I N D E X

VOLUME 7

BOOK III

1983 "S"

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

09:05 Court opens

Jury called. All present.

Mr. Edwards' Address to Jury

Madame foreman, ladies and gentlemen of the jury, may I begin first by thanking you very much for the attention you have given this most serious matter throughout the course of the evidence and I'll ask you to consider that polite and considerate attention for another short time while I give you my address and then you will hear from my learned friend Mr. Winterman and then finally from His Lordship who will instruct you on the relevant law.

I want to touch upon a matter that will be dealt with in some detail by His Lordship and his instructions and that is the doctrine of reasonable doubt and in a criminal trial the onus is squarely on the Crown to prove the guilt of the accused beyond a reasonable doubt, those are the words as we will hear them over and over again, but they are really the key to this case as with any criminal case. I want to emphasize that beyond a reasonable doubt the emphasis there is unreasonable, doesn't mean beyond any doubt, but when when you are satisfied beyond a reasonable doubt that the accused is guilty or not guilty then you come to your decision and in this case I submit to you that that means that when you arrive at the point in your deliberation where you are able to say with confidence: (a) I'm satisfied to a moral certainty that

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Roy Ebsary did cause the death of Sandy Seale and (b) that if he did cause that death that it was not justified that he went too far, that he was not acting in self defense. If you can satisfy yourselves on those two points then I submit that you will arrive at a point where you should find the accused guilty and I would say in fairness that if you can't satisfy yourself in each of those regards then you obligation is to acquit. But, I just want to re-emphasize that point, that it's beyond a reasonable doubt, it's not beyond any doubt. If it were otherwise, there would be very few criminals convicted because beyond any doubt the Crown would virtually have to show you a video tape of the crime being committed, and our system of justice just doesn't work that way.

Now, the second preliminary point I want to make with you is that no doubt my learned friend gets to speak after is I do so I have to anticipate what he is going to say. I anticipate that he is going to try and impress upon you that the Crown's case is full of inconsistencies. You know, these witnesses, they contradict themselves, they contradict each other and you can't believe a word they say and, therefore, you can do nothing but have great doubts about what happened on that night and therefore you must acquit, I anticipate that he'll probably try and impress you in that regard.

Well, in anticipation of that type of argument, I would like you to consider as men and women who have experience in

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every day life and human nature and your entitled to draw on that experience to judge this case, I want you to consider, firstly, that when one person tries to recall an event that has happened some time in the past, if he recalls that event next week he will give one version and if he tries to recall it a few months later he gives another version which won't be exactly word for word with the first version and then if he tries again a year or so later to recount that event again, he will get still a different version. But, as long as the inconsitencies are minor, I sumbit to you that there is nothing wrong with that, he is no less believable a year later or even two and in this case twelve to thirteen years later no less believable because there are minor inconsistencies in his testimony having to do with times or exactly what such and such a person said during the course of the event. To have such inconsistencies is both understandable and it's human. Looking at it the other way, if the person came in and told the exact same thing word for word each time the event was recounted, one would be suspicious wouldn't they. Wouldn't one think that that person who had memorized, wouldn't one expect a concocted version of what had happened, I submit that one would. In the same thing, if you consider that two or three or four people see the same event, let's say yesterday, and if you asked those four people individually today to recall what they saw yesterday, you are going to get minor discrepancies in the version each gives you.

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In the same day, if each of them gave you the exact times, and the exact words that were used in the event that was recounted, wouldn't you suspect that they had gotten together and concocted there story and now they are trying to sell you a bill of (inaudible) as it were. So, here, relating that type of reasoning to this case, if Jimmy MacNeil, for example, had come into this court room and said look I remember the night of May, twenty-eighth, nineteen seventy-one, vividly, I went to the tavern at precisely six twenty-five and I had exactly seven pints of beer and I left there at exactly twenty-five minutes after ten and this is exactly what happened, wouldn't you be a bit suspicious of Jimmy MacNeil? No, I submit, that those type of discrepancies are minor. Now, there are some major inconsistencies in the evidence, and I am going to deal with those. Indeed if you will recall it was the Crown that brought them out and those major inconsistencies are primarily in the evidence of Donald Marshall, Junior. You will recall that when Donald Marshall Junior was on the stand, it was the Crown who confronted him with the statement that he gave on March of nineteen eighty-two and confronted him with the parts of that statement that were totally inconsisten with what he was saying in court on the particular day he was being sentenced. I'll deal with those inconsistencies and demonstrate to you why those inconsistencies can be isolated from the rest of his testimony, and I'll get into that in some depth later on. I just want

to make that point at the outset because obviously with passage of time, considering the types of witnesses who have been before you, it's very understandable and natural that all the details are not going to be -- well, one witness is not going to be a photocopy and testimony of the other.

My learned friend confronted some of the witnesses like Jimmy MacNeil with testimony he had given on other occasion, in Halifax or on the preliminary inquiry in this matter, about times, what was said, that type of thing. I submit to you that all he was able to demonstrate was minor inconsistencies. As far as the event which is the very (inaudible) of the problem that we are to consider here, the witnesses are virtually unshaken and as far as that event is concerned, I will attempt to demonstrate to you that the evidence is consisten right through and that when the evidence is analyzed in detail you will have a very clear picture of what happened on that night -- sufficiently clear, more than sufficiently clear for you to be able to reach a verdict.

Now, I want to review some of that evidence and some of it I want to go into in some detail. I'm going to review that evidence, not necessarily in the order that it was called. I want to start first with James MacNeil. Now, James MacNeil, as you recall recounted how he was at the State Tavern on the night in question with the accused,

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Roy Ebsary, and when they left, there was some dispute what the times were and, again, I say that is understandable, they talked about going down George Street, cutting through the park to Crescent Street, then when they got on Crescent Street, crossed over to the resident side where he said the sidewalk was and began walking toward South Bentick Street, and he says it was that time they were confronted by Seale and Marshall. Now, he says that Marshall grabbed hold of him and put his--Marshall put the MacNeil arm up behind his back. Now, I suggest to you that when you consider that, when you consider all the testimony, why Marshall did that, of course, I submit that the facts demonstrate that he and Seale were up to no good, that's not really the issue here, but his intention, I submit, was to subdue MacNeil who was the larger of the two--you saw the size of MacNeil and the size of Ebsary, if you were one of the two who wanted to roll these fellas to get money of them it would be natural to subdue the bigger fella first, that's what Marshall is doing, and that's what MacNeil is describing. At the same time, he says that Seale is standing with his arms down by his side demands money from Ebsary with the words, "dig man" there is no question what Seale meant by that and I submit to you that there is no question in the minds of Ebsary and MacNeil what Seale meant by that but the important point to remember is that there was no overt physical gesture by Seale toward Ebsary at that time. (Inaudible) that Marshall had

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MacNeil subdued of to the side. At that point, there was no overt physical gesture by Seale. MacNeil, you remember later in his testimony, confirmed that, he said that-- remember when he was talking with Ebsary the day after Seale died, he said, you know, he didn't make any gestures towards you, he didn't have anything in his hands, you recall MacNeil was questioned by my learned friend Mr. Wintermans on that point. So, it was at that point, he said a split second after Seale had made that comment to Ebsary, Ebsary said words to the effect, I've got something for you and with a sweeping upward motion of the right hand he lunged toward Mr. Seale. Now, MacNeil says at that point, he didn't see the knife, but he heard Seale scream and he saw blood, the evidence shows that and I should say that what I'm telling you, as His Lordship mentioned is no evidence it's going by my recollection of the evidence, but you must be guided by your own. So, he saw blood coming out of Sea he says that then there was a gesture by Ebsary toward Marshall and I don't recall whether he said that he saw Marshall being struck at that point, but he did see the gesture by Marshall toward Ebsary and he says that Marshall then ran away, and just backing up a bit, he said ~~that~~ when Seale was struck Seale ran across the street. In any event, Seale got out of there. Now, they went then, Ebsary and MacNeil, and this is all MacNeil can talk about, he has no idea where Seale or Marshall went after that, but he and Ebsary then went to Ebsary's residence on Rear Argyle

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Street and my learned friend is going to say now, he said it took them ten minutes to get there, well a person -- people are notorious for being wrong or over estimating periods of time, I submit to you that that really has no significance, and if my learned friend tries to impress you with that type of thing, it's really a red (inaudible), it's really just deflecting from the issue at hand. I submit that what is significant is when they got to Ebsary's home on Rear Argyle Street he recalls that Ebsary went in and washed off the knife and my learned friend is going to say to you, ah, but he said there was nobody else there, there was no one else there, so you can't believe him. But, of course, that is not an (inaudible) position to take because number one, you can imagine and you can judge the demeanour of Jimmy MacNeil, you can imagine how excited and agitated and overwrought he was by the time they got to Ebsary's home after having seen what he had just seen. Therefore, I submit to you that it is quite understandable, now, twelve years later that he does not recall Donna and Mary being there, but you recall Donna and Mary's evidence it corroborates James MacNeil, it corroborates the fact ~~that~~ he came in to the house with Ebsary that night and it corroborates their movements once they got inside the house. There is no question that Mary and Donna were there, but when that was put to Jimmy MacNeil he said I would have to say I don't remember them being there, but I submit to you that that is not signific

and, again, should no deflect you from the crucial issue. The point is that when they got to the house, Jimmy MacNeil says he saw Ebsary wash blood off the knife in the kitchen sink; and he says that although he can't describe the blade of the knife he does remember it had a brown handle and remember we'll be tying that in with Donna Ebsary's evidence because it was a brown handled knife that she saw.

My learned friend tried to get it out of MacNeil that, well, it was a fairly inoffensive weapon, the type of knife that you would expect that anybody could be carrying around. But, recall when I re-directed Mr. MacNeil on that point, I said. Mr. MacNeil, why do you say it was a pocket knife and his answer was, and it's important, because I presume that's what people carry around in their pocket. It was not, he wasn't calling it a pocket knife because of the physical characteristics of the knife, he wasn't calling it a pocket knife because he saw a knife with a folding blade, but he was just presuming that's what people carried in their pocket. No, we've got a better description of the knife, we got an accurate description from Donna Ebsary, who I'll be it was only thirteen years at the time, but I submit to you that she impressed as a very intelligent person and despite the fact that she was thirteen at the time, no doubt would recall that event very vividly. You can imagine, you can imagine, if a couple of days before you heard about this stabbing in the park you recall your father coming home and washing blood off the

knife. You wouldn't have to be very old to have that imprinted on your mind and I submit to you that that is the case with Donna Ebsary.

James MacNeil, his credibility has to impress you because this is not a story that he just came up with in nineteen eighty-two or most recently, he went to the City Police on November fifteenth, nineteen seventy-one and that has been confirmed by Chief MacIntyre. He told them his story at that time, he said I don't think they believed me. You heard Chief MacIntyre say that the investigation at that time was turned over to the R.C.M.P., but that has to be a very crucial factor because if Jimmy MacNeil were just telling that story for the first time now, one would have to be quite suspicious about him. The fact that he told back in nineteen seventy-one, only days after Donald Marshall had been convicted and is telling the story again, I submit is a very great support for Jimmy MacNeil's credibility. Now, my learned friend will, of course, be concerned with James MacNeil's testimony because it is quite damaging as far as his client is concerned and he will no doubt try to impress you, and say, well look, MacNeil had a lot to drink that night, he may even go so far as to suggest well Mr. MacNeil is obviously a person of limited intelligence who can't be expected to recall that night. Well, I submit to you that there is obviously nothing wrong with Jimmy MacNeil's eyes and I submit that his evidence is supported by other evidence that I'll be getting in to and I'll submit to you that although his recollection may be vague on what happened just before

the incident, after all he had no reason to accurately remember what he was doing before that, why would he, it was another night out on the town, another night going to the tavern, or just after when he had be traumatized and in the state of agitation, which has been confirmed by Mary and Donna Ebsary, but I submit to you that the actual incident we have to consider is indelibly imprinted on James MacNeil's mind. There is no question about that. As proof of that, you consider the cross examination (inaudible) by my learned friend and all my learned friend was able to do was chip away at some of these minor points, what time you went to the tavern, what time you left the tavern, who was at the Ebsary home, but he couldn't shake him, not one bit about what had happened on Crescent Street at the time of the stabbing. Jimmy MacNeil sticks to that because I suggest to you that it's true, that's what happened. If it weren't true, what possible motive could Jimmy MacNeil have to go to the police in nineteen seventy-one and tell him that story and you heard him give his reasons, couldn't live with himself and I submit to you that he was very believable when he said that, but what possible motive other than a nagging conscience would he have had to go and tell the police that story in nineteen seventy-one or again to come here in nineteen eighty-three and tell the same story.— no reason. As a matter of fact, it would have saved him a lot of hassel probably if he kept his mouth closed,

he may have been better off. So, I submit to you that despite what my learned friend will try to (inaudible) vagueness of Jimmy MacNeil, his evidence would analyze carefully and when you look at the proof of part of it is unshaken and very believable. But, his evidence, of course, is not the only evidence against Mr. Ebsary in this case.

I just want to deal briefly with Mary Ebsary, the wife of Roy Newman Ebsary, she was home on that night, she recalls Jimmy MacNeil and her husband coming in and she said she was watching the news at the time and that is why she knows rougly what time it was. She said that MacNeil was very excited and he was saying something like "you saved me" or words to that affect. She also mentioned that she could tell that her husband had been drinking. She says that--and my learned will know that I impressed this, that Jimmy MacNeil came there several times after that night, when the other evidence Jimmy MacNeil says he didn't go there more than once after that and Donna says she didn't see him anymore after that. Well, remember we are talking twelve years ago and Mary Ebsary at this time, would attach no particular significance whether Jimmy MacNeil came there after that or not, it's another red herring, what's the difference really.

Donna Ebsary's evidence is significant and I counted out six points in her evidence that are significant. First of all she confirms MacNeil saying that she saw her father washing the blood of the knife in the sink. Number

two, she confirms the wording, do you remember what I said about the inconsistencies, like her, what she said Jimmy MacNeil said is slightly different from what her mother says and my notes were that she heard words to the affect, you did a good job back there, that was the same type of tenure or type of remark and if Mary and Donna came in and said exactly the same things this many years later, wouldn't you think they had gotten together and said this is what we are going to say, try and get the old fella. But, the fact that there evidence, and as far as the exact words are concerned are different, makes them more believable, not less. So, she confirms I submit, both Mary and Jimmy MacNeil about what was said and what was done. As far as Jimmy MacNeil, he said he saw the knife being washed off in the sink.

The third point and this is very, very significant when we consider her later evidence--she said her father always carried a knife. Imagine, a thirteen year old girl, she knew that her father always carried a knife. Fourth, she said the knife he had that knife had a brown handle, that ties in with Jimmy MacNeil. Fifthly, she says that her father went upstairs and after that night she looked for the knife but she couldn't find it. Sixthly, and most important, this is probably the most significant piece of evidence that Donna Ebsary gave -- she says, it was not a pocket knife with a fold up handle. In other words

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her father was carrying around a fixed blade knife and when you get to consider, His Lordship's instruction on the law of self defense and when you consider that instruction with the fact that Ebsary on that night, at least, and probably because she said he always carried the knife, was going around with a fixed blade knife in his pocket, you have to have very serious doubs about Mr. Ebsary's claim of self defense and I'll explain that further. It's very, very crucial that you recall that that knife was a fixed blade knife.

Now, you also heard from Constable Leo Mroz and, again, his evidence did sort of complete part of the picture. He said he arrived at the location on Crescent Street just prior to midnight. Contrary to what Ebsary says in the tape recorded statement that we'll get into in some detail in a few moments, he said the weather conditions were clear. He described Seale, he said that he knew Seale, but not his first name, that we was mulatto or black, well, I submit that you know from your own experience that mulatto is used to denote a light detected black person. He gave a vivid description of Seale's wound, which I'm sure you haven't forgot and I won't dwell on that now. He says that when he got there and Seale was conscious and in agony saying, "Oh my god, oh Jesus", words to that affect. He followed the ambulance to the hospital and he saw Doctor Naqvi actually treat Mr. Seal

when he got there. He marked the map, exhibit one, showing where he saw Seale, he arrived -- head out toward the middle of the street, the feet either just up over the curb or near the curb and as you can see it is in the same general area where Donald said that the incident took place, and Donald Marshall said the first encounter was here and the second here, in that general area. As you recall in Ebsary's tape where Seale ran the whole length of that bloody street. Well, obviously, Seale didn't get very far at all.

Now, Mroz also said that he saw Donald Marshall there and indicated it with an "X" where Donald Marshall was standing and he said that Donald Marshall was clasping is left arm with his right hand and he believes that Marshall was removed to the hospital. He also says and I'm sure that my learned friend is going to fasten on this, that there was no other civilians in the area. My learned friend is going to say, yeah, but Donald Marshall says he ran and got Maynard Chant and came back with Chant, so where was Chant, so that proves that he was lying. I submit to you that it proves no such thing, it proves that Constable Mroz didn't see Chant there. Doesn't mean Chant wasn't there, Chant could have run into one of these other houses, it was a very dark night. Really, what's the difference if Chant was there or not when you consider the actions of Donald Marshall, Junior, that night and ask yourself these questions, had Donald Marshall finished Sany Seale off

which I submit is an outrageous proposition but one that Ebsary could have (inaudible) if he had finished Seale off just ask yourself, was that the action of a guilty man just standing there, waiting for the police having gone in and summons the police and the ambulance, is that the actions of a guilty seventeen year old. So, ask yourself what would a guilty person have done in that situation, what would an innocent person have done. What did Donald Marshall do? He stayed there, that there is really no doubt that who did the stabbing and as I said this proposition that finished Seale off, his friend, who he never had an argument with before, they were in this think together that night, who'd been wounded in the stomach to suggest even the possibility that Marshall then went and finished his friend off, so his friend couldn't talk, I suggest is really a ridiculous proposition.

You also heard from Chief John MacIntyre, save more about him later because I want to get into the statement that Chief MacIntyre took from Mr. Ebsary in November, seventy-one. Chief MacIntyre referred to the efforts that they made to attempt to find the murder weapon in nineteen seventy-one and they couldn't find it. They even went to the extent of draining the creek and couldn't find it. If Donald Marshall had had any type of weapon or disposed of any type of weapon in that area, they would have found it, but they didn't. Significantly, in Chief MacIntyre's evidence, is the fact that neither Ebsary or MacNeil came to life during

the investigation prior to Marshall's conviction. It only happened after the fact. So, if you are wondering why that evidence wasn't considered back in nineteen seventy-one first of all we submit that that is not the issue that we are concerned with here but, secondly, any doubt you do have in that regard should be (inaudible) by the fact for whatever reason didn't come to life until after Marshall's conviction.

Now, I want to deal with, very briefly, Doctor Naqvi's testimony. Doctor Naqvi, he described the injury on Seale and the treatment that was taken to try to save Seale. He described two operations. He identified the cause of death. Really, I submit to you, there is absolutely no doubt, that Seale died as a result of the stab wound that he got in the park that night. Now, my learned friend may say to you that Naqvi's evidence was vague because he was referring to notes while on the witness stand, but you recall that my learned friend in cross examination, he put to the doctor, "you got no independent recollection of this, have you" and the doctor said words to the effect, "I remember doing the operation, but I can't recall the details", he says "those records you are referring, is that your notes?" Doctor Naqvi's answer to that was, "Most of the medical parts are." My learned friend did not pursue that because that would have demonstrated that Doctor Naqvi was really relying, in large measure, on his own notes to recall what happened. So, I submit that

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there is no question that Doctor Naqvi recalled enough of the situation and aided by his notes which was legitimate for him to do to establish that Seale died as a result of that stab wound. That is a question of fact and it is your exclusive prerogative.

The second point in Doctor Naqvi's evidence, which I submit is more significant than really the first because after hearing the wound that Seale had and the type of treatment and bleeding that he had, you can pretty well judge for yourself what caused his death. The second point about Naqvi's evidence and most significant, is this, when he was asked by me what would have been the minimum blade size that could have caused that injury to Seale, you recall he held up his palm and he measured his palm about three, three and a half inches, so, he said that a blade that small could have caused Seale's injury and you recall that was about the size of the blade that Donna Ebsary demonstrated. Now, you just consider, this is a ruler and you hold three inches, so that would be about the amount of blade that you are talking about. Now, we don't have the knife, so we don't know, but we know that the motion was a sweeping upward motion with the right had of Ebsary toward Seale. Now, two possibilities I submit to you as far as the knife was concerned, either the sharp side of the blade was held up so that it would cut and make the gash that was described or we had a dagger point; that is, it came to a point, sharp on both sides, which would inflict

that wound. Now, recall on Seale's part -- Seale with his arms down by his side, I submit to you would probably be in a relaxed state at that time, certainly not prepared for what was to come, taken totally by surprise and in a split second after he said dig man, Ebsary says I got something for you with a sweeping motion, is there any doubt that that much blade could have gotten in to do that much damage to Seale and to kill him. So that when Ebsary says in his tape that there is no way a three inch blade could cause that much damage, I submit that he knows and I submit that you certainly know it, that that is wrong because that knife being thrust like that and the blood was coming out (inaudible) there is no question that it was the sweeping motion by Ebsary that caused that injury to Seale. So, really the only issue here is not who did it but was he justified in doing it. I submit that is where the focus of your deliberation should be when you get into the jury room. I submit to you that there is no question that Ebsary intended to inflict grievous bodily harm or cause death to Seale, when you consider the exact circumstances of what went on there that night. Really, the issue is if he was justified.

Now, I want to consider Donald Marshall, Junior. He was seventeen years old at the time, he had a record, a criminal record, the defence raised which we elaborated upon, which included one conviction of theft under two hundred dollars and several Liquor Control Act violations,

not really the leader of organized crime in the City at the time and really that record, any criminal record can only be used to assess the credibility of the witness. I submit to you that that type of record does not assist you one way or the other. As I might have mentioned to His Lordship when we were arguing this point, that if, if a witness gets on the stand and it comes out that he has a long record of fraud related offences, well that type of person, of course, is a born liar and so you'd be very suspicious. But this type of record really has no bearing on the credibility and I only mention it because it was raised by my Learned Friend.

Mr. Marshall says that he and Seale that night, crucial time, set out to bum money. And this is where I want to deal with, what I submit are the major inconsistencies in Marshall's statement. Now, it was then confronted by myself with the statement he gave on March Ninth, Nineteen eighty-two. I should tell you that as a matter of law normally a person, i.e. myself would not be permitted to impeach the credibility of a witness that I had called. I have to be given permission by the Court to do that. And I was given that permission. But the statement that I used to cross-examine Mr. Marshall on does not become an exhibit. Therefore, when you retire to the jury room you will not have it with you and that's why I want to refer you to the parts now, that I put to

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Mr. Marshall. All the other statements, of course, that were admitted into evidence and marked Exhibits, you will have them. The transcript and the Nineteen Seventy-one statement and that. You will have them and you will have them in the Jury room with you. But because you won't have this one, I just want to refer you to those parts. I put it to him first on March Ninth, Nineteen Eighty-two, he said quote "I asked Sandy if he wanted to make some money. He asked how and I explained to him, we would roll someone. I had done this myself a few times. I don't know if Sandy had ever rolled anyone before. We agreed to roll someone, so we started to look for someone to roll. The first time I saw the two fellows we later decided to rob was on George Street side of the park." The second part of that statement I quote to you on the next page, "The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them". Thirdly, he says "When questioned about this I did not mention that Sandy and I were robbing these two, as I thought I would get in more trouble. I never told my lawyers in the Court, I just thought I would get into more trouble. I felt bad about Sandy dying as it was my idea to rob these guys".

Well, obviously, that is inconsistent. That is and was inconsistent with his contention that they were just going to bum some money. But, having said that, and this is what I want to impress upon you, I submit that impairs

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Marshall's credibility only to the extent of what their intentions were on that night. Now, of course, there's a difference between Marshall and MacNeil in whether or not there was conversation among the four prior to the event. Submit that Marshall's contention that there was conversation is more consistent with his story about intending to bum the money than anything else. The significant fact is that Marshall's testimony is supported in at least five different areas by other evidence. For example, number one, who did the stabbing? Now Marshall says it was Ebsary did the stabbing. That is confirmed by both Jimmy MacNeil and Ebsary himself in his Nineteen Eighty-Two tape recorded statement. What was said, I submit to you that Marshall's version of what was said was very close to that of Jimmy MacNeil. I've got something for you. And what Ebasary said, remember in his tape recording Ebsary said they wanted everything I had so I said I'd give them everything. Thirdly, the sequence of the attack. Marshall's testimony is supported there by the other witnesses. In other words the stabbing on Seale first and Marshall second and then them running away. Four, Seale's movements. Marshall says in cross-examination, where he best said it, Sandy never laid one hand on that man. Meaning on Ebsary. MacNeil, as I've already referred to, said Seale's arms were down by his side. He didn't make any gestures, didn't appear to be carrying any weapon. And Ebsary's Nineteen Eighty-Two

statement, the Nineteen Seventy-One statement where he described the wrestling match and the fellow slung him down on the ground, but he denied doing any stabbing. But in the Nineteen Eighty-Two statement, there is no mention and you read that transcript carefully, of Seale doing anything other than ask for what he had in his pockets. So Marshall, there's four areas on which his evidence is supported by the other, the other witnesses including the accused. Fifthly, on Marshall's own movements. Marshall said he did, jives with what MacNeil said he did, at the crucial time. That, that in getting, that he and MacNeil having contact, about he then getting the slash in his arm and then running away. Ebsary himself on Page Six of the transcript which I'll refer to later says that after he stuck Marshall in the arm, Marshall then dropped him, meaning MacNeil and ran away. Also, the fact that he did have the scar on his arm, speaks louder than words because it confirms. See look, all of this fits together like a puzzle when you consider that. Because of the scar on the arm and the fact that that's confirmed by Leo Moroz, goes a long way towards verifying the account that the Crown is presenting to you as to what actually happened.

Now before continuing I just want to deal a moment with Maynard Chant. And the Defence, although it would be a very tenuous or very hard argument to sustain, may try to convince you against the over-whelming weight of

the evidence that Marshall finished Seale off. I submit to you that that has no validity. But he may suggest that well, why didn't he call Maynard Chant, Chant could have laid that to rest. But, really, Chant could not have laid that to rest because if it were true, Donald Marshall had finished Seale off, then he likely would have done that before he ever ran over to, to summons Mr. Chant for help. And the second point, I want to practice with this. It's common ground and indisputable that the Defence does not have to prove anything in a Criminal trial, the onus stays on the Crown from the beginning of the trial to the end. But, I will say this, the Defence does have the right to call on any witnesses that they wish and if Chant's evidence was considered so important by the Defence, Chant who still lives in the area according to Chief MacIntyre, still around, the Defence had the opportunity to call that, so called, eyewitness and put him on the stand and subject him to cross-examination. But he didn't elect to do so. As I say, I preface that comment with the one that there was no obligation on him to but he had the right so to do if he wished.

Now I want to deal with the two statements. The Nineteen Seventy-One statement given by Ebsary to Chief MacIntyre. Now, I will be asking His Lordship and my Learned Friend to attach a typed copy of that statement to the written one. Don't want to reflect on Chief

Mr. Edwards' Address to Jury

MacIntyre's handwriting but not too many policemen have won writing certificates. What is significant about that statement? Well, first, what does it say? It says the short fellow tried to take my ring off my finger, I'm just reading ... (Inaudible)... while the tall fellow had his arm around the other fellow's throat, that'd be MacNeil and had him on the ground. When he tried to get my ring, I was not well. He tried to wrestle, he swung me onto ground. I made a kick at him and he got up and ran off. Went over to see how Jim was getting along, the other fellow and he dropped Jim and ran off with the other fellow. Question, didn't you stab the man you were wrestling? Answer, I'd prefer you consider this answer before I read it to you. Remember when this was given, this was given just months after the death for which Ebsary had to know he was responsible and only days after another man had been convicted as a result of that death. Question, didn't you stab the man you were wrestling? Answer, hell no. Why would I stab him? Can you imagine a person being able to give that type of account, at that time in those circumstances? Submit to you, that is one sigificant point about that statement. The second is toward the end and you will have this statement in the Jury room, you can read it yourself. Question, do you carry a knife? Answer, no. Well we now know that that is a deliberate lie. We now know he was carrying a fixed

blade knife that night. And we now know that his daughter knew that he always carried the knife. But yet, the accused Mr. Ebsary, who Jimmy MacNeil described as being much spryer at at the time, was able at that time to go in and give that cool account and tell those blatant lies to the police. Now that statement may only be a couple of pages but it speaks volumes about the man you have before you.on trial today.

I want to deal now with the tape recorded statement and I just want to highlight parts of that. I want you to note that there's no mention of any physical gesture or move by Seale in this statement. The sequence and the detail of what happened at the crucial time I submit are now consistent with what Marshall and MacNeil say and I want to get into the knife sequence. What happened to the knife because it gets a little bit confusing there, whether he stuck it and saw it after he stabbed Seale or whatever. Perhaps I'll just give you copies of that because I want to refer you to specific parts.

First of all, if you would turn to page two. Just about, a little better than half way down that last full paragraph, the sentence beginning with so. So when the police asked me down there you attacked me I wasn't able to, I wasn't able to even tell them the color. I said two men attacked me. Of course, I would submit that's an obvious reference to when he was being questioned in Nineteen Seventy-One. This is the crucial part, okay, he

turns around, this obvious reference to Seale, and he says to me, "Give me everything you've got in your pocket" and I gave him everything I had in my pocket. But when I put my hand in my pocket I discovered I had a pen knife. Now it was only a pen knife, it was no knife that you took from my home, it was a pen knife. But just backing up there, "I discovered I had a pen knife". Compare that, just keep your finger on that page and turn over page seven, little better than half way down where Ebsary says, "But I swore by my Christ, I swore by my Christ that the next man that struck me would die in his tracks". Now is that consistent with the man who discovered a pen knife on the spur of the moment in his pocket? No, it is not. Third one, got it, is just a little better than half, no going back to page two, you'll see that there's a very big hole in his version there. You see he's, in this recording he's admitting that he did the stabbing but he's trying to get it in this self-defence argument here. But it doesn't wash. He didn't just discover that he had that knife in his pocket. You don't carry around a fixed blade knife and then reach in your pocket and suddenly discover it's there. He knew it was there all the time. The last sentence on that page he says, "The blade was about three inches long. So when, so when this bastard said to me, give me everything you've got in your pocket and this, this is the state of mind that you have to consider when

you're dealing with self-defence. "I said, listen you fucker, you're going to get everything I got in my pocket". You see there was no, there was no consideration there, how best I can get out of this situation,... (Inaudible)... so I gave him everything I had in my pocket. My watch, my ring", but then he came back, "the fuckin' knife was in my fuckin' pocket and I opened". Consider that, consider that in that situation, late at night confronted by Marshall and Seale having a folded pocket knife, as he's trying to content now, in your pocket and trying to open that with one hand in your pocket. No, there again, that was no folding knife in his pocket. That was no innocent little piece of apparel he had on, he didn't open in this pocket, he didn't have to. "And I said, brother you asked for everything, you're going to get, get everything and I gave him everything". Now to tie in with that you have to skip down because Corporal Carroll gets him at the bottom of that page, you see the third, the fourth last line there. Carroll, "You say he asked you for everything you had in your pockets?" Ebsary, "Right". "And you gave it to him?" Ebsary, "Right, right". Four, "What did you mean by giving it to him?" Now here's where Ebsary, Ebsary goes off. Well, we'll just read the answer. "He said I want everything you've got in your pockets. Now I've been mugged before coming through that park umpteen times, but I've never complained to police what the hell was the use?

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But when he said give me everything you've got in your pocket, when my hand felt the knife, it was only a pen knife...". See he doesn't, he doesn't get into it there and then he goes down further and he talks about sticking the knife into the ground, So, that's the part where I say the sequence gets confusing and you've got to go down almost, well, let's see, the fifth, the fifth... (Inaudible)... Carroll, "Well, I'm not here to criticize your right to defend yourself Captain, but, in fact when you took the knife out of your pocket, what did you do with it before you stuck it in the ground?" Ebsary, "I made a swipe at Seale". Carroll, "What particular part of his anatomy did you swipe at?" Now Ebsary, you see, he's trying to skate away here from admitting that he deliberately gave it to him. He says, "I don't know, I don't know. I told you, I was after consuming two bottles of wine. I just made a blind swipe but he ran". Now just pausing at that point. Remember Corporal Carroll's evidence. He had been, he had contact with Ebsary over a period of nine months and he said that he had seen him when he was well under the influence and he said when he gave this recording, this version, he was not. But Ebsary here ~~is~~ talking about, of course, the night that he was after consuming two bottles of wine. But he wasn't so drunk on that night either, because he could recall everything that happened. But Carroll kept probing, as an experienced investigator

would. "Would you say the upper part of his body, from the head down to the waist or from the waist down?" And Ebsary finally here concedes, "Probably I got him, probably I got him in the guts. Probably I got him in the guts". He knew darn well all along where he had got him because I submit to you he intentionally got him there. And then he goes down, just a little further down, a little bit past half way on the page, Ebsary says, "Yes, strangling MacNeil", this is what Marshall was doing at the time. "So you did what?" "I had, I still had the knife in my hand so I ran across the road and I stuck Marshall in the arm". See he remembers sticking Marshall in the arm and I submit to you that he remembers that just as clearly as he remembers sticking Seale in the guts as he put it. So there's no, no question about Mr. Ebsary's recollection there. At the top of page six, where he's telling what, what did Marshall do after that. "He dropped him and he ran". And, of course, that colaborates both Marshall and MacNeil as to what happened. Ebsary goes on to talk about the meeting the next day with MacNeil and what happened at that meeting. Now, I just want to clarify there, recall Dr. Naqvi, just to make ~~this~~ a little clearer, Dr. Naqvi said that Seale actually died at eight O-five p.m. on the night of the twenty-ninth. So when MacNeil, I submit to you, and the others talked about the conversation the following morning, that is the morning after Seale

died, finally with relation, well not finally, but another point with relation to this tape recording. The bottom of page seven. Let's lay this to rest. Carroll, "Okay. Just in conclusion Captain, what stage did you feel that well, I will put it a different way, did you feel as days went on that Marshall was being blamed for something he didn't do or?" Ebsary, "No, I didn't. No. Because you know what I thought, I thought Marshall finished Seale off. Yes, because it was very easy to put a knife into a wound because the rip that that guy got in the guts didn't come from a three inch knife. It was impossible". But we now know it wasn't impossible. I'll tell what was impossible. It was impossible that Marshall's seventeen year old friend Seale would, I submit it's inconceivable that he would do something like that. That anybody would do something like that and then hang around waiting for the police to come. It wouldn't happen. The last part of the tape recording Mr. Ebsary deals with what happened to the blade afterwards. And he, generally without getting into the detail of the thing, what he's alleging there is after, either later that night or sometime after that he buried the blade of the knife in the garden plot. And you recall Corporal Carroll's evidence on that point where he says that he went with Ebsary to the point, dug an area four foot square, at least a foot down but there was no blade there. So, the sequence, I submit to you,

that is shown as far as what happens to the knife is concerned would be as follows: Number one, it is first used to stab Seale. Number two, it was then used to stab Marshall in the arm. Number three, according to Ebsary he stuck it in the sod, so when you're reading the tape I submit that this, when you analyse the sequence, he stuck it in the sod and this is how he's trying to refute MacNeil and his daughter Donna saying they saw him wash blood off the knife. And he said to Carroll in there, if you stick the knife in sod that'd take the blood off it. So they're lying when they say they saw me wash blood off. And then fourthly, I would submit that he's saying that he buried the blade in the garden plot.

So Madam Foreman, Ladies and Gentleman, I submit to you when you go through all of the evidence, you get to this, what I submit is irrefutable scenario that on the night in question when Ebsary and MacNeil made their way through the park and over to Crescent Street, Ebsary while not expecting, of course, the muggings or rolling on that particular night had himself well prepared for any such eventuality, a fixed blade knife in his pocket. They were confronted by Marshall and Seale and Ebsary did not hesitate, did not consider the rightness or wrongness or justification or anything else, he took advantage of an opportunity to kill Seale at that particular point. There was no overt, physical gestures

by Seale whatever. My Learned Friend will no doubt come on with this type of argument. What was my client supposed to do, what, what was he supposed to do? And I submit that that type of question deflects you from the issue that we are here to consider. We are not here to consider or to speculate on what he should have done, what possibilities there were at the time, but what he did do. That's what we are here to consider now. We are here to consider whether or not he was justified as far as the law is concerned in doing what he did. And to get into that other area about what he should have done, would, I submit, deflect you from that real issue and get you into a lot of needless debate. The point is, Ebsary, I submit to you that this is crucial, Ebsary did not, he was not a person on that night who decided on the spur of the moment to stab Seale. He was not a person who merely failed with nicety to measure with precision the amount of force that he was permitted to use that way. Now, like, it was not a person who had been attacked and was being rolled on the ground and then suddenly felt the knife and did the stabbing. No. Because if he were such a person then, of couse, a self-defence argument would be tenable. No. He was the man with the fixed blade knife in his pocket. He had decided, not on the spur of the moment, but at some time before, that he was going to kill the next person who tried anything with him. And that Madam Foreman, Ladies and Gentlemen is

exactly what he did. Thank you.

By the Court: Thank you, Mr. Edwards. I wonder if we'd break for just five minutes. Not a long break but five minutes and then we'll return and listen to Mr. Winterman's on behalf of his client.

Jury Called. All Present.

Mr. Wintermans' Address to Jury

Ladies and gentlemen of the jury, my name is Luke Wintermans and I am representing Roy Ebsary, I am a lawyer here in Sydney with Nova Scotia Legal Aid. Of course, you know Mr. Edwards who is the Chief Crown Prosecutor for this area and he referred to the evidence of (inaudible) you've heard the testimony of the witnesses and you've heard, what can only be described as a very able and persuasive argument on the part of the Crown Prosecutor who, of course, very good at the kind of work that he does.

Now, I would ask you to consider a couple of basic (inaudible) of criminal law. I think everybody pretty well knows and understands and that is pretty well the corner stone of our whole system is that if a person is to be presumed innoncent til proven guilty beyond a reasonable doubt and that is called the presumption of innoncence and as the judge will tell you later, by the way I should say it now, the law you take according to the way the judge puts it to you, not necessarily what I say or what the Crown Prosecutor has said. Although, I certainly won't try to mislead you or anything on what the law is and I have to talke about the law at times in order to make the argument to make sense. However, if there is a difference between what he or I say or what Mr. Edwards says and what the judge says and, of course, what the judge says you have to take the law. Everybody knows about the presumption of innoncence and that stays with

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Mr. Ebsary throughout the trial until, even at this moment, until after all the evidence finished, all the summations are finished and the judge has instructed you on what the law is.

So, that is that is the basic point you have to start with; that is, Mr. Ebsary is innoncent unless and until the evidence convinces you beyond a reasonable that he is not innocent and it is a very important principle because particulary in a case like this where the incident happened some twelve years ago, it's obviously very difficult for a person, it places an unreasonable burden on a person to expect that -- to be guilty unless proved that he is innocent. It is very difficult in a lot of cases to prove that someone is innocent and you'll note that the defense didn't call any evidence and that is because, in my opinion, the evidence that you have heard so far from the Crown's witnesses, not only does it not prove beyond a reasonable doubt that the accused is guilty but I would even go further and say that it's about equal, either way, it depends how you look at the situation. I think there is a very strong doubt here as to the criminial responsibility of the accused under (inaudible) circumstances that he found himself in on that faithful evening in nineteen seventy-one.

Now, so I ask that you keep in mind the presumption of innocence and there is another principle that kind of goes along with that and that is that the evidence that you hear, it's just simply that, it's not fact, facts are what

you find them to be based on the evidence, using your own common sense in the way you consider and interpret the evidence. So, just because someone says something on the witness stand or just because someone said something in a statement, there is not meaning that that is a fact, it's just a piece of evidence, it's for your the jurors and not the judge to determine what the facts are. Now, in determining what the facts are you listen to the evidence, you observe the witnesses, you can accept all of the testimony of a particular witness, you can accept none of the testimony of a particular witness or you can accept part of what a witness says as fact and you can reject part of what a witness as being a lie or whatever. So, I think that's important for you to consider--you are the ones that have to decide what the facts are and that is not always an easy thing to do.

Now, the principles are saying that besides the presumption of innocence, kind of a similar principle that goes along with that, and the judge, I'll think back be up on this, is that if you have a doub as to who is telling the truth or whether it's fact or not, it's your responsibility because of the presumption of innocence to resolve any doubts that you might have in favour of the innocence of the accused person. In other words, if you are not sure whether it's one way or the other then it's your responsibility to interpret the evidence, to find as a fact in such a way as to make the accused person seem

innocent. In other words, you have to resolve any doubts in favour of the accused person's innocence. I think that that's -- when you put that and the presumption of innocence together as a starting point and I think it becomes increasingly obvious that there are two different ways of looking at this whole incident and that you owe it to Mr. Ebsary to interpret the incident in favourable light to him.

Now, you've heard the testimony of three main witnesses, and that, of course, would be first, Mr. Marshall, who I think it's fair to say, his evidence should not be accepted in its entirety, I think that's perhaps an understatement. It's obvious that you can't everything that he said because he has contradicted himself so many times on such important matters. When you consider the truth over liability of the witnesses evidence you have to consider why he might be saying what he's saying, where he is coming from, what reasons does he have, what motives does he have, perhaps he's misleading the court. I think that Mr. Marshall has many reasons why is evidence is not to be relied upon very heavily and I think that that became obvious. Even the Crown Prosecutor cross examined him on major inconsistencies, Marshall saying his intention was to bum some money. Again, Marshall, as he does throughout the case, tries to minimize his own guilt in the situation. When in the past he has indicated his intention wasn't merely to bum some money, his intention was to draw someone. There is a big difference, obviously, between pan handling, or whatever you call it, and actual

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robbery. Robbery is theft and assault by, in other words, when you use violence or threats of violence, whether you are armed or not armed, it doesn't matter as long as there is violence or threats upon with together with an intention to steal, that is what robbery is. Of course, it goes without saying that robbery is an extremely serious matter and of course, also, it was brought out that Mr. Marshall had spent a considerable amount of time in jail. When you were chosen as jurors you indicated to me that you would not base your decision on prejudice. You would not prejudice or sympathy, or something like that, when you make your decision. I think one very very important element in this trial is that there is a tendency to feel a little bit sorry for Marshall because he spent a very long time in jail and some people said for something he didn't do. Now, I suggest to you that he was not exactly an innocent person, he was a robber. However, people who tend to feel sorry for somebody who probably had to spend a little bit long in jail than he would have and just for robbery. Also, on the other side of the coin some people are prejudice against Mr. Ebsary because they feel he should have come forward and he is guilty of keeping his mouth shut and, therefor should be found guilty of this offense. I think that that is an extremely dangerous way to look at that. He is not on trial for having kept his mouth shut,-that is not what he is on trial for. I think when you look at it rationally we can all agree, that that is not what he is on trial for. What he

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is on trial for is killing Sandy Seale without any justificatior Now, why Mr. Ebsary kept quiet or if he kept quiet, did he reall know what he had done that night, did he do what everyone seems to be saying he did that night, including himself-- who knows, really. The problem is that this incident happened such a long time ago, that it's virtually impossible to ever know, with certainty, exactly what did happen, that's the problem here. We have three main witnesses, one is Marshall who has ever reason to be misleading, he wants to make himself look as innocent as possible, the guy has practically become a heroe in the last couple of years, but he was robbing, he spent all his time in jail and he is trying to make himself look as innocent as possible, he's got this law suit going and I suppose he wants to make himself look as innocent for afterwards as well, he's probably worried that he might be in trouble for this incident still. So, he has every reason to bend the facts, the evidence to suit his own way. He admitted that he's been -- when he was in jail, he had the transcript of the original trial and he spent virtually every day for years thinking about this incident.

With James MacNeil, I submit to you that his evidence is also very suspect, I mean in all kindness to Mr. MacNeil, I think it's fair to say that Mr. MacNeil is not the smartest guy in the world. He's testified that he was in grade six when he was sixteen and that was the end schooling. You know, sixteen years old and he stopped going to school, he said he didn't too well in school. I mean I don't want to try and

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make James MacNeil look bad or anything but in a lot of ways I feel sorry for James MacNeil, he was a victim, there is no questionabout that. But, I have serious reservations about the accuracy of his account of what occurred and I put various other versions or at least one other version that he has given. I'll just refresh you on that because you don't get to take his previous statements in with you, but I did refer to it on the record so I think it's fair to remind you. You'll recall that he gave a very vivid account of what happened and the actual time of the incident and all this. I put you on a statement that he made to the R.C.M.P. in February eighth, nineteen eighty-two, a little over a year ago, we're talking about the same incident. I put you that he had said, "On Crescent Street two fellas came up on us from behind, they asked us for money, I heard one fella, the coloured fella or the Indian say 'dig man, dig' all I remember is the colour fella sort of ran and flopped on the road, I think the colour fella was in front of Roy. We walked kind of fast away to Roy's we went in the house, I'm pretty sure I saw him was the knife off in the sink, I can't remember if he had any blood." I asked him do you recall having made that statement and he says he doesn't know if it was the coloured guy or the Indian that said 'dig man, dig' he thinks that the coloured guy was in front of Roy, he is pretty sure he saw blood being washed up in the sink and he mumbled something about "I was nervous that day when I made that statement" -- that's

not the point, I'm not trying to make him look like a liar, because I don't think he is a liar, I think he is a person whose memory is not that good, he just hasn't got the brain power that some people have and I think it's very dangerous to place a lot of emphasis or a lot of weight on what James MacNeil's version of the incident is. I'm not saying that you can't accept anything he said I'm just going back to what I said earlier about establishing the facts, you have to establish the facts. you can accept all, none or part of what these witnesses are saying. But, I'm saying to you that because of the lengthy delay, you can't really do any more than accept part of any of these witnesses testimony--at least the main witnesses.

Now, that's Mr. MacNeil, what motives might he have. I know that, if you recall the evidence, was that at the time that this incident happened on that night, he said it all happened within a couple of seconds, that indicates that there was very little time for careful analysis and consideration of the proper and correct method of proceeding I mean, if it all happened in a couple of seconds, you've got (inaudible) and that's it. Otherwise, you would either be on the ground being kicked and beat up, but that's really not what I'm trying to say. The point is that James MacNeil said, or at least Mary Ebsary testified that when James MacNeil and Ebsary went home right after this incident, Mary Ebsary said that James MacNeil said words to the affect that

over and over again, "Roy saved my life".

Donna Ebsary testifies slightly different, but the same general feeling--you can't really know exactly what was said, only what the witnesses say was said. Donna says, he didn't say, ah, he said, "you did a good job back there" or something like that. So, in other words the fact that you have to derived from those two witnesses is that James MacNeil said something to Ebsary or at least about the incident that was to the effect that you either saved MacNeil life or did a good job back there--a positive statement on what Ebsary had done. That was minutes after the incident occurred. Now, he was on the stand here a few days ago and he went the next day which turns out to be, according to Mr. Edwards, the day after the next day, because Seale wasn't dead the next day. Of course, being not the brightest guy in the world and had this conversation--the basic feeling that you got when you heard about that conversation from MacNeil's evidence was at that point MacNeil didn't know, wasn't so sure perhaps that Roy had saved his life or did a good job back there, now that somebody was dead he was starting to feel guilty and questioning the whole thing and not knowing and know being sure and you get to see how over the course of time a person's way of interpreting the incident can change depending on the facts that happened later on. What I am saying is that before MacNeil knew that anybody was killed, he thought

that Ebsary did a wonderful job. After he found out that Seale was dead he started saying things like Ebsary went too far, and that leads to an interesting point of law which I hope that the judge will indicate to you; that is, you're not to consider the resulting injury, you are not to consider the fact that Seale died in determing the (inaudible) of whether it was justifiable self defense. What you have to consider is not that Seale died but rather what kind of a situation did Ebsary find himself in at that moment. Did he have reasonable grounds to fear for his own safety, number one. Number two, whas there any other method that Ebsary could have used to save himself from being at least hurt. Those are the two critical questions on the question of self defense and I'll go back to that again. But the important point is you can see how MacNeil's way of looking at that incident changed--moments after it happened he thought Ebsary was a heroe, a couple of days later he thought Seale was dead and he started having serious doubts about Ebsary (inaudible) because he's not that smart and he started (inaudible) own recollection of it, how serious it was, I didn't see any knives; therefore, they probably didn't have any weapons. We didn't get hurt; therefore, we shouldn't have hurt them, but the point is how was Ebsary suppose to know whether or not he is going to be hurt. He can only observe the situation--he's in the dark, attacked by two strangers who are bigger than he is. MacNeil is, according to MacNeil

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Marshall had MacNeil's arm behind his back like this, alright so he couldn't move. Now, he probably had his other arm around his shoulders, that is the way you usually do that when you put somebody's arm up behind his back. Ebsary sees that and he thinks he is strangling MacNeil and that is a reasonable thing to think when all this is happening. He thinks that MacNeil is being strangled, this other guy is right in front of him saying "dig man" what kind of language is that, a total stranger that is bigger than he is, the evidence is that Seale was five five to five seven weighed a hundred and forty-five pounds, very athletic, I think he was described as being very well built and in excellent physical condition so, it was your typical young black guy, great body and he could probably run faster than anybody in this court room and he was in really good shape. and he's bigger, what he's five five to five seven. He's going to be several inches taller than Ebsary--Ebsary is an old man, dark, he didn't know them, what is he to expect. He indicates that in his own tape recorded statement that he had been rolled before, robbed before, and that he didn't put up a fight on the previous incidents and as a result he was beaten up. You'll be looking at the phrase, grievous bodily harm. What is grievous bodily harm? You have to be in fear of at least grievous bodily harm before you are allowed to kill someone in self defense. The definition of grievous bodily harm that I'm going to refer you to is-- it's not necessary that injury should be either permanent or

dangerous if it be such as seriously to interfere with the comfort or help, is sufficient. So, you know, you don't have to have all you legs broken. If you are beaten up, that is grievous bodily harm--punched and kicked a few times and being in pain for a few days, that's grievous bodily harm. So, is it unreasonable for Ebsary under those circumstanc- to think that if he doesn't do anything that he is liable to suffer grievous bodily harm. What other method of escape did Ebsary have, what was he going to do, run away. Was he going to try to punch his way out of it, kick his way out of it, obviously he wouldn't have a prayer, a fist fight with somebody like that and he couldn't run away. So, does the law expect a person to submit to a beating by robbers. It raises an interesting question really, and that is I heard that someone whose been watching the trial remarked robbers have rights--and that raises a kind of (inaudible) question for you as jurors--robbers have rights. Now, what does that mean? A few years ago, not too many years ago, robbers were hung, just for robbery. Now, the prosecutor seems to be suggest that the pendulum has swung to the other direction, sort of speak, that now if you are being robbed and violence is used then you have to carefully consider that you don't interfere with civil rights of your attacker--now, to me that is the most ridiculous suggestion I can imagine. In other words, if you are being robbed in the dark by total strangers, you friend is being subdued over there, wrestled with, you think being strangled, now you have to consider

Mr. Wintermans Address to Jury

I guess I can't hurt this person, I don't even know (inaudible) because I wouldn't want to be on trial for hurting this person. I mean, who is the victim here anyway, who is the victim, the way it has turned out, this unusual, bizzare case is that everyone involved with those four people--were all there in the park that night, they were all really ended up being the victims. Seale, is dead. Marshall spent eleven years in jail. MacNeil, you saw what kind of a mess MacNeil is now, emotionall, physcologically, everywhere he goes people say, "oh, you're that guy, you were there for that murder, he doesn't want to go through the whole thing, he has to come to court all the time and testify. Ebsary he was the original victim here and he is now on trial so he is a victim too, I guess--a double victim.

I think the really important consideration that you can't lose sight of it is who was the victim, who were the victims anyway. I mean, the only things that is consistent about the evidence of all these people is that, one--there was a robber taking place and it was Ebsary and MacNeil that were being robbed and now the whole thing seems to have been turned around to the point that the victim is the criminial or something and it's like Mr. Ebsary--in the statement on page three, the final couple of lines of the first paragraph there, "so thugs become heroes and honest men become what". I think that that is a really interesting way of summing up the results of this whole

unfortunate incident.

Now, as I said, we ought to determine what the facts are and the facts are what you find them to be. You can accept all, part or none of a witnesses' testimony. What you accept becomes a fact. Now, just because Donna Ebsary gives an opinion that she thought it was a fixed knife blade--that is not a fact, that's her evidence, the evidence of a thirteen year old. There is other evidence and it was pointed out that although my learned friend did a good job, in affect, cross examining his witness Mr. MacNeil when it was brought out that Mr. MacNeil said on previous occasions it was a pocket knife, not a dagger, it was small pocket knife. My ver learned colleague, the prosecutor, suggested to him that the reason he said that was because he assumed that people carry pocket knives. Ebsary in his own tape recorded statement says it was a pocket knife and Donna Ebsary, although she really couldn't describe the knife in great detail, didn't handle it or anythin she said she didn't think it was the kind you pulled out, but here you have you classic difference. You have to determine what the facts are--I'm not sure if it's all that important anyway, really.

There are a lot of differences, my learned friend says that in anticipation of my summation, that I was going to bring out all kinds of differences, well I think that it's pretty obvious that there is all kinds of differences. I think that you might be able to arrive at

facts if you try and look at what were the similarities, where were the undisputed facts in this case. I've written down a few of those undisputed facts. First of all, Ebsary and MacNeil had been drinking, I don't know what affect that might have had, who knows how much. Two, Ebsary and MacNeil were walking home through the park together, minding their own business, late at night, in the dark. Three, Ebsary and MacNeil were attacked by Marshall and Seale in a robbery attempt. Four, it was much darker in Wentworth park then it is now. In other words, back in nineteen seventy-one, you've heard the evidence, it was a lot darker than it is now. Since then they've put all kinds of lights in there. Perhaps, as a result of this case, but I not sure. Five, no one actually saw Ebsary's knife in the park. In fact, there is not a witness who said they actually saw the knife. They said they saw him making a sweeiping motion, that sort of thing. I think the importance of that fact, together with the (inaudible) of course, is if no one saw Ebsary's knife and Ebsary was able to stab Seale and Marshall, then how could you as jurors reasonably expect Ebsary to know whether or not Marshall and Seale who were armed. I think it speaks for itself. Ebsary couldn't have known one way or another, he could only wonder, I guess, because if they could see his knife then he would not be in a position to see theirs. Now, MacNeil says that Seale had it arms down by his sides and as I've indicated he has given a previous statement that he doesn't remember hardly anything. All he

remembers is that they were attacked and ran away. Now, he's got all these details, cause I'm suggesting over the course of twelve years, he felt very guilty about something for one reason or another, so you think about it over and over and you talk to police officers and they question you and maybe suggest things to you, not intentionally perhaps but you pick details here and there and you add them to your recollection and then you get on the witness stand and you tell you honestly believe you remember, but the fact is that you don't really remember. I think that is a very important matter here. Another fact, Ebsary and MacNeil did not know Seale or Marshall, they were strangers. So, therefore, Ebsary couldn't really have known what to expect. Seven, Seale and Marshall were bigger and younger than Ebsary. Eight, the attempted robbery and stabbing only took a few seconds, very little time for Mr. Ebsary to make any rational process in deciding should I (inaudible), is there some other thing I should do -- he didn't have time for that. Another fact, Marshall had a hold of MacNeil, that's beyond dispute, everybody says that. I think that it's only fair. You look at this as a kind of team situation. You got two teams here in a sense--you got Marshall and Seale who teamed up, they decided that they together would rob somebody, they were like a team, they were, you know, and of the same body. On the other hand, you have MacNeil and Ebsary who are the victims and so when you consider that in a team kind of sense or

parties, may be a more proper word in law, then there is certain truth to my suggestion that if one of the team is doing something to one of your team, in other words if Marshall appears to be strangling MacNeil, then they have physically attacked you. So, the question is whether or not Seale actually grabbed Ebsary is not that important given the fact that his partner had physicall attacked, appeared to be strangling Ebsary's partner and therefore you know what one half of a team does, the parties are responsible. So, Ebsary was, in fact, attacked physically in that sense, that he was with MacNeil and MacNeil was physically attacked, Ebsary was next, obviously. Ebsary cut Marshall's arm and Marshall let go and ran away. That's another undisputed fact. The fact that Ebsary had a knife, he stuck Marshall in the arm and it worked, Marshall let go of his friend, MacNeil, and Marshall ran away and disappeared. Seale had run away too after Ebsary had cut him. Perhaps he didn't know he cut Seale as severely as he did. After all, he did run away. So, my point is what Ebsary did worked, he was being robbed, his friend was being strangled, he used his only avenue of defense, the small knife that he had in his pocket, he used it fairly responsibly. Now, if he was a killer, if he was out to kill of maim or viciously murder somebody then why did he stick Marshall in the arm, if he was a killer, if he wanted to kill, wanted his kicks--killing robbers or something, why didn't he kill

Marshall too? He didn't, he just stuck him in the arm, all that was necessary in order to get him to release his friend MacNeil and then Marshall ran away. I'm suggesting to you again going back to one of my earlier points that just because Seale died doesn't mean that it wasn't self defense. I mean, nobody feels sorrier about Seale's death than I do. Well, I suppose his family feels sorrier, probably Mr. Ebsary and James MacNeil and Donald Marshall feel sorrier to because they (inaudible) feeling guilty about this for the last twelve years for one reason or another. Sure, Mr. Ebsary feels guilty, but wouldn't you, if you killed somebody even in a war or something, if you know you killed somebody even though it was in self defense, even though you had the right supposedly to do it, nevertheless I suggest to you that you would feel guilty about it. You heard Ebsary's tape recording, he was crying half way through the thing. On one hand he's saying, it was just an incident, it was nothing but an incident and then he is crying his eyes out two seconds later, I mean who is he trying to kid. Again, Ebsary is guilty to of making up part of the story to make himself appear, you know, more innocent, so is everybody. MacNeil, says he never did anything, he was just there, I don't know what was happening, I didn't do anything. Marshall was saying I wasn't armed, I wasn't going to hurt anybody and the point is that there is no way we are ever going to know with any certainty

what happened that night. We can only try to put together the pieces and figure out what possibly might have happened. There is more than one possibility, and there again going back to one of my earlier principles, that if there was more than one possibility than you have a duty as jurors to find in favour of the innocence of the accused, you have to give him the benefit of the doubt and surely in this case there is a doubt as to whether or not he was justified. It was obvious that he was being robbed, he was definitely a victim, there is no question about that, he only stuck Marshall in the arm, there is no question about that. If he wanted to kill everybody then he could have killed Marshall too, but he didn't all he did was stick in his arm to get rid of him. All he did to Seale was take a swing at him to get rid of him and it worked, he ran away and he didn't get beat up.

One other fact that we can agree on. I think you can take this from your own personal experience that robbery is a serious crime and that victims are sometimes seriously hurt or killed. I think that goes without saying that robbery victims are sometimes killed. Whose to say that Ebsary wouldn't be dead if he hadn't done what he did, what he appears to have done.

Another fact is that MacNeil, James MacNeil, was afraid of being hurt and later said, "Roy saved my life" or "you did a good job back there" there is no contradicting that, what did he mean by that, or does MacNeil (inaudible) is he changing

his position, did he at that time--was he in on it or something, that's what the Crown seems to be suggesting, that this was some kind of vicious plan by Ebsary to vigilante or something. Then was MacNeil in on it and is MacNeil now lying about his position in it. I'd say that that is not really reasonable. The basic facts remains that Ebsary was the victim here. He was walking through the park minding his own business. He didn't try to rob anybody.

Now, I think it's worth quoting that Roy Ebsary is a human being, he is not perfect and human beings act two ways--they act rationally and they instinctively and there is no stronger instinct than survival, that's the number one, everybody knows that. Perhaps you still have the feeling despite that all the years that have passed by, all the investigations and everything, and the evidence that you have heard that you perhaps you still have the feeling that you are not (inaudible) never heard the whole story. You have some justification for the feeling. Remember now, my learned friend said that the defence could have called these witnesses either mentioned by Marshall for instance, but the judge will tell you and there is no question about this, the burden is on the Crown Prosecutor to prove beyond a reasonable doubt. There is no burden on the Defense to prove anything, that is something that you

really have to keep in mind together with the presumption of innocence. I will tell you quite frankly, we didn't call any evidence because I wanted to be last. If I called I evidence, I would have had to speak to you first and the Prosecutor would have spoke to you after and I may not have had a chance to answer what he might have said.

I thought there was not sufficient evidence for a conviction and I wanted to have the last words as far as between me and the prosecutor. The burden is on him and it never shifts, to prove the guilt. Now, Marshall mentions that he was with a Gushue and Harris, two people, Gushue and Harris, right before this incident happened. You recall that Marshall says that there was this big conversation between him and Marshall for about twenty minutes or something before this whole incident happened and he said that Gushue and Harris were right there, you know, that's witnesses presumably. They weren't called and as I say it's not my responsibility to call them, it's his and he didn't call them, why? Now, Marshall says that he ran into Maynard Chant right after the stabbing incident and he and Chant went to (inaudible) now, why wasn't Maynard Chant called. Marshall says that he went for help, but there is not one centilla of evidence to support that. We have the arrival of the ambulance, it was Constable Mroz--it was Constable Mroz justified that he called the ambulance. So, just because Marshall says he went and called the ambulance doesn't necessarily mean that he did. I mean I wouldn't

believe anything that Marshall said unless it corroborated by about five other witnesses, given his past track record.

Another point is Marshall that he was concerned about his friend and trying to get help. Again, Constable Mroz testifies that when he saw Seale lying on the street, he later saw Marshall two to three hundred feet away from his fallen friend. Now, if you had a friend--I think Mr. Ebsary says something about this in his tape recording--if you had a friend, would be two or three hundred feet away or would you be there trying to do something. If you were also an innocent victim, would you be hiding under the tree. After all, he couldn't very well run away, because he ran into Maynard Chant because Maynard Chant knew that Marshall was running from the scene of the stabbing, he couldn't very leave, could he. He was in somewhat of a dilemma trying to figure out what to do next. Now, in the nineteen seventy-one Marshall trial, Chief MacIntyre said there were two eye witnesses Chant and (inaudible) why weren't they called. Again, (inaudible) quite frankly wanted to have the last word here.

My learned friend gives a very convincing argument but one of the things that he does is that he leaves out that don't support this thing. For instance, he was talking about Mary Ebsary and some of the things that she did. The only thing that he left out when he was referring to Mary Ebsary was the part where Mary Ebsary says that MacNeil said that Roy (inaudible) my wife back

there. Now, my point is that there is a lot of evidence and you have to consider all of the evidence and you have to resolve any doubt that you have in favour of the innocence of the accused.

Now, how dark was it that night in Wentworth Park at midnight? Have you been there recently, have you ever been to Wentworth Park at night? I have on several times, I keep thinking about this case. You know, it's dark compared to Charlotte Street, but you can see clearly now.

By the Court: Don't give evidence now Mr. Wintermans.

As Constable Mroz, Ebsary and MacNeil all said, it was much darker back in nineteen seventy-one than it is today. According to Constable Mroz, after this incident happened, at least at some point after, new light poles with new kinds of lights, lower and brighter were installed, but now you can see almost all the park at night, but back then it was total darkness unless you were under a very few one of the few street lights. Now, if you were a robber and you decided to rob someone, where would a good place be back in nineteen seventy-one? Brightly lite street? No, how about a dark place, late at night, hardly anyone is walking the streets. If you were in the park, would you roll someone under one of the few light poles or would you wait in the darkness where you could see people coming without being seen. Would you wait to allow larger, younger victims

Mr. Wintermans' Address to Jury

pass, wait for the perfect targets, little old man and an average sized young man. Marshall says to Seale, you take the little old drunk, I've rolled a few before, I'll take the big guy. Marshall is now six foot one, he says he was only five foot ten when he was seventeen or eighteen, I'll leave it up to your own past experience. I'll find it difficult to imagine a person growing three inches after he is eighteen years old, but there again, I suggest to you, that all of Marshall's testimony is designed to play down his own guilt and I don't believe that he was only five foot ten. Who cares, five foot ten is a lot bigger than Ebsary was, but nevertheless, he was a big, young guy and I don't believe that they would have been standing under a light pole when this incident occurred. Obviously, they would have been somewhere in the dark, in the shadows, waiting for their prey and given that, it's only logical, how could Ebsary know what he was up against. He didn't know them, they were big, you could see that they were big. Look at Mr. Ebsary, I think it's fair to say that he's a little old man. His wife said that he was about fifty-nine when this incident happened, so that puts him over seventy now, seventy-one. It appears to be a retired veteran, had consumed a fairly substantial quantity of alcohol immediately before the incident. I think if you look at all the facts and all the evidence, there is a kind of a thread that goes through that Mr. Ebsary appears to be a person who drinks a

fair amount. For instance, Detective Carroll testified that in nineteen eighty-two when he took the tape recorded statement at noon time that Ebsary appeared to have had a couple of drinks of wine--that's in the morning, we are talking about drinking in the morning. Now, Carroll goes on to say that he had contact with Ebsary on previous times and he was relatively sober on the day that tape recording was taken, but the inference is that Ebsary has been at least hitting the bottle fairly heavily since nineteen seventy-one, at least he was in nineteen eighty-two, which is consistent with his probable feelings of guilt and confusion and disbelief and tries to rationalize is way out of this terrible mess. He would have obviously have mixed feelings about Marshall being in jail. Perhaps, he would think he had it coming with the robbery, he tried to rob me, now he is in jail, why should I do anything. As time goes by, eleven years, you heard the cheers from Ebsary, eleven years, you know that any normal person, even if he was totally innocent of doing anything wrong in law, in other words, even if he was acting in self defense and is going to be found not guilty, even then a person does feel guilty about having taken a human life and is going to feel guilty about another person spending all his time in jail. So, he suffered, god knows, he suffered, eveyone suffered MacNeil suffered, Marshall suffered, Seale's family have suffered. I guess it comes down to another question again, who

was the victim and who wasn't in respect to Ebsary's statement "thugs become heroes and honest men become what". In Ebsary's statement he asked Corporal Carroll, "Am I losing my marbles?" He is obviously concerned about his own sanity at that stage.

Now, another thing that concerns me about you as jurors, although you have been carefully picked and everything, you promised not to be prejudice or taking any irrelevant considerations into account, one thing that concerns me is that Mr. Ebsary is an older man than you and smaller than some of you, you might make the mistake of putting yourself, as you now are, in the position that Ebsary found himself that night. Some of you are fairly big sized, strong probably able to take a couple of punches and still be able to get up and brush yourself off and pound the guy a couple of times, you know. But, we are talking about a sixty year old man who is five foot two and a half and who had a few drinks and was walking through the door. We are not talking about young, strong men or young strong women, and I think it's only fair that you try to imagine what he must have felt. Try to imagine what it's like to be a little old man in the park. As I said, I suggest that because of what was happening to MacNeil and because of Seale was saying and where he was and the circumstances that Ebsary had every reason to fear and given his past experience he said that he had been rolled before, beaten up before, when

he didn't do anything, I suggest that he had every reason to think that he might be seriously hurt, at least, if not killed. That's the first requirement on self defense, did he have reasonable grounds to think that he was going to be seriously hurt. Seriously hurt doesn't mean, you know, that he was either stabbed or something like that, but (inaudible) was adequate. It was very obvious that he did have reasonable grounds to fear for his safety, I mean look what was happening to Mr. MacNeil, he was being strangled he thought, and secondly did he have any other alternate method of preserving himself from being beaten up. This little old man in the dark with the bigger person right in front of him and his friend being strangled near by. What else could he have done? He could have run away, maybe, probably wouldn't have gotten very far and he could have taken a swing a punch or a kick but he probably would have been beaten to a pulp if he would have tried that. So, there was no other way and again, I emphasize that the law does not require of a person that they allow themselves to be beaten up by thugs without doing something about it. After all, Ebsary was the victim here, he wasn't the agressor, they were the agressors, Ebsary was the victim, he was walking through the park minding his own business and on his way. Now, the tables seem to be turned by some strange quirk. I suggest to you that if the whole truth had come out back in nineteen seventy-one that Ebsary very likely would not have been on trial, but that is something we'll never

know, of course.

Another point that I would like for you to consider very seriously in your past experience you are probably aware of the fate of an older person recently who was killed and in Glace Bay and I wonder if had done something about.

By the Court: Just a minute Mr. Wintermans, we are dealing with the evidence before this court, nothing else.

I thought we were dealing with the question of justifiable force and self defense and if an old man is being robbed than clearly he as a right to use force before he himself is killed and if that person doesn't use force and is killed that is a very unfortunate thing. If he does and kills his attacker and then is he a criminal.

Just read section thirty-four (two) of the Criminal Code, which is the self defense section that I think we are confirmed with here, "Everyone who is unlawfully assaulted and causes death or grievous bodily harm in repelling the assault is justified if, he causes it under reasonable apprehension of death or grievous bodily harm (inaudible) which the assault was reasonably made or with which the assailaint pursues his purposes and he believes on reasonable and probable grounds that he cannot otherwise preserve himself from death or grievous bodily harm." That's what (inaudible) the two points. Now, did he have reasonable grounds to think he was in danger of being beaten up and was there any other avenue of self defense

that he could have used under the circumstances. I say to you that the answers to those questions are very obvious. It's an obvious case of self defense and despite the complicated story that the my learned friend the prosecutor suggested to you, that there are two, at least two ways of looking at this incident and it is your duty as a matter to law, the test is a subjective one, that means that you have to try and imagine what Roy Ebsary felt, not what a reasonable man would felt, what Roy Ebsary would have felt, a five foot two and a half sixty year old man, what did he think was happening to himself. Did he think that he was going to be hurt and did he have any other avenue of escape. Now, that's the test that you really have to apply here. I just cannot imagine that a reasonable jury could view that in any other way than self defense. Just remember one thing, who was the victim in this case, who started it? If you have a doubt, you have recall in favour of the accused and I won't waste any more of your time. Perhaps I'm just repeating my self, but I just want you to really consider the presumption of innocence here and the amount of time that has passed between then and now and the possibility, I suggest, of knowing with any real certainly what happened back then. I mean, how could we know what happend. So, if you have a doubt, resolve it in favour of the accused. This case has been going on long enough, it should be put to rest once and for all, and I leave that with you. Thank you very much.

By the Court: Thank you Mr. Wintermans.

Justice Rogers' Charge to Jury

Members of the Jury, you have been chosen to decide whether the accused, Roy Ebsary, did or did not commit the offence of manslaughter, with which he is charged here today. By the laws of our country you are created judges to determine the guilt or innocence of the accused. Your responsibility as judges is a heavy one and not to be undertaken lightly or contritiously but seriously and courageously, having in mind your duty to the state and to the community.

Now, one of the functions of the state is protect the life and property and liberty of all it's citizens. Crime must be suppressed and when detected the defendant must be dealt with according to law. Your responsiblity and duty to the state and to your community is to ascertain in this case whether a crime has been committed and, if so, whether the accused, Roy Ebsary, committed it. Needless to say, you also hold a high duty to the accused to see that he is not improperly convicted. This may be the first time some of you sat on a jury so I will to the best of my ability explain to you all of the relevant aspects of the trial by jury and with particular reference to the charge against the accused here.

My first duty is to explain to you the function of the judge and jury. The judge presiding at a trial by

Justice Rogers' Charge to Jury

judge with a jury is the sole arbiter of the law. It is my duty to advise you of the law which is applicable in this case and you must accept my advice in that regard.

On the other hand, the jury, the jury, you people, are the sole arbiters of the facts and it is your duty to decide what the facts are in this case from the evidence that you have heard.

During my remarks I may unconciously express my opinion may express my opinion with regard to the evidence which has been given by a witness and indicate what I think should be believed. If I do that I want to emphasize that you are in no way bound by my opinion as far as the facts are concerned. The evidence upon which I may comment may have left in your mind a very different impression from the impression that is left in my mind. It is your duty to place your own interpretation upon the evidence. It is your duty to weight the evidence and to come to your own conclusions about what you believe and what you don't believe. It is your duty to exercise the same independence of judgement in weighing my comments as your entitled to exercise in weighing the testimony of the witnesses and the addresses of counsel.

It's the practice of the court immediately after you retire to invite counsel to make submissions on any matter in which they request I give further instructions to you. If I accept any such submissions and recall you from the jury room, the danger, of course, arises that you may

be inclined to place some undue emphasis on what I may say briefly to you in response to those counsels observations. I trust that you do not do that, if that occasion arises. I am entitled with the assistance of counsel and indeed it is possible as you can well understand that my initial charge to you could be improved upon as a result of that assistance. So, consider what I say, if I should recall you, as part of what I'm saying now had I thought of it. In this connection should you yourselves have a question or questions, the answers to which would be of assistance to you, put the questions in writing and give it to them, the attending constable, who will transmit it to me to deal with.

Now, you've been separated overnight and during lunch hours and I hope that you obeyed my initial instruction and did not discuss the case with anybody. If you have heard or read or seen anything about the case outside the courtroom, it is your duty to clear it from your minds. You must decide whether the accused is or is not guilty solely from the evidence you heard from this courtroom during the trial of the accused. In approaching the case you must be entirely impartial when considering your verdict. You must banish from you mind again all prejudices and preconceived notions, you must decide on the guilt or the innocence of the accused without any fear, without favour, and without prejudice of any kind in accordance with the oath that each of you has taken.

Justice Rogers' Charge to Jury

I will now deal with what has already been referred to as the presumption of innocence. That presumption is driven very deep into the fabric of our law. Simply put it means an accused person is presumed to be innocent until the Crown has satisfied you, all of you, each twelve of you. An accused person, I'm sorry -- to be satisfied beyond a reasonable doubt of his guilt. It is a presumption that remains with the accused from the beginning of the case til the end and that presumption only ceases to apply, if having considered all of the evidence you are satisfied that the accused is guilty beyond a reasonable doubt.

I shall now deal with the question of the onus or burden of proof. Again, which has been spoken to both by Mr. Edwards or Mr. Wintermans. The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts, there is no burden on an accused person to prove his innocence. The Crown must prove beyond a reasonable doubt that an accused person is guilty of the offense of which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused in this case committed the offense, manslaughter, with which he is charged, it is your duty to give the accused the benefit of that doubt and find him not guilty. In other words, if after considering all of the evidence and the arguments of counsel and my charge, you come to the conclusion that the Crown has failed to prove

Justice Rogers' Charge to Jury

to your satisfaction, beyond a reasonable doubt, that the accused committed the offense with which he is charged, it is your duty to give the accused the benefit of the doubt and find him not guilty.

Now, what does a reasonable doubt mean. Well reasonable doubt is an hones doubt, a real doubt, not an imaginary doubt conjured up by a juror to escape his or her responsibility. It must be a doubt which prevents a juror from saying I am morally certain, morally certain that the accused committed the offense for which he is charged.

My next subject I am going to speak to you about is the credibility or truthfulness of witnesses. Witnesses, it has already been mentioned to you and I think you already know in any event, see and hear things differently. Discrepancies do not necessarily mean the testimony should be discredited. Discrepancies in trivial matters may be and usually are unimportant. You are not obliged to accept everything a witness says or conversely if you feel you can't accept part of the witnesses testimony you are not obliged to reject the whole of it. You are free to form conclusions as to whether you will accept part of the witnesses evidence, all of it, or none of it at all.

Now, I've been speaking to you of mere discrepancies which can easily and innocently occur. A deliberate falsehood is an entirely different matter. It is always serious and the well taint a witnesses' entire testimony. When weighing testimony, therefore, in addition to those matters

to which I have already referred, it is proper for you to consider the human factors which may affect the giving of perfectly honest testimony. These factors may suggest themselves to your minds by such questions as: Did the witness have any particular reason to assist him in recalling the precise event that he or she has attempted to describe? or Could the witness because of the relevant unimportance of the event at the time it occurred be easily and understandibly an error as to detail or even the day an time of the occurrence and as we all know with which we are considering today, it occurred way back in nineteen seventy-one?

What real opportunity did the witness have to observe the event described? Has the witness any interest in the outcome of the trial or any motive for either favouring or injuring the accused or is the witness entirely independent? What is the apparent memory capacity of the witness? What was the appearance and demeanour of the witness while testifying? Was the witness forthright and responsive to questions or was he evasive, hesitant or argumentive with counsel? Is the witnesses' testimony reasonable and consistent within itself and the uncontradicted facts? To put it in the vernacular really, how does that witnesses' evidence stack up in your view? In summary, you will use your everyday experience and good common sense in

Justice Rogers' Charge to Jury

judging people in what they have to say. If you have a reasonable doubt as to the accuracy of the evidence given by a witness or the weight you should give to such evidence, you must give the benefit of that doubt to the accused and not to the Crown.

Well, in this case there have been instances where it has been pointed out to you contradicting statements have been made by witnesses. I think I should refer you now to that kind of evidence and what importance and attention you should attach to it. The fact that a witness has on a prior occasion made a statement or statements that are contradictory of his or her evidence at this trial goes to the credibility or truthfulness of the witness. The testimony of a witness may be discredited in whole or in part by showing that he or she previously made statements which are inconsistent with his or her present testimony. I want to make it quite clear that such statements cannot be used to prove the truth of the facts to which the relate; that is, the previous statement or the previous situation where evidence was given. Unless, in your opinion, the witness has adopted that part of the statement as being true. It is for you to decide, therefore, which parts, if any, of his statements have been adopted by the witness as truth at this trial, and the weight be given to those parts. Any parts of the statement which are not adopted by the witness as being true cannot be relied upon by you as proof of the

facts stated. You can only use those parts in deciding the truthfulness of the witnesses. You are the sole judges, if there has been a contradiction of an earlier statement by the witness and the effect, if any, of such contradiction on the witnesses' credibilty.

Now, in the case of Donald Marshall, of course, there were a number of inconsistent statements. I don't think I'll go through them. Mr. Edwards pointed them out to you specifically and I think they were also referred to by Mr. Wintermans but particularly the evidence given here by Marshall was to the effect that he and Seale were out to bum money, that he had earlier bummed money in the park but in the statement that Marshall gave when he was in Dorchester a year or so ago, he talked about rolling and robbing and that's an inconsistency. You have to attach what importance you think you should to it.

James MacNeil was inconsistent in the evidence that he gave here and evidence given at the Court of Appeal with respect to arriving and leaving the Tavern. Also, at the Appeal Court he said he got a glimpse of the knife in the park, now he said he did not see the knife at that time. But, he also said now that the knife looked like a dagger. There were discrepancies with the statement given to the police on February twenty-eighth, nineteen eighty-two and some of those discrepancies have probably been clear to you and they've already been pointed out to you by counsel.

Doctor Naqvi was even inconsistent to some degree. As to the time of death, at this trial he categorically said based upon his notes that the time of death of eight-o-five in the evening, whereas at a previous preliminary hearing he gave in his evidence that the time of death was seven thirty. He explained a reason for that at this time, but there is an inconsistency in those statements that you will have to assess.

Now, I referred to some of the evidence in this case to illustrate what I've said; however, these are merely illustrations to assist you and there may be other contradictions that have occurred and that I will not refer to but in no doubt will be clear in your mind.

Another matter that I should speak to you about before I get into the charge itself is expert evidence. In this particular case there is one expert--Doctor Naqvi, who spoke, and was qualified, as a surgeon and medical practioner of some long standing and he was qualified to give cause of death in evidence at this trial. Ordinarily, witnesses are permitted to give evidence only if facts that they themselves have seen, heard or otherwise perceived with their senses. They are not allowed to give their opinions when testifying in court. However, duly qualifed experts are permitted to give opinions on matters of controversy at trial, as Doctor Naqvi was.

Justice Rogers' Charge to Jury

To assist you in deciding the issues in this trial you may consider such opinions and the reasons given for them. But, just because they are given by experts, you are not bound to accept them -- if, in your judgement, they are unsound.

Dr. Naqvi tended the victim Seale throughout--after he was admitted to the hospital. He looked after him throughout the day until he died around eight o'clock in the evening. He said that death was caused by massive hemorrhaging, abdominal injury and shock, that Seale the victim was given twenty-seven pints of blood which amounted to almost a total blood replacement.

I will now deal with the offence with which is accused is charged. The particulars of the offence and where and when it was alleged to have been committed are set forth in the indictment that I have which you will take with you to the jury room, That indictment reads as follows, you've already heard it more than once I believe: The jurors for her Majesty the Queen present that Roy Newman Ebsary, at or near Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the twenty-eighth day of May, nineteen seventy-one did unlawfully kill Sandford and in brackets (Sandy) Seale by stabbing him and did thereby commit manslaughter contrary to Section Two Seventeen of the Criminal Code of Canada.

Justice Rogers' Charge to Jury

Under the Criminal Code a person commits homicide when directly or indirectly by any means causes the death of a human being. Now, there is evidence here that Sandy Seale, a victim, died as a result of, I think it's uncontrovertivle, a stab wound. A homicide is either culpable or non-culpable. The culpable simply means "blameworthy". Now, culpable homicide is the blameworthy killing of a human being. If homicide is not culpable, it is not an offense at all. Let me give you an example of non-culpable homicide is. If a surgeon in the course of an operation using all proper care and skill causes the death of a patient, that is non-culpable homicide. Another example would be where a motorist driving slowing a carefully strikes and kills a child which has darted out suddenly from a parked truck. Both the surgeon and the motorist have caused a death of a human being and so have committed homicide but in neither case is the killing culpable or claim worthy--so, it's not an offense.

A person is culpable homicide when he causes the death of a human being by means of an unlawful act or by criminal negligence. Just a word about the word "cause" in this context -- Section Two-O-Eight of the Criminal Code says, "where a person causes to a human being a bodily injury, that is of itself, of a dangerous nature and from which death results, he causes the

death to that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith." Therefore, it does not matter whether the treatment at the City Hospital was proper or improper so long as it was applied in good faith on the subject it (inaudible). You've heard the evidence of Doctor Naqvi in that regard and I think it would be fair to say that it would appear from that evidence that he did everything possible to save the boy's life. In this case the Crown contends that the accused, Mr. Roy Ebsary caused the death of the deceased, by the unlawful act of assaulting him. Now, assault is committed when a person directly or indirectly applies force to the person of another without his consent or attempts or threatens by an act or gesture to apply force to the person of another if he has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose. Thus, an assault may consist of the intentional application of force such as a blow or a punch without consent or threats of the application of force by acts or gestures under certain circumstances and an assault is an unlawful act. If you are satisfied beyond a reasonable doubt that the accused caused the death of Seale by knifing him and the deceased did not consent, the deceased being Sandy Seale, did not consent to the knifing, which would be a difficult thing to contemplate in the

first instance then the knifing of the accused constituted an assault which was an unlawful act causing the death of Sandy Seale, the accused thus committed culpable homicide because he caused the death of the deceased by an unlawful act. Unless, of course, the Crown has failed to (inaudible) self defense, which is the principle defense in this case as been put to you by Mr. Wintermans. Culpable homicide that is not murder is called manslaughter. The accused has not been charged with murder because it's not suggested that he intended to kill Sandly Seale or to cause him bodily harm which he knew was likely to cause death and was reckless whether death ensued or not. Such an intent is a necessary part of murder. Murder is intentional killing. But, a person who commits manslaughter when he causes the death of another by an unlawful act, even though he did not intend to cause death or bodily harm that he knew was likely to cause death. You must be satisfied, beyond a reasonable doubt, that the accused intentionally assaulted Sandy Seale-- I'm sorry, intended to assault the--you must be satisfied beyond a reasonable doubt that the accused intentionally assaulted Sandy Seale, but the Crown does not have to prove that the accused intended to cause the death of Seale or to cause him bodily harm, that the accused knew was likely to cause death. If you are satisfied, beyond a reasonable doubt, that the death of Sandy Seale was caused

by the assault of the accused, an unlawful act, then you will find the accused guilty of manslaughter. If, however, you are satisfied that the accused did not act in self defense, as I will be describing it to you.

Now, with respect to self defense, it's been raised, very clearly raised as the principle defense, the only real defense I suggest in this case and it has been eloquently put to you by Mr. Wintermans. That being so then even if it has been shown that the accused would otherwise be guilty for he can be convicted, you must also be satisfied to the exclusion of any reasonable doubt that he was not acting in self defense according to law. If you conclude that the accused did kill, or in fact harm in selfe defense, as I shall define and explain it to you, or if there be any reasonable doubt in your minds to whether he did or did not, then in either case you must acquit the accused.

The term self defense is often commonly understood, as any measure employed to preserve one's self from threaten or actual physical attack regardless of the consequences of such employment or to the extent of such means. This, however, is not the legal meaning of the term and, of course, it is with that legal significance that you and I are concerned here. In law, self defense is not a loose term, it is defined by the Criminal Code and the conditions under which it may prevail are in that Code rigidly laid down. Any defense which rests on

Justice Rogers' Charge to Jury

the theory of self defense must come strictly within the provisions of the Criminal Code. There are a number of different definitions in the Code which apply in different factual situations. As I do not know what view you will take of the facts as you determine them to be from the evidence you heard, I must consider with you all of the different definitions which might apply to the several different factual situations which I think you might reach on the evidence that you've heard.

Now, the first (inaudible) situation is where it may be that the accused has been unlawfully assaulted and does not use force with intent to cause death or grievous bodily harm. You should first consider the application of this case, in this case of Section Thirty-four one of the Criminal Code which reads, "everyone who is unlawfully assaulted without having prevoked the assault, is justified in repelling force, by force if the for he uses is not intended to cause death or grievous bodily harm, when there is no more than is necessary to enable him to defend himself". So, let's consider the evidence in this case in relation to each of the elements mentioned in the section I've just read. First, was the accused assaulted by Sandy Seale without having provoked that assault? Generally speaking a person commits an assault when he applies force intentionally

to the person of another, directly or indirectly, without consent. Even when no force isn't applied, it is an assault to attempt or threaten by an act or gesture to apply force to the person of another. If he has or causes the other to believe upon reasonable grounds that he has the present ability to effect it's purpose. Now, just with respect to that I draw you attention to the evidence that came out in which Sandy Seale was heard to say, "dig man" when facing the accused Ebsary -- that has been said to mean, give me what you got or else. That is what is argued by the Defense that that meant and it indicated the situation which would cause apprehension in Mr. Ebsary.

Secondly, was the assault provoked by the accused? Provocation includes for this purpose, provocation by blows, words or gestures. My recollection of the evidence does not seem to me that there is any evidence that Mr. Ebsary provoked the assault, if you find, in fact, that the assault did occur -- there doesn't seem to be that kind of evidence for the court.

Next, was the force used by the accused not intended to cause death or grievous bodily harm? Was Seale's injury caused by the accused Ebsary and, if so, was it done intentionally? The Crown says that it was, the Defense says no, that Mr. Ebsary had to respond to the attack, and the words were heard said by Ebsary, I've got something for you. Now, it's for you to decide and

determine what those means and what (inaudible) should be attached to them and whether or not from that you can infer an intention or no intention to cause death or grievous bodily.

Finally, was the force used by the accused no more than was necessary to enable him to defend himself. In considering this question you will look at the nature of the assault by Seale, the amount of force used by him and the risk of the accused that was involved in such force. You will then consider whether the force used by the accused was no more than that which a reasonable man would regard as necessary to protect himself. Those words are a little different than the interpretation put to you by the Defense as I understood it. You will then consider whether the force used by the accused was no more than that which a reasonalbe man would regard as necessary to protect himself. The test is purely an objective one to be applied in light of what you know the facts to have been. The conduct of the accused, Roy Ebsary, in light of the actual facts was no more than that which a reasonable man would regard as necessary for his protection and, ~~of course~~, this requirement of self defense in law will have been met. It also would have been met, however, if the accused was genuinely mistaken as to the facts and did no more than a reasonable man would have regarded as necessary to defend himself on the facts as he genuinely believed them to be. Deciding

Justice Rogers' Charge to Jury

whether the force used by the accused was more than was necessary in self defense, you must bear in mind that a person defending himself against an attack, reasonably apprehended cannot be expected to weigh to a nicety the exact measure of necessary defense of action. That has already been explained to you, at least by Mr. Wintermans, perhaps by Mr. Edwards.

Now, with respect to the evidence as to whether an amount of force used was no more than necessary, we have the words "dig man" uttered in a darkened area of the reasonably deserted park resulting in a -- almost immediately thereafter, a statement something to the affect, I'll give you everything I got, a knife wound to the abdomen by the accused to Seale. Now, was this more than was necessary, was the accused entitled to consider that Seale was armed, the evidence is that Seale's arms were at his side. The Defense says as I understand it, that it was spur of the moment, necessary response to the danger he apprehended and says that what force was used was no more than was necessary.

I emphasize again, that there is no burden on the accused to establish self defense, instead the burden is on the Crown to ~~prove~~ beyond a reasonable doubt that the accused did not act in self defense as I have explained it to be, that means you must acquit the accused unless you are satisfied, beyond a reasonable doubt, that there was not an unlawful and unprovoked assault on or accused, or that

the accused intended to cause the death or grievous bodily harm or that the accused used more force than was necessary to enable him to defend himself unless it was no more than a reasonable would have considered necessary on the facts which the accused genuinely believe to exist. If the Crown has proved any one or more of these circumstances than self defense under this sub-section is not available to the accused as a defense.

If you have any reasonable doubt as to whether the accused acted in self defense, you will find the accused not guilty of manslaughter because the Crown has failed to prove that the homicide was culpable. Generally speaking, a person commits an assault -- first of all I should say--here again, you must first consider whether the accused was unlawfully assaulted by Mr. Seale. Generally speaking, a person commits an assault when he applies force as I said before intentionally to another directly or indirectly without consent of that person even when no force is applied as apparently there was no force applied here. It is an assault to attempt or threaten by act or gesture to apply force to the person of another if he has or causes the other to believe upon reasonable grounds that he has the present ability to affect his purpose. I have already reviewed that evidence and it's been reviewed to you as well by both counsel.

You next must consider whether the accused cause the death of Seale under reasonable apprehension of death

or grievous bodily harm and believed, unreasonable and probable grounds, that he could no otherwise protect himself from death or grievous bodily harm. Here the question is not whether the accused was actually in danger of death or grievous bodily harm and whether the causing of death or grievous bodily harm by him was in fact necessary to preserve himself from death or grievous bodily harm, but whether he caused death or grievous bodily harm but whether he caused death or reasonable bodily harm under a reasonable apprehens of death or grievous bodily harm and he believed on reasonab and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm. The accused may have been mistaken as to the imminence of death or grievous bodily harm or as to the amount of force necessary to preserve himself from harm or death. But, if his apprehension of death or grievous bodily harm was reasonable and I emphasize the word reasonable and there was reasonable and probable grounds for his belief that he could not otherwise preserve himself from death or grievous bodily harm then his use of force was justified as self defense.

Now, I have reviewed most of the relevant evidence, I think, and I'll be going through the evidence again, briefly. Considering under Section thirty-four one whether the accuse more force than was necessary to enable him to defend himse Under Section thirty-four two, however, the question is not whether the accused used no more force than was necessar

Justice Rogers' Charge to Jury

for his Defense, but whether he caused death or grievous bodily harm and believed unreasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm. Now, in deciding whether the accused believed unreasonable and probable grounds, that he would not otherwise preserve himself from death or grievous bodily harm you must bear in mind that a person defending earlier, as I've noted earlier, defending himself against an attack, reasonably apprehended cannot be expected to weight to a nicety, as it said, the exact measure of defense of action that should be taken. I emphasize again that there is no burden on the accused to establish self defense, instead the burden is on the Crown to prove beyond a reasonable doubt that the accused did not act in self defense as I've explained it. If you are satisfied, beyond a reasonable doubt, that the accused was not unlawfully assaulted or was not acting under reasonable apprehension of death or grievous bodily harm from the violence with which Seale's assault was originally made or with which he pursued his purpose. The defense of self defense under Section thirty-four two fails, likewise, it fails if you are satisfied beyond a reasonable doubt that the accused did not believe unreasonable and probable grounds that he could not preserve himself from death or grievous bodily harm accept by stabbing Mr. Seale.

Justice Rogers' Charge to Jury

The law of self defense proceeds from necessity the instinctive and (inaudible) of necessity for self preservation under no circumstances may it be used as cloak for retalliation or revenge or satisfying one's own general view of how he should conduct himself. Now, before I get into summarizing the evidence briefly, I earlier asked both counsel--counsel for the Crown and counsel for the Defense--to supply me in very brief form the the position of the Crown and similarly the position or theory of the Defense and I have that and in summary form the position of the Crown is this:

That on the night in question Donald Marshall and the victim, Sandy Seale, intended to roll the accused, Ebsary, and his companion, James MacNeil, and to affect this purpose Marshall grabbed the bigger man, MacNeil, in order to subdue him and prevent him from interfering with Seale and at the same time Seale demanded money from the accused, Ebsary, with the words "dig man" it was at this moment that Ebsary said, "I've got something for you" and with a sweepint upward motion plunged a fixed blade, knife, inot Seale's abdomen causing an injury from which he died some hours later. It's the Crown's position that Roy Ebsary intended to cause death and grievous bodily harm to Seale and went far beyond the amount of force the law permits under such circumstances. Now, the postion of the Defense is this:

That Roy Ebsary, the accused, and James MacNeil were

the victims of a robbery attempt by Marshall and Seale and therefore Ebsary was justified in using force in self defense. Because of the time of night, the darkness, the size of the attacking strangers, the inability of MacNeil to move, the fact -- I'm sorry -- the age and size of Ebsary and Ebsary's past experience in being robbed and beaten up. Ebsary was under a reasonable apprehension of at least grievous bodily harm and two, Ebsary had no other available means of preserving himself from grievous bodily harm. The fact that Ebsary only stabbed Marshall in the arm, as the Defense indicates that Ebsary's intent was not to kill anyone merely to preserve himself and MacNeil from harm.

Now, it is one of the functions of a presiding judge in matters where a jury is involved to review briefly as possible and to comment on the evidence that has come out at the trial and I will do so now. First witness you will recall, Donald Marshall, Junior. At the time of the killing of Sandy Seale in May of nineteen seventy-one he was seventeen, about five foot ten and weighing one hundred and forty-five pounds and according to his evidence he said that Seale was a little shorter on May twenty-eighth, nineteen seventy-one Marshall met Sandy Seale whom he had known to some degree for awhile he thinks between eleven thirty and twelve midnight near the bandshell in Wentworth Park, Marshall asked Seale if he wanted to make some money, he said it was his

intention to make some money, he said he use to bum money in the park, Seale agreed to go along with it. Following this Marshall said they were hailed by two men on Crescent Street who asked them for a cigarette. About the same time they met and talked with two friends. Eventually they met the two men--one an older man and one a younger man. The older one being between fifty-five and sixty and the other one approximately thirty. The older man being about five foot eight or five foot nine and about a hundred and seventy-five pounds. The olderman was dressed in a navy blue coat as though for winter. They talked, according to Marshall, for half an hour. The older man asked them to his home for a drink. Marshall refused, the men started to walk away when Marshall called them back. When they returned the older man went to Seale and Marshall and the older man said, "do you want everything I have?" then the younger man and he started to grab one another and he heard no words from Seale. He described the older man was Ebsary and he said that he and Seale were standing beside one another. He saw Ebsary make a motion with his right arm towards Seale, but he did not see a knife in his hands. He heard Seale moan and bend over to his knees. Marshall then let go of the younger man whom he described as Jimmy MacNeil. Ebsary then came at him and swung at him. As a result he received a three and a half

cut on his forearm. He then ran away for help returning later to see Seale lying on the ground, he said the others had gone. Shortly after he was picked up by the police and taken to the hospital and he was charged with murder about a week later.

On March ninth, of the past year, nineteen eighty-two, Donald Marshall had given a sworn statement to Staff Sergeant Wheaten while at Dorchester. Marshall agreed that the statement was voluntarily given and was indeed his statement. Three sections of that statement were put to him as being inconsistent with his present testimony that he was out to bum money. Now, those particular references have been very adequately put to you by counsel and have already been referred to by me that they were quite inconsistent with his present evidence with respect to having intention to bum money rather than to roll somebody and rob people.

On Friday last, Marshall said he could not explain the discrepancies. Under cross-examination he admitted to having been convicted of a criminal offense which he later agreed, a minor theft offense, and certain offenses under the Liquor Control Act, not serious ones. When advised that Ebsary was actually five foot two inches, and not five foot eight, he said that was perhaps because Ebsary was older man and had shrunk. He said he couldn't remember whether he grabbed MacNeil or if

Justice Rogers' Charge to Jury

MacNeil grabbed him. He was referred to several passages of his evidence, given at his preliminary hearing which were contradictory to his present evidence. His explanation generally was that what he said then was true and what he said now was true, it was just a use of different words. He said he was not planning on hurting anybody, in fact, he said rolling in fact never occurred.

Now, James MacNeil, known as Jimmy MacNeil, is the next witness. At the time of the incident he was about twenty-five or twenty-six. He met Ebsary, whom he had known for a few months, at the State Tavern where MacNeil said that he had seven or eight pints of beer over a two or three hour period and Ebsary he said/ probably had about the same amount. They left going towards Ebsary's home through Wentworth Park, up on to Crescent Street where they were approached. He said firstly that they were approached from the front by Seale and Marshall. He said that Marshall grabbed him put his arm up behind his back, he said he froze. At that time, Seale was facing Ebsary, he heard Seale tell Ebsary "dig man" and figured it was a robbery. He had no money himself, he became shook up he said and stayed right where he was. He then heard Ebsary say, "I've got something for you" at this time Seale at his hands at his sides, he saw Ebsary's right hand come out of his right pocket with a sweeping, upward motion and made contact

with Seale's abdomen area. He did not see any knife but he saw blood come immediately from Seale and heard Seale scream. He saw Seale run across the street toward the park and he said he believed that Ebsary made a swing for Marshall with a downward thrust with his right arm. Again, he said that he himself was frozen, Marshall then disappeared and he doesn't know in which direction. He and Ebsary then went to Ebsary's home taking about ten minutes he said where he saw Ebsary in the kitchen cleaning a brown handled knife with blood under the sink tap but he can't remember the length of the blade. He said he stayed about an hour and then left. He returned to Ebsary's house either the next day or the day after that. After he had heard that Seale had died, Ebsary was in bed. MacNeil told him tnt he didn't have to kill him and Ebsary said it was self defense, said they both have families and shouldn't get them into trouble or necessitate them going to court. MacNeil told Ebsary that he should have given Seale his money and that this wouldn't have happened. He said Seale was not armed. He said he stayed about an hour and then left, never to return to the house again. After Marshall's conversation, I'm sorry, after Marshall's conviction, MacNeil said he couldn't sleep and he walked around aimlessly so he went to the police and gave them a statement which he said he thinks they didn't believe. He said he was not drunk but he was certainly shook up

and that is on the night of the incident. MacNeil was cross examined at some length. He said that he feels that people are not prejudiced against him, it's hard to get a job, the whole matter has caused him emotional problems and he has to go to a doctor and he had to go to a doctor last year for these emotional problems. The doctor prescribed a type of valium which he takes once a day but only when, I gather, he's under pressure, he says when he is working he doesn't have to take them. He was reminded of a discrepancy between his evidence of the time he arrived at the tavern between that given here and that given before the Court of Appeal that's six or seven o'clock in one case and eight in another. He said it was eight o'clock when he arrived at the Appeal Court. You see, he said that he really, he said all he really knows is he arrived in the early evening hours at the tavern but the same discrepancy occurred as to the time of leaving the tavern. In one instance ten o'clock and another instance ten thirty to eleven. He agreed under cross examination that it could have been eleven as well as ten. In that cross examination he said that Seale and Marshall came at them from behind. He denied categorically that there was a half hour conversation between the four of them as alleged by Marshall. He said Ebsary was about sixty or sixty-one in nineteen seventy-one, he looked differently then, a lot spryer and not any taller. He says that he had

Justice Rogers' Charge to Jury

known Ebsary for about two months prior to the incident. MacNeil said that he was afraid, indeed, when Marshall forced his arm up behind his back. He was afraid he was going to get hurt. He said he was stunned, he didn't see the knife, he presumed both Seale and Marshall were not armed but couldn't say that Marshall was not armed. He said that he did not know that Ebsary had a knife and kept a stone sharpener in his basement. He said he figured the kids needed money to go to a dance and if he had the money he would have given it to them. He said he and Ebsary did not linger in the park, did not stop, they were minding their own business. He said it was fair to say that they were attacked. He reiterated that he saw blood on the knife at Ebsary's home and that he was positive of this. He was directed to some discrepanci between his evidence here and that given in a statement to the R.C.M.P. on February twenty-eighth, nineteen eighty-two, those discrepancies I think have been described by Mr. Wintermans and the reason he gave for those discrepancies, all -- I thought he said "rookled up" which I suppose amounts to being confused, so he didn't know what he was saying, that's what I took him to mean by that but it's usual to interpret that. Another discrepancy is he told the Appeal Court that he got a glimpse of the knife in Ebsary's hand and that it was a pocket knife. In court he said it looked something like a dagger. In

re-direct examination, however, he said that he presumed everyone carried a pocket knife and that is why he said the pocket knife to the Court of Appeal. Despite the occasional discrepancies I felt that, but it's how you assess the matter that counts, I felt that the witness was truthful overall but very fearful, insecure and timorous, but that again is my judgement, it is your assessment of the witnesses' evidence that counts and yours alone.

Now, Mary Ebsary was the next witness, she is the wife of the accused Roy Ebsary. She was at home with her Donna when Ebsary and MacNeil arrived on May, twenty-eighth, seventy-one, between eleven thirty and twelve midnight and she fixes the time in relation to late news she was watching. She said Ebsary was agitated and excited. MacNeil stood in the hall and Ebsary went to the kitchen, she could not see him in the kitchen himself. MacNeil was saying repeatedly "Roy saved my life tonight". When Ebsary came out of the kitchen he told MacNeil to shut up and go home. Mary Ebsary said she knew her husband had been drinking but could only described his condition has be very agitated and excited. She also said that MacNeil came to their house after that night quite often that Roy Ebsary was at the time in May five foot two and weighted approximately one hundred and thirty five pounds.

Donna Ebsary, who I thought a very articulate witness, and although she was only apparently about thirteen at the time, she was now twenty-six, about thirteen at the time.

her recollections appeared rather vivid. Again, it's for you to determine what weight you want to attest to her evidence. She is now twenty-six, she was at the time in Grade Twelve, she was at home with her mother when her father and MacNeil came home that night between eleven and eleven thirty. She makes reference to their listening or watching the late news. She said that Jimmy MacNeil appeared excited and said to her father "you did a pretty good job out there". Now, of course, a statement like that can be either sarcastic or truthful and that again is something for you to determine. To which Ebsary replied, "be quiet". This conversation took place near the door of the living room. Donna then went to the kitchen and saw her father over the sink cleaning up a knife which had blood on it. She said it was a small knife with a short blade, it's handle was about three inches and the blade was about the same length. She said that Ebsary took the knife upstairs and she never saw it again even though she later searched his room for it. She said her father that night seemed to be in command of the situation and he seemed to be in control. She saw no blood on his clothing and in answer to question put my be, "Court: She said the knife was not the fold up type" and later in further cross examination she said she recognized the knife as the one she had seen her father with before.

Justice Rogers' Charge to Jury

Constable Mroz gave evidence yesterday that he discovered Sandy Seale lying on the road, that's Crescent Street, as marked on the map exhibit one you will be taking with you and it's almost a stick type of man on the road, feet towards the curb. He found him with a large wound in his abdomen from which was protuding part of the intestines. He arranged to have him taken to the City Hospital, that is Seale. As he waiting for the ambulance he saw Donald Marshall Junior across the street against a tree with an apparently injured arm. He saw other policemen taking Marshall to the hospital.

Then Chief John MacIntyre gave evidence. He was in charge of the original investigation of the crime as a detective sergeant. He searched for the weapon to no avail. He was approached by MacNeil on November fifteen, seventy-one and as a result he took a statement from the accused, which is an exhibit and which you can read at your leisure. He denied stabbing Seale, he also took, that is, Ebsary denied in that statement stabbing Seale. The Chief, then a sergeant detective, also took statements from Mary and Gregory Ebsary, there is an overlap in the times given on the statements of Roy Ebsary and Gregory Ebsary of about fifteen minutes which the Chief describes as an error in putting down the times. He said he in no way took statements at the same time, that they were taken separately and one after another. He said as a result Ebsary's -- I'm sorry--

said as a result of Ebsary's statement, that he consulted the Crown officers and asked them to get another police force to carry on the investigation because he thought there would be a conflict and him doing so as he was involved in the investigation of the Marshall incident which resulted in Marshall being incarcerated at Dorchester. The R.C.M.P. did subsequently become involved.

Corporal James Carroll was in charge of the new investigation which began in February of last year and on October twenty-ninth he recorded a conversation with the accused in his kitchen. Now, you've heard the tape and the typed transcript of it, and they are each an exhibit and at this stage I would say that if you wish to have that tape played that a tape recorder be supplied to you upon request. You may wish to rely only on the transcript, but it's certainly available for you to listen to and if you request the Sheriff's Officer a tape recorder will be supplied to you. That was a very revealing document and completely contrary to the earlier statement given by Mr. Ebsary. At the time, the Corporal suspected that the accused might have had a couple of drinks of wine. He was not intoxicated, he was in reasonably normal condition. He with others went in the direction, or went on the direction of Ebsary to look for the knife referred to in the conversation, and they could find no trace at all. He has searched

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Ebsary's house and seized a number of items all of which were subsequently returned to him and he said he was pretty certain that the conversation he recorded occurred after that initial search and seizure.

Doctor Naqvi was the last witness. He described treating Seale and being with him from his admission to the City Hospital between twelve midnight and two a.m. until his death eight-o-five. He performed two operations to try and save his life. He described the stab wound as going into the aorta and cutting it through the intestine around, he said the belly button. He thought that it would have taken a three and half inch blade to inflict the kind of wound that he discovered upon examination. He described the cause of death as I already mentioned, he said that twenty-seven pints of blood were transfused to Seale in an attempt to replenish the loss that must have been coming from the severed aorta. He said that the wound was a result of but one stab wound, one stabbing thrust. Then he explained why there were discrepancies between the time of death as he described it yesterday and has he described it at the preliminary hearing.

That is just my summary of the evidence your recollection may be entirely different, and again, it is your recollection that counts.

With respect to the evidence I must refer you to the types of evidence that you will be considering --direct

and circumstantial evidence. A fact may be established by direct or circumstantial evidence. Direct evidence consists of the testimony witness who with any of his physical senses perceives the fact in question; for example, if the fact be proved whether or not the accused was in a particular house on a certain day. The evidence of a witness who says I saw him there, that's direct evidence.

To prove a fact by circumstantial evidence, involves this: there being no or sufficient direct evidence to the fact, you may infer from the fact and issue from the evidence of other surrounding facts. For example, if the fact in issue is whether the accused was in a building on the night of a crime and no eye witnesses had seen him there, the existence of his fingerprints on objects in the building and the fact that he had been seen in the neighbourhood of the building that night would be circumstances from which you might reasonably infer that he's been there.

Now, both direct and circumstantial evidence are equallyadmissible in a court of law, but there is an additional risk ~~with~~ circumstantial evidence that does not arise as in the case of direct evidence. In the case of direct evidence, the only uncertainties are as to the truthfulness and accuracy of the witness. The witness might be deliberately lying or honestly mistaken. Where the evidence is circumstantial though there

Justice Rogers' Charge to Jury

is also the uncertainty as to whether the correct inference has been drawn from the proven facts. Circumstantial evidence, therefore, should be scrutinized carefully with this in mind. Now, circumstantial evidence buries greatly in its strength depending on the number and the importance and the independence one of another of the circumstances. I'll just give you an illustration. You look out of a windown upon getting up out of bed in the morning, you see the street in front of your house is wet and you neither saw nor heard rain during the night, but you might infer from the wet street that rain had fallen. However, if you live in area in which the streets are washed during the night by trucks spraying water from tanks it would be dangerous to infer from the wet street alone that rain had fallen, cause such an inference might not be correct. But, if in addition to the wet street you observe that your lawn was wet and you had not been watering it and or there was water dripping from the leaves of trees in your garden and from your eaves and your flower beds were soft and muddy, you might feel certainl although still by inference that rain had fallen during the night. In that case, the occurrence of rain during the night would probably be the only reasonable inference to draw from the facts that you would have observed. Now where there are many independent facts that support the inference, circumstantial evidence may be as persuasive as the testimony of witnesses

giving direct evidence. The inferences which are drawn by a judge or by a jury or a judge in the criminal case must be based on the evidence and just not on mere hunches.

Now, there has been a number of instances of circumstantial evidence here. You'll recall no one saw the actual stabbing of the knife of the accused, I mean outside of Sandy Seale. If there are situations in the evidence in this case where reliance is being placed by the Crown upon circumstantial evidence, for example, the proposition that the Crown relies on is that the accused stabbed Seale with a knife, as I said, there is no actual direct evidence of this. The Crown relies on the evidence of witnesses--seeing the accused striking out at Seale. Witnesses heard Seale say "dig man" shortly afterwards the accused saying "I've got something for you" and seeing blood coming from Seale and Donna Ebsary saying her father washed blood from the non-folding knife in the kitchen of the home of the accused and Jimmy MacNeil saying "you did a good job back there" and MacNeil's--I'm sorry-- and Marshall's cut on his arm. From these and other evidence the Crown asks you to infer that the accused did, in fact, stab Seale.

I will now deal with your duties as jurors in the jury room. It is your duty to consult one another, to

Justice Rogers Charge to Jury

deliberate with a view to reaching a just verdict according to law. Each of you must make your own decision, whether the accused is guilty or not guilty. You should do so only after consideration of the evidence with your fellow jurors and you should not hesitate to change your mind when convinced that you are wrong. Since this is a criminal trial, it is necessary that any verdict you return should be unanimous. In other words, it is necessary that each of you should agree in whatever verdict you may see fit to return. Unless you are unanimous, you cannot find the accused guilty of the offence with which he is charged and equally you can't find the accused not guilty. However, while it is very predesirable that you should reach an unaimous verdict; nevertheless, you still have a right to disagree and if any of you has any reasonable doubt as to the innocence or guilt of the accused, it is your duty to obey your conscience and to refuse to be persuaded against your conscience by your fellow jurors.

Let me urge you to make every effort to reach a conclusion one way or another. Now, you will take to your jury room the indictment and the exhibits. If after considering all the evidence, the arguments of counsel and my charge you come to the conclusion that the prosecution has failed to prove beyond a reasonable doubt that the accused committed the offense, with which he is charged, then in such event, it is your duty

to give the accused the benefit of the doubt and to find him not guilty. Alternatively, if after considering all the evidence and the arguments of counsel and my charge you come to the conclusion that the prosecution has proved to your satisfaction beyond a reasonable doubt that the accused committed the offense with which he is charged then in such a case it's your duty to find him guilty.

Now, you have a solemn duty to perform, you have a duty to the state and to the accused, you've taken an oath to try the charge upon the evidence and the evidence alone and without fear or favour and to render a true verdict I'd ask you to honour that oath and if you do you would have performed your duty faithfully.

Now, in this particular case there are only two verdicts that you can bring in, the verdict of guilty as charged, manslaughter, or not guilty as charged. There is a place inside of the indictment for that purpose and it should be recorded by the foreman opposite the printed word verdict, there you will put guilty as charged or not guilty as charged.

So, ladies and gentlemen you will now retire, if you have any difficulty you may return to the court room and request further instructions and you may also return to the court room and request the replaying of pieces of evidence that you are uncertain of, if that is done I want to remind you that all the evidence with

respect to that particular matter has got to be replayed so you hear the evidence in context and not out of context. If you have questions then put them in writing and they will be dealt with. Not only before you want to consider the matter, it's more than time for lunch but I ask you all to wait for a momen or two while I consult with counsel as to whether or not there may be any further directions, so you may now retire with the indictment and the exhibits.

Jury Retires. (Voir Dire)

Mr. Edwards: Just before they go with the exhibits I indicated during my address that I have a typed copy of the nineteen seventy-one statement, my learned friend is agreeable to that going in to assist the jury.

By the Court: Well, that makes sense, I think they would appreciate that.

By the Court: Gentlemen, Mr. Wintermans.

Mr. Wintermans: My Lord, my only concern is not with the law but Your Lordship indicated to the jury twice that James MacNeil said twice that the knife was a dagger. Now, my learned friend and I don't recall him saying that. The only thing I do recall.....

By the Court: It looked like a dagger and I have that in my notes.

Mr. Edwards: I don't recall one way or the other My Lord.

Mr. Wintermans: I cross examined him on a statement that

Voir Dire

he made during the nineteen eighty-two hearing at the Appeal Court where he said it was only a short knife it wasn't a dagger or nothing, and I asked him to comment on that.

By the Court: I had that in my notes and I also have that it looked like a dagger and that's what I gave to the jury--so, it's my recollection alone confirmed by notes that I took and I don't think I would like to recall them on that ground. I think they appear to be twelve sensible people and I don't think they are going to take that out of content. If there recollection is like yours, they don't remember it all, I'm sure that's what they'll remember.

Mr. Edwards: The Crown is content My Lord.

By the Court: Thank you. I guess it's appropriate to adjourn. I assume that the jury will be going for lunch, maybe give us an opportunity to go for lunch and we'll just wait for them to return.

Court Adjourns for Lunch.

Jury Called. All present.

By the Court: Madame foreman, I have a couple of questions here from you and I just thought I better check them with you. Now, the last one was, should the fact that Ebsary assaulted Marshall after Seale play a role in our decision? All I can say is that is why we have jurys for, I'm afraid you can't (inaudible) that burden to either counsel or to me, it's not a matter of law, it's a matter of fact and you are the sole judges of the facts so you must assess that kind of evidence an place whatever weight you want upon it and make hopefully a decision from it, if that's crucial to your decision.

Another of your questions was, is it your duty to determine whether there was more force than was necessary used? Again, that is really central to your reaching a decision. The defense is self defense. It is not self defense if more force is used than is justified and it is for you to determine whether there has been more force used as justified in the circumstances after heard the evidence and argument of counsel and myself on the law and I don't think I can say very much more than that on that issue, but it is self defense, the defense of the accused, but that self defense will help him not if you determine that he used more force than necessary, but you have to determine that, it's a matter of what weight you wish to attach to the particular witnesses.

The other matter that you wanted to hear a tape of my closing remarks. It would probably to read from my own notes that I have and I gather that those are the remarks that I made following the summary of evidence and just your final duty, was that what you wanted. Alright, now, what I did say to you in essence is that it is your duty to consult with one another, as I know you've been doing, to deliberate with a view to reaching a just verdict in the law and each of you must make your own decision whether the accused is guilty or not guilty. You should do so only after consultation, after consideration, of the evidence with your fellow jurors and you should not hesitate to change your mind when convinced that your wrong. I said that since this is a criminal trial it is necessary that any verdict that you return should be unanimous. It's necessary that each of you should agree in whatever verdict you see fit to return. Unless you are unanimous you cannot find the accused guilty of the offense of which he is charged and equally you can't find him not guilty. But then I pointed out that while it is very desirable that you should reach an unanimous verdict, nevertheless you have a right to ~~disag~~ree, and if anyone of you has any reasonable doubt as to the innocence or guilt of the accused it is your duty to obey your conscience and to refuse to be persuade against your conscience by your fellow jurors. Then I added, I urged you, to consider the nature of this case, to make every effort--all of you--

to reach a conclusion one way or another and then I merely went on to say that you were to go to the jury room with the exhibits, and so on and if after considering all the evidence, the arguments of counsel and my charge, you come to the conclusion that the prosecution has failed to prove beyond a reasonable doubt that the accused committed the offense such as charged on the indictment then it is your duty to give the accused the benefit of the doubt and to find him not guilty.

Alternatively, if after considering all of the evidence and the arguments of both counsel and my charge, you've come to the conclusion that the prosecution has proved to your satisfaction, beyond a reasonable doubt, that the accused committed the offense for which he is charged, then in such case, it is your duty to find him guilty. I've just reminded you of the oath which I'm sure you know anyway. That generally was it. I would say this to counsel, I went over my notes and I missed a very crucial word, there was some evidence in cross examination of MacNeil, in which his evidence now was related to evidence that he gave at, for the Appeal Court, and before the Appeal Court he said that he saw a glimpse of a knife, a pocket knife, and I said--my notes said something like a dagger, what it was was not something like a dagger, that was MacNeil's evidence before the Appeal Court. As I noted it in my notes and when I summarizing my notes I missed that crucial word.

Now, that ought not to make any difference because there are twelve of you listening to that evidence and only one of me, so that you will have probably noticed that in any event. The matter was raised with me by counsel and I thought I better straighten that out while I have the opportunity.

So, now, Madame Foreman is there anything else that you wish to ask me at this stage.

That really shifts the burden back to you again.

Madame Foreman: I think our questions have been answered.

By the Court: Then I'll allow you to retire again.

(Voir Dire)

Mr. Wintermans: I think what the jury was asking was something to the affect that if Ebsary used more force than was necessary, does that mean it was not self defense or something to that affect. Is it there duty, they wanted to know what there duty was, was it to whether there was more force than was necessary.

By the Court: Well, that is there duty, is it not?

Mr. Wintermans: Yes, but the only danger in that is that is doctrine of disproportionate force in self defense and there is case ~~law~~, there is something in Martin's on page forty-six, that the issue as to whether or not the force by the accused was disproportionate to the original force used by the deceased, is only a matter of evidence for the jury to consider in determining whether one, the accused had a reasonable apprehension

(Voir Dire)

of death and it should say or greivous bodily harm and whether the accused had reasonable and probable grounds to belive that he could not otherwise preserve himself from death or grievous bodily harm and the thing that worries me about the way you answered the question was that it's the fact the jury may feel that the only question is did he use more force than was necessary.

By the Court: That's not what they asked me. What they asked me is there a duty--is it there duty to determine whether there was more force than was necessary. Now, there may be all sorts of other duties that rest upon (inaudible) and I've already charged them with respect to, but I don't know whether they thought it was a matter of law or not.

Mr. Wintermans: My only concern was that perhaps they should have -- perphas you should have read section thirty-four two to them.again, and that's what the law is and of the two questions that I posted to the jury in my summation was the "a" and "b" parts that if he causes it under a reasonable apprehension of at least grievous bodily harm, did he have a reasonable apprehension of at least grievous bodily harm and did he have reasonable grounds to believe there was no other method of preserving himself from at least grievous bodily harm.

By the Court: Well, I'd like to hear.....

(Voir Dire)

Mr. Wintermans: There is other case law that says in assessing whether or not reasonable force was used, the trial judge should not commence with the result in injuries, but should consider the nature of the force and the circumstances of its administration.

By the Court: Alright, but you've already to my instructions of respect to the law and now are you telling me that I'm wrong.

Mr. Wintermans: I'm just....

By the Court: Or are you considering what was just recently stated?

Mr. Witnermans: Yes,

By the Court: Well...

Mr. Wintermans: I'm concerned that the jury doesn't understand the defense of self defense and perhaps should be re-instructed in more detail than you just did and it may be misleading for them to consider that just because Seale was killed that that result would be the important thing and it's not. It's the one stab that's the important thing. Not the fact that Seale ended up dying

By the Court: Maybe they are considering that, all they asked was, was it their duty to determine whether there was more force than necessary used. Now, what do you say to that Mr. Edwards?

Mr. Edwards: As far as the Crown is concerned, My Lord, the position I take is that you have answered the question asked and I really don't think that it would be appropriate

(Voir Dire)

for us to get into speculating what the extent of their problem is.

By the Court: That's my view. It may very well confuse them further and they asked a specific question. I asked them whether they had any further questions, whether I had answered the questions to their satisfaction, not only did the foreman, forelady, nod yes, but I took it that they all did. Now, I hesitate to call them back and re-instructthem on the whole matter of self defense. It's a long charge and I think it could only serve to confuse them.

Mr. Wintermans: The thing that worries me is the same reason why when they have question as to what a particular witness may have said about something that you can't just play what the witness said, you have to play the whole testimony and similarly they asked a question about self defense, it would seem to indicate to me that they don't understand the defense of self defense and you answered one isolated question. Perhaps out of context in their minds and that's what worries me, that if they have a question about self defense, then perhaps the proper way to deal with it would be to re-instruct them completely on self defense, but to just answer one question perhaps out of context may be very dangerous, that's all.

By the Court: In looking at the question, I can't see that they had a concern about the understanding as self

(Voir Dire)

defense. Self defense has a common, ordinary meaning in any event and what they were asking was was it -- whether it was their duty to determine whether there was any or not and it's part of their duty because they have to assess the facts and I really, I could call them back in and read them section thirty-four two again and read your summary of it, which is really your theory of the defense that you gave me and I read out to them.

Mr. Wintermans: That would be satisfactory.

By the Court: What do you think Mr. Edwards?

Mr. Edwards: I would be opposed to that My Lord. As I stated, they may be having trouble with the whole issue of self defense, but all we can do is speculate that may be they are. My understanding, the usual procedure, they ask a question and the question is answered, which you've done.

Mr. Edwards: I would submit that at this point we should leave it with them for awhile and if they are having further difficulty, they seem to be not a passive jury, they'll....

By the Court: No, they're certainly not.

Mr. Edwards: They'll let us know and they'll ask another question.

By the Court: I think, perhaps, that that is the approach that I am going to take Mr. Wintermans. I'm fearful that if I start intruding at this stage, that we're

(Voir Dire)

only going to muddy the waters and that I'll not call them at this time, but I do take note of your remarks, though. So, we'll adjour further until we hear further from the jury.

Court adjourns.

Jury Called. All Present.

Madame forman, have you reached a decision?

Madame Foreman: Yes we have.

Do you find the accused Roy Newman Ebsary guilty or not guilty?

Madame Foreman: Guilty as charged.

My Lord, (inaudible) you say you find the accused Roy Newman Ebsary guilty as charged, as one says so say you all.

By the Court: Ladies and gentlemen of the jury, it's not a pleasant task that you had to perform and I want to thank you for your close attention to the trial, the evidence and to taking part in your deliberations and finally reaching a verdict. You are now discharged, I wish I could discharge you forever, but there is a jury to be picked tomorrow and you will have to return at that time. The chances are you won't be chosen again. If you are by any chance, I think I can say you wouldn't have to go at it a third time. But, you may now leave.

I will have to consider the matter of sentence and I will be considering that with counsel, it will not be today, but I hope that I will be able to set a day for sentencing and you may want to know what that date is or you may wish to go now, but it's up to you, it is five minutes to six and you may wish to go home, so you are now free.

By the Court: Gentlemen, I just don't know when I am going to be able to get back here. I don't know yet I'm -- on the first part of December, I'm on weekly list in Halifax and they would be ordinarily trying civil trials. I don't know if they been assigned to me yet. It maybe that if they are, something will free up and I'll have a settlement or something so I can get here. Secondly, it's pretty well gone, I have to be in Yarmouth and that area.

Mr. Edwards: My Lord perhaps considering the date, I'd be asking Your Lordship to remand the accused in custody pending sentencing and, of course, now that there is a verdict of guilty, that is entirely within your discretion, but the Crown's submission is that he should be remanded in custody in view of the seriousness of the offense, indeed, the unpredictable behaviour of the accused. He is a heavy drinker and his behaviour is unpredictable and I submit that both in the interest of the protection of the public and in the accused's own best interest interest that

he be kept in custody because now that a decision has been made at this (inaudible) I submit it is unpredictable what affect that will have on his behaviour from this point on.

Mr. Wintermans: My Lord, if I could respond to that I'd point out that Mr. Ebsary has been at large ever since his preliminary hearing and he has appeared in court everytime as required, there haven't been any problems in that regard, as far as his drinking goes, I think it's fair to say that he use to drink quite a bit but that ever since he had his accident where he broke his neck, he has been not drinking. as I understand. Certainly he would be willing to gander a condition that he obstain from the consumption of alcohol pending sentence. But, certainly given that the unusual circumstances, the age, and the incredibly long delay, I would submit that there is a possibility that the sentence may be a non-custodial type, there is no minimum penalty, of course, for this offense and I would submit that Mr. Ebsary has remained in this area, as far as I am aware, ever since this incident occurred in nineteen seventy-one and there is no reason to think that he wouldn't appear on the -- on secondary ground that he's likely to commit further criminal offenses. I don't think there is any evidence to support that suggestion. He certainly hasn't committed criminal offenses and hasn't been charged with any criminal offenses ever since this charge was laid against him -- that's quite a few months now.

I would ask that Your Honour considering releasing him on strict conditions. Perhaps, one problem, of course is his medical problem, his doctor practically comes to see him everyday at his residence here in Sydney and he can't dress himself, he needs help dressing himself, he can't look after himself really and he would require practically twenty-four a day care if he were in custody and I would submit that he's not a dangerous person, not anymore, if he ever was.

By the Court: Well, of course, he's has been convicted by a jury of committing a very serious offense.

Mr. Wintermans: That was twelve years ago.

By the Court: True.

Mr. Wintermans: He is seventy-one years old now and he is practically disabled. To a great extent he is disabled. He is harmless, I would submit now. He has always appeared in court.

By the Court: Well, Mr. Edwards if I were not to remand him in custody what sort of conditions would the Crown wish me to impose to insure first of all, that he return for sentencing and I think it will have to be later this month and secondly, that he would not get into trouble again. I forgot that you would talking about a crime that was committed thirteen years ago and I think I'm taking that into account. I really don't think I am prepared in the circumstances to remand him in custody. I think there ought to be some pretty stringent conditions attached

to his release.

Mr. Edwards: In that regard My Lord I would concur with my learned friend that number one there would an abstinence from the use of alcoholic beverages and non-prescription drugs. Two, that he be placed under a curfew to return to his residence at six p.m. in the evening and remain there until eight a.m. the next morning. Three, that he not communicate with or go near or molest or annoy in anyway members of his families, there have been problems in that regard, that would include his son, Gregory Ebsary and his wife and family; his wife, Mary Ebsary; well Donna has been a resident of the United States, so that's not a problem. Total non-communication or interference with those, I submit that would give us the best assurance outside the custodial setting that there won't be an interference with the administration of justice.

By the Court: Do you require any sort of reporting to any police?

Mr. Edwards: No, his non-appearance is not a concern of the Crown. It's a public interest and the safety and protection of the public which the Crown is concerned about. I mean my learned friend says that he is a harmless man now, but how much strength does it take to use a knife and there have been problems in that regard since nineteen seventy-one and the reason I made the recommendation -- those conditions would at least give the authorities, the power to intervene on the spur of the moment if there is a slightest indication

of trouble.

Mr. Wintermans: Agreeable completely My Lord.

By the Court: I'm going to set a date for later in November, let's say nine o'clock some morning. We may have another trial going on, but surely we can work that in and I was thinking in terms of.

Mr. Wintermans: What day was that?

By the Court: Well, I haven't fixed upon one. Thursday the twenty-fourth. The twenty-fourth, what case?

Mr. Edwards: That would be the Campbell case.

By the Court: Right in the middle, would it?

Mr. Edwards: It would be well under way by that time.

By the Court: Would that be a reasonable day and time.

Mr. Wintermans: What time?

By the Court: About say, nine o'clock in the morning.

Mr. Wintermans: That would be excellent.

Mr. Edwards: I assume that a pre-sentence report will be ordered.

By the Court: Yes, now who looks after that.

Mr. Edwards: I will.

By the Court: Would you, would you order one then. Again, I will allow Mr. Ebsary to go free, not to remand him on these conditions, they've already been referred to and agreed to by counsel. First, that there be total abstinence from the consumption of any alocoholic beverage by Mr. Ebsary and also any non-prescriptive drugs. Two, that Mr. Ebsary comply strictly with a curfew which would acquire him to remain in his home from six o'clock

every evening until eighty o'clock the next morning.

Mr. Edwards: Perhaps My Lord we should put his civic address so there is no confusion about where his home is.

By the Court: His home being sixty-eight Falmouth and that's where he must remain every night from six o'clock in the night until eight in the morning. Thirdly, the third condition be that he not under any circumstances communicate with or approach or go near, molest or annoy any members of his family, including -- exclusive to them his son Gregory and his family and his wife, Mary. So, the accused will be released on those basis to return here at nine o'clock in the morning on November twenty-fourth for sentencing.

Mr. Edwards: My Lord, I wonder if I might as the courts to get Mr. Ebsary to signify for the record that he is undertaking to abide by those conditions, he is being released on his undertaking to -- so, he should know that the Crown would not hesitate to have him charged under section one thirty-three if there is a breach of those conditions and I would like it on the record that he is agreeing to abide by them.

By the Court: Mr. Ebsary, do you agree to abide by those conditions that I have imposed upon you.

Mr. Ebsary: Yes My Lord, I never broke my word to anybody.

By the Court: Alright, because you've just heard what Mr. Edwards said, and if you don't abide by them you will be much worse off from my point of view as well.

Therefore, we will adjourn this case until the twenty-fourt of November.

Court Adjourns.

Court Opens: 09:00

Mr. Wintermans:

I discussed the matter with my learnered friend yesterday. I propose to call a witness, Dr. Cardew. And Dr. Cardew is going to England this morning and, therefore, it's been agreed that we call him right away so that he can give his evidence and leave if it would be the consent of the court.

Justice Rogers:

Certainly.

Dr. Cardew duly sworn. Examined by Mr. Wintermans:

1. Q. Could you state your full name and occupation please?

A. Peter Haig Cardew, medical practitioner.

2. Q. And your qualifications?

A. Member of the Royal College of Surgeons, and I attended the Royal College of Physicians in England.

3. Q. And are you a qualified medical practitioner in Nova Scotia?

A. I am.

4. Q. And carrying on a general practice of medicine?

A. Yes.

5. Q. How long have you been practicing medicine?

A. Forty years.

6. Q. I wonder if my learnered friend has any questions?

Mr. Edwards:

The Crown has no objections to the doctor being qualified to given opinion evidence in the field of general medicine.

Justice Rogers:

So qualified.

Q. Now are you familiar with Roy Newman Ebsary?

A. I am.

Q. You see him in the court room today?

A. Yes.

Q. Have you been his his physician for some time?

A. I have, yes.

Q. How long approximately?

A. I would think eight or nine years.

Q. Eight or nine years. And are familiar with his present medical condition?

A. I am yes.

Q. Have you seen him recently on a regular basis?

A. Yes.

Q. Where have you been seeing him recently?

A. In his home.

Q. Approximately how often?

A. Sometimes two, sometimes three times a week.

Q. I see. Now are you familiar with the accident that Mr. Ebsary had in the spring of this year?

A. Yes.

Q. Could you just roughly describe that to the court, the nature of that?

A. The history was that he had fallen down the cellar steps. He had injured his neck and x-rays showed that he had, in fact, a fractured neck. He was admitted to hospital and put on traction and even at that point, a small amount of burning of

his neck produced complete paralysis of all four limbs. After this he had surgery by the neuro surgeon, Doctor Malik. And from there he went to Halifax to the rehabilitation centre.

17. Q. And what is his present condition as a result of that injury?

A. What's that?

18. Q. What is his present condition as a result of that injury?

A. His present condition due to the injury are purely neurological of course. He has weakness of all four limbs. Much weaker in the arms. The left arm is much weaker than the right. He's got almost no movement of his left shoulder joint at all. The weakness is such he couldn't lift a cup. His right arm is considerably stronger and he has got full movement of the shoulder. Both legs are weaker than they should be. When he walks, his balance is such that he has to walk on what we call a wide gate. Something like six inches.

19. Q. Why is that?

A. As opposed to walking with one foot in front of the other, he puts them side by side and walks because the balance is bad.

20. Q. Does he need assistance?

A. What's that?

21. Q. Does he need assistance in his day to day activities?

A. He needs assistance to get out of bed. He needs assistance to be dressed. He, of course, can't get into a bath.

22. Q. Now what about his ability to walk up and down stairs?

A. I don't think that's possible. He lives in an apartment, but

I don't think it's possible for him to get up and down stairs without help.

23. Q. What kind of help?

A. Somebody under each armpit to steady and give him a lift to give him strength to get him up the height of the step.

24. Q. So what can you say about his ability to walk distances now?

A. Any distance?

25. Q. Yes. Assuming that he were to get help and get down the stairs and get out of his apartment, how far, roughly, would you say that he would be able to ah...

A. I wouldn't give him fifty yards.

26. Q. You wouldn't give him fifty yards?

A. No.

27. Q. And are you sure about the right and left arms?

A. Yes.

28. Q. You indicated weakness in the left?

A. The left is the weaker and has restricted shoulder movements.

29. Q. And what about his right half? Does he have normal strength there?

A. No, all four limbs are weak.

30. Q. Now what's the prognosis for recovery from this condition?

A. Nil.

31. Q. Pardon?

A. Nil.

32. Q. Are you saying he is going to remain in this present condition.

A. I think so. I have, in fact, referred him back to the neuro

surgeon asking whether he could be sent back to the rehabilation center in the hopes that he could get some improvement. But after this length of time, I don't see that one's going to get any appreciable improvement.

33. Q. What can you tell the court about his other medical problems?

A. He is on medication for his heart. I think his heart condition is secondary. His lungs, which he's obviously very emphysematus and is a cronic bronchetic but this is due to the heavy smoking. But his breathing is poor to say the least.

34. Q. And is he on any other kinds of medication?

A. Yes. He's on an awful lot of medication.

35. Q. Can you give the court a list to the best of your recollection? Indicating also what they're for.

A. For his nerves he is on tricolectapam which is sort of first cousin to valium. For his balance he's on sumserk. For his pain he's on phenafin number three.

36. Q. What kind of pain is he experiencing?

A. From the neck where the operation was. He from time to time gets an antibiotic, confristecklen. For his breathing he's on ventilin. For his heart he's on degoxin. For his blood supply to his brain he's on a drug called pusantin. There are eight of them on this list.

37. Q. Is there a problem with the blood supply to his brain?

A. I think once you get a problem with your neck you may well get that yes. I didn't, in fact, put him on that one. That was another doctor who put him on that a week or so ago.

38. Q. I see. Anything else?

A. There's eight on this list.

39. Q. What can you say as to his ability to get along on his own at the present time?

A. He couldn't cook for himself because he isn't good enough with his hands. And he can't manage himself because he can't get out of bed alone. He can't use the toilet alone. I would imagine he can't use the toilet alone.

40. Q. Now you say that you've been treating him for some eight or nine years?

A. Yes.

41. Q. How do you compare his present condition to that when you first started treating him eight or nine years ago?

A. He was a perfect fit man when I first saw him except, of course,for his lungs which were...he was already showing signs of emphysema then.

42. Q. When you say perfectly fit, what....

A. He could walk any reasonable distance and coped as we all coped in life.

43. Q. Do feel doctor, or do you have any opinion as to whether or not his present medical problems put him in a position where you may be able to project how long or short he has to live?

A. Well I don't think...his outlook is good. I would hate to put a time on it, but where you've got a chest condition. First of all...the result of his accident is not going to alter the length of his lifetime. The length of his life is

going to depend on his lungs. He keeps needing these antibiotics for his lungs, but I don't think that has anything to do with his accident.

44. Q. But can you...do you feel that he's going to be...I'm not sure exactly how to phrase this, but can you give any opinion as to his life expectancy at this point?

A. I wouldn't say his chance of longevity, are we allowed to call it that, is good. I can't give you a time in years. But not that long. I mean it's the eighty-fives and ninties. They're entering my head as being a possibility.

45. Q. Is there anything that you would like to add to what you've already said?

A. No.

46. Q. That's all the questions I have.

Dr. Cardew examined by Mr. Edwards:

1. Q. Just dealing with the last part first doctor. Despite his medical condition, you're saying that Mr. Ebsary could live to eighty-five or ninty?

A. No I won't think it was...it wouldn't enter my head that he would live to that age.

2. Q. Oh I see. Would it enter your head that he could make it to eighty?

A. I think you're pressing me on a thing that I honestly couldn't say.

3. Q. You have no way of knowing how long?

A. No, except that people with emphysema don't live as long as the non-smokers and the people with good lungs in this world.

Q. Now you say he has been a patient of yours for eight or nine years?

A. Yes.

Q. And would you say you've seen him frequently over that eight or nine year period?

A. No, I have since he came out of the rehabilitation of course.

Q. Which was just recently, within the last year?

A. Yes.

Q. Prior to that you haven't visited his home have you?

A. Oh yes.

Q. You had visited his home?

A. Oh yes.

Q. How many times would you have visited his home prior to this recent experience?

A. I suppose I saw him in his home something like once every three months, and I suppose he came to the office about once a month.

Q. So you did see him on a fairly frequent basis then over that eight or nine year period?

A. Yes for his chest condition.

Q. Now on those occasions have you ever observed him under the influence of alcohol?

A. I could say to that no, but I'm not dead sure. I don't remember having seen him under the influence.

12. Q. You say you're not dead sure. Do you say that because his behaviour may have been consistant with the use of alcohol on some of those occasions?

A. No. I say that because on the odd occasion when there has been company there, they have been under the influence of alcohol.

13. Q. Would it surprise you to know that family members have described him as a heavy drinker?

A. Yes it would surprise me very much.

14. Q. It would?

A. Yes.

15. Q. What about displays of temper in your presence? Has he ever exhibited any outbursts of temper?

A. He's been an exhibitionist, but I've never seen him in a temper more than the normal person whose exhibitionism has been marked.

16. Q. What do you mean by exhibitionist?

A. Flamboyancy in the way he dresses and the way he behaves, but not, perhaps, in a demanding and a loud voice and this sort of way. I've never seen him being angry with any of the staff at the office. He has certainly never been angry with me, and I've never seen him angry at home.

17. Q. Doctor Cardew, I assume that you didn't have the opportunity of reading the presentence report that was prepared in relation to Mr. Ebsary did you?

A. No I haven't.

18. Q. So I've already referred to the fact that his family has described him as a drinker and being violent when he's drinking as do senior police officers in that report.

A. Yes.

19. Q. Again does that surprise you?

A. Well I have never seen him being aggressive. At no time when I've seen him have I seen his behaviour being that of somebody who's out of control. Put it that way.

20. Q. Now Mr. Ebsary is wearing a neckbrace this morning. Did you prescribe that?

A. No.

21. Q. He's not wearing it this morning, but in other court appearances he was wearing it.

A. I asked him to take it off because he couldn't breath with it.

22. Q. You had prescribed that neckbrace?

A. No.

23. Q. You hadn't?

A. No.

24. Q. That was something on his own was it? Or do you know if another doctor prescribed it?

A. I know another doctor prescribed it, yes.

25. Q. But his condition as far as his neck is concerned is not sufficiently serious to warrant the continued use of that?

A. He doesn't wear it at home.

26. Q. As a matter of fact, as I understood your evidence, it is not his neck condition which is life threatening, if I can

put it that way, it's his lungs?

A. Yes that is right.

27. Q. You noted the restriction in mobility he has in his left arm?

A. Yes.

28. Q. But you say his right arm is considerably stronger. Is that correct?

A. Yes.

29. Q. And in fact, as I understood you, he has full movement of that right arm?

A. The right arm yes. Have I got it wrong, I'm sorry, did I put it the wrong way around?

30. Q. Well he has full use of one arm?

A. Weak, but full use, yes.

31. Q. Thank you doctor.

Mr. Wintermans:

1. Q. Just to clear that up, you're saying that it's the other way around that it's his right that's weak.

A. Yes, it's the right shoulder that doesn't move. It's the left shoulder that does.

2. Q. But nevertheless you indicated that his left hand is still weaker than...

A. No, the left hand is the stronger hand.

3. Q. Right, but compared to the average person?

A. Oh weak yes.

4. Q. All his limbs are?

A. Yes.

5. Q. And about the neck brace, to clear that up. You indicated that another did prescribe him to wear that?

A. As far as I'm aware that was prescribed when he first had his fall. I don't know whether it's been prescribed since.

6. Q. I see, okay thank you.

Mrs. Strowbridge duly sworn. Examined by Mr. Wintermans:

1. Q. Could you state your full name and address please?

A. Rowena Strowbridge. Seventy-four Falmouth Street.

2. Q. And that's in Sydney?

A. Yes.

3. Q. Now you're the person that's referred to in the presentence report as living next door to Mr. Ebsary?

A. Yes.

4. Q. And you've been looking after him?

A. Yes sir.

5. Q. You and your husband?

A. Right.

6. Q. How long have you known Mr. Ebsary?

A. Four months.

7. Q. And how long have you been looking after him?

A. Four months.

8. Q. And what exactly have you been doing for him?

A. Everything.

Q. What do you mean by that?

A. I got to wash him, his face and hands. Comb his hair. Get his meals for him, cut it up same as I would for a child. Dress him, bath him, put him to bed. If he goes to the bathroom, I got to walk with him.

Q. Are you living under the same roof as him?

A. At the moment, yes.

Q. At the moment?

A. Yes.

Q. But you were living next door to each other?

A. Right.

Q. Why the change?

A. I was living in Mr. Ebsary's apartment first when we went there to look out for him.

Q. You and your husband?

A. Right.

Q. Yes, and...

A. And we've been living next door for two months.

Q. And now?

A. And now at seventy-four Falmouth Street.

Q. And where's Mr. Ebsary?

A. He's at seventy-four Falmouth Street.

Q. Same driveway and everything as sixty-eight Falmouth Street?

A. Yes.

Q. Now what are your plans for the immediate future?

A. Well where I'm to is where I'm going to stay. I plan on staying there.

Q. Well let's assume for the moment that Mr. Ebsary is not put in jail today and is returned to home. What would be your role?

A. I would still look out to him.

Q. Pardon me?

A. I would still take care of him.

Q. You would. For how long?

A. As long as he lives.

Q. Why are you doing that?

A. I like Mr. Ebsary.

Q. Is there any kind of financial arrangement between you?

A. No.

Q. Do you have any income?

A. Right now we're receiving City welfare.

Q. And Mr. Ebsary, does he have an income?

A. Yes sir.

Q. What kind do you know?

A. He's getting old age pension, Canada pension, and DVA.

Q. And does he pay for anything?

A. He buys his groceries. He pays his own rent.

Q. What about your rent?

A. No.

Q. Did he at one point?

A. Pay my rent?

Q. Yeah.

A. When I was living at his house.

32. Q. Now there is an indication in the presentence report that you have children in Newfoundland?

A. Yes sir.

33. Q. And you're checking to get them moved over to Nova Scotia?

A. Yes sir.

34. Q. Now what happens if that comes about? If your children move over, what are your plans in relation to Mr. Ebsary then?

A. I'm still going to take care of him.

35. Q. You'd still take care of him?

A. Yes sir.

36. Q. And your husband?

A. Yes.

37. Q. Now what can you saw about Mr. Ebsary's drinking habits since the four months that you've been...

A. I've never seen him take a drink sir.

38. Q. No? And what can you say about Mr. Ebsary's recent habit, at least in the last four months, as far as going out of the apartment?

A. As far as he goes is my place since we moved next door to him.

39. Q. And how does he get there?

A. I go in and I escort him out.

40. Q. How do you do that?

A. I lead him by the arm.

41. Q. Does he go down town or does he go walking around or anything?

A. No sir.

42. Q. Ever?

A. No sir.

43. Q. Now if I was to say that Mr. Ebsary was dangerous, violent, what would be your reply?

A. I'd have to laugh at that one.

44. Q. Why?

A. I don't find him dangerous.

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

Mrs. Strowbridge examined by Mr. Edwards:

1. Q. Mrs. Strowbridge, at the present time you and Mr. Ebsary and your husband reside in your apartment at seventy-four Falmouth is that right?

A. Right.

2. Q. Is your husband employed?

A. No sir.

3. Q. And I believe you stated previously that both you and he are retaining social assistance from the city. Is that correct?

A. Yes sir.

4. Q. How much does that come to per month?

A. We get it every two weeks, a hundred and thirty something a month, a hundred and thirty-two a month.

5. Q. Could you speak up just a bit please?

A. A hundred and thirty-two a month for groceries.

6. Q. A hundred and thirty-two a month for groceries?

A. Right.

Q. And what about your rent? How much is that?

A. Two eighty.

Q. That's two eighty per month. Does the city pay that?

A. Yes sir.

Q. So you get the two eighty for rent plus a hundred and thirty-two? And that is it is it? There is no other source of income?

A. No.

Q. So that's approximately four hundred dollars per month? Right?

A. Yes sir.

Q. Now your four children, they're still in the Province of Newfoundland?

A. Yes sir.

Q. And what's the range of their ages?

A. The oldest is twelve and the baby is six.

Q. And they are presently staying with in-laws I take it are they?

A. My family.

Q. Your family.

A. Yes.

Q. And you've been separated from them for what? four months?

A. Yes sir.

Q. So I assume you are anxious to have them come over and join you are you?

A. Yes quite.

Q. So the apartment you presently occupy, how many bedrooms in it?

A. There's one large one and one small one.

Q. I assume that at the present, Mr. Ebsary occupies the small one. Is that correct?

A. Right sir.

Q. And you and your husband have the large one. So is it fair to assume then that upon the arrival of your four children you will need larger accomodation?

A. Yes sir.

Q. And so your living expenses are going to increase dramatically when they arrive.

A. Yes sir.

Q. Are you under any pressure from your parents to have the children taken over. It must be a burden on them to have the four children?

A. No sir.

Q. No? How old are your parents?

A. They're not with my parents. They're with my brothers and sisters.

Q. With your brothers and sisters?

A. Right.

Q. Who have families of their own?

A. Yes sir.

Q. So how are they distributed? Does one brother and sister have all four?

A. The baby is living with my sister. My oldest boy is living with my brother. My second oldest is living with my sister in Grand Falls, and my oldest is in Grand Bank with my brother.

26. Q. So surely you can't expect your brothers and sisters to look after your four children indefinately?

A. No I don't want them to.

27. Q. How do you intend to support those four children and pay the increased rent that a larger apartment would inevitably bring?

A. Well my husband was turned down by a doctor.

28. Q. Pardon me?

A. My husband can't work.

29. Q. Your husband can't work?

A. No, he has an application sent in for disability pension.

30. Q. You don't know when or if that's going to come through?

A. No I don't.

31. Q. So Mr. Ebsary at the present time, is it fair to assume that he provides a lot of the groceries and a lot of the extra money that you and your husband have?

A. I buy the groceries one week, he'd buy the groceries the next.

32. Q. And you're aware of the number of pensions he gets?

A. Yes sir.

33. Q. And do you cash his cheques for him?

A. I take them to the bank for him.

34. Q. What's his total monthly income from those pensions?

A. I wouldn't be able to tell you right off hand.

36. Q. You wouldn't be able to tell me off hand. Do you know roughly what each of them is?

A. No answer.

36. Q. The point is, Mrs. Strobridge, if Mr. Ebsary goes to jail, it's going to be a bit of a financial burden on you and your husand isn't it?

A. It's got no bearings on me. I'm not a wasteful person.

37. Q. Pardon?

A. I don't waste.

38. Q. You don't waste?

A. No.

39. Q. But still it must be prettytough to make it on four hundred a month?

A. I've made it on less with four children.

40. Q. With four children?

A. Yes sir.

41. Q. Down in Newfoundland?

A. Yes sir.

42. Q. Where you have the support of family?

A. My family didn't help.

43. Q. Over here you know no one but Mr. Ebsary though do you?

A. No, my husband's got family here.

44. Q. Have they been able to provide any financial assistance?

A. No more than my own?

45. Q. Pardon me?

A. No more than my own would.

46. Q. Now you never knew Mr. Ebsary prior to coming over here?

A. No sir.

47. Q. And when you did arrive here in Sydney, you and your husband had no place to stay.

A. We stayed with his aunt for awhile.

48. Q. With your husband's aunt?

A. Right.

49. Q. So then you were taken in by Mr. Ebsary?

A. Mr. Ebsary wanted someone to look out for him.

50. Q. Pardon me?

A. Mr. Ebsary wanted someone to look out to him.

51. Q. And that also provided you with a place to stay?

A. Right.

52. Q. You feel indebted to Mr. Ebsary?

A. I feel grateful to him, yes.

53. Q. You feel grateful to him.

A. Yes.

54. Q. And all you can say is that in the four months that you've known him, you haven't seen him drinking or any violent outbursts?

A. No sir.

55. Q. I take it that you would be surprised by the assertion of his wife and police officers that he is a violent person?

A. Yes sir I would.

56. Q. You'd find that laughable?

A. Yes sir I would.

57. Q. You'd find that laughable?

A. Yes.

58. Q. On the basis of knowing him for four months.

A. Right.

59. Q. Thank you.

Mr. Wintermans:

Nothing arising out of that.

Justice Rogers:

Are there any more witnesses?

Mr. Wintermans:

No.

Justice Rogers:

Very well. Would you like to make some representations?

Mr. Edwards:

My lord, the accused stands before you today having been convicted by a judge and jury of the offense of manslaughter which under the criminal code, of course, carries a maximum of life imprisonment. I'll have some more to say about the law and the cases surrounding sentencing, the manslaughter cases, later in my address. But first I want to deal with respectively, with the criminal record of the accused and the presentence report. The accused, your Honour, was convicted on April eighth, nineteen seventy under section eighty-three of the criminal code and that is now section eighty-five of the criminal code. The offense being possession

of a weapon for a purpose dangerous to the public peace. At that time he received a monetary penalty of one hundred dollars or in default, two months in prison. The only other entry on his criminal record is on November fifth, nineteen eighty-two, at that time he was convicted of possession of a concealed weapon and sentenced to the correction centre for a period of six months. Which in the circumstances, was the maximum sentence because the crown had proceeded some error. Significant...or two things I'd like to highlight about that criminal record. My learnered friend might suggest that the April eighth, nineteen seventy, conviction is of dubious relevance now in nineteen eighty-three because of the passage of years. But I would note, My Lord, that it is almost just a little better than exactly one year prior to the offense for which Mr. Ebsary now stands before the court. So when viewed in that perspective, the conviction is certainly not irrelevant even at this late date. The other point I would like to make with reference to the record is that both the April eighth, nineteen seventy, conviction and the November fifth, nineteen eighty-two, conviction involve knives as did the event for which he stands before the court. So for what it's worth, it does show that Mr. Ebsary has a long-standing habit of using knives, I would submit, for illegal purposes. The presentence report, Your Honour...My Lord, goes into some detail about Mr. Ebsary and what is described as his violent and volatile personality.

I would note on page two of the presentence report the last full paragraph, the second sentence in it where the writer of the presentence report, Mr. Boutlier, is noting the comments of Mr. Ebsary's common law wife from whom he is now separated. He states, "Mrs. Ebsary stated that her husband drank heavily and that much of his behaviour was strange." About six lines further Mrs. Ebsary went on to describe her husband as mean and volatile when under the influence of alcohol. Now my learnered friend will point out that since Mr. Ebsary's recent injury and as is supported by Mrs. Stowbridge, the accused has not been drinking. But of course there is no guarantee that he won't resume drinking if and when he gets clear of his involvement with the courts. And I submit that it is a fair comment to say that when Mr. Ebsary does drink, it makes him more likely to become violent. And in that regard, if I could just skip over to the community history on page five, because there is a very important comment as noted as far as police officers are concerned who have had experience with Mr. Ebsary. Note the middle paragraph under community history, the second paragraph on page five. "Senior police officers consider Mr. Ebsary violent and dangerous inspite of his age and small stature and physical condition. Family members as reported previously have described Mr. Ebsary as a Jeykle and Hyde. A person who displays radical shifts in personality when drinking. They also feel that he is vendictive and

capable of violence" and this is the part I want to emphasize "even when sober". Now these are people who have known Mr. Ebsary better than any of us here will ever know him. Page three, just going back where Mr. Ebsary's son Gregory Ebsary as results of the interview with him are reported. "Mr. Gregory Ebsary agrees with his mother's opinions and is concerned about the safety of his wife and children. He has installed deadbolt locks on the home and for a time would not sleep until the early morning hours in fear of fire. The family do not wish to have any further contact with Mr. Ebsary in the future". So, My Lord, obviously those persons are in a far better position to assess the type of character that we have here before the court than either Mrs. Stowbridge who I submit has some stake in the outcome of this morning's procedures, a financial stake. And Doctor Cardew who dispite the fact that he has seen the accused over the last eight or nine years, I submit that it's fair to assume that when he would see him, Mr. Ebsary would be on his best behaviour. And that is confirmed by the fact that Doctor Cardew stated that despite that length of time, he had not seen Mr. Ebsary for sure under the influence of alcohol. He had described his flamboyance, of course, and that pertained to Mr. Ebsary's character and not necessarily the drink as far as Doctor Cardew was concerned. But I submit that it's indisputable that Mr. Ebsary had drank a lot and has been very violent. We have his own family attesting to that. Now the facts of

this case, of course, have been thoroughly canvassed because of the fact that we've gone through a trial. But I would just like to highlight them briefly as they may assist us in arriving at the appropriate quantum of sentence in this morning's proceedings. It would appear that on the evening of May twenty-eighth, nineteen seventy-one, the accussed and his friend, James MacNeil, were at the State Tavern in Sydney. Mr. Ebsary did have something to drink that night. We're not sure exactly how much. I believe Mr. MacNeil's evidence was that he, MacNeil, had had six or seven beers so we can probably assume that Mr. Ebsary had a similar amount. Mr. Ebsary in a tape recorded statement which was introduced to trial indicated that he had been drinking quite a bit of wine that night. But, in any event, they left the tavern somewhere around eleven p.m. and made their way to Wentworth Park and then through Wentworth Park to Crescent Street. All the while, and this is significant, I submit, Mr. Ebsary had in his possession a fixed blade knife and I would submit, and apparantely the jury believed, that he had made up his mind prior to that night that he would readily use that knife; and I would submit, at the slightest provocation. And I refer in particular to the part of his tape recorded statement where he noted that, and I paraphrase, but it went something like "And I swore by my Christ that the next fella that tried it would die in his tracks". And there, of course, he was referring to the fact that as he alleges, he had been

mugged in the Park before. In any event, Mr. Marshall and Mr. Seal, the victim, came upon the accused and Mr. MacNeil and there is no question their intentions at the time were to role those two gentlemen. Mr. Marshall grabbed hold of Mr. MacNeil apparantly to subdue him and to prevent any interference between..by MacNeil between Ebsary and Seal. Mr. Seal who still had his hands by his side said something like "Dig man dig" and the accused replied and said I've got something for you and then inflicted the fatal wound. After that, of course, the facts are clear that Mr. Seal died hours later, the next day. And Mr. Ebsary and Mr. MacNeil went to Mr. Ebsary's residence at one twenty-six Argyle Street where Mr. Ebsary washed off the knife and told MacNeil to be quiet. Even when told by MacNeil the day after Seal died about this Mr. Ebsary claimed it was self-defense and accepted no responsibility for the crime at that time. Mr. Donald Marshall, of course, was charged in November of nineteen seventy-one. Was convicted of the murder and spent eleven years in jail for this particular crime. But a few days after his conviction, specifically on November fifteenth, nineteen seventy-one, Mr. Ebsary had the opportunity at that time to come forward and admit his part in the crime, but of course the statement which is admitted into evidence shows that he was not prepared at that time to admit the stabbing and it was not until the recent R.C.M.P., the nineteen eighty-two R.C.M.P. investigation proven, I submit, beyond a shadow

of a doubt, what Mr. Ebsary's involvement was. That Mr. Ebsary did finally come forward and give the tape recorded statement which is in evidence. And in which, even at that late date, he tries to excuse what he did. I submit that the fact of the guilty verdict by the jury shows that Mr. Ebsary definately was not acting in self-defense and has been so found and that what we have here is manslaughter and as such culpable homicide. And the law, I submit, has demonstrated through the cases that have gone before the court that culpable homicide must be deterred and must be emphatically deterred. I just want to refer to one of those cases which perhaps outlines as well as any the dilemma...or I shouldn't say dilemma, but the difficult situation which the court now finds itself as far as determining an appropriate sentence for this particular crime. I'm referring to a quote in R. versus MacPhee and that's recorded in twenty NSR two at five twenty...at five twenty-six and five twenty-seven. Where the court in MacPhee quoted the same court in the Queen versus Gregory and the citation is there. But I submit it's worth-while looking at that particular quote where the court said, "It may be said of manslaughter differing in that respect from other crimes, that the legal limits of possible sentences is very great. There are cases of manslaughter where the line between crime and accident is narrow and where a sentence of a few month imprisonment is appropriate. On the other hand, there are cases where the proper sentence approach-

or reaches the legal limit of imprisonment for life. Different cases involve different facts as varied as are the actions and thoughts...and the thought of man and it is always difficult to determine the punishment appropriate under the circumstances. No one case can be an exact guide for another. And, of course, in this particular case where we have the intervening years as well as the physical condition and age of the accussed, I submit, that it would be almost impossible to find a case which would give us a good yardstick. So we're left with a very great range of possible sentences and the problem of trying to figure out what would be the appropriate sentence in this particular case. Just to demonstrate that there is R. versus Jullien, six NSR, two five oh four, where a twenty-eight year old male was sentenced to twenty years whereas on the other hand, a local case, a Glace Bay case, R. versus Cormier, nine NSR, two six eighty-seven, where the thirty year old housewife who evidence disclosed had been abused by her husband and both were intoxicated on the evening in question, was given a suspended sentence for a period of two years. So there is precedent for one extreme to the other in the case law. But referring to the quote that I sited from the MacPhee case in the particular part where it says, "There are cases of manslaughter where the line between crime and accident is narrow and where sentence of a few months imprisonment is appropriate". I would submit that this is definately not one of those cases because, I submit

that there is no accident...nothing approaching an accidental killing in this particular case. Mainly because of the fact that when the accused went into the park that night, he had already made up his mind. He was prepared, and I'll use the word, to execute any person who interferred with him at that point. And that is not the type of society that we live in. We haven't got to that stage and that that type of conduct must be emphatically discouraged. Notwithstanding the passage of years and the age and physical condition of the accused. So the first point the Crown would make as far as quantum is concerned, is that the Cormier case where suspended sentence was meeded out for manslaughter is definatel not the type of sentence that we're looking for here. On the other hand, the court cannot totally ignore the physical condition and age of the accused nor can the court completelt ignore the fact that Seal and Marshall had unlawful intentions on the night in question and, therefore, those factors have to be taken into consideration, and would mitigate against the imposition of the maximum or some of the very sever sentences which have meeded out for manslaughter cases. And there I'm talking about cases where in excess of ten years have been meeded out by the court. So taking all the factors into consideration one gets back to the basic principles of sentencing as outlines in the Queen versus Grady, and the court must decide in all the circumstances how the public may best be protected. Now obviously my learnered friend will

measures could be taken in order to turn around a seventy-one year old man who, I submit, the presentence report showed has had a long period of violent conduct. So the Crown's submission, My Lord, is that taking all factors into consideration, an appropriate range of sentence would be three to five years in a federal institution. I submit that Mr. Ebsary's medical condition would then become the problem of the federal authorities and it would be up to them to see that, if necessary, and no doubt at this point it is necessary, that the proper facility be made available to him whereby he could get the medical care and personal attention he needs. But, I submit, that the public interest here far outweighs the interest of Mr. Ebsary and, therefore, I have no hesitation in recommending incarceration for the period of time I had mentioned. Thank you for your attention.

Mr. Wintermans:

My learnered friend has indicated the criminal record of Mr. Ebsary. Two offenses involving possession of knives. I would submit that to, in the case of a seventy-one year old man, to argue from that that he's an extremely violent dangerous person is not borne out by history. The fact is that this is the only crime of violence for which Mr. Ebsary in his long life has ever been before the court. Now carrying a knife is one thing but to say that he's a violent, dangerous person just because of that, as I say, is not borne

out by history. My learnered friend has indicated that his record indicates, I think he said, a long standing habit of using knives for illegal purposes. Well I think that's somewhat of an exaggeration. As I say, it's one thing to carry a knife but it is something else to have a long standing habit of using one for illegal purposes. The police, the presentence report indicates senior police officers don't have a good opinion of Mr. Ebsary. That they think he's dangerous and my learnered friend indicates that ahh...makes the statement that these police officers know Mr. Ebsary better than we do. But first of all I wonder who these officers are and based on his previous criminal record I don't see that that's fair. There was, I think that the relevant factors are perhaps that at one time Mr. Ebsary was volatile and perhaps dangerous. Had a bad temper when under the influence of alcohol. But that's the past and what your Lordship ought to be concerned about is the present and the future. I think that the law as stated in the now very famous Grady case has made it quite clear that there is no point in the principles of sentencing in Nova Scotia, at least, for the concept of retrubition. That...I thing, there is a danger in this case to want to punish Mr. Ebsary for what happened to Donald Marshall Junior, which I would submit is not a consideration that your Lordship ought to consider. There is also perhaps a feeling that Mr. Ebsary ought to be punished for having been a violent person when drinking in

the past. I think that the Grady case has stated it very clearly. That's R versus Grady, just for the record, nineteen seventy-one five NSR second at two sixty-four, where Chief Justice MacKinnon stated at page two sixty-six, "In his factum the Appealant has cited the case of Regina versus Morisat, nineteen seventy-one, CCC second, three oh seven, where Coigen C.J.S. sets forth the factors which should be considered in imposing sentence." That's in Ontario. "These are one, punishment, two, deterrence, three, protection of the public, and four, reprimation and rehabilation of the offender." And then the Chief Justice of Nova Scotia at that time goes on and says, "If Chief Justice Coigen listed these factors in order of priority, which I seriously doubt, then this court has for some years approached the matter of sentencing with somewhat different viewpoint. It has been the practice of the court to give primary consideration to protection of the public and then to consider whether this primary objective could best be obtained by A. deterrence or B. reprimation and rehabilitation of the offender or C. both deterrence and rehabilitation." And I think that's been...well it's been probably the most often cited case in recent years ever since it was decided in nineteen seventy-one. It's an interesting coincidence that that was decided in nineteen seventy-one, the same year that this incident occurred. But just to emphasize the main consideration, "It has been a practice of this court to give

primary consideration to protection of the public and then consider how this primary objective can best be obtained.." So, Your Lordship has to consider how you can best protect the public and that's, of course, in the present and the future. My learnered friend has indicated what I would submit is his opinion as to what the jury found to be the facts. And I take issue with some of his statements. He indicated that the jury found that he would readily use a fixed blade knife at the slightest provocation. My learnered friend indicated that the jury found that he was not acting in self-defence. My learnered friend indicated that the accused has already made up his mind to execute anyone who interferred with him before he went into the park. I would submit that that is one possible way of interpreting the verdict perhaps. Although my learnered friend is coming very close to a situation of describing the mind of a murderer rather than a person guilty of manslaughter. And I think that the key to what the jury found came from the ah...one of the questions they asked after they had been out for a while. They wanted to be redirected when they asked the question something to the effect, are we supposed to determine whether or not he used excessive force? And I think that that was the key to the verdict came back shortly thereafter.. after Your Lordship indicated that they were to determine that question. And so I would submit that what the jury found is that....is that Mr. Ebsary was provoked and he used

excessive force in self-defence. That he went too far, but he made have been justified in using some force in self-defence but that he wasn't justified in going as far as he did. But certainly there is no question of the facts that the accused was provoked and was under the influence of alcohol and that there was a robbery attempt that took place and initially he was a victim. The problem is...or the offense comes from his over reaction to a situation initiated by other parties, the victim and another party. I think that that is the critical element in this case. My learnered friend mentioned the case of R verses Cormier which is a Nova Scotia Supreme Court Appeal Division case from nineteen seventy-four, nine NSR second at page six eighty-six. That, as my learnered friend indicated, was a case where Mr. Justice MacDonald gave the decision of the court...a woman who committed manslaughter on her husband who stabbed him and killed him. And that case quotes the other case that my learnered friend referred to, The Queen versus Gregor where it indicates the different....that manslaughter is different.. it may be said of manslaughter differing in that respect from other crimes that the legal limits of possible sentences is very great etc. He goes on to indicate on page six ninty-two ....Mr. Justice MacDonald, "That parliment has recognized this principle as shown by the fact that although the maximum punishment for manslaughter provided by the code is imprisonment for life, no minimum is perscribed. And

in consequence the suspension of passing of sentence in manslaughter cases is a legal sentence and one comtemplated by parliment. In my opinion, however, the suspending of sentence on a conviction for manslaughter can only be justified if there are exceptional circumstances." I would suggest that certainly this case has more than its share of exceptional circumstances. The court goes on to quote the often quoted paragraph from the Grady case which I've already quoted. He goes on to quote another part of the Grady case at page six ninty-three, in Grady MacKinnon, CJNS...also said at page two sixty-six to seven of the report, "It would be a great mistake, it appears to me, to follow riged rules for determining the type and length of sentence in order to secure a measure of uniformity for almost invaribly different circumstances are present in the case of each offender." On page six ninty-six of the report Mr. Justice MacDonald states, "It is true that sentences for manslaughter in this province almost invaribly involve a term of imprisonment in a federal institution, however, there does occur in this jurisdiction the rare case where there are exceptional circumstances and mitigating circumstances justifying the suspension of sentence for manslaughter. See, for example, The Queen versus Pilot, nineteen sixty-four, SC eight four three eight, in which a Crown appeal from the imposition of sentence suspension for manslaughter was dismissed by this court then differently constructed and constituted. We

were also referred to the case of The Queen versus Lucille Mary Richard, an unreported decision of the late Mr. Justice Gillis in which following a plea of guilty to a charge of manslaughter, he suspended the passing of sentence." The conclusion of the Cormier case on page six ninty-seven six ninty-eight, Mr. Justice MacDonald states, "The report of the Canadian Committee on Corrections, the Aweemet report, nineteen sixty-eight on page one eighty-five, summarizes its views in a statement frequently quoted by many courts and by this court in Regina verses O'Sache, nineteen seventy-four six NSR second, five twenty-four. "The overall views of the committee may be summed up as follows: segratate the dangerous. Deter and restrain the rationally motivated, professional criminal. Deal as constructively as possible with every offender as the circumstances of the case permit. Release the harmless. Imprison the casual offender not committed to a criminal career only when no other disposition is appropriate. In every disposition the possibility of rehabilitation should be taken into account." Then Mr. Justice MacDonald goes on to state, "I do not feel this position conflicts with the ratio of The Queen versus Grady, and , indeed, in my opinion they should hensforth go hand in hand." So the appeal division of this province has strongly supported that statement of the report of the Canadian Committee on Corrections. And just to go over a couple of those points. Deal constructively as possible with every offender as the

circumstances of the case permit. Release the harmless. Imprision the casual offender not committed to a criminal career only where no other disposition is appropriate." I think that those are very important matters to consider. There is another more recent case in Nova Scotia, R versus MacKay, nineteen eighty decision of the Nova Scotia Supreme Court, Appeal Division, found at forty NSR second at page six sixteen, where a suspended sentence again was imposed by the trial judge on a manslaughter charge and it was affirmed by the appeal division. A very short decision. That case, of course, was the case of the two young men who were playing with a shotgun that turned out to be loaded and it went off and one of them was killed. Other cases, R versus Marseau was an Ontario Provincial Court decision, nineteen seventy-eight found at four Criminal Reports, third, at S fifty-two. That was the case of a seventy-nine year old man killing his wife with a hammer. He was given a suspended sentence and probation for three years. The judge found that he was no danger to society because...because of his mental and physical condition that personal and general deterrents were not relevant. That prison would be gravely harmful to the accused. For those reasons the sentence was suspended in that case of R versus Marseau. Another case is Regina versus Hardy, which was a Quebec Superior court decision, nineteen seventy-six, CRNS volume thirty-three at page seventy-six. Another situation where there was a

suspended sentence in a manslaughter case. The accused was originally charged with murdering his wife had pleaded guilty to manslaughter and sentence was suspended. There was another case of...in that case there are a number of other cases that are referred to, R. versus Cormier, the Nova Scotia case, at page eighty in the decision of Regina versus Hardy it states, "Rothman J. in the cases of Regina versus Shea number seventy-two dash seven four five four not yet recorded suspended the sentence of a man who pleaded guilty to killing his alcoholic concubine. He has slapped her several times in an attempt to quiet her and get her to bed. She fell striking her head on a bureau and after she died of a brain hemerage. Lately Hugisen, A.C.J. gave a suspended sentence in number seventy-five dash one eight oh seven to Janet Laberge who had killed her concubine. So there have been quite a few cases in recent years where suspended sentences have been considered on manslaughter cases. The question of exceptional circumstances seems to be the key point. Now the presentence report indicates that Mr. Ebsary has ah... it is ah...has a very unusual past at least according to his own accounts. It simply states after stating all these accomplishments, the presentence report just simply states at page four, "The above accomplishments are not varified." Well Mr. Ebsary has indicated to me that he's been decorated that the medals that you see on him are genuine. That he was given the Atlantic Star, the Pacific Star, the nineteen

thirty-nine to forty-five star, defence medal from Britian nineteen thirty-nine to forty-five medal, bar of five from Britian. The french Quad de gare, distinguished conduct medal from Britian and that he served originally.

Justice Rogers:

Is that ture?

Mr. Wintermans:

That's what he indicates to me. I attempted to verify it

Justice Rogers:

You should be able to.

Mr. Wintermans:

Because he came from Newfoundland, and it's the British who have that information. I just sort of ran up against a stone wall.

Justice Rogers:

DSM and the Quad de gare are not given away at random.

Mr. Wintermans:

That's true I suppose.

Justice Rogers:

Before you make representations like that to me, I wish you'd verify them.

Mr. Wintermans:

Well as I indicated at the beginning of that part of the submission, this is what Mr. Ebsary has indicated to me. On the one hand it hasn't been verified, on the other hand it hasn't been disproved either.

Justice Rogers:

That's no argument to make to me. Surely.

Mr. Wintermans:

All I can pass along, My Lord, is what my client has told me time and time again. One of the things that he does tell time and time again.

Justice Rogers:

I gather.

Mr. Wintermans:

Another interesting point that I would like to make to your Lordship is that ah..., of course, because this offense occurred such a long time ago, I had to rely very much on information given to me by the crown and the police through the crown. One of the pieces in all the volumes of paper that was given to me was a piece of paper that is entitled movements of Roy Ebsary. Twenty-eight, twenty-nine, May seventy-one. Statements attached. And it has A, B, C all these different steps. But it says ahh...just to get towards the relevant part...J. Fifteen November, seventy-one, James MacNeil contacts with brothers John and David and advises Ebsary responsible for murder. K. Inspector E.A. Marshall R.C.M.P. arrives Sydney seventeen November, nineteen seventy-one, reviews file and polygraphs MacNeil and Ebsary. Ebsary indications of truthfullness. MacNeil indefinate due to low I.Q. And in this one L. Ebsary goes home and literally stays in house four seven years. That's from an R.C.M.P. report.

The reason I mention it is because there may...it may be argued and I mention it that after this incident occurred there was sort of a self-imposed seven years in his house that he, according to this statement at least, Ebsary goes home and literally stays in house for seven years. I have been unable to find any reported case on a robbery victim committing manslaughter and being sentenced. I have been unable to find any reported case on a person being sentenced for manslaughter or for anything after thirteen years...the manslaughter...for manslaughter thirteen years or so after the offense. There is an indication that at the time that this offense occurred, that Mr. Ebsary was a drinker. That during the next several years that his physical condition deteriorated and he drank more and more or a lot. But that in the past few months following the April, nineteen eighty-three, accident where he fractured his neck he has given up drinking and has become unable to get to leave his residence and I would submit that there is a major change in circumstances. It's confirmed in the presentence report I understand also. A probation officer indicates at one point, "Mr. Ebsary displayed a more quiet disposition, more coherent, his living conditions following his involvement in this court action and also his neck injury in April of eighty-three. He has obviously improved his lifestyle and his general appearance indicated a notable improvement in his general health and mental state". Some opinions are given that he

is dangerous, perhaps was dangerous, but certainly a relevant consideration is that this is the only crime of violence on his record in his seventy-one years. Given that fact together with mitigating circumstances of the offense, the length of delay and his present medical condition, I would argue that it is not supportable by the facts to argue that he is presently dangerous. Perhaps a close fact situation is the case of R. versus O'Neil, nineteen sixty-six, fifty-one Criminal Appeal Reports, two forty-one. A case of manslaughter of one man and inflicting grevious bodily harm upon another sentences were reduced from eighteen months of total sentence to time served on appeal. The court stated quote " Although it may be that technically this man could not rely on the defense of self-defense, yet to all intensive purposes he was a man who was in fear of being set upon. If not actually set upon by Hans and his friends. There are strong grounds for thinking throughout this episode that Hans was the aggressor". That was the case of R. versus O'Neil. In the case of R. versus MacArthur, nineteen seventy-eight, thirty-nine, CCC second, one fifty-eight, P.E.I. court of appeal case. It was stated by the court...that was a situation rather of criminal negligence causing bodily harm in shooting of a common law wife. It was noted that the victim had in some degree instigated the incident and a suspended sentence and three years probation was imposed. The age...extreme age has been a relevant factor in sentencing. From the

Rubey on sentencing he mentions a case R. versus Nezic which is a unreported nineteen seventy-six British Columbia court of appeal case on a charge of assault causing bodily harm. A seventy-seven year old accused who, without provocation, broke a glass in a beer hall, slashed another man across the face permanently scaring him. A conditional discharge was imposed. Instead of a sentence of six months which would quote "under usual circumstances not be inappropriate". It was found that there was no useful purpose in putting the Appealant at that age of seventy-seven in jail for six months and that...I'm not suggesting that a conditional discharge was even appropriate in that case, let alone it's of course impossible in this case. But it is a situation where extreme old age was taken into account by the British Columbia court of Appeal and a situation where normally a sentence of incarceration would have been imposed. A non-custodial penalty was imposed. I would ask that your Lordship, if your Lordship feels that some period of incarceration is necessary here, it is very relevant to consider the pretrial custody that the accused has been under. He was in a hospital from April of nineteen eighty-three and then he was charged with this offense a few weeks later and was in custody on remand until August when he had his preliminary inquiry. So he spent several months in custody prior to being released after the preliminary inquiry. And I ask that your Lordship take that into account.

Justice Rogers:

Where was he in custody? At the Correctional Centre?

Mr. Wintermans:

He was in the rehabilitation centre in halifax for most of that time with a twenty-four hour guard reportedly at the cost of seventeen thousand dollars to the Province and then he was transferred back to the Cape Breton County Correctional Centre just shortly before his preliminary inquiry in August, early August. Following the preliminary inquiry he was immediately released on conditions. Which leads me to another point that since being released in August of nineteen eighty-three, several months ago, on the conditions that he obstain from the use of alcohol and non perscriptive drugs that he be under curfew and that he stay away from his family. He has followed those conditions without incident. He has not been charged or convicted in any problem since that and that is something I think your Lordship ought to take into consideration very seriously when determining whether or not Mr. Ebsary is a dangerous person at this point. I would argue that your Lorship has to consider the present and the future. That your primary consideration is the protection of the public and how can that best be obtained. I'd submit that society did not have to be protected from Mr. Ebsary any more, if it ever was. Any more by the imposition of a period of incarceration. His age and physical condition would make a period of incarceration for him much

more sever than for the average person. Something that your Lordship should take into account. The elements of provocation and self-defense that are undisbutable in this case. The element of alcohol consumption has been considered as a factor in weighing how a person could arroused passions and clouded judgement. All of these factors...and the medical evidence and the evidence of the woman who...along with her husband, is looking after the accused indicate that Mr. Ebsary does not need to be put in jail in order for society to be protected. He has proved over the past few months that he can follow the conditions of an undertaking similar to the terms of a probation order which I would submit that society in this case can best be protected. And all of the elements of sentencing be satisfied by the suspending of passing of sentence for the maximum period of time which is three years with strict conditions similar to the conditions under which he is presently subject on his undertaking, which is that he abstain from the comsumption of alcohol and non perscriptive drugs. That he stay away from his family. That he be under curfew. If your Lordship feels that is necessary although the evidence is that he never, literally never, goes out on his own with the exception of going next door and coming to court. And, of course, the value of the suspended sentence for three years is that it provides the police and court with a vehicle for bringing Mr. Ebsary back before your Lordship if there are any problems

during the next three years. And I have no doubt that the police will certainly keep an eye on Mr. Ebsary. If there are any problems, the law clearly states that he can be brought back before your Lordship, the suspended sentence set aside and a sever...any penalty up to a maximum of life imprisonment imposed by your Lordship on this charge plus, of course, he could be charged with some new offenses. And I would submit that that under these circumstances is sufficient protection for the public and taking into consideration all the circumstances...unusual and bazaar circumstances of this case. I leave all those comments with your Lordship. Thank you.

Justice Rogers:

Do you have a reply Mr. Edwards?

Mr. Edwards:

I just want the opportunity, if I might, to clarify this pretrail custody business. When Mr. Ebsary was charged on May twelfth, nineteen eighty-three, well he was originally charged with murder; but by operation of law because it was a murder charge, he...as soon as the charge was read to him which it was by a judge of Provincial Magistrates court, that judge, of course, would not have the jurisdiction to release Mr. Ebsary. So he was in custody from that point on pending an application which it would be encumbant upon him to make for his release. So from May twelfth until the date of the preliminary inquiry in August, I submit that though he was

technically in custody, that custody was more technical than actual because of the fact that he was in the hospital and the only evidence of any custody was to have a guard placed on him because by operation of law he was in custody. So I submit that that puts it into perspective.

Mr. Wintermans:

If I could just answer that one point, My Lord, the problem or the answer to that is that Mr. Ebsary was not allowed any visitors. That was a four month period. No visitors. Even in jail you're allowed to get visitors, but he was not allowed any visitors. And he had people who wanted to visit him, but they weren't allowed in. He had a twenty-four hour guard on him for four months. I think that was being in custody. Just because he was in the hospital doesn't matter.

Justice Rogers:

Thank you very much gentlemen. Mr. Ebsary, before I pass sentence do you have anything that you wish to say to the court?

Mr. Ebsary:

My Lord, A good kangaroo courts, and I've read of kangaroo courts. For the crown witnesses swore false...and were other, you for instance, you charged the jury...in addressing the jury you told the jury I deliberlately stuck a knife.

Justice Rogers:

You address your remarks to me and not to anybody else Mr. Ebsary.

Mr. Ebsary:

I'm sorry sir. That's all I have to say.

Mr. Edwards:

My Lord, if I may, perhaps it should be placed on the record. I don't believe it has been, but Mr. Ebsary has had the opportunity of reading the presentence report and has not requested the court to make any changes in there beyond the remarks made by (Inaudible).

Mr. Ebsary:

My Lord, am I at liberty to take action against my wife and family?

Justice Rogers:

I'm not competent to give you advice with respect to that. My sole function here today is to deal with your sentence as a result of the jury's verdict a week or two ago.

Mr. Ebsary:

I've been robbed of all I had sir, even my character.

Justice Rogers:

Well that's a matter you'll have to take up with your own lawyer to see what action, if any, you may take.
Mr. Ebsary, you've been convicted by a jury of your peers of the criminal offense of manslaughter. On May twenty-eighth nineteen seventy-one, you unlawfully and viciously killed Sanford Seal by ripping into his abdomen with a knife. In the name of self-defense you stabbed Sandy Seal who was standing facing you unarmed with his hands by his side.

You did so with a knife, apparantly a straight knife. At least not a pocket knife which you had been carrying in your pocket. For that killing committed by you alone, another man has spent eleven years in the penitentiary. In determining an appropriate sentence particularily with respect to such a crime as yours, I must have primary regard to the protection of society. All other considerations must bear upon and if necessary, give way to this overall concern. Including the welfare of you, the accused. I must, taking all the circumstances of the case and all the appropriate sentencing factors into account, arrive at what is a fit and proper sentence. A just proportion between the crime and the sentence. I must consider, in the circumstances, both the specific and general deterrent affect of the sentence I must impose. But mainly I must consider its general deterrent affect. Society must be seen to express its denunciation of particular crimes, in this case the crime of manslaughter, and particularily in the manner it was committed by you. So I have considered the gravity of the offense. And I've already commented on it. I've considered it in the light of your own remarks to Corporate Karrell. Particularily your remark, and I quote: "I said brother, you asked for everything. You're going to get everything. And I gave him everything." And you stabbed him obviously with a great deal of force. I've considered the very rational and cold-blooded manner in which you chose to knife Seal in the

abdomen with an upward cutting motion designed to inflict the maximum type of injury. You have a criminal record, though be it a short one, but it comprises two offenses involving weapons. The first, a year before the offense. Before this offense you were convicted of possessing a weapon dangerous to the public peace and given a one hundred dollar fine. The other, just a year ago, you were convicted of carrying a concealed weapon for which you were sentenced to six months in jail. Both of those offenses involve knives. I have examined carefully the presentence report that has been prepared by Mr. Calvin Boutlier, senior probation officer with the Nova Scotia Correctional Services in Sydney. He outlines your background and former lifestyle and your present status, condition, and attitudes. I just note for the record some of his comments. He said, "Mr. Ebsary does not recognize his addiction problems, and that is the addiction to alcohol and drugs. Nor is he self-critical of his past lifestyle. Following his involvement in the court action and also his neck injury in April of nineteen eighty-three, he has obviously improved his lifestyle and his general appearance indicates a notable improvement in his general health and mental state." And again, "Senior police officers consider Mr. Ebsary violent and dangerous inspite of his age and small stature and physical condition. Family members have described Mr. Ebsary as a Jekyll and Hyde. A person who displays radical shifts in personality when drinking. They

also feel he is vendictive and capable of violence even when sober." And then, "Mr. Ebsary does not display any remorse or concern in relation to the offense and his present situation. Inspite of Mr. Ebsary's disabilities, the families still express concern and fear for their safety."
Now it's this lack of remorse that is particularily disturbing to me. Remorse is a factor to be taken into consideration in order to mitigate...whatever...what would otherwise be an appropriate sentence in the circumstances. But you showed none. Through the years you allowed Marshall to languish in penitentiary, and you show none now. That lack of remorse does you no good Mr. Ebsary. Similarly, your conduct after the offense, twelve long years ago, could operate to mitigate sentence. But it was, infact, your conduct was, infact, reprehensible and in no way a mitigating factor at all. Now against these very negative factors, I have considered as well, of course, your age and your health. And the condition in which you found yourself on May twenty-eighth, nineteen seventy-one. And with respect to the latter, of course, there was an evident attempt to rob you of money. Your age is seventy-one, but I must say you're a very fisty seventy-one. However, you were only fifty-nine when you killed Sandy Seal. Your health is another matter. I've listened to Doctor Cardew, your physician of a number of years standing, and I accept his evidence although he didn't seem to know whether it was your right or your left

due account, and pay particular attention to your age and condition in accommodating you within the federal penitentiary system. I now close the court.