

439.

0. COURT OPENED (09:30 a.m.) January 15, 1985

JURY POLLED. All present.

CPL. CARROLL, Direct Examination (Cont'd).

MR. EDWARDS: Corporal Carroll, at the

conclusion of the taped conversation which you played
5. for the jury yesterday, Mr. Ebsary agreed to accompany
you to the place where he said he had buried the knife.

A. Yes.

Q. Did you in fact accompany him to such a
location?

A. Yes, I believe it was the following day. I
10. don't have my notebook with me this morning, but it was
one or two days later. I believe the very next day
that Corporal Douglas Hyde and myself went to an area
at Rear Argyle Street with Mr. Ebsary and we were
directed there by him. We went around to the back yard,
a small I would call it a flower bed type area right
15. beside the basement at the rear of the house.

Q. Yes?

A. And with shovels we dug up an area about
approximately 4 feet square, 3 x 4 foot area and found
nothing other than broken glass, nails and spikes, that
sort of thing.

20. Q. No knife.

A. No.

Q. Now during the course of your investigation,
were you or did you interview Donna Ebsary?

A. I've spoken with her on numerous occasions
25. but to take a statement from her, I don't believe I did.

Q. Do you know whether or not prior to the taped
conversation Mr. Ebsary had been made aware by you or
Staff Sergeant Wheaton of the evidence Donna was expected
to give?

30. A. Would you repeat that for me please?

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CPL. CARROLL, Direct Examination

Q. Well, when Ebsary taped that conversation with you on October 29th, 1984 . . .

A. Yes.

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Q. To your knowledge did he know what Donna had said? About washing the blood off the knife?

A. I would say not. I don't think so.

THE COURT: The most he can say is that he hadn't told him.

MR. EDWARDS: Yeah. You hadn't told him.

A. No. Definitely not.

10.

Q. There was one correction in the transcript which you made earlier which is not on the - can I see the exhibit, please? At the top of page 6. Oh yes, it is corrected on this one, that he dropped him and ran. The copies we had it had the original print 'he ducked and ran.' Yes, it should be he dropped and ran, and that's what's on the court exhibit.

15.

A. Yes, that's correct.

THE COURT: He dropped him?

MR. EDWARDS: He dropped him and ran.

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THE COURT: There are I noticed a couple of - I thought a couple of rights that were left out in the transcript, the one that I was reading from but nothing significant from the tape.

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MR. EDWARDS: Corporal Carroll, during your investigation you interviewed and got to know James MacNeil, the person allegedly in the park that night with Roy Ebsary?

A. Yes, I met him on numerous occasions.

Q. When was the last time you would have seen Mr. MacNeil?

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A. At 9:34 this morning, just prior to court opening.

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CPR. CARROLL, Direct Examination

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Q. Where was he?

A. He was in the hallway about five feet from the door.

Q. Outside the court room.

A. Yes.

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Q. Right.

A. On the second floor.

Q. And what about Mary Ebsary?

A. Mary Ebsary, I didn't see this morning. She was here yesterday, mid-afternoon I believe.

Q. But she's still in the city?

10.

A. Yes, I know where she works, on Kings Road and she resides at Ashby.

Q. Okay. Thank you very much, Corporal Carroll.

THE COURT: Cross-Examine?CROSS-EXAMINATION

15.

MR. WINTERMANS: Did you say that you had spoken to Mr. Ebsary a number of times before this taped interview?

A. Yes.

Q. And what can you say as to Mr. Ebsary's state of sobriety at the time that this tape recorded statement took place?

20.

A. On the morning the tape was made Mr. Ebsary informed me he had a couple of drinks of wine which I believed to be true. He had some usual signs, the odor and possibly a little bit more talkative, if that's possible. He did not drink during the taped interview except at the very end when he poured a couple of shots in a glass and I preferred that he didn't do that but I chose not to stop him.

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Q. Did you or should I say did you hear Mr. Ebsary crying at any time during the tape recorded conversation?

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A. Yes, I did, on at least two occasions.

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0. CPL. CARROLL, Cross-Examination

Once during the mention of Marshall serving 11 years and he made mention of having served I think 9 months and in the transcript that's on page - the bottom of page 8, I guess it is, the second last quote there from Mr. Ebsary. He said "Yes, I served time in the slammer too. I only spent a few months, nine months but I realize what young Marshall must have gone through 11 years," and he breaks down and cries for about 10 or 15 seconds there. There was another part, I just don't recall where it was but he kind of choked up on that as well.

10. Q. Now Sergeant or I mean Corporal, you indicated that you were the officer in charge of this investigation, is that true?

A. Since Staff Wheaton was transferred, yes.

Q. And you would have possession of all the files in relation to the investigation, is that correct?

15. A. Yes.

Q. I show you something, Corporal, and ask you if you can identify . .

MR. EDWARDS: Perhaps my learned friend would show me what he's going to show the witness first.

20. MR. WINTERMANS: I don't intend to submit this as an exhibit, I just want to show . .

MR. EDWARDS: What are you going to show him?

MR. WINTERMANS: I'm going to show him the exhibit and ask him if he's familiar with it.

25. MR. EDWARDS: My Lord, what he has in his hand as far as I can see is the report that was written by Staff Wheaton. He had the opportunity to cross-examine Staff Sergeant Wheaton on it. How can he cross-examine this witness on a report written by someone else?

30. MR. WINTERMANS: I'm not going to cross-examine him on it.

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0. CPL. CARROLL, Cross-Examination

THE COURT: Well, I'll let him show it to him, we'll see where he's going.

MR. WINTERMANS: Do you recognize that?

A. Do you want me to examine every sheet?

5. Q. Well, you can examine - perhaps you can just quickly look through here, here and I'll get to - does that look familiar to you? And finally to here, to page 10. The rest of it I'm not overly concerned with at this point.

10. A. Certain pages I do recognize, yes. The conversation when Mr. Ebsary called Staff Wheaton on the telephone following an interview and I was requested to come down and see him, I recall seeing that before, and the signature looks like Staff Sergeant Wheaton's on page 10.

15. Q. Okay. Without going into detail of what everything says in there, after all it is a report and only a report, but you would acknowledge that that appears to be an R.C.M.P. file 1982?

A. Yes, I would say so.

20. Q. Fine. I'm going to show you page 7 of that file and I'm going to point you to paragraph 22 and ask you if you would read that to yourself.

25. MR. EDWARDS: My Lord, I'm going to rise here because perhaps Your Lordship should be aware of paragraph 22 and if this cross-examination is leading in the direction it appears to be, it's improper. And my learned friend knows that.

MR. WINTERMANS: Well, I'm not going to . . .

THE COURT: I don't know what you're going to do but you've shown it to the witness. Perhaps you'll just show it to me and then I'll have some idea of what it is.

30. MR. WINTERMANS: I'm just going to ask him a question from his own recollection . . .

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0. CPL. CARROLL, Cross-Examination

THE COURT: Just before you get on to that, let me have a look at it.

MR. WINTERMANS: Now Corporal Carroll . .

MR. EDWARDS: My Lord . .

5. THE COURT: Wait and see what his question is.

MR. WINTERMANS: Were you present . .

THE COURT: And don't answer it until . .

MR. EDWARDS: My Lord, if I may rise here, the problem is that my learned friend can phrase the question so that it has the answer in it since he's on cross-examination. It's no good for me to object after he asks the question and the damage is done. So My Lord, perhaps we should have the jury out and I'd like a ruling on that before he asks the question.

10.

JURY RETIRED.

MR. EDWARDS: Perhaps I'll elaborate on my objection, My Lord.

15.

THE COURT: Well, wait till we see what the question - what are you going to ask?

MR. WINTERMANS: What I want to put to this - you know, first of all with respect to Sergeant Wheaton, I mean . .

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THE COURT: Well, forget about Sergeant Wheaton. Tell me the question you're going to ask.

MR. WINTERMANS: What I want to do is, I want to ask this witness if he was present when Donald Marshall made his statement to the R.C.M.P. in 1982. I want to refer to it before the jury and the one that Donald Marshall denied and then I want to ask him about the circumstances of the . .

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THE COURT: Why are you showing him that? Why couldn't you ask him that? He's a witness, it's cross-examination. You ask him if he was present at a certain

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time. You don't have to show him all this stuff to lead him up to it.

5. MR. EDWARDS: Or show him the 1982 statement itself. Why show him Sergeant Wheaton's report? He has the March 11th, '82 statement there. Surely it's proper for him to ask well, did you witness this statement, but I suspect my learned friend is going to get into saying were you there when Marshall said he robbed those fellows.

10. THE COURT: Well, he can't ask him that. I think you've got to . . .

MR. WINTERMANS: I will show him the statement.

15. THE COURT: Well, just a minute. You're at cross-examination. You can ask him almost anything that's proper cross-examination and the range is very wide. So if you know of an event that took place and you want to cross-examine him about it, you lay just a little bit of ground work. The ground work isn't to show him something, the ground work is to ask him whether or not he did certain things or whether he was present when certain things took place. If he was, then you ask him what took place. It's very simple, isn't it? But I think that you want to be careful in your questions, that you don't phrase a question in such a way to imply something that this witness can't testify to. You ask him. You're asking him what he saw, what he observed, what he did and why he did it and those are all proper questions, but I don't want to have to spend the day with the jury going outside every question that you want to ask.

20. MR. WINTERMANS: One other thing perhaps that I wanted to bring up with this question is that since he is the officer in charge of the investigation at this time and has been since 1982, I was going to ask him

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questions with respect to when to the best of his knowledge the R.C.M.P. took over the investigation of the Seale death and to the best of his knowledge whether or not any other police . .

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THE COURT: I see nothing wrong with that.

MR. WINTERMANS: Officers had any investigation and whether to the best of his knowledge whether any other police officers interviewed Donald Marshall before that.

THE COURT: No problem with that.

10.

MR. WINTERMANS: That's all.

THE COURT: All right. Bring the jury back in.

JURY RETURNED.

JURY POLLED. All present.

THE COURT: All right, resume your questioning, Mr. Wintermans.

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CPL. CARROLL, Cross-Examination (Cont'd)

MR. WINTERMANS: Corporal, you were present at Dorchester Penitentiary when Donald Marshall was interviewed by yourself and Sergeant Wheaton, is that right?

20.

A. Yes, on two occasions.

Q. Two occasions. Okay. I'm going to show you all I have, which is a typed document. Would you look at that please, identify it?

A. It looks familiar, yes.

Q. What is it?

25.

A. Sorry?

Q. What is it?

A. It appears to be a typed version of the handwritten statement taken from Donald Marshall at Dorchester Penitentiary. The date is not on here but it seems to be proper wording, as I recall it.

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CPL. CARROLL, Cross-Examination

Q. And was this the first or second meeting that you had with Donald Marshall?

A. I believe it was the second meeting.

5. Q. Were there any meetings with Donald Marshall before - let me withdraw that question. When was the first meeting in relation to when this one was taken, how long . .

10. A. I'd have to see the date on the original statement to give the exact date. Roughly a week or 10 days later that we went back and interviewed Marshall the second time, which resulted in that statement being taken.

Q. So it was a week or 10 days.

15. A. Yes, the reason for that was we arrived there to see Mr. Marshall initially and as we entered the penitentiary we found a bunch of young males being removed from the penitentiary. There'd been a rumble in the institution the night before and these people were being removed to Springhill so we did see Marshall for a short time but the authorities told us it would be dangerous for us to talk to Marshall under those circumstances because the prisoners would feel he was informing on those that caused the trouble the night before so for his own safety we left and came back approximately a week or 10 days later.

20. Q. During that first interview was anything at all discussed concerning the Seale death?

25. A. Oh yes, the general outline of the investigation was made to him and I don't think we were there any more than 10 or 15 minutes.

Q. Was made to him? What do you mean by that?

30. A. The outline of our investigation was laid out to him, that we were re-investigating his case.

0. CPL. CARROLL, Cross-Examination

Q. What exactly was he told?

A. I don't recall. Just that we had been -
- we were interested in reviewing the case and what
were his remarks about what he could do to enlighten
us or whatever.

5. Q. Was he given any specific information?

A. Such as?

Q. Such as did you tell him anything that you
may have learned in your investigation, in other words
did you provide him with any facts?

10. A. No, I don't believe so. We were expecting
co-operation from him, if there was any to come.

Q. So you didn't tell him what you already had
in relation to the investigation.

A. No.

15. Q. And the second time then was seven or 10 days
later, approximately, and that was when this statement
was taken, is that right?

A. Yes.

20. Q. And at that time, before this statement was
taken, during that interview did you provide Mr. Marshall
with any information that you had gathered from other
sources before he gave this statement?

A. I don't believe so.

Q. You're the officer in charge of the investigation
and the informant, is that correct?

A. Yes.

25. Q. In this charge against Mr. Ebsary.

A. Yes.

Q. And therefore you're allowed to remain in the
court room while the other witnesses are testifying.

A. Except for the Voir Dire in this case.

30. Q. Right.

A. I was, yes.

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CPL. CARROLL, Cross-Examination

Q. That was in relation to the statement, the tape recorded statement.

A. The rape, right.

Q. And so you heard Donald Marshall, Jr.

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testifying.

A. I did.

Q. And you heard him being cross-examined.

A. I did.

Q. As to the statement which I referred to as the 1982 statement which he gave to the R.C.M.P. while in Dorchester.

10.

A. Yes.

Q. And the statement that I showed you and that I'm showing you again which you examined is that a true copy of that statement?

A. Well, the statement was a handwritten copy, I would say it's quite accurate.

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Q. I'm showing you the handwritten version and the typed version which I have and ask you to compare and see if they are . .

A. Do you wish me to read them all the way through, both statements?

20.

Q. Well . .

A. It's four pages on the handwritten one and . .

Q. If you have to, Corporal.

A. I'm familiar with the handwritten one so perhaps I can just make periodic checks from the type-written one.

25.

Q. Okay. So you're saying that you were present when that statement was given.

A. I was.

Q. And that to the best of your recollection nothing was made known to Donald Marshall before that

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0. CPL. CARROLL, Cross-Examination

statement was given as to what evidence if any that you had gathered prior to that 1982 meeting with Donald Marshall, is that correct?

5. A. As I recall it the robbery aspect came from Mr. Marshall. I don't believe we provided him with any details of interviewing other witnesses who may have changed the story. I don't recall that we did at that stage.

10. Q. Okay. The phrases which I asked Mr. Marshall to comment on, on the 1982 statement they were in fact stated by Donald Marshall to you?

A. Sorry?

15. Q. The three portions of that statement which I referred Donald Marshall to and asked him to comment on and which he admitted having said and then stated weren't true, those statements are in fact in that statement.

A. Yes, they are.

Q. In relation to the robbery, the plan to commit a robbery.

A. Yes, they are.

20. Q. And you Corporal, as you said already, you're the officer in . . .

THE COURT: I'm sorry, you're putting the handwritten one in your files.

25. MR. WINTERMANS: You've already indicated that you're the officer presently in charge of this investigation and have been for over two years or approximately two years?

A. Whatever date Staff Wheaton was transferred, yes. I inherited.

Q. And so you would have access to all the information in relation to the history of the Seale case.

30. A. As far as I know I have, yes.

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CPL. CARROLL, Cross-Examination

Q. Both from the R.C.M.P. and from the Sydney police, is that correct?

A. City of Sydney Police Department were instructed to hand over their files, all files to us and as far as I know we have them.

5.

Q. And to the best of your knowledge have any other police officers from any other police forces interviewed Donald Marshall Jr. in Dorchester Penitentiary at any time between 1971 and the date of your two interviews?

10.

A. Any other police force?

Q. Yes.

A. Not to my knowledge.

Q. Any other police officers other than of course you and Staff Sergeant Wheaton together, on both of those occasions?

15.

A. Not that I know of.

Q. And - okay. Thank you. That's all my questions.

THE COURT: Re-examination?

REDIRECT EXAMINATION

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MR. EDWARDS: You told my learned friend that as far as you could recall Donald Marshall wasn't apprised of the progress or the details of the re-investigation.

A. I don't believe that he was. Now I don't have notes on it.

25.

Q. Okay. My question is do you have personal knowledge of what prompted the reinvestigation, what caused it to be initiated in the first place?

A. As I understand, a letter was written by Marshall to his lawyer, Mr. Steven Aronson in Dartmouth, possibly an ongoing series of letters, asking that

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0. CPL. CARROLL, Redirect Examination

efforts be made to reinvestigate the case to see if Marshall might get a new trial or have the case reviewed. That letter ended up on the desk of Chief John MacIntyre of the Sydney City Police, now retired and since he was the main investigator at the time of the 1971 investigation it would be impossible for him to review it since he's now Chief . .

5. Q. Well, we can't get into that. But did you see a letter from Aronson, Mr. Marshall's lawyer to Chief MacIntyre?

10. A. I believe I read that in past years, yes.

Q. And what if anything can you say about the connection between that letter and the institution of the reinvestigation?

A. The letter resulted in the R.C.M.P. being asked to reinvestigate the case.

Q. Thanks.

15. MR. WINTERMANS: If I could have one moment, My Lord, I have a copy of that letter somewhere.

MR. EDWARDS: Here it is here, Mr. Wintermans. If you want it.

CORPORAL CARROLL Re-examined by Mr. Wintermans

20. MR. WINTERMANS: I want to show you something and I don't want you to say what it says in there but I just want you to say what it is. What is that letter?

A. It's a letter to the Chief of Police in Sydney dated 26th January, 1982 from Steven J. Aronson, lawyer on behalf of Donald Marshall, Jr.

25. Q. Is that the letter that was passed over to the R.C.M.P.?

A. I received this before, I believe I have a copy on file.

30. Q. To the best of your knowledge isn't it true that about this point the City of Sydney or no, I

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0. CPL. CARROLL, Re-EXAMINATION

shouldn't say that, I should say that this letter was transferred to the R.C.M.P. because the R.C.M.P. were looking into the Seale matter?

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A. I don't think it came to us or or about that date, the 26th of January. I think it was weeks later. In fact I think the 4th of February was when we actually sat down and reviewed the file, Staff Wheaton and myself.

Q. I see. Okay.

10.

A. So I think there was a meeting between the Crown Prosecutor, the Chief of Police and possibly our Officer Commanding prior to the 4th of February.

15.

Q. Now the letter requests that the - well, it indicates that this lawyer Steven Aronson was retained by Mr. Marshall and it's regeusting that hte police look into the matter of the Seale death. There is some information in there or alleged information which I don't want to get into, but I'm going to ask you this question. Is there anything in this letter concerning the mention of James MacNeil?

A. No.

20.

Q. Is there anything in that letter mentioning a robbery?

A. No.

Q. That's all the questions I have.

THE COURT: Do you wish to re-examine again?25.

A. MR. EDWARDS: Yes, on that. Is there anything in the letter about Roy Ebsary?

A. Yes, his name is mentioned there.

Q. Thank you.

THE COURT: All right, thank you.WITNESS WITHDREW.

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0. CPL. CARROLL, Re-EXAMINATION

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Q. Thank you.

THE COURT: All right, thank you.

WITNESS WITHDREW.

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MR. EDWARDS: My Lord, at this point I would like to have the evidence given at the previous trial by Constable Leo Mroz read into evidence at this trial. I am making application to do that as Your Lordship and my learned friend have been made aware previously pursuant to the provisions of Section 643.1 of the Criminal Code, and just to paraphrase that section it allows the reading in of the evidence given at a previous trial upon the same charge where the person giving the evidence is (a) dead, and my learned friend has agreed that we don't have to prove Constable Mroz is dead. He died suddenly a month or so ago.

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MR. WINTERMANS: That's correct, My Lord. It is agreed that Constable Mroz is dead and it would be proper to have this last evidence form part of the record at this trial, as I understand the law.

THE COURT: And it's the evidence given when?

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MR. EDWARDS: This would be the evidence given in November, 1983. The second trial, and as the Section requires the transcript is signed by Mr. Justice R. MacLeod Rogers who was the presiding judge at the second trial, so with Your Lordship's permission I'd like to have that marked as being a Crown exhibit and then the one remaining problem, the Section specifically states that the transcript is to be read in and so that raises the question, who reads it in, and I haven't been able to find any authority on that. If my learned friend is agreeable and if you're agreeable, you're the neutral party here and I would think it appropriate that you read it to the jury.

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MR. WINTERMANS: I would agree with that, My Lord. The alternative of course, the tape could be played if Your Lordship feels that that would be more appropriate but I admit that I agree with Mr. Edwards to the use of

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0. the transcript.

MR. EDWARDS: Well, the Section says 'transcript read in.'

MR. WINTERMANS: Right. Whatever Your Lordship . .

THE COURT: Well, I'll read it if you wish.

5. MR. EDWARDS: The transcript of Constable Mroz' evidence is now MARKED EXHIBIT #9.

THE COURT: I'm satisfied under Section 643 that evidence can be read this way. So I propose to read, this is the evidence that Constable Mroz, Leo Mroz gave at the last trial in November of 1983 in this same matter. Since he's now dead his evidence can be re-read, so this is Constable Mroz on Direct Examination. It's question and answer, I'll see if I can avoid too many question and answer repetitions, but:

15. "Q. You are Constable Leo Mroz, is that correct?

A. That's correct, Sir.

Q. You are a police officer employed by the City of Sydney Police Department?

A. That's correct.

Q. You've been so employed for how long?

A. Approximately 20 years.

20. Q. And that is continuously during that 20 year period?

A. That's correct.

Q. You would have been employed there in 1971?

A. That's correct, I was.

25. Q. And in fact you were on duty as such on the evening of the 28th of May, 1971, is that correct?

A. That's correct, Sir.

30. Q. On that evening did you have occasion to respond to an incident which took place on Crescent Street, City of Sydney, County of Cape Breton, Province of Nova Scotia?

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CST. MROZ' STATEMENT

A. That's correct, Sir.

Q. With whom did you respond to that particular call?

A. I responded with then Constable Richard Walsh. He is currently an Inspector with the Sydney P.D.

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Q. What time did you respond to that particular call?

A. Just before midnight. Before 5 to midnight and midnight on that night, Sir.

Q. Do you recall what the weather conditions were like at that time?

10.

A. From my recollection it would be clear and a seasonable type of evening. Probable temperatures maybe around 50's or 60's.

Q. Do you recall whether or not it was raining?

15.

A. No, Sir, it wasn't raining from my recollection.

Q. Upon your arrival on Crescent Street, first of all from what direction did you come onto Crescent Street?

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A. We travelled by way of Bentinck, South Bentinck to Crescent.

Q. Yes?

25.

A. And we made a left turn from Bentinck to Crescent and we travelled a distance of a few hundred feet down Crescent where we - where a fallen - where a subject laying in the street came to view and we stopped on the front side of the fallen victim.

Q. I see. Did you know then who the victim was?

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A. On close examination I knew the victim was a surname Seale, a given one, I didn't know. He

CST. MROZ' STATEMENT

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

front of his chest and abdomen was laden with body intestine on examination, Sir.

Q. What position were his hands in?

A. His hands were almost directly beside him, just extending slightly, not very much.

Q. What if any action did you take then?

A. We immediately - I proceeded to the radio of the cruiser and I stressed the urgency of the situation to the desk and for some reason the ambulance was rather slow to respond. I think later we checked, there was a further demand for emergency elsewhere. Approximately 20 to 25 minutes after midnight which would be the 29th of May, 1971 the ambulance did respond and I assisted the removal from the ground area and into the ambulance, and later I followed the ambulance to the City of Sydney Hospital.

Q. That was the ambulance carrying Seale?

A. Exactly, Sir. Yes.

Q. And at the City Hospital what did you do?

A. Immediately he was transported from the ambulance into the Outpatients area, placed on a - transferred from the stretcher to a permanent location and Dr. Naqvi appeared on the scene instantly and I remained in Outpatients with Dr. Naqvi, and Dr. Naqvi through the assistance of a nurse that was on duty had cut the garment, the T-shirt and then it was very visible under clear light.

Q. You observed Dr. Naqvi treating Mr. Seale at that time?

A. Exactly, Sir. Yes, I did, Sir. It was very apparent to me that he was quite badly injured. The

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intestine by this time -

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

5.

A. I would guesstimate approximtely 5'5 to 5'7 , perhaps maybe 5'6 would be more exact, Sir. He wasn't extremely tall as I can recall.

Q. What about his weight?

A. I would say possibly anywhere from 145 lbs, 140.

10.

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

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

15.

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

A. While we were awaiting the ambulance car nubmer 3, which was manned by the late Corporal Martin MacDonald and Constable Howard Deane, had travelled in towards off South Bertinck Street in towards Crescent and in the light of their high beams I observed Donald Marshall. He was approximately 2 to 300 feet from the point where we had been attending to the fallen victim and he was leaning against a tree in the park. We were in the City, Marshall was in the park sort of across the street and he was leaning and his right hand was extended over to his left wrist or forearm. He appeared to be clasping it, he appeared to be injured and

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that cruiser occupied by both men that I described had rendered assistance to the injured Marshall. They had taken him to hospital, I believe that was the story on that incident.

5. Q. You mean they took him to the hospital?

A. In the cruiser, yeah.

Q. How long after your arrival on the scene was it before you observed Donald Marshall?

A. I would say approximately 5 to 7 minutes. We were upright by this time, both Constable Walsh and I were in a bent position attending to Seale. It was just a matter then of waiting for the ambulance so we were upright and we were looking. I think that Constable Walsh had given a directive to car number 3.

10. BY THE COURT: I wonder if that's

15. Q. - You can't say what somebody else did.

A. Good, Sir.

Q. Was there any other civilians at the time of your . .

A. No, Sir, I didn't see anybody at all during my stay at Crescent Street.

20. Q. Would you step down from the stand, Constable Mroz, and refer to EXHIBIT 1? I'll hand you a black felt marker. Perhaps you could just draw along the plan approximately where you saw Mr. Seale on that night."

25. Then there's something which is 'inaudible.'

BY THE COURT: Speak up.

"Q. PROSECUTOR: Speak up.

A. Yes, it's between the Crescent Street apartments and the 110 Crescent Street.

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

30. A. That's right, Sir. The victim

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0. was positioned in an angular position with his feet extended over the curb and Marshall was approximately at this point. That's -
5. (inaudible) marker, Sir, I would say it would be there.
- Q. All right, mark an 'X' then where you say you saw Donald Marshall.
- A. We entered the area by way of Bentinck Street, we made a left turn on Crescent.
10. Q. I'll put this over so the jury can see. Perhaps if you would again show the position of Sandy Seale. .
- A. Seale is here.
- Q. You are showing his head out toward the middle of the road.
- A. And the body is extended over the curb or on the sidewalk. And we had entered by way of South Bentinck, across here.
15. We had parked the cruiser in front of the fallen victim and the ambulance people had come in and they parked just ahead of the fallen victim. Under my direction I had (inaudible) park the ambulance for the purpose of pickup. Marshall was observed approximately 200' across Crescent Street in the park area.
20. Q. You've marked an 'X' where Mr. Marshall was.
- A. Exactly, Sir. That's right.
- Q. Okay. You may sit down. Can you tell us what the lighting conditions were in the
25. area then?
- A. The lighting conditions? It was basically dark and fairly poorly lighted. There was a heavy tree growth in the area and it obscured the little light that did exist at the time. Since then there's been major
30. improvements and it's considered

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lighter.

Q. Okay. No further questions, Constable Mroz."

Now that's the direct examination. Constable Mroz was cross-examined by Mr. Wintermans:

5.

"Q. So what are you saying? What you are saying, Constable, is that it's a lot brighter around that area now than when it was back in 1971?

A. Yes, they have installed short lamp posts. There are approximately 15, 16 feet and it's just brilliant there as compared to the time I described it, Sir.

10.

Q. Now did you - I don't want to dwell on the unfortunate state that you found Mr. Seale in, but did you see the intestine coming out?

A. That's correct, Sir. I did. And it probably reached a point of ... When I was at hospital where I remained with Dr. Naqvi for about 10 minutes and it was probably at a point there that it stopped coming out, as it were.

15.

Q. Have you seen that before in other cases?

A. I saw one situation but it was considerably less severe. It was a domestic quarrel up in Ward 4 area of the city and that resulted in the stabbing of a wife on her husband but it was considerably less severe. But the intestine did come out through the hole, yes, Sir, it did.

20.

Q. As I said, I don't want to dwell on that but you're saying that Mr. Marshall was some 2 to 300 feet away from where Mr. Seale was lying?

25.

A. That's correct, Sir.

Q. And that there were no other civilians around?

A. I didn't see anyone else, no, Sir.

Q. Are you sure Dr. Naqvi was at the hospital when you arrived there?

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A. Yes, Sir, he was. As a matter of

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fact he was doing an operation somewhere upstairs. I don't know the severity of it but he did come down right away to the call. He was actually there when we had landed into Outpatients at the time, yes.

5. He was attired in his operative pale green (inaudible).
Q. And you indicated you followed the ambulance in the police car?

A. Yes, I was probably a distance of 50, 60 feet. I was there at the same time.

Q. Thank you."

10. And Mr. Edwards indicated that there was no Redirect Examination. And that was the testimony of Constable Mroz at the November trial. It's now marked as an Exhibit and you'll have that as one of the exhibits. With reference to a plan, I don't know what the state of that is, perhaps you should mark this on the plan.

15. I don't know what you intend to do, Mr. Edwards.

You read it as well as I did.

MR. EDWARDS: My Lord, that is the evidence for the Crown. I tender the exhibits and rest. (10:30 a.m.)

THE COURT: All right. Would you take the jury out now for a moment?

JURY RETIRED.

MR. EDWARDS: My Lord, the plan . . .

THE COURT: I don't care, it isn't up to me. It was referred to with markings on it. I don't know whether you want to . . .

25. MR. EDWARDS: For the record I just want to put an explanation because it is conspicuous by its absence but in the previous two trials my learned friend agreed to the plan going in without the surveyor, and this time prior to the trial he advised me that he would not be agreeing to the plan going in unless I called the surveyor. I

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discovered that the surveyor was out of the country on vacation, or at least out of the area on vacation until yesterday, so that's why I couldn't call him and there wasn't much point in calling him now when the witnesses wouldn't be able to mark the plan.

5. THE COURT: Well, it's - I don't know what to say. It really is part of Mroz' evidence as it refers to marking on a plan. I have no feelings one way or the other. You people have read the evidence, both of you, you agreed to it going in. It may not be fundamental but I just note that the plan is not present.

10. All right. The Crown has closed its case. You indicated yesterday that you were going to have some motions or other, Mr. Wintermans? Do you have any motions at this present time?

15. MR. WINTERMANS: My Lord, first of all I would request that Your Lordship Mr. Edwards to call James MacNeil and Mary Ebsary as Crown witnesses. I refer Your Lordship to some authority for that power.

THE COURT: Calling Mary Ebsary and James MacNeil, is that what you said?

20. MR. WINTERMANS: Yes, James MacNeil and Mary Ebsary.

THE COURT: Before you get into the testimony or into the argument on it, I'm aware of James MacNeil. Has Mary Ebsary testified in any of the previous trials?

25. MR. WINTERMANS: To the best of my knowledge every time.

MR. EDWARDS: I believe in the last two trials but I don't think she testified in either the Preliminary or the 1982 . .

30. THE COURT: Well, it's hard to do things in a vacuum.

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What evidence does Mary Ebsary . .

MR. WINTERMANS: She was, you will recall the testimony of Donna Ebsary, that . .

5. THE COURT: I recall all of Donna Ebsary's testimony, yes.

10. MR. WINTERMANS: Her mother, Mary Ebsary is Donna Ebsary's mother and she was present when James MacNeil and Mr. Ebsary came home and she states that James MacNeil said to her, Roy saved my life tonight. I'm submitting that he's refusing to call her because her evidence is more favourable to the prosecution of my client. Donna Ebsary's evidence is more favourable to the prosecution of Roy Ebsary than Mary Ebsary, because Donna Ebsary says words to the effect that 'you did a good job back there' whereas Mary Ebsary says 'Roy saved my life.' She says he repeated over and over again, 'Roy saved my life.' 'Roy saved my life.'

15.

THE COURT: All right. Now you're going to get into some . .

MR. WINTERMANS: With respect to James MacNeil, it's already been discussed.

20. THE COURT: I don't think we need pursue that one.

MR. WINTERMANS: Okay. With respect to the law, I refer to a decision of the House of Lords, R. v. S-e-n-e-v-i-r-a-t-n-e, which is cited in 1936, E.R. Vol. 3, p. 36, a decision of the Privy Council, 1936 and I refer to p. 49, the decision of Lord Roche wherein he states:

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"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 of the prosecution."

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Further, My Lord, I refer to the case of LeMay v. The King which is a Supreme Court of Canada decision, 1951 Vol. 102 Canadian Criminal Cases at p. 1. In that case it stated that

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"There is no rule of law requiring the Crown in a criminal case to call as witnesses persons who were allegedly eye witnesses to the events culminating in the charge, or who were alleged to be able to give relevant and material evidence on an accused's guilt or innocence. Prosecution has a discretion to determine who should be called or who are material witnesses and it will not be interfered with unless exercised with some oblique motive. Thus the Crown must not hold back evidence because it would assist the accused."

10.

15.

Now the case I'd like to also refer to is Regina v. Jewell & Wiseman which is the . .

THE COURT: R v. who?

MR. WINTERMANS: J-e-w-e-l-l and Wiseman.

I have a copy of that case for Your Lordship.

THE COURT: I would appreciate that.

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I would've appreciated copies of all of the cases that you cited. It makes it certainly a lot easier.

MR. WINTERMANS: My Lord, I do have books here and I'll certainly let Your Lordship look at those.

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A short case, the Saskatchewan Court of Queen's Bench, Hughes, J., in that case he indicated that "a trial judge is justified in interfering with the exercise of the prosecutor's discretion not to call a witness when it appears that the prosecutor, in exercising his discretion, has been influenced by some oblique motive or because of the fact that the material witness who is not called might assist the accused."

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0. Thus in this case it was on a trial of an accused
 for murder where the Crown has refused to call an
 expert in alcohol to give material evidence as to
 the deceased's blood alcohol level because the expert's
 evidence would also help establish the defence of
 5. drunkenness. The trial judge is warranted in requiring
 that the expert be called as a Crown witness.

Now the judge states at the beginning of p. 287
 and continuing through 288:

10. "Under normal circumstances the
 consequences of the Crown not
 calling such a material witness
 are I believe those suggested by
 Cartwright, J. in LeMay v. The
 King, 1951, 102 CCC 1 at p. 23"

and he cites the Supreme Court of Canada, Supreme Court
 Reports 1952 1 Supreme Court Report 232, 14 C.R. 89,
 and I quote: (Now he's quoting from Cartwright in
 15. LeMay in The Supreme Court of Canada:

"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 fact
 may well be ground for
 quashing a conviction.
 Such a case is that of R. v.
 Guerin (G-u-e-r-i-n-) 1931
 23 Criminal Appeal Reports 39,"
 (which unfortunately I didn't have
 access to I might add, My Lord
 I'm not sure what that Guerin
 case says - continuing, this is
 back to the Jewell/Wiseman ...)
 "thus as I understand it under
 normal circumstances it is not
 for the Court to interfere with
 the exercise of the prosecutor's
 discretion. It is not a normal
 30. circumstance, however, where the

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prosecutor in exercising his discretion has been influenced by some oblique motive or because of the fact that the material witness being held back might assist the accused."

5. And this is the important part - I believe the latter could well be an example of an oblique motive.

THE COURT: Sometimes I wish judges would write in such a way that people could understand them. I don't know what an oblique motive is.

10. MR. WINTERMANS: I looked up the word 'oblique.' I didn't have a very great dictionary, Webster's Dictionary for Everyday Use, 1981 edition. 'Oblique' means slanting, inclined, indirect, obscure, not straightforward, underhand. That's what it says. Now at the very end of the Jewell case, the judge says:

15. The Prosecutor's reason for not calling Mr. Okamura as again at my request stated this morning by the prosecutor is that the calling of Mr. Okamura could set up a defence of drunkenness for the accused. Be that as it may, the evidence of Okamura being material on the point I've alluded to the stated prosecutor's reason, if not pregnant with oblique motive is certainly founded on the basis that the evidence of Okamura could assist the accused. Either way, it is not an acceptable reason vis a vis the overall responsibility and role of the prosecution in a criminal case. I therefore interfere with the discretion exercised by the prosecutor and order that Okamura be called as a Crown witness."

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\ And that, My Lord, is what I'm asking that you do, as in the case of those two witnesses.

30. THE COURT: What do you say of MacNeil? I had

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0. raised the matter of MacNeil.

MR. WINTERMANS: MacNeil - MacNeil is . .

THE COURT: Just a minute. I had raised the matter of MacNeil because ^{Crown} counsel indicated that certain witnesses would not be called, and I questioned him about MacNeil, but just so your motion is complete why do you want the Crown to call MacNeil? What - you've indicated what Mary Ebsary, the reason you wanted her. What reason do you want MacNeil? Called by the Crown rather than yourself.

5. MR. WINTERMANS: MacNeil is the only person who was with apparently with Roy Newman Ebsary before and after this incident, and during. Before, during and after and based on the testimony of Donald Marshall, who admitted that he has testified under oath different versions, totally different versions of what took place, I believe that in the interests of justice that Your Lordship ought to order the Crown to call him and I think as far as oblique motives, I would suggest as a motive that the Appeal Court set aside a conviction last time, the trial in November of '83 on the basis that the trial judge erred in his instructions on the meaning of self-defence and as Your Lordship I'm sure has seen the decision which is reported in Nova Scotia Reports, the Appeal Court basically said that the jury should've been told, 'if you believe James MacNeil then the Crown's case disappears, whereas if you believe Donald Marshall then there's a possible offence.'

10. Now my learned friend, Mr. Edwards has come into court the last - every time before and has asked two previous juries to believe James MacNeil, that there was a robbery and the last time, he cross-examined Donald Marshall on the question of the robbery and thus

15. indicated to the jury that he was asking the jury to

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believe James MacNeil, that there was a robbery and to believe Donald Marshall that he didn't actually stab Mr. Seale but to not believe him on the point of the robbery. Then the Appeal Court informed him that the facts as he presented the last two times would not constitute a crime and therefore I submit that the Crown is now changing the facts to get a conviction and to me I think to anyone with a sense of fairness there's something seriously wrong in that kind of an approach to a criminal prosecution. I'm suggesting that it is an oblique motive for the Crown to try to change the facts in order to get a conviction. The Crown believed last time that James MacNeil was telling the truth and Donald Marshall was lying on the point of denying the robbery. Then surely the Crown should've not proceeded against Mr. Ebsary. The matter should've been dropped, but no, the Prosecution decided that rather than do that we'll try and fit the facts to the Appeal Court's decision so that we can get a conviction against Roy Newman Ebsary. To me that is clearly an oblique motive and it just smacks of unfairness and furthermore, My Lord, with respect to my earlier submission before the evidence even started on the question of whether or not Mr. Ebsary should've been placed on trial at all given the lengthy delays and the reliance that myself and Mr. Ebsary . .

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THE COURT: Is this another matter?

MR. WINTERMANS: It goes to oblique motive, My Lord.

THE COURT: Obliquely.

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MR. WINTERMANS: Perhaps obliquely, but I stated at that point that I had no question that I was being provided with everything that the police and Mr. Edwards

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0. had in their possession when Mr. Ebsary was first
 charged. At this point I formally withdraw that and
 I now state that I am not convinced at all that I've
 been provided with everything in the possession of
 5. the police. Certainly I wasn't provided with a certain
 R.C.M.P. report which I had to get from a person in
 Truro, I don't know where they got it, which has come
 in handy a couple of times during the course of this
 trial. I would submit that there is an oblique motive
 here, that the Crown is twisting the facts, so-called
 10. facts, asking the jury last time to believe (a) and not
 believe (b) and now they're going to say don't believe
 (a), believe (b), or they're not even going to call
 their prime witness. I might indicate of course that
 both of those names are on the indictment, have been
 all along. And if my learned friend wishes to state
 15. well, the witnesses are here, available to my learned
 friend to call as a defence witness, I submit that
 that's an oblique motive also because that gives
 Mr. Edwards an opportunity to tear apart on cross-
 examination relying upon information which I certainly
 have absolutely no idea of what it is, with no notice
 20. to me and I would submit that that is also unfair and
 if that's his motive for not calling them then that
 I would submit is an oblique motive and I point to the
 case of Regina v. Jewell and Wiseman which says clearly
 that 'although there is a general rule that the Crown
 25. has a discretion, that discretion can be interefered
 with in unusual situations or in extreme situations'
 and surely this has got to be an extreme situation.
 Thank you, My Lord.

\ THE COURT: All right, we'll recess for our
 30. morning break.

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DISCUSSIONCOURT RECESSED. (10:55 a.m.)COURT RESUMED (11:10 a.m.)

THE COURT: Mr. Edwards, you told me about MacNeil earlier, do you want to put on the record why you don't want to call Mary Ebsary?

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MR. EDWARDS: Well, My Lord, I'd like to make a submission at this time responding to my learned friend's motion and I'd like to make a full submission. I'll be as brief as I can.

THE COURT: All right.

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MR. EDWARDS: Now the basis, the whole basis of his motion has to do with my motives in not calling the two witnesses and we may as well drop the euphemism right away, this oblique business. What he's saying is that I have underhanded motives. That's the basis. Now referring to the last part of his submission where he talked about the decision for whatever relevance it has, but I feel I must respond to it since he put it on the record, to order a new trial. Well, first of all, as he well knows, that decision is not made by me. That is a decision of the Attorney General in consultation with his officials in the Department, so if there's any motive to be imputed there it doesn't come on me.

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Having said that, once the decision to hold a trial is made, then it is up to me to decide what witnesses to call or not to call and I don't take direction, and none has been proffered, from the Attorney General or anyone else. So that part of his submission is complete red herring. Now my underhanded motives for not calling Jimmy MacNeil. All right? As Your Lordship, as I told Your Lordship yesterday I proffered him as a truthful witness on several occasions before. As a result of a conversation I had with Donald Marshall, a lengthy conversation on Thursday night past, I made the decision

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that at this time, at this time, and this is the crucial time when you're assessing my motivation, at this time while I still believe that Jimmy MacNeil saw Ebsary stab Seale, I have serious reservations about other parts of his testimony which bear directly on the defence of self-defence.

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THE COURT: Say that one again? I missed . you believe that MacNeil saw Ebsary . .

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MR. EDWARDS: Ebsary stab Seale. I have serious reservations about other parts of his testimony or anticipated testimony which bear directly upon the defence of self-defence and it must be obvious at this point in the trial that that is the pivotal issue in this proceeding, the defence of self-defence. So as I stated, as soon as I made that assessment, the following morning before we came into court which was last Friday morning, I gave my learned friend notice at that time that I might not be calling Jimmy MacNeil and I told him 'might' because I had to see at that time Donald Marshall hadn't completed his testimony and there was still a lot of evidence to be called. But the point is, I put him on notice that he should prepare for that eventuality and he had the whole weekend to do it. And he has all the transcripts and he's aware of what Jimmy MacNeil has said in the past. My reassessment of Jimmy MacNeil's credibility has nothing to do with any surprise evidence, it has to do simply with a different assessment by me of the evidence and I submit that I have that right as Crown counsel to make the assessment when I'm exercising the discretion of who to call or who not to call. So that is why Jimmy MacNeil is not being called in this proceeding. Mary Ebsary in other cases, as I

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readily told Your Lordship and it's all a matter of public record, I have put her on the stand as a truthful witness. Okay. But at the same time I recognized that there was an inconsistency between what she and Donna Ebsary said. So

5. when preparing for this trial I had that factor in mind and then when I made the reassessment on Thursday night as to my position re James MacNeil, that as Your Lordship, you wouldn't be familiar with the evidence but you will see if Mary Ebsary is called and James MacNeil is called by either yourself or Luke Wintermans, that her evidence

10. is entwined with Jimmy MacNeil's. Now also I am in possession and I have been - I told him about this before, I'll say that up front - but I'm in possession of a statement given by Mary Ebsary in 1971 where she says in part that she doesn't recall the events of the night in question, and I might say that on the previous trial that

15. statement was available for my learned friend, he had it available for cross-examination, he didn't choose to use that. Okay? So at the same time that I'm making the judgment about whether or not to call Jimmy MacNeil, I had inextricably I had to make the same decision about

20. Mary Ebsary, so what I did was go back to the previous four proceedings in which well, Donna Ebsary testified and two that Mary Ebsary testified in, and I made a judgment as to the credibility, who had the best memory of the night in question and as Your Lordship will see, or observed yesterday from Donna Ebsary's evidence, she

25. is as solid a witness as could ever be hoped for. So that's why I went with Donna Ebsary rather than Mary Ebsary, but at the same time as Corporal Carroll testified,

30. Mary Ebsary is available, my learned friend has in his possession all of the transcripts and previous statements she has given. My Lord, if that is an underhanded motive

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0. then - well, there's no more I can say. My intentions
here are entirely honourable and I find it rather
dismaying that Mr. Wintermans, you know, who accuses
me of gamesmanship, sees as his only out to try to put
5. it personally on me that there's some underhanded
motive. Now we're getting into gamesmanship when we
try that type of thing. My motive here in assessing how
to conduct this case is how best to get at the truth.
That's what the whole trial system is about. And in my
judgment proceeding at this time as I have done is the
10. best way to ensure that the truth or as close as we'll
ever get to the truth will be disclosed. I submit with
greatest respect that judicial interference in this
trial by ordering me to call Jimmy MacNeil or even by
Your Lordship calling Jimmy MacNeil, or Mary Ebsary,
would distort the whole process. I agree wholeheartedly
with Your Lordship and I'm well aware of my duties as
15. Crown counsel to ensure that this man, Roy Ebsary gets
a fair trial and he's getting it, but having said that,
he is not entitled to a trial which will make his
acquittal inevitable. That's going beyond being fair.
He has the opportunity, if he thinks Jimmy MacNeil can
20. assist his case, Jimmy MacNeil is there and I have gone
beyond what is required of me by having him physically
present as well as Mary Ebsary. My learned friend again
makes some rather dismaying imputations about my conduct
of this case by saying that he doesn't think he has
25. gotten complete disclosure. Now he knows that my file
has been open to him from day one. He has absolutely
no basis for saying that. That confidential report that
he makes so much of, that does not contain evidence.
There is no rule, and I would like to see him point to a
30. case which would require the Crown to disclose a report
like that. That is a report by Staff Sergeant Wheaton to

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his superiors in Halifax. It is not evidence. The Crown is required to disclose all evidence and I have done that, so he's got more now than he would normally have. My Lord, as far as cases are concerned, I would point to just three to make my point. R. v Bouchard, which is a decision of Judge Peter O'Hearn. In the Bouchard case Judge O'Hearn, he did call the witness in question but in that case he gave each counsel the right to examine the witness but in a more popu . .

THE COURT: In what manner?

10. MR. EDWARDS: In what manner, My Lord?

THE COURT: Yes.

MR. EDWARDS: It just says that he permitted them to examine but I might add, My Lord, that that decision that is in the section of McWilliams has been criticized and I submit rightly so. But the case, My Lord which is more germane where this same motion was made was O'Donnell and Cluett which was presided over by Mr. Justice Clarke and in that case the defence made a motion that the Crown be required to call the remaining witnesses on the indictment who had not been called and Mr. Justice Clarke, citing the LeMay case that Your Lordship referred to yesterday, the quote from Rand, refused to do so. He refused to call the witnesses, My Lord.

THE COURT: That was the original trial, the first trial.

25. MR. EDWARDS: Yes.

THE COURT: And I don't think there's anything surprising about that principle, you don't have to call everybody on the indictment.

MR. EDWARDS: No. You know, that's right, but he also cited the LeMay case which most of these cases do,

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which stands for the principle with respect that the Crown doesn't have to call everybody. I point out Regina v Davis that is the decision of the County Court of British Columbia, 42 CCC 2d, p. 548 at p.555 and I'm referring to the first paragraph there beyond the quote:

"The Judges of the Supreme Court of Canada in LeMay v. The King I made it quite clear that the Prosecutor is free to exercise his discretion to determine who are material witness. There is no absolute duty on a Prosecutor to call all witnesses who are in a position to give relevant evidence."

10. And when you consider the facts in this case, as far as Jimmy MacNeil is concerned, if one takes this view, he was with Ebsary on the night in question, yet he didn't come forward for six months. There's a big question mark there as to why not. If one doubts, as I do the truthfulness of the statement Marshall gave in Dorchester Penitentiary in March, 1982, that's the one where he says himself he was lying and if you consider that against the background of why Jimmy MacNeil didn't come forward, then I submit that the danger in calling Jimmy MacNeil or forcing the Crown to call him so that he cannot be cross-examined on that point, certainly my learned friend isn't going to give a very vigorous cross-examination on that point.

25. THE COURT: I'm sorry, I missed something there. You said you doubt the truthfulness of Marshall's statement in 1982?

MR. EDWARDS: In March, 1982. I mean my own witness, Marshall stated, he said that statement is lies.

30. THE COURT: He said a lot of things differently.

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Different times. Not only in March, 1982.

5. MR. EDWARDS: The basis, the whole basis, My Lord, for those things being said differently in the March 1982 statement, but there again whether that's the case or not, I submit that it is for me in exercising my judgment, right or wrong, in exercising my discretion that's the way I have chosen to see it, that's the way I've chosen to conduct this case.

10. THE COURT: Do you think there's any difference between an original trial and a third trial of the same matter?

MR. EDWARDS: Of course, My Lord.

THE COURT: What's the difference?

15. MR. EDWARDS: Well, the difference is Your Lordship said yourself, that this case has to be decided upon what is presented in this court room. Were it otherwise then why not just read the jury the transcript of the second trial?

20. THE COURT: No, what i'm saying to you is there any difference in your discretion in the situation where there is just the first trial of a matter and where there has been - where this is now the third trial of the same matter. Is there a difference in what discretion you should exercise?

MR. EDWARDS: I would say . .

THE COURT: As to the calling of witnesses.

25. MR. EDWARDS: I would say, My Lord, that the answer to that is self-evident. Of course there is.

THE COURT: What's the difference in your discretion?

MR. EDWARDS: Well, each trial I submit is a separate entity.

30. THE COURT: As far as the evidence that goes to the jury it's a separate entity, that's right.

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0. DISCUSSION

MR. EDWARDS: And therefore . .

THE COURT: But you have exercised the discretion twice before in this case to do certain things.

MR. EDWARDS: Yes.

5. THE COURT: And now you have exercised the discretion to do something differently and what I'm saying to you, does that to use a colloquialism, does that change the water on the beans?

MR. EDWARDS: I submit not.

THE COURT: All right.

10. MR. EDWARDS: Surely I am free and unfettered to change tactics in each trial, to compare the first trial to the second trial you will see that witnesses were called. Well, the tape recording, for example, was used in the second trial, it wasn't in the first trial. Nobody ever questioned that. You know, I find it surprising you-
15. know, if I'm interpreting what you're saying is correct, that I had the discretion at the first trial to decide what witnesses I'm going to call. That is cast in stone and I may never no matter what circumstances change or my assessment of the evidence, a great part of my
20. discretion has to rest on my assessment of the evidence.

THE COURT: Isn't it true . .

MR. EDWARDS: And if something happens between the third trial . .

THE COURT: Isn't it true - just tell me, because again I was not involved - isn't it true that the
25. original trial of Donald Marshall was filled with possible untruths or direct untruths?

MR. EDWARDS: There were witnesses who lied in the first trial of Donald Marshall.

THE COURT: Yes, and hasn't in all of the trial
30. haven't various witnesses come forward and changed

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evidence that they had given at previous times?

MR. EDWARDS: The first trial I didn't call Chart, Pratico or Harris. So they didn't change their testimony. They changed their testimony, well, Chant and Harris did at the reference in 1982.

5. THE COURT: Yes.

MR. EDWARDS: Pratico wasn't called because he should never have been called, he's totally unfit.

10. THE COURT: So at the 1982 Appeal Court inquiry or whatever it was, it wasn't a trial in the normal sense, people changed their testimony, certain witnesses changed testimony from what they'd given before, changed it drastically.

MR. EDWARDS: Yes, and explained why they did. And I submit that whether believed or not their explanations are capable of belief and that is the nub question.

15. THE COURT: Yes, all right. Now in the previous trials, two trials in this matter . .

MR. EDWARDS: Yes.

20. THE COURT: Some witnesses have given evidence as to the events that have taken place; Marshall, MacNeil, Mary Ebsary particularly, let's take those three.

MR. EDWARDS: Um-hmm.

THE COURT: They testified before.

MR. EDWARDS: Yes.

25. THE COURT: And Marshall in this trial has said things differently than he has said in the last trial or the last two trials.

MR. EDWARDS: Marshall . .

THE COURT: No, but just - did he or did he not?

30. MR. EDWARDS: I don't think it can be answered that simply, My Lord.

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0. THE COURT: Well, he was put on the stand, questions were put to him of statements he made at previous trials and which are different from the statements that he made at this trial.
- MR. EDWARDS: Yes.
5. THE COURT: That's true, isn't it?
- MR. EDWARDS: That's true. But I submit you can't leave it there. An analysis of the evidence shows that any untruths that he gave in previous trials are referable directly to that March, 1982 statement.
10. THE COURT: Whatever they're referable to, you have made a determination in your talks with Marshall as to his credibility . . .
- MR. EDWARDS: On certain parts of his evidence.
- THE COURT: On certain parts of his evidence. You've decided that he's telling the truth.
15. MR. EDWARDS: On the parts of his evidence which bear directly on the defence of self-defence I believe Marshall over James MacNeil.
- THE COURT: And you've made that determination. That's why you're not calling these people.
- MR. EDWARDS: That's right.
20. THE COURT: All right.
- MR. EDWARDS: And in the previous trials I had accepted as gospel the 1982 statement.
- THE COURT: Yes.
- MR. EDWARDS: Which I don't now.
25. MR. WINTERMANS: May I . . .
- THE COURT: Well, wait till he's finished. Take your time. You'll get your chance.
- MR. EDWARDS: All I can say, My Lord, is I have tried to be as straightforward and candid as opposed to underhanded with both my learned friend and the Court
30. as I possibly can. This matter I find personally dis-

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DISCUSSION

turbing because although you said yesterday it doesn't call my integrity into question, when you tell me at the same time that it is my duty to call such and such witnesses and I don't call them, then I'm shirking my duty, then surely that's a reflection on my integrity. I submit that there is not one thing to show that I've been less than candid with the Court. I defy my learned friend to point to one thing that shows I've been less than candid. I've been upfront with him right along and will continue to do so. So that is my submission.

10.

THE COURT: All right. Do you have any reply?

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MR. WINTERMANS: Well, of course I have been taken by surprise. Your Lordship can appreciate that. That you know, halfway through the trial that my learned friend would all of a sudden believe one witness versus another and in view of the Appeal Court decision that maybe a convenient explanation, but I would refer to a case that took place in the previous term, the MacDonald/Walker murder. I wasn't personally involved in it. Elizabeth Walsh represented Mr. MacDonald and Allan Nicholson and Art Mollon of my office represented Mr. Walker. My information which I believe, is that there were two separate trials in the same term. The first trial was against Mr. MacDonald where Elizabeth Walsh was representing Mr. MacDonald. During that trial Mr. Edwards was the Prosecutor on both of those, he called three witnesses for the Prosecution who testified as to blood that MacDonald had on his hands, material evidence right after the alleged murder indicating that Mr. MacDonald was likely more - was more likely guilty of murder as between MacDonald and Walker. In the next trial, - and Mr. MacDonald was convicted I might add -

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DISCUSSION

In the next trial Mr. Walker, the Crown had the same three names on the indictment, people who were right there after the murder took place who would have said that MacDonald had blood all over his hands and Walker didn't and other things, I'm not sure, and the Crown although their names were on the indictment, did not call those three witnesses and Mr. Nicholson for the Defence was - he thought forced to call them as Defence witnesses and then as I understand it, Mr. Edwards began a cross-examination with respect to the credibility of those witnesses and the judge, as I understand the story, Mr. Justice Rogers stopped Mr. Edwards and said words to the effect, "Mr. Edwards, last week you told a jury, a different jury to believe those three witnesses that you called for the Prosecution in last week's trial against Mr. MacDonald. Now you appear to be seriously questioning the veracity of those three same witnesses. Are you now going to stand up before this new jury and say that those three witnesses are not to be believed?" Now that's just one case, I grant it, and you know certainly Mr. Edwards is not on trial here and I don't suggest that he is, but I just suggest that Mr. Edwards perhaps in the heat of battle or whatever reason, appears I think objectively speaking appears more concerned with trying to get a conviction against Mr. Ebsary and I think that the objective facts would certainly put that in a very questionable light. Now in the Cluett case that my learned friend referred to, that was the case where the person was apparently beaten up by a policeman . . .

15. THE COURT: I'm very familiar with the case.

20. MR. WINTERMANS: There were 49 witnesses or so,

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DISCUSSION

about 40 eye witnesses. Now for the Crown not to call all 40 eye witnesses I would submit is a totally different situation than what we have before us here, and of course that was a first trial so I don't think that a couple of lower court decisions can contradict the basic principle of the House of Lords or the Privy Council and the Supreme Court of Canada that in exceptional circumstances the power exists for you to force the Crown to call these material witnesses as Crown witnesses and that's what I'm asking you to do.

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MR. EDWARDS: My Lord, I must respond to that because that bit about the Walker and MacDonald case can't be allowed to stand as my learned friend selectively chose to put it to you. MacDonald in the trial against MacDonald, the Crown's case was that MacDonald had been the perpetrator, the one who actually murdered the victim in that case. In the Walker case, the issue was entirely different and the Crown's theory was that Walker was a party to the offence but took no part in the beating itself. That was the theory. Mr. Justice Rogers did as my learned friend said express some concern when I started cross-examining witnesses that I had called in the first trial. We discussed it, Mr. Justice Rogers, Defence counsel and I and after the discussion he was satisfied to let me continue to proceed with the cross-examination and My Lord, you will have the opportunity, you could call Mr. Justice Rogers and if he is less than absolutely satisfied with the way that the Crown conducted the Walker case I would be very surprised.

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THE COURT: All right, this is a motion made by Defence requesting the Court to require the Crown to call as witnesses two witnesses, namely James MacNeil and

DISCUSSION

0. Mary Ebsary, both of whom testified in the last two trials with regard to this particular accused. Under our system of justice, an accused is entitled to a fair trial. All relevant evidence should be presented and it is the duty of the trial judge to see that

5. a fair trial is what is the result of a criminal proceeding. The duty of the Crown as Crown counsel, which I commented upon yesterday, has been described in a number of cases, cases that I referred to yesterday; one of the better statements is that in Wu alias Wuchuck v. The King, Supreme Court of Canada case at 62 C.C.C. at p. 90, where LaMont, J. said at p. 101:

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"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 was 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 is in the position of an officer of the Court whose duty it is to get at the truth irrespective of whether or not the evidence supports the Crown's case or not."

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That's probably the best expression of the essential duty of the Crown. There is no doubt that there are cases to say that the Crown counsel has a certain discretion in the calling of witnesses and I need not quote those cases. Several of them are referred to at

25. p. 763 of McWilliams, 764. Kerwin, J. in the quotation at the bottom of p. 763, p. 7 of the LeMay case, speaking as one of the judges of the Supreme Court of Canada, said:

30. "Of course the Crown must not hold back evidence because it would

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DISCUSSION

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assist an accused, but there is no suggestion that this was done in the present case or to use the words of Lord Thankerton, "that the Prosecutor had been influenced by some oblique motive." It is idle to rely upon such expressions as this or the one use by Lord Roche without relating them to matters under discussion, but the important thing is that unless there is some particular circumstances of the nature envisaged, the Prosecutor is free to exercise his discretion to determine who are material witnesses."

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In my view, this is a different situation than the situation which existed in those cases which are considered by those judges at that time. As Kerwin says, you must relate the matters to the particular matters you're concerned with, and in this trial I'm concerned with the third trial of the accused. The third trial cannot be considered in a vacuum as something that exists without any other surrounding circumstances and the surrounding circumstances as I see them are that in the first two trials of Mr. Ebsary, the accused here, certain witnesses namely these two particular witnesses Mary Ebsary and James MacNeil, were presented as truthful witnesses and were presented as witnesses having material evidence to present to the jury. These two trials themselves don't stand alone because as a fundamental part of the events which took place there was an appeal, the Appeal Court of this province considered the matter of whether Donald Marshall should be acquitted on the charge. He was then residing in penitentiary having been convicted for the killing of Sandy Seale. Further there was a trial in 1971 where the conviction of Marshall occurred. Throughout that trial and the subsequent - in the original trial certain statements were

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made by certain witnesses and in the Appeal Court hearing certain witnesses came to light who either had not testified before or witnesses who had changed their evidence from the early trial. The previous two cases proceeded on the basis that there was evidence that a robbery had occurred. This trial, the evidence of one of the key witnesses, Marshall, denied that any robbery had occurred. The reason for not calling those witnesses while the Crown counsel admits that both were presented as truthful witnesses with material evidence in the previous two cases, the reason given by the Crown as I understand it is that after a discussion with Marshall, just prior to the outset of this trial or during the initial stages of this trial, that he came to the conclusion that certain parts of the evidence that had been presented before were not in his view credible. It is unusual for the judge to call witnesses. At the outset of this hearing to the jury I advised them that we were operating under the adversary system and that the production of witnesses depended upon counsel for the Crown and counsel for the accused. But while it's unusual it doesn't mean that that cannot be done. In my view it's always the duty of the Crown to present all relevant evidence for the assessment of the jury. It is the function of the jury to decide whether or not witnesses are truthful either in whole or in part, or not at all. Because of that, because of the circumstances that I've outlined, the production of these witnesses before and because of the nature of this particular case and all of the other events that took place, and also because of the appeal decision in the recent case where the Appeal Court did comment that one of the key questions was the credibility of two particular people, one of whom

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0. DISCUSSION

was Marshall and the other of whom was MacNeil, and if one or other was believed then certain events would necessarily flow therefrom. Taking that into account and taking into account the position that the Crown

5. must be neutral at all times in the presentation of the case, taking into account that if I do not direct the calling of these witnesses and they are called by the Defence, which they could be, the system and procedure itself would provide for the Crown to cross-examine those witnesses as to their own credibility. It would

10. seem to me that that would put the accused in the position where he is not getting a fair trial. That and the other factors that I've mentioned. In my view it is the duty of the Crown to present these witnesses in this particular circumstance, and I would direct the Crown to present both MacNeil and Mary Ebsary as witnesses and that

15. the Crown will examine them on Direct Examination only and counsel for the Defence will cross-examine. So I'm directing in effect that the Crown call these witnesses as part of this case. I also am not unaware of the statement of Lord Roche where he says "that while it is the right of the Prosecutor to exercise his discretion

20. to determine who the material witnesses are, failure on his part to place the whole of the story as known to the Prosecution before the tribunal of fact may well be ground for quashing a conviction." In my view the first comment is that these witnesses have been

25. determined already to be material witnesses at previous trials and therefore are material in this trial, but also I do not think that it would be just to allow the trial to continue with evidence that is material not being presented to the jury and giving the grounds for the

30. quashing of a possible conviction, ^{if} the evidence as it stood

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DISCUSSION

would lead to a conviction, putting the accused in the position where it is necessary for him to appeal and knowing or believing that an Appeal Court would apply the very principle that I've given, that if all

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material witnesses weren't called the conviction would be quashed. I think it would be wrong in the circumstances of this case to lead to that further expenditure on his part and of time and money and effort and grief, and also the time and effort and money of the State. So I am directing that the Crown call both

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James MacNeil and Mary Ebsary and I'm directing also that you will examine them as I suggested, as your witness and we will hear all of the evidence and it will be up to the jury to decide who is credible, who isn't credible in whole or in part as to what took place with regard to the accused. Now do you wish a short adjournment?

15.

MR. EDWARDS: My Lord, why don't we take an early lunch and come back at 1:30? I would like a bit of time to decide just how I'm going to approach this rather novel - I don't say that pejoratively but it's the first time I've ever been directed so I have to consider how I will conduct the direct examination.

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THE COURT: All right, we'll adjourn - is 1:30 possible with everybody else in the system?

COURT RECESSED. (11:50 a.m.)

COURT RESUMED. (1:40 p.m.)

THE COURT: Mr. Wintermans?

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MR. WINTERMANS: My Lord, the only point that I was concerned about with respect to Mr. MacNeil which I would like Your Lordship to rule upon in advance, is that Mr. MacNeil recounts a conversation between himself and Mr. Ebsary, he said the following day. During the conversation statements were made by Mr. MacNeil to

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DISCUSSION

Mr. Ebsary and Mr. Ebsary answered them. In the
you know, the admissibility of what Mr. Ebsary
answered I certainly have no problem with that, you
know, given self-defence, but the concern I have is
5. that Mr. MacNeil is expressing opinions in his statements
to Mr. Ebsary, and the conversation took place
according to the medical evidence and the evidence of
Mr. Seale, Sr., this conversation must have taken place
a day and a half after the incident because it was
after Mr. MacNeil . .

10. THE COURT: Was this all admitted at the previous
trial? All this testimony you're talking about?

MR. WINTERMANS: Well, it was objected to but . .

THE COURT: And was it admitted?

MR. WINTERMANS: It was admitted, yes.

15. THE COURT: It was admitted?

MR. WINTERMANS: Yes. See, the problem is if the
purpose of eliciting the evidence is to get you know,
statements of the accused saying it was self-defence
to establish that it was in fact Mr. Ebsary who had done
whatever was done that night, that's fine, obviously,
20. but I would argue that it's not part of the res gestae
a day and a half afterwards or even the next morning
and that Mr. MacNeil is expressing opinions as to what
he thought. Now he does say they weren't - I also
understood he also said you didn't have to kill him, you
should've given him the money and all that. I don't
25. know what Your Lordship's view on that is. Perhaps it
is a conversation that is acceptable.

THE COURT: The conversation is acceptable.
You wanted the Crown to call him, you made the motion,
and the Crown will call him. We'll have to see what he
30. says. He testified as to facts.

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DISCUSSIONMR. WINTERMANS: Okay.THE COURT: He's not giving expert opinion on anything. I have to wait until he testifies. I don't know what a witness will say.

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MR. EDWARDS: Well, My Lord, so we don't have to send the jury out, one example, one quote of what he's saying is at p. 94 of the reference in 1982. He says:

"The next day I went to Ebsary's house and I told him that the fellow died. I said, I said you didn't have to kill him, you know. You should've given him the money, you know, I told him. I told his son that and his son just said well, if you say anything well, he said, so . . ."

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that conversation is a little ambiguous because he's saying to eBsary but he's also in a portion there he's talking to his son later too.

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THE COURT: Isn't he able to say what he said?MR. EDWARDS: Of course. I can't understand the objection. You talk about wanting your cake and eat it too. All he wants is that he said it was self-defence.

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THE COURT: I don't see any difficulty with that. All right. Now there are no more preliminary motions at this stage, are there?MR. WINTERMANS: No, My Lord.THE COURT: All right, then we will recall the jury.

25.

JURY RECALLED. (1:45 p.m.)JURY POLLED. All present.THE COURT: All right. Call the next witness.MARY EBSARY called, sworn, testified:DIRECT EXAMINATION

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MR. EDWARDS: You are Mary Ebsary?

A. I am.

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0. MRS. EBSARY, Direct Examination

Q. And you were formerly the wife of Roy Newman Ebsary, the accused?

A. Yes, I was.

5. Q. And in 1971 you and Mr. Ebsary and your son Greg and daughter Donna resided on Argyle Street, Rear Argyle Street in the City of Sydney, is that correct?

A. That's right.

Q. And you had lived there sometime prior to that?

A. Yes.

10. Q. Now I want to direct your attention, Mrs. Ebsary, to the night of the Seale incident?

A. Yes.

Q. May 28th, 1971. Where were you that night?

A. I was at home.

Q. And who was at home with you, Mrs. Ebsary?

A. My daughter Donna.

15. Q. And was your husband home that evening?

A. No.

Q. What time had he gone out?

A. He had gone out possibly around five. I don't remember the time but I think yes, around five o'clock in the afternoon.

20. Q. How was he dressed when he went out, Mrs. Ebsary?

A. He had on his coat.

Q. Would you describe the coat?

25. A. It was a blue, navy blue or black long Burberry type coat.

Q. I see. And how did he wear it?

A. Usually he wore it just draped over his shoulders.

30. Q. Now what was your husband's physical condition in 1971, Mrs. Ebsary?

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MRS. EBSARY, Direct Examination

A. His condition was very good.

Q. Um-hmm. And as far as his health was concerned . . .

5. A. Well, apart from being a chronic complainer his health I don't think was too bad.

Q. Mrs. Ebsary, I'm going to show you a photograph which is marked EXHIBIT 10(a).

A. Yes.

Q. Okay. Do you know who took that photograph, Mrs. Ebsary?

10. A. Yes, I did.

Q. And the person in the photograph is obviously your husband, is that correct?

A. That's right.

Q. Now on the side of the print it has June, '76.

15. A. That '76 is possibly when this picture was reprinted.

Q. To your recollection when was the photograph actually taken? Approximately what year?

A. Possibly '70 or '71.

Q. '70 or '71.

A. Yes.

20. Q. I see. And where was this photograph taken?

A. It was taken on Argyle Street, Rear Argyle Street.

25. Q. On Rear Argyle. And just for the record I'm showing you photograph 10(b) and that's simply an enlargement of 10(a).

A. That's an enlargement of this, yeah.

Q. Yes. Now Mrs. Ebsary, around that time did your husband ever complain about having been mugged?

A. Twice.

30. Q. Yes?

A. He said that coming home through the park, it

494.

0. MRS. EBSARY, Direct Examination

would be late at night, that he had been accosted and I advised him to stay away from the park, which of course he didn't do, but - yes, he did mention it to me.

5. Q. Now on those two occasions do you remember approximately when they were, in relation to this event?

A. It was prior to that.

Q. How much prior? Do you know? A month, years?

10. A. It could be months.

Q. Okay.

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

Q. No, it's a long way back. We appreciate that.

A. It would probably be months, or a year.

Q. I'm sorry, I didn't follow you.

15. A. It would be months.

Q. It would be months rather than years, or years rather than months?

A. No, it would be months.

20. Q. Okay. Now at the time that he complained about having been mugged on these two previous occasions what if any outward sign of injury did you observe?

A. No, there was never any physical sign that he had been attacked or whatever. He had no bruises or anything, just that he said 'I was attacked coming home.'

Q. I see. And that was it.

25. A. Yes.

Q. Now I want to direct your attention to the night in question, the night of the Seale incident. You say he went out around five. What time did he come home?

A. It was before 12 but I don't know what time. I don't know how much before 12 but it was before 12.

30. Q. Could you give us an at most? 15 minutes or...

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MRS. EBSARY, Direct Examination

A. Quarter to 12.

Q. Now was he with anyone at the time he came home?

A. Yes, he had Mr. MacNeil with him.

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Q. That's James MacNeil?

A. Yes.

Q. Now what can you tell us if anything about your husband's habits at the time, as far as bringing guests home at that hour of the night?

A. It wasn't unusual.

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Q. And what about Mr. MacNeil, had he been there prior to that night?

A. Yes, he had.

Q. Or how many occasions?

A. Oh, probably six or more.

Q. And other than Mr. MacNeil, were there others?

15.

A. There had been others, yes.

Q. Now when he - your husband and Mr. MacNeil arrived you say around quarter to 12 . .

A. Well, that's just an approximate time.

Q. Yes, it was somewhere between 11 and 12.

20.

Would you describe Mr. MacNeil's condition? How would you describe his behaviour at the time?

A. Mr. MacNeil was very excited at the time, very talkative. I wasn't paying too much attention to what he was saying.

25.

Q. You weren't paying too much attention to what he was saying.

A. No, but he was very talkative and he came over to my living room door and he was talking to me at that time.

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Q. And what about your husband, how would you describe his demeanour or outward bearing at the . .

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0. MRS. EBSARY, Direct Examination

A. Well, he rushed in through the door in what I would call an agitated manner.

Q. Yes?

A. And rushed into the kitchen area.

5. Q. Um-hmm. You were in the living room area, I take it.

A. Yes, I was. I didn't follow him or I didn't go in with him.

Q. So you didn't see what he did.

A. No, I didn't.

10. Q. And your daughter Donna, she was up at this time?

A. Um-hmm. Yes, she was.

Q. I see. Okay. So how long was it before Mr. MacNeil then left?

A. Oh, 20 minutes. From the time he arrived it would've been about 20 minutes, when he left.

15. Q. Now after that night, Mrs. Ebsary, how long was it to the best of your knowledge before you, your husband or son and daughter for that matter, had contact with the City of Sydney Police?

20. A. I don't remember, not accurately, it would be some months.

Q. Months later.

A. I don't know how many, or how long.

Q. Okay. Thank you very much, Mrs. Ebsary.

My learned friend may have one or two questions for you.

25. CROSS-EXAMINATION

MR. WINTERMANS: Mrs. Ebsary, you testified that your husband and Mr. MacNeil came home together on the night of May 28th sometime before midnight and that Mr. MacNeil said something to you?

30. A. Yes.

497.

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MRS. EBSARY, Cross-Examination

Q. What was it that he said to you?

A. He said 'Roy did a good job on that fellow tonight. He saved my life.'

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Q. Thank you. Do you recall what your daughter Donna did after these two came home? You say she was in the living room with you?

A. She was in the living room with me.

Q. Did she leave the living room?

A. Yes, she did.

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Q. And could you see from where you were sitting where she went?

A. No, I couldn't.

Q. I see. Thank you very much.

WITNESS WITHDREW.

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0. JAMES MacNEIL, called, sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Sir, your name is James MacNeil?

A. Yes.

Q. You've had a long wait to get here.

5. A. You won't believe it.

Q. How old are you now, Jim?

A. 39.

Q. You're 39.

A. 39, yeah.

Q. And where do you live?

10. A. I live at 222 Mount Pleasant Street, at the Pier.

Q. That's in Sydney.

A. Yeah.

Q. Are you working at the present time, Jim?

A. No, I'm unemployed.

Q. Jim, back in 1971 were you employed then?

15. A. No, I was not. No.

Q. And you were about the same height and weight that you are now?

A. No, I wasn't. I'm in good shape today. At that time I was about 105 lbs.

Q. 105.

20. A. I was way down, my health wasn't like it is today.

Q. How tall are you, Jim?

A. I'm 6'.

Q. 6?

25. A. Yeah.

Q. Now Jim, back in 1971 did you know the accused, Roy Newman Ebsary?

A. Yes.

Q. For the record would you point him out if you see him here?

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0.

MR. MacNEIL, DIRECT EXAMINATION

(Witness points to accused).

Q. Jim, you recall the night of the Seale incident?

A. I do.

5.

Q. How long had you known Roy Ebsary prior to that night?

A. I knew him since a few months, three or four months.

Q. Three or four months before.

A. Before that, yeah.

10.

Q. Did you see Roy Ebsary that night?

A. Yeah.

Q. You did?

A. Yeah.

Q. And where did you see him, Jim?

A. At the State Tavern.

15.

Q. At the State Tavern.

A. On George Street.

Q. Right. And what time did you meet him there?

A. I'd say it was around the evening, 7, 6:00.

Q. Between 6 and 7 o'clock?

20.

A. Yeah.

Q. I see. And what time did you and Mr. Ebsary leave the tavern that night, Jim?

A. I would say about roughly around anywhere after 10, something like that. 10 o'clock or after 10.

Q. After 10 or something like that.

25.

A. Yeah.

Q. Yes? Now Jim, between those times when you arrived and when you left, how much did you have to drink?

A. I had about a half a dozen beer, probably six drafts, like. Six or seven.

30.

Q. That's your estimate.

500.

0. MR. MacNEIL, Direct Examination

A. That's my estimate, yes.

Q. Now had you been drinking earlier that day?

A. No, I wasn't drinking earlier that day but the day before that I was drinking, you know, the day prior to that I had a few drinks.

5.

Q. Yes. Generally speaking, you know, around that time if somebody asked you what were your drinking habits like, what would you say?

A. Well, at the time my drinking habits were kind of bad because everything in the house wasn't that good because my mother was dying with cancer and . . .

10.

Q. Okay, well, you don't have to get into that.

A. It's best we don't go into that there.

Q. No. But you're saying you were a heavy drinker at the time.

A. Yes, I think I was. That's right, yeah.

Q. Now how much - well, first of all were you with Roy Ebsary at the State Tavern for the whole evening?

15.

A. I was with him until we left.

Q. How much did he have to drink, could you . . .

A. Well, this is something hard to describe because once you talk and I think there was somebody else come to the table, like, and you know how it is in a tavern like . . .

20.

Q. No.

A. No. Well, I'm sorry about that. But you get, you know, everybody is going here and there.

25.

Q. Okay.

A. Every darn thing.

Q. So to the best of your recollection how much did Mr. Ebsary have to drink?

30.

A. He had around the same amount as me, I suppose.