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1985

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROY NEWMAN EBSARY

(T-R-I-A-L)

HEARD BEFORE: The Honourable Mr. Justice Nunn (and Jury)
PLACE HEARD: Sydney, Nova Scotia
DATES HEARD: January 9, 10, 11, 14, 15, 17, 18, 1985

COUNSEL:

F. EDwards, Esq. for the Crown
L. Wintermans, Esq. for the Defence

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THE COURT: All right. The accused is present. Mr. Wintermans?

MR. WINTERMANS: My Lord, I assume that there are no members of the jury panel present.

THE COURT: There are none. I've been instructed the Sheriffs there are none.

MR. WINTERMANS: First of all, My Lord, some arguments. Would you like to hear now the argument with respect to whether or not Mr. Ebsary should be put on trial at all?

THE COURT: I'd like to hear the challenge to the array first.

MR. WINTERMANS: The challenge to the array . .

THE COURT: The record should show, by the way, that the Challenge to the Array has been filed in writing by Mr. Wintermans and I will read it.

> "The accused challenges the array on the grounds that Section 6 of the Juries Act of Nova Scotia, Chapter J5 offends the Canadian Charter of Rights and Freedoms, specifically Sections 7 and 11(d)."

MR. WINTERMANS: Yes, now My Lord, first of all the starting point perhaps ought to be Section 554.1 of the Criminal Code where it says a person who is qualified and summoned as a Grand or a Petit Juror according to the laws in force for the time being in a Province is qualified to serve in criminal proceedings in that province. So reference is made to the laws of province. When one examines the Juries Act of Nova Scotia, Section 6.1 it states:

> "From the rolls and other records of persons assessed for taxes in any of the municipal units in a jury district, the jury committee before the end of August in each year shall

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select a Grand choice, the names of in the case of each other jury in 300 persons qualified in order to serve as jurors."

Now the municipal - the rolls and other records of persons assessed for taxes in any municipal unit does not I suggest restrict the eligibility to being on the jury panel to people who pay municipal taxes, that is people who own real estate. Now I submit to Your Lordship that Mr. Ebsary does not own real estate. Now the question of the applicability of the Charter of Rights to provincial legislation is in issue, which is clearly before you because the Charter at this point in time doesn't apply to provincial legislation. However, I would submit that as the Juries Act is incorporated into the Criminal Code by virtue of Section 554.1 therefore there is grounds for Your Lordship considering the provisions of the Juries Act. I would submit that normally a challenging to the array is subject to Section 558.1 and it is very restrictive in that the only grounds upon which a person may challenge the array is on the grounds of partiality, fraud or wilful conduct on the part of the Sheriff or his deputies and of course that is not what we're alleging here. We're not saying there is any wilful misconduct or partiality or fraud. What we're saying is Your Lordship by virtue of the Canadian Charter of Rights and Freedoms ought to expand upon the section 558.1 or an alternative or both, question the validity of Section 554.1, the qualification of juror section of the Criminal Code by virtue of the fact that it is submitted Section 6 of the Juries Act of Nova Scotia is not providing a proper means of jury selection.

In support of that I refer generally to the Charter of Rights. I specifically refer Your Lordship to Section 7 of the Canadian Charter of Rights and Freedoms

independent and impartial tribunal."

I would submit that when one combines Section 7 with Section 11(d) that the principle that a person has a right to be tried by a jury of his peers becomes enshrined constitutionally in this country, and of course only recently has this been the case and that is why there is little case law to rely upon and I'm not citing any cases at all. I'm simply putting this forward to Your Lordship on the basis that when one considers the principles of fairness and natural justice that I would submit that it's a question for Your Lordship to consider.

So if Your Lordship wishes a suggestion as to an alternative, more suitable way of selecting a jury panel then I would submit that a more suitable way would be by choosing from the election rolls rather than from the real estate tax rolls. In other words the jury panel should be chosen from people who are eligible to vote perhaps in a provincial or federal election or whatever. That would be fairer, I would submit. Especially given that in this day and age there are a great number of people who do not own property. Now perhaps back in the olden days, if I can use that phrase, different considerations might have applied but nowadays where it is not unusual by any means for people to live in apartments, rent houses or apartments, I would submit that there's something basically wrong with that section of the Juries Act and therefore the Sections 554.1, there's something wrong with that. It depends upon the Juries Act and also Section 558.1 ought to include as a ground more than just challenging on the basis of the motives of the Sheriff or his deputy. So that's . . .

THE COURT: Your objection is not directed to 558.

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MR. WINTERMANS: Not really, no. Even thought I did file a notice it occurred to me that the ground that I'm raising is not included in 558.

THE COURT: That's right.

MR. WINTERMANS: Therefore either . .

THE COURT: It would only succeed don the basis of the Charter.

MR. WINTERMANS: So therefore I'm applying under Section 24 in the Charter of Rights and Freedoms. For a declaration that the provisions of Section 554.1 are unconstitutional, if they allow a province to use unfair practices in selecting the jury array.

Let's assume, perhaps, just to strengthen the argument if I can, the Juries Act of Nova Scotia says that no blacks, no women, no people with an income of less than $100,000 a year are eligible to serve on juries, then I would make the same argument and perhaps Your Lordship would see under those circumstances clearly there'd be something wrong with that section. And perhaps Your Lordship doesn't see this as an extreme situation as my last example. However, I submit that Your Lordship does have jurisdiction under Section 24 of the Canadian Charter of Rights and Freedoms to declare that the panel offends against the Charter of Rights and Freedoms by virtue of the combination of Section 6 of the Juries Act and Section 554.1 of the Criminal Code, and that 558.1 of the Criminal Code is too restrictive under those circumstances.

THE COURT: All right.

MR. WINTERMANS: I'll leave that with Your Lordship.

THE COURT: All right. Unless we feel a compelling need I don't really think I can hear you. Mr. Edwards -

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This is a challenge to the array made on the basis that the Section 6 of the Juries Act of Nova Scotia, Ch. J5 of the Statutes of Nova Scotia offends against the Canadian Charter of Rights and Freedoms, it specifically offends Section 7 and Section 11(d).

It's questionable whether or not the Charter of Rights applies to the Juries Act, having been argued that since the Juries Act is incorporated under Section 554 of the Criminal Code, that therefore the Charter of Rights applies. There may be some merit to that particular argument as the statute certainly is incorporated in the Criminal Code as a procedural device. I think it's unnecessary for me to decide whether or not the Charter does apply to that particular statute.

I'm satisfied that the present system of the selection of the jury panel does not offend Section 7 of the Charter of Rights nor Section 11(d). Section 11 - Section 7 rather of the Charter of Rights provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Trial by a jury of one's peers has been regarded as essential part of the principles of fundamental justice since the Magna Carta. However, the system which has been followed for many years in this jurisdiction for the selection of the jury or entitlement to be a juror has been limited to a person on the rolls or other records of the municipal tax units. In other words, persons who are taxpayers or property owners. This has beeen a system that's been in effect for some considerable time in this province and many trials have been held with jurors selected in that particular manner. It would be wrong to consider that the Charter of Rights

is a cloak which can be put over any piece of legislation to render it invalid. In my view the selection in this manner, while it may be possible to select in other manners, even by using an election roll, does not render a group of persons who are not peers, if I may use that expression. Ownership of property in this country is not limited to class or to race or to any particular distinguishing characteristic. Property owners represent all classes of society and as a result property owners constitute peers as far as a right to a jury of one's peers.

Section 11(d) of the Charter provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. I don't think that there's any doubt that jurors from the jurors selected in the array there will be an independent and impartial tribunal. There are other provisions in the Criminal Code which provide the accused the right to deal with perspective jurors to test their independence and their impartiality, so I'm satisfied that the accused in this case will be presumed innocent and is presume innocent and that he will receive a fair, public hearing by an independent and impartial tribunal and the fact that that tribunal is restricted to property owners or people on the rolls of the municipal units does not render the matter to be unfair in any respect.

Therefore Section 6 of the Juries Act does not offend the Charter of Rights, even if it does apply and the application to challenge the array is denied and since that's the limit of the challenge to the array, then there need be no further consideration of Section 558

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the Code limits the challenge of the array to the grounds of partiality, fraud or wilful misconduct on the part of the Sheriff or his deputies by whom the panel is returned and there's no suggestion that that section has been breached in any way.

So that application is refused.

MR. EDWARDS: My Lord, if I may at thisi point because of an incident that took place during the last term, I'll ask Your Lordship to caution members of the press that they're not to report anything that's carried on in the absence of the jury. We had an incidence last term where a very experienced reporter inadvertently breached that rule so I think it would be helpful to keep them mindful of that restriction on their reporting duties.

THE COURT: All right. If there are any reporters present I should certainly indicate to you that you should not report matters in this trial which have taken place or will take place in the absence of the jury.

MR. EDWARDS: Another matter if I may, Mr. Wintermans, . .

MR. WINTERMANS: My Lord, could I answer that last matter first? With respect to the order that he just made that would go up until the time that a verdict were given, I would assume.

THE COURT: What?

MR. WINTERMANS: That there be no publication of anything that takes place in the absence of the jury. That order would only continue until a verdict were rendered.

THE COURT: Whatever the law is, I don't propose to venture beyond that now.

MR. EDWARDS: The other point I feel compelled to state for the record, My Lord, is that yesterday

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during our discussions on this, my learned friend indicated that he was going to file certain material to support the motions, motion or motions that he was going to make today and to the best of my knowledge he did not do so and you know, when he's coming up with motions such as the one he just made which I'll politely term as imaginative, surely it would be good practice for him to at least fulfill his undertaking to file such material, so I just want to put that on the record.

THE COURT: Well, . .

MR. WINTERMANS: If I could answer that, I think my learned friend misunderstood the nature of the materials that I intended to file. I have some law with respect to matters which aren't coming up today but I expect will come up tomorrow and because I was very busy yesterday afternoon and because I realized that the matters, the information that I have did not relate to today's matters, I decided rather to wait until today to give Your Lordship and Mr. Edwards and I think have given Mr. Edwards some materials with respect to the Voir Dire which I expect will take place in relation to an alleged statement, and I have copies of that also for Your Lordship which I can give you now, if you wish. It has nothing to do with the arguments which are being made today and if my learned friend. .

THE COURT: I only want from you what you proposed to give me, give it to me politely and courteously in advance so that I'm prepared to prepare some - and I'm sure that the same thing applies to Mr. Edwards. The difficulty is you did indicate that you were going to file something and as a result of that and you may put other counsel in the position where he spends

an afternoon fruitlessly looking up law to answer something that doesn't materialize. So if you're not going to do this, if you say you're going to file something, file it, if you say you're going to file something and you decide not to, extend counsel the courtesy of a phone call and say I'm not going to file it. But I'm not a policeman here, I'm to see that the orderly process of the court takes place and the accused gets a fair trial so I'm not going to police the affairs between both of you, but there's a certain responsibility that you both have.

MR. WINTERMANS: I have three matters for Your Lordship.

THE COURT: Perhaps we can consider all this challenge and get the jury arranged before we get into all the other matters.

All right. The challenge has been denied. Is there any other?

MR. WINTERMANS: Yes.

THE COURT: What other matters do you propose to deal with in the absence of the array and before the panel has been selected?

MR. WINTERMANS: I refer Your Lordship to Sections 562 and 563 of the Criminal Code and I would submit that the provisions are unfair. Again that they offend against the principles of natural justice and fairness as enshrined in the two sections, Section 7 and Section 11(d) of the Charter which I referred to earlier.

THE COURT: All right. If I may hasten you and summarize that, 562 in effect for this case says you are entitled to challenge 12 prospective jurors and 563 says the Crown is entitled to challenge four and stand aside

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MR. WINTERMANS: Right.

THE COURT: Now what is unfair?

MR. WINTERMANS: That is unfair. He has the right to basically put aside or avoid 52 jurors to my 12 which is more than four times as many and Your Lordship is going to say well, standing aside isn't the same thing because those people can come back and the Crown only has four actual challenges without cause, then I would submit that that is not an accurate reflection of the realities involved. If there are more than a hundred people on this list and I would submit unlikely that the 48, if my learned friend stands aside 48 many of those people will come back.

THE COURT: So your argument is . .

MR. WINTERMANS: It's not fair.

THE COURT: The Charter applies again and that Section . .

MR. WINTERMANS: Section 24 of the Charter . . that you ought to correct the situation.

THE COURT: Well, first, what section makes it unfair? Section 11(d)?

MR. WINTERMANS: Section 7 and 11(d). Again the principles of natural justice and fairness of the trial. I might add that I understand that Mr. Justice Burchell of the Supreme Court of Nova Scotia had indicated one or two situations where this objection was raised at the outset of a jury trial and I believe by consent of counsel and the Judge that a different, even system was devised on an ad hoc basis. In other words, that each had the same.

THE COURT: Why did he do it?

MR. WINTERMANS: I don't know.

THE COURT: And on what basis?

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MR. WINTERMANS: On the basis that it's unfair. We now have a Charter of Rights. Five years ago . .

THE COURT: If he's deciding on the basis that it's unfair then what he's saying is that Section 563 at least is unconstitutional, contrary to the Charter and I don't know of any court that's decided that yet.

MR. WINTERMANS: Well, I'm asking Your Lordship to . .

THE COURT: You want me to be the first to decide that.

MR. WINTERMANS: Yes. And if my learned friend is willing I would accept any variation of the jury selection process which would put me on an exact equal footiong with the Crown and I want to put that clearly on the record.

THE COURT: I don't know why . . .

MR. WINTERMANS: If Your Lordship would be willingn to limit the Crown to 12 . . .

THE COURT: I'm not going to limit the Crown . .

MR. WINTERMANS: Stand aside 12, I will be agreeable with . . .

THE COURT: I'm not going to limit the Crown, Mr. Wintermans. If you push me, I'm going to decide in my view whether or not the Charter applies to render Section 563 inoperative and if I decide that it's not inoperative or that it is operative, then the statute applies and Mr. Edwards has the right to stand aside 48. Why would I ever try to negotiate some lower amount with him?

MR. WINTERMANS: Well, under the Charter of Rights, under Section 20 of the Charter - 24 of the Charter of Rights, "Anyone whose rights or freedoms as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction

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to obtain such remedy as the court considers appropriate and just in the circumstances. I'm suggesting that you have power, you're certainly a court of competent jurisdiction and you have the power to remedy the situation in any way you feel . . .

THE COURT: Only after I've found that his rights have been infringed or denied.

MR. WINTERMANS: Right. So Your Lordship then is ruling that where the Defence only can stand aside 12 and the Prosecution can basically avoid 52 before the Defence . . and I don't think that's fair.

THE COURT: What I'm saying, what I'm saying to you is first, do you have any authority from any jurisdiction in Canada or any court that has held that provision to be unconstitutional?

MR. WINTERMANS: No.

THE COURT: The only reference that you have is one of Mr. Justice Burchell, who somehow did some or supervised some negotiations between counsel where they agreed on some different formula.

MR. WINTERMANS: Correct.

THE COURT: Do you have the case name?

MR. WINTERMANS: I don't have the case name. I don't know what case it was. All I know Mr. Justice Burchell in the last year or so, as far as I know, an unreported case. In Halifax, I believe. It was through a conversation with Mr. Justice Burchell and I believe Mr. Williston during another trial a few months ago here that this matter came up, and Mr. Justice Burchell told us about these arrangements which he knew about in a couple of cases recently. Now of course we're back in a situation where the Charter is very new and therefore there is no binding authority on the point, but if any provisions of the Criminal Code would appear unfair,

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then surely this situation is one where the Crown has four times as many opportunities, more than four times to avoid a juror and furthermore, I might add that the Crown by virtue of the association with the police forces and R.C.M.P. has access to information with respect to prospective jurors which the Defence does not have. That adds unfairness to it. Now as I said, Your Lordship would under Section 24 devise some fairer scheme for selecting a jury that would make the Crown and the Defence equal, then I would certainly be happy to abide by that. If Your Lordship is ruling against me I would ask the Crown in the spirit of fairness indicate which people on the panel they intend to stand aside before I have to waste my precious 12 challenges out of a panel of 120. Otherwise I would submit very strongly that the whole system is extremely unfair to the Defence.

THE COURT: Mr. Edwards?

MR. EDWARDS: Well, My Lord, the first point, I find it absolutely astounding that my learned friend would come here, base his motion primarily on a case that Mr. Justice Burchell was supposed to have participated in without, at this stage, the third trial, without having taken the trouble to find out the case name to substantiate the proposition he makes, because to my knowledge in the Barrow and McFadden trial over which Mr. Justice Burchell presided just a couple of years ago, Mr. Cooper representing either Barrow or McFadden, I forget which one, made the identical motion and Mr. Justice Burchell ruled against him in that one. That went on appeal but that point was not taken on appeal by Mr. Cooper, so the very judge that Mr. Wintermans now says devised some different scheme in another case which he can't name for sure ruled on the very point in a manner adverse to what Mr. Wintermans says.

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If I remember correctly a couple of terms ago in the case of Regina v Clyde Hayes which was defended by Mr. Wintermans, he made the same motion in that case and Mr. Justice Burchell in that case ruled against him. So you know, his authority is dubious to say the least. He just makes the blind assertion that the sections are unfair. How are they unfair? All right. You know, just look at the sections in isolation in the Criminal Code, I suppose there is apparent merit to his argument, but it ignores first of all the history of those sections, they've been used for years without any unfairness ever being demonstrated, it ignores other procedural safeguards in the Criminal Code such as his right with leave of the court to challenge an unlimited number for cause, it ignores the safeguard of your instruction to jurors, so you just can't pull a couple of sections out of the Code and look at them in a vacuum and say well, they're unfair, and as far as the Crown in the spirit of fairness, you know, agreeing to modify the sections of the Criminal Code, well, really, I don't feel I should even dignify that with a response.

Thank you.

MR. WINTERMANS: If I could respond to that, My Lord, if my learned friend is suggesting that I'm in as good a position or the accused is in as good a position as the Crown, then I invite the Crown to switch, that the Defence has 48 stand asides and four challenges and the Crown has 12 pre-emptory challenges. I invite the Crown to . .

THE COURT: Mr. Wintermans . . .

MR. WINTERMANS: To accept that.

THE COURT: Mr. Wintermans, I'm not interested in - I'm only interested in whether or not the trial is

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or the section is fair, whether or not preliminary words, whether Section 11(d) has been violated by that section or whether Section 24 comes into effect to cause me to consider some other remedy. I'm not satisfied that Section 563 is unfair or offends the Charter. This has been a method of trial which has been ensconced in Criminal Law for many, many years and again I think that many times the Charter is used as an attempt to invalidate the laws. There is, you say that there's not much precedent for the application of the Charter. In my view the precedent for application of the Charter is reason and common sense and I find that there's nothing within Section 563 which would cause an unfair trial. An accused is entitled to challenges, challenges for cause, pre-emptory challenges. You're entitled to your pre-emptory challenges without any reason. You're entitled to challenge for cause anyone you think is not going to give the accused a fair and impartial hearing. The purpose of the stand asides, it's not impossible that all 48 could be used but I think that's more rare. I've never participated in a criminal trial where all of them have been used and if the panel is not large enough to support it they're only stood aside and subject to being recalled. So I don't find that it's an unfair process which would offend the Charter or call me to bring into operation the remedial powers of Section 24, so that motion is also denied and there's no basis for negotiation of those amounts that I know of. The Code provides - the function of the judge, you must consider that the judge is not necessarily here under the Charter to upset all of the procedures and laws of the country. The judge is to conduct the trial according to law and the law that the judge has in criminal cases is the Criminal Code and where that Criminal

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Code is offensive the judge has an opportunity deal with the Charter to find that section unconstitutional, so there is, since the Charter there is considerable addition to the judicial power to strike out legislation but that doesn't mean that with that power, that there is an equal enthusiasm to do it. The judge ought to look at the Charter and apply reason and common sense to see whether or not rights are being violated and if so, deal with it, but it's not every right that's being violated and every section is not necessarily going to be found invalid and I certainly don't find this section invalid.

So that motion is denied. Do you have any others?

MR. WINTERMANS: I still have my motion with respect to the question whether Mr. Ebsary should be on trial at all, but I prefer to argue that after jury selection.

THE COURT: This is relating to the Charter itself, the ones you referred to yesterday as arguments you made in the previous case?

MR. WINTERMANS: Yes.

THE COURT: I think we should do that after the jury has been empanelled.

MR. WINTERMANS: Right. I think that's all then.

MR. EDWARDS: Well, My Lord, I don't believe it is unless my learned friend changed what he said yesterday. He said that he was going to seek leave of the court to challenge each of the jurors for cause and he has to get leave, so I submit that that is a matter that has to be argued in the absence of the jury panel, unless he . .

THE COURT: I think he should put that on the record if he intends to do that. That's right, he spoke about it yesterday.

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MR. EDWARDS: And you know, the Crown is opposed to him being permitted to just go on a fishing trip with each juror so I'm going to put him to the quick proof that such a procedure is required in this trial.

5. THE COURT: All right, you'd better put it on the record, Mr. Wintermans, whether or not you intend to challenge the jurors for cause, every juror.

MR. WINTERMANS: My Lord, I'm making an application under 567 of the Criminal Code on behalf of the accused to challenge each and every juror on the basis

10. under Section 567.1(b), the juror is not indifferent between the Queen and the accused, and the basis upon which I make that application is the excessive publicity which has been taking place for many years now, as the Appeal Court indicated, the name Donald Marshall has become a household word and there've been a number of

15. newspaper articles and media reports, particularly a couple of years ago, the time that Donald Marshall was acquitted by the Appeal Division, he was referred to as the person who spent 11 years in jail for a crime he did not commit, the reference being that he was completely innocent. I have a number of newspaper

20. clippings here. The first one on the pile which is Saturday, May 14th, 1984 from the Cape Breton Post, page 8, a very lengthy article in which all kinds of inadmissible evidence was quoted with respect to Mr. Ebsary's character and I present it to Your

25. Lordship along with a bundle of other materials which are the same materials which were submitted . .

THE COURT: Were they submitted as an exhibit in any way, or how were they - were they just filed?

COURT CLERK: They were not marked exhibits.

30. THE COURT: They were not marked exhibits.

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MR. WINTERMANS: They are newspaper reports which I understand are admissible to prove at least that they appeared and . .

MR. EDWARDS: My Lord, if I may, the Crown will admit that those are actual Cape Breton Post reports for the dates specified. However, the Crown's position in this is going to be - and I don't mean to interrupt but just so he knows where I'm going to be coming from - is that publicity itself is not a basis for challenge for cause. He must demonstrate that the pre-trial publicity is prejudicial to his client and just handing me a bunch of newspapers and saying, look at all the publicity, we're going to say that's not enough.

MR. WINTERMANS: I might add, My Lord, that the difference between today's applications and the applications in the two previous trials was that the Crown consented to the challenge for cause, so therefore the Crown is not consenting, then it puts it in a different light and Your Lordship will have to decide and I would submit that the newspaper clippings do contain prejudicial material with respect to the accused.

THE COURT: And you have summarized your argument or . .

MR. EDWARDS: I've summarized it, My Lord, and there are various cases which support that position. The Hubert case is probably the leading case that's annotated right on page 563 of the Code and as I say, my learned friend has to demonstrate where his client has been prejudiced. The Appeal Court decision he referred to, I took the part of that decision that he just summarized as a summary by the Appeal Court of the proposition that had been made by my learned friend to the

Appeal Court, where they say that Donald Marshall was pictured as the victim of a maladministration of justice and that Roy Ebsary was pictured as the killer and the Appeal Corut ruled against my learned friend on those points. You know, to put it in perspective, that same Appeal Court when the Donald Marshall reference was heard on page 65 of the decision rendered on the 10th of May, 1983, they said any miscarriage of justice, as far as Donald Marshall was concerned, was more apparent than real, so it seems to me that the media reports have been fairly well balanced and I submit that my learned friend has a long way to go before he can demonstrate how the publicity has prejudiced his client in this case.

THE COURT: Well, as far as I'm concerned in this trial, I'm concerned with the rights of the accused, that's the primary concern and coincidental with that is my concern that the accused receive a fair trial. This has been perhaps because of - not perhaps, because of the Donald Marshall situation and the publicity that that has received, not only in this area but throughout the country, undoubtedly this from the press point of view has reached the stage where it has been substantially covered, and the accused Mr. Ebsary has been referred to in any number of these particular articles.

In view of that, and to assure the accused that hsi rights are being considered as a prime concern and to assure that there is a fair trial, I'm going to grant the motion to allow Mr. Wintermans to challenge the jurors on the basis that they are not indifferent between the Queen and the accused. The only caution I will give Mr. Wintermans is that as I understand these challenges, the procedure is to be ra ther strictly supervised by the

trial judge and there are certain areas as to their views and so on, the view of the prospective jurors that you ought not to get into. We're concerned with whether or not they are indifferent between the Queen and whether or not as a result of that publicity and so on are not capable of giving a fair and impartial hearing or decision, a verdict on the evidence so I'm sure with that caution that you will contain yourself in your examination to the matters really in issue. I will grant that motion.

All right.

MR. EDWARDS: One matter My Lord, corollary to that, if I may. The Hubert case mentioned that it is proper for the trial judge to address the panel as a whole and specifically in that case the trial judge read off the list of witnesses on the indictment and asked whether or not anyone on the jury panel had any connection with any of the parties and if so come forward, and then after examining them you could then decide whether or not to excuse them from the panel. I would submit that it would also be appropriate in the same vein and in order to save needless examination of witnesses, to ask the jury panel whether there are any members on it who are familiar with this case and who have discussed the case to the point that they would be unable to render a verdict without influence by those previous discussions or opinions they might have held, and I would submit in that way many jurors may come forward. Maybe they won't, but they may come forward and say, look, I've made my mind up on this case and I really couldn't be completely be objective about it, and that would save a lot of the challenges for cause.

MR. WINTERMANS: I agree with that, and that would be the normal course in any event at the outset, before

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any challenges for cause would be made by myself.

THE COURT: All right. My practice is usually to ask those questions.

MR. WINTERMANS: Also, My Lord, I would also appreciate that with respect to what's happened here for the last hour, that the jury not be told that it was all part of this media which I have objected to.

THE COURT: I don't usually tell that.

MR. WINTERMANS: No. I just bring that up because Your Lordship might say Mr. Witnermans made a number of objections that we were discussing, and I think the point that the jury may ask . .

THE COURT: You should trust His Lordship a little better than that.

MR. WINTERMANS: Thank you, My Lord.

THE COURT: We might as well recess for 10 minutes while the jurors are brought in.

MR. EDWARDS: My Lord, once they're brought in . .

THE COURT: Well, before we recess, just one moment.

MR. EDWARDS: Yes.

THE COURT: There are procedures and when they're brought in, I'll indicate to them preliminary matters and then we would proceed to the selection of the panel. We will call 12, is that the way that it was done before or do we challenge each one as they're called up?

MR. EDWARDS: Before he challenged each one as they were called up. As I recall the way it was done, the panel was brought in when we reached this stage, you give your general remarks as are usual, and then . .

THE COURT: The whole array?

MR. EDWARDS: Yes.

THE COURT: All right. Let's use the word 'array'

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for the whole group and 'panel' for the 12.

MR. EDWARDS: Okay.

THE COURT: Right.

MR. EDWARDS: Then the array was asked to go outside, then the two triers for the first juror were selected at random, I believe, from the box, just two names pulled out, they were called in and then they tried the first juror who was challenged for cause. The first juror is called in, he challenges for cause then two more names are pulled out, they sit there and they try that first juror.

THE COURT: Then we go all through until we get to 12.

MR. EDWARDS: Yes.

THE COURT: And then we go through the pre-emptory and stand asides?

MR. EDWARDS: No.

THE COURT: As each one is found to be true, then the opportunity to challenge . .

MR. EDWARDS: Arises at that time.

THE COURT: Arises at that time for stand aside.

MR. EDWARDS: Yes, and of course after you get the first two sworn then the other two are bumped, well, one of them gets bumped after the first one is sworn.

THE COURT: Yes, I understand that part of it. So what we will do is we will give the general talk to the array, we'll excuse the array and start calling the first one in. That will be all in the absence of the array.

MR. EDWARDS: Yes. Then he's challenged for cause and then two more names are picked form the box. We had some discussion on that procedure before but I believe the one we agreed on, that two more would be pulled from

the box and they would be the triers of the first juror.

THE COURT: Now there are two possibilities as to the trying of the original juror. One possibility is that we select two names from the array who would be the first triers and they would try until the first juror was empanelled. When the first juror was empanelled the first one who was brought in or picked would be dropped off, the second one would remain. All right. The other possibility or another approach is that you don't take from the array at all, you select two persons at random which means the Sheriff will bring in two persons.

MR. WINTERMANS: Off the street, you mean?

THE COURT: It could be anywhere. From the audience or from anywhere else, not necessarily from the array. Both procedures have been used. Now if I use the selecting two from the array, because it's very impractical here at the court house to start looking for outside people, particularly since everyone has moved from the building pretty near, do you have any objection to me starting with two from the array, Mr. Wintermans?

MR. WINTERMANS: Actually if my preference is asked I would prefer that 12 names be chosen first and then there is a possibility that those 12 people appear reasonably acceptable, then that may be adequate for my purposes.

THE COURT: Well, if we do it that way then we select 12 jurors and as each one stands up you indicate whether or not you're going to proceed with the challenge for cause. If you're not then we go to the pre-emptory challenges of both of you and the stand asides but we would do that in the absence of the other - once you say challenge for cause the other 11 have to leave.

MR. WINTERMANS: That's right. That's the way I would prefer it, My Lord.

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THE COURT: I'm flexible as long as it's done properly, so what you're saying is instead of doing, it as each one is called up we will select 12, a panel, and then we will treat it as though you're not challenging everyone but you're challenging those you select to challenge for cause.

MR. WINTERMANS: Um-hmm.

THE COURT: Although you have the right to challenge every one.

All right. What was your answer to whether or not you agree that I select from the array?

MR. WINTERMANS: From the array. That is agreeable.

THE COURT: All right. The record will show that both counsel agree to the procedure and so we will adjourn now for 10 minutes and we'll bring in the array.

COURT RECESSED (10:35 a.m.)

COURT RESUMED (10:44 a.m.)

THE COURT: Well, before we do anything I'd like to welcome you all. I know that you're coming at some inconvenience to your personal lives but we all indeed have a role to play in the administration of justice and this is the role that you're going to be playing each day. I'm sorry that we had to keep you out in the hall for a little over an hour but we had some preliminary matters that we had to consider and those are now done, so we'll proceed now to the calling of the roll and answer your names when called, and we'll get on to the orderly processes. Mr. Muggah?

JURY ARRAY POLLED.

THE COURT: All right. We have a number absent. It's always like preaching to the converted to all the ones that are here to say that you shouldn't be absent, that it's an important matter when people are called for jury duty and it is essential that everybody show up, and

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people don't show up, it's incumbent upon the court to find out why and deal with the matter accordingly, so I would instruct the Sheriff's officers to find out about the people who are absent as to why they're absent and why they haven't been here.

So enough said on that.

All right, this is a trial of Roy Newman Ebsary today on a charge of manslaughter and the next step is the process of the selection of a jury of a panel of 12 who will decide whether the accused is guilty or not guilty.

As I've indicated to you the name of the accused is Roy Newman Ebsary and I would first ask if there is anyone on the panel who is related to or closely connected with a party to this case, and by a party to this case I not only mean Mr. Ebsary but anyone that you know who is to be a witness or is involved in the case either as a policemen or a witness or related in any way to any other people who have been involved in this case from the victim to any of the other - the case has been highly publicized in many respects so I'm sure that you're aware of the names of anyone who might be involved in the case. So if there's anyone related to or closely connected either in a family way or in a work situation or in any other social way with anyone involved in the case, would you please indicate to me now.

MR. WINTERMANS: My Lord, might I interject at this point. I believe the procedure that ought to be followed is that the people ought to go before Your Lordship and speak quietly so that the entire panel does not hear . .

THE COURT: You're correct. Once you indicate your situation perhaps you'll just come up for a moment.

EXEMPTIONS OF JURORS

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THE COURT: All right. Those were people who were closely connected with a party to the case.

Now is there anyone who has personal knowledge of the case beyond what you read in the newspapers to start out with, anyone who in some manner or some way has information beyond what everyone has available to them in the newspapers? Anyone in that position?

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THE COURT: Now is there anyone who has discussed this case with others or considered this case on the basis of the information that was gnerally available to the point where they see they are unable to impartially decide the matter on the evidence that will be heard here in open court and on that evidence alone? In other words, are there any of you who have discussed the case, considered the case and made up your minds as to guilt or innocence to a degree which would prevent you from impartially considering the matters here? Anybody in that category? Would you come up, please?

EXEMPTIONS

THE COURT: All right. Now we'll proceed to whether or not there are any other exemptions.

MR. WINTERMANS: One last request, if I might, My Lord. It's sometimes customary to read the names of the witnesses intended to be called.

THE COURT: I'll do that. I didn't have the list of them. Could I have the indictment? When I asked you all earlier whether you were related to or connected to anyone in the trial I indicated the accused, Mr. Ebsary and I didn't name any of the other people that are involved. The alleged victim is Sanford (Sandy) Seale and the perspective witnesses to this particular case are Mary Ebsary, Donna Ebsary, James MacNeil, Donald Marshall, Jr., Dr. Mohammed Naqvi, Constable Leo Mroz, Chief Richard Walsh, Corporal James Carroll, Staff Sergeant

Harry Wheaton, Oscar Seale, Leotha Seale, Roy Gould, Donald Marshall, Sr., Deputy Chief (Retired) Michael MacDonald, Constable Douglas Hyde, Adolphus J. Evers, Greg Ebsary, Maynard Chant, Sergeant Guy Arsenault. Now the question that I earlier asked I'll repeat.

MR. EDWARDS: My Lord, if I may at this point, there are four additional witnesses who I may be asking Your Lordship to add to the indictment. I won't make that motion now but just for these purposes they are Sergeant Thomas Barlow, Constable Brian Stoyek, Constable Barry Ettinger and Mr. Richard MacAlpine.

THE COURT: All right. Go over them a little more slowly. Barlow I have. How do you spell Stoyek?

MR. EDWARDS: Stoyek? S-t-o-y-e-k.

THE COURT: And he is a Constable?

MR. EDWARDS: Yes.

THE COURT: And who is the third one?

MR. EDWARDS: Constable Barry Ettinger, E-t-t-i-n-g-e-r.

THE COURT: Yeah.

MR. EDWARDS: And Richard MacAlpine. Sorry for the interruption, My Lord.

THE COURT: That's all right. With the addition of those names, Constable Thomas Barlow, Constable Stoyek, Constable Barry Ettinger and Richard MacAlpine, are there any of you who are closely connected to or associated with or related to or involved with in any way any of those people? One gentleman. Would you come up, Sir?

MR. EDWARDS: There's one other potential also, Constable Douglas MacQueen.

THE COURT: And Constable Douglas MacQueen.

EXEMPTIONS

JURY EXEMPTIONS

THE COURT: All right. Then I guess we can get into the general matter now? Anyone who for reasons of health or family or whatever they may be, or business, that wish to be exempted from jury duty either for all of this month or for part of this month? Please step forward.

JURY EXEMPTIONS

JURY PANEL SELECTED AND SWORN

THE COURT: Well, members of the general jury panel we have now selected and sworn a panel of jurors for the trying of this case. So the rest of you will not be needed for this particular case.

Just generally so that you'll have a little idea we have seven cases set down for this month's term of the Criminal Court and the next case, at which time you are all expected to be back here, is Wednesday the 16th. That's next Wednesday. From now until then is reserved for the present case. We have another case on the 18th, we have another one on the 22nd, we have one on the 24th and we have one on the 29th, so the dates that you are all to be here and I'll repeat it each time that you come are next Wednesday, the 16th, and if you're not selected for the panel in that event then you will be expected to be back on Friday the 18th and again if not selected you will be expected to be back on the 22nd, on Tuesday the 22nd, on Thursday the 24th and on Tuesday the 29th. That's so that you can do some planning of your own that I've given you those particular dates.

Now I do want to say to you, and I'll probably make some remark at the end of the whole process down the line, that it's the last of the month. I know that being called to serve jury duty is an imposition

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on your regular routines and your regular way of life but I do want to impress upon you that we live in a democracy and the reason why we have a democracy, one of the significant reasons is our system of justice, and our system of justice calls for the participation of everybody. If it were not for the fact that a person is entitled to be tried by a jury of his peers then our judicial system, our system of justice would be like that in other countries which we don't hold in as high esteem as our own.

It would be a situation where the judges are appointed by the government, the Crown Prosecutor is appointed and paid by the government, Defence counsel of course would be acting for the Defence, but there would not be that same feeling that a person had rights were it not for the jury system, so while it is a nuisance to you at some time, some people are probably enthusiastic and hoping to be picked. I know some are not, but nevertheless it's important that you play the role that you do and you continue to play the role you do, and even if it costs you some personal sacrifice.

I know that it costs some personal sacrifice because you don't get paid very much for jury duty. There's nothing that I can do about htat. If it were up to me I'd pay you all more, but it's not up to me and the stipend for jury duty is not significant, but the preservation of your own freedom, because anybody could be picked up and charged in a system where the people did not participate, we know of some of those, the protection and preservation of your rights is worth the nuisance value that it may cause you. So I know the system has caused you some inconvenience in coming in and will require you to continue to come in at some inconvenience. I can tell you that it is important as I

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have said that you do it, and I certainly thank you for coming in and being so willing to cooperate.

JURY ARRAY EXCUSED

THE COURT: I'm just going to give you a little idea of what's in store for you from a timewise point of view and how we operate.

We start every monring at 9:30 and I'd like to have you here 5 or 10 minutes ahead of time so we can start promptly on time. We will go from 9:30 until 12:30 and we'll have a break of about 15 minutes in the mid-morning for coffee or whatever. Unfortunately here particularly in view of the circumstances that the building has been cleared of the municipal people we will only have some coffee for you. We will break at 12:30 and will resume at 2:00, and we go from 2:00 till 4:30 again with a short break in the afternoon. So that's our daily routine. The trial is scheduled for five days, Wednesday, Thursday, Friday, and Monday and Tuesday. It may not take that long and if it doesn't of course then we stop when it stops or when you reach a verdict, but for your own planning purposes I can't tell you how long it's going to last. Counsel have indicated that it's a five day matter and hopefully we'll finish it within the five days.

Now there is a jury room and it's right here. When you come to the building from now on I would ask you not to congregate in the hall, not to meet with anyone in the hall or talk to anybody in the hall. Come right into the building and come right into the jury room. That's for your own advantages as well as anything else. You don't want to overhear anything, you don't want to have anyone put any pressure on you in any way, and I'll deal with that a little later this afternoon when you first come in.

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Just go right to the jury room, that's where you'll operate from.

Is 2:00 a little too early this afternoon? Would 2:30 be better in view of the fact that we're late?

MR. EDWARDS: To bring the jury back, My Lord?

THE COURT: Yes, to start right in.

MR. EDWARDS: Well, perhaps we should talk a little bit about that because there are several matters that have to be dealt with in the absence of the jury, and I was going to . .

THE COURT: Perhaps we could do those . .

MR. EDWARDS: This afternoon, and bring the jury back tomorrow morning.

THE COURT: What do you say to that? Will we consume the afternoon on that?

MR. EDWARDS: The thing is there is some of the evidence that has to be heard in the absence of the jury going by previous conversations I've had with my learned friend, which we won't be able to hear until tomorrow morning.

THE COURT: I see.

MR. EDWARDS: So I was going to suggest that perhaps if the jury were called back at say 10:30 tomorrow morning so they wouldn't have to wait in the jury room while we finished deliberations out here.

THE COURT: All right. I think I'd better bring them back. Otherwise I'm going to have to give them an opening address here now and I don't want to keep them now, unless they wouldn't mind.

All right. We'll take 15 minutes or so now.

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THE COURT: Well, the first duty that you have is you have to select a foreman or a forelady, if I may use that expression or foreperson for the panel. Somebody operates as foreman. Now being foreman of the jury is not an onerous task. The foreman of the jury is merely the person who is the spokesman for the jury to the court, so if there's anything the members of the jury wish to say to the court they tell the foreman and the foreman conveys it onto the court.

The foreman in the jury room is sort of the chairman or chairperson of the meeting. His main function is to see-he's not a boss in that sense, his main function is to see that everybody has an opportunity to express their views, he makes sure that everybody is given that opportunity, to express their views when you're deliberating together. Essentially that's the function of the foreman. I would ask you is it possible to select a foreman now? Mr. MacDonald is the foreman. All right.

I just have a few opening remarks I want to make to you so that you can appreciate your position. The oath that you've just taken has made each and everyone of you a judge of the Supreme Court of Nova Scotia for the duration of this trial. You've been selected as the judges of the facts in this particular case, both by the accused and by the prosecution, so you and you alone are the sole judges of the facts and what this means is that your interpretation of the evidence and the credibility of witnesses, not mine or that of counsel which counts, but being a judge in this particular case means that you're a judge not only while you're sitting here in this court room but for 24 hours of each day until the case is concluded. I tell you this for several reasons. First, do not let anyone talk to you outside the court room about this case and if anyone attempts to do so, you tell

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0. them that you cannot talk about it. If the person persists then you report it to me and I shall take appropriate action and I'm sure as you can imagine the law provides very severe penalties for anyone who attempts to tamper with a juror.

5. Secondly and unfortunately I have to remind you about the members of your own family and your friends, wives and husbands. When you go home you probably will find them most interested in what you are doing during the course of the trial and I have to ask you simply that you tell them you can't discuss the case. Now it may 10. result in no dinner but that's a risk you have to run.

I also would ask you, and this is probably even more significant because you will be here among yourselves and you'll be here sitting down waiting for things to begin and so on, that you do not discuss the case among yourselves during the trial until such time 15. as you come to deliberate on a verdict. And I say that to you for a special reason, because the evidence in a trial is going to be produced by the witnesses one by one as they come to the stand. They may be in the order, a sensible order or a reasonable order where everything will flow one thing after another or they may 20. be out of order, and as some judges say it's like drawing a picture. You can't look at the artist and see when he puts one line or two lines or two strokes on the picture what the final picture is going to be. And in the case of a trial it's not until all of the witnesses have been 25. heard that you have the whole picture. Each witness adds another line or a bit of form to the picture but it's not until they've all been heard and counsel have addressed you and I've given you my instructions on the law that you'll have a complete picture.

30. Now I told you that you were the judges of the facts.

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I'm the judge as to the law. I also supervise the proceedings in the court. I will tell you what the law is and you're bound to accept what I say. If I happen to be wrong there are procedures which counsel are well aware to have me corrected, but you are the judges of the facts. Now if you start expressing your opinions during the trial to each other, you may express an opinion on some evidence or on some of the evidence and that opinion may not be valid when all the evidence is in, but human nature being what it is, one having expressed an opinion is sometimes reluctant to change that opinion and that's why I tell you don't express any opinions until the evidence is all in and you're deliberating. That way that particular human frailty that we have is avoided and it makes it much easier for you to give a purely impartial judgment. If you keep an open mind throughout the whole of the case until all of the evidence is in and you do not discuss it in the meantime.

Now as judges we must at all times be objective. We must approach our duties without sympathy or without prejudice. Be prepared to give judgment only on the evidence heard in this court room and upon the law as I shall give it to you. So you must calmly and dispassionately consider the evidence. You will appreciate at once that since you're fulfilling a public duty as judges it's important that every member of the community be able to see that you have discharged your obligations well and that there has been a fair and unbiased trial.

Now the procedure that we'll follow here at the trial is based on what we call the adversary system which means, and this is important for you to remember, that the presentation and examination of witnesses is

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conducted by the counsel. We don't decide, I don't decide nor do you, who are to be witnesses or we have no right to call witnesses. In the adversary system the Crown Prosecutor will start his case and he'll indicate maybe in general opening address to you the evidence that he proposes to introduce. That's not evidence. That's only what he hopes his witness or expects his witness will adduce and the purpose of that is to give you some general idea of what the case is all about so that you can better understand the witnesses as they speak to you. It isn't evidence. It's only a statement of what he expects the evidence will show. Having outlined his case he then calls his witnesses and he examines them on what we call direct examination and that will be followed by cross-examination by counsel for the Defence and if matters arise in the cross-examination which are new then counsel for the Crown has the opportunity to re-examine and deal with any of those particular points.

After he's finished all of his witnesses, then the Defence will decide which avenue it is going to take. I will only indicate to you now that one of the fundamental presumptions of our justice system is that an accused is presumed innocent until found guilty by his jury. He has no obligation to defend himself or to prove that he is not guilty. It's up to the Crown to prove guilty beyond a reasonable doubt.

Now as the case, just to follow on, if the Defence calls evidence, the procedure that I've just indicated to you is reversed and counsel for the Defence asks the questions on direct. Crown Prosecutor is entitled then to cross-examine and counsel for the Defence may re-examine. After all of his evidence is presented then the Crown has an opportunity to provide rebuttal evidence if

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there is to be any. Many times there's none but if there's anything that turns up in the Defence case which the Crown has to answer and has some evidence to answer which was not capable to be introduced originally then he has the opportunity to call some rebuttal evidence and the same procedure of examination, cross-examination and re-examination would occur then.

As the case proceeds I may be called upon to make some rulings on the admissibility of evidence tendered by either party, Crown or the Defence. On some occasions I may rule in your presence. Right here I might just say that's admissible or go ahead and pursue that avenue if you wish. On other cases I might ask you to retire which means you go into the jury room and at that time I will either hear the evidence that counsel wishes to introduce or I will hear argument as to what the evidence is or both, and I will make a decision whether or not that evidence is admissible. If I decide that it is not admissible then you won't hear it. That's the purpose of having you in the other room. It doesn't clutter your minds with inadmissble evidence. If I decide it is admissible then the evidence will be repeated or given for the first time in your presence when you're called back, so you can rest assured that you will hear everything that is legally admissible and nothing that is legally inadmissible. When you're called back in and you hear it, it is then part of the evidence that you have before you.

When each counsel has finished with the witnesses, all the witnesses are complete, then each counsel will address you making a submission based on the facts as they view them. This will be followed by my charge to you in which I shall give you the law and show you how to apply the law to the facts as you find them, and then you'll be

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asked to retire and consider your verdict.

Now what I must do is ask you to banish all present information that you have on this matter from your minds. Forget about it all. Anything that you might've been aware of. Do not seek to gather evidence during the trial on your own. I'm sure you understand what I mean by that, but for example if it were something to do with a motor vehicle accident that occurred at a particular intersection, if you went to the intersection to look around and to see what the signs were and what it looked like and so on, then you would be gathering evidence on your own and you're not to do that because even in that type of a circumstance it might not have been the same the day or night of the accident, the signs may have been different, the lights may have been different, the road may have been different, any number of factors may have occurred so you do not seek to gather any evidence on your own during a trial.

I'd also ask you, you're aware that there are some aspects of this case that have received a great deal of publicity in this area and nationally. I'd ask you to not read or listen to any radio or T.V. or otherwise take any cognizance of any stories that may be circulating while this case is in progress. I'm not casing any aspersions on newsmen or news reports but there are many times when you know that the news reports are not an accurate summary or not an accurate statement of what actually was said or what actually took place. You're to rely solely on the evidence in this court room. Nothing else is evidence and upon nothing else are you to base any conclusions, so it's better if the T.V. comes on and they start talking about this trial, don't look at it. Turn it off or go and do something else.

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0. And the same with any newspaper reports that you may have.

Now those are the only opening comments that I want to make to you, perhaps with this exception, that you must impress in your mind under our judicial system an accused is presumed innocent until you as the jurors are satisfied beyond a reasonable doubt as to guilt, so if you keep that in mind throughout the case you will be hearing evidence but you must start from that particular premise and when you hear the evidence you have one other concern, and that is the question of credibility and it will be up to you to decide whether or not you believe the witnesses as to what they say and so on. Let me tell you that you can believe everything a witness says, some of the things a witness says or none of the things a witness says. It's up to you to decide what you believe of the various witnesses. Credibility is not as difficult as it sometimes sounds. It really is common sense. You look at the witness, you observe the witness, you will see them in the witness box. You have to appreciate that witnesses are nervous or some may be nervous. It's a new environment. Many people are not in court and when they come to give testimony they may be nervous. But nervousness doesn't necessarily affect credibility, but there are other factors you can observe to decide whether or not a witness is credible and I will speak about that later when I address you on the law.

Those are the initial comments that I wanted to make to you before you commence your task and I've been advised by counsel that there are some preliminary legal matters of the type that I've just spoke to you to be considered in the absence of the jury, so rather than have you come here and sit in the jury room and do very little except chat among yourselves and get to know each other a little better maybe, what we'll do is I'll let you go now, it'll

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be 1:00 or a little after one, you will not have to come in the remainder of today and counsel anticipates there will be a few things tomorrow morning so instead of coming in at 09:30 come in at 10:30. Go directly there. We;ll be in session. Do not come into the court room. There's a door out in the hallway into that room so do not come into the court room. Go into the jury room and sometime after 10:30 we'll call you back.

Any question or anything you want to ask beforehand? You're clear on times of arrival and everything?

All right then, thank you and we'll see you tomorrow morning at 10:30. Do not discuss the case with anybody.

JURY DISMISSED (1:05 p.m.)

MR. WINTERMANS: One question, My Lord. There was discussion between my learned friend Mr. Edwards and I as to the beginning time of the Voir Dire of witnesses and Mr. Edwards' intention to start tomorrow morning with that, I'm just wondering are we in a position where we'll be starting with that evidence this afternoon.

MR. EDWARDS: Here again the problem with this right through, he changes his mind like a whim. When I discussed with him the scheduling of the trial and the Voir Dire and what happens if we get our jury selected, he said well, I don't want any evidence called because I want a psychiatrist sitting in the court room and I can't have him until tomorrow morning, Thursday morning, and now he says he's ready for evidence to be called.

MR. WINTERMANS: I'm asking the question, My Lord, that's all. I'm asking the question. Does Mr. Edwards intend to proceed this afternoon with the Voir Dire or not? That's all.

MR. EDWARDS: Yeah. So in other words you are ready now to - we can proceed this afternoon.

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MR. WINTERMANS: If you were ready, that's all.

THE COURT: Well, what do you propose to do? I'm here only for the month and I can't spend the whole month listening to the two of you quibble back and forth. I presume we will work the whole day today and I thought in view of what was happening that we might not have a jury selected until close to the end of the day. We were fortunate and we had one here by noon, or by 12:30. I presume that counsel was ready and we'll go ahead. I understand that this afternoon initially you're going to put on some initial legal objections based on the Charter and I don't know how long that'll take or what they all are. I presume when that's done that we would continue on. Now if because of the turn of events that has taken place, because quite frankly I was surprised at the turn of events because Mr. Wintermans did indicate he was going to challenge for cause all of the panel and if you had, it certainly would've taken the better part of the day to do that if not the whole day. So if Mr. Edwards says look, because of that I'm not ready to go ahead with my witnesses this afternoon then I'll have to really let him start tomorrow morning. If he wants to start on a Voir Dire this afternoon I'm quite prepared to do it and if we resume at 2:30 we go till 4:30, doing whatever is the natural order of things. Do you have any views?

MR. EDWARDS: Yes, My Lord. I think I can have my witnesses here. I'm just expressing some chagrin, you know, I tried to accommodate him and then he says he changes his mind so you know, the policemen involved of course have scheduled other things but I'm sure I can get them.

THE COURT: Can you give us any indication of how

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long your other argu - you've done them before and you've incorporated them before. Are they merely arguments you are going to put in based on the Charter?

MR. WINTERMANS: I can read it off from my previous written arguments, I'd say less than a half an hour.

THE COURT: All right. So then if you're able to have your witnesses then I suggest we shosuld just go right ahead.

MR. EDWARDS: Yes. So we're coming back at 2:30 so at 3 o'clock we can start the Coir Dire.

THE COURT: I would think so.

One Voir Dire, two Voir Dires? Do you have any idea how many there are?

MR. EDWARDS: Well, the one I'm interested in is the one Voir Dire on the admissibility of the tape recorded conversation given by the accused to Corporal Jim Carroll in October of 1982. Now that will require the - unless there's a waiver of part of it, to call all the police officers who had contact with Mr. Ebsary between February of '82 and October of '82. That is all the officers who were involved in this investigation. So I'm prepared to do that, but I think I should say for the record that it's very disconcerting for myself and probably for the court that the way my learned friend is conducting this case; the stunt he pulled this morning and it's accurately described as that, putting me in the position that he did with the jury, saying he was going to accept all 12 after leading us all to believe he was going to challenge for cause, and it's uncalled for. It's not needed.

THE COURT: Well, I'm not going to make any comment on that now. The record has indicated what you've said. We'll adjourn then till 2:30.

COURT RECESSED (1:10 p.m.)

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COURT RESUMED (2:50)

THE COURT: Mr. Ebsary, you're going to have to be here on time, Sir.

MR. EBSARY: I'm very sorry, Sir. Circumstances over which I had no control prevented me.

THE COURT: Well, you'd better try to control them tomorrow or the next day. Okay?

All right.

MR. EDWARDS: Before Mr. Wintermans begins, My Lord, he's indicated what he intends to do is simply read in his arguments from the Appellant's Factum from the last trial, so just a suggestion to expedite the matter. Why don't we - I have a copy of the Respondent's argument on the same points, why don't we submit them to you as written briefs and perhaps you could review them tonight and render a decision on the matter in the morning.

It seems to me pointless for each of us just to read them . .

THE COURT: Well, he wants to get them on the record.

MR. EDWARDS: Well, let's make them exhibits, C-1 and C-2. That'll get them on the record and I'll just state for the record that we'll each adopt the arguments contained in C-1 and C-2 as our arguments on the Charter.

THE COURT: What do you say to that, Mr. Wintermans?

MR. WINTERMANS: I have a few more points to make besides those . .

MR. EDWARDS: Well, with additional comments.

THE COURT: I'm flexible, I'll do it either way.

MR. WINTERMANS: Well . . .

THE COURT: Why don't you tell me what your

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objections are first and then the record will show what they are and then we can consider the arguments. Can you summarize each one of the legal points you wish to make?

MR. WINTERMANS: Myobjections are by way of evidence I would submit that the newspaper clippings which are already entered as an exhibit in relation to the motion with respect to the challenging the jury form part of the record in relation to this application, and also the preliminary inquiry transcript which is on the exhibit table before you also . . to be relied upon to some extent in the argument.

The application was under the Canadian Charter of Rights and Freedoms, Section 24.1: Anyone whose rights or freedoms is guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." And what I'm asking is that Your Lordship declare that the trial should not proceed against Mr. Ebsary because of the lengthy delay which has taken place, which I submit has caused prejudice to Mr. Ebsary and the extensive publicity which surrounded Donald Marshall, a small part of which is submitted before Your Lordship and I would like to add to that, that one of the prime reasons why I'm arguing that Mr. Ebsary's defence has been prejudiced by this delay is that we have not been able to conduct an effective independent investigation into the matter, that I had to rely upon documents presented to me by the Crown Prosecutor. Admittedly numerous documents were given to me by Mr. Edwards over the past couple of years. However, there are apparently missing documents referred to a statement made by

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the present Attorney General of Nova Scotia, Mr. Giffin wherein he indicated that in 1979 the file was destroyed inadvertently or otherwise, presumably because it was seven or eight years old at that point and anyway, but the effect is that I have no way of knowing what was in that file. There is another matter which has come to my attention which I wasn't aware of, being the R.C.M.P. report which was also referred to in the press a few months ago, that Kirby Grant in Truro who was running for political office against Mr. Giffin, I believe, brought it to my attention and sent me a Xerox copy of it, which I have here. It's apparently a report of Detective Wheaton of the R.C.M.P. who is here today, but the point is what else is there that I haven't seen and is it fair to expect the Defence or the accused to rely upon the documents or evidence, whatever you want to call it, as presented by the prosecution.

Your Lordship earlier in discussion with the jury referred to the adversary process and I would submit that although no doubt Mr. Edwards wouldn't hold anything back, if he told you that he wasn't, that I'm not so sure about some of the police officers who've been involved over the years in this case. I refer to extreme controversy concerning the Marshall case, accusations against certain Sydney police officers, all of which is very well known I'm sure, having been highly publicized. And with that as the basis I'm suggesting that we have been prejudiced, that the case law suggests that the Court of Appeal in this case earlier suggested that Prima Facie delay of 12 years is unreasonable and that a pre-charge delay can be taken into account, but they said we can find no evidence of prejudice and therefore the application is dismissed.

I'm submitting that there was in fact prejudice

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and there certainly may have been prejudice and although it's some speculation in saying that, I would submit that it cannot be proven that Mr. Ebsary has not been prejudiced by this delay. He is 72 or 73 now, 73 years old and Your Lordship can understand the difference which a 59 year old person may face a situation like this as opposed to a 73 year old person. Mr. Ebsary suffered over the past number of years as a result of facing this icharge. This is the third time that Mr. Ebsary is before the courts in relation to this charge. The first trial of course resulted in a hung jury, the second trial was declared a mistrial and now here we are again for the third time.

I would like to go through the argument if I could be permitted to do so in relation to the law.

THE COURT: Well, just so you could get the thing on a proper perspective, it seems to me that maybe Section 24.1 is more than remedial and it allows some incursion into the rest of the Act to find out about the rights or freedoms that have been denied, but that's not - surely from your point of view 24.1 is a remedial section, and if I do find that the wording says "Anyone whose rights or freedoms as guaranteed by this Charter have been infringed or denied" then surely you're referring to other sections of the Charter as the basis where the rights have been denied. You're obviously referring to Section 7, you're obviously referring to Section 11, portions of Section 11.

MR. WINTERMANS: I was just about to go into detail on those sections, in other words . .

THE COURT: All right. Go ahead.

MR. WINTERMANS: To date there are no Supreme Court of Canada decisions relating directly to the provisions

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of the Charter involved in this case. Therefore, Your Lordship must make your own interpretations. Some help may be derived from other provincial courts and other jurisdictions and from commentaries. Section 52.1 of the Charter indicates that the Charter is supreme: "The Constitution of Canada is a supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is to the extent in any inconsistency of no force or effect." The Saskatchewan Court of Appeal has made some useful statements regarding the scope of the Charter in R. v. . . . 1983 5 CCC 2nd, p. 409, Talus, J. A. said at page 428:

> "The framers of the Charter have clearly specified certain constitutional safeguards for an accused person which courts should strive to uphold rather than balance away on the . . that only .. . risks are involved."

And Beda, D.J.S. said at page 413, same case,

> "The power of the court, acting under Section 24.1 is the power of discretion and unfettered discretion. The only limits upon that discretion are those as raised in the phrase: "Appropriate and just in the circumstances."

It is important to consider the difference between the Charter and the old Bill of Rights.

THE COURT: I don't think you have to do that. To me, you don't have to convinnce me that the Charter has got more teeth than the Bill of Rights and you don't have to do much to convince me that the Charter is now the supreme law of the country. I know that. So I accept that.

MR. WINTERMANS: Okay. The scope of the Charter is wide, as Manning says in his book I referred to earlier, the infringement or denial may come about by reason of

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operation of common statute, law or by the acts of individuals or administrative bodies. I'm suggesting that in this case the Attorney General's department should not have proceeded in the way it did. The procedure for any Charter cases before the courts must be flexible because the Charter is new and there's no real precedent to follow, and primarily because of the important roles of the courts as guardians of fundamental rights and freedoms.

It is submitted that this court is a court of competent jurisdiction. With respect to Section 7 of the Charter:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice."

It is submitted that the accused should not be placed on trial because doing so violates his rights under Section 7. Because of the excessive passage of time the Appellant was not able to defend himself and had to rely completely on the information that the Crown and police gave to his counsel. No meaningful independent investigation was possible. Therefore the Appellant was unable to present his case or make full answer on defence or meet the opposite case. Because of the excessive and extremely prejudicial publicity the Appellant was not able to receive a recent decision from a tribunal free of bias and not the subject of a reasonable apprehension and bias.

The first phrase requiring an interpretation is the principles of fundamental justice. What does it mean? In Judicial Review of the Administrative Action 4th edition, 1980 it says at page 156:

"English law recognizes two principles

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> of natural justice, that an accused be disinterested and unbiased and that the parties be given adequate notice and opportunity to be heard. There is no accepted standard of natural justice to which judgments must conform though in one case the requirement that a statutory tribunal base its decision on evidence having some probative value was said to be a principle of natural justice. On the other hand the related duty of fairness increasingly relied upon by courts in a criterion of the procedural regularity may emerge as a fertile source of standards with which decision makes must comply."

Sub-section 7 deals with procedure only, see R v. Hayden, 1983 10 WCV 390 Manitoba Court of Appeal, while others say it extends to substance only, reference re Section 942 of the Motor Vehicle Act, 4 CCC 3rd at 243 B.C. Court of Appeal. It is submitted that the principles of fundamental justice must be given a generous and liberal interpretation so as to give effect to the plain meaning of the words. Use of the phrase except in accordance with the principles of fundamental justice rather than law of the land from the Magna Carta or procedures established by law or in accordance with a procedure proscribed by law European Convention indicates that the Charter of Rights rejects the English principle of supremacy of the law in favour of the American principle of the supremacy of the Constitution. Supremacy of the Constitution over statutory and common law. The Honourable David C. MacDonald, Justice of the Court of Queen's Bench in Alberta in his book, Legal Rights and Candian Charter of Rights and Freedoms, 1982, says at page 23:

> "No doubt the principles of fundamental justice include the principles of natural justice."

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He goes on to list principles of natural justice including the right to present one's caes, the opposite case, receive a reasonable decision from a tribunal free of bias, not the subject of a reasonable apprehension of bias.

In Jopin 1982 CCC 3rd 396 B.C. Supreme Court it was said:

> "Fundamental justice means nothing less than justice and fairness."

In Operation Dismantle Incorporated et al v. The Queen, 1983, Marks J. of the Federal Court of stated that Section 7 "protects the life and liberty of citizens against government actions which are arbitrary or despotic or that conflict with the general sense of fair play, justice and equality."

In Re Bruno and The Queen, 1982 69 CCC 2nd 200, the B. C. Supreme Court says a stay of proceeding for abuse of process is possible under Section 7. Consider the commentary of Manning Supra page 232:

> "The phrase 'principles of fundamental justice' does not have an historically established meaning in Canadian law. It must mean something different from natural justice or else that phrase would have been used. The rules of natural justice may be said to be procedural only but nothing so limits Section 7. Conceivably this leads to an interpretation following Section 7 in applying a substandard due process way."

Next consider the meaning of liberty. In Liverseige v. Anderson 1942 AC 206, Lord Atkin at page 245 stated:

> "It is one of the pillars of liberty that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment

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to justify his acts."

Manning Supra states at page 245, 246 that every situation

> "will have to be examined to determine whether the deprivation has been in accordance with the principles of fundamental justice. In addition there will have to be examined the question of whether the continued deprivation is in accordance with the principles of fundamental justice if the initial reason for deprivation has ceased. Any deprivation whether partial or total should be sufficient to give rise to the protection envisaged by Section 7; in other words a total loss of personal liberty in its broadest sense is not necessary before an individual could (inaudible) the right guaranteed by Section 7."

Under Section 11(b) it states that

> "Any person charged with an offence has the right to be tried within a reasonable time."

There appears considerable confusion in the interpretation of when the time begins to run under this section. In Ontario the Antoine decision, 1983 41 D.R. 2nd 207 applied CCC 3rd 97, the Ontario Court of Appeal would appear to say that pre-charge delay is irrelevant whereas in R v. H. W. Corkum 1983 10 W.C.V. 37, the Nova Scotia Ccourt of Appeal it would seem that in Nova Scotia pre-charge delay is important. It might be somewhat ... if the court accepts the earlier argument in Section 7 would cover trial within a reasonable time without reference to the time when a charge is laid.

The U.S. case of Barker v Wingo 1972 407 U.S. 514 has been frequently quoted in Canadian cases as giving a good test under Section 11(b). The test is a balancing of four factors: 1. Length of delay; 2. Reason for delay; 3. Whether Defendant has . . his right to a speedy trial; 4. Whether prejudice has been suffered.

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The remedy was dismissal of charges. In Struck v U.S. 412 U.S. 434 1973 on page 440, the court held that dismissal of the charge was "the only possible remedy." The recent decision of the Privy Council Grant v D.P.P. Jamaica 1981 3 W.L.R. 352 the Privy Council considered that Section 20 of the Jamaica Constitution which is remarkably similar to Section 11(b) of our Charter. It reads: "Whenever any person is charged with a criminal offence he shall be afforded a fair hearing within a reasonable time." The Privy Council gave a consideration to the three and one half years between the events which gave rise to the charge and the trial, and there appears no resaon in principle why pre-charge delay would not be relevant under the Charter.

THE COURT: All right. Just stop there for a minute now. When was the charge laid?

MR. WINTERMANS: The charge was laid in 1982. 1983. 1983.

THE COURT: Early in 1983?

MR. WINTERMANS: The preliminary transcript ought to show that. I believe the preliminary hearing was in August of 1983 and - actually the charge was laid 2 or 3 days after Marshall's decision came down in the Appeal Court.

THE COURT: Can you put a date on it for me?

MR. WINTERMANS: May of 1983 Donald Marshall was acquitted.

MR. EDWARDS: And it was a couple of days later. It was in May of '83.

MR. WINTERMANS: May of '83. Now our own Court of Appeal in the case of R v. Ebsary referred to the delay and said that prima facie delay of that length

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which was 12 years is excessive so it would appear that the Nova Scotia Court of Appeal at least accepts the validity of pre-charge delay whether it be under 11(b) or under Section 7 which encompasses the principles of natural justice.

THE COURT: Does it come under 11(b), does 11(b) operate at all until you're charged with an offence? 11 says any person charged with an offence has the right to be charged within a reasonable time. Is that a reasonable time from the time of the laying of the charge or a reasonable time from the commission of the offence?

MR. WINTERMANS: I'm submitting that it's the commission of the offence. The alleged offence. The pre-charge delay is relevant.

MR. EDWARDS: That's May 12th, My Lord, the charge was laid. May 12th, 1983.

THE COURT: All right. I don't want to interrupt you. Go ahead.

MR. WINTERMANS: There's another matter under Section 577.3 of the Criminal Code, the right to make a full answer in defence, it was held re Regina and Rourke 1975 25 CCC 2nd 555 B. C. Court of Appeal, that if undue delay in the prosecution of an offence prejudiced the accused's ability to make full answer in defence, then Section 577.3 would provide the substantive defence. On appeal to the Supreme Court of Canada 35 CCC 2nd 129 the Supreme Court of Canada did not comment on this, although Laskin, Chief Justice writing the minority .. opinions, stated:

> "Subject to such controls as are prescribed by the Criminal Code prosecutions initiated a lengthy period after the alleged commission of an offence must be allowed to take

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their course and to be dealt with by the court on the evidence which judges are entitled to weigh for (inaudible) as well as credibility. The court can call for an explanation of any untoward delay in prosecution and may be in a position accordingly to assess the weight of some of the evidence."

The Nova Scotia case of R. v Field 1983 6 CCC 3rd 182 Nova Scotia Court of Appeal supports the B. C. Court of Appeal position by supporting at least theoretically the substantive defence of denial of the right to make full answer in defence under Section 577.3. It is submitted that Sections 7, 11(b) and 11(d) strengthen the right to make full answer on defence and enshrined in this right in a substantive constitutional sense.

Finally, under Section 11(d)

"Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

It is submitted that Section 11(d) ought to be read in conjunciton with Section 7 of the Charter in that Section 11(d) is a specific example of Section 7 principles upon maljustice. The Appellant's rights under Section 11(d) have been breached by placing him on trial after the excessive and extremely prejudicial publicity on a national scale concerning Donald Marshall and the accused.

Particularly damaging was the Cape Breton Post article on May 14th, 1983 which was submitted as an exhibit. Also frequent national publicity in newspapers such as the Toronto Globe and Mail and on radio and television locally, regionally, nationally referred to

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Donald Marshall as the person who spent over 11 years in prison "for a crime he didn't commit" or words to that effect. The obvious inference from the references to Donald Marshall as innocent and to Roy Ebsary as the killer have made it impossible for Mr. Ebsary's rights under Section 11(d) to to be protected. A change in venue would not help because of the national coverage. Challenge for cause with respect to each prospective juror could be attempted and was attempted in earlier trials but only showed how well known the case was.

It is further submitted that the learned trial judge ought to counter any prejudice against the accused during the course of the trial. Now that the government of Nova Scotia has publicly given hundreds of thousands of dollars to Donald Marshall in compensation with the strong inference - I'll try and change this because at the time he was only given $25,000, now he's received considerably more, also from a fund in Montreal I believe somewhere in the vicinity of $200,000 more, it is submitted that the Appellant should never have been placed on trial at all.

The presumption of innocence is enshrined by the Charter of Rights. The accused is presumed innocent before the trial started and should be acquitted now as it is impossible to prove him guilty "according to law in a fair and public hearing by an independent and impartial tribunal."

. . 1962 N.R.N.L.R. 29 states at page 33:

> "The question whether there has been a fair hearing is one of substance, not of form and must always be decided in light of the reality . . of a particular case."

Even if the statute law as it exists is complied with, the trial may still be unfair, if the

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hearing is not according to law, which law is the Charter. At minimum there should be a right not to have evidence which is in possession of the opposite party destroyed intentionally. Attorney General Ron Giffin publicly stated that the Donald Marshall file was destroyed in the late 1970's. The original Crown Prosecutor Donald MacNeil is deceased. The evidence of Chief MacIntyre . . information was turned over to Donald MacNeil in 1971 after the Marshall . .

The quality of parties is an indication of fairness. The Defence had to rely on the Crown for all its information. Justice must not only be done but must be seen to be done.

The jury selection process is manifestly unfair as the Crown has a large advantage. The reasons for judgment are implicitly required in a fair hearing. Any pre-trial publicity which would prejudice the ability of the accused to have a fair trial by an impartial jury would prejudice the very heart of the trial itself.

In conclusion I would like to state one must consider the combined effect of Section 7, 11(b) and 11(d) of the Charter of Rights. Section 1 of the Charter should not be used to destroy the spirit and intent of the Charter of Rights and Freedoms and the excessive passage of time since the incident, together with the excessive and prejudicial publicity and the destruction of files, the death of Donald MacNeil, the vulnerability of the accused make it impossible for him to be tried fairly. Therefore he should not be placed on trial. Therefore Section 24.1 of the Charter should be invoked and the charge dismissed.

All this is respectfully submitted.

THE COURT: All right. Thank you.

MR. EDWARDS: Well, My Lord, again what I would like to do is just adopt this brief as my own, have it marked as C.1 and where the term Appellant is there Your Lordship would substitute the word 'Crown' and the Crown would make those arguments.

In addition to that, I take it / there's no objection to that.

THE COURT: There's no objection to that.

MR. EDWARDS: In addition to that, My Lord, I'd just like to make a couple of general comments. My learned friend's objection under Sections 7 and 11(d) seems to be mainly concerned with the ability of the accused to get an impartial jury, one which is free from as he put it reasonable apprehension of bias. Yet, this morning we selected a jury in less than two and a half hours. My learned friend used only eight of his 12 peremptory challenges and indeed when the first 12 were called indicated he was content with all of them. Now how can he possibly reconcile that with his argument under the Charter that he is unable to get a fair and impartial tribunal? You know, he could've done a lot more screening on the jury than he did if that were a genuine apprehension on his part.

He says - well, that's the only point I want to make under 7 and 11(d). Under 11(b), the unreasonable delay, he says the lengthy delay has caused prejudice to his client. Well, at best you know his contention is highly speculative. He hasn't shown or demonstrated in the Crown's submission that any prejudice has resulted. Indeed, all the key witnesses, if not the Crown Prosecutor at the time who's got nothing to do with the substance of the evidence, all the key players were alive and were called. He says oh yeah, well, we had to rely on the Crown for all our information and we've

not been able to conduct an effective independent investigation. Well, surely it was incumbent upon him if he was making that proposition to say look, we tried A, B and C without success, but as far as I know no independent investigation has ever been attempted except on January 7th, 1985, yes, the day before yesterday, Mr. Wintermans called me giving me a half a dozen names and said where are they? Now to the best of my knowledge that's the only attempt at an independent investigation that was ever made. He said Mr. Giffin, the Attorney General has indicated the file was destroyed. The Crown says so what? The file doesn't contain evidence and Mr. Wintermans knows that the Crown's files have been open to him all along. He says well, an R.C.M.P. report came to his attention during the election campaign. Well, the election was September 4th, so he's had a copy of that, yet he hasn't identified any parts of the report that are new to him which were a big surprise and made it impossible for him to prepare his case, so I would submit that the accused's arguments made by my learned friend are in all due respect nothing but a smoke screen.

Thank you.

THE COURT: All right.

MR. WINTERMANS: If I could respond to one thing that my learned friend says. With respect to the jury selection process which took place today, I indicated an objection to the process as being unfair and I submitted to Your Lordship's ruling under that protest and in an attempt to try and salvage as fair a jury as possible the procedure that I followed was followed, but it was under protest.

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THE COURT: Now wait a minute. You can't bite from both sides of the table at the same time. There was a protest registered this morning on the selection of that panel and I'm quite concerned, the record is clear. You challenged the array. You made a challenge to the array on the basis of the Charter. You had a few hurdles to get over, but the Charter being the supreme law of the country, if there was anything which offended the Charter then it might very well have affected the whole proceeding and I ruled against you on that. I ruled against you that the Charter arguments did not indicate that any right was infringed or that there was anything unconstitutional about the selection of the array.

You then indicated that you were going to challenge for cause every person on the panel. We outlined the procedure, we made it all up. You suggested that - after I had suggested what the procedure was you suggested that the 12 be called, which I agreed with. 12 were called and you stood up and said you'd take them all. Now there was no protest and I want you to be very . .

MR. WINTERMANS: My Lord, there's one thing you left out. I also objected to the unfairness of the provisions, my learned friend has 48 stand asides and . .

THE COURT: You objected to that, yes, and I told you that there was no basis for that objection. That's what the law says and I didn't find the law to offend the Constitution. But you then were willing to select the original 12 and that didn't work out because you wanted to make it on condition that the Crown would and then we went through the procedure that we did and you exercised a number of peremptory challenges. You

exercised one challenge for cause and we ended up with a panel, so I want to make it clear and make the record clear that as far as I'm concerned that it was not under any protest other than you made some initial arguments and you were unsuccessful in those arguments. The panel was selected in the normal and ordinary way that jury panels are selected in this province over the years.

Now on the other points, this trial is resulting from an appeal to the Appeal Court on a previous trial of Mr. Ebsary and the Appeal Court, having heard the arguments that you just made to me, have indicated that in their view there was no prejudice to the accused by the delay that has taken place. Now they did indicate without expanding that prima facie delay of this length is excessive. I presume that they were talking of the 12 years. They didn't expand on it and I have no idea what the reasons behind it were, but I would suggest this to you. This is a most unusual case, and it's most unusual in that the events did occur a long time ago but another man was charged with the offence, convicted of the offence or convicted of an offence and sentenced to a long term in penitentiary. After having served a considerable period of that time he was released and then your client was charged. Now that's different, very different from the circumstance where somebody commits an offence and either the Crown lays a charge and then delays and delays and delays for a long period of time, or that's one circumstance, and it's different from the situation where a person commits an offence and there is a long delay before he's found, and I'm not sure that I accept and I'm not sure that anyone has yet said that the Charter of Rights is in effect a limitation of actions act on the criminal side.

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There are certain circumstances where crimes would be committed that the most diligent of investigators may take some period of years before they are able to lay a charge against anybody, and surely that person can't come in and automatically say well, I robbed that bank 10 years ago but since I was only found out yesterday and had a charge laid against me, that I'm entitled to go free. I don't think that the Charter goes that far. I think that there are circumstances which clearly show a delay which make it unfair for the accused to be put on trial and there are other circumstances where there is a delay where it is not unfair to put the accused on trial and in those circumstances those delays are not excessive.

I, however in this particular circumstance am bound by the decision of the Appeal Court so nothing new has been added today which would show any prejudice as far as I'm concerned, therefore I'm bound by the previous decision of the Appeal Court and I find that the period of time is not excessive and there has been no prejudice to the accused.

Now as far as the fair and impartial tribunal I think the courts are coming around, if you read the decisions and the fact that we are living in an electronic age where any crime of any substance is going to get almost national attention. We are reading, watching on television everyday reports of murders in Savannah, Georgia or some place in California, some place in the States and latterly in Poland. The press are going to report and reports are going to be circulated and they're going to be circulated widely and anyone who can read is going to read them in the newspaper if they read newspapers, and anyone who can

watch a T.V. set is going to see them if they watch a T.V. set. The fact that something has received some substantial publicity in no way prohibits a group of jurors, properly selected with all of the provisions and protections of the Criminal Code, properly instructed from giving an accused a fair and impartial trial in accordance with the Charter, and in this particular case there was a great deal of publicity, that is true, but I'm satisfied that the protections under the Code and the particular process that we went through this morning selecting the jury will assure the accused of a fair and independent trial and again in that regard the Charter has not been violated, the Charter rights of the accused have not been violated. So on those motions, or the motions that would have those support, those motions are denied.

All right. Where do we go now?

MR. EDWARDS: Voir Dire, My Lord.

THE COURT: Voir Dire?

MR. EDWARDS: My Lord, I believe just before we leave it with respect to my brief there, C-1, I think I said where the word 'Appellant' I should have said 'Respondent', that the word 'Crown' be substituted.

My Lord, this is a Voir Dire the Crown is seeking to have introduced into evidence a tape recorded conversation between the accused and Corporal Jim Carroll of the R.C.M.P. which tape was made on the 29th of October, 1982 and I'll be calling evidence starting sequentially in February of '82, specifically February 22nd, 1982 is the first contact between the police and Mr. Ebsary, and in coming forward to the tape recorded conversation. There are other conversations with the accused in the interim but it's that tape recorded conversation which we believe the focus of this Voir Dire.

DISCUSSION

THE COURT: Well, so I know where I'm going judges are not blind. I've already read in the Appeal decision on the previous trial that this particular statement was entered into evidence by agreement between counsel.

MR. EDWARDS: Yes, there was a waiver of a Voir Dire at the last trial.

THE COURT: A waiver of a Voir Dire. Now is there to be a waiver this time or not?

MR. WINTERMANS: There certainly is not. I'm very strongly opposed to it.

THE COURT: Okay, there's not. You don't have to tell me you're opposed to it. I just want to know where we're going. I don't want you to come at the end of it and say that we waive it.

MR. EDWARDS: My Lord, generally speaking, so Your Lordship will have the framework, the statement was taken in October as I say. Between February and the end of March of '82 there were several contacts with various members of the Sydney Detachment of the R.C.M.P. and the accused. In between May and July of 1982 Mr. Ebsary was out of the area and in fact was in the Nova Scotia Hospital on an unrelated matter. There was no contact there. So in between July '82 and the completion of the statement in October of '82 there were several more contacts between members of the Sydney Detachment and the accused, and it is on those contacts that the Crown will be taking the position that this February to May period is really of marginal relevance for our purposes here and we will focus on the conversations between the accused and Corporal Jim Carroll and Staff Sergeant Thomas Barlow in October of '82.

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DISCUSSION & VOIR DIRE

THE COURT: Are you going to call the witnesses on the February to May at all?

MR. EDWARDS: Yes, as I say they are marginal.

THE COURT: Well, you have an obligation to complete a picture.

MR. EDWARDS: Yes, so to be on the safe side I thought better start back in February.

THE COURT: All right. You'd better do that.

VOIR DIRE

STAFF SERGEANT WHEATON duly called, sworn, testified:

THE COURT: Now, what - you haven't said anything Mr. Wintermans, I don't know whether you intend to or not.

MR. WINTERMANS: Yes, My Lord, I would ask for an exclusion of witnesses.

THE COURT: I was wondering if you were going to do that.

MR. EDWARDS: Yes, My Lord. Corporal Carroll was the informant so I assume that the exclusion does not extend to him as is customary.

THE COURT: That is the custom.

MR. WINTERMANS: Of course I'm going to point out to Your Lordship that Corporal Carroll I assume will be the next witness called. He's the person who took this statement and I might point out to Your Lordship that there is some case law to the effect that in the case of calling of Defence evidence that it is wise to call an accused person first when calling Defence evidence because the judge may comment on the credibility of that witness if he is called last and then to comment upon what everyone else has said.

THE COURT: I don't know what you're saying. As far as - what I'm going to tell you is very simple and plain. I am going to give your client a fair trial.

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VOIR DIRE

I'm going to allow only the evidence that's admissible. I'm going to make no comments that are in any way prejudicial to your client one way or the other, except that I will charge the jury on the law and tell them if I feel I should comment on any of the facts I'll comment on them, but I'm not - don't worry - there's no game in this of calling first or second or last. It doesn't matter to me when anyone is called and I don't know of any rules. I practices law for 20 years. I don't know of any rules that ever existed for when you should call someone. You try to do the beset you could for whatever side you were representing and you clal the witnesses in that order. There's no tactic of that nature that's going to cause me to make any comment on credibility one way or the other. Credibility will be discussed with the jury at the end of the case as I refer to it in the charge and I will comment on some witnesses, but don't worry about things like that. What I wanted to know is whether or not you want the informant to be removed from the court while the present witness is testifying.

MR. WINTERMANS: My Lord, I appreciate that normally an informant is allowed to remain in the court room while all the witnesses are giving evidence, but I would ask that Your Lordship consider this in a different situation given the nature of a . .

THE COURT: Well, there is law to support the informant can be excluded also. Put the other way there is a view that the information is not necessary. In this particular case to assure that the trial will be fair and impartial I will ask the informant to excuse himself until such time as he's called. Once you come in then you're entitled to remain in.

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VOIR DIRE

MR. WINTERMANS: I have no objection to that.

MR. EDWARDS: Of course we're in a trial within a trial. Is Your Lordship's ruling just for the Voir Dire?

THE COURT: Well, for the Voir Dire now and we'll deal with the trial proper when we get into that. Although for the other witnesses they'll be excluded at the trial too.

MR. EDWARDS: Um-hmm.

THE COURT: We'll deal with the informant at that time.

DIRECT EXAMINATION ON VOIR DIRE

MR. EDWARDS: You're Staff Sergeant Harry Wheaton, you're a member of the R.C.M.P. and you're presently stationed in Halifax. Formerly you were station at the Sydney Detachment, is that correct?

A. That is correct, Sir.

Q. And you in fact were the officer in charge of the reinvestigation of the Donald Marshall case and the case at bar, is that correct?

A. That is correct, Sir.

Q. And as such you had some discussions with the accused, Roy Newman Ebsary.

A. Yes, I did, Sir.

Q. Can we dispense with having each of the witnesses point out Mr. Ebsary? Identification is not an issue, is it, on Voir Dire?

THE COURT: All Right.

MR. EDWARDS: All right, so when in connection with this investigation did you have your first contact with Mr. Ebsary?

A. My first contact with Mr. Ebsary was on the 22nd of February, 1982.

Q. Um-hmm. You have notes?

A. Yes.

S/S WHEATON, Direct Examination on Voir Dire

Q. They were made at the time?

A. Yes, they were.

Q. And you wish to refer to them to refresh your memory, is that correct?

A. Yes.

THE COURT: Can you hold on?

MR. EDWARDS: Sorry, My Lord.

THE COURT: Mr. Ebsary appears to be asleep and I would - I've never had an accused who's asleep.

MR. WINTERMANS: He shouldn't be.

THE COURT: Well, wake him up.

Have him sit beside you, if you wish.

You'll have to stay awake, Mr. Ebsary.

MR. EBSARY: I'm sorry, Sir.

THE COURT: Well, you've had a long enough nap now that maybe you can stay awake for the rest of the time.

Mr. Ebsary, all that has been going on, in case you did have a little bit of a nap, was that your counsel was arguing some legal points which we've resolved and now we have Staff Sergeant Wheaton of the R.C.M.P. and he's indicated that he was in charge of the reinvestigation of the Marshall case and the investigation of your particular case, and that he first contacted you in February of 1982 and that's the last that he testified, so if you pay attention now we'll go on.

MR. EDWARDS: Yes. I was asking for the Court's permission to have Staff Sergeant Wheaton refer to his notes. He testified they were notes made at the time.

THE COURT: Any objection, Mr. Wintermans?

MR. WINTERMANS: I'd like to see the notes if I could, My Lord. Might I ask a few questions in

relation to the use of the notes?

MR. EDWARDS: I have no objection.

MR. WINTERMANS: Staff Sergeant Wheaton, these notes you say they're notes that were made at the time.

A. Yes, Sir.

Q. That would be in February 22nd, 1982?

A. Yes, I made those notes on the 22nd.

Q. Starting in the middle of the page that you've indicated there.

A. Yes, Sir.

Q. And . .

A. There's other various things in that as well.

Q. Yes. Are there reference to any other meetings in these notes?

A. With Mr. Ebsary?

Q. Yes.

A. Yes, Sir.

Q. First of all, if I can just go back to the one . .

A. On the 22nd I had a meeting with Mr. Ebsary and on the 23rd. I don't think there's a note there of it but I did have a meeting with him at that time.

Q. All right. I note that the note that you have in relation to the meeting on the 22nd of February, 1982 does not contain any actual ver batim conversation.

A. One meeting doesn't. The other is a telephonic conversation and it does. The "E" indicates Ebsary and the "W" indicates Wheaton.

Q. Right. Could you indicate what other references there are . .?

A. That's all the references to my meetings and contacts with Mr. Ebsary.

S/S WHEATON, Direct Examination - Voir Dire

Q. On that - just on that day, is it?

A. No.

Q. Are there any references in that notebook to any other meetings with Ebsary?

A. No, Sir.

Q. There aren't.

A. No.

Q. Thank you.

THE COURT: Do you have any objection to him using the notes to refresh his memory?

MR. WINTERMANS: No objection.

THE COURT: All right, Staff Sergeant. You may use the notes to refresh your memory.

MR. WHEATON: Thank you very much, My Lord.

MR. EDWARDS: So Staff Sergeant Wheaton, you had your first meeting on the 22nd of February, '82. Where and under what circumstances was that meeting held?

A. I was in civilian dress on the 22nd of February, 1982 and I was accompanied by Corporal James Carroll driving an unmarked car. We went to Mr. Ebsary's residence on Falmouth Street in the City of Sydney, County of Cape Breton, Province of Nova Scotia, we went to the door, Mr. Ebsary came to the door. I introduced myself and Corporal Carroll and we entered his home and we had conversation. I advised Mr. Ebsary that we were investigating the stabbing death of Sandy Seale in Wentworth Park in 1971 and that we would like to have a talk with him back in our office.

Q. This is approximately what time of day? You might have mentioned it.

A. This was in the morning, approximately 9, 9:30 roughly in the morning. Conversation, further conversation took place between Mr. Ebsary, Corporal

Carroll and myself, relevant to taking care of his dog. We then left the residence and drove to the R.C.M.P. office on Alexandra Street in Sydney. Mr. Ebsary was sober, he walked under his own power, he was co-operative, quite jolly and quite jovial was his demeanour. He came in to our building and we went to the general investigations section offices which are located on the second floor. We entered a room with a window, desk, various file cabinets in it at 10:17 a.m. I then warned Mr. Ebsary that he need not say anything, he had nothing to hope from any promise or favour, nothing to fear from any threat whether or not he said anything. Anything he did say could be used as evidence. I then explained to Mr. Ebsary that he should not feel threatened in any way or I was not holding any promises, that any questions I asked him may be used as evidence and did he understand that, and he said he did. I asked him if he wished to have a lawyer present and he said he did not. As I say, he was in a very expansive mood, very gregarious. He talked volubly about religion, his war experiences, throughout the conversation I endeavoured to bring him back on point as to his whereabouts and what he was doing on the night of the Seale murder, really to no avail. He didn't seem to want to discuss this. I note 11:25 a.m. I left the rooms with Corporal Carroll for a brief rest, came back in at 11:31 at which time I read him a statement made by James MacNeil. Further discussion took place . .

Q. Now the statement by James MacNeil, was that the one James MacNeil gave you in 1982 or a previous statement, can you tell me?

A. One that he gave me in 1982. The interview finished at 1:41 a.m.

Q. Okay. You read him the statement by James

MacNeil. Could you just summarize the substance of that statement?

A. In the statement Mr. MacNeil outlined his activities on the night of the Seale murder as being with Mr. Ebsary, being present in the park with Mr. Ebsary, observing Mr. Ebsary stab Sandy Seale.

Q. What if anything did Mr. Ebsary say after you read him that statement?

A. He made - he would change the conversation. He kept changing the conversation. He would not make comment on that. He would then go into sinking the Bismarck or some other conversation of that nature.

Q. Yes. Okay.

A. This conversation ended at 1:41. It was 3 hours and 25 minutes he was in my presence on the morning and early afternoon on the 22nd. At 4:30 p.m. I received a call from Mr. Ebsary.

Q. Well, when he left that meeting . .

A. He was driven back to his home.

Q. Who drove him back?

A. I don't recall, Sir. I did not drive him back.

Q. All right.

A. At 4:30 p.m. on the 22nd I received a call from Mr. Ebsary, I recognized his voice as I had been talking to him for some period of time that morning, in excess of 3 hours. On hanging up the phone I made notes verbatim of the short conversation that took place. Mr. Ebsary said all our talk today was not in vain. I said what do you mean by that?

Ebsary: Well, you know I'm a British officer and a gentleman.

Wheaton: Yes?

S/S WHEATON, Direct Examination - Voir Dire

Ebsary: You called me a homosexual.

Wheaton: Yes.

Ebsary: All our talk was not in vain.

Wheaton: Why is that?

Ebsary: Well, I did it.

Wheaton: Are you admitting to stabbing Sandy Seale?

Ebsary: Yes.

Wheaton: Would you like to speak to me?

Ebsary: No, the other fellow.

Wheaton: Okay, I'll send Jim down.

And that terminated that conversation.

MR. EDWARDS: And the Jim you're referring to and the other fellow was referring to whom?

A. James Carroll. Corporal James Carroll who had been present during the entire conversation in the morning.,

Q. Now just before we leave the 22nd of February other than yourself and Corporal Carroll, to the best of your knowledge did any other police officers have contact with Mr. Ebsary?

A. I can recall no other police officers. I do not specifically recall who drove him back, whether Corporal Carroll did or not.

Q. Um-hmm. Okay. So then after that telephone conversation what was the next contact if any you had with Mr. Ebsary?

A. The next contact I had with Mr. Ebsary was on the morning of the 23rd. I again went to his . .

Q. That was still February?

A. Oh, the next day. 1982. I went to his residence again accompanied by Corporal Carroll. Mr. Ebsary let us in the home, we sat at the kitchen table. I again warned Mr. Ebsary.

THE COURT: What do you mean by warned?

S/W WHEATON, Direct Examination - Voir Dire

A. I told him that he need not say anything, he had nothing to hope from any promise or favour, nothing to fear form any threat, whether or not he said anything. Anything he did say could be used as evidence. And I asked him if he understood this and he said yes, he did. I then asked him if he wished to tell me anything further in reference to the stabbing of Sandy Seale in Wentworth Park. Again he was even more gregarious and expansive than he was the day before. He was drinking at the time, he was not drunk. I recall there was a bottle of sherry on the table. He would not come on point in reference to the Seale murder. He wanted to talk about Donald Marshall, Donald Marshall's mother, Donald Marshall's father and wanted to meet with them. At the end - as this conversation was getting nowhere we left.

Q. What time did you leave?

A. This would've been the morning of the 23rd, prior to noon sometime. I don't have the exact time recorded. Then later on in the afternoon I again had brief conversation with Mr. Ebsary and Donald Marshall's mother and father were brought to the G.I.S. offices in Sydney and I observed Mr. Ebsary go in alone and have conversations with Mr. and Mrs. Marshall.

Q. Did you have conversation - did I understand you to say you had conversation with Mr. Ebsary at that time?

A. Brief conversation prior to his going in the room to talk to Mr. and Mrs. Marshall.

Q. Yes. What was the substance of that conversation?

A. In reference to the Seale murder again I in no way threatened him or promised him with anything

S/S WHEATON, Direct Examination - Voir Dire

He had requested an interview with the Marshall family and we accommodated him.

Q. About how long did this conversation . .

A. Very brief, Sir. A salutory conversation to tell him that these were the people in the room, Mr. and Mrs. Marshall.

Q. Are we talking seconds or minutes?

A. Maybe one minute, 35, 45 seconds.

Q. I see. Okay. So did you see him any more that afternoon?

A. No, I did not, Sir.

Q. And you didn't go into the room where Mr. and Mrs. Marshall were.

A. No. I did not. I believe I stood in the doorway.

Q. Um-hmm. And did you have any further contact with Mr. Ebsary after the 23rd of February, 1982?

A. I can recall no further contact with Mr. Ebsary.

Q. Now during the entire period of time what if anything was said by you or anyone in your presence by way of threats, promises or inducements to have Mr. Ebsary say or do anything connected with this case?

A. There was no threats, promises or inducements made by anyone in my presence nor by myself.

Q. I see. So you had no further contact with him after the 23rd of February, 1982.

A. To the best of my recall, no, Sir.

Q. Thank you. I have no further questions of this witness.

THE COURT: Cross-examine?

CROSS-EXAMINATION

MR. WINTERMANS: Now Sergeant - is it Sergeant?

A. Staff Sergeant.

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S/S WHEATON, Cross-Examination - Voir Dire

Q. You at this time were investigating the question of whether Donald Marshall was wrongfully in the penitentiary at that time, is that correct?

A. Yes, Sir.

Q. And the name of your investigation file then would have been Marshall case, true?

A. On the 22nd of February I would've been investigating the death of Sandy Seale and also the imprisonment of Donald Marshall. The two were intertwined.

Q. Do you recall how you had that file titled? I suggest to you it was Donald Marshall, Jr. Non-Capital Murder Section 206.2 CCC. Do you agree with?

A. It could very well have been, Sir, yes.

Q. You are H. F. Wheaton, or you were at that time Staff Sergeant P.C. Co-ordinator, Sydney Sub-Division, G.I.S.?

A. That's correct, Sir, yes.

Q. Okay. And the first contact with Mr. Ebsary then you say was on the 22nd of February, 1982 and you say that you were in civilian clothing and you and Carroll went to Ebsary's residence, asked him if he would accompany you to the police station, the R.C.M.P. office in Sydney?

A. That is correct, yes, Sir.

Q. And he was taken then in an unmarked car or a police car?

A. An unmarked car, Sir.

Q. Unmarked car.

A. Yes.

Q. To the R.C.M.P. Detachment. Was he under arrest at that time?

A. No, he was not, Sir.

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S/S WHEATON, Cross-Examination - Voir Dire

Q. And you say that he was sober.

A. He appeared sober to me, yes, Sir.

Q. What do you mean by that?

A. I could smell no alcohol on his breath, his eyes didn't appear glassy, he appeared to be in command of his faculties, speech not slurred.

Q. This was at around 9:30 in the morning, did you say?

A. Yes, Sir.

Q. And the warning, the police warning that you gave him you indicated the words, those were the exact words, were they?

A. Yes, Sir.

Q. And was that given at Ebsary's residence before he was taken to the police station or was that given upon arrival at the police station or what?

A. It was given when we were in the interview room, the General Investigation office at the police station. Corporal Carroll, myself and Mr. Ebsary present.

Q. And what stage, in other words at what time would that warning have been given?

A. We entered the room at 10:17 and as I recall it Mr. Ebsary was voluble, he talked awhile about his title of Reverend Captain before I gave him the warning because I didn't want to interrupt him. He talked for a little while and then I warned him.

Q. Now you say that you advised him that you were investigating the death of - you didn't indicate to him, to Ebsary that it was Ebsary who was under investigation.

A. Yes, I did, Sir.

Q. What did you say?

A. During the course of our interview as I say, he

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S/S WHEATON, Cross-Examination - Voir Dire

rambled and I made it pointedly to him you know that I felt he was responsible for the death. I also read him the statement of James MacNeil in which he claimed to be an eye witness to the death.

Q. Do you have that statement of James MacNeil which you read to him?

A. I don't have it with me, Sir.

Q. And you say that that was the 1982 statement to you that James MacNeil made?

A. Yes, Sir.

Q. Were there more than one?

A. There were other statements made by James MacNeil to the Sydney City Police.

Q. No, no, to yourself. Were there any others?

A. No, Sir.

Q. Okay. Now was this the first day of your investigation into this matter or did you start investigating the matter before speaking to Mr. Ebsary? In other words were you investigating the question of Donald Marshall's incarceration, guilt or innocence before that day?

A. Yes, Sir.

Q. When did that begin, do you recall?

A. I recall it as being approximately the 4th of February.

Q. The 4th of February.

A. That's an approximation.

Q. That's two or three weeks before your initial contact with Mr. Ebsary.

A. Yes, Sir.

Q. What about - you're aware then of records indicating that a polygraph test was conducted.

MR. EBSARY: Objection.

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S/S WHEATON, Cross-Examination - Voir Dire

MR. WINTERMANS: It's in the absence of the jury.

MR. EDWARDS: It's in the absence of the jury but if I may make my objection.

THE COURT: Go ahead.

MR. EDWARDS: I understand my learned friend has wide latitude on cross-examination but surely it has to be relevant and he knows that what he's referring to now is a polygraph test done back in 1971 and polygraph evidence isn't admissible anyway. It's hard to see how it bears on the voluntariness of a statement given in 1982, so you know, to follow that seems to be a waste of time, there's no probative value.

THE COURT: What we're doing now is we're into a Voir Dire as to the voluntariness of the statements.

MR. WINTERMANS: My understanding is that the law on voluntariness on Voir Dire proving the admissibility of a statement is that all police officers, persons in authority who had contact with the person giving the statement before the statement was given are supposed to be called by the Prosecution. Now . .

THE COURT: Do you have to go back to 1972 to get a statement that was made in 1982 in? Is that what you're suggesting to me?

MR. WINTERMANS: Well, I'm wondering, is Your Lordship ruling at this stage . .

THE COURT: I'm not ruling anything. I'm trying to find out.

MR. WINTERMANS: I'm wondering if my learned friend is going to go that far back.

THE COURT: Well, he told you what he was going to do. He told you he was going to start in February and go from February to May, then he was going to skip from May to July because nothing happened, then he was

going to go on to the next one.

MR. WINTERMANS: Well, I'm going to bring out through this witness if I might be allowed, not the contents or the results of any polygraph tests, just the mere fact that more police officers had been in contact with Mr. Ebsary before the 22nd of February, 1982.

THE COURT: Well, go ahead. Ask the question.

MR. WINTERMANS: Are you aware, I'm not asking you anything about the results of any tests or anything, but are you aware as the officer in charge of this investigation of the existence of a polygraph report, examination and report in relation to Mr. Ebsary that occurred in 1971?

A. Yes, Sir.

Q. By the R.C.M.P.

A. I'm aware of that.

Q. That was conducted by R.C.M.P. officers?

A. Yes, Sir.

Q. Were you present when that occurred?

A. No, Sir.

Q. And are you also aware of the existence of a statement allegedly made by Mr. Ebsary to the City Police, the City of Sydney Police back in 1971 to Chief MacIntyre now, Sergeant MacIntyre at that time? And MacDonald?

A. I'm aware of contact between Mr. Ebsary and the Sergeant at that time MacIntyre. The specific statement I can't recall, it could very well be. I know there was contact, I don't know if a statement was taken.

Q. Surely you examined that statement.

A. I did, I examined many, many statements, that's perhaps why I can't recall specifically.

S/S WHEATON, Cross-Examination - Voir Dire

Q. Are you also aware of who Detective Corporal Woodburn is?

A. Yes, Sir.

Q. And who is that?

A. He's a member of the Sydney City Police.

Q. Are you aware of any contact that he may have had with Mr. Ebsary in 1982?

A. Yes, Sir.

Q. Did Mr. Ebsary complain of chest pains during this initial meeting with him, this three hour meeting on the morning and early afternoon of the 22nd of February, 1982?

A. I don't recall him complaining of chest pains, no, Sir.

Q. So you read this statement of MacNeil to Ebsary but you don't have that statement here with you.

A. No, Sir.

Q. You can't recall the exact words of that statement.

A. I recall not verbatim but as I described it to Mr. Edwards, roughly.

Q. You say you told Mr. Ebsary that you thought he was maybe responsible for this stabbing.

A. Not 'may', I told him I felt he was.

Q. You felt he was responsible. And what else did you say to Mr. Ebsary during that half hour discussion?

A. Many things, but none of them were of a threatening nature or a promising nature.

Q. Perhaps you should allow the judge, His Lordship to determine what constitutes a threat or a promise or an inducement. If you could just recount . .

A. I can't recall exactly verbatim what took

place in 3 hours and 25 minutes of conversation with one pause between 11:25 and 11:31. I made notes and I know it was a rambling conversation involving religious talk, war experiences. Mr. Ebsary when got to point of the stabbing would change the subject.

Q. I'm not so concerned about what Mr. Ebsary may have said at that time, what I'm trying to get at is what did you say or what Corporal Carroll say in your presence to Mr. Ebsary at that time?

A. I can only tell you, Sir, that it was a rambling conversation, it was a friendly conversation. There were no threats or promises made in my presence by Corporal Carroll nor I certainly made none myself. I cannot specifically say what I said verbatim.

Q. You don't recall the complaint of chest pains, is that what you're saying?

A. I do not recall. I recall him talking about his medical condition. I recall him mentioning a Dr. Cardew to me. Again it was a friendly conversation in reference to his medical history.

Q. What was the reason for returning him home then at 1:41?

A. Mr. Ebsary - we were getting nowhere with the conversation in that Mr. Ebsary was neither admitting or denying the stabbing of Sandy Seale. I felt it pointless to go on with it.

Q. Did he express any interest in the Marshall family during that three hour conversation?

A. Yes, he did, Sir.

Q. What kind of things were discussed there?

A. He told me he held the key to Mr. Marshall getting out of jail. I recall him saying "I hold the key" several times but then he would not expand.

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S/S WHEATON, Cross-Examination - Voir Dire

I asked him several times what do you mean, you hold the key? I'll tell the Marshalls. He wanted to meet them at the time, I told him that was not possible. He asked me about the religion, I recall.

Q. I'm just going to show you this, Sergeant. It's only two pages but there's more where that came from. I just want you to look at that and see whether first of all you recognize on the following page the signature towards the bottom of the page.

A. Yes, this is my signature in my hand over my name.

Q. And on the preceding page then, in the middle of the page you indicated earlier a telephone conversation which took place when you say Mr. Ebsary called you and you recounted Mr. Ebsary saying words 'you know, I'm a British officer and a gentleman, you called me a homosexual' and all that. How does that compare with the words on the center of that page 9 which I've just shown you?

A. How does it compare with what, Sir?

Q. Is that the same conversation that's referred to there?

A. If I could just have a moment. No, it is not exactly the same conversation.

Q. What are the differences?

A. In one reply I have in my notes as soon as I hung up the phone, Ebsary saying 'all our talk was not in vain' and in the typewritten report of mine the reply is 'all our talk was not in vain, you know.' 'You know' has been added.

Q. Other than that . .

A. Other than that it's the same.

Q. And the report which I showed you, pages 9 and 10, the partial report I should say, you indicated your

signature in the middle of 10. Is that your report then?

A. Yes, Sir, to the best of my knowledge it appears to be my report.

Q. I point out near the top of page 9 I have underlined there in my handwriting the reference to Ebsary complaining of chest pains at which point you took him home or he was sent home. Does that refresh your memory at all?

A. I would say that it was probably more accurate then than it is now. Some two years later. But I do not recall honestly, but undoubtedly that's what I dictated to my secretary.

Q. So you're saying then that likely this report that I just showed you is more accurate than your recollection at the present time?

A. That's right, Sir.

Q. So you would allow my suggestion that there's a substantial likelihood that it was true that he did have chest pains and was sent home at that time?

A. Yes, Sir.

Q. I also again, the same two pages that I showed you, how are they entitled?

A. Donald Marshall Jr., Non-Capital Murder, Section 206.2 CCC.

Q. So I suggest to you, Sergeant, that what you were investigating at that time officially was the Donald Marshall case, if I can call it that.

A. One has to know the Mounted Police terminology. At this time I would not be at all surprised if the Ebsary matter is still being reported as the Donald Marshall, under that caption. We would probably have given it a division file number which I know we did in 1971 and that file number, for instance, would follow through till today. The two cases were intertwined.

S/S WHEATON, Cross-Examination - Voir Dire

Q. And I'm sure you must have said some words to Roy Ebsary during that three hour conversation on the 22nd of February, 1982 to the effect that this investigation involved Donald Marshall, Jr. who was in Dorchester Penitentiary, right?

A. There would have been conversation, yes, Sir.

Q. There would've been conversation. And would you also have said words to Mr. Ebsary with respect to Donald Marshall's claims up to that point that he was innocent and he was still maintaining his innocence?

A. Yes, Sir.

Q. Unfortunately you're not able today to recount in exact detail the words that were - every word that was spoken to Mr. Ebsary.

A. No, I'm not Sir.

Q. 12 years ago.

A. Well, in 1982.

Q. Oh, I'm sorry. Two years ago. The conversation that you had on the telephone which you've recounted, you say that based on one conversation with Mr. Ebsary earlier that day you were able to identify his voice?

A. Yes, Sir.

Q. The telephone conversation was taped, was it?

A. No, it wasn't, Sir.

Q. It wasn't taped. You were just sitting there writing it all down as it was happening or . .?

A. As soon as I hung up, I wrote it down.

Q. As soon as you hung up. I see. And of course those notes after what you've just testified, there was no tape recording made of the conversation, the three and a half hour conversation earlier on the 22nd of February, 1982.

A. No, there was not, Sir.

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S/S WHEATON, Cross-Examination - Voir Dire

Q. Who was present when Mr. Ebsary was interviewed at the R.C.M.P. Detachment on February 22nd, 1982?

A. Corporal Carroll and myself.

Q. Any other police officers?

A. No.

Q. Are you sure of that?

A. There were other police officers as we entered the general G.I.S. office who observed Mr. Ebsary walk through into the room where we interviewed him, but no one spoke to him.

Q. Did you take Mr. Ebsary home after that interview?

A. I don't recall taking him home, no.

Q. Do you recall telling anyone else to take him home?

A. I know one of us took him home but I don't know who. I don't believe it was me.

Q. You're saying it was either you or Carroll?

A. No, I'm not.

Q. I see. You're not sure how he got home then.

A. I know one of the other officers took him home. It may have been Corporal Carroll, it may have been one of the other plain clothes officers in the outside office who was free.

Q. I see. And of course you didn't go along, did you, for the ride.

A. No, I did not, Sir.

Q. Again the following day you went back to Mr. Ebsary's residence?

A. That's correct, Sir, yes.

Q. What time would that have been?

A. It would've been the morning of the 23rd. I don't have the specific time.

Q. You indicated some observations with respect

to alcohol consumption, a bottle of sherry on the table?

A. Yes, Sir.

Q. You said he was drinking at the time but not drunk.

A. Yes, Sir.

Q. What did you observe in order to make that conclusion? That he wasn't drunk.

A. Well, he - I suppose sobriety is an abstract thing but to me he didn't fall down, he did get up, he patted his dog.

Q. Let me ask you this then. Why do you say that he appeared to be drinking?

A. I saw him, observed him with a cup of sherry, what I took to be sherry and observed him drink it while we were sitting talking.

Q. I see. And this was at 11:00 in the morning?

A. It was in the morning. I can't be quite positive of the hour.

Q. And he wanted to talk about Marshall and Marshall's family, is that what you . .?

A. Yes, Sir.

Q. What did he say about Marshall, Marshall's family?

A. He wanted to meet with Mr. and Mrs. Marshall.

Q. Did he say anything else?

A. Yes. He said after I've met with them I may give you a statement.

Q. Did you hear him say words to the effect that he was going to single-handedly get Donald Marshall out of jail?

A. Yes, Sir.

Q. You remember him saying that, do you?

A. Words to that effect.

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S/S WHEATON, Cross-Examination - Voir Dire

Q. And do you remember the answer back that he wouldn't be able to do it all by himself?

A. I don't recall that, Sir.

Q. Do you recall any discussion with respect to the protection of the Canada Evidence Act?

A. I don't recall that, Sir.

Q. Do you recall any discussion as to letters that Donald Marshall, Jr. sent to Mr. Ebsary from prison?

A. Yes, Sir. There were discussions in reference to letters, a letter or letters sent by Donald Marshall, Jr. to Mr. Ebsary.

Q. Do you recall a discussion as to the contents of those letters?

A. Yes, Sir.

Q. Do you recall any mention of the Canada Evidence Act in that regard? Donald Marshall suggesting to Mr. Ebsary that he take protection of the Canada Evidence Act and tell the story?

A. I couldn't be positive. There could've been something to that but I can't be positive.

Q. There could've been something to that effect discussed.

A. It's very vague in my memory. It could have . .

Q. You're not clear on exactly what was said at all.

A. I didn't read the letter that Donald Marshall sent Mr. Ebsary. I don't know.

Q. What I'm asking about is the conversation between yourself and Mr. Ebsary about it.

A. Yes, Sir. There was conversation about a letter he received form Donald Marshall.

Q. And was there mention - and you then allowed I think earlier in your evidence that there could have been

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a discussion about protection of the Canada Evidence Act at that time..

A. There could've been, I specifically don't recall.

Q. Okay. And who's Inspector D. B. Scott, do you know?

A. Yes, he was the officer commanding Sydney sub-division at the time of this investigation in February of 1982.

Q. Is he still here?

A. No, he is not, Sir.

Q. Do you know where he is?

A. He's stationed in Halifax now.

Q. Do you recall looking into the matter of how the Sydney Police compiled evidence in relation to the earlier trial, the 1971 trial of Donald Marshall? In your investigation in 1982?

A. I did not investigate the Sydney City Police.

Q. No. Are you able to say whether or not there was a police report written by the Sydney Police with respect to the investigation back in 1971?

A. To the best of my knowledge there was never a report written by the Sydney City Police into the investigation of the stabbing of Sandy Seale.

Q. Are you aware of whether or not there was ever any Crown brief prepared by the City Police in relation to that 1971 . .

MR. EDWARDS: Objection, My Lord. This might be relevant but I can't see it.

THE COURT: Where are you going, Mr. Wintermans? What are you trying to get at?

MR. WINTERMANS: I'm trying to explore in addition this witness's personal contact with Mr. Ebsary in 1982 what knowledge he can shed on the question of what other

police may have had some contact with Mr. Ebsary.

THE COURT: When are you talking about in time? Are you talking about during the investigation of the Marshall case or before the Marshall trial? Are you talking about after - I understand there was a statement by Mr. MacNeil at some point in time that changed things somewhat. Are you talking about after that time?

MR. WINTERMANS: I'm talking about any time prior to the day of the taking of the statement in October 20, 1982. Any time.

THE COURT: Well, I don't know what you're trying to do but I've been thinking a little bit and I don't think that I'm going to put much weight on any contact with a police person 10 years ago or 10 years before these events, from the point of view of suggesting that it might effect the voluntariness of the statement. It just doesn't make sense to me. For 10 years to go by and then say that there was threats or something involuntary 10 years before which affected a statement given now. So I think that you're trying to thread a pretty narrow needle.

MR. WINTERMANS: There's one point which if I'd just be allowed to . .

THE COURT: Go ahead.

MR. WINTERMANS: It does relate to a long time ago but it may prove relevant to Your Lordship if I go ahead. We discussed your knowledge of the polygraph test having been done on Mr. Ebsary back in 1971, right?

A. Yes, Sir.

Q. You've seen records of that at the R.C.M.P. office?

A. Yes, Sir.

Q. During the course of your 1982 investigation?

A. Yes, Sir.

Q. Did you also see reports in 1982 that following

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that polygraph examination of Mr. Ebsary, that he went home, up to his room in his house and never went outside for 7 years, do dyou recall that?

A. Would you mind repeating the question?

MR. EDWARDS: Objection. What relevance has it got, My Lord?

THE COURT: You're objecting.

MR. EDWARDS: Yes, for one thing you know, he's extracting hearsay form this witness.

THE COURT: That's right.

MR. EDWARDS: Which is obvious hearsay, and secondly, even if it did go in what relevance has it got to the tape recorded conversation in October of '82? You know.

MR. WINTERMANS: Well, what I'm trying to suggest, My Lord, is that the polygraph, what occurred during that polygraph examination in 1971 had enough of an impact on Mr. Ebsary that it would make him go and stay in his room for 7 years.

THE COURT: This witness can't say that.

MR. WINTERMANS: No, he can't. But . .

THE COURT: So it's not in evidence. The reason why you have a little extra liberty with this witness is he was in charge of the investigation, so if there are other reports or other things. I've let you go ahead. I think you're wandering pretty far afield but I've let you go ahead and do it.

MR. WINTERMANS: I appreciate Your Lordship's. .

THE COURT: Patience.

MR. WINTERMANS: Patience. And you never had any contact with Mr. Ebsary between the 23rd of February, 1982 and the date when this - October 29th, 1982.

A. No, Sir.

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Q. Correct?

A. That's correct.

Q. Thank you very much.

REDIRECT EXAMINATION

MR. EDWARDS: A couple of questions on redirect, My Lord. My learned friend asked you about Detective Arthur Woodburn; you mentioned that he's a detective with the Sydney City Police.

A. That's correct, Sir.

Q. And you said that you were aware that he had contact with Mr. Ebsary during 1982.

A. Yes, Sir.

Q. Yes. Now without saying what, are you aware of the reason why Corporal Woodburn or Detective Woodburn had contact with Mr. Ebsary in 1982?

A. Yes, I'm aware.

Q. Did that reason have anything to do whatever with the re-investigation of the Donald Marshall case or the inquiry into the death of Sandy Seale or the investigation of Roy Newman Ebsary?

A. It had nothing to do with it whatsoever, Sir.

Q. Did any member of the Sydney City Police have anything whatever to do with the aforementioned investigation?

A. In 1982.

Q. Yes.

A. None, Sir.

Q. Thank you. My learned friend asked you about Inspector D. B. Scott.

A. Yes, Sir.

Q. Did Inspector D. B. Scott to your knowledge have any contact whatever personally with Roy Newman Ebsary?

A. Never, Sir.

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0. S/S WHEATON, Redirect, Voir Dire

Q. Thank you very much.

THE COURT: Alal right, thank you, witness.

WITNESS WITHDREW (4:35 p.m.)

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THE COURT: Well, it's beyond our stopping time.

MR. EDWARDS; My Lord, I wonder if you might consider starting at 9:00 a.m. I'm thinking about the convenience of the jury.

THE COURT: I'm thinking about them too. How many more witnesses are you proposing on the Voir Dire?

MR. EDWARDS: Well, there's only one more lengthy witness, Corporal Carroll. All the others should be fairly brief. Barlow has a few things to say but all the others are just going to testify that they did searches of Mr. Ebsary's house and had no conversation with him during those searches.

THE COURT: All right. No, I think we'll start at 9:30 tomorrow. We;ll try it out anyhow and see what happens.

MR. EDWARDS: Okay.

THE COURT: So we'll adjourn until 9:30 tomorrow morning.

COURT ADJOURNED (4:40 p.m.)