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IN THE SUPREME COURT OF NOVA SCOTIA
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

Mrs. Mary Ebsary duly sworn and examined.

Mrs. Ebsary, Direct Examination, by Mr. Edwards

1. Q. Your name is Mary Ebsary?
A. That's right.
2. Q. And your present address Mrs. Ebsary?
A. Forty-six Mechanic Street.
3. Q. That's in Sydney is it?
A. Yes it is..
4. Q. And you're the wife of the accused Roy Newman Ebsary?
A. That's right.
5. Q. And how long have you and he been living together as husband and wife?
A. Thirty years.
6. Q. Thirty years. So you would have been living with him throughout the year nineteen seventy-one?
A. Yes I was..
7. Q. And during that year nineteen seventy-one what was the address, the family address?
A. 126 Rear Argyle Street.
8. Q. And that is also in the City of Sydney?
A. Yes.
9. Q. And in nineteen seventy-one, as you do now, you have two children.
A. Yes I have.
10. Q. And, and, a son Gregory?
A. Yes.
11. Q. And his present age is what?
A. Ah, twenty-eight.

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12. — Q. And a daughter Donna. 112.
A. Yes, that's right.
13. Q. And her present age?
A. Twenty-five.
14. Q. And Gregory and Donna resided with you and your husband on Rear Argyle Street in nineteen seventy-one?
A. Yes, they did.
15. Q. Do you recall the night of the Seale stabbing in nineteen seventy-one?
A. Yes, I do.
16. Q. And on that night, where were you?
A. I was at home.
17. Q. You were at home?
A. Yes.
18. Q. And who was at home with you?
A. Donna.
19. Q. Donna. Where was Greg then?
A. Gregory was out.
20. Q. And where was your husband Roy Newman Ebsary?
A. He wasn't home.
21. Q. He wasn't home?
A. No.
22. Q. Did he arrive home that night?
A. Yes he did.
23. Q. About what time?
A. I can only guess about the time. It was possibly some time

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23. A. between eleven thirty and twelve o'clock.
24. Q. Eleven thirty and twelve o'clock.
- A. Um-hmmm.
25. Q. And you say you are guessing at the time he came in, you are giving an approximate.
- A. I'm taking that from the fact that I was watching the late news cast. So it would be between eleven thirty and twelve o'clock.
26. Q. And when he arrived home, was he alone or was there someone with him?
- A. No, he had a companion with him.
27. Q. Yes, and who was that?
- A. Mr. MacNeil.
28. Q. And do you know Mr. MacNeil's first name?
- A. Yes, James.
29. Q. James MacNeil. Um-hmmm.
- A. Um-hmm.
30. Q. And what can you tell us about the entry that Mr. Ebsary and Mr. MacNeil made?
- A. Well their entry was very agitated, or excited, or whatever, and Mr. MacNeil stood in the hallway and Roy proceeded into the kitchen area.
31. Q. And where were you at this time?
- A. I was sitting in the living room watching television.
32. Q. From where you were sitting could you see into the kitchen?

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32. A. No, I couldn't.
33. Q. But you could see into the hallway?
A. Just partially.
34. Q. And what, if any conversation passed between Mr. MacNeil and Mr. Ebsary at that time?
A. When they came in, there wasn't any conversation at all between them, until Roy came back out of the kitchen, and he told Jimmy to shut up and go home. That was the only conversation I heard between them.
35. Q. Do you know what prompted him to say that?
A. Well Jimmy was saying something like Roy saved my life tonight. And he kept repeating that.
36. Q. Who was he saying that to?
A. He was saying it to nobody in particular, just, Roy saved my life tonight. And then Roy came out of the kitchen and he told him to shut up and go home.
37. Q. And how long had Roy, when you say Roy referring to the accused - Roy Newman Ebsary, how long had he been in the kitchen before he came out?
A. Ah, I would put it at possibly five minutes.
38. Q. About five minutes?
A. Um-hmmm.
39. Q. And did Mr. MacNeil, in fact, leave then?
A. Yes, he did.
40. Q. And where did your husband go?

40. — A. I presume he went to bed because...
41. Q. But do you recall, you can't presume.
A. Oh! Well I'll say he went to bed.
42. Q. When did you next see Mr. MacNeil?
A. I don't remember if it was the next day or the following day that I saw him.
43. Q. And was that at your home?
A. Yes.
44. Q. Could you tell us how many times he came to your home after that evening?
A. Well he came..., I can't tell you how many times he came to my home, but it was quite a few times.
45. Q. Now, that's after that evening?
A. Yes.
46. Q. How long had you known Mr. MacNeil before that evening?
A. Before that..., You mean before he knew Roy, I didn't know him at all.
47. Q. No, well I'll put it this way - how long had he known Roy to your knowledge?
A. Oh, I don't know. I don't know how long Roy and Mr. MacNeil were acquainted before he came to my house.
48. Q. Could you tell whether your husband was drinking or not that evening.
A. Yes, he was.
49. Q. And how would you describe his condition when he arrived home that evening?
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49. A. His condition was very excited, agitated, I couldn't say any more than that because I didn't talk with him, and other than see him go into the kitchen, and noting his condition as he passed the doorway, I didn't talk to him and I didn't go... I didn't follow him. So he went up to bed so I knew he had been drinking.
50. Q. O.K. Thank you. How old was Roy at that time?
 A. Oh, probably fifty eight, fifty nine.
51. Q. And how tall was he?
 A. I think he is approximately five foot three, five foot two and a half - five foot three.
52. Q. And how much did he weigh?
 A. Oh, possibly one hundred and thirty-five pounds.
53. Q. A hundred and thirty-five pounds?
 A. Yes, at that time.
54. Q. Do you recall having given a statement to Sergeant Detective, as he was at that time, John F. MacIntyre...
 A. Yes, I do.
55. Q. Oh the... November fifteenth, nineteen seventy-one.
 A. Um-hmmm.
56. Q. Do you recall having said at that time "Roy only weighs about a hundred and fifteen pounds"?
 A. Yes, I possibly did... say that.
57. Q. Is that accurate, or... what happened?
 A. It was just a statement. He probably said to me, how much does your husband weigh, I would probably go a hundred and

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Mrs. Mary Ebsary, Direct Examination, by Mr. Edwards

57. A. Fifteen or a hundred and twenty-five I don't really know.
58. Q. All right. So are you now saying that he could be a hundred and fifteen or could be a hundred and twenty-five pounds?
- A. No, I'm saying that he could be a hundred and thirty-five pounds at that time.

59. Q. Do you recall having given evidence in the previous trial to this?

A. Yes, I do.

60. Q. In September...

By the Court: How necessary is it to go into this?

Mr. Edwards: Maybe we should have the Jury out while we discuss this matter...

By the Court: Yes, I think so.

Mr. Edwards: I'll with, I'll withdraw the question.

By the Court: It's inconsequential.

Mr. Edwards: It's not that important.

61. Q. Thank you, I have no more questions.

Mr. Wintermans: Nothing from me on Direct, Your Honor.

By the Court: Thank you very much, Mrs. Ebsary.

A. Thank you.

Mr. Edwards: My Lord, I'm prepared to call more witnesses but it may be an appropriate time to break for the...

By the Court: Well, if you're thinking of me, ah, I've got time.

Mr. Edwards: Okay, Donna Ebsary, please.

By the Court: Thank you for your consideration.

Miss Donna Ebsary duly sworn and examined.

Miss Donna Ebsary, Direct Examination by Mr. Edwards

1. Q. Your name is Donna Ebsary?
A. Yes, sir.
2. Q. Your present address, Donna?
A. Three eighty River Street, Waltham, Mass.
Massachusetts?
3. Q. Massachusetts?
A. Yes, sir.
4. Q. And ah, your occupation?
A. I'm a furniture maker.
5. Q. And ah, your age Donna?
A. Twenty-six.
6. Q. Twenty-six.
A. Yes, sir.
7. Q. And you're the daughter of the accused, Roy Newman Ebsary?
A. Yes, I am.
8. Q. And ah, in nineteen seventy-one you would have resided on one twenty-six Rear Argyle Street in Sydney with your Mother, father and your brother Gregory?
A. That is true.
9. Q. What education do you have Donna?
A. I have a Grade Twelve from Sydney Academy. I have two years at the College of Cape Breton and two years at the New England School of Acupuncture in Massachusetts.
10. Q. Now in nineteen seventy-one you would have been in school, I take it?
A. Yes, sir.

Miss Donna Ebsary, Direct Examination by Mr. Edwards

11. Q. Do you recall what grade you were in then?
- A. Would have been about thirteen years old. Ah, about seven or eight.
12. Q. About seven or eight years old?
- A. No. In grade seven or grade eight.
13. Q. Grade seven or eight, I'm sorry. All right. Now do you recall the night of the Seale stabbing in May, nineteen seventy-one?
- A. Yes, sir I do.
14. Q. And how did you become aware of that stabbing?
- A. Oh. I was at home on the night in question. Ah, and as far as knowing there was a stabbing, through the news in the media I knew. Ah, I knew because it related to my father.
15. Q. Well, on the night of the stabbing. You said you were home that night?
- A. Yes, sir.
16. Q. Who was home with you?
- A. My mother.
17. Q. Your mother?
- A. Yes, sir.
18. Q. That's the previous witness, Mary Ebsary?
- A. Yes, sir.
19. Q. Right. And ah, do you recall your father getting home that evening?
- A. Yes, I do.

Miss Donna Ebsary, Direct Examination by Mr. Edwards

20. Q. What time did he arrive home?
A. Around eleven I would say. Eleven, eleven thirty. The late news was on.
21. Q. Yes. And ah, was there anyone with him when he arrived home?
A. Yes. Ah, Jimmy MacNeil was with him.
22. Q. Jimmy MacNeil?
A. Yes, sir.
23. Q. I see. And he was one of the previous witnesses?
A. Yes, sir.
24. Q. All right. And how long had you known Jimmy MacNeil prior to that evening?
A. I'd known him for a while prior to that. He'd been coming to the house previously with my father and I had had occasion to go with Jimmy to a few places so I knew him.
25. Q. Okay. Do you recall if he came to the home after that?
A. I don't recall him being at my home after that.
26. Q. Now, when your father arrived home that night do you recall how he was dressed?
A. Ah, he had on his blue overcoat. I recall he had had on and just ah, I think he may have had on his dark dress pants.
27. Q. Now blue overcoat. Was it light blue or dark blue?
A. It was a dark, kind of a navy blue overcoat.
28. Q. And what length was it?
A. Ah, it hung like mid-way between ah, I think it hung just below his knee, sorry, yeah, maybe.

Miss Donna Ebsary, Direct Examination by Mr. Edwards

29. Q. Okay. And when your father and Mr. MacNeil arrived home that evening, can you describe what if anything took place as they came in the house?
- A. Ah, they came in and Jimmy appeared to be pretty excited. And Jimmy turned to my dad and said "Gee, you did a good job back there" and my father turned around and said "Oh, be quiet". And the two of them left and went farther into the house, went into the kitchen.
30. Q. Toward what room?
- A. They went into the kitchen of the house.
31. Q. Into the kitchen. Now when they came in what room in the house were you in?
- A. We were sitting in the living room where T.V. was on and they stopped by the doorway of the living room.
32. Q. Right. And ah, when they went into the kitchen area, where were you?
- A. I had followed them into the kitchen. I left the living room, went behind Jimmy. And Jim and Dad were, had gone into the kitchen.
33. Q. And could you tell the Jury please what you observed when you went into the kitchen?
- A. Ah, my father had ah, he was over the sink and ah, he was washing a knife off in the sink. The knife had the, had blood on it and was cleaning it up.
34. Q. Do you recall the, the size of the knife? Can you describe it for us?

Miss Donna Ebsary, Direct Examination by Mr. Edwards

35. A. Ah, it was a small knife that Dad could carry, my father could carry in his pocket. Had a brown handle with a short blade.
36. Q. Now when you say a short blade, could you estimate the length of the blade?
- A. Ah,
36. Q. Well, could you hold your fingers and show us the...
- A. Well, the whole knife maybe yeah and maybe the, you know like the handle would be maybe about this big and the blade about this big.
37. Q. All right. Well, just let's get that for the record. Show me the size of the handle again.
- A. About yeah. About maybe it's...(inaudible) maybe six inches.
38. Q. All right. About six inches?
- A. Maybe it's more. Whatever that is. I'm not carrying my tape measure, I don't know.
39. Q. Okay. And the length of the blade?
- A. About equal.
40. Q. I see. Do you remember what color the handle was on the knife?
- A. I recall the handle of the knife being brown.
41. Q. So you saw your father wash this knife in the sink?
- A. Um-hmm. Yes, sir.
42. Q. Did you recall what he did with the knife after he washed it?
- A. I recall him taking the knife upstairs. Into his, into his room.

Miss Donna Ebsary, Direct Examination by Mr. Edwards

43. Q. I see. And did you see the knife anymore after that?

A. No, I could never. I couldn't find the knife after that.

44. Q. What do you mean you couldn't find it?

A. I looked for the knife after that. I couldn't find, I, the knife was nowhere in his room that I could see.

45. Q. And, why, why were you particularly interested in finding the knife?

A. Because I was aware of what had happened. I knew of ah, the situation that was going on at the time. I felt that some, that it was wrong. That somebody else was being accused for something that they hadn't done.

Mr. Wintermans: Objection. I don't see that, that her opinions should be, ah, heard.

By the Court: No, I, I must say that I was engrossed in taking some notes and thinking about a question I want to ask myself but if there were opinions, they ought not to come out.

Mr. Edwards: I'll try to avoid getting into opinions.

46. Q. I was asking the witness why she was interested in finding the knife. Perhaps I could ask you, Donna, when did you start looking for the knife in relation to that night?

A. It was a while after that.

47. Q. What do you mean by a while?

A. Ah, let's see, ah, I know that like it wasn't the same night and I know that maybe a few months passed before I really started to get really interested because I want, well, for whatever.

Miss Donna Ebsary, Direct Examination by Mr. Edwards

40. Q. In any event, you did, you didn't find them?

A. No.

43. Q. Okay. Can you describe your father's condition when he got home that night? Can you recall?

A. My father seemed to be in command of the situation that was going on. He seemed to know what he wanted to be doing. He knew, I think that ah, a matter of fact, he turned to Jimmy and told Jimmy to be quiet, not to say anything. He was following something that he had pre, had already determined that he should do.

Mr. Wintermans: Again, Your Honor, that's getting ...

By the Court: (Inaudible)... somebody else and describe their intentions. Just describe what you heard.

A. Well. Well, he seemed to be in command, in control of what he was doing.

Mr. Wintermans: I, again...

Mr. Edwards: Well that doesn't say anything really, I don't think...

By the Court: Well if it doesn't say anything that you're concerned about it. The, I think she can go that far.

Mr. Edwards: Was that all your questions?

Mr. Wintermans: No.

Mr. Edwards: Is that your objection?

By the Court: Ah, Let me, let me say this. When you get up to cross-examine you can ask her why she said that and on what she based it. So that, you can keep that in mind.

Mr. Edwards: No further questions, thank you.

Miss Donna Ebsary, Cross-Examination by Mr. Wintermans

1. Q. Ah, did you notice any, anything which may have appeared to be blood on your father's clothing that evening?

A. No, I did not, sir.

Mr. Wintermans: Thank you, no more questions.

By the Court: I have ...(Inaudible) clarification if you're able to provide it Miss Ebsary. You've described the knife as having a handle and a blade and you described it in terms with your fingers which I took to be about three inches each way. That's three inches of handle and three inch blade. Now can you tell, tell us what kind of a knife, was it a pocket knife or was it a solid knife. A kitchen type of knife but, but smaller. What kind of a knife was it or, or did you tell us.

A. Ah, the knife is not, was not a pocket knife like you would go to the store and buy a pocket knife with a, you know like, that would have a fold up blade. It's not, not that type of a knife. It was more of a...

By the Court: Well was it a, did it have a fold up blade or not?

A. No. I would say that it didn't.

By the Court: Are there any questions arising out of that, Counsel.

Mr. Edwards: No.

Mr. Wintermans: Just a couple. Where were you when you were observing this knife?

Miss Donna Ebsary, Cross-Examination by Mr. Wintermans

- A. If the sink was in front of me and my father was here and Jimmy was here I would be like, a little bit to the side of that.
2. Q. How far away from the knife?
- A. Like from here to the stenographer's pen.
3. Q. Were you behind Jimmy or your father then?
- A. No, I was kind of to the side of my father.
4. Q. How long did you have to observe it?
- A. How long did I have to observe it -- I don't know how long I observed it. I seem to recognize the knife when I saw it -- when I saw the knife in his hand it was one that I recognized from him having, that's the picture that I captured in my mind, that I have in my mind that night.
5. Q. I see. That's all the questions I have.

By the Court: Well I could hurry you up even, but if there is something else only arising out of what I asked though. That's it.

Mr. Wintermans: There is something I can't seem to locate in all these files.

Mr. Edwards: Not on re-direct, but there is one matter that should be clarified for the record. When my learned friend asked her how far she was from the knife at the time the accused was washing it, she said from about here to the stenographer's pen. Perhaps we could just have the record show that that is a distance of about three feet, three to four feet.

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Mr. Wintermans: That's all the questions I have My Lord.

By the Court: How's.....

Mr. Edwards: I think that's as far as we intended to go today My Lord.

By the Court: Alright, what about Constable....

Mr. Edwards: Yes, Constable Mroz, I took the liberty of telling him that I wouldn't be calling him this afternoon.

By the Court: Well then, that completes the evidence for this afternoon ladies and gentlemen of the jury. We will adjourn until Monday morning. Now, I been advised by counsel both for the Crown and the Defense that there will be a matter they wish to discuss with me without you being present, so we might do that first thing Monday morning and I'll ask you to come back for ten thirty. If you could be back here and ready to go at ten thirty, that would be just fine. So, we will then adjourn this court until Monday morning at nine thirty, but you don't have to be back until ten thirty.

Mr. Edwards: Possibly they could go directly to the jury room on Monday instead of.....

By the Court: I have instructed them already with that and I do again, but I really want to impress upon you that there will be a whole lot of people, no doubt, milling about and the more quickly you can get in the jury room and outside of the view of conversation of these people the better so I put you on your honour to do that.

Court Adjourned

09:30 Court opens.

By the Court: My Lord, just for the record, we are now in the absence of the jury purposely to have a voir dire respecting the admissibility of a statement given to now Chief John MacIntyre, on November fifteenth, nineteen seventy-one. So, my first witness on the voir dire will be Chief MacIntyre.

Chief John MacIntyre duly sworn and examined

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

1. Q. Your name and occupation please?
A. John MacIntyre, Chief of Police, the City of Sydney Police Department, Sydney, Nova Scotia.
2. Q. And you have been Chief of Police of the Sydney Department for how long?
A. Since December -- eight years.
3. Q. And you have been a member of the Sydney Police Department how long all toll?
A. I been with Department since May the eleventh, nineteen forty-two.
4. Q. And in nineteen seventy-one, you would have been a Detective Sergeant with that Department, is that correct?
A. Correct.
5. Q. And as such you were in charge of the investigation of the stabbing death of Sandy Seale?
A. I was.

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

6. Q. And you personally conducted or coordinated that investigation?
- A. I did.
7. Q. On November fifteenth, nineteen seventy-one, you took a statement from the accused, Roy Newman Ebsary, is that correct?
- A. I did.
8. Q. And is the Roy Newman Ebsary from whom you took a statement at that time present in this courtroom today?
- A. He is.
9. Q. Would you point him out please?
- A. He's right over here in the front seat.
10. Q. Record shows he pointing to the accused My Lord.
- By the Court: Alright.
11. Q. Now, I'll show you Exhibit "B-E-2" that is the statement you took from the accused, Roy Newman Ebsary, on November fifteenth, nineteen seventy-one?
- A. It is.
12. Q. Prior to November fifteenth, nineteen seventy-one, had you had any contact with Mr. Ebsary in relation to this particular investigation?
- A. Not to my knowledge, no.
13. Q. Would you tell us briefly why you took the statement on that particular day, what led to your taking the statment on that particular day from Mr. Ebsary?
- A. On that particular date, November fifteenth, nineteen seventy-one, late in the day I had a visit from one James MacNeil

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

13. A. and his brother who had just arrived home from Toronto the day before and as a result of a conversation I had with them and statements that I took from them, I seemed fit to take a statement from Mr. Roy Newman Ebsary.
14. Q. I see, and that statement is in your handwriting, is it Chief MacIntyre?
- A. It is, yes.
15. Q. Who was present when that statement was taken?
- A. Sergeant Mike MacDonald.
16. Q. And he is now the Deputy Chief of Police at the Sydney Police Department, is that correct?
- A. That's correct.
17. Q. Now, the statement notes on the top there, nine fifteen p.m. is that the beginning?
- A. That's when the statement started, yes.
18. Q. Where was the statement taken?
- A. It was taken in the Detective's office of the old City Hall, on Bentick Street, City of Sydney.
19. Q. Okay, and where in that building was it taken, do you recall?
- A. Well we had a Dective Office the last part of it out and the building attached to the main City Hall on the first floor leading in from the driveway on Bentick Street.
20. Q. Now, prior to the statement taking beginning were you and Deputy Chief MacIntyre the only two police officers who had had contact with Mr. Ebsary?
- A. Yes.

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

21. Q. And....
- A. Deputy Chief MacDonald.
22. Q. Deputy Chief MacDonald, sorry. Alright, the statement is three pages or two and a half pages in length, is that correct?
- A. That's correct, yes.
23. Q. And the signature of Roy Newman Ebsary was placed there by the accused in your presence?
- A. That's right.
24. Q. And the signature of the witness, Detective Sergeant M.J. MacDonald, that is the present Deputy Chief?
- A. That's correct.
25. Q. Now, prior to the commencement of the statement taking, was Mr. Ebsary given any type of warning?
- A. He was warned, yes.
25. Q. What was the warning that you gave him at that time?
- A. That you need not say anything, you have nothing hope from any promise or favour, nothing to fear from any threats, whether or not you say anything and if you may say then it can be used as evidence.
27. Q. I see. Do you recall whether or not Mr. ~~Ebsary~~ appeared to understand that warning?
- A. I would say he did.
28. Q. And when the statement was completed what, if any, opportunity would Mr. Ebsary be given to read the statement over to make any corrections in it that he wished?
- A. My practice over the years in taking statements at all times

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

28. A. to ask if the party I'm taking it from do they want to read it or examine it and, of course, some do and some don't and it was signed by Mr. Roy Newman Ebsary in the presence of myself and M.J. MacDonald.
29. Q. So, it was always your practice then to be given such an opportunity?
- A. That's correct.
30. Q. What part did the Deputy Chief MacDonald play in the statement taking?
- A. He just witnessed the signatures and listened to the conversation.
31. Q. And how did that compare with the usual procedure you follow at that time when you were taking statements?
- A. That was my procedure, the man that was sitting in on the statement wasn't to do any talking and if there was any questions that he wanted to ask would have to be written down and passed to me and I wanted no talking while I was taking that statement.
32. Q. How long would Mr. Ebsary be in your presence prior to the commencement of the initial statement taking?
- A. Well he came to the station that night and I noticed my statement started nine fifteen -- it wouldn't be any length of time because there was other statements taken also. I believe I took a statement from his wife before that and I took a statement from his son before that. I would have to look at my statements to know that.

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

33. Q. My Lord I just asked the courtroom (inaudible) whose possession the original statements of Mary and Greg Ebsary are to retrieve those. I would like to show them to witness, he could use them as notes made at the time to refresh his memory on the time span between the taking of one statement and the taking of another. (inaudible) will show that Mr. Ebsary was in the Chief's presence for only minutes other than the times noted in the beginning and end of this statement.

While we are waiting for that Chief, is the, the conclusion, the time of the conclusion of this statement "B-E-2" noted on page three?

A. It is, at ten p.m.

34. Q. And during that period of time between nine fifteen p.m. and ten ten p.m., did Mr. Ebsary have contact with any other police officers other than yourself?

A. No, he didn't.

35. Q. During that period of time what, if anything, was said by you or by anyone in your presence by way of threats, promises or inducements to help Mr. Ebsary give his statement?

A. There was no inducements or promises.

Mr. Wintermans: Objection Your Honour, I would submit those are legal conclusions the witness is being asked to make. Questions of law for Your Lordship to determine whether something is a threat or an inducement within the meaning of the statements and the witnesses should be asked to indicate what was said without having the witness make the decision

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

for the court as to whether or not what was said amounts to a threat or an inducement.

By the Court: First time I heard an objection like that. Usually, it is a direct and sensible question to ask a witness as to whether a statement is voluntary or not. The Crown wished to elaborate how it came to those conclusions, but certainly it will be open to you in cross-examination to test him as to whether the word threat, inducements.

Mr. Wintermans: I would submit that if circling the role....

By the Court: Well I'll determine if he is circling or not, I don't think it is.

Mr. Edwards: It is the Crown's position that that is the question that is normally asked on voir dire and surely the answer he has given to us will be waived by the Court.

36. Q. My Lord, I'm going to show him Greory Alien Ebsary's statement, I submit there is no need I have it marked, I'm not intending to put it into evidence but as I say giving it to the witness as a note made at the time to refresh his memory.

By the Court: Do you have any concern about that Mr. Winterman?

Mr. Wintermans: No answer.

37. Q. Chief MacIntyre, that statement just shows the statement of Greg Ebsary and it also appears to be in your handwriting, is that correct?

A. That's correct.

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

38. Q. Do you recall taking that statement from Gregory Ebsary on the same night you took the statement from the accused Roy Ebsary?

A. Yes sir, I do.

39. Q. Did you note the times of the beginning and the end of Greg Ebsary's statement on there?

A. Yes, I notice this statement started at nine fifty-five p.m.

40. Q. Yes, and it was....

A. It was over ten twenty p.m. I also notice Corporal Gerald Taylor was present when this statement was taken.

41. Q. My Lord, we don't seem to have the original written statement of Mary Ebsary, I have a typed copy of it if my learned friend object to that being put in evidence. The typed copy was typed from the original.

By the Court: Well technically notes made at the time, a copy of them, I don't think I would ordinarily permit it unless Mr. Wintermans is prepared to let it go for that purpose.

Mr. Wintermans: I have no objection.

By the Court: Thank you very much Mr. Wintermans

42. Q. I'm showing you a typed copy of the statement of Mary Patricia Ebsary which my learned friend was agreeing was typed from the original copy. What is the time of commencement on that statement?

A. Time of commencement of this statement taken from Mary Patricia Ebsary on November fifteenth, seventy one is eight forty-five and the time of completion is nine-o-seven p.m.

Chief John MacIntyre, direct examination by Mr. Edwards
(voir dire)

42. A. And that was eight forty-five p.m. and nine-o-seven p.m. The statement was taken by myself and was witnessed by Sergeant William Urquhart of the Sydney Police Department.

43. Q. Sergeant Urquhart had no contact with Mr. Ebsary that he be accused that night, did he?

A. Inaudible?

Mr. Wintermans: What's the answer to that question?

A. Not that I know of. Different parties were brought to the station at this time. I just don't recollect who brought them in, but they were ordered to the station by myself and statements were taken.

44. Q. No further questions.

Chief John MacIntyre, cross examination by Mr. Wintermans
(voir dire)

1. Q. Who brought Mr. Roy Ebsary to the station?

A. I couldn't answer that at this time.

2. Q. What would be the practice -- you would send a police car?

A. In a case of this kind, there was three or four I think asked to come to the station and they were taken in and when that happens they are kept apart until they are interviewed by myself.

3. Q. But they would be taken by police car or police officers?

A. Either that or notified and drive down to the station. Both procedures are used at times.

Chief John MacIntyre, cross examination by Mr. Wintermans
(voir dire)

4. Q. Now, I noticed that you took both Roy Ebsary's statement and Greg Ebsary's statement, is that correct?

A. Yes, I took all the statements.

5. Q. Now, how could you take Roy Ebsary's statement between nine fifteen p.m. and ten ten p.m. and at the same time take Greg Ebsary's statement between nine fifty-five p.m. and ten twenty p.m. -- there is quite an overlap there.

A. That could be a slight mistake in time.

6. Q. Or I suggest to you that perhaps you were going from one room to the next?

A. No, we just had the one room for taking statements and interviews and that was done. Well, we did have two rooms, yes, in the detective's department but they were adjoining one another and I just had the one room for taking statements.

7. Q. You're saying you're not sure, but there must have been a mistake in the time?

A. There could be a mistake here in the time of what he got there, ten to fifteen minutes overlap there.

8. Q. On that particular evening, there was several statements taken as I said.

8. Q. The way you have it indicated here is that you started Greg Ebsary's statement fifteen minutes before you finished Roy Ebsary's statement and then so for the last fifteen minutes of Roy Ebsary's statement you had Greg Ebsary in and for the first fifteen minutes of Greg Ebsary's

Chief John MacIntyre, cross examination by Mr. Wintermans
(voir dire)

8. Q.

statement.

A.

No, one was taken at a time. So, I wouldn't be in with the two at one time.

9. Q.

I take it that your recollection is not to perfect as far as times and such.

A.

We're going back quite a number of years, but I know I took those statements. I know nobody was present except the police officer and myself on each individual the statements were taken from.

10. Q.

But you don't know who was in contact with Mr. Ebsary before he arrived at the police station?

A.

Not at this time, no.

11. Q.

And you don't know whether any threats or inducements may have been made before you saw him at the police station, correct?

A.

No, that's correct, yes.

12. Q.

Also, I suggest to you Chief there was some conversation between you and Roy Ebsary which is not indicated on the written statement. That there must have been some initial conversation between the two of you which would be prior to the first words on the statement?

A.

No, I'm suggesting that there was nothing between the two of us. As you notice in this particular statement I warned the above-named on this statement and there was no conversation taken until he was given the warning and then as you will notice the statement is in question/answer form.

Chief John MacIntyre, cross examination by Mr. Wintermans
(voir dire)

13. Q. The point that bothers me though, Chief, the statement starts of, I remember one night myself and Jim MacNeil were at the State Tavern.

A. Uh Hmmm.

14. Q. Surely, there must have been something said to Mr. Ebsary to get him on that topic of conversation?

A. Yes, after, after, after he was warned, yes.

You see I took a statement from Jim MacNeil before that making very serious accusations and thinking the above-named could be involved it was my duty to warn him and relate the new evidence -- what he was there for and the reason he was there on that particular night was that there was new evidence at that time came to my attention and I wanted to warn him to see what he had to say about it.

15. Q. What exactly did you say to Mr. Ebsary?

A. I can't just relate what I said to him, it was thirteen years ago; but I would, if you permit me, what I would say to him on that particular night, in my opinion, is that I had fresh evidence at this time in regard to the Seale murder in the vicinity of Wentworth Park and I wanted to know if he knew anything about it or and I also had evidence at that time that there was a disturbance in the Wentworth Park area between him and Jim MacNeil and two others and then, of course, he started to talk and then as you notice -- on the first part of it, "I remember one night myself and Jim MacNeil were at the State Tavern we were

Chief John MacIntyre, cross examination by Mr. Wintermans
(voir dire)

15. A. going home down George Street....." so forth and then it was question/answer after that.
16. Q. I see, okay. Now, you indicate on the statement that he was warned; and, of course, the words of the warning aren't on the written statement but you have indicated in your evidence here what those words were?
- A. That's right.
17. Q. You were asked whether, you thought that Mr. Ebsary understood the warning and I think you said something you would say that Ebsary understood and you then indicated the normal practice was to ask the person who you were taking a statement from if they wanted to read it, some do and some don't -- a couple of questions arising out of that. First of all, how do you know Mr. Ebsary understood the statement or the warning I should say, how do you understand the warning?
- A. It's my usual question, do you understand that?
18. Q. We are more concerned about what happened in particular case?
- A. Other than that I can't give you any -- that's my practice when taking a statement.
19. Q. I note that on the statement, as there is in some statements these days at least, a place where Mr. Ebsary would indicate whether or not he understood the warning and that's not on this particular statement?
- A. No, at that time those are the type of statements that were used.

Chief John MacIntyre, cross examination by Mr. Wintermans
(voir dire)

19. Q. And you're not sure then whether Mr. Ebsary read the statement over or not?
- A. No, I'm not sure, no.
20. Q. All you know is that it's in your handwriting and it was signed by Mr. Ebsary?
- A. Correct.
21. Q. I take it that it's fair to say that you don't recall the exact words of the conversation that you had with Mr. Ebsary prior to the first sentence on the written statement that we have before us in court here?
- A. No, not the exact words, but words to the effect I said.
22. Q. Thank you, no more questions.

Chief John MacIntyre, re-direct examination by Mr. Edwards
(voir dire)

1. Q. Chief MacIntyre my learned friend asked you whether or not you know the person--I'm para-phrasing--whether the person who brought Mr. Ebsary to the station, if in fact you sent somebody for him, would have made any threats or inducements as far as the statment is concerned. Arising out of that I want to ask you what -- if you did send somebody for him or at the time when you would send somebody to pick up somebody for questioning what, if any, instructions would you give that person?

Mr. Wintermans: Objection, speculation, he's already indicated he doesn't know who went. How can he say what he might have said and who cares what he might have said.

Chief John MacIntyre, re-direct examination by Mr. Edwards
(voir dire)

4. Q. Now, during that time of your questioning people if the person whom you warned indicated that he didn't understand the warning, what would you do?

A. I, to be honest with you, I don't ever remember running into a case where they didn't understand a warning that I've run into it after they were warned that they would either answer or reply they didn't want to say anything at that time and so forth and I would record that on the statement. In this case here after I gave the warning I took it that he did understand it and continued then to tell him why he was there.

5. Q. Okay, no further questions, thank you.

By the Court: Thank you very much Chief.

Chief John MacIntyre, re-direct examination by Mr. Edwards
(voir dire)

By the Court: Well, he's been giving evidence about what his usual practice was because it's thirteen years ago and he can't remember everything that was said and what he's been telling you is what he's been telling Mr. Edwards is while he can't remember exactly what was said his ordinary practise is this and this and I would think that this questions falls into that same category. All it is, is it goes to weight, it's what weight the court wishes to attach to any answers given in respect to his memory as to what happened at that time. I think the question is appropriate in the context of which is asked.

2. Q. So, assuming somebody was sent to bring Mr. Ebsary to the police station -- putting it this way, -- what was your practice at that time if you would send somebody to bring another person in for questioning?

A. In my practice at that time was that they were to have no conversation with the party that I wanted to see them at the station, and I didn't want any conversation with the party. I have always tried to be very careful especially in a very serious matter of this type to have as few people have anything to do with the prisoner until I interview him or the accused I should say until I interview him.

3. Q. Now, my learned friend also asked you how you do that the accused understood the warning that you gave him. Put it this way -- how many investigations would you have done in your career, would it be hundreds?

A. Up in the thousands.

Deputy Chief Michael James MacDonald duly sworn and examined

Deputy Chief Michael J. MacDonald direct examination by
Mr. Edwards (voir dire)

1. Q. Sir, would you give your name and occupation please?
- A. Michael James MacDonald, Deputy Chief Sydney City Police Department.
2. Q. How long have you been a member of the Sydney City Police Department?
- A. Thirty seven years.
3. Q. And in nineteen seventy-one, you were a sergeant with that department, is that correct?
- A. I was.
4. Q. I want to show you Exhibit "Inaudible" I want you to look at the signature at the bottom of each page and tell us whether or not that is your signature?
- A. That is my signature sir.
5. Q. It is. You have any independent recollection of the evening on which that statement was taken?
- A. No sir, I have not.
6. Q. Did you, was there a usual practice followed at that time in regards to a person who like yourself witnessed the statement?
- A. The witness wouldn't have anything to say at all, he wasn't allowed to ask any questions. If there was a question or something information you wanted to passed to the sergeant who was taking the statement you wrote it on a piece of paper and passed it to him.

Deputy Chief Michael J. MacDonald direct examination by
Mr. Edwards (voir dire)

7. Q. Was there a usual practice as far as who had contact with the person from whom the statement was being taken -- in other words normally would anyone other than the statement taker and witness have contact with that person?

A. Nobody.

3. Q. Thank you Deputy Chief.

Deputy Chief Michael J. MacDonald cross examination by
Mr. Wintermans (voir dire)

1. Q. Do you have any recollection of the taking of that statement?

A. No sir.

2. Q. You can't remember it at all?

A. No.

3. Q. I see. Thank you, no more questions.

By the Court: Thank you very much Deputy Chief.

Mr. Edwards: That's the evidence for the Crown My Lord.

By the Court: Mr. Wintermans, calling any evidence on the voir dire?

Mr. Wintermans: I wonder if I could have five minutes to discuss the matter.

Court recesses.

Mr. Wintermans: I won't be calling any evidence.

By the Court: Mr. Edwards, your turn to argue I guess.

Argument of Mr. Edwards:

My Lord the onus is on the Crown, of course, to your satisfaction that the statement be the two that was voluntarily made by the accused, Roy Newman Ebsary, voluntary in the sense that it was not obtained by any threats, promises or inducements handed out by the statement taker or anyone else to the accused and I'll quote some items from recent cases to prove that there were no oppressive tactics or oppressive atmosphere. I'll submit that that onus has been discharged by the evidence before Your Lordship. Chief MacIntyre quite understandably thirteen years having elapsed since the taking of the statement can't remember exactly what was said but he does recall that Mr. Ebsary was duly warned and he repeated that warning and he stated that apparent from the fact that he continued to take the statement that he was satisfied did, in fact, understand the warning. But, he also stated that it was his practise at the time to give the person giving the statement an opportunity to read over the statement and make any corrections in the statement that they so desire and there is nothing to suggest that that practice was not followed in this particular case. My learned friend in cross examination notice the fact that there is a time discrepancy between the statement given by the accused (Inaudible) and that given by Greg Ebsary submit

Argument of Mr. Edwards:

that while it is unfortunate does not go to this issue on the voir dire meaning voluntariness of the statement that is the item which is being tested here. The (inaudible) is controvertible that the only persons who had contact with the accused during the statement taking were Chief MacIntyre and Deputy Chief MacDonald. The Chief was unable to say how Mr. Ebsary got to the police station, but he did say his practise was and he emphasized, especially in a case like this, if he would send somebody to get a person for statement taking that he would be careful and cautioned him not to talk about what's going to be the subject matter of the statement. I submit that he left his answers clear here that if, in fact, a police officer did bring Mr. Ebsary to the police station there is no indication that there was anything said to the accused and I submit that the overwhelming probability is that there was not.-- submit that the case law is such now that every single person that had any contact with the accused does not have to be called on a voir dire. There are cases and I get them if your Lordship needed them that demonstrate that if there is no indication that a person had any part in the statement taking there is no obligation on the Crown to call that person and here both Chief MacIntyre and Deputy Chief MacDonald indicate that nobody had contact with the accused other than them at the crucial time and that, ah, Chief MacDonald indicated he had no independent recollection,-quite understandably because he

Argument of Mr. Edwards:

really had no active part in the statement taking. While he had no independent recollection of the taking of this particular statement, stated that it was there practise at the time that the witness to a statement would ask no question, would simply sit there -- I took it as a mere onlooker to the proceedings and he indicated that if in fact he wished to ask any questions that he communicated by a note through the statement taker. There is no indication that that happened here and even if it did that would not affect the voluntariness of the statement. So, I submit that the onus on the Crown has been discharged here, that sufficient evidence is available, notwithstanding the lapse of all these years to satisfy that the statement was voluntarily made by the accused, Mr. Ebsary.

Argument of Mr. Wintermans:

My Lord, about the only thing I agree with (inaudible) the Crown Prosecutor had said was it opening remark that the onus is on the Crown to prove the voluntariness of the statement. The rest of it I submit is not proper or not correct. I would submit that the burden is on the Crown to prove that the statement was made voluntarily and that there were no threats or inducements or promises or oppressive atmospheres and that apart from the testimony of one, of at least three witnesses, police officers I should say, who had contact with the accused before the statement

Argument of Mr. Wintermans:

was given, the only indication that there was no threats or inducements made was by the Chief who testified that although he can't remember what was said to the accused that in his opinion there were no threats or inducements or promises made and I have already objected to that during the testimony and the reason being, and it's my submission that it is for Your Lordship to determine what constitutes a threat, a promise or inducement and not for the witness to determine that question--that is the issue. That's like asking a witness to, ah, that may have been in the park that night whether or not in his opinion it was self defense or something. It's a question of (inaudible) that has to be determined. It's not a question for a witness to determine and the way that I think that Your Lordship answered my objection was that my learned friend could ask the question and get the answer for what it was worth that the Crown Prosecutor could go on and ask the officer what his basis for that opinion may have been and I don't think that that was satisfactorily done in this case.

By the Court: And I also said that the Defense Counsel could do the same thing.

Mr. Wintermans: That's right and I crossed examined him and the evidence indicated first of all that the officer's recollection was not very good because he couldn't remember what the times were and he couldn't explain the discrepancy in times. He agreed that there had to be some conversation

Argument of Mr. Wintermans

before the words, "I remember one night myself and Jim MacNeil,.etc." and but he failed to indicate what that conversation was and what was said to the accused to get him started on that statement and, of course, that's the critical question what was said to the accused to get him started on his statement and that question has not been answered by the witnesses and furthermore the Chief also admitted that at least one police officer was sent to Ebsary's residence to pick him up and he didn't know who it was -- and didn't know what, of course, if he didn't know who it was he could hardly testified as to what was said. All he could testify to is what the usual practise was, but whether or not the usual practise was followed is something that is left up in the air and it's not for the Defense to tie up all the loose ends in the Crown's case, it's for the Crown to satisfy the court beyond a reasonable doubt that the statement was voluntary. I submit that the evidence has been very shabby in that respect. I'll be it that it was twelve years ago and understandably the witnesses don't remember, but that's not the point the question is not why don't they remember, the question is giving that they can't remember, one of these officers can't even remember it taking place at all. How can the court be satisfied that the statement was voluntarily given that the evidence -- one witness isn't even here because we don't even know who he is and the other witness can't remember nothing about it, no independent recollection.

Argument of Mr. Wintermans:

The third witness testifies that there was some conversation before hand but he can't say what it was, that he thinks that the accused understood the warning but there is no indication on the statement that the accused was asked to indicate whether or not he understood the warning and thirdly he didn't know whether the accused read the statement over or not but simply signed it. Fourthly, the statement is in the handwriting of the Chief of Police, not in the accused's handwriting, so that doesn't exactly help on whether it was Roy Ebsary's words or those that were planted there by the Police. I would submit that on the totality of the evidence there is an enormous doubt as to the circumstances leading up to the taking of the statement. As far as oppressive atmosphere goes the evidence is that his wife and his son were both at the police station in other rooms at the same time -- what kind of effect is that going to have on a person. There is just an enormous doubt as to the voluntariness of this statement and given the circumstances that the statement was taken after the initial trial of Marshall was completed and I would submit that it is very likely that the accused didn't appreciate the situation and didn't understand the seriousness of the situation and the police witnesses have not dissolved that doubt and I would submit that the Crown cannot rely upon this statement taken twelve years ago without very strong evidence that that statement was taken

Argument of Mr. Wintermans:

voluntarily and without any threats, promises, inducements or oppressive atmospheres and if the police cannot remember the conversation leading up to it and the words of that then the opinion of the Chief that there were no threats, inducements or promises without the words of the conversation upon which he bases that conclusion I would submit is going too far to say that is satisfactory. This is a criminal charge, very serious criminal charge in a court of law and all doubt has to be resolved in favour of the accused and I would submit that it is very critical and that the statement should not be allowed in evidence.

By the Court: Anything further to add Mr. Edwards?

Mr. Edwards: No My Lord.

By the Court: I am satisfied under the circumstances on the basis of the evidence that I've heard here today that the statement "V-D-2" was voluntarily taken and given, that it was not made as a result of a threat, promise or inducement and in the absence of an oppressive atmosphere and I find that on the evidence that I have heard hear today and I am now prepared to admit it. That would bring us to the point where we should call in the jury or is there something else that you wish.

Mr. Edwards: No, that's it My Lord. As far as the order of witnesses for the court's information, I now intend to call Constable Mroz, who has nothing to do with the statement but just to finish the (inaudible) that

was begun on Friday, and then I'll be calling Chief MacIntyre back to put in the two on, the trial proper. Then I'll be calling Corporal Carroll and then Doctor Macqui.

By the Court: Call in the Jury then please.

Jury called. All present.

Constable Mroz duly sworn and examined.

Constable Mroz direct examination by Mr. Edwards.

1. Q. You are Constable Leo Mroz, is that correct?
- A. That's correct sir.
2. Q. You are a police officer employed by the City of Sydney Police Department?
- A. That's correct.
3. Q. You've been so employed for how long?
- A. Approximately twenty years.
4. Q. And that is continuously during that twenty year period?
- A. That's correct.
5. Q. You would have been employed there in nineteen seventy-one?
- A. That's correct, I was.
6. Q. And, in fact, you were on duty as such on the evening of the twenty-eighth of May, nineteen seventy-one, is that correct?
- A. That's correct sir.
7. Q. On that evening did you have occasion to respond to an incident which took place on Crescent Street, City of Sydney, County of Cape Breton, Province of Nova Scotia?
- A. That's correct sir.

Constable Mroz direct examination by Mr. Edwards

7. Q. With whom did you respond to that particular call?
 A. I responded with then Constable Richard Walsh, he is currently an inspector with the Sydney P.D.
8. Q. What time did you respond to that particular call?
 A. Just before midnight -- before five to midnight and midnight on that night sir.
10. Q. Do you recall what the weather conditions were like at that time?
 A. From my recollection, it would be clear and a seasonable type of evening, probable temperatures maybe around fifties or sixties.
11. Q. Do you recall whether or not it was raining?
 A. No sir, it wasn't raining from my recollection.
12. Q. Upon your arrival on Crescent Street--first of all from what direction did you come on to Crescent Street?
 A. We travelled by way of Bentick, South Bentick to Crescent.
13. Q. Yes.
 A. And we made a left turn from Bentick to Crescent and we travelled a distance of a few hundred feet down Crescent where we -- where a fallen, where a subject laying in the Street came to view and we stopped on the front side of the fallen victim.
14. Q. I see.
 A. Did you know then who the victim was?
 A. On close examination I knew the victim was a surname Seale, a given one, I didn't know, he was a mulatto from the Pier area.

Constable Mroz direct examination by Mr. Edwards

15. Q. When you say mulatto, what do you mean by that?
A. He was black.
16. Q. Yes.
A. And I knew the family for practically all my life, they lived in the Whitney Pier area. I couldn't identify Seale on a first name basis, but I was aware of the surname sir. I knew who he was right away.
17. Q. Would you describe Seale as you viewed him at that time? First of all was he conscious?
A. Yes he was there was an utterance of three words and that was "Oh God, no" and "Oh Jesus, no" in that sequence and he immediately slipped unconscious, there was no further conversation from that point on.
18. Q. What position was he in?
A. He was in an angle, on an angle on Crescent Street. One of his feet, possibly the right was extended over the curb on to the sidewalk area of Crescent, which would be the right curb as we came in off the left turn.
19. Q. What did you observe of any injury he might have had?
A. He was wearing a white T-shirt or white sweater, I can't recall which exactly, but it would appear that under that garment he had concealed.-- it appeared that there was something concealed and we proceeded to raise the garment and concealed under the garment was a considerable amount of body intestine, it was spread throughout his chest area and down his abdomen region, practically the entire front of his chest and abdomen was laden with body intestine on our examination sir.

Constable Mroz direct examination by Mr. Edwards

20. Q. What position were his hands in?
- A. His hands were almost directly beside him, just extending slightly, not very much.
21. Q. What, if any, action did you take then?
- A. We immediately -- I proceeded to the radio of the cruiser and I stressed the urgency of the situation to the desk and for some reason the ambulance was rather slow to respond. I think later we checked, there was a further demand for an emergency elsewhere. Approximately twenty-two, twenty-five minutes after midnight, which would be the twenty-ninth of May, nineteen seventy-one, the ambulance did respond and I assisted the removal from the ground area and into the ambulance, and later I followed the ambulance to Sydney City Hospital.
22. Q. That was the ambulance carrying Seale?
- A. Exactly sir, yes.
23. Q. And at the City Hospital, what did you do?
- A. Immediately he was transported from the ambulance into the outpatients area and placed on a -- transferred from the stretcher to a permanent location and Doctor Naqvi appeared on the scene instantly and I remained in outpatients with Doctor Naqvi and Doctor Naqvi through the assistance of a nurse that was on duty had cut the garment, the T-shirt and then it was very visible under clear light.
24. Q. You observed Doctor Naqvi treating Mr. Seale at that time?
- A. Exactly sir, yes I did sir. It was very apparent to me that he was quite badly injured. The intestine by this time ...

Constable Mroz direct examination by Mr. Edwards

23. Q.

I don't think we have to get into that again Constable Mroz. Would you describe the approximate height and weight of the Seale boy?

A.

I would guesstimate approximately five - five to five - seven. Perhaps maybe five - six would be more exact sir. He wasn't extremely tall as I can recall.

25. Q.

What about his weight?

A.

I would say possibly anywhere from maybe a hundred and forty-five pounds, one hundred forty.

27. Q.

What type of physical condition did he appear to be in?

A.

As I say, I had pre-knowledge, sir, he was very athletic very involved in sports in the Pier area. He was in extremely good condition. He was slight and well built.

38. Q.

Going back to your arrival on Crescent Street just before midnight that night who, if anyone else, did you see in the area?

A.

While we were awaiting the ambulance, car number three which was manned by the late Corporal Martin MacDonald and Constable Howard Deen had travelled in towards the -- off South Bentick in towards Crescent and in the light of their high beams I observed Donald Marshall, he was approximately, two to three hundred feet from the point where we had been attending to the fallen victim and he was leaning against a tree in the park. We were in the City, Marshall was in the park sort of across the street and he was leaning and his right hand was extended over to his left wrist or forearm

Constable Mroz direct examination by Mr. Edwards

38. A. he appeared to be clasping it, appeared to be injured and that cruiser occupied by both men as I described had rendered assistance to the injured Marshall. They had taken him to hospital, I believe that was the story on that incident.
39. Q. You mean they took him to the hospital?
- A. In the cruiser, yeah.
40. Q. How long after your arrival on the scene was it before you observed Donald Marshall?
- A. I would say approximately five to seven minutes. We were upright by this time. Both Constable Walsh and I were in a bent position attending to Seale, it was just a matter then of waiting for the ambulance so, we were upright and we were looking, I think that Constable Walsh had given a directive to car number three.....
- By the Court: I wonder if that's....
41. Q. You can't say what somebody else did.
- A. Good sir.
42. Q. Was there any other civilians at the time of your.....
- A. No sir, I didn't see anybody at all during my stay at Crescent Street.
43. Q. Would you step down from the stand Constable Mroz and refer to Exhibit Number One -- I'll hand you a black felt marker -- perhaps you could just draw along the plan approximately where you saw Mr. Seale on that night.
- A. Inaudible.

Constable Mroz direct examination by Mr. Edwards

By the Court: Speak up.

44. Q. Speak up.

A. Yes, it's between the Crescent Street Apartments and the one ten Crescent Street.

45. Q. Which is designated Crescent Street, E.W. Campbell.

A. That's right sir. The victim was position in an angular position with his feet extended over the curb and Marshall was approximately at this point. That's a (inaudible) marker sir, I would say it would be there.

46. Q. Alright, mark an "x" then where you say you saw Donald Marshall.

A. We entered to the area by way of Bentick, we made a left turn on Crescent.

47. Q. I'll put this over so the jury can see. Perhaps if you would again show the position of Sandy Seale.

A. Seale is here.

48. Q. You are showing his head out towards the middle of the road.

A. And the body is extended over the curb or on the sidewalk, and we had entered by way of South Bentick across here. We had parked the cruiser in front of the fallen victim and the ambulance people had come in and they had parked just ahead of the fallen victim here. Under my direction I had (inaudible) park the ambulance for the purpose of pick-up. Marshall was observed approximately two hundred feet across Crescent Street in the park area.

Constable Mroz direct examination by Mr. Edwards

49. Q. You've marked an "x" where Mr. Marshall was?
- A. Exactly sir, that's right.
50. Q. Okay, you may sit down. Can you tell us what the lighting conditions were in the area then?
- A. The lighting conditions, it was basically dark and fairly poorly lighted. There was a heavy tree growth in that area and it obscured the little light that did exist at that time. Since then there has been major improvements and it's considered lighter.
51. Q. Okay, no further questions Constable Mroz.

Constable Mroz cross examination by Mr. Wintermans

1. Q. So, what you are saying Constable is that it's a lot brighter around that area now then what it was back in nineteen seventy-one?
- A. Yes, they have installed short lamp posts. There are approximately fifteen, sixteen feet and it's just brilliant there as compared to the time I described sir.
2. Q. Now, did you I don't want to dwell on the unfortunate state that you found Mr. Seale in, but did you see the intestine coming out?
- A. That's correct sir, I did, and it probably reached a point of stop.-- when I was at hospital, where I remained with Doctor Nacqui for about ten minutes and it was probably at a point there that it stopped coming out as it were.

Constable Mroz cross examination by Mr. Wintermans

3. Q. Have you seen that before in other cases?
- A. I saw one situation, but it was considerably less severe it was a domestic quarrel up in the Ward Four area of the City and that resulted in the stabbing of a wife on her husband and but it was considerably less severe.
4. Q. But the intestine did come out through the hole?
- A. Yes sir, it did.
5. Q. As I said I don't want to dwell on that. You're saying that Mr. Marshall was some two to three hundred feet away from where Mr. Seale was lying?
- A. That's correct sir.
6. Q. And that there were no other civilians around?
- A. I didn't see anyone else -- no sir.
7. Q. Are you sure Doctor Nacqui was at the hospital when you arrived there?
- A. Yes sir, he was. As a matter of fact he was doing an operation somewhere upstairs, I don't know the severity of it; but he did come down right away to the call. He was actually there when we had landed into outpatients at the time, yes. He was attired in his operative pale green (inaudible).
8. Q. And you indicated you followed the ambulance in the police car?
- A. Yes, I was probably a distance of fifty, sixty feet. I was there at the same time.

Constable Mroz cross examination by Mr. Wintermans.

9. Q. Thank you.

Mr. Edwards: No re-direct My Lord.

Chief John MacIntyre duly sworn and examined.

Chief John MacIntyre direct examination by Mr. Edwards

1. Q. Sir, would you give your name and occupation please?
 A. John MacIntyre, Chief of Police, City of Sydney, Province of Nova Scotia.
2. Q. Chief MacIntyre how long have you been Chief of Police for the Sydney Department?
 A. About eight years now.
3. Q. And you have been a member of that Department for how long all toll?
 A. Since May the 11th, nineteen forty-two -- forty one years past.
4. Q. In nineteen seventy-one you were a sergeant of detectives?
 A. I was.
5. Q. How long did you hold that position, Chief MacIntyre?
 A. I was in detective work for, I would say over twenty years.
6. Q. Over twenty years?
 A. Over twenty years in detective work.
7. Q. In nineteen seventy-one you were in charge of the investigation and the circumstances surrounding the death of Sandy Seale?
 A. I was.

Chief John MacIntyre, direct examination, by Mr. Edwards

8. Q. And that investigation led to the charge and subsequent conviction of Donald Marshall?
- A. It did.
9. Q. Now, what if any efforts were made to find the murder weapon -- the knife?
- A. Well the area was searched at that time and I had the creeks drained to the best of our ability.
10. Q. You mean the creek in Wentworth Park?
- A. I mean, that would be one, two, three of the creeks were down.
11. Q. With what results Chief MacIntyre?
- A. With negative results.
12. Q. You never found the apparent murder weapon?
- A. No we didn't.
13. Q. When did you if, in fact, you did have contact with a person named James MacNeil, when did you first have contact with that person?
- A. November the fifteenth, nineteen seventy-one.
14. Q. That was following the conviction of Donald Marshall?
- A. That's correct.
15. Q. Prior to that would you have any contact with Mr. MacNeil with relation to this investigation?
- A. No.
16. Q. As a result of conversation you had with Mr. MacNeil on November fifteenth, nineteen seventy-one, did you subsequently take a statement from the accused, Roy Newman Ebsary?
- A. I did.

Chief John MacIntyre, direct examination, by Mr. Edwards

17. Q. Is that person in court today?
A. Yes, sitting over here with the blue coat.
18. Q. Record shows he points to the accused My Lord.
You took a written statement from Mr. Ebsary?
A. I did.
19. Q. On the same day, November fifteenth, nineteen seventy-one.
And you took statements from other persons also?
A. That's correct.
20. Q. Who were they?
A. James MacNeil and his brother were first and then Mrs. Roy Ebsary I believe was next.
21. Q. Yes.
A. Mr. Ebsary and then his son, Gregory.
22. Q. Following the taking of those statements what, if anything, did you do?
A. I consulted the Crown?
23. Q. Who was at the time who?
A. The late Don C. MacNeil and Mr. LeVatte.
24. Q. Yes.
A. And I requested at that time because of me handling the Marshall case and I thought another Department should look into this matter and the Crown to my knowledge had the R.C.M.P. look into it as of that date I had nothing more to do with it.
25. Q. So, all the statements you took on November fifteenth were turned over to the R.C.M.P. is that correct?
A. Well they were turned over to the Crown, I just don't.....

Chief John MacIntyre, direct examination, by Mr. Edwards

25. —Q. Chief MacIntyre, I'm now going to show you an exhibit which is marked Exhibit Number Two and that is a statement by Roy Newman Ebsary, is that correct?
- A. That's correct.
27. Q. And that is the statement you took from Roy Newman Ebsary on November fifteenth, nineteen seventy-one?
- A. Yes sir.
28. Q. And that statement is in your handwriting?
- A. Yes sir.
29. Q. First of all, where was this statement taken?
- A. It was taken in the Detective Office which is in the driveway into the old police station on Bentick Street at that time led to a building which is off the main building and in that building, of course, there were two offices used by the detectives.
20. Q. And who was present while that statement was taken?
- A. Then Sergeant M.J. MacDonald.
21. Q. He is now the Deputy Chief?
- A. Right.
22. Q. Prior to the taking of that statement what, if any, warning was given to Mr. Ebsary?
- A. I warned Mr. Ebsary because of the seriousness of the allegation which I knew about at that time -- that he need not to answer, he have nothing to hope from any promise or favour, nothing to fear from any threat whether or not he said anything, anything you say may be used as evidence.

Chief John MacIntyre, direct examination, by Mr. Edwards

23. Q.

Yes, and can you recall whether or not he appeared to understand that?

A. I would say he did, yes.

24. Q.

At the time

A. That's usually my question of taking statements -- I have a procedure which I follow and I always ask if they understand the warning.

25. Q.

Had you had any doubt at the time about his understanding of the warning what would you have done?

A. I would have to hear what his answer was.

Mr. Wintermans: Objection, speculation, what he would have done "if".

Mr. Edwards: Well, perhaps I could rephrase it My Lord.

26. Q.

Did you have a practice at the time with respect to giving warnings?

A. Yes.

27. Q.

What was that practice?

A. My practice was when I was taking a statement I always had somebody present, especially a matter of this type. I've taken statements, of course, alone on other occasions but usually on this type of thing I would have somebody present and I would warn them, of course, before we take the statement--which would be a police officer--he wasn't to ask any questions or do any talking. If there was something he wanted to ask a note would have to be written and passed to me as a note.

—

Chief John MacIntyre, direct examination, by Mr. Edwards

28. Q. What about the warning that was given to the person giving the statement, did you have any practice in that regard?

A. Yes I always asked them if they understood it and I get an answer from them and I don't recall of any ever being answered in the negative.

29. Q. So, you then proceeded to take that statement in question and answer form, did you?

A. That's correct.

30. Q. Could you note when the statement taking began?

A. Yes, nine fifteen p.m.

31. Q. Well when did the statement taking conclude?

A. Well on this is says ten ten p.m.

32. Q. Is it noted on the third page?

A. Yes ten ten p.m.

33. Q. Would you read the statement to the jury.

A. November the fifteenth, nineteen seventy-one, nine fifteen p.m. Statement of Roy Ebsary age fifty-nine years, residing at one twenty-six, Rear Argyle Street, Sydney, warning.

"I remember one night myself and Jim MacNeil were at the State Tavern. We were going home down George Street across the bridge in Wentworth Park and up to Crescent Street?

Question: "What happened?"

Answer: "When we were about over to the corner of South Bentick Street near Robbie Robertson's on South Bentick Street, two chaps who were behind us came around the side of us and asked us if we had cigarettes and if we had any money. We told them we didn't. They asked us to turn

Chief John MacIntyre, direct examination, by Mr. Edwards

33. —A.

out our pockets, so we turned out our pockets. The short fella tried to take my ring off my finger while the tall fella had his arm around the other fella's throat, Jimmy's, and had him on the ground. When he tried to get my ring I was not well. I tried to wrestle him. He swung me onto the ground. I made a kick at him and he got up and ran off. I went over to see how Jim was getting along with the other fella and he dropped Jim and ran off with the other fella.

Question: "Did you stab the man you were wrestling with?"

Answer: "Hell, no, why would I stab him."

Question: "How old were these fellas?"

Answer: "Young men. One fella was tall, I had to look up at him."

Question: "What were they wearing?"

Answer: "I would not be able to tell you."

Question: "What nationality were they?"

Answer: "I believe Canadian. I asked them where they were from and they asked -- when they asked us for the money and they said Truro."

Question: "Were they white or coloured?"

Answer: "The fella I seen, I thought his face was white."

Question: "What about the short fella?"

Answer: "I would say he was white to."

Question: "Where did you go then?"

Answer: "I went home."

Chief John MacIntyre, direct examination, by Mr. Edwards

Question: "Where did Jimmy go?"

Answer: "He went to my place for a few minutes then he went home to Hardwood Hill."

Question: "When did you see Jimmy again?"

Answer: "The next day him and his father."

Question: "For what reason?"

Answer: "They just dropped in, it was actually the first time I met his father. No, it was not the first time."

Question: "Were you in bed that day?"

Answer: "Yes, I believe I was."

Question: "What was Jimmy talking about?"

Answer: "They asked me to have a drink of wine him and his father."

Question: "Did he tell you the Seale boy had died?"

Answer: "No, I can't recall?"

Question: "Do you carry a knife?"

Answer: "No."

Question: "Does Jimmy still come to your house?"

Answer: "No, I have not seen him for a long time, he was not a regular caller at my house."

Question: "Have you been to his house?"

Answer: "Once."

Question: "Can you tell me when this disturbance took place on Crescent Street?"

Answer: "After eleven p.m."

Chief John MacIntyre, direct examination, Mr. Edwards

Question: "What month?"

Answer: "In May, the same night this boy was stabbed?"

Question: "What were you wearing?"

Answer: "A reversible top coat, blue."

Signed Roy Newman Ebsary, witnessed by myself and Detective Sergeant M.J. MacDonald.

34. Q. Thank you Chief MacIntyre, my learned friend may have some questions.

Chief John MacIntyre, cross-examination, by Mr. Wintermans

1. Q. Is that the first contact you had with Roy Ebsary on November the fifteenth, nineteen seventy-one, as far as you are aware?

A. As far as I'm aware, yes.

2. Q. How did Mr. Ebsary and you get together that night?

A. Well, he was (inaudible) it would be my instructions.

3. Q. So, you instructed what, a police officer?

A. That's right.

4. Q. To go in a car and pick him up?

A. To contact him. I couldn't say whether it was by phone or by car, but he was brought to the station at my request.

5. Q. Do you know that police officer or those police officers were?

A. Not at this time, no.

6. Q. So, you don't know what type of conversation may have taken place between Mr. Ebsary and those police officers if you don't know who the police officers were, is that correct?

A. Well, I give instructions when I'm bringing somebody in for questioning to the police, that is my usual manner of

Chief John MacIntyre, cross examination, by Mr. Wintermans

5. A. doing things that they are not to have dealings with the party they are bringing to the station and I take it from there. That's my usual practice.
7. Q. And when you arrived in the or when he arrived in the police station, do you recall that -- when Mr. Ebsary arrived at the police station?
- A. Yes, I was there when he came there.
8. Q. Other members of Mr. Ebsary's family were also at the police station at that time, is that correct?
- A. They were, yes.
9. Q. Who were they?
- A. Mrs. Ebsary, she was -- I believe I took a statement from her before that?
10. Q. Mary Ebsary?
- A. Mary. Her son was at the station that evening.
11. Q. I see.
- A. And I took a statement from him, Gregory I believe was his first name, and I have another practice that when that takes place to keep people apart so that until I interview them.
12. Q. I see. Do you recall the times that between which Greg Ebsary's statement was taken?
- A. I haven't got it here sir.
13. Q. You did take a statement from Greg Ebsary that night?
- A. I did, yes I did.

Chief John MacIntyre, cross examination, by Mr. Wintermans

14. Q.

You wrote it in your own handwriting?

A.

That's right, yes.

15. Q.

Would you like to have notes to refresh your memory?

.

I won't put this in evidence, it's just for questioning.

Is it your practice to indicate the times when a statement commences and the time when the statement finishes?

A.

Yes.

16. Q.

Have you done that on that statement?

A.

Yes.

17. Q.

Could you indicate what those times are?

A.

On this statement it shows nine fifty-five beginning and it finished at ten twenty.

18. Q.

I see.

.

And the statement of Roy Ebsary, who was present when that statement was being taken?

A.

The Sergeant M.J. MacDonald at that time who is now the Deputy Chief.

19. Q.

And nobody else?

A.

Nobody else, no.

20. Q.

Where would Greg Ebsary be while that was taking place while Mr. Roy Ebsary was being questioned?

A.

Well he would either be on his way down or in the building.

21. Q.

Would you leave the room during the time the statement would be taken?

A.

No, I wouldn't.

Chief John MacIntyre, cross examination, by Mr. Wintermans

22. Q.

So, you would continuously be with Roy Ebsary during the statement of Roy Ebsary?

A.

That's correct.

23. Q.

And continually with Greg Ebsary during the statement of Greg Ebsary?

A.

That's correct.

24. Q.

Then why is it that Roy Ebsary's statement was taken at nine fifteen p.m. until ten ten p.m. and Greg Ebsary's statement was taken from nine fifty-five p.m. until ten twenty p.m. There appears to be a fifteen minute overlap there that for the last fifteen minutes of Roy Ebsary's statement you were talking to Greg Ebsary or for the first fifteen minutes of Greg Ebsary's statement you were talking to Roy Ebsary?

A.

I admit that would be a mistake on the timing there on the bottom of the statement. The time on the top would be correct and as you noticed this statement is taken in question/answer form and I didn't get into the next statement until this statement was finished.

25. Q.

I see. Now, do you have an independent recollection of times when those statements were taken or are you pretty much relying on your notes?

A.

I'm relying on my notes, but I never take two statements at the one time or get involved in the second one when I take the first one.

Chief John MacIntyre, cross-examination, by Mr. Wintermans

26. Q. Was Mr. Roy Ebsary aware of the presence of other members of his family at the police station while this statement was taking place.
- A. I couldn't answer that.
27. Q. Do you recall any conversation to that affect?
- A. Because I think his wife was at the station. A statement was taken from her before this one. I wouldn't be able to answer that of what knowledge he had.
28. Q. When you say that the statement of Mary Ebsary was taken before Roy Ebsary's statement, how long before?
- A. Just a little while.
29. Q. Couple of minutes before?
- A. I wouldn't say, I don't know, I'd have to look at the statement.
30. Q. You took the statement from Mary Ebsary yourself, did you?
- A. That's correct.
31. Q. In your own handwriting?
- A. That's correct.
32. Q. Would you like to look at that statement just for the purposes of seeing if you indicated the times on that?
- A. I will sir.
33. Q. What does it say?
- A. It says statement of Mary Patricia Ebsary at eight forty-five.
34. Q. That's on November the fifteenth?
- A. That's correct.

Chief John MacIntyre, cross-examination, by Mr. Wintermans

35. Q.

Eight forty-five p.m.

A.

Yeah. It finished at nine o seven p.m.

36. Q.

Now, I note that this statement you indicated begins:

"I remember one night myself and Jim MacNeil were at the State Tavern, etc." I suggest that there must have been some conversation between yourself and Mr. Ebsary before that first sentence by Mr. Ebsary and before the warning that you gave to him. You must have said something to him to get him on the topic at least.

A.

Yes, I did.

Well, in those words I suppose I took a statement before that from James MacNeil where accusations were made and because of that that's why I had Mr. Ebsary taken to the station and I would inform him at that time, I can't think of my exact words, that's thirteen years ago; but I would inform him that there was new evidence that cropped up in this Seale case and that he was taken down here for questioning and at this time I must warn you and then Mr. Ebsary started to talk on that first sentence there and he said I remember one night myself and Jim MacNeil were at the State Tavern we were going home down George Street, across the bridge in Wentworth Park, up to Crescent Street, and then of course the question/answer started out.

37. Q.

Now, is it possible you may have told Mr. Ebsary some of what Mr. MacNeil--Mr. James MacNeil had indicated in his statement. In other words, did you tell Mr. Ebsary any of the content of Mr. MacNeil's statement?

Chief John MacIntyre, cross examination, by Mr. Wintermans

37. A.

No, no.

38. Q.

You didn't say anything about someone else saying that he might have been involved or anything like that?

A.

No, I was checking on the authenticity of the other statements at that time when I was asking him the questions.

39. Q.

I see. You have indicated that you can't recall what you said to Mr. Ebsary right before this statement was given, is that correct?

A.

I can recall, I can recall that I did tell him why he was there and I had a statement in my presence at that time which I had just taken which was making a very serious complaint and I was investigating it further at the time. He was knowledgeable of that what I had told him when he started talking about what he remembered.

40. Q.

Now, you say you were the officer in charge of the investigation into Donald Marshall, Junior?

A.

Yes.

41. Q.

Was it you who decided that there was sufficient case, in your opinion, to lay a charge against Donald Marshall, Junior?

A.

On the advice of the Crown, sir, at that time.

42. Q.

Who was the Crown ~~at~~ that time?

A.

The Crown Prosecutor was the late Donald C. MacNeil.

43. Q.

He's since deceased?

A.

That's correct.

Chief John MacIntyre, cross examination, by Mr. Wintermans

44. Q. Yes.

A. And since then was Lou Matheson.

45. Q. I see. As the officer in charge of the investigation, you would be aware of what evidence there was in respect to against Donald Marshall?

A. Yes.

46. Q. And given what you heard here over the last few days
By the Court: I don't think he's been here, but...

47. Q. Okay. Given that there is now a charge against Roy Ebsary in relation to the matter, why was Donald Marshall charged? What kind of evidence was there against Donald Marshall back in nineteen seventy-one?

A. Well there was eye witnesses to the murder at that time?

48. Q. Eye witnesses?

A. Eye witnesses, yes.

49. Q. What were those eye witnesses supposedly seeing?

Mr. Edwards: Objection, we are getting a little far field now because the realm of hearsay. My learned friend is aware of the witnesses who were called on the original trial. If he is interested in getting before the jury what those eye witnesses saw then let him call them, but it is improper, I submit, for him to bring out that evidence through this witness. Call them and subject them to cross examination.

Chief John MacIntyre, cross examination, by Mr. Wintermans

By the Court: I think that's so. If there are eye witnesses that you wish to know about or wish to know what they said or saw then they are the ones that should be approached, not this witness who is speaking from hearsay. You know, I'm not (inaudible) to the particular charge.

Mr. Wintermans: My point is that perhaps the jury maybe curious to know how Donald Marshall was ever convicted in the first place.

By the Court: Well, they might be curious about it, but this is the trial of Roy Ebsary. That's no way to conduct a trial.

50. Q. What were the names of those eye witnesses that were involved in the Marshall case then?

A. Maynard Chang and John

51. Q. Okay. Do you recall what you were wearing when you took the statement from Mr. Ebsary? Were you wearing your uniform or were you wearing civilian clothes?

A. No, civilian clothes.

52. Q. Plain clothes. What about the Deputy Chief MacDonald who was present when the statement was made?

A. He was wearing plain clothes too.

53. Q. And that statement was taken after the conclusion and sentencing of the Donald Marshall trial?

A. Yes.

54. Q. So, it was like new evidence coming forward after the trial was already finished.

A. That's right.

Chief John MacIntyre, cross examination, by Mr. Wintermans

55. Q.

What exactly did you do with this new evidence?

A.

I had a session with the Crown at the time and suggested to them that another police department take over this case because I had already handled the Marshall case and I thought there could be a conflict there and I wanted to to--and, ah, my request was granted because after November the fifteenth, nineteen seventy-one, I had nothing further to do with this case.

56. Q.

Nothing at all?

A.

No.

57. Q.

You weren't involved in an advisory capacity or anything like that?

A.

No.

58. Q.

Do you know who in the R.C.M.P. took over the investigation at that time?

A.

Yes, I know who took it over.

59. Q.

Who?

A.

Well it was two officers from Halifax and I think one was a Staff Sergeant Allan Marshall and the other chap was Sergeant Smith.

By the Court: What was the first person's name?

Chief MacIntyre: Al Marshall, I believe he was a staff sergeant My Lord.

60. Q.

Were you at the scene that night in nineteen seventy-one down at the park?

—A.

No, I wasn't.

Chief John MacIntyre, cross examination, by Mr. Wintermans

61. Q. Thank you, that's all.

Chief John MacIntyre, re-direct examination, by Mr. Edwards

1. Q. My learned friend brought up the names Maynard Chant and John (inaudible) do you know if both of those gentlemen are still alive and residing in the area?

A. Yes they are.

2. Q. And what Al Smith and Sergeant Smith are both those gentlemen still living?

A. They're both living, yes.

By the Court: Thank you very much Chief.

Corporal James Carroll duly sworn and examined

Corporal James Carroll, direct examination, by Mr. Edwards

1. Q. You're Corporal James Carroll and you are a member of the Royal Canadian Mounted Police stationed at the Sydney Detachment, is that correct?

A. Sydney sub-division, yes.

2. Q. And you are attached to the general investigation section of that force?

A. I am.

3. Q. How long have you been a member of the Royal Canadian Mounted Police?

A. Twenty-three years completed in January, next year.

Corporal James Carroll, direct examination, by Mr. Edwards

4. Q. How long have you been stationed in Sydney?
A. It will be four years this past July.
5. Q. You were involved in the nineteen eighty-two investigation of Sandy Seale's stabbing, is that correct?
A. I was, yes.
6. Q. And you began that investigation when?
A. The early part of the year, I'm not sure of the exact date.
7. Q. February, nineteen eighty-two?
A. Sounds close, yeah.
8. Q. During the course of that investigation did you have a meeting with the accused, Roy Newman Ebsary?
A. I did, yes.
9. Q. And is Roy Newman Ebsary in court today?
A. Yes he is seated in the front row wearing a blue top coat, blue slacks, glasses, small beard.
10. Q. On the twenty-ninth day of October, nineteen eighty-two, did you record a statement from Roy Newman Ebsary?
A. I did.
11. Q. And that statement was recorded where?
A. It was recorded at his home on Falmouth Street in Sydney just the two of us were present, it took place in the kitchen area of his home and it runs for about twenty minutes, it started just before noon time and I believe it finishes at twelve fifteen, twelve seventeen.
12. Q. You have that tape recording with you today?
—A. Yes I do.

13. Q.

Corporal James Carroll, direct examination, by Mr. Edwards

May I have it please to mark as an exhibit.

For the record My Lord I should indicate that my learned friend is waiving the necessity of voir dire respecting the admissibility of this tape recording and is thereby admitting that it was voluntarily made. I understand that he is also prepared to admit a transcript which Corporal Carroll prepared with relation to the tape recording which I also propose to tender as an exhibit. Mr. Wintermans, I believe, will agree that he has had an opportunity of comparing the transcript with the tape to verify their accuracy.

By the Court: Perhaps Mr. Wintermans should speak for the record.

Mr. Wintermans: That correct My Lord. I should state that in the presence of the jury this is an admission that the statement was voluntary in the sense that it ought to be admissible in evidence. We are not necessarily stating thereby that it is completely and perfectly accurate and should be totally relied on.

By the Court: No, no, that's a matter.-- wait for the jury.

Mr. Wintermans: That's right, just to dispel any question in the mind of the jury, rather than go through the procedure of proving that no one threatened Mr. Ebsary or anything to make this statement we're agreeable with that.

By the Court: Very well.

Mr. Wintermans: The same with the transcript of the tape, I understand that the tape will be played for the jury in

Corporal James Carroll, direct examination, by Mr. Edwards
court and they will be able to take the tape and the transcript into the jury room during their deliberations.

Mr. Edwards: That is correct My Lord, with Your Lordship's permission I now propose to have both the tape and the transcript marked as an exhibit and I have extra copies of the transcript which I would propose to distribute to the jury and to Your Lordship to facilitate you both as the tape is played in court.

By the Court: Very good. The tape will be exhibit three?

Mr. Edwards: Yes sir.

14. Q. Corporal Carroll I'm now giving you the tape we just referred to, it's now marked as Exhibit Number Three and would you put it in the recorder please and prepare to have that played to the jury. I'm also giving you the transcript which is now marked Exhibit Four.

Mr. Wintermans: My Lord I wonder, although it's perhaps normal I should wait til he is finished his evidence, but since I have agreed to the admissibility of the tape I wonder if I might be permitted to ask just one question before the tape is played for the jury so they could perhaps might consider that while hearing the tape.

Mr. Edwards: Perhaps, if I could....

By the Court: Maybe if I knew what the question was.

Mr. Wintermans: My learned friend has graciously consented to ask the question himself.

Corporal James Carroll, direct examination, by Mr. Edwards

15. Q. At the time this recording was made what would say about Mr. Ebsary's state of sobriety?

A. I suspect that he had one or two drinks of wine. He didn't in my presence and I insisted that he not drink anymore if he had, in fact, been drinking on that particular day which I suspected. He was far from being intoxicated. I have seen him in various states of sobriety in the past and in my opinion he was reasonably normal.-- in a reasonably normal condition.

Mr. Edwards: Just a second before you turn it on, is everybody at least able to look on with somebody with a transcript.

Playing of tape whereby Corporal Carroll takes a statement from Mr. Roy Newman Ebsary on the twenty-ninth day of October, nineteen eighty-two. (Inaudible).

16. Q. Okay, Corporal Carroll, just following up on that last part there, did you and Mr. Ebsary, in fact, go to the location where he said he buried the knife that night?

A. Yes.

17. Q. When was that?

A. On the second day of November, just a few days after that recording was made. Myself and Corporal Douglas Hyde, my partner at the time, we picked up Mr. Ebsary about nine thirty in the morning and we were directed to one twenty-six Rear Argyle Street, (I believe was the address) and we proceeded to dig up a small plot of land in the back yard of that particular residence.

Corporal James Carroll, direct examination, by Mr. Edwards

18. Q. That was in Mr. Ebsary's presence?
- A. Oh yes, at his direction. We concentrated on an area about four feet square digging down approximately twelve fourteen inches deep and we found nothing other than broken glass, coal ashes and usual debris, but no sign of a knife blade or knife handle.
19. Q. Okay, no futher questions.

Corporal James Carroll, cross examination, by Mr. Wintermans

1. Q. Of course, he indicated that knife handle wasn't buried, it was thrown?
- A. That's correct, it was the blade that we were looking for.
2. Q. Have you had any experience in the past with trying to find a thin piece of metal in the ground that had been buried eleven years before or so?
- A. No, very limited experience in searching for metal objects.
3. Q. Would you be able to answer one way or the other if I were to suggest it might have rusted or dissolved in that amount of time?
- A. You would expect there would be some rust on it, I wouldn't think that it would be totally gone but we were looking very carefully for any remains of a small blade, even to the point of nails or stakes or that sort of thing which were present.
4. Q. So that part of the statement then wasn't quite accurate then, is that right, or else the spot that he brought you to was the wrong spot?
- A. Well, we were totally relying on his direction. I think he

Corporal James Carroll, cross examination, by Mr. Wintermans

4. A. mentions here a spot in the, he gave it to believe that it was a very small area to begin with and we enlarged thinking he might be mistaken, so we probably went four or five times the distance that he indicated.
5. Q. Now, when did you first get involved in this?
A. If I can refer to my notes, I think February of eighty-two.
5. Q. That would be how long before -- when was that statement taken?
A. October twenty-ninth.
7. Q. Nineteen eighty-two?
A. That's correct, yes.
8. Q. That's just over a year ago?
A. Yes.
9. Q. And you had been involved some nine months before that in the investigation?
A. Again, I would have to go to my notes. There was.....
10. Q. When did you first -- did you ever see Donald Marshall in Dorchester?
A. Yes, I did.
11. Q. When was the first time you saw him?
A. I think -- again, I'll have to go to my notes.
I have one notation here on the ninth of March, nineteen eighty-two that I interviewed Mr. Marshall at Dorchester Penitentiary. Now, there were two interviews, I'm not sure if that was the first or the second, if I can go back further.

Corporal James Carroll, cross examination, by Mr. Wintermans

12. Q.

Now, you took a statement -- was it you that took that statement from Donald Marshall in Dorchester Penitentiary that Mr. Marshall was cross examined on by the prosecutor?

A.

I was present when the statement was taken. I found my other notes here--the first interview was on the eighteenth of February, when myself and Staff Sergeant Harry Wheeten drove to Dorchester and interviewed Marshall for the first time and because of a disturbance in the penitentiary on the previous, a rumble, it was dangerous for us to discuss anything with Marshall at any length because the guards felt he would be punished by the other inmates, so our interview was very brief and we made arrangements to come back at a later date, which was the other date I just mentioned.

13. Q.

Ninth of March, nineteen eighty-two?

A.

Ninth of March, yes.

14. Q.

And that's the time you took that statement?

A.

Statement was taken by Staff Sergeant Wheeten in my presence.

15. Q.

I see. Did you ever do anything or say anything to Donald Marshall to get him to write letters to Roy Ebsary?

A.

No sir.

16. Q.

Are you aware of any letters written to Mr. Ebsary from Donald Marshall?

A.

I believe Mr. Ebsary has mentioned that to me. I could be mistaken but I believe he had received a letter from Marshall or he wrote one, I'm not sure of the event but there was some contact.

Corporal James Carroll, cross examination, by Mr. Wintermans

17. Q. You didn't, you're saying that you didn't influence Marshall to write to Mr. Ebsary?
- A. No sir. In fact, on recollection I believe Mr. Ebsary had told me he received a letter from Marshall. I asked him to find it for me and he was unable to produce it.
18. Q. Are you aware that Mr. Ebsary's house was gone through by the R.C.M.P. and a lot of paper and things removed from his house?
- A. Yes sir, I instigated that search, I had a search warrant and did seize numerous papers and cassette recordings.
19. Q. Where are those articles?
- A. Mr. Ebsary has received them all back. I returned them to the Correctional Centre at the time he was residing there. They were presented to him.
20. Q. Was that seizure, search and seizure of Mr. Ebsary's property was that before this statement, the tape recorded statement the one that you played here in court.
- A. I'm sure it wasn't but again I would have to do some research on dates, it would take me awhile to find it, but if you wish.
21. Q. Well, it doesn't matter what the exact date was.
- A. I believe it was before the tape, I'm quite certain it was.
22. Q. So, this conversation that you had with Roy Ebsary was not the first conversation that you had with Roy Ebsary was it?
- No.

Corporal James Carroll, cross examination, by Mr. Wintermans

23. Q. You had been in contact with him quite a few times or several times.

A. Several times.

24. Q. And you say that Mr. Ebsary, in your opinion, had consumed some alcohol before that tape recording?

A. I suspect he had, yes.

By the Court: Mr. Ebsary maybe you -- sit down, Mr. Ebsary. Now, Mr. Wintermans do you want a little time. Mr. Ebsary is popping up every minute or so to instruct you on something or other and this must be kind of difficult for you. Do you want to speak to him and get instructions.

25. Q. That My Lord would be fine, the only thing is it's twelve thirty, I wonder if

By the Court: Are you going to be much longer?

Mr. Wintermans: I'm not sure, a few minutes at least.

By the Court: Well, I don't mind going on a few minutes beyond the twelve thirty, there is nothing particular magic in that. We can still have our hour and a half for the noon hour. But, if you want to take a little time and sit down with Mr. Ebsary and get some instructions so you are not interrupted everytime you say something.

Mr. Wintermans: Are you suggesting a short recess then. I can't really take instructions in front of the court.

By the Court: I'll give you then a couple of minutes and we'll resume again. So we'll adjourn for five minutes.

Court Recesses.

Corporal James Carroll, cross examination, by Mr. Wintermans

Jury called. All present.

25. Q. Now, we heard the Chief of Police, Chief MacIntyre, testify that in nineteen seventy-one he turned the case over to the R.C.M.P. after -- this was after the Marshall trial was over and at the time Mr. MacNeil gave a statement to the Sydney Police on November the fifteenth, nineteen seventy-one. As the officer in charge of the present case can you show us when the R.C.M.P. became involved in this case?

A. No, you can appreciate the fact that there is a great deal of documentation in this file, there is three full file folders and there is correspondence on file showing that the R.C.M.P. did at some early date assist the City Police in the investigation at that stage. That was quite a brief part, I think it involved two interviews.

27. Q. And was there any other R.C.M.P. involvement between that first time whenever that was and the present investigation which was the last year or so?

A. I don't believe so, from the two interviews I'm aware of done by the R.C.M.P. I believe it would be late seventy-one or early seventy-two.

28. Q. Do you know what type of interviews those were?

Mr. Edwards: Objection, My Lord, I wonder if we could have the jury out for a moment, there is something that I think should be discussed on the matter.

By the Court: Well, I think if they are going to be any time, I'll think we'll adjourn, the jury can go for lunch and be back at quarter past two.

Prothonotary: Court stands adjourned.

By the Court: No, no, I'm sorry, we're going to discuss this matter here.

VOIR DIRE:

Mr. Edwards: My Lord, first of all there is a significance body of press in the courtroom I just want to re-emphasize that anything discussed out of the presence of the jury may be not be broadcast.

By the Court: That is true.

Mr. Edwards: My objection was my learned friend knows that the types of interviews that he's asking about were in polygraph interviews and as such the polygraph not being admissible evidence no mention, I submit, should be made of it. My learned friend knows that polygraph tests were conducted at the time and I submit when he asking that type of question what type of interviews they were, he's trying to get out the fact that his client took the polygraph test back during that investigation. Number one, the polygraph or reference to it is not admissible. Number two, this witness does not have any personal knowledge of that investigation and therefore my learned friend is illiciting hearsay and as long as it wasn't too prejudicial or too far afield I was prepared not to object, but now he is now in very dangerous territory.

By the Court: Mr. Wintermans?

Mr. Wintermans: First of all, My Lord, I think that this witness is not an ordinary witness in the sense of the hearsay rule, in that he is the officer in charge of the investigation.

By the Court: You think, did you think that the hearsay rule doesn't apply to informants?

Mr. Wintermans: (Inaudible)... I would submit that in the sense that a person who has access to hospital records, for instance, can give, give what they say.

By the Court: It's not the same thing at all, Mr. Wintermans.

Mr. Wintermans: Or business records, that type of thing, can be, that a person who has access to a certain type of information is in some situations entitled to refer to that information even though he may not personally have taken it.

By the Court: Well, in my view, that doesn't, whatever you're saying does not apply to this witness in this trial. With respect to the investigation that he's conducted since February of Nineteen Eighty-Two.

Mr. Wintermans: Thank you.

By the Court: And I would ask you and I agree with the objection taken by Mr. Edwards that if, that this line of questioning ought not to be pursued if it's going to the illiciting hearsay evidence. Now I don't know how that affects your further questioning, but I don't want you to get into that area at all before the Jury.

By the Court:

I don't think it's appropriate or relevant. Now, I have the, it looks like there's going to be arguments and I don't know how long, much further you would be cross-examining Mr., err, Sergeant Carroll, but I have let the Jury go for lunch so we might as well go too. And we'll resume with this witness on the stand and presumably it won't take very long and then after that we'll hear Dr. ...

Mr. Edwards: Dr. Naqvi.

By the Court: Dr. Naqvi. And that will be the last witness.

Mr. Edwards: For the Crown.

By the Court: Is there any indication of the Defence will be calling evidence or I know, you may not want to tip your hand in the matter now at all?

Mr. Wintermans: Can't really indicate that one way or the other.

By the Court: No. I was just wondering whether you would want to address the Jury this afternoon is what I was thinking in terms ...

Mr. Wintermans: I think I for one would prefer to do it tomorrow considering that it wouldn't take all that long and rather than break up the summations and the charge, I think it might be appropriate to, since we have the time scheduled, certainly the Jury would be out before lunch I would think. Even if all three of us...

By the Court: Well, we'll see how it, we'll see how it goes. I'm not prepared to grant that right now because the time is of some concern, but if you feel in a position where you can't properly act for your client in doing it then, then I'll consider it. But let's just see what happens this afternoon. And we'll, so we'll adjourn then until a quarter past two.

Court adjourned for lunch.

Court resumes.

Jury called. All present.

By the Court: You're still under oath Corporal. Mr. Wintermans?

Mr. Wintermans: No more questions.

By the Court: Re-direct?

Mr. Edwards: No re-direct, My Lord.

By the Court: Thank you very much.

Mr. Edwards: Dr. Naqvi, please.

Dr. M. A. Naqvi duly sworn and examined.

Dr. Naqvi, direct examination, by Mr. Edwards.

1. Q. Sir, would you give your name?
- A. My name is Mahmood, Mahmood Ali Naqvi.
2. Q. And your profession?
- A. I'm a surgeon.
3. Q. You're a surgeon.
- A. Yeah.

Mr. Edwards: My Lord, I should advise the Court that I will be seeking to qualify this witness to give opinion evidence in the field of general surgery in determining causes of death.

By the Court: You're not prepared to admit those qualifications at the moment?

Mr. Wintermans: Yes. I'd be prepared to admit that Dr. Naqvi is a qualified medical practitioner and with a specialty in surgery and that he would certainly be, given those qualifications, in a position to give an opinion on cause of death.

By the Court: All right. Thank you very much. So qualified then.

4. Q. Dr. Naqvi, you practice surgery where?
- A. Sydney, Nova Scotia.
5. Q. And you've practiced surgery at that location for how long.
- A. Approximately fifteen years.

Dr. M. A. Naqvi, Direct Examination by Mr. Edwards

6. Q. About fifteen years?
- A. Um-hmm. Fifteen or fourteen, something like that.
7. Q. So you would have been a surgeon in Sydney in May of Nineteen seventy-one, is that correct?
- A. That's right.
8. Q. And on the early morning of May twenty-ninth, Nineteen seventy-one, did you have occasion to see one, Sandy Seale, a teenage youth at the City Hospital in Sydney?
- A. Mr. Sanford Seale was admitted to the City Hospital on twenty-nine, five, seventy-one at two a.m. at the Sydney City Hospital.
9. Q. That's when he was, that's when the actual admission was noted, is that correct?
- A. That's right.
10. Q. He could have been there sometime prior to that, is that correct?
- A. Not more than a few hours maybe.
11. Q. Not more than a few hours. But as much as a few hours earlier?
- A. It's possible. An hour or so.
12. Q. Okay. When you first saw him that morning, did you note the exact time you first saw him?
- A. No, I didn't.
13. Q. No. Okay. So you can say it was sometime after midnight?
- A. I'd say so.

Mr. Wintermans: My learned friend is leading the witness and I...

Mr. Edwards: I thought these were preliminary matters, My Lord. I'll withdraw it if it causes offence.

Mr. Wintermans: I think the question of when, when Dr. Naqvi first saw Mr. Seale is a question of some importance...

By the Court: Well, if it is of some importance then I'm sure that Mr. Edwards will not lead.

14. Q. Can you give us an approximate time, say between hours when you would have first seen him?
- A. Ah, it has to be after midnight.
15. Q. After midnight?
- A. Yeah.
16. Q. And what would have been the latest that you saw him that morning?
- A. The latest would be two o'clock in the morning.
17. Q. I see. So sometime between midnight and two a.m. you first saw Mr. Seale.
- A. That's right.
18. Q. Now, could you describe, as far as you have an independent recollection of him, his approximate size?
- A. (Inaudible)...size?
19. Q. Yes.
- A. I couldn't.
20. Q. I see. Okay. Would you describe what, if any, injuries you observed on Mr. Seale when you first saw him?

Dr. M. A. Naqvi, Direct Examination by Mr. Edwards

20. A. At the time when I saw him he had a, a stab wound of the abdomen with the evisceration of the small bowel over the abdominal wall. He was unresponsive, he was in a state of shock. He did not have any blood pressure and his pulse could not be recorded. His condition was very critical and at that time he was given initial resuscitation and then was taken to the operating room directly from the emergency room. At that time, an operation was performed. If you like me, I'll read the operative report.

21. Q. You, you performed the operation did you?

A. That's right, yes.

22. Q. Okay. I don't want to get into the details of the operation. But, perhaps you could tell us just generally what you did. What was the purpose of the operation?

A. His, the wound on the abdomen caused evis, injuries into the inside the bowel and there are not many, I can read it for you.

23. Q. Do you recall how the wound appeared, the external appearance of the wound?

A. It was a sharp, a wound as a result of a sharp object.

24. Q. Yes. And what, if anything, can you say about the size or appearance of it?

A. I couldn't tell you a definite size but this, this is the size I would think, with the fingers spread.

Dr. M. A. Naovi, Direct Examination by Mr. Edwards

25. Q. I see. That's, that's the width of it.
A. Yeah.
26. Q. Okay. And so this first operation that you performed. What did you do?
A. At the first operation, he was prepared in the operating room. Under anaesthesia, an incision above and below the stab wound was extended. In other words, his own stab wound incision was made enlarge, both above and below.
27. Q. Okay.
A. There was a, no tears into the small bowel was encountered, but there was a tear into the large bowel and there was a free spillage of fecal material into the Peritoneal cavity. Huge retro-peritoneal hematoma, extending from the level of the esophagus to the... (Inaudible)... on the left side. Although the aorta was palpated and it appear ... (Inaudible).. this probably was secondary to a stab would into the aorta which sealed off into the retro-peritoneal space. This was not touched with a fear of bright bleeding already present into the abdominal cavity.
28. Q. Okay. Would just, if I could stop you there, just in layman's terms, you repaired, you repaired some damage but you didn't touch the aorta during...
A. At this time.
29. Q. That operation. Is that correct?

Dr. M. A. Naqvi, Direct Examination by Mr. Edwards

29. A. Yeah.
30. Q. Yes.
- A. He had other vessels injury. There was an opening into his arteries going into the small intestine and his small intestine was bad at the same time. So we repaired all the other injuries...
31. Q. Right.
- A. And we did not open the aorta, no.
32. Q. So approximately what time did that first operation have been completed?
- A. What time was completed? Ah,...
33. Q. Approximately Doctor: if you don't have the exact time.
- A. Well, he was back in the recovery room by seven o'clock in the morning.
34. Q. By seven o'clock in the morning.
- A. Yeah.
35. Q. How was his condition after that first operation?
- A. Well, at seven-thirty a.m. that day he did regain some consciousness. But there was still free bleeding through the Lavine tube. Started bleeding, he started bleeding into the stomach at that time.
36. Q. He started bleeding in the stomach after the first operation?
- A. Um-hmm. The dressing was saturated with the blood which again was, the cause of this bleeding from the aorta and also bleeding from the stomach. He was remain in shock and he did not have any urine output. His condition

Dr. M. A. Naqvi, Direct Examination by Mr. Edwards

36. A. was critical. And his hemaglobin dropped, this was at seven thirty a.m. Then, then he, same morning he went back to the operating room to repair the aorta.
37. Q. So this is the second operation later in the morning, is that it?
- A. Yeah. Um-hmm.
38. Q. And was the aorta repaired at that time?
- A. Second time, yes.
39. Q. Yes. Okay. And following that second operation, what can you say about Mr. Seale's condition?
- A. I have a note here on follow up, May twenty-ninth at seven p.m.
40. Q. Yes.
- A. Patient's condition remains critical. There has not been any response since the surgery and patient has been on ventilator with an endo-tracheal tube and has had no urine output. Has been given (Inaudible).. medication but still there was no improvement. His chest tubes were draining and his blood pressure was markedly low.
41. Q. This was at seven p.m.?
- A. At seven p.m.
42. Q. Yes.
- A. Patient's condition remained critical and it was at this point, he was hopeless. And I have a last note here, at eight;0 five p.m. ...
43. Q. Yes?

Dr. M. A. Naqvi, Direct Examination by Mr. Edwards

43. A. Unable to obtain blood pressure. Patient's condition critical. And no pulse obtained. Heartbeat has stopped. Patient pronounced dead.
44. Q. He was pronounced dead at eight 0 five p.m?
A. That's it.
45. Q. And Doctor, based on your observations at that time, to what did you attribute the cause of death?
A. Massive hemmorage and abdominal injuries, shock and this was cause of the death.
46. Q. I see. What if anything can you say about the amount of blood he would have lost?
A. My note here says we have given twenty-seven pints of blood. Initial resuscitation.
47. Q. Twenty-seven pints of blood. How would you describe that in terms of quantity?
A. That's fourteen thousand cc's.
48. Q. Yeah. Perhaps I should put that another way. How would you characterize the transfusion of that extent?
A. Was almost total body blood replacement.
49. Q. Okay. Now you've stated in your earlier evidence that, you stated in your earlier evidence that you felt the cause of the injury was a knife or blunt, or sharp object. Is that correct?
A. Yeah. Sharp object.
50. Q. Yes. All right. What would you say could have been the minimum length of the blade that could have inflicted that injury?

Dr. M.A. Naqvi, Direct Examination by Mr. Edwards

50. A. I couldn't say minimum, but I could say, again, it would be approximately the width of my palm.
51. Q. The width of your palm--what is the width of your palm, three inches, do you agree it is three inches?
- A. Well you measured it, I didn't.
52. Q. You have a look and you tell me.
- A. Three and a half.
53. Q. Three and a half.
- A. Thank you doctor.

Dr. M.A. Naqvi, Cross Examination by Mr. Wintermans

1. Q. Now, I notice you flipping through some notes there, are you relying on those notes to give your testimony?
A. Yes.
2. Q. Are those notes made by yourself or.....
A. These notes are part of the hospital medical records, the time of the discharge of the patient.....
3. Q. Are you the one who writes down that information that goes into those notes or does someone else?
A. Yes most of it is -- the medical part, which is the responsibility of the direct patient's care, is mine, but other people write notes just the same, the nurses write the notes and other medical personnel.
4. Q. I notice that there is no handwriting, hardly any handwriting, on these papers?
A. There is handwriting there.
5. Q. Did you write that?
A. No, that's the other doctor.
6. Q. The rest of the information that you have there is typed, is that right?
A. Most of it, yeah.
7. Q. Do you have very much of an independent recollection of what happened?
A. I look after thousands of operations a year and I couldn't tell you.

Dr. M.A. Naqvi, Cross Examination by Mr. Wiertermans

8. Q. So you don't specifically remember this incident?
- A. I remember the patient, I mean I remember I done the operation, but I couldn't remember anything detailed.
9. Q. Now, do you remember the time of death?
- A. According to the notes.....
10. Q. That's not what I asked you, the question is do you remember the time of death?
- A. Time?
11. Q. Yeah.
- A. I couldn't tell you.
12. Q. You indicated eight -o-five p.m., is that right?
- A. According to the notes, yeah.
13. Q. According to the notes. Did you recall having given evidence at the preliminary inquiry on August the fourth, nineteen eighty-three?
- A. This was based on the same notes.
14. Q. Can you answer the question, do you recall having given evidence at the preliminary inquiry on August the fourth?
- A. I have given the court evidence, but I don't remember the exact dates.
15. Q. Down stairs in this building?
- A. Yes.
16. Q. Provincial Magistrates Court?
- A. Yes.
17. Q. Page eighty-four, do you recall having been asked the question, "Did you make a note of what time he did expire?" and your answer, "Yeah, seven thirty a.m." -- do you recall having said that?

Dr. M.A. Naqvi, Cross Examination by Mr. Wintermans

17. A. If it is there, I can't recall, all I can tell you is that time when you asked the questions, I could not figure out the time at that time and then til I went back again and looked at the record from the hospital and this is the record of times in the medical records that I can tell you.
18. Q. Did you indicate that you were with Mr. Seale from somewhere between midnight and two a.m. until....
- A. Until he died?
19. Q. Until death?
- A. Yeah.
20. Q. Without, you didn't leave him and have someone else take over?
- A. No, no.
21. Q. You say that he regained consciousness at seven thirty in the morning?
- A. Yeah, I said, the patient did regain some consciousness.
22. Q. What do you mean by that?
- A. He opened the eyes but he (inaudible) respond to.
23. Q. I see. Now, I take it that you are not sure really when you _____ first saw the patient, somewhere between twelve and two, do you remember the patient arriving at the hospital, do you recall that?
- A. I can only go by what is in here.
24. Q. Okay, so what you are saying is that you can't remember the ambulance arriving and all that?
- A. All I know it was after midnight, but I couldn't tell you the time.

Dr. M.A. Naqvi, Cross Examination by Mr. Wintermans

25. Q. Do you remember the ambulance arriving at all, were you there when the ambulance arrived?
- A. I was there, yes.
25. Q. Now, let me ask you something Doctor, we've heard evidence that some of the intestines were coming out after this injury was suffered, why would that occur?
- A. Once any cut into the abdomen is big enough that the patient when he has severe pain, it's the pain and the pressure that pushes the intestine out.
27. Q. So, it's.....
- A. It's a physiological.
23. Q. So it's intra-abdominal....
- A. Injury, yeah.
29. Q. If there was an opening it would push the insides out.
- A. Yeah.
30. Q. And, doctor, would you agree that it's possible that injury to through the abdominal wall, as you've indicated, that upon strenuous exertion, on the part of the victim that, for instance, running or falling down, that it's possible that the opening could open a little more together with this intra-abdominal pressure?
- A. When you have a cut of the abdomen, it doesn't expand by pressure, it's the intestine which is mobile pushes out, so my running or things like that, would not increase the size of the wound.

Dr. M.A. Naqvi, Cross Examination by Mr. Wintermans

31. Q. You're saying that it's not possible for the injury to tear anymore?
- A. Unless somebody put their hands
32. Q. So, the exertion of running.....
- A. It would not cause any stretching.
33. Q. Is the, that part of the body, does it have any kind of elasticity, at all, in other words, is there any kind of stretch or give to it?
- A. His kidneys are elastic, but that elasticity stretches in a different direction. It does not stretch as a result of injury.
34. Q. I see. Now, isn't it true that there was no autopsy done?
- A. That's right.
35. Q. So no exact measure, and, I should say, no exact measurements were made of the size and depth of the injuries?
- A. That's true.
36. Q. Does it say anywhere on that document that you are relying on the size of the injuries?
- A. No, it does not.
37. Q. You say that you don't recall the size of Sanford Seale, you don't remember how big he was?
- A. He was an average boy, I couldn't be sure of the exact height and weight.
38. Q. Now, in your opinion Doctor, if this was caused by a stab with a knife, how many stabs would there have been?
- A. He only had one stab.

Dr. M.A. Naqvi, Cross Examination by Mr. Wintermans

39. Q. One stab. Where approximately was that injury located as far as indicating on the outside of the body?

A. Approximately somewhere around the belly button.

40. Q. Do you recall if it was above or below?

A. I wouldn't be sure if I said yes.

41. Q. Thank you.

Mr. Edwards: No re-direct My Lord.

By the Court: Thank you very much Doctor.

Mr. Edwards: That is the evidence for the Crown My Lord, tender the exhibits.

Mr. Wintermans: I wonder if the jury could be directed out of the courtroom for a moment.

By the Court: We'll get the jury to retire for a few moments while counsel is assessing (inaudible).

Mr. Wintermans: My Lord, on behalf of Mr. Ebsary, at this point I would make a motion for a directed verdict of acquittal. First of all, I don't believe there is evidence of cause of death before the court and, of course, in the absence of that there is the total absence of evidence on (inaudible) that point. that has to be proven by the Crown and if the Crown hasn't proved all the elements of the offence then, of course, if there is no evidence with respect to an element of offence then the matter should not go to the jury. I would submit that the evidence of Doctor Naqvi is not to be considered evidence in that he has no independent recollection of what occurred, he was relying on notes that were not prepared by himself and that notes that weren't

Mr. Wintermans:

even handwritten, they were typed, and filled in by other people involved. He has no real recollection of time of death and I don't recall him giving an opinion as to the cause of death.

By the Court: I seem to recall one.

Mr. Wintermans: Perhaps I may have missed that, My Lord.

By the Court: It's an important thing to miss.

Mr. Wintermans: I thought that although he talked about the injuries, he never actually said -- I could be wrong on that, but my main point is that his evidence, ought not to be admissible under the circumstances as he has admitted that he has no independent recollection and is relying upon notes that he, himself, didn't prepare.

By the Court: Mr. Wintermans, this is a matter that you referred to before. Have you witnessed many wills, yourself?

Mr. Wintermans: Pardon me.

By the Court: Do you suppose that you could remember every will you witnessed and the circumstances in which you witnessed it, and yet when you look at your signature what you say is that is yes that's my signature, therefore, that person must have been of sound mind because I wouldn't have witnessed it otherwise.

Mr. Wintermans: I don't see the connection. I didn't hear Doctor Naqvi say that he saw his signature and he prepared those notes. It would be one thing if he was the one who wrote them all himself and signed them and didn't have an independent recollection.

By the Court: Hospital records are always typed up from the notes that are made by the individuals so they can be read by everybody and stand as a record. That's not evidence, I'm just saying that from personal knowledge. I would have thought you would have known that to.

Mr. Wintermans: Well, I make that objection. Secondly I would submit that on the totality of the evidence before the Court that it would be dangerous to leave such a case in the hands of the jury in view of the overwhelming evidence of a robbery in progress and the accused being a victim at the time that this incident occurred and that a properly instructed jury would not enter a conviction under these circumstances and under those circumstances the trial judge ought to take a case of this type out of the hands of the jury and that there may be a preversed verdict. Given the overwhelming evidence from the Crown's own witnesses as to the robbery and the circumstances and the circumstances found himself in that clearly he was the victim, not the aggressor, and that it shouldn't be a matter that should go to a jury, and I leave with My Lordship.

Mr. Edwards: My Lord, on the first motion--two submissions there. Number one, dealing with his last point there, my recollection is that Doctor Naqvi clearly did give a cause of death and it is a matter for the jury to consider. On his first point that Doctor Naqvi was relying on notes and didn't have the independent recollection I would submit firstly that if my learned friend had really believed that then his objection is most untimely, he should have objected.

Mr. Edwards:

to Doctor Naqvi using the notes in the first place. But, having said that, Doctor Naqvi made it clear in answer to my learned friend on cross examination when asked who was the author of the notes--I made a note Doctor Naqvi said, "most of the medical parts are mine." But, my learned friend didn't touch that, he didn't pursue that matter to try and establish that the crucial parts were Doctor Naqvi's, I suspect that he knew that he would find that the crucial parts were Doctor Naqvi's. So, I submit that his objection really has no merit whatever and I ask you Lordship to reject that motion.

The second one, on the totality of the evidence, well obviously there is a very real issue to be weighed by the jury and that is the issue of self defense. Really, I don't know what more I can say about that, this is one of the clearer cases of where that section should be put before the jury, obviously the major issue they have to consider is whether the accused was acting in self defense or was he not and it would be wrong to withdraw that issue.

By the Court: First of all as I understand the test in connection with the directed verdict, the matter may only be taken from a jury if there is no evidence on which the jury properly instructed could bring in a verdict of guilty. With respect to the cause of death, my notes say the doctor said the cause of death was massive hemorrhaging,

By the Court:

abdominal injury and shock. The notes he said were -- I'll admit most of the medical notes were his and he admitted that they were (inaudible), that again is usual. When talks at this stage about the totality of the evidence, I think that takes the question, the matter must be put the jury, it's a matter the jury must decide, there's sufficient evidence before the court in my view that the jury must consider the evidence and weigh it and bring in a verdict with respect to it and I deny the application.

I wonder if we could adjourn. I wonder what your wishes are.

Mr. Wintermans: I would prefer to continue if everybody else wishes to do that.

Mr. Edwards: I'm prepared to do that My Lord; however, I just want to clarify that when we had a brief pre-trial the other day that I indicated that I thought the other day that indicated that I thought the addresses would be a half hour each. Well, my own may be between a half hour and an hour, that would put us near four o'clock and then if my learned friend takes a similar amount of time we would be in to five o'clock. I'm quite prepared to stay that long if the court directs, but perhaps we should all understand that it could take that long.

Mr. Wintermans: My only concern is that the jury is going to be tired and perhaps not follow what's being said, that's why earlier I suggested it might be better to put it over

Mr. Wintermans:

until tomorrow if we have the time anyway, and I still feel that way, but on the other hand it's up to Your Lordship to decide when. My only concern is it's already three o'clock and we are going to be into four thirty, five o'clock and if the jury is exhausted by the end of it then maybe they won't.....

By the Court: If there is some concern about the length of the addresses, I think it would be best if we were to start tomorrow. What about starting at nine o'clock and then we would gather a half hour there and it would give you a night--usually delays of this sort tend to reduce the length of remarks and so on, so we might keep that in mind. I'm not compelling you to do that at all. I think in those circumstances then, we will adjourn until tomorrow at nine. We'll call the jury back and then adjourn until tomorrow. My address won't, I don't know, between an hour and a hour and a half, we should get finished by one by the sound of things.

Jury called. All present.

By the Court: Ladies and gentlemen of the jury, I've had a discussion with counsel in your absence about a couple of matters, but the last one was what we should do with the remainder of our time and we concluded that we will adjourn until tomorrow morning at nine o'clock. At which time, counsel will be each addressing you from their respective

By the Court:

points of view, following which I'll give mine, a charge to respect to the law, that ought all to be completed in the morning and giving you lots of time to begin deliberating somewhere in the noon time area. We thought it better to do that and keep you possibly late this afternoon.

Therefore, we'll adjourn til tomorrow at nine o'clock, I'll ask you all to return at that time.