

I N D E X

VOLUME 6

EBSARY SECOND TRIAL-----PAGES 1 - 217
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November, 1983

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1983

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IN THE SUPREME COURT
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROY NEWMAN EBSARY

Mr. Justice R. MacLeod Rogers

F. Edwards, Esq. for the Crown

L. Wintermans, Esq., for the Defence

November 4, 1983

09:30 Court opens.

2.

Jury called. All present. Mrs. Miller sworn as Foreman.

Mr. Muggah reads Indictment for jury.

By the Court:

Ladies and gentlemen of the jury, you've been selected as the judges of fact by the accused and the prosecution over, I might say, a very lengthy period of time yesterday. It is your duty carefully, calmly and dispassionately to consider and weigh the evidence without the slightest trace of sympathy or prejudice for or against any party to this trial. It is important not only that justice be done, but also that it be seen to be done. It is important that all concerned with this trial are convinced that there has been, in fact, a fair trial. Therefore how you conduct yourselves in and out of this courtroom while this trial is going on is important to you and to the administration of justice.

You must not discuss this case with anyone nor let anyone tell you anything about it, outside of the courtroom. If anyone tries, politely refuse to listen, and if he or she insists then you should report that to me as the presiding Justice. The law imposes severe penalties on anyone who attempts to or does communicate with a juror respecting a matter on trial. I warn you especially in respect to your own families and friends, since they very naturally will be curious to hear about the case. What is more, I advise you not to discuss the case among yourselves because of the very great danger of coming to a premature conclusion.

Your role should be one of patient, careful listening to the

By the Court

3.

evidence. The time to discuss the case is when you've retired to consider your verdict. At that time you will have heard all the evidence, the arguments of counsel and my direction on the law, and you will be in a much better position to exchange views and to arrive at a fair conclusion.

If you have heard or read anything about this case, it is your duty to banish such information from your mind. You must decide whether the accused is innocent or guilty solely upon the evidence that you hear in this courtroom during the trial of the accused.

I'll now give you a short outline of the procedure that is usually followed in a criminal trial and we will be following it here. Our system of justice is known as the adversary system, which means that the presentation and examination of the witnesses is substantially in the control of the Crown Prosecutor, Mr. Edwards, and counsel for the defence, Mr. Wintermans, and subject to certain rules which I shall enforce, you and I, as impartial judges will sit and listen to what the parties, their witnesses and counsel have to say.

The case will begin with the Crown Prosecutor outlining to you the evidence that he intends to present. The sole purpose of this is to assist you to understand the evidence for the Crown. What the Crown Prosecutor says when outlining to you the evidence he intends to present is not proof of anything, and is only a statement of what he hopes to prove. Subject to my control he may also comment on the law. Having outlined his case the Crown Prosecutor will then call his witnesses. He will ask them questions in what is known as his examination in chief, by which is meant that he cannot suggest answers in controversial matters,

By the Court

4.

although he may do so on unimportant details. After the Crown Prosecutor has finished his examination of the Crown witness, counsel for the defence may cross-examine that witness and by that is meant he can ask questions to test the memory of the witness and the accuracy of his evidence. The purpose of cross-examination by counsel for the defence is to test the truth, to aid the witness in recalling other facts he may have forgotten and also to bring out evidence in favour of the defence. When counsel for the defence has concluded its cross-examination of the Crown witness, the Crown Prosecutor then will be entitled to ask the witness further questions to explain fresh matters which have been brought out in cross-examination by counsel for the defence. Re-examination.

Now after the witnesses for the Crown have given their evidence and have been cross-examined, counsel for the defence may then outline to you the evidence that he intends to present if he does in fact choose to do so. The sole purpose of this is to assist you to understand the evidence for the defence. Again what counsel for the defence says when outlining the evidence he intends to present is not proof of anything but only a statement of what he hopes to prove. Again subject to my control he may also comment on the law.

As the case proceeds you will notice from time to time that I shall be called upon to rule upon the admissibility of evidence tendered by the parties. We have a well developed body of law which guides us as to what evidence is admissible and what evidence is inadmissible and you must be guided by my ruling. On some occasions I shall rule in your presence while on others I may ask you to retire because

By the Court

5.

it may be necessary for me to hear the evidence before ruling on it. When I ask you to retire, I would ask you not to speculate on what's going on in your absence. You may rest assured that anything that is proper for you to hear you shall hear.

Now it is at this stage and before the trial begins, I want to let you know, perhaps you know already, that an accused person is never obliged to testify in our system of justice because he is presumed to be innocent until convicted, and that is something to keep in mind.

Now if any juror has any difficulty in hearing any of the evidence, it will be his or her duty to advise your foreman who in turn will give me this information. The witness is fairly close to you but sometimes they for one reason or another don't speak up and perhaps you will have difficulty hearing. Don't let that pass. Let us know and we will see if we can correct the matter.

Now what I will be trying to do is to start each day, and I hope there will not be too many days, at nine thirty in the morning and adjourning at about twelve thirty at noon, coming back at two o'clock and ending up around four thirty in the afternoon, with a mid-morning and a mid-afternoon short break.

Now I should advise you now, I should keep advising you, I suppose, that you should not hang around the hallways or around the courthouse, the doors, where you may hear or see things that you ought not to hear and see. Remember what I have advised you and you know because of the procedure we went through yesterday that you must decide the issues

By the Court

6.

before you on the evidence you hear in this court and that alone, so it behooves you not to be talking about it or to be seen talking to anybody outside this courtroom, and so when you do come back after you go home for lunch or whatever, please go directly to the jury room and do not tarry and talk with even good friends in the hallway outside.

It is now your duty to hear the evidence as I've said at the beginning, and dit is your duty and mine to listen objectively without prejudice and without sympathy, and if all of us listen in that manner we will have fulfilled our tasks.

Mr. Edwards?

Mr. Wintermans: First of all if I could, I would request that Your Lordship order the exclusion of all witnesses until they are called and even after they're finished from the courtroom so they won't be influenced perhaps by what they may hear on the witness stand.

By the Court: All right, there'd be no great objection on the part of the Crown I expect.

Mr. Edwards: No objection to that, My Lord. Presuming the informant is not covered by the exclusion.

By the Court: All right, I would ask that all those people who will be appearing as witnesses in this case retire from the courtroom other than the informant and those witnesses will be called when appropriate.

Mr. Wintermans: They may already be outside.

By the Court: Well, usually that's the practice. Are we all . . . ?

Mr. Edwards: We're all here, I believe.

By the Court: Some may not understand the nature of what I said.

By the Court

7.

All right. If you see any witnesses appearing just let me know.

Mr. Edwards?

Mr. Edwards: Thank you, My Lord.

Madame Foreman, ladies and gentlemen of the jury, my name is Frank Edwards and as His Lordship mentioned, it is my privilege to represent the Crown in this procedure.

Now the evidence will be fairly short. We expect that the evidence will conclude sometime on Monday so as far as trials go this will not be excessively long, but because of that fact it is no less important and no less serious, of course.

Now the facts which gave rise to this particular charge against Mr. Ebsary occurred on the night of the twenty-eighth of May, nineteen seventy-one, and on that date Donald Marshall, Jr. who was then aged seventeen years, and Sandy Seale, Sandford William Seale the victim, was approximately the same age, maybe a year younger, and they were acquaintances, and on that night sometime before midnight at approximately eleven p.m. they met in Wentworth Park and it appears that it was a chance meeting and was no pre-arranged in any respect, but Donald Marshall Jr. on that night met Sandy Seale in the park and they had some discussion and the gist of the discussion was that they decided to roll somebody in order to get some money.

Now meanwhile while they were having this discussion in the park the accused, Roy Newman Ebsary and his friend James MacNeil were at the State Tavern, which has since closed, but which at that time was in operation in the George Street area of the City, and they left the State

Mr. Edwards' Address to Jury

8.

Tavern at roughly eleven p.m. and headed for Ebsary's home which at that time was on Rear Argyle Street. Now the route they took would have been in a southerly direction along George Street and then they cut through Wentworth Park to Crescent Street, which skirts the perimeter of the park. And Crescent Street, of course, would take you in the direction of Argyle Street. Well, it was while they were walking along Crescent Street that they met Donald Marshall Jr. and Sandy Seale, and it was at that point that Donald Marshall Jr. and Sandy Seale confronted Ebsary and MacNeil and tried to as the term goes 'roll them.'

Now exactly how that happened we expect the witnesses will bring out is that Ebsary and Seale had a brief conversation but there was no physical contact between them prior to the actual stabbing, but at the same time that they were having the conversation MacNeil and Marshall were in a scuffle close by there and apparently Marshall and Seale had come up behind MacNeil and Ebsary and that's how things got started.

Well, you'll hear James MacNeil give his version of what happened and you will hear Donald Marshall Jr. give his version of what happened. One fact which is incontrovertible is that during that skirmish the accused, Roy Newman Ebsary, took out a knife and stabbed Mr. Seale. Mr. Seale fell a short distance from where the stabbing actually took place. Donald Marshall Jr. noting that his friend Seale had received a wound let go of MacNeil and at that point he suffered a stab injury to his left arm, and it was at that point that he ran away, he ran from Crescent Street to South Bentinck Street. Now meanwhile Ebsary and MacNeil left the area and made their way to Mr. Ebsary's

Mr. Edwards' Address to Jury

9.

residence and when they arrived there, you will hear James MacNeil's version of what occurred at that location and you will also hear from Mr. Ebsary's wife, Mary Ebsary and his daughter who was then aged thirteen years old, Donna Ebsary, and they will tell you about what happened when James MacNeil and Roy Ebsary came into the Ebsary residence apparently shortly after the stabbing had taken place.

Now meanwhile, back in the area of Crescent Street and South Bentinck and Byng Avenue, all those streets are - those of you who live in Sydney will be aware, are all in the area of Wentworth Park. Donald Marshall Jr. met another chap by the name of Maynard Chant and he and Chant then returned to the area where the stabbing had taken place and they returned there at the request of Mr. Marshall. Mr. Marshall ran into one of the residences which was on Crescent Street and asked the occupant of that residence to phone the ambulance and the police and then he returned to where Sandy Seale was still conscious but severely wounded on Crescent Street, and in fact it was Donald Marshall Jr. who flagged down the police car when it arrived and in that regard you will hear from one of the first officers on the scene that night, Constable Leo Mroz of the City Police Department and he will tell you where Sandy Seale was at the time he arrived, and where Donald Marshall Jr. was at the time he arrived and about the condition of each. He will also tell you about following Sandy Seale's ambulance to the City Hospital and he will tell you that there he observed Mr. Seale being treated by Doctor Naqvi and on Monday you will hear Doctor Naqvi give evidence as to his recollection of the treatments which were undergone by Mr. Seale at that

Mr. Edwards' Address to Jury

10.

time. Unfortunately, despite the efforts of Doctor Naqvi to save him, Mr. Seale died a few hours after getting to the hospital.

Now the tragedy was then compounded after that because a week later Donald Marshall Jr., you will hear him tell you about this, a week later he was charged with the murder of Sandy Seale, and in fact on November fifty, nineteen seventy-one he was convicted by the Supreme Court judge and jury of that murder and sentenced to life imprisonment, and that was November fifth, seventy-one.

You will hear, going back now to James MacNeil's evidence, you will hear him tell you that on November fifteenth, ten days after Marshall's conviction, he went to the Sydney Police and he told the Sydney Police at that time that it was in fact Ebsary and not Marshall who had stabbed Seale, and you will hear that the investigation was then reopened but it was closed again without any charges being laid at that time, or appeals being heard at that time about Marshall.

The investigation was finally reopened in February of nineteen eighty-two and following that reinvestigation, the Appeal Division of the Nova Scotia Supreme Court heard evidence on December first and second of nineteen eighty-two and on May tenth, nineteen eighty-three they acquitted Donald Marshall Jr. It was a few days after that that Mr. Ebsary was charged in relation to the stabbing death of Mr. Seale and that charge has culminated with this matter being before you today.

So without more, I will begin to call evidence and prior to calling the first witness, I want to have marked as an exhibit a plan of Wentworth Park which my learned friend Mr. Wintermans has graciously

Mr. Edwards

11.

agreed to admit without the necessity of calling Mr. J. Carl MacDonald who prepared this plan on June fifteenth, nineteen seventy-one. Now during the course of the trial I will have the plan on this board and as the witnesses come forward I will have them refer to the plan so that you can have a more accurate picture of what happened on that night in May, seventy-one.

So the plan is now marked Exhibit One. If I could have your assistance, please? (Putting plan on board).

Now would you please call Donald Marshall Junior?

Mr. Donald Marshall duly sworn and examined by Mr. Edwards:

Donald Marshall, Jr., Direct Examination by Mr. Edwards

1. Q. Your name is Donald Marshall, Junior?
- A. Yes.
2. Q. And what is your age, Mr. Marshall?
- A. Thirty. Thirty years old.
3. Q. Thirty? And what is your present address?
- A. Fifty-one fifty-six Ogilvie Towers, Halifax.
4. Q. And your present occupation?
- A. I'm a plumber on the Reserve.
5. Q. A plumber on . . .?
- A. Shubenacadie Reserve.
6. Q. The Shubenacadie Reserve.
- A. Yes.
7. Q. And in May of nineteen seventy-one, Mr. Marshall, where would your

Mr. Marshall, Direct Exam. by Mr. Edwards

12.

— residence have been?

A. On Membertou Reservation in Membertou.

8. Q. And that's in Sydney, is it?

A. Yeah.

9. Q. Yes?

A. Yes.

10. Q. Speak up just a little bit louder, Mr. Marshall, please, so that members of the jury can hear you.

And you were a lifelong resident of Sydney up to that time, is that correct?

A. Yes.

11. Q. And you resided on the Membertou Reserve with your parents, Donald Marshall Senior and your mother, is that correct?

A. Yes.

12. Q. And do you have brothers and sisters?

A. Yes, I have. I have ten brothers and sisters.

13. Q. Ten brothers and sisters.

By the Court: Can the jury hear Mr. Marshall?

(Answer yes).

14. Q. Mr. Edwards : All right. So in nineteen seventy-one then you would have been approximately seventeen years old?

—A. Yes.

15. Q. How tall are you now, Mr. Marshall?

A. I'm six foot one.

16. Q. Six foot one. And what is your present weight?

—A. About a hundred and seventy-five.

Mr. Marshall, Direct Exam. by Mr. Edwards

13.

17. — Q. About a hundred and seventy-five?

A. Yes.

18. Q. And how does that compare with your height and weight in nineteen seventy-one?

A. I was about five foot ten, seventeen, and about a hundred and forty-five. A hundred and forty-five pounds.

19. Q. In nineteen seventy-one were you still in school?
Or had you left school?

A. I left school when I was fourteen.

20. Q. Okay. And were you employed in nineteen seventy-one?

A. Yes, I was working with my father.

21. Q. And what business was he in at that time?

A. Drywall.

22. Q. Drywall installation.

A. Yes.

23. Q. Gyproc and that type of thing.

A. Yes.

24. Q. Okay. Now do you recall the evening of May twenty-eighth, nineteen seventy-one?

A. Yes.

25. Q. Prior to that evening did you know the victim, Sanford Sandy Seale?

A. Yes.

26. Q. And approximately how old was he at that time?

A. About my age, sixteen or seventeen.

27. Q. Sixteen or seventeen years old? Okay. And how did his height compare to yours at the time?

Mr. Marshall, Jr., Direct Exam. by Mr. Edwards

14.

— A. I believe he was shorter than me, a little shorter than me.

23. Q. You believe he was a little shorter. Okay. And how would you describe your relationship with him prior to May twenty-eighth, nineteen seventy-one?

A. My relationship with him?

24. Q. Yeah. How well did you know him? If I can put it that way.

A. Like any other - like everybody else, we just knew them, the group.

25. Q. Had you ever visited his home?

A. One day I went there to help my father do drywall work over there.

26. Q. All right. How long was that prior to May twenty-eighth, seventy-one?

A. I don't know. I don't remember. It wasn't long before that.

27. Q. Well, would it have been months or years before?

A. Months.

28. Q. Months before. Okay. Had you ever had any arguments or fights with Sandy Seale?

A. No.

29. Q. Now the night of May twenty-eighth, nineteen seventy-one, prior to that night, where had you been that day?

A. I was on the Shubenacadie Reserve and I went to Halifax, Bedford, then came home.

30. Q. Yes. And what time did you arrive back in the Sydney area?

A. About nine thirty in the evening.

31. Q. About nine thirty p.m.?

A. Yes.

32. Q. And when you arrived home, do you mean you arrived back at the Membertou Reservation?

Mr. Marshall, Direct Exam. by Mr. Edwards

15.

- A. Yes.
38. Q. And where if anywhere, did you go from there?
- A. I met a friend of mine, Artie Paul from Membertou, we went to - we were going to Tobin's house on Intercolonial and before that . .
39. Q. Tobin's house on Intercolonial Street?
- A. Yes.
40. Q. That's another street here in Sydney, is it?
- A. Yes.
41. Q. And before that?
- A. Before we went there we hiked a ride from Roy Gould on the Reserve and asked him to take us to the liquor store, and we went to the liquor store and bought a bottle of rum.
42. Q. You bought a bottle of rum?
- A. Yes.
43. Q. Do you remember if it was a pint or a quart?
- A. I don't remember. I think it was a quart.
44. Q. I'm sorry, Mr. Marshall, I didn't hear you.
- A. I think it was a quart.
45. Q. You think it was a quart?
- A. Yeah. I'm not sure though.
45. Q. Okay.
- A. And when we got there, a few of the people we knew, we got together in the back yard.
47. Q. This is where now?
- A. On Intercolonial.
48. Q. Yes?
-

Mr. Marshall, Direct Exam. by Mr. Edwards

16.

By the Court: What's Intercolonial? Is that a street?

Mr. Edwards: Intercolonial Street.

A. So I stayed there for about ten, fifteen minutes and I left.

49. Q. I see. Okay. Let's just back up for a moment. Prior to getting home to the Reservation that evening, had you anything to drink, any alcoholic beverages?

A. I had about one drink^{out}/of that rum bottle.

50. Q. One drink out of the rum bottle?

A. Yes.

51. Q. That was prior to getting home to Membertou, was it?

A. Yes.

52. Q. So then after you got home and then went to Intercolonial Street, how much did you have to drink there?

A. Pardon?

53. Q. How much did you have to drink on Intercolonial Street?

A. One drink of rum.

54. Q. That's when you had the drink of rum.

A. Yes.

55. Q. But I mean prior to getting home at nine thirty that evening, when you were in Halifax, had you had anything to drink while you were in Halifax or on the way home?

A. No.

56. Q. No. Okay. So at Intercolonial Street you had one drink of rum. Where did you go from there?

A. I went to the Keltic Tavern with two other guys and . . .

Mr. Marshall, Direct Exam. by Mr. Edwards

17.

57. Q. Who were they, do you recall?
- A. Gary Tobin and I don't remember the other guy.
58. Q. Yes.
- A. And we walked in the Keltic Tavern and we just walked in and I lost track of them, and I went out the back door of the Keltic Tavern and I kept going. I didn't bother looking for them.
59. Q. Did you have anything to drink at the Keltic Tavern?
- A. No.
60. Q. How long would you have been there all toll.
- A. The Keltic Tavern?
61. Q. Yes.
- A. Oh, about a couple of minutes.
62. Q. And from the Keltic Tavern where did you go?
- A. I was going to the dance hall on George Street.
63. Q. That's Saint Joseph's dance hall?
- A. Yes.
64. Q. And you left the Keltic Tavern alone?
- A. Yes.
65. Q. Okay. All right. And where in fact did you go?
- A. When I reached Wentworth Park I walked down one of the paths going off the road.
66. Q. From George Street?
- A. Yes.
67. Q. Yes?
- A. And what I did was, I was walking through the park. My intentions was

Mr. Marshall, Direct Exam. by Mr. Edwards

18.

going to the dance hall.

68. Q. I'm sorry, Mr. Marshall, I didn't catch that last answer.

A. I was going to the dance hall and I ended up going down the park to see if any of my friends were there and I didn't find nobody there, so I bumped into Sandy Seale.

69. Q. You met Sandy Seale.

A. Yes.

70. Q. That was in Wentworth Park?

A. Yes.

71. Q. Whereabouts in the park did you meet Mr. Seale?

A. Where the bandshell is, in that area, around the center of the park.

72. Q. Maybe you'll just step down from the stand for a minute and show us on the plan, exhibit one, where you first met Mr. Seale.

A. This way.

73. Q. When you say this way, you're showing the path. All right. So maybe then we'll put an arrow where you say you left George Street to go into Wentworth Park, okay? Put a B on there. All right? Now where did you meet Mr. Seale?

A. There.

74. Q. Maybe you'll just put a DM and SS right there. That's where you met Sandy Seale. All right. Do you want to take the stand again and I'll have you refer to this later. All right.—So you met Sandy Seale at the point you've indicated there on the plan and did you and Mr. Seale have any conversation at that time?

A. Yes, I asked him where he came from and he told me he came from the dance and he told me like, the dance place was closing down, right? So - and he

Mr. Marshall, Direct Exam. by Mr. Edwards

19.

— said he was on his way home, and he was on his way home when I met him.

75. Q. What did you say to him?
A. I asked if he wanted to make some money with me.
76. Q. You asked him if he wanted to make some money with you?
A. Yes.
77. Q. Yes?
A. And he said okay.
78. Q. And what discussion did you have about making money, if any?
A. It wasn't a discussion, just making money like, I didn't ask him to do a certain thing with me, I just asked him to make money with me. If he wanted to make some money with me.
79. Q. What were your intentions at that time, Mr. Marshall?
A. Making money, bum it, you know. I'd been in the park before that and we used to bum money all the time up there, so it was just to bum money.
80. Q. So how long did this conversation between you and Mr. Seale last?
A. About not more than ten minutes, I'd say.
81. Q. Not more than ten minutes. Okay. Where did you and Mr. Seale go from there?
A. We went to the footbridge there in the park.
82. Q. Yes?
A. And that's where we stood and I don't recall what we were talking about then.
83. Q. Could you give us an idea of what time it was when you first met Sandy Seale?
A. About between eleven thirty and twelve o'clock.
84. Q. Okay. Were you wearing a watch that night?
-

Mr. Marshall, Direct Exam. by Mr. Edwards

20.

A. No.

85. Q. All right. So you went from the place you say you met to the footbridge in the park and you were there how long?

A. About - not over ten minutes anyway.

86. Q. What if anything occurred then?

A. We were called by two guys on Crescent Street and they asked me for a cigarette.

87. Q. Now did they ask you for a cigarette before you left the footbridge or was that after you left Crescent Street?

A. We were on the footbridge when they called us up.

88. Q. Yes. And what did you do after that, that they hailed you from Crescent Street?

A. We went up and the grass part there in the map, we were coming up the hill and there was a girl and a guy, they asked me for a light on that same street, and . . .

89. Q. Who were they?

A. Terry Gushue and Patricia Harris, and . . .

90. Q. You mean you met Gushue and Harris after you'd been called by these two people?

A. Yes.

91. Q. Were Gushue and Harris the two people who called you up to Crescent Street?

A. No, it was the two men that were up there.

92. Q. Did you recognize the two men that called you up to Crescent Street?

A. No.

93. Q. All right. So you met Gushue and Harris.

A. Yes.

Mr. Marshall, Direct Exam. by Mr. Edwards

21.

91. Q. What took place?
A. I went over.
95. Q. Went over to where?
A. To Harris and Gushue.
96. Q. Yes?
A. And they asked me for a light and I gave them a light.
97. Q. Where did Sandy Seale go when you went over to Harris and Gushue?
A. He went to the two guys that called us up the first time, he joined up with them two.
98. Q. Yes? So at the time when you were first speaking to Harris and Gushue how far would you have been from Mr. Seale and the two people that had called you first?
A. I'd say about a hundred feet.
99. Q. Well, looking at distances in this courtroom.
A. About three times the length of the room.
100. Q. Three times the length of the room.
A. Yes.
101. Q. Yes? Okay. So how long did you stay with Harris and Gushue?
A. I'd say not more than five minutes.
102. Q. Not more than five minutes? All right. And after you spoke with Harris and Gushue, where did you go then?
A. I went back to join the two men that called us up and the people that met Sandy Seale, I joined them people.
103. Q. You joined them.
A. Yes.
104. Q. All right. And what if anything took place then?

Mr. Marshall, Direct Exam. by Mr. Edwards

22.

- A. Nothing took place then. We just - I was talking to the older guy and like we were just talking about everything, like I asked him where he was from, I told him he dressed like a priest and he told me he was a priest, and we talked about you know, twenty minutes to a half hour anyway and we just talked in general, you know.
105. Q. Okay. When you say the older fellow, can you describe the two men that you spoke with at that time?
- A. Yes. The younger guy, . . .
106. Q. There was a younger guy and an older guy.
- A. Yes.
107. Q. Right. Now take the younger guy. Approximately how old would you have judged him to have been at that time?
- A. I'd say about thirty years old.
108. Q. Yes.
- A. Anywheres in that area, about five ten.
109. Q. He was about five foot ten in height?
- A. Yes.
110. Q. Yes?
- A. And . . .
111. Q. What build? Fat or thin?
- A. Medium. Medium build.
112. Q. Yes? How was he dressed, do you recall?
- A. I remember he had a brown corduroy coat on, I think.
113. Q. A brown corduroy coat.
- A. Yes.
114. Q. What length was the young fellow's coat?

Mr. Marshall, Direct Exam. by Mr. Edwards

23.

A. Short.

115. Q. Waist length?

A. Yes.

116. Q. Yes? What about the older fellow? What age would you have judged him to have been at the time?

A. I'd say he was about fifty-five, sixty years old.

117. Q. Yes? And his height?

A. Five eight, five nine. And he weighed about a hundred and seventy-five pounds.

118. Q. Yes. And what was he wearing?

A. He had a navy coat on, or he was dressed like ready for winter or something. He was dressed pretty heavy.

119. Q. This coat he was wearing, what length was it?

A. It was down to his - down to here.

120. Q. You're indicating the calves of your legs, eh?

A. Yes.

121. Q. It was a long coat.

A. Yes.

122. Q. And was it dark coloured or light coloured?

A. It was dark coloured.

123. Q. And do you recall exactly how it was worn?

A. No, I - it was a big coat anyway, I didn't know what it was, it was a big coat.

124. Q. Do you recall whether it was closed in front or open?

A. It was closed.

125. Q. What about the man's facial features?
- A. He had black rimmed glasses on, dark rimmed glasses anyway, and his hair was combed back and . .
126. Q. What colour was his hair?
- A. It was white. Grey hair.
127. Q. Grey hair?
- A. Yes. He had - his face was wide, like, wide. He had a wide face, I don't know how to describe it.
128. Q. Okay. Do you recall anything about the manner in which he spoke?
- A. In what way, like?
129. Q. Well, if somebody asked you how to describe how the man spoke, could you answer that?
- A. I don't know.
130. Q. So you and Mr. Seale had a discussion, you say, with these two men.
- A. Yes.
131. Q. It lasted how long?
- A. About not more than a half hour.
132. Q. No more than a half hour.
- A. Yes.
133. Q. And what happened then?
- A. The older fellow asked us to come over the house and have a drink with him, and I told him no, and they proceeded to walk down Crescent Street to go home because he indicated where he lived.
134. Q. Sorry, I didn't hear that.
- A. He indicated where he lived.

135. Q. Yes?
- A. And he told us I just live up here and he said why don't you come up for a drink and I told him no, and he walked away. They proceeded to go home and I called them back.
136. Q. You called them back.
- A. Yes.
137. Q. When you called them back, how far had they gotten from Mr. Seale?
- A. About a hundred feet anyway.
138. Q. About a hundred feet?
- A. Maybe more.
139. Q. Okay. When you called them back, what did you say?
- A. I just told them, I said come on back here, and they came back and . . .
140. Q. How did they come back?
- A. They just walked back.
141. Q. All right.
- A. And when they - when they - when they caught up to us, he - the old fellow went to Mr. Seale and asked him everything, if he wanted everything he had.
142. Q. Well, before he said that where was the other fellow?
- The younger fellow?
- A. He was with me, standing beside me.
143. Q. Standing beside you?
- A. Yes.
144. Q. And what were you and he doing, if anything?
- A. We grabbed on to each other.
145. Q. You grabbed on to each other.

Mr. Marshall, Direct Exam. by Mr. Edwards

26.

A. Yes.

146. Q. For what reason did you grab onto each other?

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

147. Q. Now you mentioned that the older fellow said something to Seale.
What was that?

A. He asked him if he wanted everything he had.

148. Q. I see. Now did he say that before or after you and MacNeil had grabbed
hold of each other?

A. Around the same time. Everything happened the same time. I don't think
it was before or after.

149. Q. Yes. And when the older fellow said that to Seale, if he wanted
everything he had, what if anything did Seale say?

A. Seale never said nothing.

150. Q. Had Seale said anything before that?

A. No. I never heard him saying anything.

151. Q. You never heard him. Okay. What happened then?

A. After Seale asked - after Ebsary asked Seale . .

152. Q. You're saying Ebsary now.

A. Now.

153. Q. Who are you referring to when you say Ebsary?

A. Roy Ebsary.

154. Q. Are you referring to the older man or the younger man?

A. The older man.

155. Q. The older man.

~~A.~~ Yes.

Mr. Marshall, Direct Exam. by Mr. Edwards

27.

- A. After Mr. Ebsary asked Seale if he wanted everything he had, that's when he - that's when he knifed him.
156. Q. That's when who knifed who?
- A. Mr. Ebsary knifed Seale.
157. Q. Okay. Exactly how did he do that?
- A. Can I show you? Could I show it on there?
- Mr. Edwards : Is it permissible for him to show a motion, My Lord?
- By the Court : Yes.
- And while you're doing it you can describe what you're doing.
- A. Yes. Okay.
158. Q. So you're using me as Mr. Seale, and we're standing approximately two feet apart.
- A. Side by side.
159. Q. Side by side.
- (Mr. Marshall does demonstration with Mr. Edwards).
160. Q. This is the position the two parties were in, right now my left shoulder is next to your right shoulder, or maybe a foot between them, and this is the position they were in when Ebsary asked Seale if he wanted everything he had.
- A. Yes.
161. Q. And what happened then?
- A. Seale nodded his head.
162. Q. Seale nodded his head. Yes?
- A. Ebsary turned around and grabbed him like this.
163. Q. All right. Now you're grabbing me with your left hand on my right shoulder. Yes?

-
- A. I didn't know whether he stabbed him or what.
164. Q. All right, so you have your left hand on my right shoulder so that he must have stabbed him with his right hand.
- A. Yes.
165. Q. Now what made you think that he had stabbed Seale at that time?
- A. After he stabbed Seale he came after me.
166. Q. No, before he comes after you, how did you know Seale was stabbed?
- A. I didn't know.
167. Q. What if any noise did you hear coming from the two of them?
- A. Just a moan.
168. Q. Mr. Seale moaned.
- A. Yes.
169. Q. How did Mr. Seale's body react at that time?
- A. He bent over.
170. Q. He bent over. How far did he bend over?
- A. Down to his knees.
171. Q. Yes? All right. So you described to me how Seale bent over. What happened then as far as you can recollect?
- A. I let go of Jim MacNeil.
172. Q. You let go of Jim MacNeil.
- A. Yes.
173. Q. How far were you and Jim MacNeil, now when you say Jim MacNeil you must be referring to the younger fellow.
- A. Yes.
174. Q. Yes. How far were you and Jim MacNeil from Ebsary and Seale?
-

Mr. Marshall, Direct Exam. by Mr. Edwards

29.

~~A.~~ Five feet anyway. Three feet, five feet, whatever.

175. Q. Yes. Okay.

By the Court : I wonder if you'd keep your client under restraint.

Mr. Wintermans: Yes.

176. Q. Mr. Edwards : Okay. So you let go of MacNeil.

A. Yes.

177. Q. What happened then?

A. Mr. Ebsary come after me and he swung at me from the - from his waist like, and he swung the knife at me.

178. Q. He swung what?

A. The knife.

179. Q. The knife at you.

A. I don't -

180. Q. Where if anywhere on your body did he connect?

A. He hit me in the inner part of my forearm here.

181. Q. You're indicating your left arm?

A. Yes.

182. Q. With what result?

A. I got ten stitches in the hospital.

183. Q. When did you get the stitches in the hospital?

A. That same night.

184. Q. That same night.

A. Yes.

185. Q. So at that time, what were you wearing?

A. I had a light yellow jacket on, windbreaker.

186. Q. Yes?

Mr. Marshall, Direct Exam. by Mr. Edwards

30.

-
- A. And a - that's what I was wearing.
187. Q. It was a long-sleeved jacket, I presume?
- A. Yes.
188. Q. Right. What if any damage was done to the jacket?
- A. Inside part was all ripped.
189. Q. You're indicating now your left arm again.
- A. Yes.
190. Q. Yes?
- A. And the jacket was ripped about four inches.
191. Q. A four inch rip in the jacket?
- A. Yes.
192. Q. And how big was the cut on your arm that you had to get ten stitches?
- A. At the time? It was three and a half inches, I think.
193. Q. All right. Do you still have the scar from that cut?
- A. Yes.
194. Q. Would you show that to the jury?
- (Mr. Marshall steps down to show jury scar).
- Mr. Edwards: For the record, there is visible a two and a half to three inch scar on Mr. Marshall's arm. Come back here, Mr. Marshall, and show everyone on the jury this.
195. Q. Okay, so when you suffered that injury to your left arm, what if anything did you do then?
- A. I started to run down Crescent Street and towards Bentinck Street, and I met up with a young fellow on one of the bridges there.
196. Q. Okay. Don't pay attention to the plan now, Mr. Marshall, I'll bring you
-

Mr. Marshall, Direct Exam. by Mr. Edwards

31.

back to that. You just tell us what happened and I'll get you to trace your route later.

A. I asked him to help me out.

197. Q. Who was that fellow you asked to help you out?

A. Maynard Chant.

198. Q. Yes? Did you know Mr. Chant before?

A. No.

199. Q. You learned his identity after.

A. Yes.

200. Q. Yes?

A. And he asked me what happened and I told him my buddy was stabbed down the park, and . .

201. Q. Sorry?

A. He asked me what happened and I told him my buddy was down there, you know, he got stabbed and he told me let's go then, I'll help you out, and . .

By the Court : Speak up, Mr. Marshall.

A. Yes. And we went down towards Byng Avenue and we met a bunch of people there and I asked them to help me out and one girl gave me a handkerchief to wipe my arm and they said they didn't want to go down the park.

Mr. Wintermans: Objection. I think he's indicating what other people are telling him and it was not in the presence of the accused, so it's hearsay. It's not that important, perhaps, in this instance, but it's happened a few times, I let it go, but I think it should be corrected.

By the Court: Mr. Marshall, you're only to tell the jury what you observe

Mr. Marshall, Direct by Mr. Edwards

32.

and not what you heard people saying.

A. Well, that's what I observed, because I went back to the scene.

202. Q. Mr. Edwards : All right. You had some discussion with Mr. Chant and you had some discussion with another group of people.

A. Yes.

203. Q. And you say one of those people gave you a handkerchief.

A. Yes.

204. Q. All right. So then what did you do then?

A. I stopped a car on Byng Avenue.

205. Q. Yes?

A. And asked them to help me, and they told me to get in the car.

206. Q. Without telling what they told you, what did you actually do then?

A. We went back to the place where Mr. Seale was laying.

207. Q. All right. Now between the time that your left arm was injured and the time that you got back to where Mr. Seale was, on Crescent Street, how much time elapsed there, could you give us a rough idea?

A. It wasn't too long.

208. Q. It wasn't too long.

A. No.

209. Q. Now before we proceed further, could you tell us whether or not you were armed with anything, knife or anything else that evening?

A. No, I wasn't armed.

210. Q. To your knowledge, was Sandy Seale?

A. No. I don't think so.

211. Q. Pardon me?

A. No.

Mr. Marshall, Direct Exam. by Mr. Edwards

33.

212. Q.

So to get back to the area where the stabbing had eventually taken place. What did you see when you got back there?

A.

I seen Sandy Seale laying on the ground and we got out of the car, I - I thought that he needed an ambulance so I went to a house to call an ambulance when I got there.

213. Q.

Yes?

A.

And . . .

214. Q.

When you say Sandy Seale laying on the ground, could you tell us whether he was conscious or not at that time?

A.

No, I don't recall.

215. Q.

You don't recall. Okay. So you went to a house for what purpose?

A.

I asked them to call an ambulance for me.

216. Q.

Yes?

A.

And they said okay.

217. Q.

And where did you go from there?

A.

I was put in a police car and taken to the City Hospital.

218. Q.

Just to take it step by step, you went to a house to have them summons an ambulance.

A.

Yes.

219. Q.

Tell us step by step where you went after that.

A.

I went back out and once I hit the street two City policemen put me in a car and took me to the City Hospital.

220. Q.

So the police were already there.

A.

Yes.

221. Q.

I see. Where was Mr. Seale?

A.

He was on the ground.

Mr. Marshall, Direct Exam. by Mr. Edwards

34.

212. Q. He was on the ground.
A. Yes.
223. Q. Okay. And the City Policemen took you where?
A. To the City Hospital.
224. Q. To the City Hospital.
A. Yes.
225. Q. And that is where as you've already stated you got ten stitches.
A. Yes.
226. Q. All right. Mr. Marshall, I ask you to leave the stand again and come here to the plan. Can everyone on the jury see this okay?
All right. Perhaps you will just point out for the jury where you and Mr. Seale and Ebsary and MacNeil had your conversation on Crescent Street.
A. Right here.
227. Q. You're indicating the area between two walkways that come up from the footbridge to Crescent Street, right?
A. Yes.
228. Q. All right. Now would you mark with an H and a G where you were talking to Harris and Gushue prior to your meeting with Ebsary and MacNeil?
A. (Mr. Marshall makes mark).
229. Q. So you're put a P - H, PH for Patricia Harris and TG for Terry Gushue. Now at the time that you were talking to Harris and Gushue there, where were Ebsary and MacNeil?
A. Back there.
230. Q. You're indicating back toward Argyle Street, now, and Crescent Street.
A. Yes.

Mr. Marshall, Direct Exam. by Mr. Edwards

35.

231. Q. All right, now if one inch is forty feet, how many inches would you have been from where Seale and - about a hundred feet? Two and a half inches? All right then. So then you left Harris and Gushue and you joined Seale, MacNeil and Ebsary.
- A. Yes.
232. Q. Right. Now when you joined them, you were where?
(Points to area on map).
233. Q. Yes. All right. Now you say that after having some discussion, your evidence was that Ebsary and MacNeil left you and Seale. In what direction did they go on Crescent Street?
- A. They went like this.
234. Q. All right, now you're indicating they proceeded along Crescent Street toward Bentinck. All right. This being Bentinck Street right here. And I believe your evidence was that - I just don't recall, how far did you say you got from them before you called them back?
- A. They got quite a ways.
235. Q. You called them back.
- A. Yes.
236. Q. All right, so then the four of you met up again. Where did you meet this time?
- A. Right around here.
237. Q. All right. Now let's clarify it for the record. Let's call this first meeting you had with them when you had the conversation with them, we'll put first, a one there, and circle it. All right? Now if you would mark the place where the second meeting took place and where the stabbing apparently took place, as second.

Mr. Marshall, Direct Exam. by Mr. Edwards

36.

All right. Now if you would mark the spot where you recall Seale was laying when you got back after having gone and summoned Chant and the others.

A. In here.

233. Q. In that area. Okay.

By the Court : How will it be identified?

Mr. Edwards : Okay, this area where he just marked where Seale was, it's in the same area where he had marked 'second' and he has put two arrows, one in each side of Crescent Street.

239. Q. Okay, Mr. Marshall. Return to the stand again, please.

Now Mr. Marshall, after May twenty-eighth, seventy-one, you were in fact charged with the murder of Sandy Seale, is that correct?

A. Yes.

240. Q. And do you recall how long after May twenty-eighth, seventy-one it was before you were actually charged?

A. It was on - about a week after.

241. Q. About a week after?

A. It was on a Friday.

242. Q. Yes. And you were subsequently tried by a Supreme Court judge and jury probably in this very courtroom, was it?

A. Yes.

243. Q. And convicted on November fifth, nineteen seventy-one, is that correct?

A. Yes.

244. Q. And then your case was reinvestigated, was it not, in February of nineteen eighty-two?

Mr. Marshall, Direct Exam. by Mr. Edwards

37.

A. Yes.

245. Q. And you were acquitted by the Appeals Division of the Nova Scotia Supreme Court on May tenth, nineteen eighty-three, is that correct?

A. May tenth. I don't know if it's May tenth, I don't know. I was acquitted.

246. Q. This year. The spring of this year?

A. Around summer time, I guess, I don't know.

247. Q. Okay. My Lord, at this stage I would like to make an application under Section 9.2 of the Evidence Act and for that purpose I think the jury should be excused.

By the Court: All right. Members of the jury, you are excused while we go into matters which you ought not to hear about at this time.

(Jury retires).

VOIR DIRE

Mr. Edwards: My Lord, following the procedure in the Milgard case, which is annotated on page 761 of Martin's Criminal Code, we've already taken care of sections one and two, step three: 'Upon retirement of the jury counsel should advise the learned trial judge of the particulars of the application, . . . in the alleged statement in writing are the writing to which the statement has been reduced.' Now Mr. Marshall, in his evidence this morning, said that he and Mr. Seale had discussed making some money and he said that at that time his intention was to bum it. That's my submission, that it's inconsistent with a statement that Mr. Marshall gave to the R.C.M.P. on March ninth, nineteen eighty-two, wherein he stated on page two of that statement and this is what I'm alleging is the inconsistency, where he stated in part: "I asked Sandy if he wanted to make some money, he asked how and I explained to him that

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire) 38.

we would roll somebody. I had done this before myself a few times. I don't know if Sandy had ever rolled anyone before. We agreed to roll someone so we started to look for someone to roll." And then he goes on to describe meeting the two fellows. That I submit is vastly different from his evidence today where he says they were intending to bum, bum some money. If I may, Mr. Wintermans, I guess that takes us to step four, where Your Lordship - it says 'the learned Trial Judge should read the statement or writing to determine whether there is in fact an inconsistency so I propose to show Your Lordship the statement and direct you to the part that I just read. Perhaps we could have this marked, My Lord, as VD-One. I'm just referring now, My Lord, to page two, the last four paragraphs there, about midway down the page.

By the Court: Yeah, well . . .

Mr. Edwards: I guess the next step would be to prove the . . .

By the Court: To prove the statement. Certainly that's inconsistent and I don't think anybody could argue with it. Do YOU?

Mr. Wintermans: I'll certainly argue that my learned friend shouldn't be allowed to do what he is doing. He may be showing Your Lordship an inconsistent statement but to suggest that this witness is hostile to the Crown . . .

By the Court: He hasn't done that yet.

Mr. Wintermans: Well, as I understand, that is what's required.

Mr. Edwards: No, it isn't.

Mr. Wintermans: That - it says 'may' and I would submit that although I'm taken somewhat by surprise by this whole procedure . . .

By the Court: Well, in a case like this, Mr. Wintermans - wait till I

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

39.

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speak, finish speaking. This sort of thing usually does take people by surprise because that's what has happened here. The evidence evidently has come out differently than it came out in the statement, and I think you'll just have to contend with being caught by surprise, as I was.

Mr. Wintermans: If I could speak on that? This is not exactly the first time that we've had Mr. Marshall on the stand in relation to this incident and he is not very much different than he's ever been before on the witness stand, and the Crown certainly hasn't made any attempt to do this before. Mr. Marshall has always attempted to downplay the intentions that he had that night in comparison to the statement that he made to the R.C.M.P. that my learned friend is showing Your Lordship. However, I would submit that the purpose of this section is for situations where you have what's referred to as a hostile witness where a witness has given a statement which contains information that will support the position of the Crown, and then on the witness stand - when he gets on the witness stand for one reason or another refuses to testify for the Crown, so to speak, and in that type of situation the Crown may, with the permission of the trial judge, cross-examine that witness on a previous statement to - you know, to try and force him to say what he said at a previous time. However, I'm not sure what my learned friend is attempting to do here, but I would submit that this witness is not a hostile witness to the Crown, and secondly, that whatever his motives might have been, I don't see that they're particularly relevant as far as the Crown is concerned, and that I don't see what the whole point is, but he certainly - this witness has not come across, I would submit, as being hostile to the Crown.

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Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire) 40.

By the Court: Section two, I read section two, well then, where the party producing the witness alleges that the witness made at other time a statement in writing or reduced to writing, inconsistent with his present testimony, the court may, without proof of the witness's adverse. grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination to determine whether in the opinion of the court the witness is adverse. The procedure that's followed is found in Milgard and has been followed in many cases since, and is set out in Martin's Criminal Code at page seven sixty-one, and that seems to me to be the procedure that the Crown is following at this time. Now . .

Mr. Wintermans: You have to consider the facts of the Milgard case. It's a situation where the witness for the Crown simply said that she didn't remember anything and so the Crown was faced with a situation where they had what they thought was a witness who was going to testify and then the witness just said oh, I'm sorry, I don't remember anything, and so that's not exactly the same situation that we have here, by any means.

By the Court: Generally, that's the proper procedure, I believe.

Mr. Wintermans: I object.

By the Court: I understand you object. That is an inconsistent statement and I will, therefore, permit the cross-examination with respect to this statement, although I think that the statement ought to be proven.

Mr. Edwards: And step five shows how that may be done, and then I'll propose to do that by showing the statement to the witness.

248. Q. Mr. Marshall, you do recall then in Dorchester, New Brunswick, on the ninth of March, nineteen eighty-two, you gave a written statement to Staff-Sergeant Wheaton and Corporal Carroll of the R.C.M.P., is that

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

41.

correct?

A. Yes.

249. Q. And I'm going to show you now exhibit VD-One which I ask you to examine, perhaps you'll just scan each page of it, Mr. Marshall, and in particular examine the signature on the end of the statement and advise the court whether or not you agree that is the statement that you gave at that time to those persons.

A. Yes, that is the statement.

250. Q. That is?

A. Yes.

251. Q. And you gave that statement voluntarily to the gentlemen?

A. Yes.

252. Q. Okay.

Mr. Edwards:

So, My Lord, I believe that satisfies the requirements of the Milgard case, and I would ask for permission to cross-examine the witness on the statement before the jury.

I note that Mr. Wintermans has the right to cross-examine as to the circumstances under which that statement was taken.

By the Court: That's what I was just going to ask.

Mr. Edwards: There's no problem with that.

By the Court: Do you wish to cross-examine Mr. Marshall?

Mr. Wintermans: No, My Lord.

By the Court: Well, then, I am prepared to call the jury back. I'm wondering before we do whether this mightn't be an appropriate time to adjourn for ten minutes, the rest of us, for our mid-morning break.

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

42.

By the Court: Witness, you still are under oath and you mustn't talk to anyone with respect to the evidence during this intermission.

Court recesses for ten minutes.

Court resumes.

By the Court: Gentlemen, I understand that you wanted to talk further with me outside the ears of the jury. There is one thing that I've wanted to check further, point out as well, that I may have cut Mr. Wintermans off too early, he had a right to cross-examine the witness on that with respect to the statement. You also have the right, as I understand it, to call evidence and argue the matter and I didn't want to deny you the right, and you declined to cross-examine, but Mr. Wintermans, do you wish to go into that matter further? I'm not sure that these two interpretations of the statement - you think Mr. Edwards is acting to get out what we thought earlier and may be more in favour of the accused, but we can start looking at it in any event.

Mr. Wintermans: I'm just wondering whether my learned friend is suggesting that the entire statement go to the jury as an exhibit that they take into the jury room when they're deliberating.

Mr. Edwards: My Lord, that's one of the matters I wanted to . . .

Mr. Wintermans: Which I will object to because there's all kinds of conversations and things that get in there that I would submit are not relevant to the case as a whole, and that parts of the statement, if he wants to cross-examine with respect to parts of the statement without the

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

43.

statement going in in its entirety, then that's another matter.

By the Court: Okay, let's hear what Mr. Edwards does propose.

Mr. Edwards: My Lord, first of all before I continue my submission on this particular application, I was advised during the adjournment by the court reporter that the tapes are not going to be that good, part of the reason being that there's quite a bit of traffic here in and out of the court room.

By the Court: Well, I can put a stop to that. There will be no traffic in and out except during breaks between witnesses and so on, because it is very distracting for one thing to the jury, and additionally I guess it's causing noise that interferes with proper tape recording.

Mr. Edwards: Particularly with Mr. Marshall.

By the Court: Well, it doesn't seem we can get him to speak any louder.

Mr. Edwards: So I just wanted to raise that, My Lord.

There's two further points, really, I submit we should consider at this point. Number one, the extent of the examination that I would be permitted to conduct on this statement, and then secondly, the use that can be made of the statement, will it be marked as an exhibit and put in with the other exhibits or not. On the first point, just for purposes of the application I showed Your Lordship what I consider to be the most blatant inconsistency, but there are several other sections of the statement that I would like to refer Your Lordship to, and with leave of the court to examine the witness with respect to those other sections as well. My Lord, on the top of page three of the written statement, yes, starting on the fourth line down: "The two guys started to walk away from us and I called them back." So far that's consistent. This part: "They

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

44.

then knew we meant business about robbing them." That again seems to be another part which is likely inconsistent with what he says were their intentions at that time. Another one would be down the last paragraph on that same page where he says, the paragraph starts: "I definitely did not stab Sandy Seale. I saw Ebsary do it." And this is the inconsistency, "when questioned about this, I did not mention that Sandy and I were robbing these two as I thought I would get into more trouble", that's an apparent reference to his being questioned in nineteen seventy-one. And then he goes on to tell that "I felt bad about Sandy dying as it was my idea to rob these guys. I knew Sandy but not real well." So I would like permission of the court to put those sections to the witness in cross-examination before the jury also, because they are equally inconsistent with his testimony and explain I think why there is an inconsistent.

Secondly on the use to be made of the statement, I would submit that the statement should be marked as an exhibit, Exhibit Two in this case, should go to the jury that of course it would be made clear in your charge that the statement does not thereby become evidence as to the truth of the facts contained in it, but the jury would have the statement for the purpose of assessing the credibility of the witness. They would have the entire statement there containing those parts.

By the Court: It might be difficult for them to separate out those things when you look at it from a practical point of view, but I hear your argument.

Mr. Edwards: Well, those are my two further submissions pursuant to the

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

45.

application, My Lord. No doubt my learned friend will want to respond to . .

Mr. Wintermans: As I've already indicated, I would submit that my learned friend is using - trying to use Section 9.2 of the Canada Evidence Act beyond the intended scope of that provision in that I would submit that it's designed for a situation where a Crown witness simply refuses to testify as he may have . .

By the Court : Oh, no, no. That's not so, Mr. Wintermans. But you carry on.

Mr. Wintermans: And that this witness is not adverse to the Crown, and that my learned friend is simply trying to do this to perhaps to take some of the winds out of the sail with respect to cross-examination.

By the Court: It might be to put a better face on the argument for the Defence.

Mr. Wintermans: I appreciate that some of these points are certainly in - favourable to the Defence, but I would submit that it's not for the Crown to proceed in this way, and that the section does not extend as far as this. However, assuming that Your Lordship is going to allow him to cross-examine on parts of the statement, I would certainly submit that the entire statement should not go to the jury, that there are parts of the statement that are not inconsistent, there are parts of the statement that are irrelevant and there are other parts of the statement that would be inadmissible if they came in to evidence by way of verbal testimony, and that you can't just direct the jury to ignore parts and only consider other parts. I just don't feel that that's a reasonable expectation from a jury of twelve ordinary people, that they're going to

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

46.

be able to not be prejudiced by other parts of the statement. That's my submission.

By the Court: Well, before I rule on the application, do you wish, Mr. Wintermans, to call any other evidence or make any submissions with respect to the voluntariness or the introduction of that statement itself? The accused admitted the statement and you're prepared to accept that, I think that's correct?

Mr. Wintermans: That's correct.

By the Court: First of all, I do recognize the further inconsistencies that have been pointed out to me and that I see in the statement by Mr. Marshall, and I will, as I will with respect to the first inconsistency pointed out, permit cross-examination with respect to those inconsistencies before the jury. On the second application, I will not permit the marking of the statement as an exhibit. I think there's too much inherent danger in permitting the whole statement to go to jury for fear that they will take an improper perspective of what else is said. When inconsistent statements are put to a witness that he made at a discovery or at a preliminary hearing, the whole of that evidence doesn't go before the jury as an exhibit. It's used as a tool to cross-examine and to test the credibility of the accused, so I'm not going to permit that but I will permit the cross-examination with respect to the inconsistencies, so therefore I guess we are in a position now to call the jury in, unless there's any . . .

Mr. Wintermans: For the purpose of clarification, which inconsistencies..

By the Court: Well, the 'bum' and 'rob' distinction, then on page three at the top of the page, 'the two guys started to walk away from us and I

Mr. Marshall, Direct Exam. by Mr. Edwards (Voir Dire)

47.

called them back. They then knew we meant business about robbing them.' I think that's inconsistent with the evidence that's come out this morning, and then down near the bottom on page three in the statement, 'I definitely did not stab Sandy Seale. I saw Ebsary do it. And when questioned about this, I did not mention that Sandy and I were robbing these two, as I thought I would get into more trouble.'" That's inconsistent with what is said here this morning. Are those the only inconsistencies?

Mr. Edwards: Yes, My Lord. That last one, I would like to continue on with that because it all seems to be part of one section. 'I thought I would get into more trouble, I never told my lawyers in court, I thought I would get into more trouble. I felt bad about Sandy dying, as it was my idea to rob these guys.'

By the Court: Yes.

Mr. Edwards: That far on that one, and just so there's no confusion on that first one on page two, the final sentence there, up above the part "we agreed to roll someone so we started to look for someone to roll." I believe in my original submission I just said that it goes on from there, I'd like to include the section that the next sentence as well, "The first time I saw the two fellows we later decided to rob, was on the George Street side of the park."

By the Court: Where exactly is that, on which page?

Mr. Edwards: On page two, My Lord, that's the first section I pointed out to you, starting half way down on the page, with 'I asked Sandy....'

By the Court: Oh, yes. Right.

Mr. Edwards: So I want to go as far as the end of the sentence that reads:

Mr. Marshall, Direct Exam, by Mr. Edwards (Voir Dire)

'The first time I saw the two fellas we later decided to rob was on the George Street side of the Park', I like to go that far because he says we later decided to rob.

By the Court: Very well. You've got those marked off, have you Mr. Winterman. Very good then. Anything further Mr. Edwards?

Mr. Edwards: No My Lord those are all.

By the Court: Alright then.

Mr. Edwards: Mr. Wintermans has the one the top of page three, 'the two guys started to away, they then knew we meant business about robbing'.

By the Court: You'll want this statement back I guess.

Mr. Edwards: Yes.

By the Court: I don't have a copy of it so I can't keep track of it. Mr Wintermans....

Mr. Edwards: I have a copy

By the Court: Do you? Oh, just then let me underline what we are considering. The first one is on Page Two.

Mr. Edwards: Page Two, beginning with 'I asked Sandy' and ending with 'side of the Park', just before the sentence that begins with (Inaudible).

By the Court: Okay.

Mr. Edwards: The second one is at the top of Page Three the beginning of the third full sentence 'the two guys started to walk away'.

By the Court: Yeah.

Mr. Marshall, Direct Exam, by Mr. Edwards (Voir Dire)

Mr. Edwards: And ending with 'they then knew we meant business about robbing them'.

By the Court: Okay.

Mr. Edwards: And the next one is at the bottom of Page Three beginning with 'when questioned about this'.

By the Court: Yes.

Mr. Edwards: And ending on Page Four with 'it was my idea to rob these guys'.

By the Court: Okay. Very good now. We'll ask the jury to return. When we close at noon I wonder if I could speak to either--I would like to catch a plane at five thirty which would mean possibly adjourning at four fifteen, would that cause a problem, or maybe slightly before that?

(Jury Returns)

Mr. Marshall, Direct Exam, by Mr. Edwards

253. Q. Mr. Marshall, in the course of your testimony you referred to 'the old guy' who had done the stabbing as Mr. Ebsary.

A. Yes.

254. Q. Now, is Mr. Ebsary in court today?

A. Yes.

255. Q. And where is he?

A. Sitting there.

256. Q. Would you describe what he is wearing?

A. He is wearing a blue coat with a cane, and..

Mr. Marshall, Direct Exam, by Mr. Edwards

By the Court: The record should show that the accused, I'm sorry, the witness identifies the accused.

257. Q. Now, Mr. Marshall you testified this morning that it was your intention to 'bum' some money when you went in the park that evening?
- A. Yes.
258. Q. That was your testimony this morning?
- A. Yes.
259. Q. Now, do you recall giving a statement to Staff Sergeant Weitman of the Royal Canadian Mounted Police on March ninth, nineteen eighty-two at Dorchester Penitentiary?
- A. Yes.
260. Q. You do?
- A. Yes.
261. Q. And that statement -- that was a written statement given by you to Staff Sergeant Weitman at that time?
- A. Yes.
262. Q. And you signed that statement?
- A. Yes.
263. Q. And that statement was voluntarily given to the R.C.M.P. by you at that time, is that correct?
- A. Yes.
264. Q. I'm going to show you now the statement which appears to be a copy of a statement dated March ninth, ninety eighty-two and it appears to be signed by Junior Marshall--you go by Junior Marshall, don't you?
- A. Yes.

Mr. Marshall, Direct Exam, by Mr. Edwards

265. Q. Would you speak up just a bit Mr. Marshall. Would you agree with me then that that is the statement that you gave the Staff Sergeant Weitman at Dorchester Penitentiary on March ninth of ninety eighty-two, do you?

A. Yes.

266. Q. Now, I want you to refer to Page Two of the statement Mr. Marshall and the middle of that page you apparently told the police at that time and I'll read to you the part: 'I asked Sandy if he wanted to make some money. He asked how and I explained to him we would roll someone, I've done this before myself a few times. I don't know if Sandy had ever rolled on anyone before. We agreed to roll someone so we started to look for someone to roll. The first time I saw the two fellas we later decided to rob was on the George Street side of the park'. Do you agree that the statement says that as I read it?

A. Yes.

267. Q. And you agree that is what you told the R.C.M.P. on March ninth, nineteen eighty-two?

A. Yes.

268. Q. And would you agree further that that is different than what you are saying here today when you say that you were merely intending to bum someone?

A. Yes.

269. Q. You do?

—A. Yes.

Mr. Marshall, Direct Exam, by Mr. Edwards

270. Q. I want to refer you to another part of the statement, will you turn to Page Three. Down the third sentence there beyond the end of the fourth line on Page Three: 'The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them!, Do you agree that the statement says that as I read it?
- A. Yes.
271. Q. And do you also agree that that is different than the evidence you are giving this morning?
- A. Yes.
272. Q. Down the bottom of that Page Mr. Marshall, the second sentence of that paragraph there: 'When questioned about this, I did not mention that Sandy and I were robbing these two as I thought I would get into more trouble. I never told my lawyers or the court, I just thought I would get in more trouble. I felt bad about Sandy dying as it was my idea to rob these guys'. Do you agree that the statement says that?
- A. Yes.
273. Q. So you agree with me Mr. Marshall that the statement indicates that it was clearly your intention to rob or roll the two gentlemen in the park that night?
- A. The statement or...?
274. Q. Yes, the statement says it was your intention to rob, do you agree with that?
- A. Ah, I agree yes, but I could have used a lot of words though.

Mr. Marshall, Direct Exam, by Mr. Edwards:

275. Q. So, today you're saying something different, that it was your intention to bum?
- A. Ah, yes, ah.
276. Q. Now can you explain why there is a discrepancy between what you are saying today and what you told the police on March ninth, nineteen eighty-two?
- A. Ah, the difference?
277. Q. Yeah.
- A. Ah, when I wrote this statement I, ah, I can't explain.
278. Q. Pardon.
- A. Can't explain.
279. Q. You can't explain. Thank you Mr. Marshall.

Mr. Marshall, Cross Examination, by Mr. Wintermans

1. Q. Mr. Marshall you were seventeen years old at the time this occurred?

A. Yes.

2. Q. And you are now thirty?

A. Yes.

3. Q. Happened a long time ago. Now, you indicated you had been in Halifax area a few days before this incident?

A. Yes.

4. Q. And you were up there with some friends were you?

A. Yes.

5. Q. And, ah, I understand that you had been drinking up in Halifax?

A. Drinking, not drinking steady.

6. Q. You, ah, have described yourself in the past as being a heavy drinker for a seventeen year old?

A. I can't answer that.

7. Q. Are you denying it?

A. I'm not denying it, I can't answer it.

By the Court: Cross examination has to be fair I think you have to confine yourself. I didn't hear those things come out in direct examination, ~~that's~~ come out somewhere else. I'm not so sure you should be referring to it, but the Crown hasn't objected, I, ah.

Mr. Edwards: I'll object at this point My Lord.

By the Court: We are dealing with this one case today and that should be clear here today.

Mr. Marshall, Cross Examination, by Mr. Wintermans

8. Q. Do you recall having testified before the Supreme Court Appeal Division of Nova Scotia in Halifax in nineteen eighty-two in relation to your charge of murder?

A. Yes.

9. Q. Do you recall having been asked the question: 'Could you describe....

Mr. Edwards: Could you give us the page?

10. Q. On page twenty-six. 'Could you describe your drinking habits' I'm sorry, 'Could you describe what your drinking habits were generally around that time' and the answer 'I was a heavy drinker'. Do you recall having testified that way?

A. I don't recall.

11. Q. Now, ah, have you ever been convicted of a criminal offence?

A. Yes.

12. Q. Before this incident occurred?

A. Yes.

13. Q. Now, isn't it true that Mr. Marshall that it was very dark that night in the area that you were on Crescent Street in Park?

A. It wasn't totally dark, but it was dark.

14. Q. And, ah, isn't it true that you can't describe the knife that you said Mr. Ebsary had?

A. I can't describe the knife, I didn't see the knife.

15. Q. You didn't even see the knife?

A. No.

Mr. Marshall, Cross Examination, by Mr. Wintermans

15. Q. Now, you say that you arrived in -- you went to the park around eleven o'clock that night, is that what you said earlier today?
- A. Approximate, yeah.
17. Q. And, you indicated that you had been at the liquor store earlier that night.
- A. Yes.
18. Q. Ah, you ran into Sandy Seale and had some conversation... .. I think you said earlier in your evidence for about ten minutes you talked about how you were going to get some money?
- A. Ah, no I didn't say that. I said I asked him where he came from. He told me from the dance.
19. Q. Now Mr. Marshall are you saying that you can now identify Mr. Ebsary as being the person who you encountered in the park that night?
- A. Through the years the man looks different--his size, his age and everything. So, you know I could identify and I can identify him.
20. Q. Is it fair to say that you now know who Mr. Ebsary is because of subsequent events through the courts--what about your knowledge at that time?
- A. My knowledge at that time I didn't know, I didn't know.
- . . Mr. Edwards: My Lord, this may be the time for me to make an objection on the question he asked earlier and I expected he was going to come back where he asked the witness if he was

Mr. Marshall, Cross Examination, by Mr. Wintermans

ever convicted of a criminal offence. My learned friend knows very well that he is suppose to put these specific events to the witness and asked him whether or not he was convicted of them because as the question is left now it could be anything from shoplifting to treason.

Mr. Wintermans: My Lord, how am I suppose to know what criminal record he has. I don't have the same resources....

Mr. Edwards: I would not object to him asking what offence

By the Court: It's usually the other way around. I think the purpose of asking that question in the -- well, the purpose is that it is a way of testing the credibility of a witness. If a witness comes back and says yes I have been convicted, I think that's where it ends. And it may be that the further question may be put 'what was it', but I don't think its required.

Mr. Edwards: Of course My Lord. That's right and of course...

By the Court: The nature of the record is not important for this purpose, it's the...that there is one. If he denies the record and there is a record to be put to him....

Mr. Edwards: My Lord, my difficulty is that the jury is left without the knowledge of what the record is and in order to be able to assess if it has any bearing whatever.

By the Court: It can't have any bearing. It only goes to credibility and he has admitted he has a record.

Mr. Edwards: Well I would ask the court then in the alternative for permission to illicit his criminal record and re-direct examination of my learned friend.

Mr. Marshall, Cross Examination, by Mr. Wintermans

By the Court: I think that's fair enough.

Mr. Wintermans: Well if the purpose of the question is to determine his credibility by the way he answers the question yes or no then what's the point of the crown going any further than that, of course don't know what his criminal record is, all I know is that he has answered the question the way he has.

By the Court: We'll deal with that when we come to it.

21. Q. Now, you testified that you thought that the person who (inaudible) as Mr. Ebsary was five foot six or seven did you say?

A. Seven or eight. I said about five eight.

22. Q. Five eight?

A. Yes.

23. Q. If I were to suggest to you that the person behind me, Mr. Ebsary, is five foot two, would that change your description?

A. No. The man got older, people say they shrink when they get older.

By the Court: We don't need more uprise or uproar in the -- think of the people in the courtroom, including the accused and this witness.

~~24.~~ Q. I suggest to you Mr. Marshall that your recollection is not that good.

A. My recollection.

25. Q. In fact you memory of what happened -- the details of what happened that night are not very good?

A. My memories are pretty good.

Mr. Marshall, Cross Examination, by Mr. Wintermans

26. Q. I suggest to you that there may have been some conversation between Mr. Seale and Mr. Ebsary prior to or before the words that you say that Mr. Ebsary said, I've got something for you, other words there may have been a conversation before that and you were--you're not in position to say what it was?
- A. I never said there was conversation between them.
27. Q. Are you saying there wasn't?
- A. I didn't say, I don't know, I wasn't there.
28. Q. I see. I'm talking about immediately before the incident -- the stabbing incident.
- A. Before the stabbing incident.
29. Q. Right before the stabbing incident?
- A. The conversation.
30. Q. Moments before.
- A. That was between me and Mr. Ebsary.
31. Q. Between you and Mr. Ebsary?
- A. Yes.
32. Q. Between Seale and Mr. Ebsary?
- A. I was talking to Mr. Ebsary before the stabbing. Before he walked away, I was talking to him. Not Mr. Seale, I was.
33. Q. What about right before the stabbing incident occurred, who were you with then?
- A. Ah, we were all together at one spot. I was -- when them two men walked away, when they walked back I was closer to Mr. MacNeil.

Mr. Marshall, Cross Examination, by Mr. Wintermans

34. Q: And isn't it true that you grabbed hold of Mr. MacNeil?
- A. I can't recall.
35. Q. You can't recall.
- A. Either he grabbed me or I grabbed him I can't straighten that out, I can't say yes or no, who grabbed who.
36. Q. Now you recall giving evidence at the preliminary inquiry into this matter on August the fourth, ninety eighty-three at the Magistrate's Court?
- A. Yes.
37. Q. Page Eleven--start at about line three. Question: 'Could you take it step by step and describe exactly what happened as they came toward you and Sandy Seale.'
- Answer: 'It is difficult for me to really tell you what happened, I think there were too many stories already, I think I jeopardized my whole story.'
- Question: 'Well then, would you tell it from your memory as best you can.'
- Answer: 'They came back, I don't know what happened between them, my memory just went after that, I got stabbed and I don't remember too much.'
- Question: 'Well do you remember what, if anything, happened to Sandy Seale?'
- Answer: 'The older fella with the light hair was with Sandy, they had a conversation and I never understood what they were talking about. All I can remember is the old fella told Sandy I got something for you right here and he knifed him.' Now, do you remember those questions and answers?
- A. Yes.

Mr. Marshall, Cross Examination, by Mr. Wintermans

38. Q. Are they true?

A. Yes they are true.

39. Q. So, once again I suggest to you that your memory of what occurred on that faithful night in nineteen seventy-one is not all that clear?

A. My memory is clear.

40. Q. Well then why did you give them different accounts?

A. Every time it was practically.....

41. Q. Different details?

A. I was only twice here.

42. Q. You said you recall testifying before the Appeal Division in nineteen eighty-two?

A. Yes.

43. Q. You testified in your trial, when you were on trial in nineteen seventy-one. You testified at the preliminary inquiry on August fourth, nineteen eighty-three.

Mr. Edwards: Objection to this My Lord. So far he has only shown what he suggests is a discrepancy between what the witnesses is now saying and what he said at the preliminary inquiry in August of nineteen eighty-three. He then went on from that, he made an awfully big jump and said, that he told us a different story almost everytime and he listed on three or four other occasions, if he wishes to establish that he is going to have to refer to the witness I submit to the precise sections on those precise dates, but he can't (inaudible) to say that because he gave a different testimony today than what he gave in August doesn't mean

Mr. Marshall, Cross Examination, by Mr. Wintermans

he gave different stories on every occasion.

Mr. Wintermans: My point, I'm referring to the various times he testified and I haven't quite finished yet was that...

By the Court: Before you start talking about the various times he testified, I don't want to hear that kind of evidence before this jury. Unless, there can be a specific reference to the specific occasion. But initially you paint a broad brush and I don't think that's appropriate.

Mr. Wintermans: My point on my last question was the witness suggested he only testified twice in relation to this incident so I referred him to the several other times, that's all.

Mr. Edwards: Objection to that. That can't be allowed to stand either. The witness said he was only here twice and obviously meaning the previous trial this year and now. There was nothing contradicting when he said that.

By the Court: We don't want to get into that other... this is a trial all by itself and I don't want to hear any reference unless it really goes to credibility.

44. Q. Now you testified a moment ago that you don't know who was holding who between you and Mr. MacNeil, is that right, you don't know who grabbed you?

A. Yes, I don't know.

45. Q. Would you stand by that?

A. Yes I don't know.

Mr. Marshall, Cross Examination, by Mr. Wintermans

45. Q. Again, do you recall having testified at the preliminary inquiry on August fourth, nineteen eighty-three, page twelve, that's page eleven, the bottom of page eleven.

Question: 'Where were you when the old fella knifed Sandy Seale and what were you doing?' Answer: I was -- I don't know if I should say I was fighting and holding the other guy. No one on my side, eh, no one was hurt, physically harmed. Do you recall having said that?

A. Yes.

47. Q. Is it true?

A. Say that again.

48. Q. 'Where were you when the old fella knifed Sandy Seal and what were you doing?' Answer: I was -- I don't know if I should say I was fighting and holding the other guy. No one on my side, eh, no one was hurt, physically harmed.

A. Yes, I remember that.

49. Q. That's the truth?

A. Yes.

Mr. Edwards: Objection to that My Lord because Mr. Wintermans is leaving that -- is leaving the inference that there is some kind of inconsistency there, there isn't. His initial proposition to Mr. Marshall are saying you don't know who grabbed who, and Mr. Marshall as I recall in his evidence said yes. That's my position. What he just read to Mr. Marshall does not clarify that one way or another it doesn't dispute what Mr. Marshall said. Doesn't say who started it, just says the two of them were fighting.

Mr. Marshall, Cross Examination, by Mr. Wintermans

By the Court: Yes, that appears to be so Mr. Wintermans.

50. Q. Now, did you get into a shouting match with Mr. MacNeil?
- A. No answer.
51. Q. You did. Now did Mr. Seale take Mr. Ebsary while that was going on?
- A. No.
52. Q. No?
- A. No.
53. Q. You recall you've already testified that you recalled giving a statement in nineteen eighty-two to the R.C.M.P?
- A. Yes.
54. Q. The one that my learned friend cross examined you on just before I started questioning you. Is that statement true?
- A. My statement, the way I put it down is I use different words today as ten years ago. I could have said anything on that statement. Ah, I'm indicating in that letter that it's mostly my fault what happened. I took my blows for it. Whatever I say on here is what I said and it got to a point I felt that is the only way they are going to believe me. They are not going to believe me if I say some old man stabbed me cause this and that.
55. Q. Are you saying that the statement is not true now?
- A. I'm saying it's true but I put in different words. I could have put in a polite way I could have put it in other words, do you know.

Mr. Marshall, Cross Examination, by Mr. Wintermans

56. Q. And my learned friend referred you to, ah, I'll just continue that a little further. '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.' And you go on further in that statement to say 'I don't remember exactly what was said, but I definitely remember Ebsary saying I got saying something for you and then next stabbing Sandy'. Now is that the truth or not?
- A. Ah, when I say he took them, I don't mean physically took them. Sandy Seale never laid one hand on that man.
57. Q. Now, you testified earlier today that when you are standing up with the prosecutor here showing how the stabbing took place you put your hand on the prosecutor's shoulder?
- A. Yes.
58. Q. Indicating that Mr. Ebsary put his hand on Sandy's Seale's shoulder?
- A. Yes.
59. Q. Now I suggest to you that there is a possibility because of the darkness, because you were tied up fighting with this other person that maybe it was the other way around maybe it was Sandy Seale who put his hand on Mr. Ebsary's shoulder?
- A. No.
60. Q. That's what you say?
- A. That's what I know. It's not what I say, it's what I know.

— Mr. Marshall, Cross Examination, by Mr. Wintermans

61. Q. I see. You spent quite a few years in jail in relation to this incident, did you not?
- A. Yes.
62. Q. And you had some -- at least parts of the transcript of the original trial in your possession, in your cell in Dorchester?
- A. Some, the original trial in seventy-one.
63. Q. You read those over ever day, did you?
- A. Yes, but in nineteen seventy-one and today is two different transcripts all together. Different people involved.
64. Q. Same incident though?
- A. Same incident but different stories, different people. I was accused in seventy-one.
65. Q. That's right. You've given this case a lot of thought, is that fair to say?
- A. Hmmm, I use to.
66. Q. You use to.
- A. Yeah.
67. Q. When you were in your cell?
- A. Ah, a lot of interest, I mean like interest.
68. Q. Are you ~~still~~ afraid you maybe something bad in this for you still to come?
- A. I'm not afraid.
69. Q. Not anymore?
- A. I was never afraid.
-

Mr. Marshall, Cross Examination, by Mr. Wintermans

70. Q. No. Ever worried?
- A. I'm worried.
71. Q. Your worried?
- A. Yeah, because of my family, I fear for myself, I fear for at what's going to happen, the outcome.
72. Q. Isn't it true that you have some kind of a law suit against the City in relation to this incident.
- A. That's a different subject altogether.
73. Q. It's true though.
- A. It's a different subject altogether.
74. Q. Is it true also that you have your own lawyer sitting in the courtroom at this very moment from Halifax?
- A. He's here, yes.
75. Q. And I suggest to you that you would -- it's only natural that you would want to make yourself appear as innocent as you possibly could under the circumstances?
- A. I don't care how I look coming in here. I came in here to testify. I didn't come here for money financially. I came here to get myself out of prison and clear my name if that's clear to you.
76. Q. You were involved in a bad group back in nineteen seventy-one?
- A. I don't say bad -- I don't find, I don't know, I can't answer your question.
77. Q. Okay, page nineteen of the preliminary inquiry, do you recall having giving evidence you already said at the preliminary inquiry on August the fourth, nineteen eighty-three?

Mr. Marshall, Cross Examination, by Mr. Wintermans

77. A. No answer.

73. Q. Page Nineteen, question: 'You also describe yourself as being, what were the words you used, a bad young guy?
Answer: 'A bad young group, that's what I was involved in, not a bad young guy, I was involved in a bad young group.'
Question: 'Isn't it true that you were a fairly wild character then getting into quite a bit of trouble.'
Answer: 'Not only me individually, generally speaking we all got into trouble.' Do you recall having said that?

A. Yes.

79. Q. Is that the truth?

A. I can't answer it.

80. Q. Pardon me?

A. I can't answer it.

81. Q. Now isn't it true Mr. Marshall that you weren't with Mr. Ebsary and Mr. Seale at the very beginning of this incident?

A. Yes.

82. Q. And you can't say one way or another whether threats were made?

A. No I can't say.

83. Q. Conversation took place?

A. I can't say.

84. Q. And you were holding on to Mr. MacNeil and where was Mr. Seale in relation to Mr. Ebsary at the times you were holding on to Mr. MacNeil?

A. At the same time, Mr. Seale was leaning over Mr. Ebsary.

Mr. Marshall, Cross Examination, by Mr. Wintermans

85. Q. Leaning over?

A. Over his arm.

85. Q. Was he -- were they facing each other then?

A. No, ah, the way I indicated what happened.....

87. Q. Sort of beside each other?

A. Yes.

83. Q. Which side of the two were you on, which one were you closest to?

A. Ah, they were about the same distance.

81. Q. Were they facing you then or were they sideways to you, were their backs to you.

A. They were facing me.

90. Q. So, ah, I take it that you didn't plan on hurting anybody, is that right?

A. Yes.

91. Q. You were hoping that whole grueling incident could be handled without anybody getting hurt, is that right?

A. I said earlier, I could have bummed it. As far as attempted robbery, it didn't even occur, it didn't even happen and you are stretching to a limit where it did happen and it didn't happen.

92. Q. Thank you, no more questions.

Mr. Edwards: My Lord if I could just have a moment the the (inaudible) has been able to find the criminal records, that is what I am going to re-direct the witness on.

Mr. Marshall, Re-Direct Exam, by Mr Edwards

Mr. Wintermans: Well My Lord as I indicated earlier I wonder what the basis is for this.

By the Court: Well, I think the basis -- I'm going to allow the question.

Mr. Edwards: May I speak to that My Lord. There are two basis, really. The first, what I submit is the indisputable one. Number one the criminal record of the witness was a brand new matter raised in cross examination and therefore proper matter for re-direct. Secondly in the alternative the fact that normally the way the criminal record was put to a witness is that isn't it true on such and such a date you were convicted of such and such a crime and sentenced to such and such as the penalty. My learned friend says he doesn't have the resources to get that information to ask the question properly. Fair enough, well I do and that's what I propose to do now. In that way, the criminal record is only allowed to be, as your Lordship well knows, to assess the credibility and trustworthiness of the witnesses' evidence. Concurrent with that is the type of criminal record he has. If he has a lengthy record of fraud, obviously that has more bearing on the trustworthiness of his evidence than if he if was in a bar room brawl and was convicted of common assault now there is that difference and so I submit in fairness to the witness and in fairness to the jury they should know exactly what his record is and they can decide whether or not it taints his evidence and affects it one way or another.

Mr. Marshall, Re-Direct Exam, by Mr. Edwards

By the Court: I'll permit you to put the record to the accused.

1. Q. Mr. Marshall isn't it true that you were convicted on June twelfth in ninety seventy of one count of theft under two hundred dollars and for that you received one day in jail served by presence in court?

A. Yes sir.

Mr. Wintermans: Excuse me My Lord, I object that my friend is leading the witness. I would suggest that my learned friend ask the witness if he wants to know what his criminal record is, ask him what his criminal record is? But just because the point was brought out that he has a criminal record does that entitle the Crown man to lead their own witness in relation to that evidence.

By the Court: It's not a wholly rule written in concrete that you can't ask leading questions and I will permit that leading question in that case because it produces -- it gets the record straight in a very short order and I don't think without prejudice to anybody, with prejudice I mean. He was certainly leading, I'll agree to that.

2. Q. So your answer to that was yes, Mr. Marshall?

A. No. Answer.

3. Q. Were you also convicted on November tenth, nineteen seventy of one count of drunkenness under the Liquor Control Act and fined ten dollars?

A. I don't recall that one.

Mr. Marshall, Re-Direct Exam, by Mr. Edwards

4. Q. You don't recall whether you were or not. Do you recall, perhaps I could put it this way, ever being convicted of drunkenness?

A. Couple of times, yes.

5. Q. Then on May first, nineteen, no I'm sorry -- that is the extent of the criminal record other than on June fourth, nineteen seventy-one.

A. By the Court: Inaudible.

6. Q. Well, other than the murder charge for which you served eleven years, that is the extent of your criminal record?

A. Yes.

7. Q. I have no further questions

Mr. Wintermans: Well My Lord I would think that the way my learned friend is presenting the criminal record is somewhat misleading. I would like to have an opportunity to ask him a couple of questions in relation to his criminal record.

By the Court: Alright.

Mr. Marshall, Cross Examination, by Mr. Wintermans

1. Q. Did you ever go to jail before you were convicted of this Seale murder?
- A. Yes.
2. Q. Isn't it true that you were sentenced to four months on one occasion?
- A. No, I was sentenced to eight months.
3. Q. Eight months?
- A. Yes.
4. Q. And that was not the only time you were in jail, there was another time also?
- A. I don't recall. I hadn't spent too much time in there before that.
5. Q. This is when you were seventeen years old?
- A. Yes.
6. Q. Thank you, no more questions.

Mr. Edwards: Arising out of that My Lord is the eight months-
I don't have that information (inaudible) to say what that conviction was for to put him jail for eight months.

By the Court: I think it better be put to clarify.

Mr. Marshall, Re-Direct Exam, by Mr. Edwards

1. Q. Do you know what you were in jail for eight months for?
A. It started with four months then I got an extra month.
2. Q. For what?
A. Liquor charge.
3. Q. Liquor charge?
A. Charge for giving drinks to minors.
4. Q. Giving drinks to minors?
A. Yes. I was a minor myself at the time.
5. Q. Thank you.

By the Court: Thank you very much Mr. Marshall for that evidence.

A. Okay.

Court Adjourned for Lunch at 12:15 p.m. to 1:45 p.m.

1:50 Court Opens.

Jury called. All present.

Mr. James MacNeil duly sworn and examined.

Mr. MacNeil, direct examination, by Mr. Edwards

1. Q. Your name is James MacNeil?
A. Yes your honour.
2. Q. What's your address Mr. MacNeil?
A. Two-two-two Mount Pleasant Street.
3. Q. That's in Sydney is it.
A. Yeah.
4. Q. How old are you now Mr. MacNeil?
A. Thirty-Nine.
5. Q. And what's your present occupation?
A. I'm working part-time -- just casual labour, like part-time you know.
6. Q. Okay, and in nineteen seventy-one how old were you?
A. Ah, twenty-five.
7. Q. Twenty-five or twenty-six?
A. Yeah.
8. Q. What was your occupation then?
A. I was in landscaping then.
9. Q. Landscaping?
A. Yeah.
10. Q. What was your address then?
A. Ten-0-Seven Rear George Street.

Mr. MacNeil, direct examination, by Mr. Edwards

11. Q. And had you been a life long resident of Sydney up to that time?
- A. Yes Your Honour.
12. Q. And prior to May of nineteen seventy-one, had you known the accused, Roy Newman Ebsary?
- A. Yeah.
13. Q. Yes?
- A. Yeah.
14. Q. How long before May in seventy-one had you known Mr. Ebsary?
- A. About a couple of weeks, something like that.
15. Q. And is the Roy Newman Ebsary whom you knew then in court today.
- A. Yeah.
16. Q. And would you point him out please?
- A. Sitting right over here.
17. Q. What's he wearing?
- A. Blue coat, glasses, black tie and white shirt.
18. Q. And the record show him indicating the accused My Lord.
- By the Court: Yes.
19. Q. On the night of May twenty-eight, nineteen seventy-one were you with Roy Newman Ebsary that evening?
- A. Yeah.
20. Q. Were you?
- A. No answer.

Mr. MacNeil, direct examination, by Mr. Edwards

21. Q. And where did you meet Mr. Ebsary on that evening?

A. In the State Tavern on George Street.

22. Q. The State Tavern on George Street?

A. Yeah.

Mr. Ebsary: Objection of the victim.

By the Court: Mr. Ebsary you have counsel and he is very competent and he is doing a good job for you. So, you just let him speak for you and if you want to speak in some manner, you just tug his coat tails and the message will get across.

23. Q. You met him in the State Tavern that evening?

A. Yes your Honour.

24. Q. What time did you go to the State Tavern?

A. I went there between six and seven -- something like that in the evening.

25. Q. You mean six or seven p.m.?

A. Yeah.

26. Q. And who did you go there with?

A. Myself.

27. Q. And you met Mr. Ebsary inside the tavern?

A. Right.

28. Q. And who was with him, if anyone, at the time?

A. I can't be just positive, I believe there was another person sitting with him?

29. Q. And you joined him at the table?

A. Yeah.

Mr. MacNeil, direct examination, by Mr. Edwards

30. Q. And you remained at the State Tavern how long?
A. About two hours, I'd say two hours.
31. Q. And during that two hours how much had you had to drink?
A. I had roughly seven, eight beer.
32. Q. Seven, eight beer. Had you done any drinking that day before you went to the tavern?
A. No, I didn't do no drinking that day.
33. Q. So, when you got to the tavern who was with you then?
A. Mr. Ebsary.
34. Q. Do you recall time it was roughly when you left the tavern?
A. It was after ten o'clock.
35. Q. And you went there at what time?
A. I went there at seven.
36. Q. So, you were there over three hours?
A. Yeah, right.
37. Q. So, did you and Mr. Ebsary leave alone or did someone else go with you?
A. We left alone, the two of us.
38. Q. Now, the State Tavern, that was located on George Street?
A. Yeah, right across from the Joy Supermarket on the right hand side.
39. Q. And when you and Mr. Ebsary left the tavern, what direction did you go?
A. We went towards George Street down, that's, ah, towards the park.

Mr. MacNeil, direct examination, by Mr. Edwards

40. Q. Down George Street, toward--that would be Wentworth Park?
- A. Yeah, right.
41. Q. Where were you headed?
- A. We were headed for Mr. Ebsary's home.
42. Q. And where was that at the time?
- A. That was on Rear Argyle Street.
43. Q. When you got to Wentworth Park, what route did you take then?
- A. We took the shortcut, there's a bridge, that goes down like-- you go down first and there's like, there was a bridge there it's been rebuilt -- then it was just like old fashion, like wood and that. Now, they rebuilt it, they have a concrete one there. But it's in the same indentially spot.
44. Q. I see.
- A. Per say.
45. Q. So, you left George Street, then went through the Park over the foot bridge?
- A. Yeah.
46. Q. And were did you come out of at?
- A. We came out up at Crescent Street.
47. Q. And that runs along the perimeter of the park?
- A. Yeah, right.
- . . . When we came up to the top of the hill we crossed over on the Crescent Street where we went right over, like the sidewalk.
48. Q. You crossed Crescent Street itself?
- A. Yeah.

Mr. MacNeil, direct examination, by Mr. Edwards

49. Q. So what you are saying is that the sidewalk that runs across Crescent Street is on the side of the street furthest from the park?
- A. Right, yeah.
50. Q. Alright. So, then when you got on the sidewalk on Crescent Street, what direction did you go?
- A. When we crossed over, ah, we crossed over, I believe we took the direction towards, there is two ways you can go to his house, eh?
51. Q. Yeah.
- A. You can go that way or you can go up like that.
52. Q. Perhaps you /could just come down here Mr. MacNeil and refer to Exhibit Number One. Maybe you could just stand aside so the jury can see it. Just over there. Now, this is George Street now show us where you would enter the park.
- A. Right about here.
53. Q. You are indicating, another witness has put an arrow there already?
- A. Oh no.
54. Q. But you're indicating this, where the arrow. And there is a bridge shown here, is that the bridge you are referring to?
- A. Yeah.
55. Q. So then we you come off the bridge, what way did you go?
- A. We walked right up to here, this is Crescent right?

Mr. MacNeil, direct examination, by Mr. Edwards

56. Q. So, you are indicating the path on the right hand side-- there are two path going from the bridge and the one on the right hand side is the "Y".
- A. Yeah.
57. Q. So then you crossed, you're saying, the far side of Crescent Street, the far side from the park?
- A. Yeah.
58. Q. To the sidewalk?
- A. Right.
59. Q. Alright, now my question was when you got on the far side of Crescent Street what way did you go--back this way toward Argyle or this way toward the intersection of South Bentick Street?
- A. We went this here way.
60. Q. You are indicating the intersection toward South Bentick Street?
- A. Yeah, right.
61. Q. Alright then perhaps you could return to the witness stand. Alright, so, what if anything occurred as you began walking toward South Bentick Street.
- A. We were approached, by, ah, the deceased, Sandy Seale and Mr. Marshall.
62. Q. Now prior to that night did you know either Sandy Seale or Mr. Marshall, you referred to Donald naturally?
- A. No.

Mr. MacNeil, direct examination, by Mr. Edwards

53. Q. You didn't know either one of them on that evening?

A. No.

64. Q. So, when you met them -- would you describe how you met them?

A. Well, I think, it came so fast it seemed like I think we were -- they approached us from the front but then Marshall had my right arm and started coming like counter clockwise and put it up behind my back. So, then I kind of like froze like, eh. At that time the deceased, Sandy Seale, was facing Ebsary on the inside like.

65. Q. On the inside you mean from the street?

A. Yeah.

66. Q. You and Marshall would have been out by the curb?

A. Yeah.

67. Q. As opposed to the street?

A. Yeah, right.

68. Q. And Ebsary and Seale would have been on the inside?

A. Yeah, on the inside right, yeah.

69. Q. And when Mr. Marshall put your arm up behind your back, can you recall what Seale and Ebsary were doing?

A. When he done that I heard Seale telling Mr. Ebsary to dig. Dig man, like that.

70. Q. He said what?

A. Dig man.

71. Q. Dig?

A. Yeah.

Mr. MacNeil, direct examination, by Mr. Edwards

72. Q. Yes.

A. So, I figured it was probably a robbery. I didn't have no money, I was kind of shook up. I just stayed and, ah.

73. Q. So when Seale said to Ebsary, dig man, what, if anything, did Ebsary do?

A. He said I got something for you.

74. Q. He said I got something for you?

A. Yeah.

75. Q. Now when Seale says dig man to Ebsary, do you recall how Seale's hands were?

A. They were just out like that?

76. Q. When you say out like that...

A. Just laying by his sides.

77. Q. By his sides?

A. Right, yeah.

78. Q. And what about Mr. Ebsary, where were his hands at the time?

A. I just can't recall where his hands were, but I imagine they would be by his side.

79. Q. Alright now you can't imagine but just tell us.

By the Court: He can but he mustn't tell us.

80. Q. Now tell us--you said that after Seale said dig man, Ebsary said what?

A. I got something for you.

81. Q. Now how much time passed between Seale saying dig man and Ebsary answering I got something for you?

—A. Just a split second -- no time at all.

Mr. MacNeil, direct examination, by Mr. Edwards

82. Q. Split second, right?
- A. Yeah.
83. Q. What, if anything, did Ebsary do when he said I got something for you?
- A. I think he put -- come out of his pocket like that.
34. Q. Now you're motioning with your right hand?
- A. Yeah, he came out with his hand and he went like that.
85. Q. Now when you said when he went like that, for the record, you are showing upward motion with your right hand, is that correct?
- A. Yeah, yeah.
86. Q. And in what direction did he make that motion?
- A. In upwards, like upward direction.
87. Q. In relation to Mr. Seale?
- A. In like, just like upward direction.
88. Q. Put it this way--where did he make contact with Mr. Seale, if he did make contact?
- A. In his abdomen--his stomach.
89. Q. Did you see if Mr. Ebsary had anything in his hand as he made that upward sweeping motion you just described?
- A. No, but I seen like blood.
90. Q. When did you see the blood?
- A. Coming out of the deceased Mr. Seale.
91. Q. What if any sound did you hear from Mr. Seale or Mr. Ebsary?
- A. I heard a scream coming from Mr. Seale and then everything was in phrases and I seen him, he ran.

Mr. MacNeil, direct examination, by Mr. Edwards

92. Q. Who ran?
- A. Mr. Seale, he ran.
93. Q. Right.
- A. And he sort of like ran to the other side of the street.
94. Q. Ran to the other side of the street--the park side?
- A. Yeah, right.
95. Q. Then, I believe that Marshall had tried to do something or some darn thing but I think Ebsary or something I can't be quite sure.
96. Q. You tell us what you remember Ebsary doing?
- A. I think like Ebsary made like a swing for him.
96. Q. For him you mean Marshall?
- A. Marshall, yeah, but I think what Marshall was trying to do was help his friend or something like that.
97. Q. What type of movement did Marshall make before Ebsary made the swing at him?
- A. Like sort of like he come over, sort of like that to grab he left my hand go behind my back.
98. Q. Marshall let your hand go?
- A. He let my hand go.
99. Q. When he let your hand go, what was the motion he made then?
- A. He sort of come over, like, then I was like, everything was happening so fast there.
100. Q. When you say he came over, do you mean he came over towards Ebsary?
- A. No, he just of like, I don't know if he reached over or it was some darn, you know?

Mr. MacNeil, direct examination, by Mr. Edwards

101. Q. Reached over to whom, to where?
A. Reached over, like he put his hand over.
102. Q. But to where?
A. Toward Ebsary.
103. Q. But when he reached over toward Ebsary, what did Ebsary do?
A. As far as I can think Ebsary sort of like went like that.
104. Q. You are making sort of a downward motion with your right hand?
A. Yeah, right.
105. Q. What, if anything, did you see in Ebsary's hand at that time?
A. I couldn't see because I was sort of in a state of shock. You see something like that, you don't, you know, you get some people get different ways but I guess, I was just frozen like, you know.
106. Q. Now, after Ebsary made that last motion you just described, towards Marshall what, if anything, did Marshall do then?
A. I can't--Marshall just disappeared.
107. Q. Do you remember what direction he went when he disappeared?
A. No, I don't remember the direction, no.
108. Q. Did you see Mr. Seale at that time?
A. No, I couldn't see him at that time.
109. Q. What did you and Mr. Ebsary do then?
A. The next minute we were at his house.
110. Q. You went to his house?
A. Yeah.
111. Q. Do you remember what route you took to get to his house?
— A. I can't be sure.

Mr. MacNeil, direct examination, by Mr. Edwards

112. Q. Can you give us an idea of how long it would have taken you to get from where this incident took place to Mr. Ebsary's house?

A. I'd say ten minutes or so.

Mr. Ebsary: (Inaudible).

By the Court: Remember what I told you earlier Mr. Ebsary, that you have to have you stay in court throughout the whole proceeding.

113. Q. So you and Mr. Ebsary went to Mr. Ebsary's house on Rear Argyle Street?

A. Yeah, right.

114. Q. I take it you went in the house?

A. Yeah.

115. Q. With Mr. Ebsary?

A. Yeah, right.

116. Q. Do you recall if there was anyone else in the house that night?

A. I can't--I never seen anybody.

117. Q. Where did you and Mr. Ebsary go then?

A. Well I sort of sat out in a room, like you know, it's right off to the kitchen and look in the kitchen and I'd seen him cleaning his and the knife underneath the thing.

118. Q. What do you mean by cleaning the knife underneath the thing?

A. Underneath the tap.

119. Q. Underneath the tap?

— A. Yeah.

Mr. MacNeil, direct examination, by Mr. Edwards

120. Q. That would have been in what area, bathroom, kitchen?

A. In the kitchen.

121. Q. How far were you sitting from Mr. Ebsary?

A. I was only about from where you're standing to.....

122. Q. Are you indicating approximately twenty feet?

A. Not even that just about from here to the middle of the rail there.

123. Q. Middle of the rail?

A. Yeah.

124. Q. About ten feet away?

A. Yeah.

125. Q. You saw him clean a knife at that time?

A. Yeah.

126. Q. Can you describe the knife?

A. I can't describe it, but I presume it was a pocket knife.

By the Court: Don' presume.

127. Q. Don't presume, just tell us what you remember about the knife, if you remember anything? Do you remember the length of the blade?

A. No, but it had a brown handle on it, but I can't remember the length of the blade.

128. Q. And, how long did you stay at the house?

A. I'd stayed about an hour after that.

129. Q. And who, if anybody, did you talk to in that hour.

A. Nobody, just him, Mr. Ebsary.

Mr. MacNeil, direct examination, by Mr. Edwards

130. Q. Now, after that hour passed I take it you left Mr. Ebsary's house.

A. Then I went home.

131. Q. You went home?

A. Uh Hmmm.

132. Q. And when did you next go to Ebsary's, if you did go there?

A. I went the next day there after I heard the young fella had died.

133. Q. How did you hear that the young fella had died?

A. I heard it on the news eh. He was laying in bed and he said well.

134. Q. Who was laying in bed?

A. Mr. Ebsary. He said well, it was self defense.

Mr. Wintermans: Excuse me My Lord, I wonder if this evidence is relevant, as to a conversation that took place the following day.

By the Court: It's all part of the same transaction in my view.

Mr. Edwards: On the objection, the following day, the I submit following year-/if he had conversation with the accused in relation to the events that happened that night it was indeed relevant and admissible.

By the Court: I think it's admissible to. (inaudible) mentioned earlier the one -- Mr. Edwards has just stated the statement by the accused in respect to the alleged occurrence and since it's not up to a person in authority there's no necessity for (inaudible).

Mr. MacNeil, direct examination, by Mr. Edwards

Mr. Wintermans: Then I would understand that only the exact words that were spoken would be admissible and not perhaps the witnesses opinions with respect thereto.

By the Court: He is not suppose to give opinions in any event. We don't know what his evidence is, but certainly his recollection of what was said is admissible. Now if gets into impressionable opinion, we'll have to deal with that when we come to it.

Mr. Wintermans: So, therefore, the witness is not to give his own opinion.

By the Court: No, no, he has not been established as an expert, so there's no.

Mr. Edwards: (inaudible) that last remark because I don't see where that came into it. The witnesses wasn't giving any opinion nor did I anticipate that he would.

135. Q. Okay, Mr. MacNeil, you were relating a conversation that you and Mr. Ebsary had the day after this incident in the park?

A. Yes, right.

136. Q. And Mr. Ebsary was in bed at the time?

A. Yes.

137. Q. What did you say to Mr. Ebsary first?

A. I said you didn't have to kill him. I said you should have gave him the money.

138. Q. What did Mr. Ebsary say to that?

A. He said it was self defense.

Mr. MacNeil, direct examination, by Mr. Edwards

139. Q. Do you recall what else was said, if anything?
- A. Well he said, well, I got a family and, ah, you don't your family in trouble and every darn thing so, you know, I said well we'll have to go to court and everything like that.
140. Q. That's what he said to you?
- A. Yeah.
141. Q. And then what did you say?
- A. Well I just, you know, I just well should have gave him the money and this thing wouldn't have happened. because he wasn't armed or nothing, you know.
142. Q. You told Mr. Ebsary that Mr. Seale wasn't armed?
- A. He wasn't armed, he wasn't cursing, he just "dig man, dig" which meant he wanted money.
143. Q. When you said that to Ebsary about Seale not being armed what did he say to that?
- A. Well, Mr. Ebsary said self-defense.
144. Q. How long did you stay at the Ebsary house on that occasion?
- A. Ah, not too long about an hour and that's the last of it-- I never went there again.
145. Q. You never went there again?
- A. No.
146. Q. Okay. You were aware that Donald Marshall had been charged with stabbing Sandy Seale?
- A. Yes, I was aware of that, I was aware of that, and, ah, I, ah, after I found out he was convicted and sent away I couldn't sleep. I said it's just not right for a person to be in jail for something he didn't do, and, ah, I was

Mr. MacNeil, direct examination, by Mr. Edwards

walking around there and my mother.

147. Q. Now you can't tell us what your mother said?

A. Yeah, but I was walking around and anyhow that's it. I went down and made my statement to the police and I told them and they, I don't think they believed me, so.

148. Q. That was after you heard Donald Marshall had been convicted?

A. Convicted, yeah, but they didn't believe me.

149. Q. Mr. MacNeil you say you had how many beers that evening?

A. I had seven or eight beers.

150. Q. What effect would you say the beers were having on you at the time of this incident in the park?

A. What effect--well, I wasn't drunk or nothing. I was alright but after this happened I went kind of like in shock, eh. Like, you know, after the incident happened I was all shook up. I can't describe it you have to go through it yourself and then you realize what it's like.

151. Q. Okay. Do you ^{know} any of Mr. Ebsary's family?

A. At that time I knew Donna.

152. Q. Donna, who would be who?

A. That's her daughter.

153. Q. The daughter.

A. Her brother.

154. Q. What was his name.

A. The end of my tongue now and I can't think.

155. Q. Would it have been Gregory?

A. Gregory, yeah.

Mr. MacNeil, direct examination, by Mr. Edwards

156. Q. Yeah.

A. And his mother, Mary.

157. Q. Okay. When prior to the stabbing would you have last seen them?

A. Prior, that's like after....

158. Q. No, before.

A. Well, I seen them when they bought a car. I had my license, eh.

159. Q. How long before the night of the stabbing was that?

A. Awhile, about a month, something like that.

160. Q. When did you next see them after the stabbing?

A. After it happened I seen them a couple of days after that, they told me...

161. Q. Well you can't tell what...

A. No, no, no.

162. Q. Okay, I have no further questions.

Mr. MacNeil, cross examination, by Mr. Wintermans

1. Q. Mr. MacNeil, you say at the present time you are thirty-nine years old?
- A. Yeah.
2. Q. Working?
- A. Yeah.
3. Q. Part-time?
- A. Part-time, yeah.
4. Q. What kind of work are you doing?
- A. I'm just doing some work down at the Isle Royal Hotel. They are tearing it down--like tearing the insides out and they are rebuilding it, eh.
5. Q. Yeah.
- A. So, I'm down there just hauling the stuff out and that.
6. Q. And what kind of education do you have?
- A. I have Grade Six.
7. Q. How old were you when you finished school?
- A. Sixteen.
8. Q. I take it you didn't do too well in school?
- A. Not too well in school, no.
9. Q. Ah, you say that at this time, back in nineteen seventy-one, you were working as a landscaper, who was that with?
- A. I worked with Sydney Landscaping, I worked with Ellebrok, and I worked with Khattar, Khattar's Landscaping.
10. Q. All back in nineteen seventy-one?
- A. Yes, well, prior to that prior to that.

Mr. MacNeil, cross examination, by Mr. Wintermans

10. A. I worked at C.N.R. and I worked at Keddy's for awhile.
11. Q. And you're single, are you?
- A. Yeah.
12. Q. How would you describe you memory, generally speaking?
- A. Memory, since this here, I go through a lot of strain. It's not easy to get a job. I find when I go looking for a job everybody says I know you, you're in the paper there and then you know, sometimes you think people are like prejudice against you for some darn thing because you've been where there was somebody killed, and, ah, it hurts you inside a lot.
13. Q. So, this incident has caused you considerable suffering?
- A. And emotional problems a little bit, not serious, but serious enough I had to go to the doctor and get something for my nerves.
14. Q. When was that?
- A. That was last year.
15. Q. Are you still -- are you taking anything now?
- A. I'm still taking Valium.
16. Q. Valium?
- A. Yeah.
17. Q. How often do you take that?
- A. One every day, but if I'm not uptight--if I'm working I don't need them at all.
18. Q. I see. You say that you went to the tavern between
— six and seven in the evening?
- A. I'm posi....., pretty sure.

Mr. MacNeil, cross examination, by Mr. Wintermans

19. Q. Do you recall having given evidence in Halifax in nineteen eighty-two before the Nova Scotia Supreme Court Appeal Division, in relation to the Donald Marshall matter?
- A. Yeah.
20. Q. Page Eighty-Two, Page Eighty-One, do you recall having asked the Question: 'Now can you say what time you arrived at the State Tavern?' and the Answer: 'I would say we arrived around eight o'clock in the evening, I would say.' Question: 'You say we?' Answer: 'Yeah, me and Roy. Oh no, not me and Roy I mean to say that is where I meant Roy that evening.' Do you recall having said that?
- A. No, I don't recall saying that.
21. Q. Are you saying you didn't say that?
- A. I might have, but I don't recall it.
22. Q. The point is I wonder if you really do remember what time you went to the tavern, not that it's all that important, but if you said six or seven, I'm suggesting you may have previously said eight.
- A. Maybe.
23. Q. You are not sure?
- A. ~~I'm not sure.~~
24. Q. Sometime between six and eight, is that fair to say?
- A. Yeah.
25. Q. Sometime in the early evening?
- A. Yeah.

Mr. MacNeil, cross examination, by Mr. Wintermans

26. Q. You weren't looking at your watch as you went out the door?
A. No, I never had a watch.
27. Q. Figuring you might have to testify about it, were you?
A. No, no.
28. Q. Isn't it true, you indicated when you got the tavern, whatever time it was Mr. Ebsary was already there. You say that you had seven or eight beers?
A. Yeah around seven or eight beers.
29. Q. How many did Mr. Ebsary have while you were there?
A. Ah, I would say around the same number. You don't look and watch.
30. Q. Approximately, give or take?
A. Approximately, yeah.
31. Q. And it's true that Mr. Ebsary was there before you got there so I suggest to you that he may have had more beer before you got there.
A. He might have, how would I know.
32. Q. Was Mr. Ebsary drinking beer when you arrived at the tavern?
A. Yeah, he had some in front of him there.
33. Q. Now, ah, what time did you say you left the tavern with Mr. Ebsary?
A. We left around ten o'clock.
34. Q. You again recall having testified in Halifax, as I indicated, before the Appeal Court, in relation to the Donald Marshall matter.
A. Uh Hmmm.

Mr. MacNeil, cross examination, by Mr. Wintermans

35. Q. Do you recall page eighty-three, being asked the question: 'Can you recall what time you left the State Tavern?'
Answer: 'I can recall, I'd say around, between ten thirty and eleven o'clock or something like that, like you know like.' Question: 'How certain you about the time?'
Answer: 'Well you know like I just--I'd say about eleven o'clock I would say.' Do you recall those questions and answers?
- A. No, not directly.
36. Q. Are you saying those answers are not true?
A. No, I'm not saying that they are not true.
37. Q. So, again I suggest to you, that you are not sure about the times, that it could have been eleven o'clock, is that right?
38. Q. Okay. Now, did you say that you were approached by Mr. Marshall and Mr. Seale from the front or was it from behind?
- A. I figured it was from behind like, they come up on the counterwise, like from behind.
39. Q. And you say that Mr. Marshall put your arm up behind your back?
- A. Yeah, right.
40. Q. Up like...
A. Yeah.
41. Q. Got a hold of your wrist or something?
A. Yeah.
42. Q. Little bit of pressure?
A. Yeah.

Mr. MacNeil, cross examination by Mr. Wintermans

42. Q. Did that put you in a position where you couldn't really move?
- A. Well I could have moved, but I just froze, I just stayed there.
43. Q. Did Mr. Marshall say anything to you before he put your hand up behind your back?
- A. Marshall never said nothing to me.
44. Q. Never said a word?
- A. Not a single word.
45. Q. Did he say anything to Mr. Ebsary?
- A. I never heard him saying a word.
46. Q. Was there any conversation between you before Mr. Marshall put your hand up behind your back?
- A. No, no conversation at all.
47. Q. If I was to tell you that Mr. Marshall testified that the four of you were having a conversation for about a half an hour before that incident occurred on that same evening, what would you say to that?
- A. I would say it's wrong.
48. Q. Are you sure about that?
- A. Positive.
49. Q. So, there was no conversation between you and either Seale or Marshall?
- A. There was no conversation whatsoever.
50. Q. Did you see Mr. Marshall or Mr. Seale before your hand was put up behind your back?
- A. Ah, just, like it happened so fast, eh, like I say, in a sense I think I did see him, like you know.

Mr. MacNeil, cross examination by Mr. Wintermans

51. Q. For how long?
- A. For just a second, that's about all.
52. Q. Now, do you know how old Mr. Ebsary was at that time?
- A. I guess he would be around sixty, I guess, sixty-one, or sixty.
53. Q. Did he look very much different then than he does now?
- A. I guess he did.
54. Q. Pardon me?
- A. I guess he did.
55. Q. In what way?
- A. He was a lot more spryer.
56. Q. He was?
- A. Yeah. He walked a lot more spryer.
57. Q. Was he any taller?
- A. No answer.
58. Q. You say that you only knew Mr. Ebsary for a couple of weeks before this incident occurred?
- A. Pardon.
59. Q. You say that you only knew Mr. Ebsary for a couple of weeks before this incident occurred?
- A. No, I knew him a couple of months before, but before the incident.....what are you talking about, like the?
60. Q. How long did you know Mr. Ebsary?
- A. Two months before that, yeah.
61. Q. And is your father living?
- A. Yeah.

Mr. MacNeil, cross examination by Mr. Wintermans

52. Q. He is?

A. Yeah.

53. Q. Where does he live?

A. Spring Garden Villa.

54. Q. Where's that?

A. It's up off Alexandra Street?

55. Q. Did Mr. Ebsary know your father at all, as far as you know?

A. As far as I know, he did not.

56. Q. Are you sure about that?

A. Positive.

Unless he met him in the State and I didn't know anything about it because my father use to go the State Tavern when he got pensioned up. He use to go there with all his friends there.

57. Q. How old is your father now?

A. My father is about, oh, he is way over seventy. About, seventy, he was born March, nineteen o one. So that makes him.

58. Q. Eighty two?

A. Yeah, eighty-two, yeah.

59. Q. Now, when Mr. Marshall put your hand up behind your back, were you afraid?

A. I was afraid indeed.

70. Q. You were.

A. I was afraid indeed.

Mr. MacNeil, cross examination by Mr. Wintermans

71. Q. What were you afraid of?

A. Well, I had an incident when I was young where this fella was -- I don't know if I had to mention it here.

72. Q. Were you afraid he was going to hurt you?

A. I was afraid, yeah.

73. Q. Now, you testified that you didn't see any knife in Mr. Ebsary's hand at the park on Crescent Street at that time, is that correct?

A. Yeah, that's correct.

74. Q. You couldn't see the knife?

A. No.

75. Q. Were you looking in that direction?

A. I was stunned. If it was there, I, you know.

76. Q. Was it because it was dark you didn't see?

A. Well, the lighting wasn't the best. The lighting was only fair.

77. Q. Do you recall the lighting in the park at that time as compared to now.

A. To now, it's different now, it was only fair at that time. It wasn't as bright as it use to be.

78. Q. It's much brighter there now.

A. It's much brighter there now, yeah.

79. Q. You indicated that you crossed across the bridge here and that it use to be an old wooden bridge?

A. Yeah, right.

80. Q. And now it's a new...

A. Concrete.

Mr. MacNeil, cross examination by Mr. Wintermans

31. Q. Concrete bridge?

A. Yeah.

32. Q. Do you recall whether or not there were any lights on that bridge back in nineteen seventy-one?

A. No, I don't recall none on that bridge.

33. Q. I suggest to you that there weren't.

A. No.

34. Q. Although there are very bright lights, do you agree with that?

A. Yeah.

35. Q. Ah, now you said that Mr. Marshall and Mr. Seale were not armed, in a conversation between yourself and Mr. Ebsary the following day. You testified to that?

A. Yeah.

36. Q. And I suggest to you that you can't really say or at least you couldn't say that night in the park when this incident happened whether or not they were armed?

A. No, they could have, but I presumed that they weren't because you know, but I can't.

37. Q. When did you presume they weren't, after?

A. No, no, I mean to say well, you know, they could be armed, they could....

Mr. Edwards: Objection, the witness is trying to get his answer in but my learned friend is not letting him to complete it.

By the Court: We should do that. This witness obviously takes longer to answer than some other witnesses and I think you have to hear him out when you ask a question

Mr. MacNeil, cross examination by Wintermans

87. A. I can't say that they wouldn't be armed, I'm not, you know, but to me the way I see, I didn't see nothing in the deceased's hands, you know, club or anything like that, but then I can't say for sure that Marshall wouldn't have a weapon on him. You can understand that, eh.
88. Q. Sure. Of course, you couldn't see any weapon on Mr. Ebsary either?
- A. No.
89. Q. Isn't it true that you didn't know before this incident that Mr. Ebsary even had a knife?
- A. I didn't even know, I didn't even know he had a stone sharpener in the basement and every darn thing, I didn't know anything about that.
90. Q. Isn't it true that you couldn't really see the hands of four hands of Mr. Marshall and Mr. Seale when you were being held by Mr. Marshall.
- A. Repeat that question again please.
91. Q. You couldn't see their, ah, the four hands of Mr. Marshall and Mr. Seale while you were being held by Mr. Marshall?
- A. No, just Mr. Seale's hands were the only one, I couldn't this is kind of, I could see Mr. Seale's hands, but, ah.
92. Q. You could see whether he had a....
- Mr. Edwards: Objection.
- A. I didn't see no, to my, I couldn't see no weapon in his hands but, I can't say that Marshall wouldn't have something on him, but the way I figure out the kids, they were just probably looking for some money to go to a dance or something and if I had any money I would have gave it to them that night

Mr. MacNeil, cross examination by Mr. Wintermans

92. A. instead of all this going on
93. Q. Let me just say something by way of question, I'll ask you to comment on. I'm suggesting to you, that the way you are thinking now about that incident in a lot of ways, based on the consequences that resulted and everything from it.
- A. Yeah, I....
94. Q. But that particular night, back in nineteen seventy-one, at that moment when Mr. Marshall grabbed you and held you.
- A. Yeah.
95. Q. And when Mr. Seale said "dig man" and you thought there was a robbery and you were afraid as you testified, you weren't thinking quite this clearly then, were you?
- A. No, that's true.
96. Q. You have given this a lot of thought over the years, I suggest.
- A. I've given it a lot of thought, you know, ah, I.
97. Q. Do you....
- Mr. Edwards: Objection, let him finish.
- By the Court: Just because a witness does not answer as quick Mr. Wintermans as you would like, doesn't mean that he ought not be given the opportunity to answer the question you ask. So, don't be too impatient, just wait until he finishes the question, the answer if you would.
98. Q. Now, you saying that when you went back to Ebsary's residence ah, you're not sure which route you took.
- A. No.

Mr. MacNeil, cross examination by Mr. Wintermans

39. Q. How would you describe the speed?
- A. We were going pretty fast, I know that.
100. Q. And, ah, you say that you were sitting in one room off the kitchen?
- A. Uh Hmmm.
101. Q. While (inaudible) Mr. Ebsary was doing something under the sink, is that right?
- A. Right.
102. Q. Can you describe what you saw in that kitchen?
- A. Ah, I can just describe, as I think, ah, it's got a brown handle on it. I can't really describe how long the blade was or because or because I was too shook up to start looking to see what size knives are.
103. Q. Now were you lingering in the parking lot when this incident occurred?
- A. No, I wasn't lingering at all. No.
104. Q. Were you -- is it fair to say you were walking from George Street through the park on you way to Mr. Ebsary's residence?
- A. Right.
105. Q. Without stopping?
- A. Without stopping.
106. Q. Minding your own business?
- A. Minding my own business, yeah.
107. Q. Is it fair to say you were attacked by these two?
- A. Yeah, that would be fair, yeah.

Mr. MacNeil, cross examination by Mr. Wintermans

108. Q. And you've indicated that you were afraid you might be hurt?
- A. Yeah, but the only thing that gets me there is that he should have had more experience than me. Everybody thinks that in a case like that, you know.
109. Q. I don't want what you opinions might be. Now, did you or did you not see blood on the knife in the kitchen?
- A. Yes, I did.
110. Q. Are you sure?
- A. Positive.
111. Q. Do you recall having given a statement to the R.C.M.P. on February the eighth, nineteen eighty-two?
- A. Yeah.
112. Q. Do you recall having stayed at -- I'll read it to you and ask you -- "On Crescent Street two fellas came up on us from behind, they asked us for money, I heard one fella, the coloured fella or the Indian guy say 'dig man, dig'. All I remember is the colour fella ran and then flopped on the road. I think the colour fella was in front of Roy. We walked kind of fast away to Roy's, we went in the house. I'm pretty sure I saw him wash the knife off in the sink, I can't remember if it had any blood."
- A. That was the morning -- whose name is on that Weitman?
113. Q. Yes.
- A. Yeah, he and MacQueen came up to the house and I wasn't feeling good that there morning and I wasn't, I was all (inaudible) up and didn't, and everything came back so sudden there and I just, you know, I told them, you know, I was all worked up

Mr. MacNeil, cross examination by Mr. Wintermans

113. A. and that's, ah.

114. Q. How many times did you discuss this matter with the police?

A. I discussed it after Marshall was convicted and then I never discussed it again?

115. Q. You never discussed it again?

A. No.

116. Q. What do you call February the eighth, nineteen eighty-two?

A. Well, that was the next time after that. But before that, like, Marshall's lawyer Anderson was down and he was asking me questions and then there was people coming around from Cape Breton Post and everybody is coming around asking questions about this and that.

117. Q. What about Mr. Edwards, did he talk to you about it?

A: Mr. Edwards, Yea. Now that I think about it yea.

118. Q. What about Corporal Carol of the R.C.M.P.? You must have talked to him about it on more than one occasion.

A. Yes.

119 Q. Now, you have already indicated that you recall having a testified in Halifax before the appeal court in 1982. in relation to the Donald Marshall matter.

A. Yes.

120 Q. Do you recall this question and answer? Question: But the point is you did see the knife before it went into seal didn't you? Answer: Not exactly because you know it was kind of dark like, but I seen it. I had a glimpse of it Like after you know. It was only a pocket knife. Not a

Mr. MacNeil, cross examination by Mr. Wintermans

109.

- 120 Q. dagger or nothing, it was only small. Do you recall having said that?
- A. I have, recall saying that.
121. Q. Is that true?
- A. Yes.
- 122.Q. And you don't recall having seen anyone else at the Ebsary house besides you and Roy Ebsary?
- A. I don't recall seeing anybody.
123. Q. Do you recall seeing Donna Ebsary, the daughter?
- A. No.
124. Q. Do you recall seeing Mary Ebsary, Mr. Ebsary's wife?
- A. No.
125. Q. Are you saying that they weren't there?
- A. I never seen them.
126. Q. If I was to suggest to you that they were there and they saw you what would you say to that?
- A. I would say, I would say I don't remember seeing them.
127. Q. Now you said that this whole incident where Marshall grabbed you by the arm and Mr. Ebsary stabbed Mr. Seale, all happened pretty quickly did it?
- A. Pretty quickly.
- 128 A. In a matter of a couple of seconds?
- Q. A couple of seconds.
129. Q. So you didn't have a lot of time to really think about what was happening before Mr. Ebsary used his knife?
- A. No.
130. Q. No more questions.

— Mr. MacNeil, redirect by Mr. Edwards

110

131. Q. Mr. Edwards: The last part of the testimony you gave in Halifax that Mr. Wintermans reffered you to where you said the knife was only a pocket knife, why did you say that it was only a pocket knife?

A. I presume that's what people carry is pocket knives.

132. Q. Thank you.

By the court: Thank you very much Mr. MacNeil.

Court recesses.