

0. COURT OPENED (09:35 a.m.) January 14, 1985

JURY POLLED. All present.

MR. WINTERMANS: My Lord, I have a request that I'd like to make. Perhaps it should be in the absence of the jury. It's in regard to Mr. Marshall and you will recall that the . . .

5. MR. EDWARDS: Perhaps it should be in the absence of the jury, My Lord.

THE COURT: All right.

MR. EDWARDS: Since we've had no notice of what it's going to be.

JURY RETIRED (9:36)

10. MR. WINTERMANS: My Lord, you will recall that at approximate 4:30 the cross-examination ended and my learned friend requested that the matter be set over until this morning for redirect. I have a few questions that I would like to ask Mr. Marshall, I'd like Your Lordship to allow me to continue very

15. briefly, I might add, no more than five or 10 minutes I assure you. A few questions that arise primarily as a result of what I would suggest is a major change in Mr. Marshall's testimony and I most humbly request Your Lordship for the sake of justice allow me a very

20. brief cross-examination.

THE COURT: Mr. Edwards, do you have any comment on this whatsoever?

MR. EDWARDS: Well, I wonder if since technically speaking he's finished his cross-examination, if we could have some notice of what the questions are going to be.

25.

THE COURT: Well, the only thing, I don't want to make it more complicated. You have not started your re-examination and had he come in this morning without the formality of all excusing the jury and saying there's

30. a few more questions I would like to ask, I would have

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0. DISCUSSION

granted it to him, so . .

MR. EDWARDS: Um-hmm.

THE COURT: So I see no reason why I can't grant you the opportunity to ask a few questions.

5. MR. WINTERMANS: I can assure Your Lordship that it won't take more than five or 10 minutes at the outside.

THE COURT: That's all right. All right, we'll bring back the jury.

JURY RETURNS. (9:38)

10. JURY POLLED. All present.

THE COURT: All right. Mr. Foreman, members of the jury, we're calling Mr. Marshall back now. Would you bring Mr. Marshall back in?

MR. MARSHALL, JR., sworn, testified:

15. MR. WINTERMANS: Mr. Marshall, do you agree that the cut that you had on your arm that evening was not bleeding at the time that you went to the house of Brian Doucette in order to call for help for Mr. Seale?

A. Yes, it was bleeding.

Q. Is that true?

A. It was bleeding.

20. Q. It was bleeding?

A. Yes.

Q. And would you also agree or disagree with the proposition that there was no blood, no visible blood when you arrived at the hospital?

25. A. There was blood.

Q. There was blood?

A. Yes.

Q. You received 10 stitches, is that right?

A. Yes.

30. Q. Would you agree that the wound would be fairly described as being superficial or minor?

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That you received that night?

A. Superficial.

Q. Superficial?

A. Yeah.

5. Q. Did you remove those stitches yourself when you were in jail before the doctor came back to do it?

A. I had them on for about - it was 16 days I had 'em on and - let me explain, okay? When I showered most of them were coming out so they just fell out anyway.

10. Q. Would you speak up a little bit please? I'm having difficulty hearing you.

A. I said when I showered through the two weeks they j t came out on their own.

15. Q. I see. You're not saying that you pulled out the stitches so that there would be a scar.

A. Most of them were out anyway.

Q. Your answer to that is no. Did you at that time have a tattoo on the same arm which said I hate pigs or I hate cops rather? I hate cops?

A. It has nothing to do with it.

20. Q. Did you have that at that time?

A. It has nothing to do with it.

THE COURT: You have to answer the question, Mr. Marshall.

A. Yes, I had it.

25. MR. WINTERMANS: Would you show the arm again, the same arm?

A. Where the cut?

Q. Yes.

A. Okay. It was I hate cops, not pigs.

30. Q. I hate cops. Now could we see the other side of your arm, please?

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Show the jury the other side of your arm.

Is that where the tattoo was?

A. Yes.

5.

Q. Now you testified that you went to the house I presume of Mr. Doucette to call for help, is that right?

A. Yes.

Q. Did you ask for an ambulance?

A. I asked for an ambulance and the police.

Q. You asked for the police, did you?

10.

A. Yes.

Q. And who were you with when you did that?

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

Q. You were with another person, is that right?

A. I don't know whether it was Maynard Chant or somebody else, I don't know.

15.

Q. Did you ever tell that other person not to call the police?

A. No.

Q. No? Did you ever try to get money out of people in the park and use violence against those people for that purpose before this incident?

20.

A. No.

Q. No?

A. No.

THE COURT: I'm sorry, I can't hear your answers.

MR. WINTERMANS: He said no.

25.

You talked about how you were in a gang of Indians you described as a bad group that you hung around with before May 28th, 1971, is that correct?

A. I didn't say a bunch of bad Indians.

Q. You said a gang.

30.

A. Yes, I said a gang.

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0. Q. And that you were in trouble. You didn't say a bad young group?
- A. I said we were all bad, groups.
- Q. Yeah. Did this group or gang ever beat people up in or around the park, Wentworth Park before this
5. night?
- A. Other gangs.
- Q. Other gangs? Were there other gangs of Indians?
- A. No, other gangs of other people.
- Q. Were there other gangs of Indians?
10. A. No, just one.
- Q. Just one?
- A. Yes.
- Q. Now if I could just recap what I thought you said last time, yesterday I should say or Friday, you testified on Friday that although you admit giving a
15. statement to the R.C.M.P. in 1982 stating that you tried to rob Ebsary and MacNeil, and that in 1982 and 1983 you testified in court under oath that that statement indicating that you were attempting a robbery was true, you are now saying that you weren't trying to rob anyone, is that correct?
20. A. That's correct.
- Q. Or roll anybody.
- A. That's right.
- Q. Or use any violence against MacNeil or Ebsary.
- A. That's right.
25. Q. That's right? Okay. Now you received compensation from the Province of Nova Scotia?
- A. Yes.
- Q. For \$270,000.00?
- A. \$170,000.
30. Q. \$170,000. And how much did your lawyers get then?

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A. \$97.

Q. I see. The total amount was \$270 and your lawyers got almost a hundred thousand and you got a little more than \$170,000, is that right?

5.

A. Yes.

Q. And that was after you gave that statement to the R.C.M.P.?

A. Yes.

Q. And before now, or before Friday, right?

A. Pardon me?

10.

Q. That was after you gave the statement to the R.C.M.P. in 1982 and after you testified in the Appeal Court and before this trial that we're having now, is that correct? That you received that compensation?

A. That has nothing to do with this trial.

15.

Q. Just answer yes or no, that's all.

A. Tell me what you're asking.

Q. Did you receive the \$270,000 compensation before this trial or before Friday, when you testified?

20.

A. Yes.

Q. And it was after the 1982 statement that you gave the R.C.M.P., right?

A. Yes.

Q. And what about this priest in Montreal who raised this reportedly some \$50,000 compensation for you besides that \$270,000?

25.

A. Yes.

Q. And you received that as well?

A. Yes.

30.

Q. And that was also in the same general time frame?

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A. Yes.

Q. Between 1982 and 1985?

A. Yes.

5. Q. And you would agree, would you not, that you have become famous over the past three year, as the man who spent 11 years in jail for a murder he didn't commit.

A. I didn't say I was famous.

10. Q. Would you agree that you have been reported nationally and that your name is well known and that the phrase that most often accompanies the mention of your name is 'the man who spent 11 years in jail for a murder he didn't commit'?

A. Yes, and I'm tired of it too.

15. Q. And you were out of jail and acquitted by the Appeal Court before any of the testimony which you gave in trails in relation to Mr. Ebsary, right? You were acquitted by the Appeal Court in 1982 or in 1983, right?

A. Yes.

Q. And you were out of jail.

A. Yes.

20. Q. And all of that occurred before the first time you ever testified against Mr. Ebsary.

A. Yes.

25. Q. Were you 1) out of jail and 2) acquitted and found not guilty of the murder of Sandy Seale, both before any testimony which you gave against Roy Newman Ebsary under oath in court? You were, don't you agree?

A. I don't know.

Q. You're not denying it.

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

30. Q. And you have had an opportunity to read and examine transcripts of previous testimony in relation to the Seale death? True?

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A. My own.

Q. Your own? You had a transcript, did you not, of your testimony last time that you went to court?

A. Yes.

5.

Q. That you studied before you came on the witness stand.

A. No, I didn't study it.

Q. You have a lawyer and you have spent a lot of money on lawyers, have you not, in the last few years?

10.

A. Yes.

Q. You said \$97,000, right?

A. Yes.

Q. Those lawyers have advised you, have they not?

A. Advised me on what? I only had one lawyer.

Q. You had another one before.

15.

MR. EDWARDS: Objection, My Lord. Obviously he had lawyers, it was for legal advice and I submit that no more than that can be obtained from the witness. What went on between he and his lawyer surely is privileged information.

20.

THE COURT: I would agree with that.

MR. WINTERMANS: And I suggest to you, Mr. Marshall, that now that you've accomplished the feat of getting out of penitentiary, satisfying everyone that you didn't actually kill Sandy Seale, you received hundreds of thousands of dollars compensation, your name is a household word in this country, that now you're again changing your evidence for the purpose of making yourself appear like a saint, like you completely innocent at the time.

25.

A. No.

Q. No?

30.

A. No.

Q. No more questions. Thank you very much, My Lord.



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THE COURT: Re-examination?

RE-EXAMINATION

5. MR. EDWARDS: Donald, you've already testified that you were charged with murder, of course, in 1971 and faced trial. Did you testify in your own behalf in 1971?

A. Yes.

Q. Would you tell us what you told the court in 1971? What did you tell the court happened after you and Sandy got to the footbridge in Wentworth Park?

10. A. We were called up on Crescent Street by two men, asking for a cigarette.

Q. Yes.

A. And we . .

15. MR. WINTERMANS: I will object at this point. I wonder if it's proper for the Crown to be asking what exactly it was that he said in 1971 and having him recount today what it was that he said. I suppose I could always refer him to any inconsistencies, of his account of what he says he said back then. I just bring that to Your Lordship's attention, that's all.

20. THE COURT: I don't believe you did, though. You didn't ask him anything about 1971 testimony, did you?

MR. WINTERMANS: I didn't, so therefore how can . .

THE COURT: Well, that's the problem.

25. MR. WINTERMANS: That Mr. Edwards said anything . .

MR. EDWARDS: May I address that, My Lord?

THE COURT: Yes.

30. MR. EDWARDS: My Lord, the whole drift of my learned friend's cross-examination, and in particular this point is emphasized by the last question he asked this morning, is that the testimony that the witness gave

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on direct examination on Friday, was really a recent concoction harking to his words, aren't you just saying this now to make yourself appear as a saint? Now my understanding of the law is that when counsel on cross-examination challenges a witness and by imputation and he directly says it, he's alleging that the witness's testimony is recent concoction, that this is a new story he's telling now.

THE COURT: I think the jury better go out for a few minutes.

JURY RETIRED (09:50 a.m.)

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MR. EDWARDS: As I say when a witness is cross-examined as Mr. Marshall was, then I submit that it is entirely appropriate for the Crown in this case to prove that the witness made at another time a statement which was consistent with his direct testimony. McWilliams cites ample authority for that. I refer Your Lordship to page 355. I'll just read the first paragraph because it states my point exactly:

15.

"If on cross-examination a witness's account of some incident or set of facts is challenged of being of recent invention or concoction, this raises an issue which the party calling the witness is permitted to rebut by showing that at some earlier time the witness made an earlier statement to the same effect."

20.

And that is precisely what I'm attempting to do, by referring the witness to his 1971 testimony, to demonstrate that his testimony on direct examination on Friday was on all fours with the 1971 testimony. I refer Your Lordship also to Criminal Pleadings and Practice in Canada and this is item 15.77 at page 384.

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THE COURT: What's the name of the book again?

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MR. EDWARDS: Hewischuk. He's now Mr. Justice

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Eugene Hewischuk, Criminal Pleadings and Practice in  
Canada, and this is a relatively new volume, it's a  
first edition.

THE COURT: Page?

5. MR. EDWARDS: And it's page 384, item 15.77,  
where he says:

10. "Rebutting allegation of recent  
fabrication as an exception to  
the rule against leaving confirming  
self-serving evidence, a witness's  
prior consistent statement is  
admissible to rebut impeachment by  
way of cross-examination or other-  
wise suggesting that the witness's  
testimony is false because of  
recent fabrication."

15. As with McWilliams he cites a number of case authority.  
He goes on to say that it seems in exceptional circumstances  
a consistent statement may be tendered in examination in  
chief, in justifiable anticipation of an attack on the  
basis of recent fabrication.

THE COURT: You didn't . . .

MR. EDWARDS: No, I didn't - not for that.

20. THE COURT: What's the difference between recent  
fabrication and merely proving that prior inconsistent  
statements were made under oath?

MR. EDWARDS: I'm sorry, My Lord?

25. THE COURT: What's the difference between the basis  
of recent fabrication and cross-examination concerning  
previous inconsistent statements, sworn statements?  
How do you get ot the recent fabrication?

30. MR. EDWARDS: Well, the recent fabrication, I mean  
as I stated he stressed the point this morning. He said  
'you're now saying' or you're now trying to portray yourself  
as a saint' so that I submit is a very blunt assertion that  
what he's saying, he's just making it up. I would submit

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that it'd be grossly unfair to the witness and would be giving the jury a gross distortion of the truth of the matter if they were not made aware of the fact that the witness testified to the exact same effect in 1971, so that is the basis upon which the Crown seeks to elicit from the witness in summary form what he said in 1971 and I was going to center on from where he and Seale left the footbridge to when he ran away from Ebsary and MacNeil after having been stabbed in the left arm.

MR. WINTERMANS: My Lord, can I reply?

THE COURT: Yes.

10. MR. WINTERMANS: I don't recall ever having suggested to Mr. Marshall that he just recently concocted his story. I've been fully aware of the fact that Donald Marshall's testimony today very closely resembles the testimony that he made in 1971. However, I submit that the theory of the defence is that he lied then, he told a different lie or perhaps the truth later, told the truth to the R.C.M.P., told more lies after that and now he's back to earlier testimony and he of course has had the benefit of counsel and had the opportunity to examine these transcripts and when you think about it, for a witness of Donald Marshall's credibility record, the only possible way that he could come in here would be to - and have any chance at all of being believed is for him to go back to that 1971 testimony. Which he did. But I submit it was lies then and it's still lies now, and I've never suggested that he concocted it or that he ever said anything different from what he said in 1971. I think that's the most important part. He didn't say anything different today than he did in 1971. Therefore I don't think that my learned friend ought to - however, I'm concerned about what the jury already heard from the beginning of Mr. Edwards' questioning.

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MR. EDWARDS: My Lord, I can make one brief response to that. Surely what my learned friend just argued is a matter for argument before the jury at the end of the case. There's no prejudice involved here which isn't proper matter of argument at the end of the case to the jury.

MR. WINTERMANS: All I can say, My Lord, is I never once mentioned the 1971 testimony in cross-examination. To the best of my recollection.

THE COURT: All right, I understand what you say. I'll have to adjourn for a few minutes.

10. COURT RECESSED (10:01 a.m.)

COURT RESUMED (11:00 a.m.)

THE COURT: All right. I've considered the objection that has been raised by Defence counsel as to this line of questioning by the Crown and I considered the law on the whole matter. I'm unable to see how alleged prior inconsistent statements alone give rise to the recent invention doctrine. The witness gave his evidence here at this trial and was cross-examined on previous inconsistent sworn statements. While it's for the jury to determine the facts, there are clearly apparent inconsistencies. This is a witness and not the accused and his credibility will have to be determined by the jury. It would not be just to now permit on re-examination an opportunity for the witness to attempt to show an earlier statement of whatever tenor in area not raised on cross-examination by any questioning relating to that trial and not directly or impliedly raising the doctrine of recent innovation. Certainly there's been no surprise element in the testimony here and therefore no advantage can be taken of surprise. To allow this line of questioning would open the door to the introduction of otherwise inadmissible confirming or self-serving evidence. It must be remembered that this witness

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is not on trial. He does not stand as an accused. Crown  
counsel has had full knowledge of what his testimony  
would be and of the fact that there was a distinct  
possibility of his being confronted with prior incon-  
5. sistent sworn statements. As I've said, to allow this  
line of questioning would be to unfairly permit the  
Crown to attempt to bolster the direct testimony of a  
witness by leading self-serving evidence which is  
otherwise inadmissible. Since I've already indicated  
the doctrine of recent invention has not been raised,  
10. since this area has not been covered in cross-  
examination by counsel for the Defence, questioning in  
this area will not be permitted. Counsel, you will re-  
examine as to the matters raised on cross-examination.

MR. WINTERMANS: My Lord, may I interrupt the  
court? I'm concerned as to the effect of my learned  
15. friend's opening questions that he made. My  
recollection is a bit shaky on exactly what it was that  
he said, but I'm concerned that he may have indicated to  
the jury the proposition that Donald Marshall testified  
precisely the same today as he testified in 1971, which  
concerns me very greatly because I found a lengthy  
20. number of inconsistencies between his 1971 and present  
testimony and I'm very, very concerned that it would  
appear that the theory of the Crown seems to have  
changed between last time and this time. The Crown is  
now attempting to convince the jury that Donald Marshall  
25. is telling the truth today whereas in previous trials in  
relation to Mr. Ebsary, Mr. Edwards was asking the jury  
to accept the proposition that there was a robbery and  
now he appears to be changing that. Perhaps it's a  
reaction to the Appeal Court's decision indicating what  
30. the law is and my concern is that I would ask leave of the

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Court that the tape be played back of the first couple of minutes of my learned friend's redirect so that I might be able to address the question.

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THE COURT: All right. Play it back. Can you play it back?

(Tape played back for Mr. Wintermans).

JURY RETURNED (11:15)

JURY POLLED. All present.

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THE COURT: All right, Mr. Foreman and members of the jury, I'm going to just give you a short instruction now and that short instruction is that you are to disregard and put out of your minds anything that Mr. Edwards has said, any questions he's asked or any responses or partial responses that were given so we'll start the re-examination again and anything that you may have heard is not evidence, not legally admissible evidence and therefore you can disregard it. So would you start your re-examination again, Mr. Edwards?

15.

MR. EDWARDS: Thank you, My Lord. Mr. Marshall, after you were released from the penitentiary in 1982 what month was it?

20.

A. It was March.

Q. March of '82. You first testified as my learned friend indicated in his cross-examination in Halifax before the Appeal Division of the Supreme Court, is that correct?

25.

A. Yes.

Q. And that would have been on December 1st and 2nd of 1982.

A. I don't know the dates of the courts.

Q. It was in December of '82.

30.

A. Yes.

Q. Now during your direct examination do you

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recall your lawyer at that time was Mr. Aaronson?

A. Yes.

5. Q. Now during your questioning by him, what did you tell Mr. Aaronson about the events in the park from the time you and Sandy Seale got on the footbridge?

A. I told him . .

10. MR. WINTERMANS: Again I want to object. My learned friend, you know, he can't ask this witness to give his account today of what he thinks he said at some previous time. I put to him exact quotes and asked him to comment on them, and now Mr. Edwards is trying to . .

THE COURT: Okay, you've own your point.

MR. EDWARDS: I'm prepared to put the exact passages to him, My Lord.

THE COURT: I think if you're going to do it, you'll have to put exact passages to him.

15. MR. EDWARDS: All right. I'm referring now, Donald, to page 13 of the 1982 transcript.

THE COURT: Page what?

MR. EDWARDS: Page 13. Starting at line 20, or 19.

Q. What happened concerning Patricia Harris and Terry Gushue?

20. MR. WINTERMANS: My Lord, I object. I never asked the witness to comment on . .

THE COURT: Just a minute. Just a minute. All right. Take the jury out.

JURY RETIRED (11:16 a.m.)

25. THE COURT: All right. Now, sit down. Mr. Edwards, what do you propose to ask on re-examination?

MR. EDWARDS: My Lord, the position of the Crown is . .

THE COURT: I want to know what you're going to ask. Then tell me your position. What are you going to get into?

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MR. EDWARDS: Well, I'm going to get into, I'm going to establish that in 1982 on which he was cross-examined, he said that after he left Harris and Gushue he joined up with Sandy Seale and the other two and  
5. continued from there. I can read Your Lordship the passage now, to show that his testimony there on direct was the same as it was on direct on Friday. Like as it stands now, my learned friend has selected passages against the accused from that testimony. I submit that it is proper on re-examination to put the matter into  
10. perspective to show other parts of his testimony which will counterbalance the points that my learned friend has made.

MR. WINTERMANS: My Lord . .

THE COURT: Just a minute, now. Just a minute. So it's your intention then to go through all of these  
15. harings and trials and matters and select portions where he said something that was more consistent with what he said today or yesterday, or Friday?

MR. EDWARDS: I'm going to focus on the time between he and Seale meeting on the footbridge and the time that Marshall runs away after the stabbing, and  
20. I've selected for example in 1982 page 13, line 35, at page 15, lines 5 to 10 where he recounted in 1982 about he and Seale having had the conversation about Ebsary and MacNeil being priests and the discussion about any bootleggers or women in the park. Page 16, line 28, the  
25. older, shorter fellow did the stabbing. Page 18, line 25, he went to hit me in the stomach and I blocked him with my left hand.

THE COURT: He said all that already. That's what he said in his testimony. Just a minute, Mr. Wintermans,  
30. sit down and wait a minute. You'll get your turn.

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MR. EDWARDS: He said all that on direct, then he was challenged on some of those points or all of them on his cross-examination, and so what I'm saying is that surely when those contradictions were raised on cross-examination regarding his testimony in 1982, as it stands now the jury is left with the impression that he gave a whole different unrelated story in 1982 which is clearly not the case.

10. THE COURT: I don't know if that's what they're left with. What they're left with is that he made certain statements here Friday and was confronted with certain prior inconsistent statements that he made, and that's the extent of it.

MR. EDWARDS: That's the extent of it, but those prior inconsistent statements were first raised on cross-examination.

15. THE COURT: It doesn't matter, does it? They're sworn statements given under oath.

MR. EDWARDS: But surely, I mean that's the difference between this and the 1971 statement.

20. THE COURT: His answer could have been when confronted with it, that's what I said on cross-examination but on direct examination I said something different, but the witness didn't say that.

25. MR. EDWARDS: No, the witness didn't say that, but you know, how does - if I can pose this, how does that alter the rule on re-examination? I refer Your Lordship to McWilliams, page 1074 and I submit that that section on re-examination in McWilliams would seem to indicate that what the Crown is seeking to do here is completely proper. The inconsistent testimony was raised first on cross-examination. And you know, the principles of re-examination generally along with  
30. the portion that I cited in relation to the 1971 testimony,

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surely those coupled together give the Crown the right at this stage to show that the accused has had some consistency at least in the testimony he's given in each of the hearings that my learned friend touched on in his cross-examination.

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15.

THE COURT: Mr. Edwards, I don't think that you should be permitted to attempt to bolster the credibility of this witness by putting to him statements which he may have made in any of these previous matters that would show some consistency with the statement now. I think that the most that I would ever permit you on re-examination is that you could say you made this statement today and you made that statement under oath a year ago or two years ago or at some particular time, do you have any explanation for that? And that's the most that I would permit. I think that's permissible, to give him an opportunity to explain, but I don't think that you can introduce other portions where he may have said something that is consistent in order to show that the story he's telling today is a true story.

20.

MR. WINTERMANS: May I respond to that?

THE COURT: Well, there's no response. I've told him - you don't have to respond. You should be satisfied now. I'm not going to permit him to ask that question.

25.

MR. WINTERMANS: But that's not - now I want to discuss the question what you just said that he could do. I already asked him last time to comment on the discrepancy. Is my learned friend now allowed to get up and ask the same question, exactly the same question that he already asked, that he already . .

30.

THE COURT: If there is any statement, any particular statement that counsel feels for some reason

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on re-examination that he should ask him some questions even to the tenor that I've asked, I'll permit it, but it doesn't necessarily mean that he's going to go and take each one and ask him the same questions. I won't permit that.

5. MR. WINTERMANS: My Lord, I would also ask that the record show that the witness, Donald Marshall, Jr., has been sitting here throughout this entire discussion in the absence of the jury.

10. MR. EDWARDS: The record will also show that you made no objection to that fact.

THE COURT: All right. Now I'm going to restrict you very severely on your re-examination because I'm not going to open the door for you to go into each particular statement given at the time. I think on re-examination limit yourself to the matters that are raised on cross-examination which are proper matters for re-examination and I think that the caution that counsel has indicated, that he's already asked him to explain the statements and given him an opportunity to do so. And the answers are there.

15. MR. EDWARDS: Fine, My Lord. I understand your ruling and I will certainly abide by it. That being the case, there is but one question that I wish to put to the witness and perhaps we can avoid another shuffle. I'll tell you what it is now and perhaps if there's any objection you can rule on it. During his testimony on Friday, the witness said under cross-examination: "I was not going to rob them. I was almost forced to say that. That's what it boiled down to." Now my recollection is there was no explanation of that. I had two points I wanted to query him on that: a) when he says that, what is he referring to; and b) what did he mean by that

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0. MR. MARSHALL, JR., Redirect Examination  
statement. Allow him to explain that.

THE COURT: All right. I'll permit those questions.

All right, we'll bring the jury back.

5. JURY RETURNED (11:29 a.m.)

JURY POLLED. All present.

THE COURT: All right, Mr. Edwards?

MR. EDWARDS: Thank you, My Lord.

10. Q. Mr. Marshall, during your cross-examination on Friday in response to my learned friend, you said "I was not going to rob them, I was almost forced to say that. That's what it boiled down to." Mr. Marshall, what were you referring to when you said that?

A. Would you ask it again?

15. Q. Sure. The statement that you made: "I was not going to rob them. I was almost forced to say that. That's what it boiled down to." What were you referring to when you said that?

A. I was referring to - the reason I said that and other things, I was told one time . .

20. Q. Well, you can't tell us what you were told but you can tell us - put it this way. Let me ask you, what did you mean when you said that? "I was not going to rob them, I was almost forced to say that." What did you mean by that?

25. A. I meant that I knew beforehand what the accused told people and other information I got that that's the side of his story, and I said the only way I'm going to have to challenge him is to agree what he says.

Q. That there was a robbery.

30. A. Yes. That's what he said. And that's why I said it.

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MR. MARSHALL, JR., Redirect Examination

Q. When did you first say that, that there was a robbery?

A. In - when I was visited by the R.C.M.P. in 1981. When I was released out of prison.

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Q. Pardon me?

A. When I gave the statement to the R.C.M.P. in '81.

Q. And what statement are you referring to? Where was that statement given?

A. In Dorchester Penitentiary.

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Q. That's be the March, 1982 statement?

A. Yes.

Q. No further questions.

THE COURT: All right. You're excused, Mr. Marshall.

WITNESS RETIRED. (11:34 a.m.)

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MR. EDWARDS: My Lord, I'm very sorry but there is a procedural matter that must be discussed in the absence of the jury before I call the next witness.

THE COURT: All right.

JURY RETIRED (11:35 a.m.)

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5.           MR. EDWARDS: My Lord, the Crown moves to add the name of Patricia Harris to the indictment. My learned friend has indicated that he is opposed to that addition. For the record I would state that it is of course now Monday morning, January 14th. On Friday, January the 11th before court at 9 a.m. I gave Mr. Wintermans notice that I intended to make this motion and that I intended to call Miss Harris this morning. I also told him that any statements or testimony that she has previously given are available and that if he did not have copies I would provide him with copies. I state that because as I understand the law the addition of a name to the indictment is discretionary and one of the prime factors that a judge should weigh when considering such a motion is whether or not the accused or his counsel have been taken by surprise and have been put in an unfair position. I submit that with the weekend intervening, the notice that was given, the fact that Miss Harris gave testimony before the Appeal Division in 1982, and my learned friend has been referring in his cross-examination of Donald Marshall to that transcript so I assume he has it, and the fact that she's given three previous written statements, all of which were available to my learned friend, that my learned friend cannot argue surprise and therefore the motion should be granted.

15.           THE COURT: Is there a section under the Code involving . . .

20.           MR. WINTERMANS: Not that I know of, My Lord.

25.           THE COURT: Any references? Where's your reference?

30.           MR. EDWARDS: All I can say is that it has arisen from time to time in previous Supreme Court trials in

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this court room and the test given at those times has been exactly as I gave to Your Lordship.

THE COURT: McWilliams?

5. MR. EDWARDS: I apologize for not having a reference available, My Lord, but this is the first time that the test has ever been questioned. To my knowledge.

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

MR. WINTERMANS: What I have to say, My Lord . .

10. THE COURT: Try to make as succinct . .

MR. WINTERMANS: First of all, My Lord, I would refer to the letter which I received, which you also received, well, it was a letter to you from Mr. Edwards dated December 21st, 1984: "Re Roy Newman Ebsary; Enclosed please find a copy of the summary for the trial judge regarding the above which is set for trial 15. January, '85 session of the Supreme Court." The copy which I got is the summary for trial judge and I'm sure that Your Lordship must've examined that and basically the gist of the case there is that it would indicate that James MacNeil would be the primary witness for the Crown 20. and the theory that there was in fact a robbery taking place here.

MR. EDWARDS: What does that have to do with it, Mr. Wintermans?

MR. WINTERMANS: Well, I'm getting to that.

25. THE COURT: Try and get there quickly.

MR. WINTERMANS: That's what I might add, December 21st the letter was dated, which was right before Christmas and the trial is the first trial on in the January term, so the question whether I've been taken by surprise, I would indicate that during the past week 30. or the first few days of this trial, my learned friend



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approached me requesting whether I would agree to certain evidence being avoided like continuity of exhibits and like the plans of the park and things like that and I indicated to him that we were not agreeing to anything this time with the exception that Leo Mroz is dead, if the Crown would agree that Dr. Aktar is out of the country. I received instructions from my client. A psychiatrist told me that Roy Ebsary is fit to stand trial and therefore if he tells me not to agree to anything then I have to abide by that, whether Mr. Edwards likes it or not.

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THE COURT: Well, you've established you haven't agreed to anything. Now take it from there.

MR. WINTERMANS: I'd like to say, My Lord, that Mr. Edwards has been extremely difficult to get along with since this trial started. He has insulted me in court not on the record perhaps.

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THE COURT: Well, I don't know . . .

MR. WINTERMANS: But . . .

THE COURT: Mr. Wintermans, I don't know whether I'm interested in . . .

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MR. WINTERMANS: It's not . . .

THE COURT: Just a minute now. When I'm talking you be quiet. Now I don't know whether I'm interested in your ongoing relationship with Mr. Edwards and I don't know how long you two have been involved in this particular trial or other trials. What I'm concerned with is why are you objecting, give me your argument as to why you do not wish to have this person added to the indictment. That's all I'm interested in at this point.

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MR. WINTERMANS: Because Mr. Edwards never indicated to me that the theory of the Crown is different this time than it was in all previous trials. The theory has always

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been that there was a robbery and the question has been whether or not Mr. Ebsary stabbed Sandy Seale in self-defence given that it was a robbery. Now Mr. Edwards has never yet not to this day told me that he has a different theory. It was only by little innuendoes like the other day before court when he said I might not be calling James MacNeil, Donna Ebsary or Mary Ebsary. I may be calling one or two but I might not be calling one or two or none. So what is that supposed to tell me? I'm not quite sure at that point. And then he said I may be asking to add Patricia Harris as a witness without giving any reason. Then it wasn't until Friday afternoon when Donald Marshall began his testimony that it became apparent to me that when Mr. Edwards appeared to have been suggesting, without telling me, I might add, was that he was changing the theory of the Crown. Now last time he stood before a jury and told them to believe James MacNeil and he cross-examined Donald Marshall himself and he asked the jury to believe as fact that James MacNeil was telling the truth and that there was a robbery but that Mr. Ebsary shouldn't have gone so far. Now he appears to be coming before another jury and from what I have heard so far from what's happened in this case, it's becoming apparent to me that he's now going to stand up and tell a new jury not to believe James MacNeil and to believe Donald Marshall, and he never gave me any notice of this. Now it's been a year since the last trial and surely if Mr. Edwards had a plan like that, of that magnitude, that he should've given me notice. Now over the weekend I've had to find all kinds of witnesses, trying to find witnesses who can prove Donald Marshall a liar and I've had some success, I might add.

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THE COURT: Well, I'm not interested in . .

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on between Mr. Edwards and myself.

THE COURT: Try not to be too flowery in your description of what's going on between you. The duty of Crown Counsel is pretty clear. To present the evidence. Coldly, impartially and fairly.

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MR. WINTERMANS: That's what I always thought, My Lord.

MR. EDWARDS: That's what the Crown is seeking to do.

THE COURT: There's no problem about that. Is there anything in the Code at all?

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MR. EDWARDS: Not that I'm aware of, My Lord.

THE COURT: Why so late in the game, Mr. Edwards, that you want to call another witness? This story has gone on for 13 years now and all the participants have been known and all of them, sure, you have statements from everybody two, three and four times, some consistent and some not consistent. Why would you wait this late?

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MR. EDWARDS: Well, My Lord, I guess the simple answer to that is that after the trial began my impressions, my thinking on the case changed. Patricia Harris really has nothing to do, I mean if Patricia Harris is called or if she's not called, that has nothing to do with whether or not the theory of the Crown will be that there was or was not a robbery. The fact is that she was there that night. Donald Marshall mentioned her in his evidence and it seems to me that . . .

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THE COURT: But Donald Marshall mentioned her in his evidence at least four times, or three times before.

MR. EDWARDS: That is correct, My Lord. See, the difficulty from the Crown point of view with this case from its inception has been the difficulty, or the

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impossibility of reconciling the story of Donald Marshall Jr. with that of James MacNeil and that's why . .

THE COURT: That's why we have a jury.

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MR. EDWARDS: That's right. But at the same time it is incumbent upon the Crown to say what witnesses or to decide what witnesses we're going to call and when I saw - immediately when I saw that it was likely I would not be calling James MacNeil or Mary Ebsary or possibly Donna Ebsary, I immediately, Friday morning so that my learned friend would have the opportunity to bone up on their evidence and decide whether he was going to call them or not, I told him that Friday morning before court.

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THE COURT: Why would you not call James MacNeil? He's an inherent party to all of the things that went on and he has given testimony. Surely it would be your duty to call him.

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MR. EDWARDS: I submit not. I submit that the duty of the Crown is to present the evidence, I mean the Crown's role is ambiguous. On the one hand as you've told the jury yourself, we are engaged in the adversarial process.

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THE COURT: Yes, but the Crown . .

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MR. EDWARDS: On the other hand, it's the duty of the Crown to call all credible evidence. Now on Thursday night, without getting into the details, I had a discussion which told me that I preferred the evidence of Donald Marshall, Jr. to that of James MacNeil so I had to make a decision at that point about who was most credible in my view and at that point I decided I would go with the evidence of Donald Marshall, Jr. and that I would give the defence notice that I might not call James MacNeil so that he can make what decisions he had to make.

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THE COURT: I would say to you this. This trial has - not this trial, this particular matter has reached some rather sensational proportions.

MR. EDWARDS: No question about that, My Lord.

5.           THE COURT: It has aspects that have nationwide and maybe internationally publicized. You have had several trials.

MR. EDWARDS: This is my 5th time through.

THE COURT: But your third trial with Mr. Ebsary.

MR. EDWARDS: Yes.

10.          THE COURT: And you have called a number of witnesses on the previous two trials.

MR. EDWARDS: And I might say different witnesses on each of the two trials.

THE COURT: But I think that you called Donald Marshall and you called James MacNeil.

15.          MR. EDWARDS: That's correct, My Lord.20.          THE COURT: Certainly as two of them. I think in view of the nature of this trial and in view of the apparent public knowledge that everybody has of the thing, that it is incumbent upon you this time to produce at least the same witnesses that you produced before, particularly Mr. MacNeil. And I'm - I don't want to get into - I've never gotten into this aspect of the case before of directing the Crown, but I think it is incumbent upon you by virtue of this case, in order to give the accused a fair trial that it is incumbent upon you to at least call MacNeil. Now there  
25.          may be others that I'm not too aware of but I think the duty of the Crown is to present the evidence fairly and impartially, it's not a matter of winning or losing as far as the Crown is concerned. The Crown presents what would be in their view credible testimony to the court.  
30.          Because a witness' testimony may be different from

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another and the Crown is aware of it, the Crown has to make counsel for the Defence aware of that and generally has a duty to call those witnesses. There may be certain exceptions and certain times when that's not done and the obvious factor is that the Defence would call them, but this particular trial I think has now reached the proportion where it is different and I think it's incumbent upon you to stop playing any games with Mr. Wintermans and Mr. Wintermans to stop playing any games with you. There is an accused on trial. I think there is evidence that has been published in every newspaper and magazine almost in the country and that the Crown should produce the evidence. If it's conflicting, then it's conflicting but I think the demands of a fair trial would call that and I think that it is incumbent upon you in this particular trial, and I'll run the risk of being wrong, but I think it's incumbent upon you to produce those witnesses and not give notices back and forth. As far as Patricia Harris is concerned, I think that you have had years of knowing what Patricia Harris was going to say and you could've had her on the indictment and you didn't. Whether she testified before I don't know but I think that I'm not going to grant you now leave to add her to the indictment but I'm cautioning you that it is incumbent upon you in my view in this trial in the interests of justice, that witnesses be produced even if the evidence is contradictory, so that the jury can hear that evidence and decide. Now it's plainly obvious that the witness that you have put on has told a story and that story differs in many respects from things that he has said before and his credibility is certainly suspect. The jury may find that he has no credibility. If he has no credibility then the case falls, I would think but in

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these particular circumstances, because of the notoriety of the case, because I want to see that Mr. Ebsary gets a fair trial and that justice will prevail, I'm suggesting to you that it is incumbent upon you to produce certainly Mr. MacNeil and if nobody calls Mr. MacNeil, I'm going to call Mr. MacNeil. I want to see that he's here and see that he testifies. I anticipate that you will because I think in view of what is generally known, whether it's true or not is another matter, truth is what's going to come from the witness box through the questioning of you and the cross-examination by Mr. Wintermans and what the jury accepts. Our legal system, what they accept that's the truth, as far as the legal system is concerned. So I'm not going to grant you permission to add Patricia Harris at this time and I'm telling you that I want you to call MacNeil.

15.           MR. EDWARDS: May I respond, My Lord?

THE COURT: Yes.

MR. EDWARDS: I don't wish to engage in debate with Your Lordship but I feel that there are matters that I would like to put on the record.

20.           THE COURT: Go ahead.

MR. EDWARDS: You made the comment about playing games and my learned friend made the comment about playing games. Let me assure Your Lordship and my learned friend that the Crown has no intention of playing games. That is not the purpose of my taking the course that I have taken. I agree with Your Lordship that it is incumbent upon the Crown to produce those witnesses and I have Jimmy MacNeil here available for whatever purposes the Defence or Your Lordship even, may wish to make of him. But I submit with the greatest respect that there is no duty upon the Crown to call any witness and as I under-

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stood Your Lordship you are not ordering me to call him. I will say to Your Lordship that unless you so order I will not be calling James MacNeil.

5. THE COURT: Well, I'm saying this to you, that I can't anticipate what the course of this trial is going to produce. I haven't even read all of the newspaper material on it so I'm not as familiar as many people with all of the events. I've suggested to you that it is your duty as the Crown Prosecutor to introduce relevant evidence through relevant witnesses. It is not up to you to decide whether or not they are credible or not in one sense, whether their testimony is believed. If they were there in the events and they testified I think that it's incumbent upon you to bring them in. . Now particularly do I say that when this is the third trial because if it should get to the point that Mr. Wintermans mentioned, that you are facing the jury this time and saying the opposite to what you may have said the last time, then I think that's wrong and that's what I mean when I say the element of the game that's in it. I've been counsel. I've been counsel for 20 years and I fought tooth and nail with many various solicitors or counsel and sometimes there is a little jockeying back and forth that takes place. Some of that is perfectly proper and perfectly good. But I think it would put you in a very difficult position if the argument that you make to this jury is substantially different from the argument that you made to the previous jury in this particular case. This case has some unusual elements in that it's the third time and it's been highly publicized. So what I'm saying to you is I think you have a duty to present certain particular witnesses in this particular case and you've indicated to me that in the summary that you sent that

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what MacNeil's - a summary of what MacNeil's essential testimony was, and it seemed to me that there'd be no question that you would be calling him. But I think that you should consider what I've said to you and you should consider that the unusual elements of this case would require you to put these witnesses forward. . . . stand or fall on whatever the jury decides is the credibility.

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MR. EDWARDS: My Lord, may I beg the indulgence of the court just about one additional matter on record. And since you know in a way my integrity is in question . . .

THE COURT: Oh, I'm not questioning your integrity.

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MR. EDWARDS: Well, my role as Crown Counsel and what my duties are, let me say that the course that this case or the position that the Crown would take on this case depends upon the Crown's assessment of two witnesses, James MacNeil and Donald Marshall. Let me say that on Thursday evening, it was the first time that I could speak to Donald Marshall who is obviously suspicious of prosecutors and who can blame him? But that was the first time that I had over a two hour discussion with him and as a result of that discussion I cannot in conscience now at this time urge a jury to believe everything James MacNeil says over what Donald Marshall says. Certain portions of MacNeil's evidence are believable but it is a matter of conscience and trying to give the accused a fair trial and at the same time present the jury with as accurate a picture as I can possibly do of what happened in the part in 1971. That's what it comes down to.

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THE COURT: Yeah. The problem that I have, Mr. Edwards, and I don't want to prolong the discussion with you . . . .

MR. EDWARDS: But it is important.

THE COURT: Yes. There was a trial in 1971, a man was sent to prison. People gave testimony. He spent 10

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years and 10 months in prison. He has been discharged by our Appeal Court who found that he did not commit that offence for which he was sent to prison. That's a terrible thing to have happened. Witnesses gave testimony who later came along and changed their testimony drastically. Several witnesses. A number of witnesses. Now we are trying somebody else. He's entitled to a fair trial. He's entitled to have the whole system of justice stand up to say you're entitled to a fair trial and that's what you're going to get.

10. MR. EDWARDS: No question.

THE COURT: Now in this particular case, we're not trying to necessarily solve all of the events that took place in that park in 1971, that's 12 or 13 years ago, or 14, 15 years ago and we may never know. But we can have evidence presented to the jury on which the jury can make findings. In the course of that they will decide on the credibility of witnesses to make those findings. Particularly MacNeil was called as a witness at every trial, as far as I know at every trial. Now I think it's incumbent upon the Crown to call him not at this point but in this trial, having done it on all the others because the fundamental principal of law is that justice must not only be done but be seen to be done and it would not be seen to be done in this community if a key witness, and he was a key witness, the Appeal Court told you that there was a question in that matter of who did the jury believe. If they believed MacNeil, one course of events took place. If they believed Marshall, another course of events. In view of that, even if that Appeal Court wasn't there I'm saying justice and the appearance of justice would call for the calling of MacNeil. I would go further, since the Appeal Court made that decision and say to you that the decision of

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the courts show that this case involves the credibility of one of two people particularly. Now how you could ever turn around and say well, I'm only going to call one of them, the one that suits my side and I'm not going to call the other one, is a little surprising. I think in view of that appeal decision that that's what you should do, that you should call both of the witnesses. It doesn't matter to you, you don't decide whether or not you believe them. The question of the belief of the witness is for the jury.

10. MR. EDWARDS: That's right, My Lord.

THE COURT: You just present their testimony and that's it. Now I'm concerned at the turn that this particular trial has taken because of this and like I said at the beginning, it's the adversary system and witnesses are called by the counsel and they conduct who appears. There is an overriding principal, I suggest to you, that's well established for the Crown, that the Crown calls many witnesses many times that are not as favourable to the Crown's own case. The Crown's interest is to see that the court is apprised of all the relevant evidence and if I can't see, and I'm not as familiar with this case as anybody else, if I can't see how it would not be relevant to produce MacNeil I'm sure everybody in this community would think that the justice system has got something wrong with it, that somebody can call one witness and not call another in a key matter such as this. Now if you want some time to stop and think about things for 20 minutes or a half hour I'm prepared to give it to you, but in my view, I'm not calling into question your integrity or anything else. I certainly wouldn't do that. I've found that you have been straight-forward and certainly a competent Crown counsel. I think

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maybe you haven't thought of the point that I'm suggesting to you now and I'm suggesting that you do think about it. I don't want to - it's absolutely crazy for me to start being forced to make rulings, which you people love, because it's the only way that you can get an appeal. If the jury makes a finding and you want to appeal, the only avenue of success is that the judge made a mistake but if you want me to make all these rulings I'm quite prepared to make them. I'm not the least bit worried whether there's an appeal from my decision or they find I made a mistake. I can make a mistake just as easily as anybody, sometimes easier. But I don't think I'm making a mistake when I say in this community, at this time the system of justice demands that these witnesses be present. Now Patricia Harris apparently was not a witness in the last trial, I don't know. I'm not sure but I think she was a witness in the last trial, I don't see any reason why you have to call her and I'm not at this stage going to grant you the opportunity of adding her onto the indictment. But I'm concerned about the other ones.

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MR. EDWARDS: My Lord, you raised a couple of little matters there. Whether I need any time for thought, I've given it a great deal of thought and you know, we're in a system that calls for the Crown to produce the evidence. I'm not hiding Jimmy MacNeil as I said before. He is here available for whatever purpose Mr. Wintermans or Your Lordship wishes to make of him. It's fundamental to our system that the only means of testing the credibility of a witness is cross-examination and I submit that in my judgment, and I'm conducting the case for the Crown, in my judgment the best way to get at the truth of what happened in the

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park that night in May of '71 would be if in the event Jimmy MacNeil were called by the court or Luke Wintermans for me to cross-examine him. And then we'll get to the truth.

5. THE COURT: No. There's no way that you're going to cross-examine him. I think it's your duty to call him. I'm suggesting it's your duty to call him and you'd have to examine him on direct.10. MR. EDWARDS: Well, My Lord, as I stated before with greatest respect, having given the matter a lot of thought, as much thought as possible without becoming redundant, the Crown will not call Jimmy MacNeil unless Your Lordship so orders. If you do so then of course you're the boss here, but short of a direct order I will not call him.15. MR. WINTERMANS: My Lord, I move for a mistrial at this point.THE COURT: Now why would you ever move for a mistrial?MR. WINTERMANS: If my learned friend . .20. THE COURT: Just a minute now. Just a minute. Just a minute. Let's start. Why would you move for a mistrial? The jury has not heard any of this.25. MR. WINTERMANS: Because I have no idea what my learned friend is getting at when he questions the credibility of Mr. MacNeil. Mr. MacNeil has never been cross-examined by anybody on his credibility, and if my learned friend knows something . .THE COURT: We haven't got to that point yet.30. MR. WINTERMANS: Anyway, I strongly object. I don't care if Mr. Edwards doesn't call him as long as Mr. Edwards is not allowed to cross-examine Mr. MacNeil on his credibility.

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MR. EDWARDS: So for you to call him and me not be able to cross-examine him.

5.           THE COURT: The difficulty is, if you call him the normal provision would be that he would be cross-examined by the Crown. That's the normal route. That's why I have a little difficulty here.

MR. WINTERMANS: Perhaps Your Lordship could call him as a witness.

MR. EDWARDS: That would give us both the right to cross-examine.

10.          MR. WINTERMANS: I don't think . .

15.          THE COURT: Well, let's not worry about who has the right. I'll think about that. In any event I'm not going to - I said what I said to you. I'm not going to permit you to call Patricia Harris or to add her to the indictment and what we will do is we will go on with the trial. If I have to decide on MacNeil I'll decide on it later. You have other witnesses you propose to call, I presume.

MR. EDWARDS: Oh, yes.

20.          THE COURT: All right. We'll get on with these other witnesses. That's what we'll do now and motion for a mistrial which I suggest to you is greatly premature and not warranted is certainly denied at this time.

Bring in the jury.

JURY RETURNED. (12:15 p.m.)

25.          JURY POLLED. All present.

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0. D. EBSARY, called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: You're Donna Ebsary?

A. I am.

Q Where do you reside, Donna?

5. A. I'm residing at #9 Signet Street, Brighton, Mass.

Q. And you are formerly of Sydney?

A. Yes, I am.

Q. And your age at the present time?

A. 27.

10. Q. 27. Now Donna, you are the daughter of the accused, Roy Newman Ebsary.

A. Yes, I am.

Q. And for the record would you point him out, please?

15. A. He's sitting over there with the medals on his chest, just behind and to the left of Mr. Wintermans.

THE COURT: The record will show she identifies the accused.

MR. EDWARDS: And you resided with the family until when, Donna?

A. I left here about six years ago, so about ..

20. Q. '79?

A. Yeah.

Q. And prior to 1979 you lived continuously with your parents.

A. Yes, I did.

25. Q. Your mother's name is Mary Ebsary?

A. Yes.

Q. And you have one brother Gregory Ebsary.

A. Yes.

Q. —Now in 1971 where was the family resident?

30. A. 126 Rear Argyle Street, Sydney.

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0. D. EBSARY, Direct Examination

Q. And that would be approximately what distance from Wentworth Park? Or let me put it this way, how long would it take you to walk from your residence to Wentworth Park?

5. A. Oh, maybe 10, 15 minutes.

Q. 10 or 15 minutes?

A. Yeah, 10 or 15 minutes.

Q. Now Rear Argyle Street is the family address between what years? Can you recall, approximately?

10. A. Well, we moved there when I was I think about two years old when we moved up there, so 1959 maybe we moved in there and we moved out of there I think in high school, so I graduated from high school in '75 and in 1972, 1971 - no, '72 we moved out of there, I think.

Q. '72?

A. Yeah, I think so.

15. Q. And after you moved from Rear Argyle Street where was the family home after that?

A. 46 Mechanic Street.

Q. All of those addresses are in the City of Sydney, is that correct?

A. Yes. They are.

20. Q. All right. You would have been how old in May of 1971? I'll try you on that.

A. About 13 years old, around that.

Q. About 13 years old. Do you recall what grade you were in in school?

25. A. Probably grade 8.

Q. Grade 8. Donna, what is your present occupation?

A. Manager of a furniture company.

Q. And what formal education do you have?

30. A. I got my grade 12 from Sydney Academy and went



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on to the College of Cape Breton for three years, then from there I went to the New England School of Acupuncture for a year and a half.

Q. When did you graduate from school?

5. A. '75.

Q. In Sydney. In 1975. And that was with senior matriculation, Nova Scotia grade 12?

A. Yes.

Q. Did you ever fail any years in school?

A. No.

10. Q. Now would you describe eyour father's physical condition in 1971?

A. He was healthy. He went to work every day. He got up every morning and did the normal kind of things. He wasn't sick.

Q. How would you rate his physical strength say on a scale of 1 to 10?

15. A. Oh, 9, 9½.

Q. Okay. One being weak and 10 being strong.

A. Yeah.

Q. Yes. Now where did he work at that time, Donna?

20. A. The Isle Royale.

Q. At the Isle Royale, as a what?

A. As a cook.

Q. As a cook. And how long did he work there?

25. A. As long as I can remember. He used to go to the Isle Royale Motel, Isle Royale Hotel, he worked other places cooking but at that time he was at the Isle Royale.

Q. And prior to working at the Isle Royale, did you say Hotel or Motel?

30. A. Either one. He used to work at both. I

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don't know exactly which one he worked at.

Q. Well, prior to working at the Isle Royale where did he work before that, how did he make a living most of his life?

5.

A. As far as I know most of his life he was a cook. I don't know before that.

Q. Now what if any titles did your father affix to his name around that time?

10.

MR. WINTERMANS: My Lord, might I ask that the jury be excluded. Perhaps the jury could go home for lunch.

THE COURT: Well, all right.

JURY RETIRED (12:20 p.m.)

15.

MR. WINTERMANS: My learned friend is asking questions that he's never asked before and I just want to say that it sounds to me like he may be getting perilously close to character evidence which he cannot do. Now what is the point of these questions is what I would like to know and how far is Mr. Edwards . . .

THE COURT: Is it any different than asking him if he had a nickname at the time?

20.

MR. WINTERMANS: I suppose it might depend on what the nickname was.

THE COURT: Well, I presume the answer that he was seeking is that he would be called Reverend or something of that nature. Now what problem do you have with that?

25.

MR. WINTERMANS: I'm just worried that my learned friend is getting close to character evidence here, that's all.

30.

THE COURT: Well, let's not have the jury on a string. So that they're going back and forth all the time. Let's wait till the questions are asked and object where you feel there is a proper objection but not all the

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time, they can't all be proper.

MR. WINTERMANS: I'm sorry, My Lord, but he's entering into a line of questioning that in four previous times . .

5. THE COURT: But he's not obliged in any way - just a minute now, Mr. Wintermans - he's not obliged to ask identical questions that he asked at another trial. He's entitled to examine the witness on direct. Now anything that's proper on direct and relevant, he can ask.

10. MR. WINTERMANS: He's asking though questions like how - what did he do before 1971 for a living.

MR. EDWARDS: Big deal. .

THE COURT: What harm is there ien that?

MR. WINTERMANS: Fine, My Lord. I just bring up the point, that's all.

15. THE COURT: Well, I'll tell you, I'm getting a little tired of some of the points that are being brought up because I want this trial to continue and we're going to waste all morning with the jury going in and out as though they're on a string. Now I'm going to caution you both to restrain yourselves to think before you talk and think before you make an objection  
20. so that we don't have the jury going out on some silly point. All we lose now is 10 minutes time. The jury is gone home and it's now 20 after 12. I have no other choice now than to adjourn the trial.

MR. EDWARDS: My Lord, may I respond . .

25. THE COURT: There's nothing to respond to. I think I've told him enough now. You're permitted to ask the question. Surely there's nothing to respond to and I've cautioned him . .

30. MR. EDWARDS: But I'd like to respond to what Your Lordship - you know, you urged us to think before we

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made an objection. I submit that I have, any time I made an objection but there's been a few thoughtless ones on the other . .

5.

THE COURT: The record will show that and we will adjourn until 2:00.

COURT RECESSED (12:22 p.m.)

COURT RESUMED (2:03 p.m.)

10.

THE COURT: All right, Mr. Edwards, before we start again I want to get back to the question of calling of the witness MacNeil. As I understand it MacNeil was the main witness used in the Court of Appeal to testify to facts which caused the release of Marshall.

MR. EDWARDS: He was one of them, My Lord.

THE COURT: He was the main witness, was he not? It was his evidence that led to the conclusion that he was the eye witness that was there.

15.

MR. EDWARDS: He's the one the Court of Appeal put most on.

THE COURT: All right. That's number one. And he was put as a witness in the last two trials, is that correct?

20.

MR. EDWARDS: That's correct.

THE COURT: Now in the last two trials you put him forward as a truthful witness, did you not?

MR. EDWARDS: Yes, My Lord.

THE COURT: And he was also put as a truthful witness before the Court of Appeal.

25.

MR. EDWARDS: Um-hmm.

THE COURT: And in the last two trials you determined that he had material evidence as to the guilt or innocence of the accused Ebsary.

MR. EDWARDS: Yes, My Lord.

30.

THE COURT: Now I want to read you several passages.

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MR. EDWARDS: Are you referring to McWilliams, My Lord?

5. THE COURT: McWilliams, page 762. LaMont, J., Supreme Court of Canada said:

10. "I have always understood that it was the duty of the Crown counsel to place before the court the evidence of those who were eye witnesses of the crime with which the accused is charged, whether they give evidence which is consistent with the commission of the crime by the accused or otherwise. I have always considered that counsel for the Crown was in the position of an officer of the court whose duty is to get at the truth irrespective of whether or not the evidence supports the Crown's case."

15.

And Lord Roche in the next case there, Seneviratne v. the King, said again quoting from p. 762 of McWilliams:

20. "Witnesses essential to the unfolding of the narratives on which the prosecution is based must of course be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution."

25. The book then goes on to cover the discretion that the prosecutor and Rand, J. in the Supreme Court is quoted at p. 763:

30. "I think it clear from the authorities cited that no such absolute duty rests on the prosecution as the Court of Appeal had indicated in an earlier case. Material witnesses in this context are those who can testify to

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0. material facts but obviously  
that is not identical with  
being essential to the un-  
folding of the narrative. It is  
the duty of the prosecutor to  
see that no unfairness is done  
the accused is entirely  
5. compatible with discretion as  
to witnesses. The duty of  
the court is to see that the  
balance between these is not  
improperly disturbed."

And Kerwin went on and said:

10. "Of course the Crown must not hold  
back evidence because it would  
assist an accused but there was  
no suggestion that this was  
done in the present case or  
to use the words of Lord  
Hankerton, 'that the prosecutor  
had been influenced by some  
oblique motive' which was one of  
the tests set forth before."

15. And then on page 764 in the middle of the quotation  
the words:

20. "I wish to make it perfectly clear  
that I do not intend to say  
anything which might be regarded  
as lessening the duty which  
rests upon counsel for the Crown  
to bring forward evidence of  
every material fact known to the  
prosecution whether favourable to  
the accused or otherwise, nor do  
I intend to suggest that there  
may not be cases in which the  
failure of the prosecution to  
call a witness will cause the  
25. tribunal of fact to come to the  
conclusion that it would be unsafe  
to convict. While it is the right  
of the prosecutor to exercise his  
discretion to determine who the  
material witnesses are, the  
failure on his part to place the  
whole of the story as known to the  
prosecution before the tribunal of  
30. fact may well be grounds for quashing  
a conviction."

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Now in my view in this particular case you have determined that MacNeil was a material witness, you put him forward as a truthful witness in the hearing before the Appeal Court on Marshall, you put him forward as a material witness in the last two trials and put him forward as a truthful witness, and another fact to add to this particular case is that this particular case most of those situations that I referred to are cases of a trial of the first instance. This is the third trial of this particular event against this particular accused. It is a matter of some local and national sensationalism. People are aware of stories being told by different people, they've been in the press and otherwise and taking into account that as well as the things that I've told you, he was a material witness you have decided, he certainly was one of the persons that was in the park on that particular night and I would suggest to you very strongly that it is your duty to call him as a witness. I can't see how you can put the case fairly, give the accused a fair trial before the jury without calling MacNeil as a witness. So I want you to consider that.

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

THE COURT: Well, I don't know whether it's a response or not. I think I want to know whether or not you intend to call him as a witness. I've told you what I thought is a pretty clear exposition of what your duty is as Crown Prosecutor and it seems to me that this is the case where having presented him several times before as a material and truthful witness, and he is a person who was in a sense an eye witness of the crime as in that first passage and I can't see how you can avoid not calling him at the present time. Now if you want to think about what I said you can think about it and

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0. respond to me afterwards or if you've already thought about it you can tell me now. I'd like to know what you intend to do.

5. MR. EDWARDS: Well, My Lord, I'd like to deal first with some of the authorities that Your Lordship cited, if I may very briefly. The one where you quoted Rand, J., p. 763, the beginning of that paragraph starts out:

I think it clear from the authorities cited no such absolute duty rests on the prosecution as the Court of Appeal held."

10. and I take it that the Court of Appeal had held there that there was a duty on the crown to call all the witnesses and I submit that when he goes on, he says:

"That the duty of the prosecutor is to see that no unfairness is done to the accused is entirely compatible with the discretion as to witnesses"

15. and I submit that my duty to ensure that no unfairness is done to this accused was done by telling the defence counsel in plenty of time for him to make the decisions he has to make.

20. THE COURT: All right, now you're the Crown Prosecutor on that particular point. You have had two trials already.

MR. EDWARDS: Yes.

THE COURT: And you have presented him as a witness. You have already in those trials determined that he was a material witness and you presented him as a material and truthful witness. Now what has changed your mind?

25. From then to now.

MR. EDWARDS: Well, as I indicated I had a lengthy conversation with the other key personality in this and it caused me to reassess the credibility of some parts ....

30. THE COURT: It's not for you to assess credibility of all witnesses.



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MR. EDWARDS: . . . . exercise my discretion.

THE COURT: You don't exercise too much of a  
discretion on eye witnesses to an offence when they  
are the - the only people as I understand it who are  
eye witnesses to that are the accused Marshall and  
5.           MacNeil, and it's not for you to decide whether MacNeil  
is a truthful witness or not in those circumstances.  
In my view it's your duty to call him, particularly so  
since you called him before.

MR. EDWARDS: Well, two points. I would submit  
that there's a very great discretion on the Crown as to  
10.           who to call and when we don't call them to disclose to  
the defence.

THE COURT: You have a discretion and that  
discretion has been permitted you. There are people  
that somehow had some role in these activities that you  
have not called. No one is interfering in that  
15.           discretion. I'm talking about one particular witness  
who is the major - without that witness Marshall would  
still be in jail. He's the man that was the witness  
that went to the Appeal Court, the Appeal Court accepted  
his evidence and Marshall was acquitted. MacNeil.

MR. EDWARDS: I have difficulty, My Lord, and  
please don't think I'm being impertinent but I have  
difficulty with Your Lordship's position. On the one  
hand you instruct the jury that they are to disregard any-  
thing else they might have heard about this case, that  
25.           this case is to be decided upon the evidence heard in this  
court room whereas on the other hand, a large part of your  
rationale as I take it for insisting on my calling MacNeil  
is because this case is sensational and has gotten a lot  
of publicity.

THE COURT: That's part of it. The large part is  
30.           that you presented him before as a material witness and

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as a truthful witness in two trials of this same accused.

MR. EDWARDS: Yes.

5.

THE COURT: And in view of that, and you know what the evidence is, you know the testimony of all of these parties. There is an element of the sensationalism but it's not the main element. The main element is he is a material witness.

MR. EDWARDS: Um-hmm. And I have him available for the court.

THE COURT: He's not available for the court.

10.

MR. EDWARDS: Well, for the defence.

THE COURT: In my view it's your duty to call him. That's what I've indicated to you. Now what other . .

15.

MR. EDWARDS: Well, my perception of the whole system is this. There's absolutely no onus on the accused to call any evidence but that does not mean that he has the right to call evidence, and if he wishes to call evidence he may and I have that evidence here available for him if he thinks it's of assistance to him, then let him call him.

THE COURT: Is it material?

20.

MR. EDWARDS: Of course.

THE COURT: Then it's your duty to call him.

MR. EDWARDS: I submit that - well, we'll have to agree to disagree, My Lord.

25.

THE COURT: The duty of the prosecutor is to call all material evidence, if there is material evidence it's your duty to call him whether the jury accepts the evidence or whether they don't, or whether it's favourable to the accused or whether it's unfavourable to the accused. That's what I'm saying these cases say.

30.

MR. EDWARDS: Well, My Lord, I guess we're going around in circles now. My position is the same as it was

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this morning. Unless ordered to do so the Crown will not call James MacNeil.

THE COURT: Fine. That's your position.

MR. EDWARDS: That's my position.

5.           THE COURT: You will not be calling MacNeil.

MR. EDWARDS: I will not be calling him.

THE COURT: All right. We will proceed with the trial. I've indicated to you what I thought your duty was. We've resolved all problems with Donna Ebsary so we'll recall her to the stand.

10.           MR. EDWARDS: My Lord, before she is recalled I have Dr. Naqvi here, he's been here on two previous occasions having to postpone office hours and that type of thing, and I'm wondering if since we're just at the beginning of Donna Ebsary's testimony if we might not have her step down in order that Dr. Naqvi might be heard and allowed to get back to his very busy schedule.

15.           THE COURT: I have no problem with that.

MR. WINTERMANS: No problem with me, My Lord.

MR. EDWARDS: Perhaps Your Lordship might just explain that to the jury so that they're not . .

20.           MR. WINTERMANS: With the understanding of course that Donna Ebsary is going to be back on the stand.

MR. EDWARDS: Oh, she's going to be back.

THE COURT: How do you spell Dr. Naqvi? N-a-h-?

MR. EDWARDS: N-a-q-v-i.

JURY RETURNED (2:19 p.m.)

25.           JURY POLLED. All present.

DR. NAQVI, called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: My Lord, I'll be seeking leave of the court to qualify this witness to give opinion evidence with respect to general medicine and surgery.

30.

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0. DR. NAQVI, Direct Examination

MR. WINTERMANS: My Lord, might I go on record as indicating that I'm familiar with Dr. Naqvi's qualifications as a medical practitioner and general surgeon and I'm prepared to admit that he is qualified in that regard.

5. THE COURT: All right. So the doctor will be qualified as an expert entitled to give opinion evidence on general medicine and surgery.

10. Now members of the jury, before we start on this witness in order to accommodate Dr. Naqvi who has a busy schedule and not have him sit around outside, we have stood aside the previous witness, we'll do Dr. Naqvi and then the previous witness will be recalled and her testimony will be heard then.

All right, Mr. Edwards?

15. MR. EDWARDS: Thank you, My Lord. Dr. Naqvi, you were on duty at the City of Sydney Hospital on the night of May 28th and early morning of May 29th, 1971?

A. Yes, I was.

Q. And at that time and place you treated one Sandy Seale?

A. Sandford Seale.

20. Q. Yes. And he was a male youth, a teen-age male youth?

A. That's correct. 17.

25. Q. Yes. And could you indicate to the jury at approximately what time that night you first saw him and what was his condition when you first saw him?

A. 29.5.71, after midnight.

Q. It was after midnight. And what was his condition at that time, Doctor? What if any injuries did he have?

30. A. He had a stab wound of the abdomen and at the

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0. DR. NAQVI, Direct Examination

time I saw him most of his small intestine was lying over his abdomen.

Q. You mean outside the . .

A. Yes, outside the . .

5. Q. The abdominal cavity.

A. The abdominal cavity, yes.

Q. Right. Yes?

A. And he was in a state of shock, he did not have any blood pressure at that time and he was very extremely restless and cold, cyanotic and he also had a very thready pulse.

10. Q. A very what?

A. His pulse was markedly weak.

Q. I see. So then what steps did you take after observing his condition?

15. A. Immediate resuscitation was carried out. It started off from the outpatient department of the City Hospital and we took him right away to the operating room the same night and at that time we did perform the operation to correct the injuries.

Q. Um-hmm. And how long was he in surgery, do you recall?

20. A. I . .

Q. Well, that's not important I guess, Doctor. After the surgery was completed what happened then? He survived the initial surgery?

A. He survived the initial operation.

25. Q. Yes.

30. A. And then we took him back to the recovery room which was adjacent to the operating room and he still was in shock and still was bleeding and he was bleeding so badly including he was bleeding from his stomach as well so we took him back to the operating room on the same day, early morning, same morning, and at that time he

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DR. NAQVI, Direct Examination

had a tear into the aorta which is the major artery going from the heart and supplies the rest of the body from the chest down.

Q. I see. And what if anything was done to repair the tear in the aorta?

A. We went back, we repaired that the second time and he was back into the recovery room afterwards but despite that he still remained in shock and he continued to bleed. We replaced almost all of his blood volume. He had received over 27 pints of blood, 14,000, something like that.

Q. Um-hmm.

A. But he died that evening.

Q. He died that evening.

A. Yes.

Q. So, Doctor, in your opinion what would have been the cause of death?

A. Hemorrhage. And shock.

Q. And with what would the injury to his abdomen and subsequent tearing of the aorta, with what would that injury be consistent?

A. With a sharp pointed object.

Q. And what would have been the minimum length of the sharp pointed object in order for it to penetrate far enough to tear the aorta?

A. Well, I couldn't be definite in the size but I would say it would be something the width of my palm.

Q. The width of your palm. And I believe on a previous occasion we measured your palm and it was  $3\frac{1}{2}$  inches wide, is that correct?

A. I couldn't tell you. Really.

MR. WINTERMANS: I'll acknowledge that it is 3 or  $3\frac{1}{2}$ . There was some discussion between Mr. Edwards as to whether it was 3 or  $3\frac{1}{2}$ .

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0. DR. NAQVI, Direct Examination  
MR. EDWARDS: That was the minimum length.  
A. Yes.  
Q. What would've been the maximum length or can you give an opinion?
5. A. The maximum length I can't tell you.  
Q. Okay. Were there any other wounds?  
A. One wound.  
Q. One wound.  
A. Yeah.  
Q. And exactly where was it located, would you point. . .?
10. A. Somewhere around the belly button.  
Q. Thank you, Doctor.  
THE COURT: Cross-examine?  
CROSS-EXAMINATION  
MR. WINTERMANS: What was the approximate time of death, Doctor?
15. A. Time of death is 8:05 p.m.  
Q. 8:05 p.m.  
A. That's right.  
Q. I notice you're looking through some documents there.
20. A. They are all the hospital records.  
Q. They are?  
A. That's right.  
Q. 8:05 p.m. on the 29th of May, 1971?  
A. That's correct.  
Q. So therefore if he had arrived there around
25. midnight or I believe at one time you testified that as far as you knew it was somewhere between midnight and 2 a.m.  
A. That's right.  
Q. That you had an inscription saying 2:00 in the
30. morning was when a record was actually written down,

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0.

DR. NAQVI, Cross-Examination

although he certainly could have been there for an hour or two before that, before the notation was made.

A. It is possible, but our record shows 2:00 a.m.

5. Q. Right. And so therefore Mr. Seale was in the hospital then from at least 2 a.m. to 8 p.m. which would be about 18 hours.

A. That's right, yes.

Q. And during that time there were two operations performed, is that right?

A. That's right, yes.

10. Q. The first operation was shortly after he arrived in the hospital.

A. That's right.

Q. At which time you patched up most of his injuries but not the aorta.

A. That's right.

15. Q. And then the second time after his condition failed to improve you realized that there was still something wrong in there, I assume, and you had to go back in for a second operation, is that correct?

A. That's true.

20. Q. At which time you noted the injury to the aorta.

A. Well, we knew the injury before. The only reason we couldn't do it all because he was not stable, he had had a lot of injury to his bowel, his circulation to the bowel, the artery was also injured both the small  
25. bowel, the large bowel, a lot of fecal contamination so all these things had to be taken into consideration to do what we did at that time.

Q. And you indicated that if this injury were caused by a sharp object such as a knife, that it would  
30. have only been one insertion of that knife, correct?



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0. DR. NAQVI, Cross-Examination

A. That's right.

Q. And with respect to the - you indicated that the small intestine was outside of him, in other words it was coming out, is that right?

A. Yeah.

5. Q. Could you just explain to the jury how the body works that way?

10. A. Well, the body is - during the development phase is the bowel that grows around the artery and the bowel all stays inside the abdomen. What happens is the abdominal pressure and the chest pressure that controls most of the abdominal content, if there is no opening outside the bowel will remain inside the abdominal cavity but once that <sup>aortic</sup> opening is made the pressure inside the abdomen leads to the extrusion of the bowel outside. It's called the . . . intra-abdominal pressure that would lead to the bowel being  
15. sterilized. The same thing happens as people who have hernias perhaps and the hernias get bigger and bigger because it's the pressure that causes those opening in people. However, in this particular case that was not the reason the bowel was outside because the pressure  
20. inside built up.

Q. So in other words if you - if a person were to be stabbed and then the opening would cause the pressure from inside to . .

A. Push the bowel out.

25. Q. Push the bowel out. It's something like if you pop a balloon I suppose, the air bursts out of that because there's more pressure. The abdominal wall holds everything in.

A. That's right.

30. Q. Right. And without the abdominal wall everything would spring out.

0. DR. NAQVI, Cross-Examination  
A. Yes.  
Q. Now there's no way that this injury went right through this boy, in other words there was no hole in the back.
5. A. No. Because the hole was as far as to the aorta. The aorta lies right over the bone, the backbone.  
Q. I see. And a lot of times when you think of aorta you think of your heart, but actually the aorta is a long . . .
10. A. The aorta doesn't start from the heart. The aorta originates from the heart, that is from the first two vessels that originate from the aorta is the coronaries supply the heart, then the aorta divides and as it goes down it has various names. In the chest cavity the aorta is called thoracic aorta, in the abdominal cavity the aorta is called hte abdominal aorta.
15. Q. And we're talking about the abdominal aorta.  
A. The abdominal aorta, that's right.  
Q. So in other words we're not pointing around the area . . .  
A. The abdominal aorta.  
Q. Around the area of the belly button.
20. A. Yes. And in order to control the bleeding in this particular boy we had to make two upward incisions; one was into the chest and one was into the abdomen so we controlled the thoracic aorta first. We were able to repair the abdominal aorta.
25. Q. I see. And is it not true, doctor, that there were no measurements taken of this injury?  
A. That's correct.  
Q. Is it also not true that there was no autopsy done in relation to Sandy Seale?
30. A. That's true. In fact you asked me the last time, that when the boy came in he was in so bad shape

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0. DR. NAQVI, Cross-Examination

we were too busy to resuscitate the boy and there were a lot of things of this kind may have been left behind.

5. Q. So really there is no way for us to know with any degree of certainty the exact measurements or anything because there was no autopsy done.

A. That's true.

10. Q. And you indicated in your testimony that your recollection, although you recollect the operation and the conditions, that you can't really state with much certainty the size of this boy or you know, the exact depth and measurements, you were more concerned with trying to save this boy's life than you were about measuring things, right?

A. Yes. There's no question about it.

Q. And how many operations would you have performed since then, since May 29th, 1971, thousands?

15. A. Well, I say would you believe it would be something like 15,000?

Q. 15,000 operations.

A. Yes.

20. Q. So therefore your recollection of this may be a little shaky and you are relying on notes.

A. I only go by what the operative record shows.

Q. Right.

A. Because everything is here in the operative record that is the permanent record of every operation I do.

25. Q. Right. Right. Thank you very much, Doctor.

MR. EDWARDS: No re-examination, My Lord.THE COURT: All right. Thank you, Doctor.WITNESS WITHDREW.

30.

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0. DONNA EBSARY RECALLED, testified:

DIRECT EXAMINATION (Cont'd)

5. MR. EDWARDS: Donna, when we left off this morning I was asking you whether or not your father appended any titles to his name and I'd like you to answer that now.

A. Well, he used to call himself Reverend or Captain or Reverend Captain or some combination thereof.

Q. Reverend Captain or Captain. Yes. And what would be the basis for the name Captain, do you know why he'd call himself that?

10. A. He used to serve - he used to work on the ships so he called himself Captain.

Q. Why would he call himself Reverend?

15. A. Him and another gentleman used to spend a lot of time researching the bible and during the course of time he was on the naval base with my father, they spent a lot of time in bibles in research and background materials on the bible and he just called himself Reverend. Then quite awhile after that he received some sort of documentation from the church that had his name on it as Reverend. That was later on.

20. Q. Can you tell us whether or not your father usually carried a knife in 1971?

A. He used to carry a knife on him.

Q. And would you describe the type of knife he would carry on him at that time?

25. A. It had a short handle and you could hold it in your hand comfortably and a blade that was fixed, it was like a one piece, it had nothing you could fold up, it was a one piece knife.

Q. Yes.

A. And he carried that with him.

30. Q. If I were to get you to look at a group of

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0. DONNA EBSARY, Direct Examination

knives do you think you'd be able to select one that was similar to the one that he usually carried at the time?

A. Probably.

5. Q. I want you to look at the knives here on the table which are in the folder marked EXHIBIT 1.

A. The knife he carried was something like this one.

Q. You are referring now to a knife, #8, is that correct?

A. Yes.

10. Q. All right, Donna, you can get back on the stand. How did your father usually dress around that time, Donna? Like if he was going out.

A. He'd get dressed up if he was going out. He'd put on a pair of dress slacks and a shirt, and he'd put a scarf on and tie it and flip over around his neck and he had a blue like trench coat that he'd wear and he'd put it over his shoulders, he wouldn't put his hands out in the arms, he'd just put it over his shoulders and he'd go wherever he was going.

15. Q. Okay. And what about your father's hair at the time, what colour was it? Well, how was it compared to his hair colour today?

A. I don't know. I can't remember what his hair looked like.

Q. Okay. What about facial hair at the time?

25. A. He used to have a goatee.

Q. A goatee.

A. Chin whisker.

Q. Now did you know James MacNeil at that time?

A. I knew him. I didn't know him personally but he had been to the house with my dad.

30.

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0. D. EBSARY, Direct Examination

Q. On how many occasions had he been to the house?

A. I couldn't give you an exact number. A couple of times. Enough that I knew him to see him.

5. Q. Now Donna, were you home on the night of the Seale stabbing?

A. Yes, I was.

Q. Who was home with you?

A. My mom and I were at home.

Q. That's Mary Ebsary.

10. A. Yes.

Q. Yes. And when did you last see your father that evening? Put it this way. Was your father at home at all that day?

A. He was home earlier, like earlier in the day and then he came home late in the evening.

15. Q. I see. Do you recall what time he left the house earlier in the day approximately?

A. I don't know.

Q. Now when he came back later in the evening approximately what time was it then?

20. A. It was around 11 o'clock in the evening.

I know the news was on television when he came in so whatever the late news would be on he came in.

Q. Yes. And who was with him when he came in?

A. Himself and James MacNeil.

25. Q. Just before we go any further do you know what your father's age would've been in '71, approximately?

A. 62, 63.

Q. Now you say that he and Jimmy MacNeil came in.

A. Um-hmm.

Q. Now what did they do when they came in?

30. A. Well, they came in and they stopped at the door,

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0. D. EBSARY, Direct Examination

in the room where my mom and I were and there was - Jimmy turned in to say to myself and my mom, or kind of saying it to my father and saying it to us at the same time, 'Look, you did a good job back there.' Dad told him to shut up and the two of them went into the kitchen.

5. Q. How was your dad dressed when he got home that night, do you recall what he was wearing?

A. He still had his trench coat on when he came in.

10. Q. And it was what colour?

A. Blue.

Q. Light or dark?

A. Dark.

Q. Okay. How would you describe MacNeil's condition at that time when they returned?

15. A. He was excited, that's the best way to describe it. He was very excited.

Q. I see. And what about your dad?

A. I couldn't say. He was sort of excited, he was kind of like he was telling Jimmy something. I don't know quite how to describe what it would be.

20. Q. All right. So after Jimmy made this comment about you did a good - how did you put it?

A. You did a good job back there.

Q. Um-hmmm. Where did your father go then?

A. He went into the kitchen.

25. Q. He went into the kitchen.

A. Yeah.

Q. Where did you go?

A. He went into the kitchen, Jimmy went into the kitchen, I followed behind them.

30. Q. You followed behind them.

A. Yes.

0. D. EBSARY, Direct Examination

Q. Now what if anything did you observe your father doing when you got to the kitchen?

A. Dad was washing a knife off in the sink.

Q. Could you see what he was washing off it, if anything?

5. A. It appeared to me that there was blood on the knife that he was washing.

Q. Now could you describe the knife for us?

A. The knife had a brown handle and it was kind of a short blade on it. It wasn't really a big knife, just a small knife that he carried in his pocket.

10. Q. A fixed blade or folding?

A. Fixed blade.

Q. How did it compare in size to knife #8 that you picked out earlier?

A. It's about the same size.

15. Q. So he washed the knife off. Where was Jimmy MacNeil while your father was washing the knife?

A. He was with dad. Everybody was in the kitchen at that time. Well, not everybody. Jimmy and my father and myself were in the kitchen at that time.

20. Q. I see. So after your father washed the knife what did he do with it?

A. I recall him going upstairs.

Q. Um-hmm.

A. I figured he had the knife with him.

Q. I see. Did you ever look for that knife?

25. A. I did, after that. Yes.

Q. Did you ever find it?

A. No, I did not.

Q. When did you first become aware of the Seale stabbing after that night, or the Seale death?

A. The next day, probably.

30. Q. Do you know when if at all your father first had



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0. D. EBSARY, Direct Examination

contact with the Sydney City Police after that night?

A. The only time I recall was around November when the police came to the house and we all went down to the police station.

5. Q. In November, '71.

A. Yes.

Q. Who went to the police station? You say we all went.

A. My brother, myself, our dog and my father.

10. Q. Donna, would you again step down from the stand and look at those knives which are contained in EXHIBIT 1 and tell us whether or not you recognize those knives?

A. Yes, they all belong to my dad. Or they all belonged to the household at the time that we were all living together.

15. Q. And could you cite us a couple of examples of how you're able to say that with a fair certainty?

A. Well, the knives, I'm used to seeing them. We used to use them in the house, like.

Q. You're picking up knife #10.

A. Well, #10 we used to use in the kitchen.

20. Q. Perhaps you'll just stand aside so that the jury can see.

A. A kitchen knife. We had it in the kitchen for cutting different things with.

Q. Yes.

25. A. These knives here, there's four, a set of steak knives that we had that dad took the handles off and he put some copper pipe on them instead. He was good at fixing or repairing or readjusting knives. A brown handled knife, it's a bread knife that used to be in the house.

30. Q. You're picking up knife #5. Yes?

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D. EBSARY, Direct Examination

A. This knife here is . . .

Q. This is knife #7.

A. It's sharpened on both sides. Dad had a grinding wheel and he'd sharpen them on it. It's got a piece of garden hose on it.

5.

Q. Do you have any idea why he'd grind them on both sides?

A. Well, he used to use them out in the garden sometimes like for digging things out of the ground or he'd use them for sharpening different things like, whatever he wanted the knife for at the time he'd adjust it so it worked.

10.

Q. Um-hmm. I see. That night after your father took the knife upstairs, was Jimmy MacNeil still in the home or had he left?

A. Dad ran upstairs, Jimmy was still there, but I believe Jimmy went shortly after that.

15.

Q. And do you recall how long Jimmy was there altogether? That night?

A. I don't know exactly, no.

Q. No further questions. My learned friend may have some.

20.

THE COURT: Cross-examine?

CROSS-EXAMINATION

MR. WINTERMANS: Donna, you indicated that in November of 1971 the whole family, it sounds like, went down to the police station. The Sydney police. Is that right?

25.

A. I recall myself, my brother and my father being there. I don't recall if my mother was there or not.

Q. Isn't it true that you were left out in the car?

30.

A. That is true.

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0.

D. EBSARY, Cross-Examination

Q. You were how old, 13 or so at the time?

A. That's right.

Q. So you stayed outside in the car with the dog, is that right?

5.

A. That's right.

Q. And so you're not really sure exactly what transpired of your own personal experience inside since you weren't there. But your recollection of this particular night, is it clear in your mind or is it a little bit foggy after all these years?

10.

A. It's pretty clear. Those particular things are pretty clear.

Q. Now I'm going to suggest to you that you might not be absolutely correct on what you say James MacNeil said to your father when they first walked into the house. You say now, 'you did a good job back there' or words to that effect. I suggest to you that James MacNeil said 'Roy saved my life tonight.'

15.

A. No, that's not what I recall him saying.

Q. You don't recall that. You're sure that you haven't just thought about this so much that you've kind of got your pat memory of it now and that your - really your imagination might be filling in some of the details here.

20.

A. No, my imagination is not filling in the details.

25.

Q. Okay. Now you say that you followed them into the kitchen, followed your father into the kitchen. And this is where you observed the washing of this knife.

A. Yes.

Q. Is that right?

A. Yes.

30.

Q. Okay. And he was washing something off this

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0. D. EBSARY, Cross-Examination

knife, is that right?

A. Yes.

Q. I suggest to you that perhaps it was dirt that he was washing off the knife.

5. A. There was a red substance on the knife.

Q. There was a substance on the knife.

A. We had this discussion the last time, you and I, you asked me questions and I told you that I did not have the knife analyzed and I have not since had the knife analyzed, but as far as I can recollect there was blood on the knife.

10. Q. Okay. That's what you're testifying today. And the knives that you see on the table before you, there's 10 knives.

A. Um-hmm.

15. Q. Which have been the only pen knives referred to. None of those knives exactly fit the description which you've given, would you agree with that?

A. I would agree with that.

Q. All right. Would you also agree that those knives were in constant use or frequent use between May 28th, 1971 and several years afterwards?

20. A. They were in use as long as we lived up on Argyle Street. They were around the house.

Q. And when was it that you moved form Argyle Street?

A. I believe it was in 1972.

25. Q. 1972?

A. Well, I graduated from high school in '75 and we moved up to Mechanic Street just prior to that and I thought that what I had said earlier that it was around '72 that we moved.

30. Q. 1972. The coat that you described your father

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D. EBSARY, Cross-examination

usually wore, it was a long blue coat, is that correct?

A. Yes.

Q. Coming down perhaps around the knees or something like that on him?

5.

A. Yes.

Q. And you say he often wore it over his shoulders so that his arms weren't through the sleeves, is that what you're saying?

A. I rarely ever saw him with his arms out in the sleeves, yes.

10.

Q. And do you agree that your father would often remove his glasses when he was outside?

A. I wasn't with my father when he was outside.

Q. Are you saying that your father didn't remove his glasses?

15.

A. He may have in the home but I did not accompany my father on his journeys out of the house, so I cannot answer the question you asked.

Q. All right. The coat, when you were a girl of 13 did you ever examine that coat or put it on or put your hand in the pockets or anything like that?

20.

A. I never examined it for the purpose of going over it, no.

Q. Okay. Well, can you answer this? Did it have slits in it so that if you were to put your hands through the outside pockets would your hands go right through the coat?

25.

A. I don't know.

Q. You can't recall that? Who's the first person that you ever talked about this incident with?

A. The first person might've been the person I was studying with at the time, Dave Ratchford.

30.

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D. EBSARY, Cross-Examination

Q. David Ratchford?

A. I think so.

Q. And when would that have been, approximately?

A. I don't know. I couldn't put a date on it.

5.

Q. It was a few years later, right?

A. Um-hmm.

Q. And did you - could you describe your relationship with David Ratchford at that time?

A. He was my teacher.

Q. And you confided in him, did you?

10.

A. Yeah.

Q. You trusted him?

A. Um-hmm.

Q. What was he your teacher, what did he teach at that time?

A. He was Martial Arts instructor.

15.

Q. Martial Arts?

A. Um-hmm.

Q. And was he also your school teacher?

A. No.

Q. And did you go to the police after that conversation with David Ratchford?

20.

A. No.

Q. Do you recall having testified in 1982 in Halifax before the Appeal Court?

A. Yes.

Q. And you recall having been asked the question:

25.

"Q. Can you describe the knife?

A. The knife is a small knife, it had a short blade and a brown handle with tape around the bottom of the handle.

Q. How certain are you of that?

30.

A. I'm as certain as I am that I'm sitting here now."

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0. D. EBSARY, Cross-Examination

Q. Do you recall having said that?

A. Um-hmm.

Q. And on page 16, 116, you were asked the following questions and gave the following answers:

5. "Q. Can you say whether you saw anything on that particular knife?

A. There was definitely something on the blade of the knife. I have - it seems to me there was blood on the blade of the knife.

Q. I'm sorry?

A. I said there was blood on the blade of the knife.

10. Q. How certain are you of that?

A. I'm not as certain as I am of the fact that I'm sitting here but I'm pretty certain that is what it was."

Q. Do you recall having said that?

A. Yes.

15. Q. Are you more certain now than you were in 1982?

A. I'm as certain.

Q. As certain.

THE COURT: I'm sure those statements were inconsistent with anything, Mr. Wintermans.20. MR. WINTERMANS: Fine. Just the question of the degree of certainty, I guess, My Lord.THE COURT: She sounded pretty certain when she said it here.25. MR. WINTERMANS: Would you agree that with respect to your father's physical appearance that he was a small man, he was maybe 5'2, kind of slight, he didn't have any amount of meat on him . .THE COURT: What are you referring to?MR. WINTERMANS: I'm just asking the question.30. MR. EDWARDS: No, you're not. You're reading from the transcript.

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0. D. EBSARY, Cross-ExaminationTHE COURT: You're reading in something.MR. WINTERMANS: Okay, I'm going to ask her whether she agreed or disagreed with a description, that's all.5. THE COURT: Well, ask her to describe him or do it properly, and again you don't have to . .MR. WINTERMANS: Describe your father's physical appearance as far as size and - exact size?

10. A. Well, he's a few inches taller than I am and I'm 5 feet tall, so that'd make him around 5'3 and he weighed about 160 lbs and I'd say he weighed around that much. He used to wear - he filled out his clothes all right, you know, he looked okay. I don't know, I didn't weigh him or pick him up at any time so . .

Q. Did you say 160 lbs?

A. I'd say he weighed about that much, yeah.

15. Q. Do you recall having testified at the Appeal Court in Halifax in 1982 being asked to describe his physical appearance, page 117:

20. "He was a small man, he was maybe 5'2, kind of slight. He didn't have any amount of meat on him so he was like I say very slight. He looked kind of - let's see, how can I picture how he looked? Well, he looked like an average little old man, I guess. That's all I ever pictured him as."

Q. Do you recall having said that then?

25. A. No, not in that manner.

Q. You don't recall having testified that at the Appeal Court in Halifax?

A. I don't recall making it exactly that way, no. Of course I don't have the transcripts to study them before I come in here either.

30. Q. Are you questioning the accuracy of that



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0. D. EBSARY, Cross-Examination

description?

A. If you say I said it, I must have.

Q. Okay. So therefore you're not questioning the accuracy of that description?

A. If you say . . .

5. MR. EDWARDS: The Crown admits the accuracy of the transcript, My Lord.MR. WINTERMANS: You indicated that the time that your father and Mr. MacNeil came home that night was 11 o'clock, did you say?

10. A. It was late in the evening. I did say 11 o'clock. I know the late news was on but I'm not 100 per cent certain it was exactly 11 o'clock.

Q. Could it have been 10 o'clock?

A. The late news didn't come<sup>on</sup> at 10 o'clock.

15. Q. You indicated that you recall testifying in Halifax at the Appeal Court in 1982 and I'm going to ask you to comment on this question and answer:

Q. Okay now, how late at night . . .

MR. EDWARDS: Page?MR. WINTERMANS: 114.

20. "Q. Okay now, how late at night? You said it was late. Can you say approximately what time it would've been?

A. It may have been 10 o'clock or later. It was just late. I know that I was up late, so . . .

25. Q. Okay, so could it have been 12 o'clock?

A. It could have."

Q. Do you recall having said that?

A. Um-hmm.

Q. Is that true?

A. It's no different from what I just said.

30. Q. Okay. So what you're saying is it could have

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0. D. EBSARY, Cross-Examination

been sometime between 10 and 12.

A. It was late in the night. The late news was on television. We were sitting there watching it. I don't know exactly what time it was. I didn't look at the clock, I did not write it down.

5.

Q. Do you recall having given a statement to the R.C.M.P. to Sergeant Wheaton on April 17th, 1982?

A. Yes.

Q. And do you recall having stated:

"Jimmy said to Roy "You did good or you did a good job" words to that effect?"

10.

Do you recall having said that?

A. Yes.

Q. Now you're certain that it was . .

A. You did a good job.

Q. What?

15.

A. You did a good job. Are you sure, Donna, that you're not just kind of giving the gist of what you heard rather than exact words?

A. What I recall Jimmy saying is that 'you did a good job.' That is what I recall.

20.

Q. Did you notice any blood on your father's clothing that night?

A. No, I did not.

Q. Would you agree that James MacNeil was very hyper, really, really excited when they came in?

A. Yes.

25.

Q. Now do you remember having testified last time November the 4th, 1983 here in the Supreme Court, page 121, question 29?

THE COURT: What page?

MR. WINTERMANS: 121. Being asked the question and given the answer. First the question:

30.

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0.

D. EBSARY, Cross-Examination

Q. Okay. And when your father and Mr. MacNeil arrived home that evening, can you describe what if anything took place as they came in the house?

5.

A. They came in, Jimmy appeared to be pretty excited. Jimmy turned to my dad and said "Gee, you did a good job back there." My father turned around and said: "Oh, be quiet."

10.

MR. EDWARDS: My Lord, I'm going to enter an objection. This is about the 4th or 5th time he's put that very point to her. I don't question his right to ask it but surely there's a limit on how many times he can trot over the same ground. There's no inconsistency whatever.

MR. WINTERMANS: I would suggest that she's saying today what she . . .

15.

THE COURT: I don't want to hear your argument. I don't want to hear your argument. I don't think there's any prior inconsistent statement that would warrant the continual putting of those questions to her. Get on with it.

20.

MR. WINTERMANS: Now when you spoke to David Ratchford, did you tell him truly about your recollections of May 28th, 1971?

A. What are you asking? What do you mean, did I tell him truly?

25.

Q. Did you tell him the truth?

A. Yes.

Q. That's all the questions I have.

THE COURT: Re-Examination?

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

THE COURT: All right, then. Thank you, witness.

30.

WITNESS WITHDREW. (3:13 p.m.)

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0. THE COURT: All right. We'll take our afternoon break now.

COURT RECESSED. (3:14 p.m.)

COURT RESUMED. (3:35 p.m.)

5. MR. WINTERMANS: My Lord, I have a problem and that is that there is a witness here, Mr. MacKay. Would you kindly come forward please? This witness whose name is Scott MacKay and he's subpoenaed to be here this afternoon to give evidence and it would appear that the Crown's case will end early tomorrow at the latest and Mr. MacKay informs me that he has a very important

10. meeting that he's been waiting for 10 months to get in Port Hawkesbury at 1 p.m. tomorrow. He will be back here on Wednesday but it would appear that he'll be needed tomorrow and I put the problem before Your Lordship. Mr. MacKay is indicating that he's going to leave unless the Court says otherwise and I need him as a defence

15. witness, on calling defence evidence which I intend to do and I need him as a material witness.

THE COURT: Can this meeting be changed?

MR. MacKAY: No, Sir.

THE COURT: Why not?

20. MR. MacKAY: It involves, you know, like there was quite a time period to have this meeting set up and I can't change it at this time. There was quite a waiting period.

THE COURT: Well, what kind of a meeting is it? What's it about?

25. MR. MacKAY: It's a personal meeting, Sir.

THE COURT: Well, sometimes personal reasons have to be set aside in order for the system of justice to proceed. How many more witnesses do you have, Mr. Edwards?

30. MR. EDWARDS: Two more, My Lord. But they'll be fairly lengthy, I think. I would say. We might get

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0.

DISCUSSION

through one of them this afternoon, possibly get a start on the second one. It's hard to say.

5.

MR. WINTERMANS: I would anticipate that there would be motions made following the closing of the Crown's case which would take some time. It would appear that the Defence would be starting their evidence either late morning or first thing in the afternoon tomorrow, I would expect, if everything goes as expected. Therefore that would put Mr. MacKay in his meeting which is at 1 p.m.

10.

THE COURT: How long is the meeting going to last, Mr. MacKay?

MR. MacKAY: It's hard to say, Sir. Probably approximately 45 minutes.

15.

MR. WINTERMANS: He's assured me that he could certainly be here the first thing on Wednesday morning. There may be a loss of a couple of hours on tomorrow afternoon.

THE COURT: If you do plan to call evidence, is this your only witness?

20.

MR. WINTERMANS: No, I have some others but it's not lengthy. It's a series of short witnesses I anticipate.

25.

THE COURT: Well, everything you promised me up to now wouldn't be lengthy has been very lengthy. We'll run the risk for you to be back here Wednesday morning. So you be back here Wednesday at 9:30 and whatever happens at that meeting you tell them that you are obliged to be in court as a witness the next morning and be back here. All right.

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

THE COURT: Bring in the jury.

30.

JURY RETURNED. (3:40 p.m.)

JURY POLLED. All present.

422.

0. ADOLPHUS EVERS called, duly sworn, testified:

DIRECT EXAMINATION ON QUALIFICATIONS

MR. EDWARDS: My Lord, I'll be seeking to have this witness qualified to give opinion evidence in the field of the identification, examination and comparison of clothing fibres.

5. Q. Sir, your full name, address and occupation, please.

A. Adolphus James Evers, Surname spelt E-v-e-r-s, I'm in charge of the hair and fibre section at the Forensic Laboratory, Sackville, New Brunswick.

10. Q. And you've been employed in that capacity for how long, Sir?

A. I've been in the Sackville Laboratory since the year of 1970. Prior to that I was in the Vancouver Laboratory.

Q. Now Mr. Evers . .

15. THE COURT: Before you go on, I want to ask Mr. Wintermans whether or not he admits the qualifications.

MR. WINTERMANS: Yes, I admit that Mr. Evers has given evidence in many courts throughout the country in the comparison of hair and fibres and that he is . .

20. THE COURT: Do you admit his qualifications?

MR. WINTERMANS: Yes, he's qualified to . .

MR. EDWARDS: My Lord, I appreciate my learned friend's courtesy on that point. However, the qualifications of the witness are germane to the weight which the jury will attach to his evidence and therefore while I will attempt not to be lengthy I do wish the jury to hear about his qualifications.

25. THE COURT: Fine, his qualifications though have been admitted and he is entitled to give opinion evidence as an expert in the identification, examination and comparison of clothing fibres.

30.

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0. MR. EVERS, Direct Examination on Qualifications  
MR. EDWARDS: Thank you very much.
- Q. What is your formal education, Mr. Evers?
- A. I have received a Bachelor of Arts Degree from Carleton University in Ottawa with a major in
5. Biology.
- Q. Yes. And generally how were you trained for the work you now do?
- A. I had training in two forensic laboratories in the R.C.M.P. Laboratory in Ottawa and Vancouver. This training was in the examination, identification and comparison of hairs and fibres.
10. Q. And you have previously given evidence or expert opinion evidence in the courts of this province and other provinces?
- A. Yes, I have.
- Q. And that would be in the Supreme Court or
15. all levels of court.
- A. All levels of court, yes.
- Q. In the four Atlantic Provinces?
- A. I've given evidence in the courts of Ontario. British Columbia, the Yukon, Prince Edward Island, Nova Scotia, New Brunswick, Newfoundland and Labrador.
20. Q. And in each case your qualifications to give such opinion evidence was admitted.
- A. Yes.
- Q. Now Mr. Evers, you testified at the trial of Donald Marshall in 1971, is that correct?
25. A. Yes, I did.
- Q. And prior to giving that testimony you took possession of certain items of clothing, is that correct?
- A. Yes. On the 16th of June, 1971 I received
30. two articles of clothing from a Sergeant MacDonald. I

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0. MR. EVERS, Direct Examination

examined these articles of clothing.

Q. He's of the City of Sydney Police, or was?

A. He was at that time.

Q. Yes.

5. A. I examined these articles of clothing, I gave them to another section, I subsequently received them back and I presented them to court on the 28th of July, 1971.

THE COURT: 197..?

A. '71.

10. MR. EDWARDS: And would you describe basically what these two articles of clothing were?

A. Both of the articles of clothing were jackets. The first was a yellow nylon jacket with white trim and white lining. The second article was a brown wool coat with white pile lining. It also had a brown belt.

15. Q. Okay. Now what about the brown jacket? What if anything can you say about the presence of any irregularities, if I can put it that way, on the brown jacket?

20. A. I examined both articles for the presence of any fresh appearing cuts. The brown jacket I found one cut present on the left side of the jacket. This would be on the selvage edge or flap of the jacket. The cut was 5½" from the bottom of the jacket. It was 2-3¾" in length in the shape of a '7'. The cut continued through the interlining or interfacing of the jacket and through the back flap of the jacket. The cut was 13/16" in length on the back of the jacket and the cut was fresh in appearance.

25. Q. So if we follow that, the cut on the outside of the jacket you said was 2½" long and in the shape of a '7'?

30. A. It was 2-3/4" long and irregular in shape, in



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the shape of an irregular '7'.

Q. Okay. And then where something came through or on the inside . . .

5.

A. Well, it continued through the interfacing of the jacket where the jacket is folded and forms a neat selvaged edge, continued through the interfacing and through the back flap of the jacket. 13/16" in length.

Q. Okay. And do you have any opinion as to with what that type of hole would be consistent?

10.

A. I could state the time that the separation was a cut and that it was fresh in appearance. Fresh simply means that the garment was not washed, laundered or had sufficient wear applied to the cut fibres to cause a matting of slubbing. It could've occurred several months before and been put away in a drawer, it would still appear fresh as long as it did not have that wear or laundering.

15.

Q. Okay. What about the yellow jacket? What about the physical appearance of it?

20.

A. The yellow jacket had two separations present on the left arm of the jacket, away from the elbow surface. The first separation. . .

Q. You're indicating here on the inside of the arm.

A. I call it the inner surface of the arm.

Q. Yes.

25.

A. The first separation was 1" in length, it was continued through the outer surface of the jacket and through the lining of the jacket. The cut was fresh in appearance. The second separation continued from that point down through the cuff of the jacket approximately 8" in length. The first 6½" was a cut that was

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fresh in appearance, the remaining 1½" was a tear and it continued through the cuff of the jacket and was also fresh in appearance.

5. Q. And just for clarity, where would the tear have been, near the wrist or further from the wrist?

A. The tear was on the cuff of the jacket.

Q. On the cuff of the jacket.

A. Yes.

10. Q. All right. And what if anything can you say about the cause of that cut or tear?

A. Only that the cut, the 8" separation was very irregular in shape and that 6½" was cut, 1½" was torn and it was fresh in appearance.

Q. I see. Now did you take fibre samples from each of these jackets?

A. Yes, I did.

15. Q. Um-hmm. And what did you do with them?

A. I took a sample from each of the jackets to see what kind of fibre was composing the two articles, I simply took a small snippet from the garments, I dropped them on a slide and retained the slide in my possession.

20. Q. And they were kept in your exclusive possession until presented in court at the Donald Marshall reference in December of 1982?

A. Yes, on December 2nd, 1982 they were presented to court.

25. Q. Mr. Evers, I'm going to show you court EXHIBIT #2. Would you identify that, please, and tell the jury what it contains?

A. I identify court EXHIBIT 2 by my case at that time, by the exhibit number and by the writing. This is

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a small sample of the yellow jacket which I received on June the 16th, 1971.

THE COURT: And that's exhibit what?

MR. EDWARDS: That's Exhibit 2, My Lord.

5. Q. EXHIBIT #3 which is a white box?

A. EXHIBIT 3 is marked with the case number, I cannot recall what I had done with this other than perhaps it was used to transport slides.

Q. Okay. EXHIBITS 4, 5 and 6 are slides. Perhaps you can tell us what they are.

10. A. Court EXHIBIT 4 is a slide which I identify by my case number and my writing. This slide was a small sample of the interfacing or pellon of the jacket, of the brown jacket which I received on June 16th, 1971. Court EXHIBIT 5 I identify by my case number and writing. This is a sample of the brown wool which I removed from the brown wool jacket, court exhibit which  
15. I received on the 16th of June, 1971, and court EXHIBIT 6 is a slide which I identify by my case number and writing as being a small sample that I put in from court EXHIBIT #2 which I identified previously.

THE COURT: Which was?

20. A. The sample of the yellow jacket.

MR. EDWARDS: That was EXHIBIT 2. Now you see before you, Mr. Evers, a series of 10 knives and you have examined those prior to coming to court and there was a piece of tape also contained thereon marked

25. EXHIBIT #1 at this moment. Did you ever have those knives in your possession?

A. If I can have a look at the knives.

Q. Step down and have a look then.

A. I identify each of the knives by my initials, date and case number appearing on the red laboratory tag  
30. On the 17th of March, 1982 I received a sealed box from

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Mr. Richard MacAlpine of the Halifax Laboratory. The registered mail number was 2185. The sealed box contained a sealed brown envelope which I opened and found to contain a piece of tape and 10 knives.

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Q. Mr. MacAlpine actually gave you the sealed packet personally, did he?

A. He did, yes.

Q. And that was on the 17th of March, '82?

A. Yes.

Q. Okay.

10.

A. I examined those knives, removed fibres from some of the knives and returned the knives or contents to Mr. MacAlpine on the 18th of March, 1982.

Q. Now perhaps you would describe for the jury exactly how you would examine the knives for the presence of fibres.

15.

A. Well, these knives being relatively small in comparison to some exhibits which we examined, I was able to examine with a stereo microscope. The power or the magnification ranged from approximately 6 to 50 times depending on what I was examining. I examined the knives, I removed any fibres which I found, I put the fibres on glass slides, examined and identified the fibres and compared them to the samples which I had removed from the 1971 jackets.

20.

Q. Now you say you used a stereo microscope to locate these fibres. I might be asking the obvious but are the fibres at all visible to the naked eye?

25.

A. Usually fibres are visible to the naked eye. These fibres were very small in length. The fibres ranged from .35 mm to 4 mm in length, the 4mm being close to a quarter of an inch. The smaller fibres would not be visible to the naked eye unless one were determined, knew

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0. MR. EVERS, Direct Examination

where it was and determined to find it. I suppose you could.

Q. Now I refer you in sequence to each of the knives. You have notes you made at the time?

5. A. Yes, I do.

Q. If you wish to refer to them. Knife #1, without handing them to you, what can you tell us about the number of fibres if any which were on it?

A. If you are referring to the numbers which I received I can go through each of the knives.

10. Q. This is your number here?

A. Yes, it is.

Q. Yes. I'm referring to knife #1.

15. A. From knife #1 I removed one synthetic fibre, I found this synthetic fibre to be consistent with the interfacing or pellow of the brown jacket which I received in 1971. Knife #2 contained one synthetic fibre, again I found this to be consistent with the interfacing or pellow of the brown jacket which I received in 1971. Knife #3, 4 and 6 I found to be negative for the presence of any fibres. Knife # - I'm sorry, that was knives #3, 4, 5 and 7 were negative.

20. Q. 3, 4, 5 and 7?

A. Yes.

Q. Yes?

25. A. Knife #6 I removed 4 synthetic fibres which I found to be consistent with the interfacing or pellow of the brown jacket which I received in 1971. Knife #8 contained 8 synthetic fibres consistent with the interfacing or pellow of the brown jacket which I received in 1971. It also contained one wool fibre consistent with the brown jacket which I received and it contained 3 white acetate fibres consistent with the interlining of the yellow jacket which I received in 1971.

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Court exhibit or my exhibit 9 contained two synthetic fibres consistent with the inter pellow of the brown jacket and knife #10 contained two synthetic fibres consistent with the interfacing or pellow of the brown jacket.

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THE COURT: Sorry, would you just go back to the three white acetate fibres which you said were consistent with the . . .

A. The interlining, the lining of the yellow jacket.

10.

MR. EDWARDS: Did you find any other synthetic fibres?

A. I also found other fibres in the envelope; from the inside of the envelope itself I removed two wool fibres consistent with the brown jacket and from a piece of tape present in the envelope I removed two synthetic fibres, consistent again with the interfacing or pellow of the brown jacket.

15.

Q. So was there any one knife upon which there were more fibres found than the others?

A. Yes. I found more fibres to be consistent with the articles on my Exhibit #8, the knife #8.

20.

Q. And how many fibres in total on that?

A. From that knife I found 12 fibres in total to be consistent with the two articles of clothing.

Q. Yes?

25.

A. I did remove additional fibres from the knife, from that particular knife. I removed three additional white wool fibres from that knife. I also removed two additional synthetic fibres. One of the synthetic fibres was very close to the inter pellow of the brown jacket but because of the limited sample I could not positively identify it.

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Q. Okay. So there were 12 in total.

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A. I found 12 to be consistent.

Q. Yes?

A. I found an additional three wool fibres.

Q. Yes?

5.

A. Making 15 and I found an additional two synthetic fibres making 17 fibres.

Q. Now what's the breakdown of the 12?

A. The 12 was 8 fibres consistent with the pellow of the brown jacket.

Q. Yes?

10.

A. One fibre consistent with the brown wool or outer covering of the brown jacket and three acetate consistent with the lining of the yellow jacket.

Q. And they were all on knife #8.

A. Yes.

15.

Q. Now can the presence of the synthetic fibres be explained on these knives other than by the fact that one of them must've come in contact with the two jackets?

A. The - are you speaking of just the knife #8 or are you talking of all of the fibres?

Q. All of them.

20.

A. All of the fibres which I removed and found to be consistent, there were 26 in total. Out of those 26 fibres there were 12 different types of fibre. The type, maybe the colour, the diameter of the fibre, the cross-section of the fibre or the delustrant added to the fibre but there were 12 distinct types of fibres. In order for those fibres to come from a source such as contamination

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I would consider to be very remote. The fibres if dealing with the 26 fibres in total in my opinion they would have to come from an article or articles of clothing consisting mainly of the 12 fibre types which I have

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identified.

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0. MR. EVERS, Direct Examination

Q. So what if I had asked you the question about knife #8, the presence of the fibres on that one knife be explained other than by contact with the clothing such as the two jackets? What would your answer be?

5. A. Again the knife #8, I was dealing with 12 fibres and I found seven different types of fibre. Again in order for those fibres to be present on that knife it is my opinion that they would come there not as a result of contamination or as a result of coming in contact with a number of articles. They would have to come from contact with one, two or three articles composed mainly of the types of fibres which I have identified.

10. Q. In the two jackets.

A. Yes.

15. Q. Well, put it this way. Do you think that if you took a fibre from each of the persons in this court room, would they be consistent with the fibres you took from the knife?

A. No.

Q. Thank you.

20. CROSS-EXAMINATION

MR. WINTERMANS: Where are these jackets, these coats that the samples were taken from?

A. The last time I recall was that I transported the jackets to court on the 28th of July, 1971 and I have not seen them since.

25. Q. So your answer is you don't know where they are. Now isn't it true that you cannot state that any of those knives caused the cut in the brown jacket?

A. No, I cannot state that any one of those knives caused the cut in the brown jacket.

30. Q. You say that there were fibres on the knives



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that you examined which were not consistent with the samples from the brown coat and the yellow coat, is that right?

5.

A. Yes. You're talking about any particular knife or all of the knives?

Q. I'm talking about all those 10 knives.

A. Yes, there were fibres which I found that were not consistent with the samples which I had. I should state that the samples which I had were very limited. Usually when I . .

10.

Q. Where are those . .

MR. EDWARDS: Let him finish his answer.

15.

A. Usually when I am doing a comparison of fibres I have the jackets that I can go back to jackets or other articles, go back to and obtain further samples. The samples which I had were just small snippets which I had removed from the garment and dropped onto a slide. They were not all - they did not include for example the white pile lining of the brown jacket, they did not include sewing threads which would be present, so that the samples were limited but with the limited samples I did find fibres that were not consistent with the limited samples.

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MR. EDWARDS: May I rise at this point? My Lord, from time to time throughout the trial I find it is getting more distracting as the trial goes on. There are exclamations from the audience. I have an idea of who they're from. I would ask Your Lordship to warn the audience because if it continues I'll ask Your Lordship . .

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THE COURT: I haven't noticed until this last moment and I did hear a distinct noise. The gallery will have to restrain themselves. There's to be no indication whatsoever of anything from the gallery. The evidence is

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0. MR. EVERS, Cross-Examination

coming from here and the jury is not to be distracted.

5. MR. WINTERMANS: And isn't it true, Mr. Evers, that the fibres that you're referring to from the samples which came from the two jackets that you referred to, were commonly found fibres in the 1960' and 1970's?

10. A. That's true. The fibres were common and could be found readily. My - I guess I am basing my evidence more upon the fact of the different varieties and types. Each one of these fibres would be found today and quite readily today, but finding them in this combination is what makes them unique.

Q. And there are no yellow fibres, is that correct?

A. That's correct.

Q. Thank you. No more questions.

THE COURT: Any re-examination?

15. MR. EDWARDS: My learned friend's last question, what significance if any do you attach to the fact that you found no yellow fibres?

20. A. The fact that I found no yellow fibres does not affect my opinion. Had I found yellow fibres my opinion would've been stronger. The yellow fibres composing the nylon shell would not shed as readily as the acetate fibres.

Q. Okay. Thank you, Mr. Evers.

THE COURT: All right, thank you, Sir. You may be excused.

25. WITNESS WITHDREW.

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CPL. JAMES CARROLL called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: You are Corporal James Carroll, you are a member of the R.C.M.P. stationed at Sydney, is that correct?

5.

A. That's correct, yes.

Q. And together with one of the previous witnesses, Staff Sergeant Wheaton you were involved in the re-investigation into the circumstances surrounding the death of Sandy Seale in 1971, is that correct?

A. That's correct.

10.

Q. Now you initiated that investigation around approximately the 4th day of February, 1982?

A. Yes.

Q. And during that period of time from February to October, 1982 you had various contacts with the accused, Roy Newman Ebsary.

15.

A. I did.

Q. Would you point him out, please?

A. He's sitting in the front row of the court room directly behind his counsel, Mr. Wintermans, wearing three stars on his brown corduroy jacket.

20.

THE COURT: The record will show that he identifies the accused,

MR. EDWARDS: And you are familiar with Wentworth Park and Crescent Street?

A. I am.

25.

Q. And both of those locations are located in the City of Sydney, County of Cape Breton, Province of Nova Scotia.

A. They are.

30.

Q. Now Corporal Carroll, in October of 1982 you taped a conversation between yourself and the accused, Roy Newman Ebsary at his home?

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A. I did.

Q. Perhaps you could relate for the jury the circumstances leading up to the taping of that conversation? Just go back a few days before.

5.

A. Prior to I believe the 29th of October, 1982 I had several conversations with Mr. Ebsary and on one final occasion prior to this actual taping in May, Mr. Ebsary had agreed to sit down at his typewriter at his own home and type a resume of what had happened in Wentworth Park the night the Seale boy was stabbed. That didn't work out because he had broken his glasses or had lost them and he suggested that I supply him with a tape recorder and a fresh tape, which I subsequently did. I had originally planned to leave it with him but I decided to stay with the machine and to conduct the taping in my own presence.

10.

15.

Q. Okay. So you went to Mr. Ebsary's home. So you went to Mr. Ebsary's home you say on the morning of the 29th?

A. Yes, I did.

Q. Approximately what time did you get there?

20.

A. The taping began somewhere in the vicinity of 11:00 in the morning. I was there prior to 11. We had a discussion prior to the tape being started and there was a little bit of delay there while he was finishing a letter he was writing to a friend of his and addressing the envelope, putting some money on the side and so on and then we got down to the tape after that.

25.

Q. Okay. So following the completion of the interview you took possession of the tape?

A. I had Mr. Ebsary initial it as I did myself.

Q. You're looking at a tape which has been marked EXHIBIT #7, is that correct?

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A. Yes. That's correct.

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0. CPL. CARROLL, Direct Examination

Q. That is the tape of the conversation between you and Mr. Ebsary on the 29th of October, 1982?

A. It is.

Q. And you say you had Mr. Ebsary initial it.

A. Yes.

5. 

Q. And you initialled it on that date.

A. Also put the date on it as well.

Q. And you retained possession of that tape until it was presented at court during the previous trial.

A. Correct.

10. 

Q. Now also after the tape was made, you had a transcription of the tape prepared?

A. I did.

Q. And EXHIBIT #8 is the transcript of that conversation?

A. Yes, it is.

15. 

Q. And have you listened to the tape and followed along with the transcript so that you can verify the accuracy of the transcript?

A. Yes, I have.

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

20. 

A. I proofread this several times. It's as accurate as I can make it.

25. 

Q. My Lord, Corporal Carroll has been good enough to make several copies of EXHIBIT #8, the transcript with the intention of the Crown, with the court's leave, of course, to have the tape played and I wonder if it might not be helpful to distribute copies of the transcript to the jury so they can follow along.

THE COURT: Might it not be better to let them hear the tape first and then give them the transcript after?

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MR. EDWARDS: Well, whatever the Court wishes.

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CPL. CARROLL, Direct Examination

THE COURT: I think that would probably be better.

MR. EDWARDS: So Corporal Carroll, would you mind playing the tape, please?

5. A. Yes.

MR. WINTERMANS: My Lord, might I be allowed to follow along on one of the transcripts?

THE COURT: Might as well.

(Tape recording of conversation played).

10. THE COURT: Well, it's now 4:30, Mr. Edwards. Probably this is as good a spot as any to adjourn for the day.

COURT ADJOURNED (4:30 p.m.)

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