

I N D E X

VOLUME 8

EBSARY THIRD TRIAL-----PAGES 1 - 252
January, 1985

MEDIA POOL COPY

CANADA
PROVINCE OF NOVA SCOTIA
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

INDEX

	<u>Page</u>
MOTIONS	1
JURY SELECTION	29
REMARKS	30
DISCUSSION	40
<u>STAFF SERGEANT WHEATON</u>	
Direct Examination on Voir Dire	64
Cross-Examination on Voir Dire	74
Redirect Examination on Voir Dire	92
<u>CONSTABLE STOYEK</u>	
Direct Examination on Voir Dire	95
Cross-Examination on Voir Dire	97
<u>CONSTABLE ETTINGER</u>	
Direct Examination on Voir Dire	100
Cross-Examination on Voir Dire	102
<u>CONSTABLE MacQUEEN</u>	
Direct Examination on Voir Dire	105
Cross-Examination on Voir Dire	107
<u>CONSTABLE HYDE</u>	
Direct Examination on Voir Dire	111
Cross-Examination on Voir Dire	115
<u>STAFF SERGEANT BARLOW</u>	
Direct Examination on Voir Dire	120
Cross-Examination on Voir Dire	125
<u>CORPORAL JAMES CARROLL</u>	
Direct Examination on Voir Dire	131
Cross-Examination on Voir Dire	155
Redirect Examination on Voir Dire	171
DISCUSSION	175
MR. WINTERMANS' ARGUMENT ON VOIR DIRE	177
MR. EDWARDS' ARGUMENT ON VOIR DIRE	206
MR. WINTERMANS' REBUTTAL ON VOIR DIRE	214
DECISION ON VOIR DIRE	216
DISCUSSION	219
MR. EDWARDS' OPENING REMARKS TO JURY	224
<u>MRS. LEOTHA SEALE</u>	
Direct Examination on Evidence	224
Examination by The Court	228

<u>DONNA EBSARY</u>	
Direct Examination (Cont'd)	404
Cross-Examination	410
<u>DISCUSSION</u>	420
<u>ADOLPHUS J. EVERS</u>	
Direct Examination	422
Cross-Examination	432
<u>CPL. CARROLL</u>	
Direct Examination	435
Cross-Examination	441
<u>DISCUSSION</u>	444
<u>CPL. CAROLL</u>	
Cross-Examination (Cont'd)	446
Redirect Examination	451
Redirect by Mr. Wintermans	452
Re-Examination by Mr. Edwards	453
<u>DISCUSSION</u>	454
<u>CST. LEO MROZ' EVIDENCE</u>	
Read into evidence by Court	455
<u>DISCUSSION</u>	463
<u>MARY EBSARY</u>	
Direct Examination	491
Cross-Examination	496
<u>J. MacNEIL</u>	
Direct Examination	498
Cross-Examination	511
<u>DISCUSSION</u>	514
<u>MR. WINTERMANS' ADDRESS TO JURY</u>	
	515
<u>DR. RYBA</u>	
Direct Examination	516
<u>MRS. STROWBRIDGE</u>	
Direct Examination	524
<u>MR. DECKER</u>	
Direct Examination	526
Cross-Examination	529
Redirect Examination	530

<u>DAVID RATCHFORD</u>	
Direct Examination	531
<u>DISCUSSION</u>	533
<u>BRIAN DOUCETTE'S EVIDENCE</u>	
Read into evidence by Court	536
<u>MRS. MERLE DAVIS</u>	
Direct Examination	541
Cross-Examination	543
<u>DISCUSSION</u>	544
MR. WINTERMANS ADDRESSES JURY	545
MR. EDWARDS ADDRESSES JURY	578
CHARGE TO THE JURY	591
DISCUSSION	612
CHARGE TO THE JURY (CONTINUED)	633
VERDICT	640

EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>	<u>Page</u>
V.D.1	Cassette Tape	152
V.D.2	Transcript	152
V.D.3	Transcript	175
V.D.4	Single page	175
V.D.5	Double page	175
1	(10) Knives	247
2	Fibre sample	427
3	White box	427
4	Slides	427
5	Slides	427
6	Slides	427
7	Tape	436
8	Transcript	437
9	Transcript L. Mroz	455
10(a)	Small print	493
(b)	Enlargement	493

COURT OPENED (January 9, 1985 - 09:32 a.m.)

0.

MOTIONS

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.

5.

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?

10.

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.

15.

"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)."

20.

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:

25.

"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

30.

2.

MOTIONS

0. 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
5. 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
10. 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
15. 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
20. 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
25. 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
30. Section 7 of the Canadian Charter of Rights and Freedoms

4.

0.

MOTIONS

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.

5.

10.

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 . . .

15.

20.

25.

30.

THE COURT: Your objection is not directed to 558.

5.

MOTIONS

0.

MR. WINTERMANS: Not really, no. Even though 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 . .

5.

THE COURT: It would only succeed on 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.

10.

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.

15.

20.

25.

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 -

30.

6.

0.

MOTIONS

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).

5.

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.

10.

15.

20.

25.

30.

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 been 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

7.

0.

MOTIONS

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.

5.

10.

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.

15.

20.

25.

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

30.

8.

0.

MOTIONS

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.

5.

So that application is refused.

10.

MR. EDWARDS: My Lord, if I may at this 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.

15.

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, . .

20.

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?

25.

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.

30.

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

9.

0. MOTIONS

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.

10. 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

30.

10.

0.

MOTIONS

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

5. 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.

10.

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.

15.

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?

20.

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.

25.

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

30. 48.

11.

0.

MOTIONSMR. WINTERMANS: Right.THE COURT: Now what is unfair?

5.

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.

10.

THE COURT: So your argument is . .MR. WINTERMANS: It's not fair.THE COURT: The Charter applies again and that Section . .

15.

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)?

20.

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.

25.

THE COURT: Why did he do it?MR. WINTERMANS: I don't know.THE COURT: And on what basis?

30.

12.

0.

MOTIONS

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

5.

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.

10.

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 footing with the Crown and I want to put that clearly on the record.

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

15.

MR. WINTERMANS: If Your Lordship would be willing 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 . . .

20.

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.

25.

Why would I ever try to negotiate some lower amount with him?

30.

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

13.

0. MOTIONS

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 . . .

5. 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.

10. 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.

15. 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?

20. 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
25. 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
30. provisions of the Criminal Code would appear unfair,

14.

0.

MOTIONS

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.

5.

10.

15.

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.

20.

25.

30.

15.

0.

MOTIONS

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.

15.

Thank you.

20.

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 . . .

25.

THE COURT: Mr. Wintermans . . .MR. WINTERMANS: To accept that.

30.

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

16.

0.

MOTIONS

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

5.

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

10.

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

15.

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.

20.

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

25.

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

30.

17.

0.

MOTIONS

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.

10.

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.

15.

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.

20.

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 . . .

25.

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.

30.

18.

0.

MOTIONS

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.

10.

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

15.

20.

25.

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.

19.

0.

MOTIONS

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

5.

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.

10.

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.

15.

20.

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

25.

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

30.

20.

0.

MOTIONS

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 Court 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.

5.

10.

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.

15.

20.

25.

30.

In view of that, and to assure the accused that his 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 rather strictly supervised by the

21.

MOTIONS

0. 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
5. 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.

10. 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
15. 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
20. 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
25. 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
30.

22.

0.

MOTIONS

any challenges for cause would be made by myself.

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

5.

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.

10.

MR. WINTERMANS: No. I just bring that up because Your Lordship might say Mr. Wintermans 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.

15.

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.

20.

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?

25.

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.

30.

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

23.

0.

MOTIONS

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

MR. EDWARDS: Okay.

THE COURT: Right.

5. 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.

10.

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?

15.

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.

20.

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.

25.

MR. EDWARDS: Yes. Then he's challenged for cause and then two more names are picked from 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

30.

24.

MOTIONS

0.

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

5.

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

10.

persons.

MR. WINTERMANS: Off the street, you mean?

15.

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?

20.

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.

25.

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.

30.

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

25.

MOTIONS

0. 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.
5. 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?
10. 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.)
15. 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
20. 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?
25. 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
- 30.

26.

0. DISCUSSION

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.

5. 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.

10. 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

15. 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

20. 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.

25. 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.

30. EXEMPTIONS OF JURORS

27.

0. 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?

5.

EXEMPTIONS

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 generally 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?

10.

15.

EXEMPTIONS

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

20. 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.

25. 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
30. Richard Walsh, Corporal James Carroll, Staff Sergeant

28.

0. 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.

5. 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.

10. 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?

15. 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.

20. 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?

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

THE COURT: And Constable Douglas MacQueen.

EXEMPTIONS

30.

29.

0.

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.

5.

JURY EXEMPTIONSJURY 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.

10.

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.

15.

20.

25.

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

30.

30.

REMARKS

0. 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
5. 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.
10. 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
15. 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.
20. 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 that. 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
25. 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
30. inconvenience. I can tell you that it is important as I

31.

0.

REMARKS

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

JURY ARRAY EXCUSED

5.

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.

10.

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.

15.

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.

20.

Now there is a jury room and it's right here.

25.

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.

30.

32.

DISCUSSION

0. 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.

5. 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 . . .

10. 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?

15. 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.

20. 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.

25. 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.

30.

33.

REMARKS

0.

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.

5.

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.

10.

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?

15.

Mr. MacDonald is the foreman. All right.

20.

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

30.

34.

REMARKS

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
20. everything will flow one thing after another or they may 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
25. of a trial it's not until all of the witnesses have been 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.

35.

0.

REMARKS

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.

10.

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.

15.

20.

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

25.

30.

36.

0.

REMARKS

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.

5.

10.

15.

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.

20.

25.

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

30.

REMARKS

0. 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
5. 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
10. 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
15. 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 inadmissible evidence. If I decide it is admissible then the evidence will be repeated or given
20. 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.
25. 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
30. the law to the facts as you find them, and then you'll be

38.

0.

REMARKS

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

5.

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

10.

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

15.

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

20.

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 casting any

aspersions on newsmen or news reports but there are many times when you know that the news reports are not an

25.

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.

30.

REMARKS

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
5. 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
10. 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
15. 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
20. 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
25. 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
- 30.

40.

0.

REMARKS

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.

5.

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?

10.

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.)

15.

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.

20.

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.

25.

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.

30.

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

41.

0. DISCUSSIONMR. 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?

15. 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.

20. THE COURT: Can you give us any indication of how

30.

42.

DISCUSSION

0.

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.

5.

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.

10.

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.

15.

20.

25.

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.)

30.

43.

0.

DISCUSSIONCOURT RESUMED (2:50)

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

5. 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.

10. 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.

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

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

20. 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.

25. 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 . . .

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

44.

0.

DISCUSSION

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?

5.

MR. WINTERMANS: My objections 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.

10.

15.

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."

20.

25.

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

30.

45.

DISCUSSION

0. 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.
- 10.
15. 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.
- 20.
- 25.
30. I'm submitting that there was in fact prejudice

46.

0.

DISCUSSION

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 charge. 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.

10.

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

15.

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.

20.

25.

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

THE COURT: All right. Go ahead.

30.

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

47.

0.

DISCUSSION

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:

5.

"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

10.

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."

15.

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."

20.

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 convince 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.

25.

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

30.

48.

0.

DISCUSSION

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.

5.

10.

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."

15.

20.

25.

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:

30.

"English law recognizes two principles

49.

0.

DISCUSSION

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 makers 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 Canadian Charter of Rights and Freedoms, 1982, says at page 23:

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

50.

0.

DISCUSSION

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

5.

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

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

10.

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."

15.

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:

20.

"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."

25.

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

30.

"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

51.

0.

DISCUSSION

to justify his acts."

Manning Supra states at page 245, 246 that every situation

5.

"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."

10.

Under Section 11(b) it states that

15.

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

20.

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 Court 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.

25.

30.

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.

52.

0.

DISCUSSION

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 reason in principle why pre-charge delay would not be relevant under the Charter.

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

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

THE COURT: Early in 1983?

20. 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?

25. 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.

30. 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

0.

DISCUSSION

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.

5.

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?

10.

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.

15.

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:

20.

25.

30.

"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

54.

0.

MOTIONS

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."

5.

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.

10.

Finally, under Section 11(d)

15.

"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."

20.

It is submitted that Section 11(d) ought to be read in conjunction 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.

25.

30.

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

55.

0.

MOTIONS

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 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.

5.

10.

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.

15.

20.

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."

25.

. . . 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."

30.

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

56.

0. MOTIONS

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 . .

5. 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.

10. 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.

15. 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.

20. All this is respectfully submitted.

30.

MOTIONS

0. 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.

5. 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.

15. 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

20. 25. 30.

0.

MOTIONS

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.

30.

MOTIONS

0. 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
5. 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
10. 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 -
15. 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 . .

20. 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.
25. 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
30. you exercised a number of peremptory challenges. You

60.

MOTIONS

0.

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.

5.

10.

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.

15.

20.

25.

30.

61.

0.

MOTIONS

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.

10.

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.

15.

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

20.

25.
30.

62.

0.

MOTIONS

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.

10.

15.

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.

20.

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.

25.

30.

63.

DISCUSSION

0. 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.

5. 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.

10. 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.
15. 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
20. 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
25. in October of '82.

30.

64.

0. 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.

5.

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:

10.

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.

15.

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.

20.

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.

25.

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.

30.

65.

0.

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

5.

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

10.

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

15.

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.

20.

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 . . .

25.

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

30.

to remain in.

66.

VOIR DIRE

0.

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?

5.

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

10.

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.

15.

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.

20.

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.

25.

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?

30.

A. Yes.

67.

0. 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?

5. 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.

10. 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.

15.

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

20. 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.

25.

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

30.

68.

0. S/S WHEATON, Direct Examination - Voir Dire
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
5. 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.

10. 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?

15. 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
20. 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 verbatim
conversation.

25. 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 . . .?

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

69.

0. 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.

5. 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.

10. 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?

15. 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.

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

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

30.

70.

0. S/S WHEATON, Direct Examination on Voir Dire
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.
5. 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
10. 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 . . .
15. 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?
20. A. One that he gave me in 1982. The interview finished at 1:41 a.m.
25. Q. Okay. You read him the statement by James
- 30.

71.

0.

S/S WHEATON, Direct Examination - Voir Dire

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

5.

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?

10.

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.

15.

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?

20.

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

Q. All right.

25.

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.

30.

Wheaton: Yes?

72.

0. 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?

5. 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.

10. 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.,

15. 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.

20. 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 . .

25. 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.

30. THE COURT: What do you mean by warned?

73.

0. 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 from any threat, whether or not he said anything. Anything he did say could be used as evidence. And I

5. 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

10. 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.

15. 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 20. G.I.S. offices in Sydney and I observed Mr. Ebsary go in alone and have conversations with Mr. and Mrs. Marshall.

25. 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?

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

74.

0. 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 . .

5. A. Very brief, Sir. A salutary 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?

10. 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?

15. 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?

20. 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.

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

THE COURT: Cross-examine?

CROSS-EXAMINATION

MR. WINTERMANS: Now Sergeant - is it Sergeant?

30. A. Staff Sergeant.

0. 75.

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?

5. 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.

10. 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.

15. 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.

20. 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.

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

A. An unmarked car, Sir.

Q. Unmarked car.

A. Yes.

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

A. No, he was not, Sir.

0. 76.

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?

5. 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.

10. 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?

15. 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?

20. 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.

25. 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?

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

0. 77.

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.

5. 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.

10. 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.

15. 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?

20. 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.

25. 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.

30. MR. EBSARY: Objection.

78.

0.

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.

5.

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.

10.

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

15.

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 . .

20.

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.

25.

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

30.

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

79.

0. S/S WHEATON, Cross-Examination - Voir Dire
going to go on to the next one.

5. 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.

10. 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.

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

A. Yes, Sir.

Q. Were you present when that occurred?

A. No, Sir.

20. 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?

25. 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.

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

80.

0.

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?

5.

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.

10.

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.

15.

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.

20.

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?

25.

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 . . .

30.

A. I can't recall exactly verbatim what took

81.

0. S/S WHEATON, Cross-Examination - Voir Dire

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.

5. 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?

10. 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?

15. 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?

20. 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.

25. 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.

30.

82.

0.

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.

5.

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.

10.

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

15.

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?

20.

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

Q. What are the differences?

25.

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.

30.

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

83.

S/S WHEATON, Cross-Examination, Voir Dire

0.

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.

5.

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?

10.

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.

15.

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?

20.

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.

25.

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.

30.

84.

0. 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?

5. 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?

10. 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.

15. 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?

20. 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 . . .?

25. 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.

30. A. No, there was not, Sir.

85.

0. 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.

5.

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.

10.

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.

15.

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.

20.

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.

25.

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.

30.

Q. You indicated some observations with respect

86.

0. S/S WHEATON, Cross-Examination - Voir Dire
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.

5. 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.

10. 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?

15. 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.

20. 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.

25. 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?

30. A. Words to that effect.

87.

0.

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.

5.

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.

10.

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?

15.

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.

20.

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.

25.

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 from Donald Marshall.

30.

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

88.

0. S/S WHEATON, Cross-Examination - Voir Dire
a discussion about protection of the Canada Evidence Act
at that time..

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

5. 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?

10. 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?

15. 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?

20. 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 . .

25. 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?

30. 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

90.

0. S/S WHEATON, Cross-Examination - Voir Dire
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
5. 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.

10. 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
15. 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 . .

20. 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?

25. 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.

30. Q. Did you also see reports in 1982 that following

91.

0.

S/S WHEATON, Cross-Examination - Voir Dire
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 you recall that?

A. Would you mind repeating the question?

5.

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 from this witness.

THE COURT: That's right.

10.

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.

15.

THE COURT: This witness can't say that.

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

20.

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.

25.

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.

30.

A. No, Sir.

92.

0. S/S WHEATON, Cross-Examination - Voir Dire

Q. Correct?

A. That's correct.

Q. Thank you very much.

REDIRECT EXAMINATION

5. 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.

10. 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.

15. 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.

20. 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.

25. 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?

30. A. Never, Sir.

93.

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.)

5.

10.

15.

20.

25.

30.

94.

0. 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.

5. 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.

10.

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.

15.

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

COURT ADJOURNED (4:40 p.m.)

20.

25.

30.

95.

0. COURT OPENED (January 10, 1985 - 09:40 a.m.)
THE COURT: All right. We're ready to continue
the Voir Dire.

MR. EDWARDS: Constable Brian Stoyek, please.
CST. STOYEK duly called, sworn, testified:

5. DIRECT EXAMINATION

MR. EDWARDS: You're Constable Brian Stoyek,
you're a member of the Royal Canadian Mounted Police
stationed at Sydney, Nova Scotia, is that correct?

A. Yes.

10. Q. And you were involved in the search of the
Ebsary residence in 1982?

A. Yes, I was.

Q. And on what date were you involved?

A. The 23rd of March.

15. Q. Yes. And could you tell the court, please,
what time that day you went to Mr. Ebsary's residence
and the address of that residence.

A. It would've been late morning, approximately
noon.

Q. Yes.

20. A. And the address, I'm not sure of the street
but I believe it was Falmouth Street.

Q. Falmouth Street. Um-hmm. And who was with
you at that time, Constable Stoyek?

A. Corporal Jim Carroll, Constable Barry
Ettinger and Constable Doug MacQueen.

25. Q. And when you went inside did you see
Mr. Ebsary?

A. Yes, I did.

Q. Perhaps you could just describe your
activities. You were acting pursuant to a search
warrant, I take it.

30. A. Yes, I was.

Q. Yes. And perhaps you could tell the court

96.

0.

CST. STOYEK, Direct Examination - Voir Dire
your activities inside the Ebsary home.

A. Inside we were looking nfor documentation, diaries, any sort of documentation in relation to a diary type material, and I mainly conducted the search in the living room area of the residence and then I moved into the combination type kitchen/bedroom area.

5.

Q. Where was Mr. Ebsary at that time?

A. During the search of the living room area Mr. Ebsary was in the company of Corporal Carroll in the kitchen area.

10.

Q. Yes.

A. Once I moved into the kitchen area I searched a bureau dresser type piece of furniture. At that time Corporal Carroll and Mr. Ebsary were also in the kitchen area and basically that's . . .

Q. Did you have any conversation with Mr. Ebsary during the search?

15.

A. No direct conversation instigated by myself. On searching the bureau type furniture in the kitchen area I located an apparatus at which time Mr. Ebsary stated a few words to me at that time in relation to what the appliance was or the instrument was.

20.

Q. What did he say? Do you remember?

A. He explained it as a sort of a homemade catheter instrument.

Q. Did you have any conversation with him in respect to the Seale murder?

25.

A. No, I did not.

Q. Did anyone in your presence or did you say anything by way of threats, promises or inducements to have Mr. Ebsary say anything?

A. No, I did not.

30.

Q. What about the others?

97.

0.

CST. STOYEK, Direct Examination - Voir Dire

A. Not in my presence. contact

Q. Okay. Is that the only/you've had with Mr. Ebsary?

A. Yes, it would've been on that day.

5.

Q. You had no further meetings with him.

A. I saw him on occasions after that but I had no direct contact with him.

Q. Okay. No further questions.

THE COURT: Cross-examine?

CROSS-EXAMINATION

10.

MR. WINTERMANS: How long did this incident take from the time you first arrived until you left?

A. It was quite lengthy, I would estimate approximately an hour, an hour and a half maybe.

Q. Could it have been two hours?

A. It could've slipped up to two hours, yes, it was lengthy.

15.

Q. And there was you and three other police officers, is that right?

A. Yes.

Q. Were you wearing a uniform at the time?

A. No, I was not.

20.

Q. Was anyone wearing a uniform at the time?

A. No, they weren't.

Q. What time of day was this that you went there?

A. It would've been, I can't give you a precise time but it would've been late morning, the vicinity of noon.

25.

Q. Did you make any observations of whether or not Mr. Ebsary was under the influence of alcohol? Did you notice anything that might lead you to believe that?

A. No, I did not.

30.

Q. Are you saying that he was completely sober

98.

0. CST. STOYEK, Cross-Examination - Voir Dire
or that you just can't comment on it?

A. I can't say whether he had been drinking, period, but he wasn't to the point of obvious intoxication.

5. Q. And did you remove anything from the apartment? You were looking for something like diaries and such. Did you take any documents or diaries or papers or anything out of the apartment?

A. I personally did not, but there was material taken from the apartment.

10. Q. Did all four of you police officers leave together?

A. I believe so.

Q. You believe so. So you were there when materials were removed from the premises? You witnessed materials being removed from the premises?

15. A. I witnessed materials back in our office knowing that's where they came from.

Q. So maybe the four of you didn't leave together, then.

20. A. It would've been in close proximity with each other. I can't remember exactly in which manner but it would've been within a short period of time, a matter of minutes but we all did leave.

Q. Did you take Mr. Ebsary with you?

A. No, I didn't.

25. Q. Do you know if any of the other police officers took Mr. Ebsary with them at that time?

A. I don't believe they did.

Q. Did you actually say anything to Mr. Ebsary?

30. A. Like I say the only conversation that I may have had was very brief in relation to that instrument which I briefly stated, and I can't remember exactly other than the fact of the brief explanation of the

99.

0. CST. STOYEK, Cross-Examination - Voir Dire
homemade . .

Q. I'm not asking what Mr. Ebsary said to you. I'm asking you what you said to Mr. Ebsary.

5. A. Well, I was getting to that in relation to once he did explain to me I can't remember if I said something brief to him in relation to okay or anything of that manner. There was no direct lengthy conversation or specific conversation by myself to him.

Q. Is your recollection of that incident somewhat vague?

10. A. No, it's pretty specific. Once it was explained to me and after touching it . .

Q. Not in relation to that, the hour or two hours that you were at the Ebsary residence.

A. Is it vague to me? No, I remember being there.

15. Q. So you say that you were searching in one room and Mr. Ebsary was in another room with Mr. Carroll, is that right?

A. Yes.

Q. And Mr. Ebsary was kept in that room, was he? Or remained in that room?

20. A. To my knowledge, yes.

Q. Throughout the two hours or so that you were there?

A. Yes.

25. Q. Did you have any other contact - no, I'll withdraw that question. No more questions.

THE COURT: Any re-examination?

MR. EDWARDS: No re-examination, My Lord.

THE COURT: All right. Thank you, Constable.

WITNESS WITHDREW

30.

100.

0. CST. ETTINGER duly called, sworn, testified:

DIRECT EXAMINATION - Voir Dire

MR. EDWARDS: You're Constable Barry Ettinger, you're a member of the R.C.M.P. and you're stationed at Sydney, Nova Scotia, is that correct?

A. Yes, I am.

5. Q. And I understand that you participated in the search of the residence of Roy Ebsary on Falmouth Street in Sydney on the 23rd day of March, 1982, is that correct?

A. That's correct.

10. Q. Do you recall what other members of the R.C.M.P. were with you on that occasion?

A. Yes. Corporal Carroll, Constable Stoyek and Constable MacQueen.

Q. Now during that search did you see Mr. Ebsary?

A. Yes, I did.

15. Q. Did you have any conversation with Mr. Ebsary?

A. No, I did not.

Q. Did you or anyone in your presence say anything to him by way of threats, promises or inducements to have him give a statement of any kind?

20. MR. WINTERMANS: Objection, My Lord. It's a legal question. Might I suggest it's for Your Lordship to determine what constitutes a threat or a promise or an inducement.

THE COURT: He can ask whether anyone else has made any comments.

25. MR. WINTERMANS: Comments, and then indicate what they are, and I submit that is a central question for your Lordship to determine. Certainly that's a conclusion that is so central to the issue that this witness ought to just indicate affirmatively what was actually said and leave it for Your Lordship to determine
30. whether those comments constitute anything which may

101.

0. CST. ETTINGER, Direct Examination - Voir Dire
lead to the statement being inadmissible.

THE COURT: You're not suggesting to us that he's going to have to say everything that he heard somebody else say in response to this question? We'll be forever trying to do it.

5.

MR. WINTERMANS: Well, anything. I would say that any conversation directed by any police officers that he heard directed towards Mr. Ebsary is what is required here.

MR. EDWARDS: May I respond to that briefly, My Lord?

10.

THE COURT: Yes.

MR. EDWARDS: Certainly whether there were any threats, promises or inducements in the issue Your Lordship has to decide, but surely the Constable is well aware of what a promise is and what an inducement is and he can state from his knowledge whether any were made and then on cross-examination if any comments were made that may fit into the category, Your Lordship is no less able to make a determination notwithstanding what the Constable said. That is a standard question asked in Voir Dire.

15.

THE COURT: I certainly think it's a question capable of being asked, what if any promises were made, I don't think that's - what if any threats were made, what if any inducements were made are not leading questions and I will permit it.

20.

MR. EDWARDS: Thank you, My Lord.

25.

Q. So what is your answer to that question, Constable Ettinger?

A. I didn't make any promises or offer any inducements to Mr. Ebsary and in my presence I never heard anyone else make any.

30.

Q. How long were you at the Ebsary residence that day, do you recall?

102.

0. CST. ETTINGER, Direct Examination - Voir Dire

A. Approximately an hour and a half to two hours.

Q. Um-hmm. And did all four of you arrive together or did you go separately?

5. A. Two of us in one car, Constable Stoyek and myself in one car and Corporal Carroll and Constable MacQueen were in another car.

Q. Like going in through the door of the Ebsary home.

A. Corporal Carroll and Mr. Ebsary went in first and MacQueen, Stoyek and myself went after.

10. Q. I see. Okay. So how many minutes or seconds . . .

A. Well, we just followed right behind them.

Q. And then what about leaving?

A. I don't recall the order that we left in. We were back and forth into the house because there was a number of articles that were seized from the residence by Corporal Carroll.

15. Q. Did you have any other contact in 1982 with Roy Newman Ebsary?

A. No, I did not.

Q. Thank you very much, Constable Ettinger.

THE COURT: Cross-examine?

20. CROSS-EXAMINATION

MR. WINTERMANS: Can you indicate whether there was anything said to Mr. Ebsary that you recall?

A. I could hear conversation. I was in another room but I could hear Corporal Carroll and Mr. Ebsary talking.

25. Q. I see. Did - where were you in relation to Brian Stoyek at this time in the residence?

A. Well, at some points we were in the same room and at another point he was in the kitchen and bedroom area.

30. Q. The apartment of Mr. Ebsary is a rather small

103.

0. CST. ETTINGER, Cross-Examination - Voir Dire
apartment and you could certainly hear any conversation
from one room to another?

A. Yes, you can.

Q. Do you recall any conversation between
5. Mr. Stoyek and Mr. Ebsary?

A. I don't recall anything that I could repeat.
I don't remember the - you know, I know they had
conversation, I can't remember what it was about.

Q. What about Constable Carroll and Mr. Ebsary?

A. Corporal Carroll, the only conversation that
10. I remember was Corporal Carroll asking Mr. Ebsary how
he felt, he was ill or something apparently the week
before, he asked him if he was feeling better or whatever.
That general conversation.

Q. How did Mr. Ebsary get there? You said that
Constable or Corporal Carroll and Mr. Ebsary went in to
Mr. Ebsary's apartment first?

15. A. Yes.

Q. So in other words Mr. Ebsary wasn't in the
apartment just before this search began?

A. No, Corporal Carroll brought him from
somewhere. He was in the car with Corporal Carroll when
20. they arrived at the house.

Q. Do you recall the time that this started?

A. It was somewhere between I'd say 11:30 and
12:30, somewhere in that area. It was around lunch hour
if I recall.

25. Q. You discussed this matter with Corporal
Carroll, Stoyek or MacQueen before coming to court here
today?

A. I would say we probably did, yes.

30. Q. Did you review your testimony or intended
testimony with any of those individuals or the Crown
Prosecutor before testifying here today?

104.

0. CST. ETTINGER, Cross-Examination - Voir Dire

A. Yes, I did.

Q. Did you read any reports in order to refresh your memory, any notes?

5. A. I believe I looked at the search warrant that Corporal Carroll had to see what date was on the search warrant.

Q. Anything else?

A. No.

Q. You didn't take any notes yourself?

A. No.

10. Q. Did you personally remove any articles from the residence that day?

A. I may have directed Corporal Carroll to a box of letters that he seized but I don't recall that I carried anything out of the house, no.

15. Q. Did you witness Corporal Carroll bringing those articles out?

A. Yes, I did.

Q. What can you say as to the times when the various police officers, the four police officers including yourself, left the residence?

20. A. It was approximately about 2:00 I believe when we left.

Q. Did you all leave at precisely the same time or did some leave first and others remain behind?

A. I think that we left within minutes of each other.

25. Q. No more questions.

MR. EDWARDS: No re-examination, My Lord.

THE COURT: All right. Thank you, Constable.

WITNESS WITHDREW

30.

105.

0.

CST. DOUGLAS MacQUEEN sworn, testified:

DIRECT EXAMINATION - VOIR DIRE

MR. EDWARDS: You're Constable Douglas MacQueen, you're a member of the R.C.M.P. stationed at Sydney, Nova Scotia, is that correct?

5.

A. Yes, Sir.

Q. And you had contact with Roy Newman Ebsary in 1982?

A. Yes, I did.

Q. Do you recall the date of your first contact with Mr. Ebsary during that year?

10.

A. Yes, it was the 23rd of March, 1982.

Q. Um-hmm. And where did you first see Mr. Ebsary on that date and who were you with at the time?

A. I was accompanying Corporal Jim Carroll, we went to the Provincial Building on Prince Street in Sydney.

15.

Q. The Provincial Building. Yes.

A. And met Mr. Ebsary at that point.

Q. Where in the Provincial Building?

A. At the Probation Office.

Q. Yes?

20.

A. And . . .

Q. Was there a conversation with Mr. Ebsary at that point?

A. Corporal Carroll had a conversation with Mr. Ebsary.

25.

Q. Did you overhear it?

A. Parts of it, yes.

Q. And could you recall for us the parts that you heard?

30.

A. Yes. With respect to the fact that Corporal Carroll was explaining to Mr. Ebsary that he had a

106.

0. CST. DOUGLAS MacQUEEN, Direct Examination - Voir Dire
search warrant and requested Mr. Ebsary to accompany us to
his residence at this point.

Q. And what was Mr. Ebsary's response?

A. He concurred.

5. Q. Do you recall approximately what time of day
that was?

A. It would've been approximately 11:00 a.m.

Q. You didn't make any notes at the time, did you?

A. No, I did not.

10. Q. And what was Mr. Ebsary's condition at that
time?

A. He appeared to be in a sober condition,
somewhat physically feeble but I made no other observations
other than that.

Q. So then you and Mr. Ebsary and Corporal Carroll
drove to Mr. Ebsary's home on Falmouth Street?

15. A. That's correct.

Q. Was there any conversation during the trip
from the Provincial Building to Falmouth Street?

20. A. There were a few comments exchanged between
Mr. Ebsary and Corporal Carroll, just with respect to the
fact that the search would be taking place at Mr. Ebsary's
residence. I had no conversation with him.

Q. So then upon your arrival at Falmouth Street
could you describe to the court what occurred then?

A. Yes, along with other members of the Royal
Canadian Mounted Police . . .

25. Q. Could you name them?

A. Yes, Constables Ettinger and Stoyek and
Corporal Carroll, myself, we conducted a search of
Mr. Ebsary's residence.

Q. And do you recall how long that search lasted?

30. A. It would've been approximately an hour and a
half.

107.

0. CST. MacQUEEN, Direct Examination - Voir Dire

Q. An hour and a half. All right. And did you have any conversation with Mr. Ebsary . .

A. No.

Q. During that time.

A. No, Sir, absolutely none.

5.

Q. Did you overhear any conversations?

A. Yes. Corporal Carroll was speaking with Mr. Ebsary in the kitchen portion of the residence. I wasn't paying much attention to the conversation. I remember conversation taking place but I don't recall what was being said.

10.

Q. Did you hear anything by way of threats, promises or inducements by anyone to Mr. Ebsary to have him give a statement of any kind?

A. No, Sir.

Q. Did you have any further contact with Mr. Ebsary during 1982?

15.

A. No, I did not.

Q. It was just that one day in 1982.

A. Yes.

Q. No further questions.

THE COURT: Cross-Examine?

20.

CROSS-EXAMINATION

MR. WINTERMANS: You say you overheard part of the conversation between Corporal Carroll and Mr. Ebsary?

A. Yes, at what point, Sir?

Q. The first point being at the Probation Office?

A. Yes.

25.

Q. And what can you recall Corporal Carroll having said to Mr. Ebsary at that time?

A. Explaining the fact that he had a search warrant and he was going to conduct a search of Mr. Ebsary's residence.

30.

Q. Anything else?

108.

0.

CST. MacQUEEN, Cross-Examination - Voir Dire

A. No, I don't recall any other remarks at that point.

Q. Any indication as to why he was executing a search warrant?

5.

A. No, I don't recall them discussing that.

Q. And did you yourself say anything to Mr. Ebsary at all?

A. No, Sir.

Q. What about back at the Ebsary residence? Did you yourself have any conversation with Mr. Ebsary at all?

10.

A. No, Sir.

Q. You never said one word to him?

A. No, Sir, not one word.

Q. Did you overhear any conversation between Brian Stoyek and Mr. Ebsary?

15.

A. No, Sir.

Q. Are you saying there was none?

A. I'm saying I didn't overhear any.

Q. Are you saying you don't recall?

A. I don't recall overhearing any conversation between Constable Stoyek and Mr. Ebsary.

20.

Q. Would you agree that the Ebsary apartment is small and that if there was a conversation virtually anyone in the apartment that you would be able to hear it from virtually anywhere else in the apartment?

A. I agree that it was small. I don't think I'd agree that if a conversation took place that I'd necessarily hear it. I was doing other things.

25.

Q. Okay. What about between Corporal Carroll and Mr. Ebsary, conversation at the apartment? While executing this warrant.

30.

A. Um-hmm.

109.

0.

CST. MacQUEEN, Cross-Examination - Voir Dire

Q. Was there?

A. Yes.

Q. Do you recall what Corporal Carroll said to Mr. Ebsary?

5.

A. No, I don't.

Q. And you say that you yourself had absolutely no conversation, you never said one word to Mr. Ebsary the whole time.

A. That's right.

10. Q. What about Constable Ettinger, do you recall him having said anything to Ebsary?

A. No, Sir. The only person I recall having conversation with Mr. Ebsary is Corporal Carroll.

Q. Where were you in the apartment during this search? What were you doing?

15. A. I was going through boxes of documents in the living room portion of the apartment.

Q. Where was Carroll and Ebsary?

A. In the kitchen portion.

Q. Was there any door closed or anything?

20. A. No, there was a doorway, as I recall the door was open.

Q. When you say that Ebsary appeared sober but somewhat physically feeble, what did you mean by that?

25. A. As I recall he was using a cane and seemed unsteady on his feet but it didn't appear to me to be through intoxication, it was just the fact that he was somewhat feeble physically.

Q. Was he hobbling around or . . . ?

A. No, he wasn't hobbling, his walk seemed to be unsteady and it appeared to me that he did in fact need the cane that he was using.

30.

Q. He needed the cane that he was using.

110.

0.

CST. MacQUEEN, Cross-Examination - Voir Dire

A. Yes.

Q. Thank you. That's all the questions I have.

MR. EDWARDS: No re-examination, My Lord.

WITNESS WITHDREW

5.

10.

15.

20.

25.

30.

111.

0. CST. DOUGLAS HYDE duly sworn, testified:
DIRECT EXAMINATION - Voir Dire

5. MR. EDWARDS: You are Constable Douglas Hyde, you're a member of the R.C.M.P. presently stationed in Corner Brook, Newfoundland, formerly stationed in Sydney, Nova Scotia, is that correct?

A. That's correct, Sir, it is.

Q. And during the year 1982 you were stationed at Sydney.

A. That's correct, Sir, yes.

10. Q. Now during that year did you have contact with the accused, Roy Newman Ebsary?

A. Yes, I did, on one occasion.

Q. Yes. And what was the date of that one occasion?

A. February 23rd, 1982.

15. Q. Yes. And could you tell the court please when you first came in contact with Mr. Ebsary on that date, where it was and who was present?

A. On February 23rd, 1982 I was accompanied by Corporal Carroll and we went to Mr. Ebsary's residence.

Q. This would be at what time of day?

20. A. At 1:55 p.m. Falmouth Street. We went into his house, we were invited in.

Q. By whom?

A. By Mr. Ebsary.

Q. Yes?

25. A. There were two other persons in the house with him and we left about 10 minutes later.

Q. Neither of whom were police officers.

A. That's correct, Sir, yes.

We left about 10 minutes later and returned to our office on the Sub-Division.

30. Q. All right, now before we get to the R.C.M.P.

112.

CST. HYDE, Direct Examination - Voir Dire

0. building, was there conversation with Mr. Ebsary at his residence while you were there for the 10 minutes?
- A. Yes, there was, yeah.
- Q. And who had conversation with him?
- A. Corporal Carroll and myself, we had conversation
5. with Mr. Ebsary at the house and in the car on the way up to the office and at the office as well.
- Q. All right. Could you recount for us in as much detail as you can remember what the conversation was about at his residence?
- A. Well, at his residence he and I were talking
10. about Newfoundland generally. I'm from Newfoundland myself and I believe he lived in Newfoundland at one time as well. Talking about different things, St. John's and Newfoundland in general.
- Q. Did you have any discussion with him at the residence regarding the Seale murder?
15. A. No, I did not.
- Q. All right. Now Corporal Carroll had conversation with Mr. Ebsary at his residence.
- A. General conversation, but he did not mention anything about the Seale murder. To my recollection.
20. He was brought back to the office for a reason.
- Q. Was that reason discussed at his residence?
- A. Yes, it was.
- Q. Yes? Could you tell us what was said?
- A. We wanted him to come back to our office to meet Mr. and Mrs. Marshall.
25. Q. That's Donald Marshall's parents.
- A. That's correct.
- Q. Yes.
- A. And it was pre-arranged, Mr. and Mrs. Marshall were at the office when we arrived or came shortly after-
30. wards, I'm not quite sure.

113.

0. CST. HYDE, Direct Examination - Voir Dire

Q. Well, before we get back there who requested him . .

A. Mr. Ebsary requested that he'd like to talk to Mr. and Mrs. Marshall.

5. Q. Were you there when he made that request?

A. No. I think that was requested earlier in the day.

Q. I want to center on the conversation on Falmouth Street on that day.

10. A. Oh. No mention of the Seale murder. There was talk about just general conversation, talked about drinking, talked about drinking wine, talked about Newfoundland in general. Things like that.

Q. Okay.

15. THE COURT: I think I'm going to interrupt because when the jury comes back in I don't think in your questioning you should refer to it as the Seale murder, I think you should refer to it as the Seale killing in front of the jury, or some other expression.MR. EDWARDS: The death of Seale.THE COURT: The death of Seale.20. MR. EDWARDS: It's a point well taken, My Lord.

Q. So then you and Corporal Carroll and Mr. Ebsary left his residence and drove to the R.C.M.P. office?

A. Yes.

25. Q. And you say there was conversation in the police car.

A. Yes. Just general conversation.

Q. And again was the Seale death discussed?

A. No, it wasn't. No.

30. Q. So when you arrived at the R.C.M.P. Detachment where did you go?

A. We went upstairs to an office which is up on

114.

0. CST. HYDE, Direct Examination - Voir Dire
top of the stairs, the right hand side, it's used as a
conference room. It has a long desk in it with several
chairs.

Q. Yes? And what took place then?

5. A. Well, My Lord, may I refer to my notes?

Q. They were made at the time, to refresh
your memory?

A. Yes.

THE COURT: Do you have any objection,
Mr. Wintermans?

10. MR. WINTERMANS: I'd like an opportunity to
examine them, My Lord. No objection.

THE COURT: All right, you may refer to your notes.

MR. EDWARDS: Yes, continue, Constable.

15. A. We arrived at the office at approximately
2:12 p.m. and we went into the room at the headquarters
building at 2:15 p.m. It took some time for us to get
out of the car and up the stairs sort of thing.

20. Corporal Carroll went in the room first and introduced
Mr. Ebsary to Mr. and Mrs. Marshall. They shook hands,
they say down and then Mr. Ebsary wanted to meet at
their home, at Mr. and Mrs. Marshall's home. Then he
wanted us to leave.

Q. Yes. By us you mean yourself and Corporal
Carroll.

25. A. Yes. So Mr. Ebsary wanted to meet
Mrs.
Mr. and Marshall at their home, we said no,
Mr. and Mrs. Marshall said no, you can't do that and
we'll talk about it here, so Corporal Carroll and myself
left at 2:18 p.m., left the room and . .

Q. Leaving Mr. Ebsary and Mr. and Mrs. Marshall
in the room alone.

A. That's correct, Sir, yes.

30. Q. Okay.

115.

0. CST. HYDE, Direct Examination - Voir Dire

A. And approximately 2:28 p.m. he asked for a match and at 1:39 p.m. Corporal Carroll went back into the room.

Q. Ebsary asked for a match.

5. A. Yes. At 2:43 Corporal Carroll came out again. At 2:50 Corporal Carroll and myself went back into the room and at 2:55 I took Mr. Ebsary home by myself, I drove him home.

Q. You drove him home.

10. A. Yes. There was no conversation other than just general conversation about the day and the weather.

Q. You mean on the drive home.

A. That's correct, yes.

15. Q. So during that whole period of time when you had contact with Mr. Ebsary, did you or anyone in your presence say anything by way of threats, promises or inducements to have him give a statement of any kind at any time?

A. No, Sir.

20. Q. And that was your one and only contact with the accused, Roy Ebsary in 1982?

A. That's correct.

Q. Thank you, Constable Hyde.

THE COURT: Cross-Examine.

MR. WINTERMANS: You're sure of the date that this occurred, are you?

25. A. Yes, Sir.

Q. Because you took notes at the time, right?

A. Yes, Sir.

Q. And you're sure who was present?

A. Yes, Sir.

30. Q. Because you took notes of that also?

116.

CST. HYDE, Cross-Examination - Voir Dire

0.

A. Yes, Sir.

Q. I'd like to see those notes, please.

Was Detective Sergeant Wheaton with you?

A. No, Sir.

Q. He wasn't?

5.

A. No, Sir.

Q. Are you positive about that?

A. Positive, Sir.

Q. Would it surprise you if I were to tell you

that Detective Sergeant Wheaton testified here
yesterday that it was him and Corporal Carroll?

10.

MR. EDWARDS: Objection, My Lord.

MR. WINTERMANS: What's wrong with that?

MR. EDWARDS: I don't believe that's an accurate
reflection of the evidence that was given yesterday.

Staff Sergeant Wheaton said that he saw Mr. Ebsary on
that occasion, on the afternoon of February 23rd as

15.

he went into the room where Mr. and Mrs. Marshall
were. His testimony talks about picking Mr. Ebsary
up after the noon hour. I believe Staff Sergeant
Wheaton said something about a meeting he had in the
morning between he and Ebsary and Corporal Carroll but
not in the afternoon, other than seeing Ebsary go into
the room where Mr. and Mrs. Marshall were.

20.

THE COURT: He did indicate his first contact
was on February 22nd.

MR. WINTERMANS: Sorry, My Lord.

25.

THE COURT: Just to make sure - Staff Sergeant
Wheaton's first contact was February the 22nd, he and
Corporal Carroll went to Ebsary's house at 9:30 in the
morning and his next contact with him was on the morning
of the 23rd and again he and Corporal Carroll went to
Ebsary's house. So it was the morning.

30.

MR. WINTERMANS: So you - what time did you say

117.

0. CST. HYDE, Cross-Examination - Voir Dire

that it was that you first went to the Ebsary residence?

A. 1:55 p.m.

Q. 1:55 p.m. Okay. Sorry about that.

And you were in the presence of Corporal Carroll, were you?

5. A. That's correct, Sir.

Q. And Sergeant Wheaton wasn't with you at that point.

A. No, Sir.

Q. And you weren't earlier at the residence that day.

10. A. No, Sir.

Q. Or the day before?

A. No, Sir.

Q. And did you say - you say you had discussion with Mr. Ebsary of a general nature.

A. That's correct, Sir.

15. Q. But not involving Seale.

A. No, Sir.

Q. Is that right? Was there any discussion that you recall concerning Donald Marshall, Jr.?

A. I don't believe. I don't recall, Sir.

20. Q. You don't believe or you don't recall?

A. I don't recall.

Q. You don't recall. Now there must've been some conversation concerning Mr. and Mrs. Marshall Sr., Donald Marshall Jr.'s parents.

25. A. Conversation to the effect that they were at the office or they were going to be at the office and wanted to talk to Mr. Ebsary.

Q. Was there any conversation as to why they were at the office? The Marshalls?

30. A. Mr. Ebsary had already arranged this before with Corporal Carroll, he would like to speak to those people.

118.

CST. HYDE, Cross-Examination - Voir Dire

0. Q. Were you presne twhen that arrangement was made?
 A. No, I wasn't.
 Q. So what are you relying on to testify what you just said?
5. A. That Mr. and Mrs. Marshall were at the office when we arrived.
 Q. Pardon me?
 A. That Mr. and Mrs. Marshall were at the office when we arrived.
 Q. No, I asked you the arrangements which may or may not have been made between Ebsary and anyone else.
10. A. Oh, I can't say what . . .
 Q. You can't.
 A. No.
 Q. All right. And who was in charge of this investigation at that time?
15. A. Staff Sergeant Wheaton.
 Q. Would Sergeant Carroll or Corporal Carroll I mean, is he a superior of yours?
 A. He was at the time.
 Q. At the time.
20. A. Yes.
 Q. So you were basically jsut following orders to go and pick up Ebsary?
 A. Well, I was assisting Corporal Carroll, yes.
 Q. Did you know what was being investigated at that time?
25. A. Yes, I did.
 Q. It was the Donald Marshall matter.
 A. That's correct, Sir. Yes.
30. THE COURT: Mr. Wintermans, in the interests of time, I'm giving you great latitude but in the interests

119.

CST. HYDE, Cross-Examination - Voir Dire

0. of time these witnesses are all witnesses who participated or were involved in this months before this statement was taken. The purpose of a Voir Dire is to find out whether the statements are free and voluntary. Now I think I've allowed you to fish for
5. a long time but when you go fishing you should have a hook on the end of the line and this is just - I don't know how relevant it is at all but I think you should try to concentrate your questioning into the relevant areas.

MR. WINTERMANS: No more questions.

10. THE COURT: Any re-examination?

MR. EDWARDS: No re-examination, My Lord.

WITNESS WITHDREW

15.

20.

25.

30.

120.

0.

STAFF SERGEANT T. BARLOW DULY SWORN, TESTIFIED:

DIRECT EXAMINATION - VOIR DIRE

MR. EDWARDS: You're Staff Sergeant Thomas Barlow, you're a member of the R.C.M.P. stationed at Sydney, is that correct?

5.

A. That's correct.

Q. And you're in charge of the General Investigation Section in Sydney.

A. Yes.

Q. And have been since what date?

A. Since August, 1982.

10.

Q. Now during 1982 - oh, excuse me. Prior to August of 1982 you were stationed in another part of the province.

A. Yes, in Yarmouth.

Q. Now in 1982 after your arrival here, you had contact with the accused, Roy Newman Ebsary?

15.

A. Yes, in October, 1982 I accompanied Corporal James Carroll to Mr. Ebsary's residence on Falmouth Street, Sydney.

Q. And do you recall the precise date in October?

A. It was over a period of four days, 26th, 27th, 28th of October, 1982.

20.

Q. All right. So what time did you first go to Mr. Ebsary's residence on the 26th of October, 1982?

A. The three visits I made there were in the morning, I think they were all around 9:00 or shortly after. The first one on the 16th was around 9 in the morning, Corporal Carroll and I went there.

25.

Q. You didn't make any notes at the time, did you?

A. Just briefly that we had been there. The only reason I was there was because Corporal Carroll and I were working on some other matters and I just happened

30.

121.

0. S/S BARLOW, Direct Examination - Voir Dire
to be travelling with him when he was doing that.

Q. Now when you went into Mr. Ebsary's home, you and Corporal Carroll went in?

A. Yes, Sir.

5. Q. And you were let in by Mr. Ebsary.

A. Yes.

Q. Was there anyone else present at the time?

A. The first day I don't believe. One day I think it probably the 28th we were there, there was another person there but on the first day he was alone.

10. Q. Yes. And did you have conversation with Mr. Ebsary on the 26th? That first meeting.

A. I'd never met him before and after being introduced, Corporal Carroll did most of the talking, I was just - I just passed the time of day with him when I was introduced to him.

15. Q. And could you recount the conversation as far as you can recall it at the time?

A. That I had or Corporal Carroll had?

20. Q. That - well, either of you, whatever conversation there was, could you tell the court about it?

A. Mr. Ebsary had called Corporal Carroll previous to our arrival there. My only conversation was to say hello to him and be introduced to him, he and Corporal Carroll had conversation regarding Mr. Doyle, I believe his name was, who was a prisoner at the county jail in Richmond County.

25. Q. What was the substance of that conversation? About Mr. Doyle.

A. Mr. Doyle had been arrested and was in the county jail in Richmond County and Mr. Ebsary was apparently a friend of his and wanted us, Corporal Carroll

30.

122.

0.

S/S BARLOW, Direct Examination - Voir Dire

to find out what he was in there for and make some arrangements to get him out of jail.

Q. Um-hmm.

5.

A. At that point in time I didn't know anything about Mr. Doyle or anything about it at that particular point in time.

Q. Um-hmm.

10.

A. During that time I believe Corporal Carroll told Mr. Ebsary, you know, we didn't know why he was there, what it was about, or anything else, but we would make inquiries and find out.

Q. What did Mr. Ebsary say?

15.

A. Mr. Ebsary was quite upset about Mr. Doyle being in jail and he was anxious to get him out. He said during the conversation that if Corporal Carroll could get Mr. Doyle out of jail or make arrangements to get him out then Mr. Ebsary would give him the Marshall case.

Q. Ebsary would give Carroll the Marshall case.

A. The Marshall case, right.

Q. In return for getting Doyle out.

20.

A. Yes.

Q. So what was Corporal Carroll's reply to that?

A. Well, he said I don't know, you know, I can't promise you anything. I don't know anything, I don't - we didn't have any idea of why Mr. Doyle was in jail or anything or what for or where he was going or anything.

25.

Q. Um-hmm.

A. So we - the only thing we told Mr. Ebsary was that we'd check into it and find out and let him know.

30.

Q. Um-hmm.

A. So the phone . .

123.

0. S/S BARLOW, Direct Examination - Voir Dire

Q. Sorry, I didn't hear you there. Did you say Carroll said I can't promise you anything?

A. Yeah, we couldn't promise him we could do anything about getting him out of jail because we didn't have knowledge of why he was there. The following day ...

5. Q. How long did that conversation last that day, the 26th? How long were you and Corporal Carroll at Ebsary's home?

A. I would say not more than 15 minutes probably at the outside. 10 or 15 minutes.

10. Q. Yes? Okay. Then you and Corporal Carroll left.

A. Yes.

Q. When did you next see Mr. Ebsary?

A. The next morning about the same time we went back and Corporal Carroll told him that Mr. Doyle had been remanded to the Nova Scotia^{Hospital} and was either in the Nova Scotia Hospital or on his way there, and there was no way he could be released from jail. Mr. Ebsary was obviously upset about that and he said he wouldn't go back on his word about the Marshall case, that he would write up a statement.

20. Q. He said he'd write it up?

A. Type it up. Type up a statement.

Q. Type up a statement.

A. Type up a statement for Corporal Carroll.

25. And Corporal Carroll agreed to go back the following day I think it was to pick up the statement.

Q. Yes?

A. We were only there a very short time that morning.

Q. This is October 27th.

A. The 27th, right.

30. Q. Yes?

124.

0. S/S BARLOW, Direct Examination - Voir Dire

A. The following morning, the 28th we went back to get the statement and Mr. Ebsary said he had broken his glasses and he couldn't see to type or his typewriter was broken, or something was broken, I believe his glasses, and he didn't have the statement done. He mentioned if he had a tape recorder he could do it on tape and he didn't have a tape recorder so Corporal Carroll volunteered to get him one. And we left. The next morning, probably later in the morning, 10:30 or so, 11:00, I dropped Corporal Carroll off at Mr. Ebsary's residence with the tape recorder.

10. Q. This is October 29th.

A. The 29th. I didn't go in the building, I left him off there.

Q. You had no contact at all with him that day.

15. A. No. And I picked Corporal Carroll up there again oh, about an hour later, I suppose, an hour and a half later.

Q. I see. Okay. Did you have any other contact with Mr. Ebsary during 1982 or indeed at any time other than . . .

20. A. Not before that 26th of October, and afterward I don't believe I had any contact with him all that year, or since.

THE COURT: Wait now, I just got a little behind. On October the 29th when you went there what did you do or what did you bring?

25. A. Corporal Carroll, I dropped Corporal Carroll off at Mr. Ebsary's residence with a tape recorder and he went inside and I left. I returned sometime later and picked him up.

MR. EDWARDS: And you had no contact with Ebsary at all then.

30. A. Not on that day, no.

125.

0. S/S BARLOW, Cross- Examination - Voir Dire

Q. No further questions.

THE COURT: Cross-Examination?

MR. WINTERMANS: So your first contact then was on the 26th of October, 1982.

5. A. Yes.

Q. All right. And that was at the Ebsary residence?

A. Yes.

Q. You and Corporal Carroll?

A. Corporal Carroll.

10. Q. Just the two of you?

A. Yes.

Q. And there was - you say there was conversation concerning Doyle. Can you go into as much detail as possible on exactly what was said?

15. A. Mr. Ebsary said that a friend of his, this Mr. Doyle had been arrested in Richmond County, St. Peters or some place down there, I'm not even sure what the charge was, but he was in custody in the Richmond County jail. And Mr. Ebsary was quite demanding, he wanted Mr. Doyle out of jail because he was a friend of his. Exact words, I certainly can't recall that but the gist of the conversation was . . .

20. Q. What was it that . . .

MR. EDWARDS: Well, let him finish his answer please.

25. A. The gist of the conversation was that Mr. Ebsary wanted Corporal Carroll to make whatever arrangements he could make to get his friend Mr. Doyle out of jail.

MR. WINTERMANS: In exchange for which . . .

A. Mr. Ebsary said I'll give you the Marshall case.

30. Q. And what did - do you recall what Corporal

126.

0. S/S BARLOW, Cross-Examination - Voir Dire

Carroll replied to that exactly?

A. Well, he said words to the effect that, you know, he didn't know why Mr. Doyle was in jail, he couldn't promise him any - he couldn't get him out but he'd check into it and let him know.

5.

Q. That was the end of that?

A. That was the end of it for that day, yes.

Q. How long - what time was it that you and Carroll arrived at the Ebsary residence and what time did you leave?

10.

A. Well, that day I would say we arrived there at approximately 9:00, we went there before we went to work even we sotpped off there. We left about 9:15 probably. About that time.

Q. So it was just a very short visit then.

A. About 15 minutes, yes.

15.

Q. Okay. And the next day was the next contact again around 9 o'clock in the morning was it or what time did you say?

A. Yeah, it was the next morning. We were involved in another investigation that day. We made some phone calls to find about Mr. Doyle and we got back to Mr. Ebsary's the next morning about the same time.

20.

Q. And what did you - you went to Ebsary's residence, did you?

A. Yes.

25.

Q. And what was the gist of the conversation that morning?

A. The gist of that conversastion was to inform Mr. Ebsary that Mr. Doyle had been remanded to the Nova Scotia Hospital and that there wasn't any way to get him out for 30 days.

30.

Q. And what did Mr. Ebsary say in response to that?

127.

0.

S/S BARLOW, Cross-Examination - Voir Dire

A. Well, he sort of - he was quite upset, emotionally upset about the fact that he couldn't get his friend out, and . . .

Q. Well, just ..

5.

MR. EDWARDS: Let him answer, please.

A. He was sobbing softly, there was tears in his eyes and then he seemed to realize that there was no way he could get his friend out of jail.

MR. WINTERMANS: Could you just get to what you observed rather than your opinions on his motives. You say you say him crying, did you?

10.

A. Yes.

Q. Did he say anything?

A. He said I won't go back on my word on the Marshall case.

15.

Q. Did he say anything else at all before that in response to the news that his friend was sent to the hospital?

A. He probably did but I can't recall anything significant he said. We were there for probably about 10 minutes.

20.

Q. You were only there for 10 minutes. Mr. Ebsary was informed that Mr. Doyle was gone to the hospital.

A. Yes.

Q. And in response to that you don't recall Ebsary saying anything immediately, except that he was crying, is that right?

25.

A. He may have asked what he was charged with or something like that but I can't exactly, I can't recall exactly what he said, no.

30.

Q. And the only thing you can recall Ebsary saying is I won't break my word to you.

A. He said that.

Q. What exactly was it that he said?

A. He said I won't go back on my word on the Marshall case and he said he would type a statement on

128.

S/S BARLOW, Cross-Examination - Voir Dire

0. his own typewriter and we could pick it up the next morning.

Q. And that was the end of the conversation?

A. That morning, yes.

5. Q. Okay. And then the following day was the 28th. Did you actually go into the Ebsary residence again?

A. Yes. Yes, I did.

Q. And that was you and Carroll. What time approximately would that have been and how long did it last?

10. A. It was in the morning, I guess it would be about the same time, shortly after 9 in the morning. That was probably the shortest visit I had there, maybe five minutes or so. Mr. Ebsary said he had broken his glasses or his typewriter or something and he couldn't type the statement, so he and Corporal Carroll made arrangements for a tape recorder and we left.

15. Q. Were you present when those arrangements were made?

A. Yeah. Yes.

20. Q. Do you recall as precisely as possible or could you recall as precisely as possible the words that were spoken by those two parties?

A. Exact words I can't, no. Generally the conversation was that his glasses were broken. If he had a tape recorder he could do the statement on tape.

25. Q. Who said that?

A. Mr. Ebsary.

Q. I see.

A. Corporal Carroll volunteered to bring him a tape recorder.

30. Q. Which happened first, did Corporal Carroll . . .

A. No, Mr. Ebsary suggested a tape recorder.

129.

0. S/S BARLOW, Cross-Examination - Voir Dire

Q. Are you sure about that?

A. Yes, I'm sure about that.

Q. And that was the extent of that conversation?

A. Yes.

5. Q. And the following day you say you dropped
Carroll off with the tape recorder.

A. Yes.

Q. What time would that have been?

A. I believe that was around 11 o'clock in the
morning. Later in the morning.

10. Q. Okay.

A. It was later in the morning that our first
three visits.Q. Did you make notes at the time of these
incidents?

A. Yes, I did.

15. Q. Do you have those notes?

A. Not with me, no. Brief notes.

Q. Where are they?

A. They're home.

Q. What kind of notes are they?

20. A. Just scribbles on what I did that morning,
where I was. I was involved in another case. Most of my
notes . .

Q. Did you have times noted?

A. No.

25. Q. In relation to when you had been to the house
on the various days.

A. No.

Q. Okay, so you say you're not sure exactly what
time it was.30. A. It was later in the morning, I recall that.
Probably around 11 o'clock.

130.

0. S/S BARLOW, Cross-Examination - Voir Dire

Q. Could it have been earlier than that?

A. Maybe 10 or 15 minutes earlier, not significantly earlier than 11. I would say it'd be around 11 o'clock that I dropped Corporal Carroll off.

5. Q. Could it have been later than that?

A. 10 or 15 minutes later maybe, give or take.

Q. Is there anything that causes you to remember that time?

10. A. I had to go somewhere, that's why I didn't go with Corporal Carroll. I dropped him off because I had something, I had a meeting with someone else at the time before noon hour and that's why I wasn't in there with him.

Q. I see. And you say you picked up Corporal Carroll later on?

15. A. Yes, he phoned the office and the message was passed on to me to pick him up there, yeah.

Q. Okay.

A. I believe it was around 12:30, around that time. It was during the noon hour, lunch hour.

Q. Thank you. That's all the questions I have.

20. MR. EDWARDS: No re-examination, My Lord.

THE COURT: All right. Thank you.

WITNESS WITHDREW

25.

30.

131.

0. CPL. JAMES CARROLL, duly sworn, testified:

DIRECT EXAMINATION - Voir Dire

MR. EDWARDS: You're Corporal James Carroll,
you're a member of the Royal Canadian Mounted Police?

A. I am.

5. Q. Stationed in Sydney.

A. Yes.

Q. How long have you been stationed in Sydney,
Corporal Carroll?

A. Five years this past July.

10. Q. Five years this past July. And how long have
you been a member of the R.C.M.P. altogether?

A. I start my 24th year next month.

Q. Now Corporal Carroll, you and Staff Sergeant
Wheaton were the two officers who initially got involved
in the reinvestigation of the Marshall case and the
Seale death, is that correct?

15. A. That's correct. Yes.

Q. And you initiated that reinvestigation when?

A. I believe it was around the 4th of February,
1982.

Q. And during that reinvestigation you had
contact with the accused, Roy Newman Ebsary.

20. A. Yes.

Q. Now when did you have your first contact
with Mr. Ebsary?

A. The 22nd of February, 1982.

25. Q. And prior to that there were no telephone
conversations between you or no meetings of any kind?

A. There might possibly have been a phone call
to instigate that first meeting on the same day, I don't
recall that there was but I don't think we just went
to the home and picked him up, I think there must have
been some prior arrangement. I'm not positive about that.

30.

132.

0.

CPL. CARROLL, Direct Examination - Voir Dire

Q. Okay. So you and Staff Sergeant Wheaton did in fact go to his home on the 22nd of February, 1982.

A. Yes.

5.

Q. At what time?

A. It would be early morning, possibly 9 or

10. I have some notes if I might refer to them.

Q. They were made at the time?

A. Yes.

Q. And you wish to use them to refresh your

10.

memory.

A. Yes.

THE COURT: Have you any objection?

MR. WINTERMANS: I'd like to examine them.

THE COURT: It's a slow process. You're free to do it but why don't you wait till he testifies and then you can look at them if there's anything you want to examine. He's indicated he made them at the time.

15.

MR. WINTERMANS: I'd like to see them.

THE COURT: Go ahead.

20.

MR. EDWARDS: He's had lots of opportunity, My Lord, if I might state for the record, to examine them long before now, the third trial.

MR. WINTERMANS: I might state that . . .

THE COURT: Well, just look at them and go ahead and do it.

25.

MR. WINTERMANS: When were these notes made?

A. Made the same day, possibly within an hour or thereabouts of the interview, possibly even some during the interview.

Q. You're saying you don't recall whether you made them during the interview or after the interview?

30.

A. I made other notes during the interview but

133.

0. CPL. CARROLL, Direct Examination - Voir Dire
that would be generalizing, summarizing the overall
interview.

Q. I see. Do you have those as well?

A. Yes.

5. Q. Do you have those with you?

A. They're in my briefcase.

Q. And those are the notes that you made at
the time, is that right, the ones that are in your
briefcase?

A. Yes.

10. Q. Those are notes that you made afterwards?

A. Yes.

Q. My Lord, I would suggest that he ought to
rely on the ones that he made at the time, if there is
better evidence on this matter.

15. THE COURT: Fine. Let him look at the ones he
made at the time. Are you going to use both of them?

MR. EDWARDS: Yes, he can use both of them.

20. THE COURT: The normal police routine many of the
notes are made either after something occurs, immediately
after or sometimes some hours after or sometime close to
the end of the shift. And those have always been
accepted by the courts as being notes made at the time.
Do you have any objection of him looking at both of
them?

25. MR. WINTERMANS: No. I would request an opportunity
before cross-examination of this witness to briefly
examine both sets of notes.

THE COURT: Well, you've looked at one of them
already. Do you want to look at those again?

30. MR. WINTERMANS: No, before cross-examination
of the witness in relation to his Voir Dire evidence,
not in relation to his use of the notes. In other words

134.

0. CPL. CARROLL, Direct Examination - Voir Dire
after Mr. Edwards is through with Your Lordship's
indulgence to perhaps have five minutes to . .

5. THE COURT: Well, we'll be having a mid-morning
break, but I just want to know what you want to look
at. You've already looked at the one set. Do you want
to look at that set again? Is that what you're saying?

MR. WINTERMANS: I want an opportunity to compare.

THE COURT: Fine. Go ahead, Mr. Edwards.

MR. EDWARDS: Thank you, My Lord.

10. A. The time was approximately 10:17 a.m. and
the interview finished at 1:41 p.m. That's the only
thing I wanted to refresh my memory from the notes.

Q. Okay.

THE COURT: The time again was what?

A. 10:17 until 1:41 p.m.

15. MR. EDWARDS: So is that the time spent at the
R.C.M.P. office after you picked Mr. Ebsary up?

A. That's correct, yes.

Q. And you would have arrived at Ebsary's home
at what time?

A. 10:00, 10:10 thereabouts.

20. Q. And upon your arrival at Mr. Ebsary's home
when you had your first contact with him, what if any
conversation did you or Staff Sergeant Wheaton have
with him at that time?

25. A. Just generally that was wanted to discuss
the matter, the Seale matter with him, the Marshall
case at the office and as I recall the conversation
was kept to a minimum until we got ot the office.
It's my normal practice under the circumstances to
have the conversation kept to nil if possible until
we get to where the office is located so we can take
proper notes.

30. Q. Yes. And so upon your arrival at the R.C.M.P.

135.

0. CPL. CARROLL, Direct Examination - Voir Dire
Detachment could you recall for us what happened then?
In as much detail as you can.

5. A. Well, we entered the building through the
rear entrance and climbed to the second floor where
the conference room is located, pardon me, into the
Sub-Division office and we held a conversation with
Mr. Ebsary in Staff Sergeant's office, the three of
us. Staff Sergeant Wheaton did most of the talking,
I was sitting back as a witness and making notes as
well. It was almost continuous talking, there was
10. actually no breaks. WE left the room at one point
to let Mr. Ebsary reflect on certain comments that
he had made concerning the investigation and when we
returned there was a few more comments made and we
drove him home.

15. Q. Okay. What if any warning was given to
Mr. Ebsary either before or during the interview?
And by whom?

A. I can't recall if there was a warning given,
if Staff Wheaton did. It certainly wasn't by myself.
If Staff Sergeant Wheaton gave him a warning I don't
recall it.

20. Q. I see. And could you give us the gist of
the conversation during this three hour interview?

25. A. Yes. Mr. Ebsary has a very colourful past,
in the Navy and so on. A good percentage of the
conversation was concerning his days at sea, battles
at sea, his life in Newfoundland, his life in the
Sydney area, his family problems. There was discussion
of being in the park that night, Wentworth Park.

Q. That night, you mean realting to the night
of the Seale stabbing.

30. A. The night of the Seale death. He got into
the field of religion with Staff Wheaton and they

136.

0. CPL. CARROLL, Direct Examination - Voir Dire
talked on that for quite some time. He was quoting
scriptures and whatever and Wheaton was coming back
with other comments along the same line. There was
quite a discussion on his book writing, a friend of
5. his in the United States who he said was a ghost
writer for him. There was mention of a friend of
his by the name of Sweeney in Pictou and a friend of
Sweeney's by the name of Sarsson who he had living
with him for awhile who he was training to be a cook
or something along that line. Many different topics.
10. Q. Okay. So could you focus then on
conversations that specifically pertained to the Seale
death?
- A. He didn't really touch on that all that much.
The questions were there but the comments didn't come
from him. There was some comment about him being in
15. the park that night and I believe he said someone was
robbed or attempted robbery or whatever, but he
wouldn't commit himself to being directly involved.
- Q. Now you said at one point comments were made
and then he was left alone to reflect upon those comments.
Do you recall what they were?
20. A. Something to the effect that he knew much
more than what he was saying, that he did have knowledge
of that particular night's activities and that he should
give it some thought at which point we left the room to
see if he might come around to our way of thinking.
25. Q. And how long were you and Staff Wheaton out
of the room?
- A. I'd say approximately 10 to 15 minutes.
- THE COURT: Sorry, I missed - he suggested that he
had some knowledge or did you suggest?
30. A. We suggested, My Lord, that he had more

137.

0. CPL. CARROLL, Direct Examination - Voir Dire
knowledge than what he was admitting to and we left him to consider what he had just said or what he might say to us when we returned to the room. Nothing really changed when we came back in.
5. MR. EDWARDS: Do you recall what was said in fact when you came back in?
A. Just a general denial of any further knowledge or denial of involvement.
Q. Um-hmm. So then you say he was driven home at what time?
A. 1:41 we left the office so approximately quarter to two or thereabouts.
Q. Who drove him home?
A. I believe I did. I'm sure I did but I don't know who else was with me, if possibly Staff Wheaton accompanied me, I'm not certain about that.
Q. Okay. Other than yourself and Staff Sergeant Wheaton did any other peace officers have contact with him that day?
A. No.
Q. So when did you next see Mr. Ebsary or have any conversation with him either face to face or by telephone?
A. I'm aware of a phone call made to our office by Mr. Ebsary that afternoon, approximately 4:30.
Q. You're referring to the phone call to Staff Wheaton?
A. Yes.
Q. Yes?
A. As a result of speaking with Staff Sergeant Wheaton I made a return visit to Mr. Ebsary's house at approximately quarter to five, the same date, 22nd of February.
- 30.

138.

0. CPL. CARROLL, Direct Examination - Voir Dire

Q. Yes? And what . . .

5. A. I was greeted at the door on Falmouth Street, 68 Falmouth by Mr. Ebsary. There was another person in the kitchen area who was quite intoxicated. Mr. Ebsary had been drinking as well. I wanted to get him to a private room where I could discuss the matter further with him without the presence of the other male in the kitchen, but that was next to impossible. We went into his living room but between the shouting back and forth from one room to the other by the two men and a dog running around it was impossible to get anybody's attention, but there was a short conversation.

10. Q. Can you recount that for me?

A. Yes, if I might refer to my notes I think I have that recorded.

Q. Yes, you've been given permission.

15. My Lord, while Corporal Carroll is looking at his notes, I'm just looking at the time, 10 to 11 and there's a mid-morning break in there. Corporal Carroll is going to be on the stand for some period of time. I'm wondering if as a courtesy to the jury, and I've got quite a number of witnesses waiting outside that we send the jury home until 2:00. Because the prospects of getting anything done before the jury this morning are almost nil.

20. THE COURT: Well, it looks that way. All right. Perhaps we can advise the jury that in the circumstances we won't need them this morning and they can come back at 2:00.

25. MR. EDWARDS: And my witnesses also.

THE COURT: You can deal with your witnesses. Is this the last witness or are there others?

MR. EDWARDS: This is the last witness on the Voir Dire.

30. THE COURT: Well, perhaps what we'll do now we'll

139.

0. CPL. CARROLL, Direct Examination - Voir Dire
take our break now and then you can deal with your
witnesses and twell the jury. We'll recess for
15 minutes.

COURT RECESS 10:55 a.m.

COURT RESUMED: !!:16 a.m.

5. DIRECT EXAMINATION (Cont'd)

MR. EDWARDS: Thank you, My Lord.

Yes, Corporal Carroll, prior to the adjournment you
were consulting your notes I believe to the afternoon
of February 22nd?

A. Yes.

10. Q. Continue then?

A. At 4:45 p.m. I went to 68 Falmouth Street.

Q. And that's Mr. Ebsary's address?

A. His address, yes. As I mentioned earlier
there was another person present in the kitchen and the
conversation went on between . .

15. Q. Do you know who the other person was?

A. No, I'd just be guessing. It's somebody
that goes there often, I guess.

Q. It wasn't a policeman.

A. No. One of his friends.

20. Q. Yes?

A. Ebsary was in quite a good mood, he was
laughing, smiling, he was shouting back and forth to
the fellow who was drunk in the kitchen.

Q. Um-hmm.

25. A. And I was in the living room with Mr. Ebsary
at the time trying to find out what he actually had to
say.

Q. Um-hmm.

30. A. And he informed me that the incident was
self-defence, that he had used a small pen knife and
that he didn't have it any longer. He said the victim

140.

0. CPL. CARROLL, Direct Examination - Voir Dire
ran and took his money. He said Marshall was fighting
with MacNeil and then he asked me what was my sign, my
horoscope sign and when my birthday was so I told him,
that I was a Scorpio, he said the only break I ever
5. got was from a Scorpio. He did not want to give a
statement at that time. I quoted him from his words,
he said get a new trial for Marshall, I'll give
evidence, and then he said he wanted to meet
Mrs. Marshall to see her eyes and to more or less
assess her, see what kind of a person she was.

10. Q. Yes?

A. And he wanted to give her his dog. He was
tired of living a skid row type of life and he wanted
to get it over with so the final remarks were to - his
instructions to me were to set up a meeting with
Mrs. Marshall and for himself, he wanted to have the dog
15. with him, so at 5:15 p.m. I left the house. I made
those notes in the car as soon as I got outside.

Q. Yes? So when did you next see Mr. Ebsary?

A. Since he wanted to meet the Marshall family
and I thought possibly something could be gained from
that, I did contact Mr. and Mrs. Marshall and set up a
20. meeting for 1 o'clock the following afternoon, which
would be the 23rd of February. I went to Membertou and
picked up Mr. and Mrs. Marshall and brought them to the
office and then went down to get Mr. Ebsary at his
address and did in fact transport him to the office. He
25. was drinking at the time, drinking quite heavily.

Q. Yes. Who went with you at that time?
If anyone?

A. Possibly Corporal Hyde, Douglas Hyde.
I'm not certain. I know I drove the vehicle.

30. Q. What about on the morning of the 23rd of

141.

0. CPL. CARROLL, Direct Examination - Voir Dire
February? Did you or anyone else have contact with
Mr. Ebsary?

5. A. Yes, at 10:59 a.m. Staff Sergeant Wheaton
and myself went there to Ebsary's house and found him
at home in his kitchen. Wheaton gave him the police
warning at 11:00 a.m. Mr. Ebsary said he understood
the warning. He produced some captain's papers
relating to his seafaring days. There was another
man present, John O'Day who I believe lives upstairs.
He left shortly after we arrived. A statement was
taken from Mr. Ebsary starting at 11:03. Staff
10. Sergeant Wheaton left the house prior to the finishing
of that statement and at . .

Q. That was a written statement, was it?

A. Yes.

Q. That's - and prior to that you say he was
given a warning?

15. A. He was given a warning at 11 a.m. We
arrived there just one or two minutes before 11 o'clock.

Q. Staff Wheaton gave him the warning.

A. That's correct.

Q. And what was the nature of that warning?

20. A. It's a standard police warning. You need
not say anything. You have nothing to hope from any
promise or favour, nothing to fear from any threat,
whether or not you do say anything. Anything you do
say could be used as evidence. Do you understand that?
He replied he did.

25. Q. And Staff Sergeant Wheaton left prior to the
completion of that statement, and how much longer were
you there?

A. I would say in excess of half an hour.
Approximately half an hour, maybe a little bit longer.

30. Q. Okay. So then you left and returned in the

0. 142.
CPL. CARROLL, Direct Examination - Voir Dire
afternoon to take him to the Detachment for the meeting with Mr. and Mrs. Marshall.
- A. That's correct.
5. Q. Yes. And could you describe what happened from your arrival at the Detachment?
- A. Yes, I placed Mr. and Mrs. Marshall in our conference room which is a room about 14 feet square, with a couple of tables end to end and chairs all around it. I left them there and brought Mr. Ebsary in and introduced him to the Marshall family and had
10. a very brief word with them and I stepped outside the door and I remained outside the door for approximately 10 or 15 minutes and I knocked, entered the room and nothing very much had been said in my absence, nothing that would become evidence.
- Q. Yes.
15. A. So Corporal Hyde drove Mr. Ebsary home and I took the Marshalls back to their residence at Membertou.
- Q. Now when did you next see Mr. Ebsary after February 23rd, 1982?
- A. On the 23rd of March.
20. Q. The 23rd of March was the next contact you had with him.
- A. Yes, I believe that's correct.
- Q. Okay. Now before we leave the 22nd and 23rd of February, 1982 what if anything was said by you or anyone in your presence on either of those days by way
25. of threats, promises or inducements to have Mr. Ebsary give a statement of any kind then or at any time?
- A. Nothing.
- Q. So tell us about your contact with him on March 23rd, 1982.
30. A. On the 23rd of March I prepared a search

143.

0. CPL. CARROLL, Direct Examination - Voir Dire
warrant for Mr. Ebsary's residence, myself and other
members arrived at his house at 11:10 a.m.

Q. Yes?

5. A. He was not at home. We made some enquiries
and located Mr. Ebsary at the probation office in the
Provincial Buidling on Welton Street. He was speaking
with Mr. Calvin Boutilier, the Probation Officer at
the time. He finished his meeting, I met him in the
hallway and informed him that we had a search warrant
and we would like for him to come back to his own
10. residence for the purpose of the search. He agreed to
do that. Constable Douglas MacQueen I believe was
driving the vehicle that day and was the only other
policeman in the car besides myself. We arrived at his
house in the vicinity of 12 noon and the search was
conducted by the other constables who were awaiting our
15. return.

Q. Yes?

A. Constables Ettinger and Stoyek, S-t-o-y-e-k.

Q. How long were you there altogether?

A. I would say approximately an hour.

20. I maintained conversation with Mr. Ebsary and stayed
basically with him in the kitchen area while the search
was going on, and . .

Q. Did you discuss the Seale death with him during
that period of time?

25. A. It would be in general terms. I told him that
I was disappointed that he had been drinking on the
previous day when he was to meet the Marshall family,
that he had given his word to me that he would not be
under the influence for this meeting.

Q. On the previous day, you mean the month before.

30. A. Yes. The meeting with the Marshalls.

144.

CPL. CARROLL, Direct Examination - Voir Dire

0. The search . .

Q. What did he respond when you said that, do you recall?

5. A. Just some general comments about his illness, that he was under medication and so on and that it was more or less a part of his lifestyle. The search resulted in numerous cassettes being taken from the apartment or the house, and many pages of a daily diary or log that Mr. Ebsary kept, it was typewritten, we were interested in that particular set of documents so we seized those and brought them back to the office.

10. Q. I may have gotten ahead of myself here, but do you recall a letter from Donald Marshall to Ebsary being discussed by you and Staff Wheaton and Mr. Ebsary?

A. I recall very briefly the thing was mentioned.

Q. Yes? When would that have been?

15. A. That was the morning the first statement was taken, on the . .

Q. The 23rd of February?

A. The 23rd of February.

Q. Yes?

20. A. And Mr. Ebsary made a fair effort to try and find that letter. He described it to us and he left the room to go into his living room to find this letter. He was unsuccessful and when he returned there was further conversation about the contents of the letter.

Q. Yes? Do you recall what was said about the contents?

25. A. Generally it was a plea from Junior Marshall, Donald Marshall, Jr. to Mr. Ebsary to come forward and tell what he knew of the incident in the park in 1971 for which he was serving time in Dorchester, and I think there was some reference to a newspaper clipping or an article that Marshall had read or had been sent to him at

30.

145.

0. CPL. CARROLL, Direct Examination - Voir Dire
the penitentiary, so his plea was to Mr. Ebsary to
come forward and tell what he knew about the case that
might give him his freedom.

5. Q. Now at that time or at any time what if any
conversation did either you or Staff Wheaton have with
Mr. Ebsary about his giving testimony or a statement
under the protection of the Canada Evidence Act?

10. MR. WINTERMANS: Objection, My Lord. First of all
I think it would have to be established that somehow
this witness knew that Staff Sergeant Wheaton and
Mr. Ebsary never had a conversation in his absence in
his absence before he could possibly answer that question.
He can testify as to what he witnessed himself, but the
way it was phrased I think . .

THE COURT: Well, perhaps you could rephrase that.

15. MR. EDWARDS: What if any conversation was there
in your presence by either you or Staff Sergeant Wheaton
regarding Mr. Ebsary giving either a statement or
testimony at any time under the protection of the
Canada Evidence Act?

A. None whatsoever.

20. Q. What if any reference in the letter from
Donald Marshall Jr. do you recall regarding the Canada
Evidence Act?

25. A. As I say Mr. Ebsary was unsuccessful in
finding that letter and so the actual contents were not
given to us in total, but it did not come out in the
conversation from Mr. Ebsary to us on that date.

Q. So going back to the 23rd of March, during
the time you had contact with Mr. Ebsary on that date
what if anything was said by you or anyone in your
presence by way of threats, promises or inducements to
have him give a statement then or at any time?

30. A. Nothing.

146.

0. CPL. CARROLL, Direct Examination - Voir Dire

Q. All right. So after March 23rd, I take it the search was completed and you and the other constables left the house.

A. Yes.

5. Q. Leaving Mr. Ebsary at the house.

A. That's correct.

Q. When did you next see Mr. Ebsary?

A. The 26th of October, 1982.

Q. That's when you had your next contact with him. Did you see Mr. Ebsary between March and October and not have any contact with him?

10. A. Yes, on several occasions in the court system downstairs in this building.

Q. And did the matter for which he was in court downstairs, without saying what it was, have any connection whatever with the investigation you and Staff Wheaton were doing?

15. A. No.

Q. What police department was doing the investigation?

A. The Sydney City Police.

Q. Do you know Detective Arthur Woodburn?

20. A. Briefly, yes. Not too well.

Q. Yes. Did Detective Woodburn or any member of the Sydney City Police Department have anything whatever to do at any time with the 1982 reinvestigation of the Donald Marshall case or the inquiry into the death of Sandy Seale?

25. A. I don't quite understand the question.

Q. What I'm saying, did anyone other than the R.C.M.P. have anything to do with the reinvestigation.

A. Not as investigators, no.

Q. Okay. So . . .

30. A. What I'm saying is Wheaton and myself were the

147.

0. CPL. CARROLL, Direct Examination - Voir Dire
main investigators. There was no one else.

Q. Yes. And any questioning of the Sydney police, questioning of officers involved in 1971, they weren't conducting the investigation with you and Staff Wheaton.

5. A. No.

Q. All right. Are you aware of the whereabouts of Mr. Ebsary between May and July of 1982?

10. A. I know that he received a six months jail sentence at the local Correctional Center. I'm also aware of the fact that he was in the Nova Scotia Hospital for evaluation for 30 days or more. I don't have the exact dates.

Q. Okay. All right. But other than seeing him, your next contact with him either by telephone or in person was in October of '82.

15. A. That's correct.

Q. And precisely on what date in October of '82 did you next see him?

A. The 26th of October.

Q. Yes?

20. A. At 1:30 p.m. and that was as a result of a phone call from Mr. Ebsary.

Q. He phoned you?

A. Wanting to talk to myself.

Q. Yes.

25. A. And I did in fact go to his house. I believe Staff Sergeant Thomas Barlow was with me.

Q. Um-hmm.

30. A. And the content of that conversation dealt with a friend of Mr. Ebsary's, Gerard Francis Doyle from Arichat, who had been an acquaintance of his at the Nova Scotia Hospital in Dartmouth and had also lived at the Ebsary residence for some time. He told us that he had

148.

0. CPL. CARROLL, Direct Examination - Voir Dire
bought a car for this young fellow. Shortly after the
car was purchased they had an accident downtown and
the car was damaged quite heavily, but his main
concern was the car being put out of commission and
5. practically new, plus the fact that he had received
a phone bill from the telephone company in excess of
\$2,000 and he suspected or he knew that Doyle had been
making phone calls while a patient at the hospital and
charging them to Ebsary's number here in Sydney, so he
didn't know what to do about it and he was asking for
my advice. My advice to him was for him to contact the
10. telephone company and advise them that he had not made
the calls and tell them who he suspected was the culprit
and they would no doubt be in touch with our office to
try and locate Mr. Doyle and have him questioned as to
the fraud or theft, so . . .

15. Q. Um-hmm. Was there any further conversation
respecting Mr. Doyle on the 26th of October, 1982?

- A. Yes, he became quite emotional about this
time, started to cry and he said that Doyle was not a
bad lad, that he needed some help and that he had
learned that Mr. Doyle was in trouble in the St. Peters-
20. Arichat area. In fact he believed that he was under
arrest and he wanted to do something to help the fellow,
Mr. Doyle, and he made a comment that if I could get
Doyle released he would give me the Marshall case.
Those were his words.

25. Q. Yes. What was your response to that?

- A. I told him I would make some inquiries.
I could not promise him anything at all, no
guarantees or suggestion that I could have Doyle
released from custody, if he was in fact in jail, and I
told him I would get back to him once I found out what
30. the situation was.

149.

0.

CPL. CARROLL, Direct Examination - Voir Dire

Q. Yes?

5. A. So as a result of phone calls to St. Peters R.C.M.P. I learned that Mr. Doyle had been before the courts already, was remanded to the Nova Scotia Hospital in Dartmouth for 30 days or more observation and that he was already under escort to there from Arichat, so I called Mr. Ebsary by telephone.

Q. When?

10. A. The same afternoon and I informed him of the present standing of Doyle's case. He cried some more on the telephone and thanked me, that was the end of the conversation.

Q. Um-hmm?

A. I reminded, prior to the end of the conversation I reminded Mr. Ebsary of his words concerning the Marshall case and we agreed to meet I believe on the following day.

15. Q. Yes? That's the 27th of October.

20. A. Right. I think I'm in error, I think it was the 27th I called him back with the results of my inquiries, so he asked me on the 26th and I'm quite certain in my mind it was the 27th when I called him back with the results that Doyle was in fact on his way to the Nova Scotia Hospital. We agreed to a meeting for 9:30 the next morning.

Q. I'm not quite clear. Are you saying it was on the 27th or the 26th that you made the phone call with the information?

25. A. On the 27th I called Mr. Ebsary and told him of Doyle's whereabouts.

Q. What time of day would that have been?

30. A. I would say mid-afternoon. I have a notation in my book here that I received a phone call from Ebsary at 4:30 p.m. on the 27th and a meeting set for 9:30 a.m. which would be the following day, the 28th.

150.

0.

CPL. CARROLL, Direct Examination - Voir Dire

Q. Now before we leave the 26th what was Mr. Ebsary's condition on that day?

A. He was under the influence for sure, I would say probably pretty well intoxicated.

5.

Q. On the 26th.

A. On the 26th.

Q. Okay. So then you had a telephone conversation with him on the 27th and I believe you said you arranged for a meeting with him.

10.

A. A meeting was agreed to for 9:30 the next morning which would be the 28th.

Q. Um-Hmm.

A. Myself and Barlow . .

Q. Well, when you told him that Doyle was gone to the Nova Scotia Hospital was there any further conversation after that?

15.

A. I just said there's nothing more could be done, he was there for 30 days and that was it.

Q. What was Mr. Ebsary's attitude when you told him that nothing more could be done?

20.

A. He appreciated my efforts but he cried, he was quite broken up over it. He said the boy needed some help and he wasn't going to get it down there. He needed more or less a psychiatrist or special treatment.

Q. Um-hmm. So then when did you next see Mr. Ebsary?

25.

A. The next morning at 9:30 a.m. myself and Staff Barlow went to his home. At that time he agreed to sit down and type at his own leisure a record or an account, resume if you like of what happened in the park on the evening of Seale's death and having read some of the material seized from his house I knew that the

30.

typewriter was there and he did type quite well. So that

151.

0. CPL. CARROLL, Direct Examination - Voir Dire
was agreeable to myself and to Staff Barlow so we left
him with that idea that he would do that, and we
returned on the morning of the 29th to find that he
had not typed anything, that he had lost his glasses
5. and said he was unable to do any typing and he suggested
that a tape recorder possibly would be the answer.
So a tape recorder was supplied and a new tape taken
to his home 8:50 a.m. on the 29th.

10. Q. Well, was the tape recorder taken to his home
on the same day the request for the tape recorder was made
or the next day?

A. I believe that would be the following day.
The tape recorder was mentioned on the 28th, I have a
notation here.

Q. On the 28th.

15. A. On the 28th. He suggested a tape recorder
would be the answer since he couldn't type. On the
morning of the 29th I arrived there with a tape
recorder and a new tape and . .

Q. Now did Staff Sergeant Barlow go into Ebsary's
residence on the 29th?

20. A. No, he did not stay, he dropped me off.
There was another person there, the first name was
Ronnie.

Q. Just to clarify for the record then it would've
been on the 28th of October that you and Barlow went
there and discovered that he hadn't typed up the account.

25. A. That's correct, yes.

Q. Okay. So the 29th you go there alone and
well, take it from there. You arrived at what time?

30. A. I asked the other gentleman to leave, his first
name was Ronnie, I don't know, Landmeyer or - he was one
of Ebsary's neighbours or close friends, so he left and

152.

0.

CPL. CARROLL, Direct Examination - Voir Dire

that left Mr. Ebsary and myself seated at the kitchen table in his residence. I inserted the tape in the machine, I sat it on the table between us. He did not start the interview until he had addressed a letter and envelope to his friend Mr. Doyle in care of the hospital in Dartmouth.

5.

Q. Did you and he have any further conversation about Mr. Doyle at that time?

A. Yes. He said he was sending some money to the young fellow to help him along while he was at the hospital, and the interview didn't start until - I have a notation, the tape commenced at 11:50 a.m. after letter and envelope completed. So that's when he . . .

10.

Q. So you commenced then to tape record the conversation between yourself and Mr. Ebsary.

A. I did, yes.

15.

Q. Corporal Carroll, I'm now showing you an envelope which has been marked EXHIBIT VD-1 and it apparently contains a cassette tape. Was that the tape of the conversation that you had with Mr. Ebsary on the 29th of October, 1982?

20.

A. Yes, it's marked by myself and also by Mr. Ebsary, initialled.

Q. It's initialled.

A. Yes.

Q. Yes. And after the 29th of October, 1982 that was kept in your possession until tendered in court at the preliminary inquiry in this matter? I'm sorry, at the second trial of this matter?

25.

A. That's correct.

Q. Yes. And I'm showing you EXHIBIT #4 which is a transcript apparently of the tape which is - I'm sorry, EXHIBIT VD-2 which apparently is a transcript of the tape

30.

153.

0. CPL. CARROLL, Direct Examination - Voir Dire
VD-1.

A. Yes.

Q. Yes. And have you compared that transcript by following along in it while the tape was playing?

5. A. Yes, I have.

Q. And what can you say as to the accuracy of that transcript?

A. It's as accurate as I can make it.

10. Q. Yes. All right. Now with reference to the transcript, could you tell us what if any warning was given to Mr. Ebsary respecting the volunteering of that tape, that conversation?

A. Yes. I gave him the standard police warning just moments into the interview.

Q. Well, perhaps you'll just read the first few exerpts from the transcript.

15. A. It starts off in my voice, it states that it is 11:50 a.m. the 29th day of October, 1982 and Roy Newman Ebsary and I are seated at his kitchen table. Ebsary interrupted at that stage and said 'Captain Roy Ebsary, don't forget that.' And my next remark was at 68 Falmouth Street, Sydney, Nova Scotia. His reply was right. I said I'm here at the request of Captain Ebsary who requested that I produce a tape recorder and a fresh tape for the purpose of discussing an incident that happened in Wentworth Park in 1971 which resulted in the death of a . . . and then he interrupted again and said Sandy Seale, and I replied Sandy Seale. He said 20. yeah. My next comment was now Captain, before we go any further I have to give you something, I have to give something that is called a police warning which is as follows. His reply was right, go ahead. I said you 25. need not say anything, you have nothing to hope from any 30.

154.

CPL. CARROLL, Direct Examination - Voir Dire

0. promise or favour, nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence. Do you understand that? And his reply was yes.
- Q. Um-hmm.
5. A. My next comment was now also with the new Bill of Rights you realize that you are entitled to counsel and the wording of that is, you have the right to retain and instruct counsel without delay now, and he interrupted again and said right. Do you understand that? Yes. Do you wish to have your lawyer? I - do you know what I call my lawyer? A dimwit. I said Okay, he said
10. all right, and I started interviewing him.
- Q. Then you got into the body.
- A. Yes.
- Q. It begins at 11:50 a.m.?
- A. That's correct.
15. Q. And it is completed at, referring to the last section of the transcript page 11, it's completed apparently at 12:17 p.m.
- A. That is correct.
- Q. And during that period of time could you
20. describe Mr. Ebsary's condition?
- A. He had been drinking when I arrived even though it was early, mid-morning. He certainly was not intoxicated.
- Q. How did his condition compare with other occasions on which you'd seen him?
- A. With exception of the day I brought him up to
25. meet the Marshall family he was pretty well under the weather then, but I would say he had a couple of drinks, probably wine. He had some wine there on the table. I asked him not to drink any more while we were doing the interview. I think he had one glass of wine at the very
30. end of the interview or close to it. I couldn't prevent

155.

0. CPL. CARROLL, Direct Examination - Voir Dire

A. No.

Q. And I've already asked you about his condition, but as far as his demeanour or his attitude towards you was concerned at that time, how would you describe it?

5.

A. I think the comments themselves speak for that, very friendly, very open. Certainly no animosity. He did become a little loud on a couple of occasions when he was describing the overall situation and that had to do with the robbery aspect. He made some comment there and his voice ranged a bit, and he'd cry a bit, but generally quite open.

10.

Q. Okay. And other than the instances that we've recounted you had no other contact with Roy Newman Ebsary prior to October 29th, 1982?

A. No.

15.

Q. Thank you very much, Corporal.

THE COURT: Cross-examine?

CROSS-EXAMINATION

MR. WINTERMANS: Perhaps you could locate the notes that I requested earlier?

20.

A. I have them in my file folder. I'm not referring to them.

MR. EDWARDS: Objection, My Lord, we had a 15 or 20 minute adjournment during which time I understood that Mr. Wintermans was going to go and check with the Corporal and go over those notes.

25.

THE COURT: That's my impression of what you were going to do.

MR. WINTERMANS: I thought My Lord that I requested before cross-examination . . .

THE COURT: Well, to make it perfectly clear, he hasn't referred to them. If you want to look at them, if

30.

156.

0.

CPL. CARROLL, Cross-Examination - Voir Dire

he wants to produce them, go ahead. If you want to look at them, go and look at them. If you don't want to look at them indicate that you don't wish to look at them.

5.

MR. WINTERMANS: The notes that you were relying on when you were giving your direct evidence on this Voir Dire, those were notes that you compiled from other notes, is that true?

A. Not really, it was just done after the interview from memory. The notes here are very brief.

10.

MR. EDWARDS: My Lord, I'm going to object here. He hasn't responded to your direction. Does he or does he not wish to refer, to look at the other notes? Does he have an answer for that?

THE COURT: Well, we'll let him go ahead, see where he's going.

15.

MR. WINTERMANS: Could you answer that question?

A. My notes here in my note book refer to interview with Roy Newman Ebsary, first date 20 June, 19.12, 68 Falmouth Street, 10:17 to 1:41 p.m., driven home accompanied by Staff Sergeant Wheaton. That's the total remarks there from that interview.

20.

Q. Do you have any lengthier notes?

A. Yes, I have.

Q. That were made even earlier?

A. Made during the interview, yes.

Q. Made during the interview?

A. Yes.

25.

Q. I would like you to get those out, Sergeant. Corporal.

THE COURT: Just so you'll be clear, he has not referred to those to refresh his memory when he was testifying.

30.

MR. WINTERMANS: That's right.

157.

CPL. CARROLL, Cross-Examination - Voir Dire

0.

A. My Lord, I have three large file folders in this file and I can't lay my hands on it right at the moment. I'm sure I have them.

THE COURT: Mr. Wintermans, what do you want?

MR. WINTERMANS: (Inaudible)

5.

THE COURT: Well, by that time the witness is gone. He's not on the stand, so what do you want him to do? He's told you he has three big file folders of notes on this case. Do you want him to provide the notes that he hasn't used to refresh his memory?

MR. WINTERMANS: No.

10.

THE COURT: All right.

MR. WINTERMANS: Now Corporal, when was it that Donald Marshall, Jr. was released by the Appeal Division of the Supreme Court of Nova Scotia in relation to when the 1982, October 29th tape recorded statement was given? Was it before or was it after? In other words, was Donald Marshall, Jr. still in jail when that tape recording was made?

15.

A. I'm only guessing, I would say he was. I'm not positive.

20.

Q. If I were to suggest to you that it wasn't until 1983 that the Appeal Court acquitted Donald Marshall...

MR. EDWARDS: Objection. He's a little bit misleading here. He asked him when Marshall was out of jail and Marshall was out of jail a long time before the Appeal Court acquitted him. So what is he asking?

25.

MR. WINTERMANS: All right, I'll ask him the question, when the Appeal Court acquitted him.

A. I don't quite understand. Would you repeat it, please?

30.

Q. When did the Appeal Court render their decision that Donald Marshall be acquitted? Was it after - I suggest to you that it was after this tape recorded

158.

0. CPL. CARROLL, Cross-Examination - Voir Dire
statement from Roy Newman Ebsary. Do you agree with that?

A. I would say you're probably right. I know we interviewed Mr. Marshall in Dorchester on the 9th of March, 1982 and as far as the many court appearances in this case, I'm sure I just can't give you the dates. I don't have them in my memory.

5. Q. Were you present when testimony was given before the Appeals Division in Halifax in relation to Donald Marshall?

A. I believe I heard most of it.

10. Q. I suggest to you that that also took place after the tape recorded statement which you're seeking to introduce here. Do you agree with that?

A. I would say you're probably right.

MR. EDWARDS: It's admitted. That was in December, '82.

15. MR. WINTERMANS: And the investigation that you were conducting at that time during February and March and October of 1982 was entitled Donald Marshall Case, would you agree with that?

20. A. I think from what you're getting at is at what stage did the case become the Ebsary case instead of Marshall, is that what you're . . .?

Q. Yeah.

25. A. Officially, since I was - after Staff Wheaton was transferred to Halifax I became the person responsible for the reporting to our superiors in Halifax and I'm quite certain that not until Ebsary was actually charged with the offence did the caption on our reports change. I'm reasonably certain of that.

Q. When was Mr. Ebsary charged with this offence? You were the informant, were you not?

30. A. Yes, I believe it is the 12th of May, '83. I

159.

0.

CPL. CARROLL, Cross-Examination - Voir Dire
have that in my file, I can find that if you like.

MR. EDWARDS: That's admitted.

MR. WINTERMANS: That would be some more than six
5. months after this tape recorded statement had been given,
right? October 29th, 1982 as compared to May of 1983?

THE COURT: You hardly have to flail away at the
obvious.

MR. WINTERMANS: You will recall the first interview
with Roy Ebsary on the 22nd of February, 1982, you and
Staff Sergeant Wheaton picked him up at his residence and
10. took him back to the R.C.M.P. station, correct?

A. Yes. Yes.

Q. And that that interview lasted over three
hours, from 10:17 p.m. to 1:41 p.m., right?

A. Yes.

15. Q. Do you have a tape recording of that
conversation that took place?

A. No, it was not taped.

Q. Do you have a transcript of that conversation?

A. No.

20. Q. You're relying on your memory then to recount
to the court the words . .

A. Yes, I was there for the sole purpose of being
a witness to the conversation and we didn't know what he
was going to say, and Wheaton was doing all the questions.

25. Q. Can you offer any explanation as to why Ebsary
may have later that day called Sergeant Wheaton and
requested that you rather than Sergeant Wheaton come down
to interview him?

A. Do I have . .

Q. Any explanation as to that? You did absolutely
no talking you said during that three and a half hours.

30. A. I have an opinion, yes.

160.

0.

CPL. CARROLL, Cross-Examination - Voir Dire

Q. What is that?

5. A. During the conversation Staff Wheaton asked Mr. Ebsary if he was a homosexual. This was a result of a line of conversation between the two of them. He became insulted over that, denied that he homosexual and he was very sensitive about it, so I don't know whether he did not relate to Wheaton from that point in the conversation or not.

10. Q. So you're saying that you had no conversation or you didn't say anything to Mr. Ebsary during that three and a half hours?

A. No, I'm not saying that, no. I'm saying that Wheaton conducted most of the questioning.

Q. Okay. Were you present during the entire three and a half hours without fail? Did you get up and leave perhaps for a few minutes?

15. A. I don't recall leaving the room at all.

Q. Are you saying you didn't?

A. No, I'm saying I don't recall leaving the room with exception when Wheaton and I went out to let him reflect on the conversation up to that point.

20. Q. So you're not denying the possibility that you may have gotten up to go and use the washroom or something like that?

A. No, I'm saying I don't recall leaving the room at all.

25. Q. You don't recall. But you're not saying that you didn't.

THE COURT: He says he doesn't recall.

A. As far as I know I was in the room the total time with Wheaton and Ebsary.

30. MR. WINTERMANS: Do you recall Mr. Ebsary complaining of chest pains during that interview?

161.

0. CPL. CARROLL, Cross-Examination - Voir Dire

A. I recall him asking for a glass of water. This was well into the latter stage of the interview. He got a glass of water, by what means I don't know, possibly myself, possibly somebody brought it to the door, I don't know. I know he asked for a glass of water and got it.

5. Q. Let me ask you this, is there a tap in that room?

A. No.

10. Q. So if you were the one who got him the glass of water you'd have to leave the room in order to do that.

A. Or somebody may have brought it to the door.

Q. So you're not sure exactly whether or not .

A. No, I'm saying to the best of my knowledge I did not leave the room.

15. Q. Okay. So what do you have to say about the chest pains?

A. He started complaining at the last, possibly the last 15, 20 minutes of the interview that he was feeling not too well so we terminated the interview and drove him home.

20. Q. He wasn't . . . during this period, was he?

A. No, he was not.

Q. But he was at the police station, the interview room.

A. Yes, certainly.

25. Q. And you say that you and Staff Sergeant Wheaton left the room for a period, left Ebsary alone for a period of time?

A. Yes.

30. Q. And you said you were - before that that there were things that were said to Mr. Ebsary as far as

162.

CPL. CARROLL, Cross-Examination - Voir Dire

0. your opinions or Wheaton's opinions with respect to his involvement, knowledge of the Seale death?

A. Yes.

Q. Before that, and that you left the room hoping that he would come around to your way of thinking.

5.

A. That's correct.

Q. Did you show Mr. Ebsary any documents or any statements or anything like that, or did Sergeant Wheaton?

A. I recall Staff Wheaton showed him a statement of James MacNeil, I believe. I'm reasonably certain on that.

10.

Q. Any other pieces of evidence, or statements or documents or anything shown to Mr. Ebsary?

A. Not that I can recall.

Q. I take it your recollection of the details of this three and a half hour conversation are somewhat vague, as you keep answering not that I can recall.

15.

A. No, that's not true. My recollection is quite good because I had reviewed the notes in recent days. There was a lengthy conversation on religion. It seemed a battle of wits between he and Wheaton as to different topics that were surfacing there.

20.

Q. Could you elaborate on that a little bit?

A. No, I'm just - I know that it was a general question on religion, hell on earth, he believes that or at least he told Wheaton he believes that there's a hell on earth, that humans are punished while still alive for their misdeeds and so on and that may have gone on for 15 minutes just discussing that.

25.

Q. Any discussions relating to law?

A. Law?

Q. Law and order, or law that you can recall?

30.

A. Oh yes, yes. Nothing in particular but just

163.

0. CPL. CARROLL, Cross-Examination - Voir Dire
law in Canada. Like I say, Mr. Ebsary has a very
colourful background, trips around the world and so on.
He just did a lot of rambling.

Q. Do you recall any details of that discussion
on the topic of the law in Canada?

5. A. No, just general conversation, no particular
case discussed other than the one that we were interested
in, the Marshall case.

Q. So you did discuss the Donald Marshall case.

A. Yes, that's what we were there for, to see if
he had anything to offer.

10. Q. When you say you discussed the Donald Marshall
case, can you indicate what was said about the Donald
Marshall case to Mr. Ebsary at that time?

A. Not really word for word other than the fact
that Marshall had served 11 years and there were strong
indications that he was not the guilty party. Jimmy
15. MacNeil's statement was read to him by Wheaton, I'm quite
certain it was his statement that was read to him aloud
by Staff Wheaton. He gave indications that he had
something to say but it didn't come out.

Q. You wanted him to say something, did you not?

20. A. We wanted him to say something that would
corroborate the other evidence that we had and what we
hoped to get.

Q. And that was your first meeting with Mr. Ebsary
and is it fair to say that right up until the 29th of
October, 1982 that you wanted Mr. Ebsary to give a
25. statement in relation to this matter?

A. Well, a statement yes, but more or less if he
had something to tell we wanted to know about it.
In some form.

30. Q. And you were there the following day when -

164.

0. CPL. CARROLL, Cross-Examination - Voir Dire
perhaps I'll back up a little bit. Later on in the
afternoon of the 22nd of February, 1982 after this
conversation between Wheaton and Ebsary on the telephone,
you were dispatched to the Ebsary residence, is that
5. correct?

A. Yes.

Q. And he indicated to you at that time, did he
not, that he would give evidence at a new trial for
Marshall?

10. A. That's right. He said he would give evidence.
"Get a new trial for Marhsall and I'll give evidence."

Q. All right. So he was co-operating or at least
he was making overtures to co-operate in relation to the
- to assisting you in getting Marshall acquitted.

A. Yes, that's true. Mr. Ebsary has been generally
quite co-operative anytime that I've met with him.

15. Q. And you have been co-operative with him too,
have you not?

A. As far as I dare go with this investigation in
mind.

20. Q. Do you recall having once said to Mr. Ebsary
something to the effect if I could do anything for you,
give me a call?

A. That's pretty broad, I don't know what you're
referring to but . . .

Q. Well . . .

A. You have to pertain to some . . .

25. MR. EDWARDS: I'm going to rise on this point, My
Lord. When a question like that, it's a legitimate
question for cross-examination provided counsel intends
to back that up with some evidence, you know. Did you
tell Mr. Ebsary . . .

30. THE COURT: I would hope that's what the situation is.

165.

CPL. CARROLL, Cross-Examination - Voir Dire

MR. EDWARDS: Pardon me?

THE COURT: I would hope that's what the situation is.

MR. EDWARDS: Yes. You know, to start pulling statements out of the air that's quite illegitimate, I would submit.

THE COURT: Mr. Ebsary, you'll have to be quiet and let your counsel deal with it. Mr. Ebsary, you'll have to be quiet. Any intention of you giving evidence, you will have an opportunity to give that but in the meantime you will be quiet.

MR. WINTERMANS: Were you able to answer that question?

A. If you could be more specific, I would relate to a comment like that possibly being made over the Doyle incident as to find out what I can for you and let you know.

Q. Right.

A. There was another - in one of those same meetings I advised - it had to do with Doyle as well - there was a dangerous character had escaped from a hospital in Halifax and he was known to be in the company of Doyle. I mentioned that to Mr. Ebsary, that if Doyle came there with this particular individual that he should call me, this fellow is known to be violent and very unpredictable, so I could relate to a comment like that being made under those circumstances, but . . .

Q. What about in relation to Mr. Ebsary's meeting with Mr. and Mrs. Marshall? You say that that was his idea, was it?

A. Yes, most definitely.

Q. And you and Staff Sergeant Wheaton arranged that?

A. I arranged it myself. His comments about that were he wanted to meet Mrs. Marshall, in fact he wanted to

166.

0. CPL. CARROLL, Cross-Examination - Voir Dire

drive by and see their house, what kind of a place they lived in and he wanted to see her eyes, to more or less read her or determine what kind of a person or what character she had, and to give her his dog which he thought a great deal of the dog and he mentioned he was tired living this skid row type of life that he went through.

5. Q. And so you complied with that request and you arranged for a meeting between Mr. and Mrs. Marshall and Mr. Ebsary?

10. A. I did. I thought it might produce some results to the investigation.

Q. And that occurred the following day, did it, the 23rd of February, 1982?

A. Yes. It did.

15. Q. Mr. Ebsary was under the influence of alcohol, he was under the . .

A. He was, yes.

20. Q. Now you indicated in relation to all your evidence I believe was a very general question from Mr. Edwards in relation to whether or not you made any threats, promises or inducements to Mr. Ebsary, I believe the question was during the whole period, before the tape recorded statement was made, February 22nd to October 29th and you said no.

A. That's correct.

25. Q. I suggest to you that that is a conclusion that you're coming to and I would ask that you support that by giving what you exactly did say to Mr. Ebsary between those dates in order that the court may make that conclusion.

30. THE COURT: Mr. Wintermans, I'm going to stop you. I'm only going to stop you because I don't think it possible

0. CPL. CARROLL, Cross-Examination - Voir Dire
for him to relate every statement that was said. He's
indicated that he made no promises or threats or
inducements and are you asking him now, do you want him
to recite to the court everything that he said to
5. Mr. Ebsary on that February period and months later
into the October period? You've already gone into the
October period.

MR. WINTERMANS: My position, My Lord, is that
he's . . .

10. THE COURT: It may be a conclusion. It may be a
conclusion. If you have - you're doing nothing but
fishing, you have no basis to support this fishing.
You're just wasting the court's time. I think that he's
indicated that he's made no promises, threats or
inducements and if you have any reason to zero in on
any particular time then fine, but I don't think that
15. it's a proper procedure to say that's a conclusion
that he reached and now ask him everything that he said.
This is over a long period of time and a number of
engagements and meetings.

20. MR. WINTERMANS: You indicated that no other
police department or something to that effect, no other
police or police department had any investigation into
the Marshall matters during the 1982 period?

25. A. From the 4th day of February, 1982 when Staff
Sergeant Wheaton and I reviewed the file, that is the
transcript of the trials and the statements taken from
witnesses, all done by the City Police, there has been
no further investigation by that department to the best
of my knowledge. Wheaton and I have done it all.
When he was transferred months later it fell into my
lap to continue any further interviews or write crime
30. reports to Halifax, so I'm not aware of anyone being

168.

0. CPL. CARROLL, Cross-Examination - Voir Dire
interviewed or any other further investigation by the
City Police in this matter.

5. Q. Now you indicated that prior to the actual
taping on the 29th of October, there was a discussion
between yourself and Mr. Ebsary before the tape was
put on?

A. You mean the same day?

Q. Yeah.

A. Yes.

10. Q. And what time was it that you arrived at the
Ebsary residence?

A. I have a notation here, 8:50 a.m. There was
a person there with Mr. Ebsary, a friend of his,
somewhat intoxicated I believe and we got rid of him,
asked him to leave and Barlow left.

THE COURT: I don't believe you're talking about
the same day.

15. MR. WINTERMANS: The 29th of October, 1982, the
day that the tape recorded statement was taken.

A. Yes.

Q. You were there at 8:50?

20. A. I have a notation in my book, 8:50 a.m. to
Ebsary's residence at Falmouth Street. There was a
person there.

25. THE COURT: I think this going back, really, I
don't want to interrupt you but I think you're going to
go along and find out that he's in error. He was
testifying to Mr. Edwards earlier on direct and
obviously his dates were mixed up. Mr. Edwards then
corrected him on the dates by referring back and if he
went by his first testimony he would've been delivering
a recorder on the 30th. Just so that I'll let you know
where the thing occurred, because I don't think we need
30. to waste a lot of time on something that appears ^{NOT} to be

0.

CPL. CARROLL, Criss-Examination - Voir Dire

correct. He indicated where he got mixed up apparently, he straightened it out on his direct examination, was on the 28th, his testimony on to the 28th, and when he went on he indicated that he was going to bring the recorder to Mr. Ebsary, it would have to have been the 30th and then Mr. Edwards attempted to clear it up by going backwards, so I think now you've got him in the spot where he's looking at the same note, he's going to make the same error, so go ahead and try and straighten it up.

5.

10.

MR. WINTERMANS: You're saying that you have a note there that indicates on the 29th of October, 1982 that you arrived at 8:50 a.m. at the Ebsary residence?

A. I have that. On the 28th I have met with Ebsary 9:30 a.m., he agreed to type details of Seale incident, and the tape recorder was discussed at that stage, so on the 29th I did in fact take the tape recorder to him and a new tape, and we actually started to record the thing at I think it's 11:50, 11:50 a.m.

15.

Q. I'm concerned about earlier that morning when you first arrived there. What time did you arrive at Ebsary's place?

20.

A. To the best of my knowledge when we first arrived there at 8:50 a.m. this Ronnie fellow was present, the last name I don't know. We found out the typewriting thing was gone, we agreed to the tape recorder and started at 11:15 I believe. Tape commenced 11:50 a.m. after letter and envelope were completed to Mr. Doyle.

25.

Q. Are you getting mixed up between the 28th and the 29th of October?

A. I'm looking at the 29th of October in my notebook.

30.

Q. You're saying it was early in the morning on

170.

0.

CPL. CARROLL, Cross-Examination - Voir Dire

the 29th of October that you went there and found that Ebsary's typewriter, that he couldn't type?

A. No.

5. Q. Sorry, just for the sake of clarity could you go over the events of the 28th and the 29th?

A. I'll start from the 27th. The 27th of October. I advised Mr. Ebsary of the situation on Mr. Doyle, that he was on his way to the Nova Scotia Hospital and a meeting was agreed for 9:30 a.m. on the 28th. On the 28th I met with Mr. Ebsary at 9:30 a.m. He agreed at that time to type the details of the Seale incident. I'm reading directly from my notebook. The tape recorder - my notation is the call requesting the tape recorder.

10.

Q. What date was that call?

A. Still on the 28th.

15.

Q. Yeah.

A. So on the 29th I arrived with the tape recorder at his house. The interview was taped starting at 11:50 a.m. and prior to that there was discussion regarding Mr. Doyle and he was in the process of writing a letter, addressing it and stamping it before he would start the interview.

20.

Q. Now you indicated that you arrived at the Ebsary residence on the 29th, that's the day that the tape recording was taken, the 29th of October, 1982 at 8:50 a.m.

25.

A. I have that in my notebook, yes.

Q. And that's what you're relying upon to give your evidence today?

A. Yes.

30.

Q. And you don't have any independent recollection apart from that of exactly when it was that you arrived

171.

0. CPL. CARROLL, Cross-Examination - Voir Dire
there?

A. I can only refer to my notes and I have that here, that I arrived there at 8:50 with Staff Barlow.

Q. Okay. Did you make that note at the time?

5. A. We made it that morning.

Q. That morning.

A. Yes.

Q. Okay.

MR. EDWARDS: Re-examine, My Lord.

REDIRECT EXAMINATION

10. MR. EDWARDS: Okay. If you and Staff Barlow went there on the morning of the 29th at 8:50, did you remain there continuously until the tape recording began?

15. A. I'm a little bit cloudy on that, I don't know if we left because he had company or whatever, but I know when the taping started and I know that Barlow was not there. He dropped me off. I have that notation there, what it means I'm a little cloudy on it, 8:50 a.m. to Ebsary's residence.

20. THE COURT: I'm sorry, I just don't know what to do with this. I have two separate sets of these events from this same witness and on direct examination he indicated the first contact was on October the 26th with Ebsary and then in direct examination he got onto the 27th and he was reading from his notes, and if that's what he was using to refresh his memory that's fine. I have no problem with that, and he referred to the 29th as the day that he brought the tape recorder, but on 25. direct he seems to have corrected his testimony with Mr. Edwards that there was an incident about the chain of events were that on one day they discussed Doyle and on the next day . .

30. MR. EDWARDS: That's when he told me Doyle was gone

172.

0. CPL. CARROLL, Redirect - Voir Dire

to the Nova Scotia Hospital.

5. THE COURT: That he indicated Doyle was gone to the Nova Scotia Hospital. On the next day he and Barlow went to the house and Ebsary agreed to type out a statement. On the second day. Now this is the direct evidence, direct testimony. The third day they went and there was no typed statement because of the typewriter and there was a suggestion of the recorder. The recorder was produced the 4th day. Which was the 29th. Now that was what the direct testimony was and I understand what you established on your cross-

10. examination and I understand the question that you asked but there is a mix-up. Which I thought was straightened out on direct.

MR. EDWARDS: So did I.

15. THE COURT: But if that's his notes and that's what it is, that's his evidence. And I don't think that you can re-examine him unless there are areas - you can re-examine him, but you can't re-examine him on direct, it has to be a proper re-examination.

20. MR. EDWARDS: Well, put it this way. Was the day that you learned he hadn't typed the statement and the day you arrived with the recorder one and the same or were they on different dates?

25. A. No, they had to be different days. I know that I had to go home and get the recorder from my own residence and that just wasn't done within the hour sort of thing.

Q. Can you recall for us then the circumstances under which you arrived with the recorder, how you got to Ebsary's house, who went into Ebsary's house when you had the recorder in your hand?

30. MR. WINTERMANS: My Lord, I think that I'm entitled

173.

0.

CPL. CARROLL, Redirect - Voir Dire

to object to it on the grounds that he's going over the same things exactly that he went over in direct examination.

5.

THE COURT: Well, the unfortunate thing is that what he went over in the direct examination that resulted in the notes that I referred to have been seriously muddled or changed on cross-examination, so I'm going to allow him a little leeway on those areas to see if we can clarify it. I have to make a decision and I have to have some idea what the situation is.

10.

MR. EDWARDS: Okay. So do you have any recollection of arriving at Ebsary's with the tape recorder in your hand?

A. Yes. I do.

Q. Yes. So were you driving the car or was somebody else?

15.

A. I believe Staff Barlow drove me down and left me there.

Q. All right. Well, the walk from the car to the house, were you alone or was somebody with you?

A. I believe I was alone.

20.

Q. So you go in with the tape recorder. How long do you have a conversation with Mr. Ebsary before the taping begins?

A. Just from my memory I would say probably a half hour or thereabouts.

Q. Um-hmm.

25.

A. Possibly less than that.

Q. And that's when you described in your direct that he was addressing a letter to Mr. Doyle.

A. Yes.

Q. Okay.

30.

A. I do have this notation of 8:50 a.m., whether

174.

0.

CPL. CARROLL, Redirect - Voir Dire

for some reason or other I had to leave and come back later on in the morning prior to 11:00 I just don't recall that, but I have the notation here. Tape recorder and new tape to Ebsary at Falmouth Street,

5.

then following that is 8:50 a.m., Ronnie (blank) present, Staff Sergeant Barlow - that means that he was involved in at least the trip down there to drop me off or whatever.

Q. Um-hmm. Okay. No further questions.

THE COURT: All right. Thank you.

10.

WITNESS WITHDREW

MR. EDWARDS: That is the evidence for the Crown on the Voir Dire, My Lord.

THE COURT: All right.

MR. WINTERMANS: I would ask that we break for lunch. It's 12:30.

15.

THE COURT: Well, I want to know - you do intend to call evidence.

MR. WINTERMANS: It is my intention.

THE COURT: All right. We will recess until 2:00.

COURT RECESSED (12:30 p.m.)

20.

25.

30.

175.

0. COURT RESUMED (2:09 p.m.)

THE COURT: Mr. Wintermans?

5. MR. WINTERMANS: Yes, My Lord. On behalf of Mr. Ebsary in relation to the Voir Dire I propose to - I wanted to call Dr. Aktar, psychiatrist from the Nova Scotia Hospital. Unfortunately Dr. Aktar is presently in Saudi Arabia which is outside of Canada and my learned friend has agreed with this fact, that he knows also that Dr. Aktar is on a year's sabbatical in Saudi Arabia and therefore it is proposed to consent to submit before Your Lordship

10. on the Voir Dire the transcript of evidence taken before Judge O'Connell on May 7th, 1982 in relation to a fitness hearing which was conducted at that time and I have a transcript of that which is signed by the Magistrate together with an exhibit which is attached. Also my learned friend wanted, because the transcript

15. indicates that he's unfit to stand trial, and also I might add that he was found fit to stand trial after a number of months under a Lieutenant Governor's warrant, the Crown requested that I also add two discharge reports also signed by Dr. Aktar as evidence of the end result of the time that he spent in the hospital

20. The reason I'm submitting it is because he was in the Nova Scotia Hospital between the two time periods that my learned friend called evidence in regard, and he was admitted on March the 30th, 1982 and discharged on July 30th, 1982, so therefore I will submit this as evidence on behalf of Mr. Ebsary and asked that they

25. be marked as exhibits, I believe V.D. 3, 4 and 5. Perhaps this one here, the transcript is V.D.3. The single page is V.D.4 and the double page is V.D. 5. And the Defence rests. I might add, My Lord, that I tried to get this to you at about 12:35 and I couldn't

30.

0. find you, so unfortunately . .

THE COURT: Had you arranged it beforehand?

MR. WINTERMANS: Yes.

5. THE COURT: Why didn't you give it to me at 12:30 when I asked you, then I could have had the opportunity of reading it during the break.

MR. WINTERMANS: That's why I tried to get it to you at 12:30.

10. THE COURT: Well, you knew beforehand that's what you were going to do, you had it all agreed with counsel then you could've given it to me out of courtesy to the court and also in the interests of saving time. We have a jury sitting out there for a day now. You agree to these being introduced, are you in agreement?

15. MR. EDWARDS: I'm satisfied, My Lord, that the transcripts are admissible under Section 643.2 of the Criminal Code. I question their relevancy but I won't formally object to their admission.

THE COURT: All right, can I see them?

20. MR. WINTERMANS: I also apologize, there's some writing on some of the pages and of course I had this transcript for the last couple of years and I didn't anticipate having to introduce them at this time and unfortunately I didn't have possession of a fresh copy that didn't have any notes.

THE COURT: All right.

MR. WINTERMANS: They're covered over, I tried to cover most of them over.

25. THE COURT: All right, the only thing I can see is that we recess hopefully for 15 minutes while I have an opportunity to read them.

COURT RECESSED (2:15 p.m.)

COURT RESUMED (2:26 p.m.)

30.

177.

0.

DISCUSSION

THE COURT: I've had an opportunity to read the transcript of the evidence of Dr. Aktar. No other evidence . .

MR. WINTERMANS: That's it, My Lord.

5.

THE COURT: All right. Argument on the Voir Dire?

MR. EDWARDS: The Defence having called evidence, My Lord, I submit he should sum up first.

10.

MR. WINTERMANS: Thank you, My Lord. Well, My Lord, the only evidence submitted by the Defence relates to the - perhaps we'll refer to it as the interim period between the two periods, the first period being February and March of 1982 and the second period being late October of 1982. My learned friend has commented on the relevance of this evidence and certainly at first blush it's a valid comment to make, to question the relevance of it. However,

15.

I would state the testimony of Dr. Aktar is certainly relevant to the first period if I can refer to it as I've referred to it. The testimony of Dr. Aktar indicates that the alcohol abuse and his physical problems, that he would have to ^{abuse} / alcohol for at least a period of months I believe in order to bring about the brain damage that he was suffering from when admitted to the Nova Scotia Hospital and therefore I would submit that it causes serious doubts as to Mr. Ebsary's physical and mental state at the time of the first period during which the police initiated contact with him. The importance of that, I would submit, is that under the Criminal Code a person has a right to make full answer in response to a charge and I would submit that although in the past this would have been considered as a purely procedural matter,

25.

30.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. that he had the opportunity to call evidence and have
counsel, that under the Charter of Rights I would
submit that under Section 24 of the Charter of Rights
specifically Sub-section 2 where the proceedings under
5. Sub-section 1 a Court concludes that evidence was
obtained in a matter that infringed or denied any
rights where freedom is guaranteed by this Charter,
the evidence shall be excluded, if it is established
that having regard to all circumstances the admission
of it in proceedings will bring the administration of
10. justice into disrepute. Now admittedly the evidence
that the Crown is intending to present today was
obtained afterwards, after Mr. Ebsary was released
from the Lieutenant Governor's warrant and released
from the mental institution that he was in. That
occurred on July the 30th that the Lieutenant Governor's
15. warrant was lifted. I would direct Your Lordship's
attention to the testimony of the Crown witnesses on
the Voir Dire as to the alcohol consumption that was
taking place during that second period, even on the
actual day that the statement was given, the evidence is
that the accused was drinking in the morning. He was
20. drinking wine. The evidence today was that he
apparently had a couple of drinks of wine. Comstable
Carroll or Corporal Carroll testified that there was
wine present. He even testified that Mr. Ebsary had a
drink of wine after. So the evidence is there that
25. Mr. Ebsary resumed drinking alcohol and when one
examines the testimony of Dr. Aktar I would submit
that it raises a doubt as to the capacity of the accused
to understand exactly what was entailed in the giving
of the statement.

30. My Lord, under Section 24.1 of the Charter and
Sub-section 2 I think that some reference again in

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. relation to the statement can be made to Section 7
of the Charter of Rights, that everyone has a right
to life, liberty and security of the person and the
right not to be deprived thereof except in accordance
5. with the principles of fundamental justice. Surely
if the Crown is calling all this evidence as to what
occurred during that first period in February and
March of 1982 and if the evidence is that Mr. Ebsary
was unfit to stand trial, had memory impairment,
confusion, forgetful, brain damage resulting from
10. alcohol consumption over a long period of time and
chronic lung disease or a combination of both, that
surely the accused, Mr. Ebsary cannot be reasonably
expected to account, to give an account of what took
place during those initial interviews with the police
and there's a danger that if he were to attempt to
give an account based on Dr. Aktar's testimony
15. concerning fabrication, short-term memory loss, that
he would tend to give a very likely unreliable account
or at least a possibly unreliable account in an
attempt to cover up the fact that his memory is
impaired, he would make up something in order to appear
20. to be normal and therefore it puts Mr. Ebsary in an
impossible position with respect to answering the evidence
that has been presented by the police here this morning
and yesterday afternoon. Therefore I would ask that just
on that basis Your Lordship invoke the provisions of
25. Section 24 and rule that it would bring the administration
of justice into disrepute to have the Crown and the jury
subjected to a statement which may very possibly be
unreliable. Surely if there is evidence that Mr. Ebsary
is involved in this matter, that the Crown ought to
present better evidence than what I would characterize
30.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0.

as the ravings of a person whose mind is very suspect on objective grounds. The evidence of course that he resumed his drinking habits after being released from the hospital I think would have to cause Your Lordship to question whether those symptoms would . . .

5.

by October 29th, 1982 when the statement was given, but that is not the only ground upon which I object to the admissibility of the statement.

10.

I would submit that there are a number of indications of possible inducements in this case. I would characterize any discussion with respect to the protection of the Canada Evidence Act would certainly be an inducement. Now unfortunately there is no direct evidence of that. There's two pieces of evidence, one Staff Sergeant Wheaton admits to the possibility that it was discussed and the possibility of some discussion concerning letters from Donald Marshall to Mr. Ebsary, that Mr. Ebsary may have brought up this question with him, and we have also the testimony of Corporal Carroll with respect to that early meeting, that Canadian law was discussed. He relied upon notes which he wasn't able to produce in court today, but he did rely on some notes which were extremely brief. A three and a half hour interview which he summarized in a paragraph or two. He didn't have a transcript of the exact words and he did a tape recording and he said although there was some discussion about Canadian law, that he says that there was no discussion on the protection of the Canada Evidence Act although in contrast Staff Sergeant Wheaton, he was in charge of the investigation at that point, admits to the possibility of that.

15.

20.

25.

30.

Now given the testimony of Dr. Aktar any testimony I would submit from Mr. Ebsary with respect to that period would be meaningless and therefore he's not in a

181.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

position to comment on the evidence of the Crown in
that regard. That is, I would submit, the lesser
of my arguments with respect to inducements. I
would submit that the arranging of the meeting
5. between Mr. and Mrs. Marshall and Mr. Ebsary when
Mr. Ebsary was under the influence of alcohol and
in an apparent state of intoxication be indications
to Mr. Ebsary that the matter being investigated was
the Donald Marshall matter, the fact that Mr. Ebsary
was not charged for a year or so almost after, more
than a year after that first meeting, and the fact
10. that Donald Marshall had not at that point in time
been cleared by the Appeal Division, I would submit
that all of these factors together with the testimony
of Corporal Carroll, he said ever since the first
meeting with Mr. Ebsary he tried to get Mr. Ebsary to
make a statement. Now to induce means to try to have
15. a person do something that perhaps he . .

THE COURT: That's what they go there for,
isn't it? In any statement.

MR. WINTERMANS: I would think that Your
Lordship would feel that the police are entitled . .

20. THE COURT: Don't anticipate how I feel. What
I'm saying to you is that anytime a policeman approaches
a person to ask them questions, what they're looking for
is answers and possibly statements.

25. MR. WINTERMANS: Okay. Now another factor I think
Your Lordship has to take into consideration in relation
to the early meetings with Mr. Ebsary is that Staff
Sergeant Wheaton testified that a statement of James
MacNeil was shown to Mr. Ebsary. Now we don't have the
statement of Mr. MacNeil which was shown to Mr. Ebsary
before the court, and of course it goes without saying
30. that the burden is ^{NOT} on the Defence to prove that there

182.

0.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

was an inducement or that there was a threat or that the statement was not voluntary for some particular reason. The burden is on the Crown to prove by affirmative evidence that the statement was not obtained by inducement or threats or promises. By affirmative ...

5.

THE COURT: But what's the inducement of showing MacNeil's statement?

MR. WINTERMANS: Well, . .

THE COURT: I'd like to go on with it for awhile but what's the inducement?

10.

MR. WINTERMANS: That's not an inducement, perhaps, what it is, it's presenting a person who a couple of months later is in the Nova Scotia Hospital on a Lieutenant Governor's warrant so . .

15.

THE COURT: You've covered that. You've covered that. All right. They don't know in February that he's going to be under a Lieutenant Governor's warrant in March.

MR. WINTERMANS: All right. So what they do is they're planting information in the mind of a person who is ill.

20.

THE COURT: They don't know that, though. I want to know - presume that he's not, for a moment. Presume that the Lieutenant Governor's warrant never happened. Showing him the statement, what's wrong with that?

25.

MR. WINTERMANS: Well, I think another factor Your Lordship has to consider is the particular characteristics of the individual involved, that is Mr. Ebsary himself. The courts in the past have considered the age, the physical health, the mental health of a person and the question of an inducement or what constitutes a threat or a promise or an inducement, you

30.

183.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

have to look at it from the point of view of Mr. Ebsary, what might be an inducement or a threat or a promise to one person may not be to another person.

5. THE COURT: I understand that.

You didn't answer my question as to what would be the . .

10. MR. WINTERMANS: Okay, the relevance of showing MacNeil's statement to Mr. Ebsary is that it's giving Mr. Ebsary upon which he - they're giving him information and then he's later able to use that in the statement, that's what I suggest, and we don't have - there's a possibility of that and we don't know what they said MacNeil said and so the Crown has not established that everything in the statement that the Crown is attempting to introduce isn't in the statement that was shown to Mr. Ebsary back in February of 1982. 15. Most important of all, I would submit, besides putting Mr. and Mrs. Marshall in the same room and all the rest of it, is in the second period, in the October 1982 period I would submit that the conversations with respect to Mr. Doyle clearly constitute an inducement 20. in the mind of Mr. Ebsary or I should say there is a reasonable doubt that Your Lordship should certainly have reasonable doubt that what those conversations regarding Mr. Doyle may very reasonably have been interpreted by Mr. Ebsary as an inducement. That is perhaps my main argument with respect to the admissibility of the 25. statement and I'll go through that with Your Lordship, that again we have to try and look at it from the point of view of Mr. Ebsary. Mr. Ebsary . .

30. THE COURT: Mr. Ebsary said, before any of this happened, do something for my friend, words to the effect

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

do something for my friend Doyle and I'll give you the story on the Marshall case.

MR. WINTERMANS: Okay.

THE COURT: So he initiated it.

5. MR. WINTERMANS: Perhaps. But there was a question put to Corporal Carroll, by myself, did you ever say to Mr. Ebsary, if I can ever be of any help or if I can ever do anything for you give me a call? And he didn't deny that that was possible and I would submit that there's a reasonable possibility that Mr. Ebsary's request with respect to Mr. Doyle was initiated by the police and 10. what happened was, Mr. Ebsary says, if you can get Mr. Doyle out of jail, and I emphasize 'jail', I will give you the Marshall case. Now presumably that means you get him out of jail and I'll give a confession or I'll give a statement, and then when you add that with the next day the 15. police called or later the police called and say that Mr. Doyle is not in jail, he's on his way to the Nova Scotia Hospital, and then when you add the conversation Mr. Carroll says came from Mr. Ebsary that he needs help, he needs a psychiatrist, I would submit that when you put that altogether there's a real question as to 20. whether or not an inducement was made, and then Mr. Ebsary says something to the effect I'm not going to break my word to you, I'll give you the statement. In other words, I'm saying that even though the Crown seems to be arguing that because the police didn't free Mr. Doyle, that therefore Mr. Ebsary couldn't possibly have been induced but I'm saying that in Mr. Ebsary's mind getting Doyle from jail into a hospital is coming across as far as he's concerned. That means - and furthermore Mr. Ebsary thanks the police, according to Carroll's testimony, for 25. - he cried and thanked him for doing his best for him and

185.

0.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

adds that he needs to be in a hospital because he needs some help and he needs a psychiatrist, words to that effect.

5.

Now clearly that raises a serious question of an inducement.

THE COURT: What's the law on inducement?

Tell me that. What constitutes an inducement according to the cases?

10.

MR. WINTERMANS: An inducement does not have to be directed towards the accused himself. It can be in relation to a third party.

THE COURT: Well, we worry about that only as far as Doyle is concerned. There was no inducement to Doyle. It may have involved a third party but . . .

15.

MR. WINTERMANS: Just to point 'induce' from Black's Law Dictionary, 5th Edition, 1959, 'induce' - to bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on. See also 'seduce.'

20.

THE COURT: Are there any cases regarding that or confessions, statements, Voir Dires, on what constitutes an inducement?

MR. WINTERMANS: Okay, I'm reading from

McWilliams which I have here, Canadian Criminal Evidence, 2nd Edition, page 476:

25.

"There are numerous cases dealing with the question whether particular words constitute an inducement, and particular phrases have acquired recognition almost as a matter of law. However, this tendency was criticized in R. v. Priestly, 1966, 50 Criminal Appeal Reports 183 and again in D.P.P. v. Pinquin, 1975 62 Criminal Appeal Report 14, House of Lords at page

30.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. 17 in which it was emphasized that the task of the Judge is to apply the spirit and intentment of the confession role without being anchored to any particular words and
5. that it is a question of fact in each case. The words "you had better" or "it would be better" have acquired a sort of technical meaning as an inducement. In R v. Merachamy in 1951 100 CCC 117, The Supreme Court of Canada case, the accused although not charged accompanied the police to the station and was told inter alia that his girlfriend was in the hospital in serious condition and that there were serious charges likely to arise from her condition. He was then given a caution. Apart from form of words Rant, J. reveals healthy awareness of how the threat or inducement can arise in such a situation. At page 178 thus he says: "These to me furnish ample matter, first from which to draw the inference that there was an indirect inducement;
10. secondly that its effect had not been removed by the formal warning, since the officers were out to obtain information from him, what other possible object could the reference to the likelihood of charges have had than to exert upon him a coercive pressure to disclose what he knew, and how can it be said that he might not take that to apply that it would be better for him to do so?" Now the caution. At one time it was held to be an inducement to warn an accused that anything he said would be given in evidence for him, and a threat if it was said
- 15.
- 20.
- 25.
- 30.

187.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

that it would be given against him. However, in R v. Valdry 1852 2 DEN. 430, Polack, C.V. held that words were not to be tortured and admitted in confession despite the words in warning that the confession would be used against him."

5.

I might add at this point, My Lord, that I'm also going to be addressing the question of the warning that was given to Mr. Ebsary. You'll note that the warning did not end with the words 'against him' or 'against you', it was that anything you say can be used as evidence and the reason that I emphasize that is that the investigation at that time was into Donald Marshall, not Roy Ebsary.

10.

Roy Ebsary was not charged and as far as Mr. Ebsary was concerned, I submit, the statement that he was giving was for the purposes of helping Donald Marshall Jr. obtain his acquittal and there's a serious question given the circumstances as to whether or not it was made clear to Mr. Ebsary that any statement that he made could be used against Mr. Ebsary. Conversation was, you will recall, I'm going to do whatever I can to get Marshall out. You just watch me and words, the investigation involving Donald Marshall, the bringing of Mr. and Mrs. Marshall to Mr. Ebsary, all of these things support the suggestion that the warning was not proper.

15.

20.

The initiation of an inducement, even though the suggestion which forms the basis of the inducement is first suggested by the accused, the fact that the person in authority agrees is sufficient to render the confession inadmissible. That's R v. Northam 1967 52 Criminal Appeal Report 97.

25.

THE COURT: Would you just repeat it? Not the citation but the line before that.

30.

MR. WINTERMANS: Even though the suggestion which

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. forms the basis of the inducement is first suggested by
the accused, the fact that the person in authority
agrees is sufficient to render the confession inadmissible.
Now you'll recall the evidence. The accused said, you
get Doyle out of jail and I'll give you the Marshall case.
5. The police, Mr. Carroll's response was, I can't make you
any promises but I'll see what I can do, I'll make some
inquiries. The next day he gets back to Ebsary and says,
Doyle is not in jail, he's on his way to the hospital.
Then the words that Carroll says Ebsary said, that he
was crying, he said he thanked him for the efforts that
he made, he said I'm not going to break my word to you,
10. presumably meaning he'd give the statement and comments
to the effect that Doyle needed help, basically he agreed
it was good that Doyle was going to the hospital. In
other words in Ebsary's mind his - he had given his word
that if they got him out of jail he'd talk and they got
him out of jail and so he felt obliged to talk. You
15. recall the testimony of Corporal Carroll that on the
actual day that the tape recording was made, Mr. Ebsary
under the influence of alcohol, but Corporal Carroll said
that they discussed the question of Mr. Doyle before the
tape recorder was put on and then of course I'm also
20. relying quite heavily on the obvious confusion of
Corporal Carroll as to the - what happened during that
period sometime between 8:50 a.m. and the time that the
tape recorder was turned on after 11 a.m., almost 12:00
noon. What happened during that period? We have a tape
25. recording of part of a meeting and which I would submit
is unfair because you can't just tape part and leave out
part. The fact that the last two minutes of the tape
has a seven-minute interval in between, there must've been
more said than the two minutes worth which is taped during
30. seven minutes. These are also serious questions, but

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. - and I might add further that it is immaterial that a person in authority did not intend to make a threat or a promise. I certainly would not suggest that Mr. Carroll was lying in response to my question. He did everything that you could for Mr. Ebsary which
5. he said I did as much as I dared, you will recall, something like that. I don't have a transcript of it. So you know, obviously he was doing everything Ebsary asked in order to get his confidence to get him to talk. He was using psychology like putting Mr. and Mr. Marshall in the same room as him, hoping that that would jar his
10. feelings or whatever, showing him a confession from MacNeil so that he would have some reason for talking when maybe he didn't really want to, and then using this whole Doyle question to put Mr. Ebsary in a position where he may very well have felt obliged to live up to his side of the bargain and talk. For those reasons I
15. would submit that the statement ought not to be admitted. I submit that there's a serious question here as to whether the statement was elicited under false pretenses when one considers the words of the warning, they do not include any warning that the statement would be used
20. against him. Also the fact that there was no secondary warning. Your Lordship is aware no doubt of what a secondary warning is, that is the warning where a person who has had a previous contact with the police on other occasions before giving him a statement, it's normal to warn the person that anything that anybody
25. else may have said to you before or any promises that may have been made to you by some other police officer before, words to that effect, that those should have all be ignored by the accused and should have been made clear. I think it should've been made clear to
30. Mr. Ebsary that the statement, the investigation was into

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. Mr. Ebsary, not just into getting Donald Marshall out.
I would submit that it's not unreasonable to think here
that Mr. Ebsary may have thought that he was giving
testimony for Donald Marshall, not against himself and
he had no intention of incriminating himself or having
5. this used as evidence in a later proceeding against
himself.

I would like to quote from R v. Swezie 1974
20 CCC 2nd 400 Ontario Court of Appeal at page 113,
where Martin, J.A. said:

10. "I conclude that the role with
respect to proof of voluntariness
is not confined to statements
made by a person in custody or
charged or about to be charged
with an offence. I'm consequently
of the view that a statement made
by a person to a police officer
conducting an investigation with
respect to a suspected offence
15. must be shown to have been made
voluntarily before it is
admissible against that person in
a criminal trial in which he is
an accused."

The words 'statement by an accused' used by
Lord Sumner in Ibrihim v. The King 1914 A.C. 599
20. in my view refer to a statement made by a person who is
an accused in a criminal trial when the statement is
sought to be introduced against him rather than to the
fact that he was an accused at the time that he made the
statement, so I would submit that there's no question
that just because Mr. Ebsary was not charged, not in
25. police custody, not under arrest, nevertheless the
rules of voluntariness would clearly apply.

With respect to the incomplete warning, I'd like
to read what I have to be from an R.C.M.P. card,
secondary police warning:

30. "I wish to give you the following

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. warning; you must clearly
understand that anything
said to you previously
should not influence you
nor make you feel compelled
to say anything at this
time. Whatever you felt
influenced or compelled to
5. say earlier, you are not
now obliged to repeat nor
are you obliged to say
anything further, but
whatever you do say may be
given in evidence. Do you
understand what has been
said to you?"

10. That's the usual secondary warning, I submit that the
R.C.M.P. give.

I'd like to refer to a couple of older cases from
the Canadian Abridgment. Trepanier v. R 1911 18 R 177
or 19 CCC 290, the Court of Appeal, the law requires
with regard to making a confession, that the prisoner's
15. mind should be disabused of all idea of leniency by
discussing the offence. In this case, was that warning
given by a detective, was it a warning? He said to the
prisoner 'what you say will be taken down and may be
used for or against you.' We hold that that was not
20. complying with the law. We hold that he should not have
been told that what he says might be used for him
because that was leading him to expect he might obtain
some benefit from making the confession. So I would
argue that under these circumstances, where he thought
he was perhaps a witness in relation to the Marshall case,
25. then it should have been made clear to him that anything
he said could be used as evidence in a trial against
himself. This was not a normal situation where a person
is being investigated for some new charge or is under
arrest for a particular charge or is being investigated
30. for a particular charge. This is a very unusual case that

192.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

Your Lordship has. In this case, as you know, a person spent a long time in jail after having been convicted of this crime. There was an investigation going on to determine whether or not that person was wrongfully convicted and in that regard the police conducted an investigation entitled "Donald Marshall Case" and questioned the accused. He should've been warned clearly, he shouldn't have been just given the standard warning that was given to him at the top of the statement as indicated in the evidence, apparently. He should've been given a better warning than that, it should've been made clear to him that anything he said would be used against him or could be used against him in relation to a charge. I would submit that the case of Gatch v R 1943 Supreme Court Report, 250 79 C.C.C. 221 1943 2 D.L.R. 417 indicates that the burden is on the Crown to show that a proper warning has been given. I'd also like to read something from the Canadian Abridgment, page 421, paragraph number 4269, it says in relation to confessions, per Boyd, McBride J. dealing with the admissibility of evidence of blood analysis which he said should be decided on principles analagous to those governing the admissibility of confessions:

"If the confession has been made to a person in authority it is not admissible unless first the Crown proves a proper warning"...

in italics, 'proper' . .

25. "apart from the necessity of being proper in the sense of being free of threats, of fear or on the other hand of promises of favour or advantage or other inducement, there is now an additional or special requirement to make the warning proper and not an abuse of the criminal law. As I read the

30.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0.

authorities the warning must indicate clearly and fairly the offence or charge for or on which the person has been arrested or is likely to be arrested."

5. THE COURT: Would they not know until they got some statement from him? They had nothing on which to charge him.

MR. WINTERMANS: Okay. I'll continue on . .

10. THE COURT: Just before you do, when they first talked to him and throughout the time February and they thought, one of the witnesses said we thought he knew more than he was telling us, but they had nothing at that time on which to lay any charge against Mr. Ebsary, did they?

MR. WINTERMANS: Well, as I recall the evidence there was a conversation on the telephone.

15. THE COURT: Forget about the conversations. They always felt that Ebsary was holding something back. The first February meetings they had with him and so on, they tried to zero in on the questions and he eluded them. The October series of discussions with Mr. Ebsary started from the 'I'll give you the statement' or 'I'll give evidence' or 'I'll save Marshall' or whatever the words were, I forgot exactly the precise words but even at that time while they were investigating the Marshall case and as they said the Seale incident was an integral part of that, they had nothing on which to charge Ebsary at that time until this, and I don't know what the statement was, but they didn't charge him until some months later.

20.

25.

MR. WINTERMANS: They still didn't charge him after the statement.

30. THE COURT: No, they charged him some months later.

194.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0.

Well, go ahead.

5.

MR. WINTERMANS: It's interesting to note on the testimony of Corporal Carroll that this statement, there was no submission of this statement into evidence as to Voir Dire exhibit or any kind of exhibit, ever, really. There's never been a Voir Dire, it's the first Voir Dire in relation to this matter. The first trial . .

THE COURT: Well, I know that. I know this is the first Voir Dire.

10.

MR. WINTERMANS: At the first trial-the witness testified that it was submitted as an exhibit in the second trial. Of course it was by consent at that time and because of very different circumstances than we find ourselves in in this case. We - just to continue on that previous quote, the caution or warning has two additional purposes: a) to make the position clear to the accused, and b) to remove the effect of any inducement or threat which previously may have been held out to him by anyone. That's R v. Ford 5 C.R. 146 Court of Appeal. There's other cases where a warning was given in relation to one charge and then the statement was attempted to be used in relation to a much more serious charge and it was allowed - it was not allowed into evidence.

15.

20.

R v. Dent 1947 Ontario Reports 105 Court of Appeal. Also R v. Daigle 3 C.R. 98 . .

THE COURT: What relevance is that in this case?

25.

MR. WINTERMANS: Well, as I'm saying, that if it was not made clear to Mr. Ebsary what the purposes of this statement were, if Mr. Ebsary thought . .

THE COURT: Just a minute now. The case you cited had two offences alleged by the one person, and a statement was made on one by the same person?

30.

MR. WINTERMANS: Yes. . .

THE COURT: And they couldn't use it on the other

195.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

on the same person. So what is different in this case?

MR. WINTERMANS: It was a wife who was being questioned in relation to vagrancy to warrant in relation to vagrancy, and she gave some admissions which they attempted to use against her on a murder . .

5. THE COURT: And you're saying that because . .

MR. WINTERMANS: And it was ruled inadmissible.

THE COURT: You're saying now that because they were investigating Marshall and he was going to give a statement on Marshall, that it ought not to be admissible against himself.

10. MR. WINTERMANS: Exactly, because he wasn't

properly warned that that could be - the only warnings that anything you say could be used as evidence. I would submit that given Mr. Ebsary's age and the infirmities that he could very well have interpreted that as meaning this statement can be used as evidence for Donald Marshall in the Appeal Court or in this new trial which he kept talking about all the way through his dealings with the police, that he wanted to help Donald Marshall get a new trial and that he'd testify, 'I will testify for Donald Marshall.' So then they give him a warning, anything you say can be used as evidence period, and he gives a statement I submit for the purposes of testimony on a Donald Marshall trial, not against himself and he wasn't warned properly.

15. THE COURT: Take it out of this situation altogether
20. but make it closely akin. Supposing that his statement is Donald Marshall didn't do it, I did it. Just presume that's his statement. Are you suggesting that a statement like that, that presume everything else was voluntary and admissible, is this not admissible because
25. he was giving it for a different purpose?
30.

196.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE
MR. WINTERMANS: I'm sorry . . .
THE COURT: Is that what you're suggesting?
MR. WINTERMANS: No. If it had been that clear cut
then maybe . . .
5. THE COURT: Well, I have no idea. But I'm just
giving it by way of analogy.
- MR. WINTERMANS: I really can't speculate on that
but in relation to this incident I think that the
evidence as per - even if you look at the statement itself
he certainly doesn't admit to . . .
10. THE COURT: I haven't seen the statement, and I'm
not going to look at the statement for the purpose of
deciding its admissibility.
15. MR. WINTERMANS: Well, in that case, My Lord,
there are a number of other arguments that I have in
relation to information which are contained in that
statement which, that they police suggested to Mr. Ebsary
during these previous meetings that there's practically
nothing I would submit in the statement of any objective
value that couldn't have come from the police or from
MacNeil's statement, whatever that was, because we don't
even know what that was, and that the whole question of
20. reliability has to be considered here to. Historically
that was the main test, if you read Wigmore on Evidence,
the only test ultimately for the admissibility of
evidence is, is it relevant, is it trustworthy? Those
are the only questions and I would submit that when you
consider the type of person that Mr. Ebsary is and was
25. at the time that this statement was given, that it's
unreliable, not trustworthy, to accept this kind of
evidence. If the Crown can prove something against
Mr. Ebsary then they shouldn't be able to rely upon the
ravings of a person of highly questionable capacity and
30. condition under circumstances which he cannot answer

197.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

because he was declared to be mentally ill and was actually institutionalized for a period of several months, during the process when the police were possibly feeding him information and trying to convince him to say Marshall, and I would submit it's very

5. questionable whether the warning was proper and that most importantly of all, that the conversations relating to Doyle were a clear inducement and that the accused has the absolute right to remain silent, the Appeal Court has indicated, and that should only - that he

10. should only incriminate himself if he truly wants to and is aware of what he's doing. I would submit that the warning was not clear, that it's very likely that the only reason that he talked was because the police, he believed at least the police had done something for his friend and so he owed them and he promised and therefore

15. he was going to live up to his promise. And he was drinking at the time that the statement was given and the police cannot account for the details of the conversation that took place. They're giving opinion evidence, I submit, when they state there were no promises, threats or inducements. They can't just say

20. that. They have to say what they said. It's a conclusion. I'd like to read from the case of Ebsary v. The Queen which I have a citation, Supreme Court Case 00934 1984 but it is now I believe reported in 65 N.S.R. most recent edition, it's not even hard bound yet, dated

25. December 7th, 1984 and I quote from page 7. This is in relation I might add to another statement that was - not the same statement but a voluntary statement properly obtained is admissible against an accused as an exception to the basic principle that an accused has an absolute

30. right to remain silent either completely or partially and not to incriminate himself unless he wants to and that's

198.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. from Deeds, J. in Harvath v. The Queen 1979 2 Supreme
 Court Report 376 at page 433. "A strong burden rests
 on the Crown to prove affirmatively that the statement
 was in fact voluntary and made without any threats,
 5. promises or inducements., or any other improper pressure
 from a person in auauthority. The Crown must fully
 disclose the circumstances and what was said to the
 accused." And in that case it was over 10 years, over
 10 years had passed and the police and not given any
 evidence about the actual fact. Chief MacIntyre can
 10. ony assume that he had followed his usual practice, he
 assumed that neither he nor anyone else in authority made
 any threats, promises or inducements to Mr. Ebsary. There
 was thus no proof, and they underline 'proof' of anything
 but the signatures of Ebsary and the police officers.
 The Crown in my opinion completely failed to discharge
 the burden of proof. A basic right cannot be disregarded
 15. merely on the assumption that proper police practice was
 followed. The statement should not have been admitted into
 evidence. The statement was highly prejudicial. I think
 that perhaps Your Lordship may want to consider the contents
 of the statement as well as the Appeal Court ruled that the
 20. prejudicial effect of this statement and another statement,
 a different statement was a factor.

THE COURT: The evidence is all in now, isn't it,
 on the Voir Dire?

MR. WINTERMANS: The statement is in as an exhibit.

25. THE COURT: An exhibit. What's the law on my
 agreeing the statement . .

MR. WINTERMANS: The Appeal Court says the
 statement is highly prejudicial in discussing the question
 and I think that it is because if the statement is
 completely irrelevant then it wouldn't be admissible and in
 30. order to determine relevance the Court would have to look at

199.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

0. the statement, but as to - I don't believe I have any case law on that question. Perhaps my learned friend does, but/Your Lordship does look at it, there are a number of other points that I would like to raise.

5. One other further point, if I might be allowed is on the question of capacity to confess. The fundamental question in determining whether a statement is admissible is whether the statement is freely and voluntarily made. In that respect the mental state of the accused at the time the statement was taken is of importance as a mentally disturbed person may be more susceptible to pressures and threats, whether real or imaginary. I would submit
10. Mr. Ebsary is more susceptible to pressures and threats, perhaps imaginary ones, especially - now in delivering the majority judgment of the Supreme Court of Canada, in R. v. Bitton, 1956 Supreme Court Report page 958, Rand, J. cited the proposition as follows:

15. "The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation all call for delicacy and appreciation of the part they have played behind the admission, and to enable the court to decide
20. whether what was said was freely and voluntarily said, that is, was free from the influence of hope, or fear arrived by them."

This view was again reiterated in the Supreme Court of Canada in Ward v. R. 1979 Supreme Court, Criminal Report 3rd at 153, where Spence, J. held:

25. "Both the mental and physical condition of the accused must be considered in order to determine whether a person in his condition would be subject to hope or advantage or fear of prejudice in making the statements where perhaps a normal
30. person would not."

200.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

And I quote from Spence:

5. "In my view, the examination of whether there was any hope of advantage or fear of prejudice moving the accused to make this statement is simply an investigation of whether the statements were freely and voluntarily obtained. In my view there is further investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found, in consideration of the mental condition of the accused at the time he makes the statements to determine whether or not the statements represent the operating mind of the accused."

10.

The question of examination of the statement, My Lord, looking at Canadian Criminal Evidence, McWilliams 2nd Edition p. 510, it has been said variously that it is the right of the trial judge on Voir Dire to examine the statement, R. v. Robert 1969 3 CCC 165, B.C. Court of Appeal, or that it may be necessary to do so, R. v. Chalumpa #2 1973 17 C.C.C. 2d 394, or that the inquiry frequently relates to the truth of the statement, R. v. Donegan - all these quotes are - one might task why it is necessary since Peach v. The Queen 1974 C.C.C. 27 Supreme Court of Canada, it is no longer material to determine whether the statement is inculpatory or exculpatory. Also the content of the statement is primarily a matter of relevance and weight to the jury.

20. Okay. It is difficult not to demand a judicial impartiality to rule a statement inadmissible if a judge examines it and discovers that it is a confession, but it is an impossible imposition when a judge is sitting without a jury and is himself the trier of fact. The trial judge must first

25. exclude the statement from his mind in determining the

30.

201.

0.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

issue of voluntariness and he must then, if he rules it inadmissible, also exclude it from his mind in the determination of guilt or innocence. However conscientiously he may do this the appearance of justice suffers. Cross at p. 73 comments drily that trials within a trial or time-wasting in cases heard by a jury and something of an unreality in cases tried before a Magistrate.

5.

10.

It was suggested in Reed v. The Queen 1974 20 C.C.C. 2d 257 Court Martial Appeal Court that the judge should make a preliminary ruling as to voluntariness and then examine the statement to see if it contains anything which would render it inadmissible. This found favour in R. v. Poradis 1976 38 C.C.C. 2d 555 Quebec Court of Appeal, however in Re Mitchell and The Queen 1976 31 C.C.C. 2d 344 Alberta Supreme Court this suggestion was rejected and it was said that the matter ... however, the court was invited to examine the statement. The question remains as to why the judge should examine it at all. It is submitted that especially where a judge is sitting without a jury, he should avoid if possible examining the statement. Brown, Provincial Court Judge in R v. Conway, it looks like the Supreme Court of Canada said that it's not something that you should do.

15.

20.

25.

THE COURT: I read the same thing that you did. I wondered what you were going to tell me it told me to do. One goes one way and says one is the best practice and the other one says no. They're talking really about an invitation to read it at the request of the Crown. Now you're on the Defence and I don't know whether you've invited me to read it or not. I think you may have.

30.

202.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

5. MR. WINTERMANS: Well, My Lord, if it's only on a question of relevance then I'm not asking you to read it then, except unless it relates to the question of voluntariness. Did the accused intend to incriminate himself by giving the statement? I would submit that an analysis of the statement would indicate that there's a serious question there, certainly there is a question of whether the admission would constitute any crime and if Your Lordship earlier referred to the statement, the hypothetical question that maybe Ebsary would say Marshall didn't do it, I did, or something, well, of course that's what the statement is, but in this particular case where there's an investigation into Marshall's - the validity of Marshall's conviction for murder, if a person hypothetically were to give a statement not admitting the murder, admitting homicide but inculpable homicide, then what the situation -

10. I submit that that is the situation here.

15. THE COURT: I thought what you really said to me in summary was, you indicated a number of - one is you said Ebsary didn't have the capacity to make a statement because he was suffering from incapacity and your evidence of that is the Exhibit V.D. 4, 5 and 6, is it, or 3, 4, 5? That was one point. So that I was to look at and consider whether or not he had capacity at all to make a statement.

20. MR. WINTERMANS: Whether there is a reasonable doubt on the question.

25. THE COURT: Well, it has to be proved beyond a reasonable doubt or whether I have a reasonable doubt that he had capacity.

30. MR. WINTERMANS: Are you suggesting that I have the burden of proof?

203.

0.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

5. THE COURT: You have no burden whatsoever. The burden is over there on the Crown. The burden he has to prove everything beyond a reasonable doubt. Be careful and listen to what I say. The Crown has the burden to prove beyond a reasonable doubt. You've raised a summary of the legal part, you've raised the point that he doesn't have capacity to make the statement. In support of that you say, refer to his own physical condition, refer to his age and the circumstances and refer to the Exhibit V.D.3. You then say, all right, presuming he does have capacity then the statement is not free and voluntary and you attack it from two sides. One, the activity of the police and what they did, and you also attack his own - he's not saying it for himself, he's saying it for the Marshall matter and not to incriminate himself and that's your second, one of your other attacks. Now you've gone through the various items of the evidence which I don't need to repeat. Now the first one is capacity then are you asking me to look at the statement and if I read the statement that I'm going to - just reading it as an outsider, then I'm going to see that it's obviously the product of mental illness or an incapacitated mind? You're not asking me to look at it from that point of view.

10.

15. MR. WINTERMANS: No.

20. THE COURT: Then what would you be asking me to look at the statement for? The statement itself is not going to prove its free and voluntariness. Reading the statement itself is not going to reflect on whether it was given freely or whether it was voluntary, or whether there was any inducement, from the statement itself I presume. The statement is going to presumably be a typical police statement where there is a warning at the

25.

30.

204.

0. MR. WINTERMANS' ARGUMENT ON VOIR DIRE

beginning and either questions or answers are recorded, so there's no reason for me to look at the statement itself, is there?

5. MR. WINTERMANS: If I could just have a second to respond to that, My Lord.

MR. EDWARDS: My Lord, I wonder if I might rise at this point. Obviously Mr. Wintermans is not quite finished yet and I'm going to be of necessity regrettably some bit of time.

10. THE COURT: Well, we'll keep the jury in if that's what you're . . .

MR. EDWARDS: Yes. It's 20 minutes to 4 o'clock.

THE COURT: Well, I'm going to leave them there. I don't know what is going to happen. I'm not going to send them home now.

15. MR. WINTERMANS: There are a number of things in the statement which go to, I would submit, to the question of voluntariness.

MR. EDWARDS: If it would be of assistance, My Lord, I can indicate that the Crown has no objection to you reading the statement or hearing the tape, which may be even better.

20. MR. WINTERMANS: Well, I think it would be easier if you read the transcript. I'm not strong on the point one way or the other but it would certainly be quicker to refer you to certain parts of - unless Your Lordship is already - perhaps Your Lordship would like
25. to wait until after my learned friend has . . . and if you have any tendency at all to know that the statement ought to be admitted then I certainly would ask that you - I would submit that just that last series of comments with respect to Doyle are clear inducements, clear
30. inducements which certainly would raise a reasonable doubt.

205.

0.

MR. WINTERMANS' ARGUMENT ON VOIR DIRE

THE COURT: Yeah, you've given me all of that.

I know that. I'm asking me why you want me to look at that particular statement and maybe you don't want me to look at it. That's what I'm concerned with.

5.

How am I going to read a series of questions and answers and decide that they weren't the produce of a lucid mind unless they obviously reflect that. Which I don't know.

If

10.

MR. WINTERMANS: /Your Lordship is considering the question of whether there were any threats, promises or inducements then perhaps there is some evidence already before you.

THE COURT: Well, I have the evidence already there, you're asking me to look at the statement. You know what the statement says, I presume. I don't. Well, let's just hold off on that one for a minute.

15.

Are you finished with your presentation?

MR. WINTERMANS: Yes.

THE COURT: All right then, I think we'd better take five minutes off and then we'll hear you.

Recess for five minutes.

20.

COURT RECESSED (3:40 p.m.)

COURT RESUMED (3:46 p.m.)

25.

30.

206.

0. THE COURT: Mr. Edwards?

MR. EDWARDS: Thank you, My Lord.

MR. EDWARDS' ARGUMENT ON VOIR DIRE

MR. EDWARDS: I'll attempt to be as brief as
possible, My Lord. The purpose of a Voir Dire, of
5. course, is to prove the statement was voluntary, and
voluntary in the sense that it wasn't obtained through
any threats, promises or inducements either by persons
in authority and voluntary in a sense secondly, I guess
these are the two key points, secondly in the sense that
it was the produce of an operating or conscious mind and
10. so the Crown set out to satisfy you on both those
requirements beyond a reasonable doubt that this tape
recording was voluntary.

 As I indicated in my opening remarks on the Voir
Dire, the Crown has no indication of seeking Your
Lordship to allow the admissibility of any statements
made in that so-called first period, February to May.
15. The sole purpose of calling evidence from the police
officers during that period of time is referent to our
desire to satisfy you that no threats, promises or
inducements were made from the inception of this
investigation in February of '84 during that particular
20. time period and I submit that the evidence clearly
discloses, having come from all police officers with
contact with Mr. Ebsary, all the police officers who
were in any way connected with this investigation
during that time period, that there were no such threats,
25. promises or inducements made at that time.

 I stated in the opening also that the evidence from
that time period is of rather dubious relevance as far
as its referent to the statement taken in October of '82
and I would submit as I said then that we were being on
the safe side by introducing that evidence.
30.

207.

0.

MR. EDWARDS' ARGUMENT ON VOIR DIRE

Now Mr. Wintermans introduced the transcript of the fitness hearing held in May of '82 and the reports, the discharge report showing that in July of '82 the accused was again fit to stand trial, albeit on a separate and unconnected matter, but there is nothing wrong insofar as the law was concerned at that time with the functioning of his mind and I submit that when you consider in July of '82 he was fit, then what's - what relevance has it that he received treatment between May and July? The point is that well before the October statement was taken psychiatrists had found him fit to stand trial.

10.

I want to deal in sequence with some of the specific points made by Mr. Wintermans and these for the most part deal with the first question of whether or not there were any threats, promises or inducements which would render the statement inadmissible. Well, he mentions the reference to the Canada Evidence Act which apparently was in Donald Marshall's letter to Mr. Ebsary and Staff Sergeant Wheaton was unsure at that time whether or not the Canada Evidence Act outside the context of the letter was discussed with Mr. Ebsary. I submit that that point was put beyond all question by Corporal Carroll because he said it definitely was not. He said there may have been some reference in the letter to the Canada Evidence Act, he couldn't remember that, but he stated categorically that there was no discussion by he and Wheaton with Ebsary concerning Ebsary's giving a statement or testimony under the protection of the Canada Evidence Act. I want to emphasize that, he was categorical on that point.

15.

20.

25.

30.

My learned friend stated that Corporal Carroll was operating from rather scanty notes as far as the February situation is concerned and again I remind Your Lordship

208.

0. MR. EDWARDS' ARGUMENT ON VOIR DIRE

that he was given the opportunity if he wished to see the more extensive notes that were in the file and indeed he could've seen them long before today, had he ever requested, but he didn't. And all of this activity in February again, even if there were the possibility, which I submit there is not, let's say the Canada Evidence Act had been discussed, how could it be suggested that that was still operating in October? There was no mention of it in the evidence.

5. My learned friend suggested that arranging the meeting with Mr. and Mrs. Marshall had some effect on the admissibility of the statement. That one escapes me, My Lord, I can't respond to it because I don't understand what he's suggesting there.

10. He said fourthly that because the case was called the Donald Marshall case and the officers were investigating the Donald Marshall case, therefore Ebsary - this is how I understood his argument - therefore Ebsary wasn't put on guard that what he might say might affect his legal status and of course that jumps in the face of the evidence because Staff Wheaton said specifically that Jimmy MacNeil's statement was read to Ebsary which accused Ebsary of doing the stabbing, and Wheaton told Ebsary that he thought he did the stabbing, so Mr. Ebsary would be in no doubt, I would submit, about the purpose of the interviews with the R.C.M.P.

15. My learned friend suggested that because the statement of Jimmy MacNeil, which was read to Mr. Ebsary at the time, wasn't put in evidence, that that had something to do with the admissibility, I guess the inference is that maybe there was something in the statement which would constitute an inducement. I note from his cross-examination my learned friend had full

20. 25. 30.

209.

0. MR. EDWARDS' ARGUMENT ON VOIR DIRE

opportunity to ask Corporal Carroll to produce the statement but he didn't do so.

MR. WINTERMANS: Might I interject? That . .

5. THE COURT: No, I think you should wait until he's finished and then you'll have an opportunity to rebut this.

10. MR. EDWARDS: He had full opportunity to ask that the statement be produced but he didn't do so. He talks about the conversation regarding Mr. Doyle and states that that is clearly an inducement which would render the statement inadmissible. Well, I would submit that that is far from accurate. Just referring to our notes on what Corporal Carroll said about that, he referred first to Ebsary saying words to the effect that if you help Doyle I'll give you the Marshall case and I said I couldn't promise I'd get him out. Ebsary said he'd give me the Marshall case, then he told 15. Ebsary after he made his inquiries that Doyle was on the way to the Nova Scotia Hospital, nothing could be done, so there was no promise there and that is close to what Staff Sergeant Barlow said at the time, but more significantly even if that were an inducement, I want to refer Your Lordship to page 196 of Kaufmann, 20. The Admissibility of Confessions, 3d Edition, where the well recognized author in this area states the following:

"Where the motivation for a statement comes from 'within' the accused"

as I suggest it does here,

25. "his declaration will be admitted."

He cites as authority for that proposition R. v. Siniarski - S-i-n-i-a-r-s-k-i - and that is a 1969 of the Saskatchewan Court of Appeal found at 3 C.C.C. 228. In this case on the Voir Dire the accused 30. had put the matter quite frankly. "I gave a statement

210.

0.

MR. EDWARDS' ARGUMENT ON VOIR DIRE

to get out of the hole because it's not a nice place to be, and I think I would've signed anything to get out of there." The trial judge admitted the confession and this was confirmed on appeal. The

5.

author goes on to say:

"However, distinction must be drawn between those cases where the accused decides by himself that a confession would bring him a benefit, and those where the accused believes that a confession would help but asks a person in authority to confirm this fact."

10.

Now in the latter case, of course, that type of statement would likely be ruled inadmissible, while here the motivation came from within Ebsary to give the statement to the police if they would help him out with Doyle. Well, in the first place they didn't help him out with Doyle and in the second place, even if they had it was never confirmed by any of the police that giving the confession would help Mr. Ebsary.

15.

My learned friend referred to his suggestion in cross-examination that Corporal Carroll may have said something like 'if I could do anything, if I could ever do anything for you' and that was the question that I objected to, I submit that it wasn't a proper question for cross-examination, and that's confirmed by the fact that now he hasn't done anything to confirm that that suggestion was ever made, and I submit that Corporal Carroll gave instances in context where that type of suggestion could have been made and I submit that's why Corporal Carroll said - certainly didn't come close to verifying the allegation made by my learned friend.

20.

25.

—My learned friend complains about the form of the warning, 'cannot be used as evidence.' He wants the

30.

211.

0. MR. EDWARDS' ARGUMENT ON VOIR DIRE

words 'against you.' Well, that's the way the warning used to read years ago and it fell into disfavour with the courts and the accepted warning now is that anything you say can be used as evidence, period. And again, there's no question that Mr. Ebsary knew the reason why they were there.

Now as far as the statement itself is concerned, I guess this bears on the second point, that it is incumbent upon the Crown to prove that the statement is the product of a operating or conscious mind. Well, I would invite Your Lordship to read the statement, if not hear the tape recording and I submit that having done so, you will readily see that the conversations in it are not the ravings of a mentally ill person as suggested by my learned friend, but are obviously the product of a conscious mind and in large part the statement is self-serving because in the statement is contained his defence or what he believes is his defence. So I would invite Your Lordship to do that and as authority for that proposition I refer to Re v. The Queen, it's a 1974 20 Criminal Cases 2, p. 257, it's a decision . .

20. THE COURT: I'm sorry, the citation in 1974?

MR. EDWARDS: Yes.

THE COURT: Criminal Cases?

MR. EDWARDS: Criminal Cases 2, p. 257. The Court Martial Court of Appeal. The court held the judge should first make a preliminary ruling that subject to the contents of the statement the Crown has established voluntariness and then consider the contents and make a final ruling, and I submit that if Your Lordship did that, you would find as I suggested that there is nothing in the statement to indicate that even marginally that Mr. Ebsary . . .

212.

MR. EDWARDS' ARGUMENT ON VOIR DIRE

0.

THE COURT: That procedure was rejected, looking at McWilliams, p. 510 on the most recent edition, the second edition and that suggestion was rejected by the Saskatchewan Court of Appeal.

5.

MR. EDWARDS: What's the year of that citation?
I don't have McWilliams with me.

THE COURT: That was 1976, 31 C.C.C. 2d.

10.

MR. EDWARDS: Well, I have a further citation, R. v. Cunliffe - C-u-n-l-i-f-f-e - which is a 1977, 34 C.C.C. 2, p. 287. That's a decision of the Ontario Provincial Court and the court suggested that if Defence counsel objects to the trial judge examining the contents of the statement, the trial judge should decline to do so unless Crown counsel is able to assure the court that examination of the statement will materially assist the judge in determining the issue of voluntariness, and I would submit, you know, if we just put aside the case law for a moment because the cases do seem to go both ways, you know, just looking at it from a point of view of logic, what is one of the main objections that he's making to the statement? Well, the introduction of the psychiatric evidence, I suppose is designed to show that Mr. Ebsary wasn't really conscious of what he was doing, couldn't be expected to give a rational account. Well, I submit what better way available to us would there be than for Your Lordship to listen to the tape, to hear the intonations, the articulation of the accused, or at least read the transcript. I submit that it will materially assist Your Lordship in making the determination which you're now being called upon to do. And from my learned friend's argument, he seemed to be suggesting also albeit it for other reasons, that Your Lordship should be aware of the contents of the statement. And again, the cases make it very clear that

15.

20.

25.

30.

213.

0. MR. EDWARDS' ARGUMENT ON VOIR DIRE

there is a danger where, if Your Lordship were deciding this case alone without a jury, then sure, there's a great danger of you being influenced by the contents of the statement because of human factors, being influenced in your final decision of guilt or innocence. However, 5. the cases suggest that the danger certainly is not nearly as great where the trier of fact are those 12 people in the room next door, because of course they are not going to become aware of the contents of the statement until you rule the statement is admissible. Considering all those factors, the issue of voluntariness and whether it was the product of conscious mind can be 10. assisted by Your Lordship reading the statement.

My learned friend quoted the Court of Appeal case which had to do with the second trial in this matter and said that in that case, because as I understood it, because everything couldn't be recalled, therefore the 15. Court of Appeal threw out the 1971 statement, well, he started reading I submit a little too late in the game because that statement is clearly distinguishable from this one, because in that case the police officers, and no criticism of them, trying to recall something they 20. had done 12 years or so ago, couldn't remember anything. I just refer briefly. The only evidence about the making of a statement was by Sergeant John MacIntyre who had written the statement in his own handwriting and witnessed Ebsary's signature. He could not recall any 25. of the circumstances except that he had taken the statement at the police station. He could not say how Ebsary got there or what was said. He assumed that he followed his usual practice and gave a standard warning and gave no threats, promises or inducements. He did not remember what he told Ebsary. He did not recall 30. who saw Ebsary before he questioned him and of course did

215.

0. MR. WINTERMANS' REBUTTAL Voir Dire

it fell into disrepute but I ask that he substantiate that remark.

5. With respect to his comments concerning the purpose of introducing the psychiatric evidence of Dr. Aktar, he indicated that the only purpose was that he couldn't give a rational account of what occurred. I would point to the contents of the psychiatric report with respect to the first period, the February '82 period, I would submit that anything that happened there, Mr. Ebsary is not in a position to respond to because of his memory loss so he can't make a full answer, he can't say what took place during that period. With respect to the second period I point to Dr. Aktar's testimony concerning confabulation meaning making things up, in reaction to a loss of memory he tends to make up these grandiose stories is what Aktar says, so I would submit that the purpose is two-fold and it relates to both the period before and the period after, together with the evidence of intoxication. It relates to the voluntariness and what would constitute a threat or inducement to one person may not to another, but to Mr. Ebsary who is weak and old and frail, very little could constitute an inducement and he could get things mixed up in his own mind. He might think that he remembered talking about the Canada Evidence Act even if it wasn't true.

10.

15.

20.

25. With respect to the Ebsary appeal the ruling that the 1971 statement was inadmissible, my learned friend neglected to point out that Chief MacIntyre did attempt to give an account of what took place, he did make statements such as there were no threats, promises or inducements, just like here today and the Appeal Court ruled that that's not good enough, he can't just say there were no threats, promises or inducements when on . . .

30.

MR. WINTERMANS' REBUTTAL ON VOIR DIRE

0. THE COURT: Wasn't there an indication in those that the reason why he said he made no threats, promises or inducements because that's his standard practice? Isn't that the reasoning in that one?

5. MR. WINTERMANS: Right. But the case law which I cited earlier, the decision did clearly state that that is a conclusion which if questioned on cross-examination he has to support it, by the words which were spoken and it's for the judge to decide what's a threat, promise or inducement, and it has to be presented by way of affirmative evidence, not just there were no threats, promises or inducements. And in this case, even on the 10. morning that Corporal Carroll took the statement there was conversation concerning Doyle and there was drunkenness and there was a lengthy period of time, at least a half hour, maybe three hours which was unaccounted for.

That's all I have to say, My Lord.

15. THE COURT: All right. Thank you. We'll have an adjournment. I'll try and see if I can decide this in the next short while. We'll have an adjournment of about 10 minutes.

COURT RECESSED (4:14 p.m.)

COURT RESUMED (4:46 p.m.)

20.

DECISION ON VOIR DIRE

25. THE COURT: All right. With regard to the admissibility of a statement a Voir Dire has been conducted and the Crown has produced evidence from all members of the R.C.M.P. who were investigating the Marshall matter who had any contact with Mr. Ebsary the accused in two periods, February and October of 1982.

30. Ebsary himself was in the Nova Scotia Hospital from Mach 30th to April 26th, 1982 and on May the 7th a finding was made that he was unfit to stand trial and was returned to the Nova Scotia Hospital on a Lieutenant

217.

0. DECISION ON VOIR DIRE

Governor's warrant. A finding that he had recovered and was fit to stand trial was made and he was discharged on July 30th, 1982.

5. The Defence produced only the evidence of Dr. Aktar. I have reviewed all of the evidence and submission of both Crown and Defence counsels. Nothing in the Crown's evidence would indicate any lack of lucidity on the part of Ebsary in February. He was given the standard police warning when taken to the police office before any conversation and understood it.

10. All of the evidence re the February event clearly shows that there were no threats, promises or inducements of any kind on these occasions. Even if there were, they would only be relevant if they led to the October statement or put it another way, were still operating in October. There's no such evidence of that.

15. There is sufficient evidence as to what took place in October with regard to the meetings between the police officers and Mr. Ebsary so that a finding can be made. I'm satisfied again beyond a reasonable doubt the statement does represent the operating mind of the accused. There's no indication of lack of intellect or insanity. While there is some evidence of consumption of alcohol at all relevant times I'm satisfied that there was no degree of impairment which would come close to question the capacity of the accused to give a statement or to question its reliability or to have any effect on his will.

20.

25. The activities of Constable Carroll re the Marshalls and arranging the meeting between the Marshalls and Ebsary do not in my view constitute an inducement.

30. With regard to the evidence concerning Mr. Doyle Ebsary himself initiated the request to get Doyle out of

218.

0. DECISION ON VOIR DIRE

jail and was told immediately by Constable Carroll that he could promise nothing but that he would look into it. Constable Carroll knew nothing about Doyle at the time. Ebsary did say, if you get Doyle out I'll give you the Marshall case and after he learned that .Doyle was on the way to the Nova Scotia Hospital on a 30-day remand and in the words of Corporal Carroll 'that nothing could be done' he said he would not go back on his word. I'm satisfied beyond a reasonable doubt that the evidence clearly discloses that no promises were made by persons in authority that could constitute an inducement in these circumstances.

5. As to the warning given, it was a proper warning, a standard police warning and Ebsary understood it.

10. With regard to the reference to the Canada Evidence Act I suggest that this is of no consequence as there is no acceptable evidence to support its discussion and certainly Ebsary did not request the protection of the Canada Evidence Act and further, those discussions were not in the relevant period and again I find that whatever discussions were held where the Canada Evidence Act was mentioned, which I repeat were minimal, certainly were not operating in October. The statement is therefore voluntary, given freely without promise or threat or inducement of any kind.

15. In reaching this decision I have not read the statement itself and despite the invitation of counsel I do not feel it necessary to do so.

20. So the statement is admissible, Mr. Edwards.

25. MR. EDWARDS: 'Thank you, My Lord.'

30.

219.

0. THE COURT: Now it's 10 to 5. Obviously we're beyond our time. Would you bring the jury in, please? There are no other preliminary matters.

MR. EDWARDS: Not that I'm aware of, My Lord.

MR. WINTERMANS: There was one other, My Lord.

5. THE COURT: Just hold off on the jury for a minute. What's the next preliminary matter?

MR. WINTERMANS: Well, I wasn't anticipating the admission of the statement but now that the statement has been ruled admissible I see that my learned friend is also going to be tending to introduce evidence concerning a knife and I would submit that there is some question there as to the admissibility of that.

10. THE COURT: Is that something we do preliminary or do we wait until the time that it may or may not be introduced? I have no idea.

15. MR. EDWARDS: If I may, My Lord, just for clarity, what on earth has it got to do with whether or not the statement was admissible?

THE COURT: It's got nothing to do with the statement.

MR. WINTERMANS: It's got nothing to do with the statement . .

20. MR. EDWARDS: He said now that the statement has been ruled admissible . .

25. MR. WINTERMANS: My point is, I wasn't sure if my learned friend would be bothering with the knife evidence if the statement were ruled inadmissible, but now that the statement has been ruled admissible then I expect that is not a possibility so and it usually comes to the admissibility of the knife evidence which has been described^{by} the Appeal Division, that particular knife or those knives, the evidence has been described by the Appeal Division in the Marshall Appeal hearing in 1983
30. as highly speculative or very speculative and that makes

220.

0. DISCUSSION

it somewhat of a Voir Dire in relation to that.

5. THE COURT: But I want to get the trial under way. I'm anxious that we not consume tremendous amounts of time into irrelevant matters and matters that are just going to slow us down. I don't know whether the Crown is going to produce a knife. I'm sure not going to decide in advance unless I have some indication that they are going to introduce it, and I would suggest that you wait until the knife is introduced. If you have an objection to the introduction of the knife we'll consider it then.

10. MR. EDWARDS: My Lord, if I may - the evidence that I intend to call with relation to the knives, well, Mr. Wintermans as has Your Lordship has been given notice in the Summary for the Trial Judge I forwarded it in December, and it has to do with the evidence of Adolphus J. Evers. If there is some question on the admissibility of the knives, and my learned friend I might say has never indicated to me over the months since we've known about it, that he had any objection to its admissibility but if there is a question, then it affects the testimony of oh, about six, seven, 15. seven or eight witnesses and in order - if we are going to get into a Voir Dire on the admissibility of that evidence, well, we're going to be tied up without the jury for at least another half a day and I might say that the first witnesses who I will be calling, you see, 20. what the evidence amounts to is a comparison between the fibres found on the jackets worn by Marshall and Seale on that night in '71 with fibres found on knives seized from Mr. Ebsary's home in 1982, so of course what I have to do to establish the ground work for that is 25. call the witnesses to get the jackets into evidence. 30.

221.

DISCUSSION

0. There's about five or six there, then call the witnesses to get the knives into evidence, so you know . .

THE COURT: And what is the basis of your objection to the introduction of the knife or knives?

5. MR. WINTERMANS: It's prejudicial and highly speculative evidence which may prejudice the jury.

THE COURT: Why is it prejudicial?

MR. WINTERMANS: It's an exhibit. A knife is handled in front of a jury and it may cause some emotional reaction on their part and if the knife cannot be established to be . .

10. THE COURT: Let's make it a gun. Let's make it a gun for a moment. A gun is a pretty menacing thing and somebody introduces a gun at trial, and they want to show that certain bullets came from that gun and they have bullets that were fired and they have bullets from a victim and they have all the markings on them and so on. Now unless it's inadmissible for some other reason, surely the gun is admissible and then the witnesses come on and say I tested bullets from this gun and it has certain markings, the bullets have certain markings. The bullet found in a certain body had certain markings and the evidence goes on in the normal manner, doesn't it? Well, am I right or not?

15.

20.

MR. WINTERMANS: I think one of the questions that is involved is whether continuity of an exhibit is . .

THE COURT: That's another matter.

25. MR. WINTERMANS: It's a question of admissibility versus weight.

THE COURT: I don't know about that one.

MR. WINTERMANS: Whether the question of proving continuity, having to prove continuity of an exhibit goes to the question of the admissibility of that exhibit versus the question of weight.

30.

222.

DISCUSSION

0. THE COURT: I think it's a question of weight, isn't it?

MR. WINTERMANS: If the Crown cannot prove continuity of an exhibit . .

5. THE COURT: Then it's a question for the jury to decide whether or not they have sufficient evidence to accept that that particular exhibit is the same exhibit that was seized at such and such a time. It's not a question of admissibility.

MR. WINTERMANS: Then I withdraw my . .

10. MR. EDWARDS: The Crown intends to prove continuity anyway. You know, what's the problem?

THE COURT: And there will be no waving of knives before the jury. I can assure you of that. It's in as an exhibit, it'll be treated as an exhibit. It will not be used in an inflammatory way.

15. Well, you think about it overnight as to whether or not you intend to pursue it. If you do intend to pursue it, I'd like to know in advance, in the morning, so that we can deal with it and I'm going to call the jury back in and I'm going to tell them that they're ready. Just give me one more minute. There was one
20. other thing I wanted to add on to my decision on the Voir Dire so the record will be complete.

DECISION ON VOIR DIRE (Cont'd)

25. Submissions were made by the Defence counsel as to the application of the Charter of Rights, Section 24.2 and 24.1 to the matter of the admissibility of the statement and it is my view that there was nothing involved which would constitute a violation of the Charter.

(End of decision)

30. THE COURT: All right. Call them in.

223.

THE COURT: Thank you.

JURY RETURNS (5:00 p.m.)

JURY POLLED (All present)

0.
5.
10.
15.

THE COURT: All right. Mr. Foreman, members of the jury, I am sorry that you had to sit around most of the day or all of the day without knowing what was going on, but I told you at the beginning that there might be some matters that would be discussed in your absence and there was one. It's unfortunate that one can't predict how long these things are going to take and this one happened to take all of the time since I let you out. That matter has now been resolved and we are ready to commence with the trial itself in the presence of the jury so we will start tomorrow morning at 09:30 and we'll start hearing evidence, so while you may have had an easy day today it's going to be a little more difficult, probably, as the next few days go by. At least you've had an opportunity to get to know each other.

All right. So it'll be 09:30 tomorrow morning that we start.

20.

Now everything else is in line for 09:30 tomorrow morning. At that time you can indicate to me whether or not you're going to pursue any other matters. In advance. You know, some of these can come up during the trial itself.

All right. Close court for today.

COURT ADJOURNED (5:04 p.m.)

25.

30.

224.

0. COURT OPENED - (January 11, 1985 - 09:35 a.m.)

JURY POLLED - All present.

THE COURT: Good morning, Mr. Foreman, members of the jury. Good morning, counsel. We're ready to start on the presentation of evidence, correct? Or your opening remarks.

5.

MR. EDWARDS' OPENING REMARKS

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

Mr. Foreman, ladies and gentlemen of the jury, my name is Frank Edwards and I have the privilege of representing the Crown in this particular matter. I will be assisted by Shauna Wilson, the lady on my right.

10.

Now it's customary at the opening of any criminal trial for the Crown Prosecutor to give you an opening address summarizing the evidence he intends to call. I'm not going to do that this morning. I'm going to begin calling evidence immediately, but I'll say this. The Crown intends to prove to you beyond a reasonable doubt two things: number one, that Roy Newman Ebsary, the accused fatally wounded Sandy Seale on the night in question; number two, that when he did so he was not acting in self-defence.

15.

The first witness, Mrs. Leotha Seale.

20.

MRS. SEALE duly called, sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Would you give your name and address, please?

A. Leotha Seale, 985 Westmount Road.

25.

Q. Mrs. Seale, I'm going to stand over here so that your testimony will be directed to people who need to hear it most. Now Mrs. Seale, you are the wife of Oscar Seale?

A. Right.

30.

Q. And you're the mother of the late Sandy Seale,

MRS. SEALE, DIRECT EXAMINATION

0. is that correct?
A. Yes.
Q. What was Sandy's full name, Mrs. Seale?
A. Sandford William Seale.
Q. And Sandy died in 1971?
A. That's right.
5. Q. And the exact date of his death, Mrs. Seale?
A. He died on May the 29th.
Q. May 29th.
A. 1971.
Q. Do you remember what time that day?
A. That he died?
10. Q. Yes.
A. It was around 7 o'clock, a little after 7.
Q. In the evening.
A. Yes.
Q. All right. Do you know what doctor treated
him at that time?
15. A. Dr. Naqvi.
Q. How old was Sandy at that time, Mrs. Seale?
A. 17.
Q. 17 years old. And was he a student?
A. Yes.
20. Q. What grade was he in?
A. Grade 9.
Q. Now could you tell us what his approximate height
and weight was at that time?
A. Well, I'd say he was around - I don't know, you
know, actually. I think around 155 maybe.
25. Q. 155 lbs.
A. Yes.
Q. Could you estimate his height?
A. 5-7.
30. Q. 5-7. Now on the night of May the 28th, 1971

226.

0. MRS. SEALE, Direct Examination

when did you last see Sandy that day?

A. At home.

Q. At home?

A. He was at home.

5. Q. And at approximately what time?

A. I just can't remember. It was around - it was the last bus that was leaving Westmount, you know, he was catching the last bus.

Q. And where was he going?

A. He was going to a dance.

10. Q. Do you know where?

A. Well, I know - right off hand I don't know the hall.

Q. Do you know where it's located?

A. Well, down here. It's past the park here, you know.

15. Q. Past Wentworth Park.

A. Right.

Q. Okay. May I suggest the name of the hall to the witness?

MR. WINTERMANS: No objection.20. MR. EDWARDS: Is it St. Joseph's Hall?

A. Well, it might've been.

Q. Mrs. Seale, do you recall what he was wearing when he left the house that night?

A. Yes, I do.

Q. What type of jacket was he wearing?

25. A. He was wearing a brown jacket, a heavy jacket.

Q. Pardon me?

A. He was wearing a brown heavy jacket.

Q. A brown heavy jacket.

A. Um-hmm.

30. Q. Okay. And do you recall if it/waist length or

227.

MRS. SEALE, Direct Examination

0.

three-quarter length?

A. Yeah, it was a way down to his waist, there.

Q. To his waist. What was he wearing under his jacket, Mrs. Seale?

5.

A. He was wearing a white short-sleeved T-shirt and a long turtle neck sweater, an off-white.

Q. An off-white sweater. Okay. Do you remember what colour trousers he was wearing?

A. Yeah, blue jeans.

Q. Blue jeans.

A. Yes.

10.

Q. And what time did you expect Sandy home that night? Or was there a set time for him to come home?

A. Well, he usually came home around 10 after 12, on the last - not the last bus, but - like the buses leave Sydney around 12, you know, and then he's home around 10 after 12.

15.

Q. Um-hmm. So I take it then from your testimony that he got to and from Westmount where you live by bus.

A. By bus, yes.

Q. Where would he usually catch the bus like when he was leaving from Sydney?

20.

A. Well, he'd usually catch it right here at the - you know, he goes down this street, there's a - I forget the name of the street here.

Q. Well, in relation to the park.

A. Yeah, right.

25.

Q. In relation to the park where is the bus stop?

A. Well, right here at the corner, you know, when you turn around that corner?

Q. You don't know the name of the street.

A. No, I don't. No.

30.

Q. Now when did you next see Sandy after he left

228.

0. MRS. SEALE, Direct Examination

the home that evening?

A. In the hospital.

Q. Was that that night or the next day?

A. That night. We had a phone call that night.

5. Q. Now as a result of the phone call you and your husband went to the City Hospital.

A. Yes, that's right.

Q. Yes. And was Sandy conscious when you saw him?

A. Yes. He was.

10. Q. Now the jacket he was wearing that night, can you tell me what eventually happened to that?

A. Well, the jacket was given to me by my husband. The City Hospital gave the jacket to my husband and he gave it to me to put it away.

Q. Yes.

15. A. And then later on, after the funeral Mike MacDonald, the police officer came to the door and he asked for the clothing and I gave it to him.

Q. You gave the jacket to Mike MacDonald.

A. To Mike MacDonald, yeah.

Q. And did you ever get the jacket back after that?

20. A. No.

Q. That was the last you saw of it.

A. That was the last I seen of the jacket, yes.

Q. Thank you very much, Mrs. Seale. I have no further questions but my learned friend may ask you some.

25. THE COURT: Cross-examine?

MR. WINTERMANS: No questions, My Lord.

THE COURT: I suppose just to make the record clear, when you're referring to the bus, getting the bus, you said over here and you pointed, well, that doesn't go on the record very well. You were pointing to Kings Road.

30.

229.

0. MRS. SEALE EXAMINED BY THE COURT

A. Is it Crescent Street?

Q. Crescent Street is the street there, yes.

A. And Kings Road, yes. Right at the corner
of Crescent and Kings Road. That's where he catches
5. a bus.

Q. All right. Thank you very much, Mrs. Seale.

A. All right.

WITNESS WITHDREW

10.

15.

20.

25.

30.

230.

0. MR. SEALE duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Sir, your name is Oscar Seale, is that correct?

A. Right.

5. Q. Mr. Seale, I'm going to stand over here if I could just direct your comments to the jury. Mr. Seale, your wife just testified and she stated that you live on Westmount Road and you're the father of the late Sandy Seale, is that correct?

A. Right.

10. Q. Now Mr. Seale, on the night of May 28th and the early morning of the 29th of May, 1971 you saw your son Sandy at the Sydney City Hospital?

A. Right.

Q. And Mr. Seale, could you tell us whether you took possession of the jacket he had been wearing that night?

15. A. Yes, I did.

Q. And do you recall what colour the jacket was?

A. Yes.

Q. What was it?

A. It was a brown one.

20. Q. It was a brown jacket. And what did you do with the jacket?

A. I received the jacket, blue jeans, boots, and it was a plastic bag and I took them home.

Q. And gave them to whom?

25. A. I gave them to my wife. My wife was there.

Q. Okay. Mr. Seale, do you recall your son's approximate height and weight in 1971?

A. Yeah.

Q. —What was that?

30. A. I'd say he was about 5 ft 8½, weight between 158 to 162 lbs.

231.

0.

MR. SEALE, Direct Examination

Q. Okay. I think I covered everything else with your wife, Mr. Seale. Thank you very much. Mr. Wintermans may have some questions.

THE COURT: Cross-examination?

5.

MR. WINTERMANS: Your son Sandy was a good athlete?

A. Yes, he was.

Q. What sports did he play?

A. I can't hear you very well, Mr. Wintermans.

Q. What sports did he play?

A. He played hockey, baseball, a good swimmer.

He was a very good athlete.

10.

Q. A very good athlete?

A. Very good.

Q. Was he a strong boy?

A. I'd say he was very strong. Yes.

Q. Now when you saw your son at the hospital was he ever conscious?

15.

A. Yes, he was conscious.

Q. Did you have any conversation with him?

A. No. At the time I seen him I don't guess he could talk. The doctor took me in. I asked the doctor could I see my son. He took me in and he said yes, of course. He took me in and I asked him could he talk. Sandy was looking at me and the doctor said Sandy, do you know your name? I'll call your name. If you know your name nod your head. Is your name Sandy Seale? He nodded his head. He said do you know your parents? And he nodded his head, and this was about the extent of what we talked about.

25.

Q. And he wasn't asked anything about who may have caused his injuries.

A. I wish I had knew he was going to die, I certainly would've asked.

30.

Q. Okay. thank you. That's all the questions I have.

232.

0.

MR. EDWARDS: No re-examination, My Lord.

THE COURT: All right. Thank you, Mr. Seale.

WITNESS WITHDREW

5.

10.

15.

20.

25.

30.

233.

0. DONALD MARSHALL, SR. duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Your name is Donald Marshall?

A. Senior.

Q. Donald Marshall, Senior.

A. Right.

5.

Q. And what is your address, Mr. Marshall?

A. My address is 38 Micmac Crescent, Sydney.

Q. And how long have you resided there?

A. About 15 years.

Q. Now Mr. Marshall, you are the father of

Donald Marshall, Junior?

10.

A. Yes.

Q. And you gave evidence at your son's trial in 1971.

A. I believe I did.

Q. Now going back to then, do you recall taking possession of the jacket your son was allegedly wearing that night?

15.

A. At the trial or at home?

Q. Well, can you tell us what happened to the jacket that Donald was wearing on the night of the stabbing?

20.

A. I seen the jacket afterwards. At home.

Q. What colour was it?

A. Yellow.

Q. Yes. And what did you do with that jacket?

A. We just left it in the house, i guess.

For a week or so or whatever.

25.

Q. Yes. And then what happened?

A. Either somebody came for it or I took it to I believe Roy Gould's. It was Roy Gould's jacket.

Q. It was Roy Gould's jacket.

A. Right.

30.

234.

0.

DONALD MARSHALL, SR. Direct Examination

Q. You think you might've given it to Roy Gould.

A. Right.

Q. How old was your son Donald in 1971?

A. He wasn't quite 17 I don't think. 17.

5.

Q. No further questions.

CROSS-EXAMINATION

MR. WINTERMANS: Mr. Marshall, this yellow jacket that you say was at home, do you know how it came to be at your home?

10.

A. I believe my son Donald wore it from that night when this happened.

Q. How did the jacket get there? Did you put the jacket in your home?

A. No, he probably brought it home when he came home.

15.

Q. I see. No further questions.

MR. EDWARDS: No re-examination, My Lord.

THE COURT: All right. Thank you, Mr. Marshall.

WITNESS WITHDREW

20.

ROY GOULD called. (Not present)

25.

30.

235.

0. MIKE MacDONALD duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Sir, your name is Mike MacDonald?

A. Yes, Sir.

5. Q. And you're recently retired Deputy Chief
of the Sydney - City of Sydney Police Department?

A. Yes, Sir.

Q. And how long were you with that department,
Mr. MacDonald?

A. 38 years.

10. Q. Mr. MacDonald, you were involved in the
original investigation into the death of Sandy Seale in
1971?

A. Yes, Sir.

Q. And following that incident in Wentworth Park
you took possession of certain exhibits?

A. Yes, Sir.

15. Q. Among them were two jackets.

A. Yes, Sir.

Q. Would you tell the jury, please, where you
got the jackets and what you did with them?

A. On June 2nd, 1971 I received a jacket from
Mrs. Oscar Seale.

20. Q. What colour was that jacket, Mr. MacDonald?

A. It was a dark colour jacket, brown or black.

Q. Yes.

A. And on June the 3rd I received a jacket from
Mr. Roy Gould.

25. Q. Do you remember the colour of that jacket?

A. Not at the moment, Sir.

Q. And then what did you do with the jackets after
that?

A. They were placed in my locker at the Sydney
Police Department.

30.

236.

0.

MR. MacDONALD, Direct Examination

Q. Yes.

A. And on June the 16th I took both jackets . .

Q. This is in 1971?

A. 1971. I proceeded to the Crime Lab in

5. Sackville, New Brunswick where both pieces of clothing were turned over to Mr. Evers at the Crime Lab.

Q. That's Adolphus J. Evers?

A. Yes, Sir.

Q. Of the Hair and Fibre Section of the Crime Lab?

A. Yes, Sir.

10. Q. Okay. Thank you very much. My learned friend may have a couple of questions.

THE COURT: Cross-examine.CROSS-EXAMINATION15. MR. WINTERMANS: Mr. MacDonald, do you recall having given evidence at the preliminary inquiry into the Donald Marshall trial back in July 5th, 1971?

A. Yes, I believe I did, yeah.

Q. And on page 16 you were asked the question at the top of page:

Q. What did you do with this jacket?

20. A. The jacket was in my care until I went to the R.C.M.P. Lab in Sackville and turned it over to them.

Q. Do you know to whom you turned over this jacket?

A. At the time I just forget his name, I have it marked.

Q. Where do you have it marked?

25. A. Mr.D.. R.C.M.P. Lab in Sackville.

Q. (The Court): A Sergeant?

A. No, Mr. D.. is a civilian.

Do you recall those questions and answers? At that time back in 1971?

A. No, I don't believe.

30. Q. How is your recollection of those events at this

237.

0. MR. MacDONALD, Cross-Examination

time?

A. Well, I recall receiving them and I placed them in my care in my own locker at the Sydney Police Department until the day I was ordered to Sackville, New Brunswick with them.

5. Q. You went to Sackville. You don't recall exactly who it was that you gave them to there.

A. Well, I had marked down Mr. Evers.

Q. Where are those jackets now, do you know?

A. I couldn't say, Sir.

10. Q. Thank you. That's all the questions I have.

THE COURT: Re-examine?RE-EXAMINATIONMR. EDWARDS: My learned friend just referred you to the preliminary inquiry which was held in July of 1971, right?

15. A. Right.

Q. You also testified on the trial in November of 1971.

A. I just had one appearance in court, Sir.

20. Q. Well, I'm referring to the transcript of the trial, page 54, Sergeant Michael MacNeil being duly called and sworn, testified as follows:

A. Michael MacNeil?

Q. Michael MacDonald, I'm sorry. I'll show you the page. Do you want to read that over? Would you say that was a transcript of testimony given by you?

25. A. Yes, Sir.

Q. Yes. I want to refer you to lines 20 to 30 which reads:

Q. Just hold it there, please. I show you Exhibit 3. Do you recognize the jacket?

30. A. yes, that is the jacket.

238.

0.

MR. MacDONALD, REDIRECT

Q. 1971. You held it until
June 16th, 1971.

A. Yes. Where I proceeded
to the Crime Lab in
Sackville, New Brunswick.
I turned this jacket over
to Mr. Evers.

5.

A. Right, Sir.

Q. So at the trial you said . .

A. I turned it over to Mr. Evers.

Q. And that is your recollection now.

A. Yes, Sir.

10.

Q. Thank you, Mr. MacDonald.

WITNESS WITHDREW

15.

20.

25.

30.

239.

0. MR. EDWARDS: My Lord, before I call the next witness perhaps we should have the jury out for a few moments.

THE COURT: All right.

JURY RETIRES (10:02 a.m.)

5. MR. EDWARDS: My Lord, I thought it would be prudent in view of what my learned friend said yesterday, and just so there's nothing said before the jury that shouldn't be said, I indicate that the next witness will be the one from whom the knives in question come in and I figured if there was going to be an objection to that it should be discussed now.

10. THE COURT: All right, Mr. Wintermans.

MR. WINTERMANS: My Lord, when I came here this morning I wasn't going to make any objection on the grounds that the belief that the continuity on the exhibits went to weight as opposed to the admissibility. Now we're in a situation where there is a break in the link.

15. Mr. Gould isn't here and didn't testify.

THE COURT: He may be here.

MR. WINTERMANS: I have no objection.

THE COURT: You have no objection on the witness on the knives. All right. Bring the jury back in.

20. MR. EDWARDS: Perhaps, My Lord, before we bring them in I could just check outside for a minute to make sure that . . .

My Lord, I'm missing a couple of witnesses. I wonder if I could ask for five minutes to try to locate them.

25. THE COURT: All right. We'll recess for five minutes.

COURT RECESSED (10:05 a.m.)

COURT RESUMED (10:15 a.m.)

THE COURT: All right.

30. MR. EDWARDS: Yes, My Lord, I'm ready to go.

240.

0.

JURY RETURNS. (10:16 a.m.)

JURY POLLED. All present.

ROY GOULD called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Sir, you are Roy Gould?

5.

A. Yes, I am.

Q. What is your address, Mr. Gould?

A. Presently residing at 3 Millard Street in Sydney.

Q. Mr. Gould, where did you reside in 1971?

A. 124 Membertou Street, the same - Membertou

10.

Reserve.

Q. At that time did you know Donald Marshall, Jr.?

A. Yes, I did.

Q. Did you know Donald Marshall, Sr.?

A. Yes, I did.

15.

Q. Now on the day of May 28th, 1971, the day of the incident in question, do you recall where you were that day?

A. We were just returning from Bedford, Nova Scotia. Arriving in Sydney about 9:30 that evening.

Q. Yes. Now who returned to Sydney from Bedford, Nova Scotia with you?

20.

A. Donald Marshall, Junior.

Q. Okay. And where did you stop off in Sydney?

A. I took him back to the Reserve and I left him there.

25.

Q. Now what was Donald Marshall wearing when you left?

A. He left with my jacket which was a yellow jacket with white stripes.

Q. A yellow jacket with white stripes. And what condition was the jacket in when you lent it to him that evening?

30.

241.

0.

MR. GOULD, Direct Examination

A. It was fairly new. It was in perfect condition.

Q. Okay. When did you next see that jacket,

Mr. Gould?

5.

A. About mid-week of that same week, the following week rather.

Q. And where did you see it?

A. Well, I obtained the jacket from Mr. Donald Marshall, Senior at the request of the City Police.

THE COURT: I'm sorry, I missed that. What was that?

10.

A. I took it from Donald Marshall, Senior. At the request of City Police.

MR. EDWARDS: And what was the condition of the jacket at that time?

A. There was a rip on one of the sleeves and there was blood stains on it.

15.

Q. What appeared to be blood stains.

A. Um-hmm.

Q. What did you do with the jacket then?

A. I turned it over to Michael MacDonald, a detective at the time with the Sydney City Police.

20.

Q. Did you see the jacket or get the jacket back after that?

A. No.

Q. Thank you very much, Mr. Gould. No further questions. My learned friend may have some questions.

CROSS-EXAMINATION

25.

MR. WINTERMANS: Mr. Gould, going back to the day that you returned from Bedford, Nova Scotia with Donald Marshall, Jr. you say you arrived back at 9:30 that day?

A. It was around 9:30 in the evening.

30.

Q. In the evening. 9:30 p.m. And you say you dropped off Donald Jr. at his home, did you?

242.

0.

MR. GOULD, Cross-Examination

A. Somewhere around the Reserve. I think I went home myself and he just hopped off the car.

Q. Okay. Did you see him later on that night?

5.

A. Not that evening. The next morning I saw him.

Q. And do you recall whether or not you went to the liquor store with Donald Jr?

A. No.

Q. That evening at approximately 9:30 when you returned from Bedford, Nova Scotia?

10.

A. No, I don't recall.

Q. Are you saying that you didn't?

A. No, I'm not saying I didn't. I just don't remember it.

Q. So to the best of your recollection you came back from Bedford and went straight home. Or to the Micmac area.

15.

A. Yeah, well, I went home, probably got dressed and went out again.

Q. With Donald Jr. or by yourself?

A. By myself.

20.

Q. Are you sure of that?

A. That was my normal routine on a Friday night.

Q. Thank you.

THE COURT: Any re-examination?

MR. EDWARDS: Nothing out of that.

THE COURT: All right, thank you, Sir.

25.

WITNESS WITHDREW

30.

243.

0. STAFF SERGEANT WHEATON called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Sir, you are Staff Sergeant Harry Wheaton and you are a member of the R.C.M.P., are you?

A. I am, Sir.

5. Q. I'm going to stay here, Staff Sergeant Wheaton but I want you to direct your testimony to the jury, please.

A. Yes.

Q. Staff Sergeant Wheaton, how long have you been a member of the R.C.M.P.?

A. 23 years, Sir.

10. Q. And during part of that time you were stationed at Sydney where you were in charge of the General Investigation Section of the Sydney Detachment?

A. Yes, I was, Sir.

Q. And during what years did you hold that particular position?

15. A. 1980 and '81.

Q. Yes.

A. And part of '82 I think.

Q. Part of '82.

A. Yes.

20. Q. Do you recall when you were transferred to your present posting?

A. In June of 1982.

Q. When did you actually move?

A. I don't recall the specific date, it would be in the latter part of June, I believe.

25. Q. Now so you are stationed in Halifax now, is that correct?

A. That is correct, yes.

30. Q. Now Staff Sergeant Wheaton, you were the officer in charge of the re-investigation of what has become known as the Donald Marshall matter, is that correct?

0. 244.

S/S WHEATON, Direct Examination

A. That is correct, yes.

Q. And into the circumstances of the death of Sandy Seale.

A. That is correct, yes, Sir.

5. Q. And you commenced that reinvestigation when?

A. I believe it was the 4th of February, the early part of February in 1982 when I began investigating this matter.

10. Q. And during that reinvestigation I take it you took a number of statements from those you considered principals in the matter?

A. I did, Sir, yes.

Q. And among those were statements from Donald Marshall, Jr.?

A. Yes, Sir.

15. Q. And when did you take the statement from Mr. Marshall?

A. May I refer to notes made . . .

Q. Were they made at the time?

A. At the time and at various times during this investigation.

20. Q. Yes.

THE COURT: Mr. Wintermans?

MR. WINTERMANS: No objection to that.

THE COURT: All right. You may refer to them.

A. Thank you, My Lord.

25. MR. EDWARDS: Sergeant Wheaton, the precise date is unimportant. Can you tell us where and approximately when?

A. Yes. I interviewed Mr. Marshall on two occasions in Dorchester Penitentiary in the Province of New Brunswick.

30. Q. Yes.

245.

0.

S/S WHEATON, Direct Examination

A. In March and in February, the precise dates I'm not sure.

Q. Of 1982.

A. 1982, yes, Sir.

5.

Q. Okay. And as far as the other principals in the matter, from whom did you take statements?

A. I would have taken statements from Mr. Chant, Mr. Pratico . .

Q. That's Maynard Chant?

A. Maynard Chant.

10.

Q. John Pratico?

A. John Pratico.

Q. Patricia Harris?

A. Patricia Harris, Terrence Gushue, various witnesses.

Q. And a number of others.

15.

A. In the park, yes, and probably 15, 20 others.

Q. Who assisted you on the investigation?

A. Corporal James Carroll assisted me.

Q. Did members of any other police departments assist you during the reinvestigation? That is by assist you I mean did they take part in the conduct of the investigation or was it exclusively R.C.M.P.?

20.

A. It was exclusively R.C.M.P., Sir.

Q. Now during the reinvestigation you had occasion to meet the accused, Roy Newman Ebsary?

A. Yes, I did.

25.

Q. And is Mr. Ebsary here today?

A. Yes, he is, Sir, seated at the rear of the court room wearing the brown jacket, cane in his right hand.

Q. The record will show he's indicating the accused, My Lord.

30.

246.

S/S WHEATON, Direct Examination

0. THE COURT: Yes.

MR. EDWARDS: Now when was the last personal contact you had with Mr. Ebsary during 1982, that is either by telephone or face to face meeting?

5. A. The last personal contact I had with Mr. Ebsary was in February, the 23rd of February, 1982.

Q. Okay. Now Staff Sergeant Wheaton, during your reinvestigation you also interviewed Mary Ebsary, the wife of the accused?

A. That is correct, Sir, yes.

Q. Donna Ebsary, the daughter of the accused?

10. A. Yes, Sir.

Q. And Gregory Ebsary, the son of the accused.

A. Yes, Sir.

Q. And as a result of conversations with those people you took possession of certain exhibits, is that correct?

15. A. Yes, I did, Sir.

Q. And would you tell the jury where and under what circumstances you took possession of those exhibits?

20. A. Yes, Sir. On the 3rd of March, 1982 I went to the home of Mrs. Mary Ebsary and also the residence of Mr. Gregory Ebsary and his wife Linda and their children.

Q. Which is where?

25. A. Which is on Mechanic Street here in the City of Sydney, Province of Nova Scotia, County of Cape Breton. After some conversation with Mrs. Ebsary and her son Gregory I accompanied Gregory Ebsary to the basement of the home. I then walked with him over to a beam up over a work bench and observed a fruit basket such as one would buy pears or peaches in, a wooden basket and I observed Mr. Ebsary take it down and in

30.

247.

0. S/S WHEATON, Direct Examination

the basket were a number of knives. This was on the 3rd of March and he turned them over to me and I took possession of them. We went upstairs to the kitchen of the home and Mrs. Ebsary, Mrs. Mary Ebsary was there and I spread the knives, 10 knives out on the kitchen table and I had conversation with Mrs. Ebsary about these knives.

5. Q. Okay. So following that conversation what did you do?

10. A. Following this conversation I took the knives back to our office on Alexandra Street. I locked them up overnight. The next morning I packaged these knives in an envelope together, and I forwarded them to Mr. Richard MacAlpine of our Crime Detection Laboratory in Halifax.

Q. And he would be in the serology section.

A. Yes, he would examine them for blood.

15. Q. Right. Now you forwarded them to Mr. MacAlpine on what date?

A. I forwarded them by registered mail number 2185 to Mr. Richard MacAlpine on the 4th of March, 1982.

Q. And did you get the knives back after that?

20. A. Yes, Sir. I subsequently received the knives on the 27th of March, 1982 by registered mail from Mr. Richard MacAlpine again, and I kept the knives in my possession in my exhibit locker, took them to Halifax with me when I was transferred and on the 1st of December, 1982 I turned them over to the clerk of the court for the Supreme Court of Nova Scotia in Halifax.

25. Q. That would be the Appeal Division.

A. Yes, Sir.

30. Q. I'm going to show you what for our purposes we'll generously call a folder which is marked EXHIBIT 1 and it contains 10 knives and a piece of tape.

248.

0. S/S WHEATON, Direct Examination

A. Yes, Sir.

Q. Would you examine those briefly please?

Well, you examined them prior to coming to court, did you not?

5. A. Yes, I have, Sir.

Q. Yes. And are you satisfied that they are the knives to which you've just referred in your evidence?

A. Yes, I am satisfied. These are the knives. They are not exactly in the condition which I seized them. This particular knife . . .

10. Q. All right, now you're holding up knife #8.

A. Knife #8.

Q. Which is also marked in the Appeal Division Exhibit R4I.

15. A. Yes, Sir. Knife #8 is a homemade knife and - what appears to me to be a homemade knife and when I seized it and forwarded it to the laboratory it had black tape similar to this black tape I have in my hand here now attached to the bottom of the handle here.

Q. You're indicating at the juncture between the plastic handle and the blade of the knife.

20. A. That's correct, similar to what can be seen attached to the top of the handle now. There were two pieces of this black tape attached here as well.

Q. Okay. Thank you very much.

THE COURT: Cross-examine?25. CROSS-EXAMINATIONMR. WINTERMANS: Now when you first observed these knives it was on March the 3rd, 1982 at the home of Mary Ebsary, is that correct?

A. That is correct, Sir, yes.

30. Q. And how were they packaged at that time?

249.

0.

S/S WHEATON, Cross-Examination

A. They were open sitting in this fruit basket, this wooden fruit basket up over a beam.

Q. So they were all together in the same basket.

A. They were in one common container, yes, Sir.

5.

Q. And how did you package them after that, did you send them in that basket to Halifax?

A. No, I did not, Sir. I packaged them in an envelope.

Q. All together?

A. Yes.

10.

Q. All just bunched together.

A. That's correct, Sir.

Q. They weren't individually wrapped or anything.

A. No, Sir.

Q. No more questions.

THE COURT: Re-examination?

15.

MR. EDWARDS: No re-examination.

THE COURT: All right, thank you, Sir.

WITNESS WITHDREW

20.

25.

30.

0. 250.

GREGORY EBSARY called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Your name is Gregory Ebsary, Sir?

A. That's true, yes.

5. Q. And your present address, Mr. Ebsary?

A. 46 Mechanic Street in Sydney.

Q. And you're employed?

A. I'm with Briand's Cab Company.

Q. I'm going to stand over here, Mr. Ebsary and I'd like you to direct your answers to the jury. So your present occupation you say is . .

10. A. Cab driver.

Q. Cab driver. How old are you, Mr. Ebsary?

A. 31.

Q. And you are the son of the accused, Roy Newman Ebsary?

A. I am.

15. Q. And for the record would you point him out please?

A. Over there with the brown sport jacket.

Q. The witness points to the accused, My Lord.

20. THE COURT: Yes. The record will show that he points to the accused.

MR. EDWARDS: Now where - first of all how many comprised your family?

A. There was my sister, myself and my mother and. .

Q. Your sister is Donna?

25. A. Donna, yes. And my mother Mary and Roy.

That's all that resided at Argyle Street.

Q. What was the exact address on Argyle Street?

A. 126 Rear Argyle.

Q. And that's in Sydney, County of Cape Breton, Province of Nova Scotia.

30. A. Yes.