applies force intentionally to the person of another, directly or indirectly, without the consent of that other person. Even when no force is applied it is an assault to attempt or threaten by act or gesture to apply force to the person of the other if he has or causes the other to believe on reasonable grounds that he has the present ability to effect this purpose.

The evidence of the alleged assault of Seale on the accused is the same as I have already discussed with you when talking about this same form minutes ago in relation to subsection (1) of Section 34.

You next must consider under this subsection whether the accused caused that of Seale or grievous bodily harm to

BY THE COURT:

Seale under reasonable apprehension of death or grievous bodily harm and believe on reasonable and probable grounds that he could not otherwise protect himself from death or grievous bodily harm. Here the question, ladies and gentlemen, is not whether the accused was actually in danger of death or grievous bodily harm and whether the causing of death or grievous bodily harm by him was in fact necessary to preserve himself from death or grievous bodily harm; but whether he caused death or grievous bodily harm under a reasonable apprehension of death or grievous bodily harm and whether he believed on reasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm.

The accused may have been mistaken as to the imminence of death or grievous bodily harm or as to the amount of force necessary to preserve himself from death or grievous bodily harm. But if this apprehension of death or grievous bodily was reascnable and there was reasonable and probable grounds for his belief that he could not otherwise persue himself from death or grievous bodily harm, then his use of force was justified as self defence.

I have reviewed most of the relevant evidence in considering under Section 34(1) whether the accused more force than was necessary to enable him to defend himself. Under Section 34(2),

BY THE COURT:

however, the question is not whether the accused used no more force than was necessary for his defence but whether he caused death or grievous bodily harm under a reasonable apprehension of death or grievous bodily harm and believe on reasonable and probable grounds that he could not otherwise reserve himself from death or grievous bodily harm. You will have to decide who and what you believe on this issue as to whether there were reasonable and probable grounds for the accused's belief that he could not otherwise preserve himself from death or grievous bodily harm.

The crown says there were no such grounds and the accused took the opportunity to inflict hard on Seale. The defence says otherwise. Not knowing what to expect and fearing the worst, the defence says it was a reasonable response for his own preservation.

In deciding whether the accused believed on reasonable and probable grounds that he would not otherwise preserve himself from death or grievous bodily harm, you must bear in mind that a person defending himself against an attack reasonably apprehended cannot be expected to weigh to a nicety the exact measure of necessary defensive action.

If you are satisfied beyond a reasonable doubt that the accused was not unlawfully assaulted or was not acting under reasonable apprehension of death or grievous bodily harm

BY THE COURT:

from the violence with which Seale's assault was originally measured or with which he persued his purposes, the defence of self defence under Section 34(2) fails. Likewise it fails if you are satisfied beyond a reasonable doubt that the accused did not believe on real and probable grounds that he could not preserve himself from death or grievous bodily harm except by stabbing Seale.

The law of self defence proceeds from necessity, the instinctive and intuitive necessity for self preservation. Under no circumstances may it be used as a quote before retaliation or revenge. Reference has been made during the course of summations to Section 37 of the Criminal Code and I am going to read it to you but I am not going to touch much on it. "Everyone is justified in using force to defend himself or anyone under his protection from assault if he uses not more force than is necessary to prevent the assault or the repetition of it. Nothing in this Section shall be deemed to justify the wilfull infliction of any part of mischief that is excessive having regard to the nature of the assault that the force was intended to prevent."

Now I don't want to give you the impression, I mention it to you because it has been mentioned, but I don't want to give you the impression that this is something to be considered separately from that which I said to you when I

BY THE COURT:

was talking about the effect of Section 34(2). I want you to understand that any reference to Section 37 are not to be considered as qualified defence as to Section 34.

So far as self defence is concerned, in my opinion, the essential sections for you to consider on the application of self defence are those in Section 34, meaning 34(1) and 34(2) which I have already discussed with you in some detail.

Let me also say a word to you about the evidence concerning the consumption of liquor. While it is a part of the evidence it is not such as to cause it to be a defence in this case.

One other point. You need not be concerned by any suggestion which may have been made that there are any political considerations involved in this case.

Now the evidence is fresh in your minds and it would be repetitious for me to spend a great deal of time reviewing it. Both counsels have spoken to you and analyzed the synical detail in the addresses that they gave to you. You heard the evidence of Donald Marshall, Jr. and he told you about meeting Seale and discussing whether he wanted to make some money, he agreed. He says that they were called up to Crescent Street by an older man and a younger man and the older man had grey hair combed back; he doesn't remember the other fellow. He says he can't identify them. He joined up

BY THE COURT:

with the two men and Seale. Says that he started talking with older man and had some general discussion with him, there about ten minutes. He invited Seale and Marshall to his house for a drink and they said no. Then they started to walk away and Marshall says he called the two men back and then "an argument started among the four of us". "The only words I heard,the old fellow asked Seale if he wanted everything he had". He says that he was standing by Jimmy MacNeil and they had hold of each other;"the old fellow had Seale bent over for a couple of seconds, he turned around and came after me and I let MacNeil go; he swung something at me and he got me in the left arm, slashed in the left arm; I couldn't see what made the slash; when the old fellow bent over I didn't hear any other words. When I got slashed I don't recall where Seale was then; I saw Seale laying on the ground" In his cross examination he noted that "we were considered as bad young guys; I suggested to Seale that we make some money by rolling somebody;and rolling is different from robbing". You will recall that then he was asked by defence counsel questions having to do with a statement he had made to the R.C.M.P. on March 3, 1982 at Dorchester. He was also asked questions about evidence which he gave at a preliminary hearing and some other matters which were raised in terms of whether he had made a contradictary previous

BY THE COURT:

statement -- contradicted previous evidence.

Constable Leo Mroz talks about the discovery of Seale and how he was dressed, observing the noticeable buldge on the high abdomen or lower chest and he told you what he saw and did. In cross examination he indicated the nature of the injury did not vindicate putting him in the car for permissable further injury and about fifteen minutes for the ambulance to get there.

You heard the evidence of MacNeil in some detail. He talks about reaching the park and walking over the Crescent and they were approached by Seale and Marshall. He says that: "Marshall put my hand up behind my back and I froze; next I heard Seale say to Ebsary 'dig man,dig' I think the intentions were to rob".He was standing three to four feet in front of Ebsary. Ebsary said "I've got something for you". "He reached and then I saw a squirt of blood coming out of nowhere, I was in a state of shock. I think Marshall let go of my arm and it dropped. Seale ran and then he fell down. I never saw the blade." "I've got something for you", I guess he's referring to what he thinks he heard him say. "The accused slipped his hand in his pocket, he had a knife in his hand; he brought it up in an awkward motion, I never saw the blade; I think Ebsary waived at Marshall with his hand; Marshall took off; Ebsary and I went up to his place on

BY THE COURT:

Argyle Street, it took us about fifteen minutes to get there; I sat in the front room and I saw in the distance washing the blood off the knife; it was too much of a state of shock to remember if anybody elese was there". He went back the next day and had conversation with Ebsary. In his cross examination he said that he was twenty-five when the incident took place and Ebsary was sixty; that they had not stopped in the park, they kept walking through at a steady pace and that "we didn't approach them" meaning Seale and Marshall, "we didn't call them over". Then he was asked about evidence which he had given at the preliminary inquiry, whether he accpeted it or rejected it in terms of where Seale and Ebsary were standing. MacNeil said also in the cross examination that "I thought I was being robbed and I thought I might get hurt". "There was no conversation with Seale and Marshall before Marshall grabbed my arm. Seale and Marshall were (inaudible) it all happened very fast. I understood 'dig man, dig' meaning to reach in your pocket for your money. I don't think there was any conversation between Ebsary and Seale before Seale said 'dig man, dig'. I didn't see the knife until at Ebsary's house; I can't describe the knife, it was probably a pocket knife. When we got to the house I said 'you did a good job back there',I was glad because I thought I might get hurt". Then he was asked some questions about the

BY THE COURT:

evidence given now and the evidence given at the preliminary hearing; about the knife and blade and whether it was a folding knife blade and that sort of thing. "I was totally unaware Ebsary had any kind of knife on him. The lighting in the park was fair; I couldn't see the knife that well. I'm not sure of the size of the knife that I saw in the house that night". Then he was asked some further questions about evidence which he had given in Halifax in nineteen eighty-two.

Mary Ebsary, she said that MacNeil was with Mr. Ebsary and that they came home sometime between eleven and twelve p.m.; MacNeil was agitated and excited, so was Ebsary; Ebsary went into the kitchen and MacNeil stayed in the hallway and he kept repeating "Roy saved my life tonight".

Donna went out to the hallway; she saw MacNeil and she doesn't know what was said to MacNeil; MacNeil left fifteen or twenty minutes later. In her cross examination she agreed that then Mr. Ebsary was around sixty years old and he was about five feet and two inches in height. She was unable to say what was his weight. Donna Ebsary says she was home with the mother in the living room, her father and James MacNeil came home she thinks during the late news, 11:30 or 12:00 p.m. "Jimmy was excited, telling my father he had done a good job. I followed them into the kitchen." Her father

BY THE COURT:

was at the kitchen sink and was washing blood from the knife. In cross examination she said she didn't notice any blood on her father's clothes at that time.

Dr. Naqvi reported about the wound, what he found. In Seale the wound approximated three to four inches, extended from the front of the abdomen all the way to the back where the aorta is. This he estimated to be six inches, maybe more. He described the condition of Mr. Seale and what he did and gave his opinion, as I mentioned to you, with respect to the cause of death. In his cross examination he says that it was one stab wound that was caused by injury and that the injury was somewhere around the umbilicus area. He was asked questions then, as I already mentioned to you, about earlier evidence which he gave in terms of when the hour of death occurred. He told us that he operated on Seale giving the hours.

That is just a recaption on some of the evidence. That is not to say that my recaption on that covers all of the evidence at all nor is it to say that that's the important evidence in the case. The evidence in the case is what you find to be important, you decide what is important.

Yesterday afternoon you recall that the first lawyer to speak to you was Mr. Edwards on behalf of the crown. He, as he saw it, answers the question of whether or not Mr. Ebsary

BY THE COURT:

assaulted Seale. He suggested to you that there is no room for doubt on that, that Mr. Ebsary stabbed Seale.

The second question, did that assault cause Seale's death? He said that that is obvious, suggested to you. Dr. Naqvi's opinion is important, that the cause of death was due to loss of blood supply which followed the wound.

His third question which he put to you was whether the assault by Ebsary on Seale was lawful. He told you that Marshall and Seale were committing an offence of robbery and evidence persuaded him to believe that reasonable force hadn't been used to prevent the commission of crime. Sorry, that reasonable force cannot be used to prevent the commission of crime and he proceeded to talk to you about the implications of self defence and the evidence which has been induced as he saw it from the crown's point of view.

He told you that Ebsary stabbed Seale, in his view and the view of the crown he intended to cause death or grievous bodily harm to Seale and there was no question about that so far as his interpretation of the evidence was concerned. It was justified said Mr. Edwards, only if Ebsary was under real apprehension of receiving grievous bodily harm himself. He discussed the efforts of MacNeil and he talked about MacNeil having said that Ebsary was three to four feet away from Seale and the evidence of the words "behind me". He asked you

BY THE COURT:

to consider the reply and whether it constituted the words of a terrified man "do you want what I've got" and then said Mr. Edwards, the accused lunged for Seale and that's when the stabbing took place. MacNeil used the words "I've got something for you." Mr. Edwards said to you that these are the words of a man taking advantage, par of a person who is up to no good at that particular time.

He talked to you about justification. Ebsary had to be under the apprehension of death or grievous bodily harm or he had to be in circumstances where he could not have otherwise preserve himself. Mr. Edwards said that these were two teenage boys, one wrestling with MacNeil the other with Ebsary, and the response to the words "dig man, dig" was to punish Seale.

Mr. Edwards said it was up to you to decide whether Ebsary stepped across the line of justifiable force and Mr. Edwards is suggesting that he did.

He also talked to you about the type of weapon; you should consider the size of the wound; would he have had an opportunity to get a closed knife open. The knife would have to penetrate the lower abdomen and he suggested that it was a pocket knife.

Mr. Edwards concluded by saying the crown proves this case beyond a reasonable doubt.

BY THE COURT:

Then Mr. Wintermans spoke to you on hehalf of the defence and told you that you are not to look at the case in the point of consequences to any people who are involved, you are to look at the whole situation as it folded through the eyes of the accused.

He said that here was an old man that was going through the park that night. Marshall said the whole incident took five to ten minutes, it all happened in a matter of seconds, the accused didn't have time to consider options considering his size and age.

He told you to - asked you to consider that it was reasonable for a person like Ebsary to think he was going to be hurt, to be manhandled or beaten, that he had a prospect before him suffering grievous bodily harm and all he has to believe is that he may be hurt seriously. Mr. Wintermans urged you to accept that proposition in the evidence. He told you that Seale and Marshall were strong, that MacNeil was quickly disabled by Marshall. Without warning they were attacked by two total strangers said Mr. Wintermans and neither MacNeil nor Marshall saw the knife. Neither of those two could see a knife, but Ebsary could reasonably expect that they might be armed.

He pointed out that the real questions was whether this was an unlawful act which caused the injury and the death is not

BY THE COURT:

all that relevant, the point is not so much what happened to Seale; What do you expect Ebsary to do, punch Seale in the mouth, hit him over the head with a stick? Seale reached into his pocket for his money, in a split second he lunged blindly and desperately. The law permits a person to act personally before he is actually hurt, you don't have to wait for him to fire the first shot, said Mr. Wintermans. What degree of force is he entitled to use, the only force available to Ebsary was to protect himself from robbery with violence says Mr.Wintermans, and he's told you that in his view there is no question they attempted to rob MacNeil and Ebsary. That Ebsary's intention was not to hurt anyone, it was an unfortunate consequence (inaudible) which the court does not require one to sit back and consider. Seale is the author of his own misfortune to a very serious degree; Ebsary and MacNeil didn't start it and he urged the doubt to be resolved in favour of the accused and that it is impossible to know what would have happened if Ebsary had not pulled the knife.

The crown has not proved its case, says Mr. Wintermans, beyond a reasonable doubt.

Now the section 205(5) of the Code provides that person commits a culpable homocide when causes the death of a human being by means of an unlawful act. If you are satisfied beyond

BY THE COURT:

a reasonable doubt that the accused caused the death of Seale and that the accused was not acting in self defence in law as I have explained it, then the accused committed culpable homicide and is guilty of manslaughter.

The reason he would be guilty of manslaughter in these circumstances is that he would have caused the death of Seale by an unlawful act, being the assault which wounded and ultimately caused his death.

If you find that the accused acted in self defence as I have explained it to you, then that is a complete defence. But as I have said to you, the burden of proof is on the crown, it does not shift to the accused. The crown must prove its case beyond a reasonable doubt, any real doubt is to be resolved in the favour of the accused.

I told you that you would take the indictment into the jury room with you and you will note Mr. Foreman, inside the indictment there is a place which is marked verdict and which you will have circled the verdict. There also is a printed line down here which is marked foreman beside it. When you have arrived at a verdict which you write in on the left side, then you will sign it, your own signature as foreman. That is the only signature required.

There are no exhibits so you have this to take with you. There is only one of two possible verdicts. One is guilty as

BY THE COURT:

charged. The other is not guilty as charged. I have told you that you must be unanimous in your verdict. If you aren't, if you can't arrive at unitity, then I will have to discharge you and set the matter down for a new trial, so please do try to arrive at an unaminous verdict. If you wish to hear any of the evidence you can let me know by a note to the sheriff's officer and we can arrange to have a replay.

I have come to the conclusion of my charge unless for some reason I call you back with some other comment, so at this point I then order that you will no longer separate, you must stay together until your determination is made. Only the sheriff's officers will have access to you, they will look after you with respect to your food and your comfort. No other person is permitted to speak to you and certainly not in reference to this case. They are not able to speak to you with regard to any of the details in this case. They will be sworn in a moment and they honour their oath.

Clarence B. Landry is duly sworn for jury.

Jury is discharged.

MR. EDWARDS:

The crown has no objection to the charge My Lord.

MR. WINTERMANS:

The only problem that I have My Lord with all respect is on your very brief comment with respect to drunkeness. I realize that perhaps the defence of drunkeness -- well, the defence of drunkeness is not available in a strick sense. However, perhaps I should have guilty myself of not having said it in my own summation, but on reflection it seems that when one considers the subjective elements involved in assessing the situation, on behalf of Mr. Ebsary that is, that when he found himself under those circumstances I would submit that his degree of intoxication is a factor which the jury could take into account to consider how it may effect the way he thinks or reacts. That's about all, really.

BY THE COURT:

What do you say to that point Mr. Edwards?

MR. EDWARDS:

I respectively disagree with my Learned Friend and I would oppose to having the jury reinstructed on that point.

Just on that point, I see in the latest edition of Crankshaw's, volume one, the annotated cases, it says:

BY THE COURT:

"Section 34(2) requires a reasonable apprehension which must be taken to mean the apprehension of reasonable man. There is, therefore, no justification for taking into consideration the fact that the accused was drunk in determining the degree of apprehension under which he acted." In support of that proposition they quote a case of the Saskatchewan Court of Appeal which is a 1936 case. It's in 66 Canadian Criminal Cases, 134.

Although the case is old it apparently has never been overturned so that would seem to answer my Learned Friend's concern. As I say. . .

BY THE COURT:

Do you want to take a look at that case? We'll take five minutes and then reconvene?

MR. WINTERMANS:

Perhaps. . . that would be . . .

BY THE COURT:

I didn't think that drunkeness was a defence here. Of course that's what I said, that's what prompted you to make your comment which is fair game. In thinking about it last night

BY THE COURT:

and looking at my notes on the evidence of consumption of liquor, I didn't think - at least my notes which may not be terribly reliable - were all that convincing about the effect, if any, that liquor had on either pair, if I can put it that way, MacNeil and -- I'm not making a speech or engaging you in argument, I'm just telling you how it struck me.

It appeared to me from the evidence that MacNeil and Mr. Ebsary were certainly walking a - o.k. and didn't have any - the evidence didn't strike me as though there was a couple of drunks heading home. Marshall and Seale, the evidence of Marshall, they all had some beer,there is no doubt about that. Maybe more than may have had its effect. I'm just explaining to you why I sort of came to the conclusion that it's not a serious matter. But I'm glad to hear you on it.

MR. WINTERMANS:

The way I see it My Lord is that the evidence of MacNeil was that both he and Ebsary had around seven or eight beers at the tavern, that Ebsary had been there before MacNeil arrived so he wasn't sure how much Ebsary may have had before he got there so Ebsary had at least seven or eight beers. Of course he was asked whether or not he was drunk or feeling good and as a typical Cape Breton, of course, he said that he was feeling pretty good but wasn't drunk.

MR. WINTERMANS:

I would submit that anybody who has eight beers or more is obviously going to be under some effect. But be that as it may, perhaps if I could take a few minutes and . . .

BY THE COURT:

Take five minutes and you and Mr. Edwards can also discuss it and then we'll reconvene. It's not that major a point that we're going to disturb the jury too much by taking a five minute break.

FIVE MINUTE BREAK

BY THE COURT:

Mr. Wintermans?

MR. WINTERMANS:

Yes, My Lord. I'm satisfied that it's not important enough to bring the jury back to recharge them.

MR. EDWARDS:

And I concur with my Learned Friend.

BY THE COURT:

Alright, thank you. We'll await the return of the jury.

The jury returns and is recalled.

BY THE COURT:

Mr. Foreman, I have a message from you and it says MacNeil testimony, Section 34 of the Criminal Code and you would like to hear that?

MR. FOREMAN:

We would like to hear that.

BY THE COURT:

Sure. Alright, I've shown this note to the counsel, they know what it is and we have arranged to set up the machinery so that we will first play to you the evidence of Mr. MacNeil.

The jury is recalled.

BY THE COURT:

Mr. Foreman, I have your request which reads as follows: Is it possible that the jury could have a written copy of a section 34 or a photocopy of the Criminal Code page containing this section?

That is the message, isn't it?

MR. FOREMAN:

Yes it is.

BY THE COURT:

The answer is yes, I will of course give you that. First of all I should ask counsel if they have anything to say, that's the decision I intend to make.

MR. WINTERMANS:

No My Lord.

MR. EDWARDS:

Yes that's agreeable My Lord.

The jury receives a copy of Section 34 and retires to deliberate.

The jury returns and is recalled.

BY THE COURT:

Mr. Foreman, have you agreed upon your verdict?

MR. FOREMAN:

We have not.

BY THE COURT:

The message here from Mr. Foreman says: "We,the jury, after extremely careful consideration have determined that we cannot reach a unanimous decision". Now we thank you for the message. I want to just speak to you a bit about that Mr. Foreman and members of the jury.

As I indicated to you earlier on and certainly I am sure we are all aware of the desire to have a verdict in a case, any case before the court. I certainly realize that it has been a long day, I realize that you have been in a room with rather close quarters and I realize full well that you have all given this your consciencious dedication. I am sure you tried to reach a verdict.

Now if you are unable to reach a verdict then, as I indicated to you earlier today, the whole matter is set over to be tried again at the next sitting of the Supreme Court in Sydney. That means a delay in an already rather protracted proceeding in a sense, and it means worry, inconvenience and so on to all concerned. So that to know that youwent out about quarter past eleven or something like that this morning and there has been a couple of meal times, some time spent in here listening to tapes and so on, I'm wondering Mr. Foreman if before you make this a final thing, if you and the members of the jury would be interested in considering whether you would like to break for tonight and have the sheriff arrange

BY THE COURT:

accomodation and return tomorrow morning after the sun rises to take another look at this situation, see if that is the final position that you are taking. Don't misunderstand, I hope you appreciate why I am saying these things to you because of the desire of the process to render a verdict but I don't want you to think that I'm attempting to bring any pressure. I hope you understand that Mr. Foreman. The last thing that I would try to do and I have no right in any respect to try and pressure you in any way whatsoever. Having said those things to you, Mr. Foreman, would you be prepared to go back once more to the jury room and consider what I have said and then let me know how you feel about that proposition.

I am not trying to make deals with you, I am not trying to bring any pressure on you, I am just asking you if you would consider, in the event that you have not considered that possibility in the face of what would have to be done if you are unable to reach a unanimous verdict.

Would you mind giving that a little consideration and then you can let me know.

Jury deliberates.

Jury returns and is recalled.

MR. FOREMAN:

Your Honour, we have discussed what you have mentioned to us as we have unanimously decided that we cannot agree. I feel quite competent that all those concerned have given very sincere thought and that in all conscience that's the best we can do. We also feel that more time would not really assist us unless there are other things to consider. Based on what we have seen, that's what we have come up with.

BY THE COURT:

Thank you Mr. Foreman.

Well Mr. Foreman and members of the Jury, it goes without saying that I want to thank you for what I know has been a diligent and consciencious effort which you have made during these last two or three days that you've been here. I can tell you have worked hard and that you have given these matters your serious consideration and I certainly accept what you say Mr. Foreman on behalf of all members of the jury.

As I indicated, naturally the court is sorry that a verdict has not been achieved and I expect that you, Mr. Foreman, and members of the jury are as well. Even though, I want you to know that you have engaged in very important and a significant part of the democratic process and the court is equally

BY THE COURT:

grateful for your effort and understands the position that you have expressed.

It will be a -- there is another case to begin tomorrow but I am not going to ask you to come tomorrow for that. I will, however, ask you to return on Tuesday of next week, the twentieth of September at half past nine, unless there are any of you to whom I have granted an exemption while we're in that period. So so far as your duties are concerned, I want to officially thank and I want to ask you to please return on Tuesday, September twenty at half past nine in the morning.

Now then, so far as the indictment of Her Majestythe Queen against Roy Newman Ebsary is concerned, I order that it be set over to the November, nineteen eighty-three sitting, of the Supreme Court of Nova Scotia Trial Division in Sydney, in the County of Cape Breton, for the reason that the jury has been unable to reach a verdict.

There is no other matters. . .

MR. WINTERMANS:

My Lord, with respect to Mr. Ebsary's liberty I would ask that he continue to be released on his own recognizance or his own undertaking to reappear at the next trial date in November of nineteen eighty-three.

MR. EDWARDS:

The crown has no objection to that My Lord.

BY THE COURT:

Alright. What is the specific date in November?

MR. EDWARDS:

November first.

BY THE COURT:

Then with respect to the application which has been made on behalf of Roy Newman Ebsary, I grant your application that Mr. Ebsary shall continue to be on his own recognizance with the direction that he return to this court on Tuesday, November one, nineteen eighty-three at nine thirty o'clock in the morning.

MR. EDWARDS:

My Lord, he was subject to certain conditions about staying away from certain properties so rather than reiterate those, I don't have the precise wording of them, I think we can agree on the saying he is released on his own recognizance. . .

BY THE COURT:

As an addendum to the Order which I have just read, I will add that the conditions which have existed on the recognizance

BY THE COURT:

and bail provision prior to the hearing of this case with respect to Roy Newman Ebsary shall also continue until he next returns to Supreme Court on November one, nineteen eighty-three, as though each and every said restriction were now repeated by me specifically in this court.

MR. WINTERMANS:

Thank you.

MR. EDWARDS:

Thank you My Lord.

BY THE COURT:

The court will adjourn until nine thirty in the morning.