I N D E X

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EBSARY THIRD TRIAL CONT'D---------PAGES 1 - 250
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MEDIA POOL COPY

G. EBSARY, Direct Examination

Q. Now is that where you resided in 1971?

A. It is, yes.

Q. And how long approximately had you resided there at that time?

A. That's 10 years anyway.

Q. 10 years?

A. I'd say, yeah.

Q. And after Rear Argyle Street where did the family move?

A. We moved to 46 Mechanic Street.

Q. 46 Mechanic Street. And that is also in Sydney.

A. In Sydney, yes.

Q. Approximately when did the family move to Argyle Street?

A. I believe it was in the summer of 1974.

Q. And the family was still all together at that point.

A. Still all together, yes.

Q. And at some point subsequent to that was there a separation between your mother and father?

A. There was, but that was in the winter of 1979 or the early part of 1980.

Q. So up until then the family lived as a unit.

A. Well, I got married so I moved out.

Q. When did you move out?

A. 1975 I got married.

Q. And what about your sister Donna?

A. Well, she ws home for a few years and then she moved to Boston but I'm not really sure of the date when she moved.

Q. Okay. So in 1971 how old would you have been, Mr. Ebsary?

G. EBSARY, Direct Examination

A. I would be 17.

Q. 17. And were you employed at that time?

A. No, I wasn't. I was a student.

Q. And what grade would you have been in?

A. I would be in grade 11, I believe, Sydney Academy.

Q. Could you describe for the jury how your dad generally dressed?

A. Are you referring to when he went out or just around the house, or . .

Q. Well, when he was going out.

A. Well, when he was going out he would have a pair of suit pants or what I would call a good pair of pants, a white shirt, he would have a silk or nylon white scarf which he would put inside his shirt and fold it over like an ascot and then he'd have a suit jacket or sport coat, and then when he was ready to leave he'd put on his top coat or whatever he called it, a top coat and he'd just drape that over his shoulders like a cape sort of.

Q. And what colour was that coat?

A. Well, there was a blue, I guess. There was a blue one he had and then there was a couple of ones that were reversible, they were blue on one side and white on the other.

Q. And what shade of blue would the coat be?

A. Well, one was navy blue, like I say the other one was white and blue.

Q. Do you know if he had any particular favour, if he wore one coat more than the other?

A. Well, he wore a blue one more than the reversible type.

Q. That's the navy one.

A. Yes.

0. G. EBSARY, Direct Examination

Q. Could you describe your father's state of health around 1971, and generally his physical ability?

A. He was in quite good shape. He walked everywhere he went when he was working and he was sitll working up to that time, he worked at the Isle Royale Hotel or down at the Esplanade Grill, I'm not really sure, but he walked everywhere he went. He was in good shape.

Q. Now the previous witness testified that you turned certain exhibits over to Staff Sergeant Wheaton.

A. Yes, I did.

Q. I'm going to show you a folder which is marked Exhibit #1 containing about 10 knives. Would you examine those knives? You had the opportunity to examine those knives prior to coming to court.

A. Yes. Yeah, these are the knives that I turned over to Harry Wheaton.

Q. Um-hmm. And you didn't make a note of the date on which you turned them over to him.

A. No.

Q. Do you remember what year?

A. I really don't, no.

Q. So could you explain to the jury where those knives came from? How they . .?

A. Well, they were in use at 126 Rear Argyle where we resided and then when we moved, well before that, I guess, some of them were in the upstairs location around Roy's bedroom and the rest of them were downstairs in the kitchen and then when we were moving everybody kind of packed up their own junk and we shipped them up to Mechanic Street. I moved them up in a little trailer, a truck and then we just moved them into the house and

0. G. EBSARY, Direct Examination

again Roy had a room upstairs and they - some of them went up there, he was using them for letter openers or whatever and the rest of them went into a drawer in the kitchen and subsequently they went into a drawer in
5. the dining room and then down into the basement.

Q. So where were they when you retrieved them for Staff Sergeant Wheaton?

A. When I retrieved them for Staff Sergeant Wheaton they were in a basket in the basement up above my work bench.

10. Q. What kind of a . .

A. An apple or a peach basket.

Q. And how did they get down there?

A. I put them there. I took them out of the - they were in a drawer, they were all in a drawer in the dining room and I took them out of that drawer and I put
15. them in the basket and I put them downstairs up above my bench.

Q. Now I'm going to show you a couple of the knives. First of all I'm going to show you knife #1 which is also marked R4G.

A. Okay.

20. Q. Now explain to the jury how, if you can, say that that is your father's knife or it came from your home.

A. Well, this is not the kind of a knife that you'd buy in a store, I guess, not with this kind of a
25. handle on it anyway. This was a bone handle or a plastic handle steak knife and the handle either became broken - there was a set of these - and some of them either became broken or he took the handles off and . .

Q. By 'he' you're referring to your father.

30. A. Yes, Roy, yes. He took the handles off and he

put this copper pipe on it and used that for the handle, so that's how I know that this is one of our knives, or one of his knives, I guess.

Q. What's on the end of it there?

A. Oh, this is a bullet shell, a little dressing, I guess, but he put that there as well.

Q. I see. All right. What about knife #7 which is also R4C?

A. Okay. This is also one of his creations, the knife is sharpened on both sides. This is what I would call - it used to be what I would call a butter knife. It should be flat here on the top instead of sharp and it's - there's usually no edge on these at all but he has it sharpened to a fine edge on both sides and he has the piece of rubber hose of some sort on the handle and that's his work as well, I guess.

Q. Do you know of any reason why the blade would've ben ground sharp on both sides?

A. I don't know why he did it. I know that he did it but I have no reason - I have no idea why he did it.

Q. I see. Knife #8, what can you tell us about that?

A. Again this is one of his knives and it's the same story. The blade is ground on both sides and the knife comes to a sharp point and it's again what I would call a butter knife. It has the green hose on the handle and tape to support the hose where it's split, I guess and a little bit of cellophane, I guess or whatever you call it, tinfoil around the handle here. That's one of his knives. Or one of the knives that came out of the house, I guess.

Q. Mr. Ebsary, you've examined the other seven

knives.

A. Yes.

Q. And are you satisfied that each of those came from . .

A. Oh yes, yes. They all came from our house, yes.

Q. Now I want to direct your attention to the night of the incident, we'll call it, in Wentworth Park. That would be May 28th, 1971. Do you have any idea where you were that day?

A. Yes. I was working with a friend who was building a house on Harold Street and I was there until quite late in the early morning of May 29th, I guess, before I arrived home.

Q. So did you see your father at all on May 28th, 1971?

A. No, I didn't.

Q. Did you see him on the 29th?

A. I saw him on the 29th for a couple of minutes and then I went back to building the house with a buddy of mine.

Q. Did you have any conversation with him?

A. No, Sir, I didn't.

Q. On that day. Now around that time, 1971 could you describe your father's use of alcohol if in fact he did use alcohol?

A. He used quite a lot of alcohol at that time. He spent the better part of his non-working time in - drinking alcohol. He was a bad drinker. He frequented the State Tavern which was on George Street, again during most of his off time.

THE COURT: Which tavern?

A. The State on George Street.

G. EBSARY, Direct Examination

THE COURT: Thank you.

A. All of his off time he was drunk, all of his off time.

Q. And whom did he include among his friends at that time? Do you recall?

A. Well, the only - well, Henry Peters was a friend of his and Jimmy MacNeil, that's the only two that I know by name that I could say right off the top of my head.

Q. Jimmy MacNeil, how well did you know him at that time?

A. I didn't know Jimmy all that well, he was at the house a couple of times before that incident so I didn't know him all that well. I knew him to see him or say hello to him or something.

Q. And can you comment upon the degree to which Mr. MacNeil used alcoholic beverages?

A. No, I can't say. I can't really say if I've ever seen him drunk or anything.

Q. No further questions. Thank you, Mr. Ebsary.

THE COURT: Cross-examine?

CROSS-EXAMINATION

MR. WINTERMANS: Did you actually see your father modify or change or fix any of those knives?

A. I saw him change the handles on some of those steak knives with the copper handles. I did not see him change or add the rubber hose to the butter knives.

Q. And you moved out of the house you say in 1975 when you were married?

A. I'm saying around 1975. Around there.

Q. Some three or four years after this incident.

A. Yes.

Q. And before that though you lived in the home

with your father and mother and your sister?

A. Yes, that's correct. Yes.

Q. At that time in May of 1971 your father was a cook at the Isle Royale Hotel, is that correct?

A. It's - I'm saying yes but there's two jobs he had around that time. He worked for the Isle Royale Hotel and then after he - around that time he worked for the Esplanade Grill so I'm not really sure.

Q. He was a cook, though.

A. He was a cook, yes.

Q. Did you move, did you and your family move from the residence at Argyle Street where you lived in 1971 to a new residence on Mechanic Street?

A. Yes, that's correct.

Q. When was that? Approximately.

A. I'd say the summer of 1974.

Q. '74, was it?

A. Um-hmm.

Q. I see. And do you recall how those exhibits, the knives, got from the first house to the new house?

A. Well, I moved the - once everything was packed I moved it in a half-ton truck and a little trailer from Argyle Street to Mechanic Street. Now some of the stuff, whatever was in the kitchen I would imagine my mother packed. Anything that was upstairs in their bedroom, Roy and my mother probably packed it and whatever my stuff was, I moved it so the knives, wherever the knives were my mother packed them or Roy packed them, just depending on where they were, upstairs or in the kitchen.

Q. I see. And were some of these knives to the best of your knowledge from the kitchen?

A. Some of them were in the kitchen drawer.

0. G. EBSARY, Cross-Examination

I've seen them in the kitchen drawer. And some of them were upstairs.

Q. So that would be up until the time of the move in 1974?

5. A. That's correct.

Q. And some of them were in a dining room, did you say?

A. Well, that was after that.

Q. After that. I see. So there was no dining room at Rear . .

10. A. No, we had just a kitchen. That's where we ate and cooked. Everything was done in the kitchen.

Q. I see. Were you - would you describe yourselves as a wealthy family? At that time?

A. Certannly not. Certainly not.

Q. Were you a poor family at that time?

15. A. We were - I'd say we were - I don't know. I don't know if we were poor or not. WE never had a hell of a lot but we did all right.

Q. Um-hmm. Did your mother work at that time?

A. Yes, she did. She worked for Wandlyn Inns.

Q. I see. Doing what?

20. A. She was a cook.

Q. Now after the - or when the move took place to the new house in 1974 you indicated that articles were packed according to room, is that correct?

A. Yes, that's correct.

25. Q. So all the kitchen things were put in a kitchen box.

A. Yes.

Q. Kitchen boxes, and then when they were unpacked were they unpacked according to room?

30. A. Yeah, they were put the same way they came

out of the other house they went into the new house.

Q. So the knives would've been put into kitchen drawers.

A. Yeah, they would've been put into a kitchen drawer. In the new house that we moved in there was no cupboards or counter tops. There was only just one drawer in the kitchen for - it was in an old sink that was there, so any knives that were in the kitchen would've been put into that drawer first.

Q. I see. And in the new house there was a dining room?

A. There was a dining room, yes.

Q. And were some utensils kept in the dining room?

A. Yes, anything that we used day to day like the eating utensils would've been kept in the kitchen. There was no room for the larger knives or ladles or anything like that so they were all kept in a drawer in the dining room and . .

Q. Do you recall, can you say which of these 10 knives would've been kept where? At that apoint in time after the move?

A. The only ones I can say with any surety at all were the two of the bigger knives that are there. They were kept in the - they would've been in the dining room. The rest of them, well, I don't know. I have no idea. I can't say which ones were which. There were some downstairs and there were some upstairs. I don't know which ones.

Q. Okay. And I understand your parents separated. When would that have been, 1979 and 1980?

A. That was around Christmas, around Christmas time of 1979. Into the early part of 1980.

Q. Um-hmm. And before that separation I understand

G. EBSARY, Cross-Examination

that your father pretty much had his own room.

A. Yes, he did. Yes.

Q. And what happened with the things that were in his room?

A. The stuff that was in his room I helped him pack up and I moved him down to a place, the Cliefden House first and the - anything that was left over after he moved out, there was a few of those knives that were left. He had - I think to explain it better I'd have to tell you he had a desk in his room and he had some of those knives in a desk in his room on the upstairs level and when we packed up of course, I was moving him out in a car that I had at the time so there wasn't enough room in the car to take everything, so there was a few of those knives left over and the knives, I just took them and I fired them in the drawer downstairs in the dining room and the rest of his stuff we moved out in the car down to the - to his new location.

Q. I see. And these knives that we see before us, the 10 knives, they then at a certain point went from the kitchen and dining room down into the basement?

A. No. Eventually they all - all of those knives which you see there eventually all of those knives at one point were all in the dining room in a drawer, I don't know if you'd call it an obsolete drawer or not. They just became- they just weren't in use any more.

Q. When would that have been?

A. I can't really say. We bought some new cutlery that looked a little cleaner and was a little cleaner in fact and we just moved that stuff away and we put it into the drawer in the dining room and then I took it from there and put into the basement. I can't say how long they were down in the basement.

0. G. EBSARY, Cross-Examination

Q. Okay. I refer you to - you recall that you gave eidence in Halifax in 1982?

A. Yes.

Q. I refer to page 209, question . . .

5. THE COURT: Which transcript is this?

MR. WINTERMANS: This is from the - Halifax.

MR. EDWARDS: This is the Donald Marshall reference.

MR. WINTEREMANS: Yes, the Donald Marshall matter.

10. Q. All right, now, let's try to get the time frame. When would you have put the knives in the peach basket and put them in the cellar?

A. I'd have to say sometime between 1981 and when Mr. Wheaton came to the house.

Q. Do you recall that?

15. A. Well, what I'd have to say there is, I'd have to check. What happened there is we had the house insulated. I know that doesn't mean anything to you but in terms of the date it means something to me, because when we had the house insulated I went in and looked.

20. We were moving some stuff out of the dining room and when I pulled out one of the drawers there was some mildew on the inside of one of those drawers. Now I'd have to look and see when the house was insulated, then I could give you an exact date.

25. Q. I'm looking for an exact date, but do you recall having given that answer? Would that be an approximate date?

A. Sure. That's it.

Q. Can you say how your father's height, now compared to back in 1971? It's approximately the same, I

30. would assume?

G. EBSARY, Cross-Examination

A. Approximately, yes. He may even be a little shorter now. I'm not sure.

Q. I suggest to you approximately 5'2?

A. Approximately, yes.

Q. And his weight in 1971?

A. Oh, I'd say he was a little heavier in 1971 than he is now. He was a little stockier in 1971.

Q. Would you be able to put a weight on it?

A. I have no idea.

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

THE COURT: Any re-examination?

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

WITNESS WITHDREW

MR. MacALPINE duly called, sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Your name is Richard MacAlpine?

A. That is correct.

Q. And how are you employed, Mr. MacAlpine?

A. I'm presently in charge of the serology section of the Royal Canadian Mounted Police Forensic Laboratory in Halifax, Nova Scotia.

Q. Now Mr. MacAlpine, I want to direct your attention to the 8th of March, 1982. On that date did you receive some registered mail from Staff Sergeant Harry Wheaton then of the Sydney Detachment of the R.C.M.P.?

A. I did.

Q. Would you tell the jury what that was?

A. It was a sealed package bearing registration #2185. It was addressed to the officer in charge of othe Halifax laboratory and it came into my possession on the 8th of March, 1982.

Q. I want to direct your attention for a moment, Mr. MacAlpine, would you just look at the folder, Exhibit #1 containing 10 knives? Would you examine those knives and tell the court whether or not they are the ones you got by registered mail on the date you just stated? After you got them what did you do with them?

A. I placed the sealed pac . .

THE COURT: I'm not sure that he answered your question that he got them.

MR. EDWARDS: Oh.

A. I did not receive the knives actually on the 8th of March, 1982. To my knowledge. I received a sealed package.

Q. I see. What did you do with the sealed package?

A. I retained this package in my possession in my personal locker at the laboratory until the 17th of March, 1982when I turned it over intact to Mr. Adolphus

0. MR. MacALPINE, Direct Examination

Evers of the Hair and Fibre Section of our laboratory in Sackville, New Brunswick.

Q. You turned that over to him personally on the 17th.

5. A. I did.

Q. Yes?

A. ON the 18th of March, 1982 I received from Mr. Evers the knives which I identified on the table at the court room and the wrappings of the package which I had received on the 8th of March.

10. Q. And what did you do with them then?

A. I transported them back to Halifax and while they were not being examined by myself were kept in my personal locker and I subsequently examined the items that I have identified before the court.

THE COURT: You received them back on which day?

15. A. I received them back on the 18th of March, My Lord.

MR. EDWARDS: Personally from Mr. Evers.

A. Yes.

Q. Um-hmm. And then you said you took them

20. back to Halifax and when you weren't looking at them . .

A. They were kept in my locker.

Q. They were kept in your locker until they were eventually what?

A. They were eventually returned to Staff

25. Sergeant Harry Wheaton accompanying a copy of my report by registered mail on or about the 26th of March, 1982.

Q. Okay. So what was your purpose in examining the knives subsequent to the 18th of March, 1982?

A. I was asked to examine the items for hte presence of blood.

30.

0. MR. MacALPINE, Direct Examination

Q. Now My Lord, I haven't qualified this witness to give opinion evidence, he's called mainly for continuity but do you have any objection to his qualifications?

5. MR. WINTERMANS: I have no trouble with Mr. MacAlpine. I agree he's qualified to give opinion evidence.

MR. EDWARDS: Opinion evidence in the field of serology.

THE COURT: All right, the witness is qualified to
10. give opinion, qualified as an expert to give opinion evidence in the field of serology.

MR. EDWARDS: Perhaps you could just tell the jury briefly what serology is.

A. Certainly. Serology in its broadest sense of the term is the science which deals with the liquid
15. part of blood or the serum. My involvement in the field is more specialized. We refer to it as forensic serology and it involves the identification of blood and blood stains, the differentiation between human and animal blood and the classification or blood grouping of human blood into several blood grouping systems.

20. Q. Now when you examined each of the 10 knives there what was the result of your examination?

A. I did not find blood to be present on any of the knives which I examined.

Q. Could you tell the jury how easy or difficult,
25. as the case may be, it is to remove fresh blood from the blade of a knife?

A. Well, of course circumstances can vary from one instance to another. Usually when an exhibit or an item comes to me, if blood is present on it it is usually
30. dry and knives as such usually being of smooth metal, the

0. MR. MacALPINE, Direct Examination

sample is quite readily removed with a scalpel blade, a scalpel being a very sharp surgical blade, and it's not difficult usually to remove a sufficient sample for testing and other examination.

5. Q. That's removal of the blood sample when you get it, but I'm talking about if a knife has blood on it on a particular night, how easy or difficult is it at that time to clean the knife off?

A. Well, in my experience dealing with blood and blood stains on particularly such items as knives which again I pointed out that they do have smooth

10. surfaces usually, especially on the blade, and it's not difficult at all to remove blood. Blood is relatively water soluble and can be removed from the blade of the knife simply by washing it under running water and wiping it with a cloth or other cleaning device.

Q. Thank you very much, Mr. MacAlpine.

15. CROSS-EXAMINATION

MR. WINTERMANS: Mr. MacAlpine, when you say that you examined these 10 knives for the presence of blood, perhaps you could explain to the jury exactly how you examine these knives. Certainly not with the naked eye.

20. A. Well, I did examine with the naked eye initially and I also examined the items by the use of what we call a stereo microscope. This is a microscope which magnifies an image, unlike conventional microscopes which use transmitted light through a very thing object,

25. a stereo microscope uses reflected light onto the object and the object is magnified and also you get a stereo image, that is you get a three-dimensional image because there are two paths of light coming, and one coming into each eye, so I did use the stereo microscope with intense light and i also used a chemical test. We

30.

call it a screening or presumptive test for the presence of blood. A positive test indicates the possible presence of blood. If we get a positive test with a presumptive test we go on with more specific tests to determine the actual presence of blood. I tested these various items in a number of areas on each item with the presumptive test and the presumptive test was negative in all instances.

Q. When you use the stereo microscope what degree of magnification are we talking about?

A. I would estimate - probably, it's variable, of course, from 1 or 2 times actual size to perhaps 10 times the actual size.

Q. What about the handles of these various knives? You've described how easy it is for blood to be washed off a bladebecause of the material, is that correct?

A. Yes.

Q. Because of the type of material, smooth metal. What about the blade? Sorry, what about the handles of these various knives? I notice that there's several different materials on these various knives.

A. I would suggest that it's probably possible to remove blood, or would be, hypothetically possible to remove blood from these items with relative ease. Some materials are very porous. I don't recall when I examined the items in question that there was any material used in the construction which would retain blood to a very great degree, so in my opinion it wouldn't be terribly difficult to remove blood from any portion of the items which I examined.

Q. You examined the little piece of tape also, did you?

R. MacALPINE, Cross-Examination

A. I believe there was tape with the items and I examined that tape, yes.

Q. Would that have been a porous material?

A. I wouldn't consider it a porous material, no.

Q. So your results were that there was no blood found on any of these knives.

A. That is correct.

Q. Thank you.

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

WITNESS WITHDREW

COURT RECESSED (11:14 a.m.)

COURT RESUMED (11:37 a.m.)

JURY POLLED. All present.

MAYNARD CHANT duly called, sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Sir, would you give your name, address and occupation to the jury, please?

A. My name is Maynard Chant, I live in Louisbourg, I work for National Sea Products. I'm a fish cutter.

Q. How old are you, Mr. Chant?

A. I am 28.

Q. So that would have made you how old in 1971?

A. 14.

Q. And at that time you were a school student?

A. Yes.

Q. What grade were you in?

A. I was in grade 6.

Q. And did you reside in Louisbourg at that time?

A. Yes.

Q. With your family.

A. Yes.

Q. Now I want to direct your attention to the night of May 28th, 1971. Do you recall where you were that evening?

A. Yes.

Q. Where were you?

A. On that specific evening we were having special services in Sydney. I went in with my family in the church. Do you want me to continue?

Q. Yes.

A. And a little later on in the evening I had asked would it be all right if I went down to meet a friend of mine in the Pier in Sydney and well, after a little bit, after the service, maybe around 9 or so I decided to take off from church and go down to the Pier and meet one of my friends, that we had planned earlier.

Q. Yes?

MR. CHANT, Direct Examination

A. I couldn't locate him when I got down there so I had to hitchhike back from the Pier, I was going to try to catch the bus that goes out to Louisbourg from the bus terminal on Bentinck, and by the time I had got up there I had missed the bus so I decided well, I better find a way home so I walked down Bentinck and went out to George Street. Well, I never got out as far as George Street. As I walked down Bentinck Street . . .

Q. Bentinck Street is on the perimeter of Wentworth Park in Sydney, is that right?

A. Yes.

Q. So you were walking on Bentinck Street towards George.

A. Yeah.

Q. And George Street forms another boundary of Wentworth Park.

A. Um-hmm.

Q. All right.

A. And just as I got down to the corner of Bentinck And the street that runs parallel to Bentinck, which I don't remember the name of it, I just barely turned the corner and I was walking on this side of the park, I seen a fellow running from the bridge side towards me and I didn't know who it was, I just kept walking and he hollered to me and I turned around and he ran up to me and he just - he had his arms on his jacket rolled up and - the sleeves of his jacket rolled up - and he said . .

Q. No, you can't tell us what he said.

A. Oh, I'm sorry.

Q. But do you know who that person was?

A. Not at the time. I didn't know.

Q. Have you learned since who he was?

0. MR. CHANT, Direct Examination

A. Yes.

Q. Who was it?

A. It's Donald Marshall.

Q. Donald Marshall Junior.

5. A. Junior.

Q. Yes. Now what if anything did you notice about his arms other than the fact that his sleeves were up?

A. He had a gash on his arm, it looked fairly deep and he told me what had happened and he wanted

10. to know if I could help him. Can I go into detail what he said what happened?

THE COURT: You cannot tell what he said.

MR. EDWARDS: You cannot tell us what he said.

A. Okay.

Q. But you can tell us as a result of the

15. conversation at the time with Donald Marshall Junior what did the two of you do?

A. Well, we flagged down a car. First we met- as we were walking towards to get a hold of somebody to help us out, to help his friend out, we flagged down a car. Just before that we met a girl, two girls and

20. like two couples and they had given Marshall a handkerchief for his arm so at that . .

THE COURT: Sorry, you're going a little too fast. I'm trying to write this down.

A. I'm sorry.

25. THE COURT: You met a girl, and then you said two girls and then you said two couples.

A. I meant two couples, two boys and two girls, I'm sorry.

MR. EDWARDS: And they gave him a handkerchief for

30. his arm?

0. MR. CHANT, Direct Examination

A. Yes.

Q. Yes?

A. So at that time we had flagged down a car and we drove around like to George Street up to where

5. Sandy Seale was hurt.

Q. Do you know what street that was?

A. After you come off of George Street you turn onto Argyle.

Q. Yes.

A. You go up Argyle a way. Now the street that

10. runs along the perimeter of the park, on the left side . .

Q. Would Crescent Street. . .

A. Crescent Street, yeah, sounds familiar. So we got just about almost all the way like to the end of the road and there was a young man laying down on the pvement like, all hunched up and. . .

15. Q. Did you know that person?

A. No.

Q. Have you learned since who he was?

A. Yes.

Q. Who was he?

A. Sandy Seale.

20. Q. Describe his condition.

A. He wasn't saying much. After we got out of the car we went over to him. Marshall, Donald said that he would go for the ambulance and he ran up a couple of houses and went up the stairs and tried to get an

25. ambulance and while I was there Sandy never said much, he just murmured a few words and said that he was cold.

Q. You can't tell us what he said. He was conscious.

A. Yes.

30. Q. And did you observe any injuries on him?

0. MR. CHANT, Direct Examination

A. I noticed he had a lot - a lot of blood. I took my shirt off and put it to where the cut was on his almost like on his stomach.

Q. You're indicating your abdominal region.

5. A. Yes. And I didn't actually see the cut but there was a lot of blood at the time. We just waited there, I just told him to hold on. I just . .

Q. All right. So you're waiting with Seale. You say that Marshall went where?

A. He went to a house up the road, not very

10. far, just a couple of houses.

Q. Yes.

A. And he said that he would call an ambulance.

Q. Well, you can't tell us what he said.

A. Okay.

Q. How long was he gone?

15. A. It wasn't very long, maybe five minutes.

Q. Yes.

A. And then he came back and sort of stood in back of Seale. He never said very much, he was just sort of standing there, I guess he was in a bit of a shock.

20. THE COURT: Look, I'll have to tell you at the beginning, all that you can tell us are facts that you saw or observed, you can't give us any opinions as to what you may think nor can you give us any evidence of what anybody said to you. All right?

25. A. Okay.

MR. EDWARDS: All right, so Mr. Marshall returned about five minutes later, you and Seale are there on the road on Crescent Street, he's standing behind. What happens then? Marshall, that is, is standing behind.

30. A. Marshall is standing behind. About a couple

0. MR. CHANT, Direct Examination

of minutes later the ambulance comes.

Q. Yes.

A. And they just picked Seale up to take him to the hospital. And I proceeded on my way home and I got out to George Street and . .

5. Q. Excuse me, before we leave Crescent Street you say the ambulance came and took Seale away.

A. Seale.

Q. What about the police? Did they arrive at that time?

10. A. I never really - I never really saw or seen the police there. All I remember is the ambulance and I don't even remember where Marshall went after that.

Q. Do you remember where Marshall was when the ambulance arrived?

A. He was right in back of Sandy standing up. Like I say he was just standing there waiting, I guess.

15. Q. So after Sandy is placed in the ambulance and taken away, you proceed where?

A. I proceeded to go home.

Q. By what route?

A. Well, I walked back Crescent, out Argyle and

20. then from Argyle to George and I was walking up George Street there, up towards Hardwood Hill.

Q. How did you intend to get home to Louisbourg?

A. Hitchhike.

Q. Yes.

25. A. And just at the bottom of Hardwood Hill the police car rolled over and I guess they seen the blood on my shirt.

Q. Well, you can't say what they - what you guessed they thought. Anyway what did the police do?

A. So they picked me up and took me up to the

30. hospital. I don't know why they took me to the hospital.

MR. CHANT, Direct Examination

They asked me . .

Q. Well, you can't -

A. Okay.

Q. Before we leave this sequence do you recall approximately what time it would've been when you were first hailed by Donald Marshall towards the intersection of George and Bentinck?

A. It would be close to midnight. I think the last bus left the depot at 11:45 so it would be handy between 11 and 12.

Q. And about how many minutes or whatever had elapsed by the time the police picked you up at the base of Hardwood Hill?

A. Anywhere from a half hour to an hour.

Q. So the police picked you up and they took you to the City Hospital.

A. Right.

Q. And where from there?

A. From there they took me up to the police station.

Q. How long were you at the hospital?

A. Just a short amount of time.

Q. Did you see anyone there? Of course you saw someone, but did you see Donald Marshall there?

A. Not that I can remember.

Q. Did you see Sandy Seale?

A. No.

Q. So then you went to the police station.

A. Right.

Q. And who among the principals in this matter did you see there?

A. I don't remember the names of any of the detectives who I came in contact with to give a statement

depending upon what happened that night. I had just given a statement and my parents came and picked me up and took me home.

Q. And then subsequently did you testify at the preliminary inquiry and trial of Donald Marshall?

A. Yes.

Q. How if at all does your testimony given then differ from the testimony you just gave now?

A. Back in the '71 trial I had said that I had seen Marshall murder Seale and I never seen nothing bearing that at all. The actual sighting - anything I seen was to where I met Seale on Bentinck - the corner - Marshall on the corner of Bentinck Street. That was the only thing I seen involving the murder.

Q. Can you explain to the jury why you would have given that testimony at that time?

A. Well, the reason was because the police had - after I went home, a couple of days later or a day later, they came out and they said that hte statement that I had given . .

Q. Well, you can't say what the police told you. Without telling what anyone told you can you explain?

A. Well, the only thing that I can say is they took me down to a room in the Town Hall in Louisbourg and the thing was that I was on probation and first . .

Q. For what?

A. I was on probation just through personal crime, like, and that I - that they had information that . .

Q. Again, if you can't explain it without getting into what somebody said to you . .

A. Well, I could give up to it anyway. It came to the point where I had given a falst statement the first time and . .

Q. Why had you done that?

MR. CHANT, Direct Examination

A. Mostly because I was scared, I guess. The night that I had given the first statement, when I went up to the police station Marshall was coming out and he had come over to me and leaned over to me.

Q. And you and he had conversation?

A. Yeah. And so that's why I gave the statement that I gave so they - I don't know how to explain this. So anyway resulting in I ended up giving a false statement and when I tried to tell the truth they wouldn't accept it.

Q. They - the police?

A. The police wouldn't accept the story when I begin to confess up to say I never seen nothing and they just kept pressing and like I was more or less saying it was rough for me where I had perjured and I could really get into a lot of trouble.

Q. Those were your fears.

A. Those were my fears. Those were the -

Q. Okay. When did you decide to come forward with the story that you told the jury in the first instance today?

A. Two detectives approached me in '82 - between '82 and . . .

Q. Who were they?

A. One was Jim - I don't remember.

Q. Would you know him if you saw him?

A. Oh yes. Yes. That was one of the gentlemen.

Q. I just had Corporal Carroll stand up and you said that's one of them. Do you remember the other name?

A. No.

Q. Okay. And why did you decide to tell them the story you told us?

A. They were very level. I had - between the time of the '71 trial and '82 or coming up to where they came

to question me, I had become a Christian and it seems like the principals or the tragedy that happened way back I wanted somehow to straighten it out because I knew then that I did wrong and I just felt that it was time that I should tell the truth.

Q. The jacket Mr. Marshall was wearing on the night in question, do you recall its condition? Do you recall anything about it?

A. All I remember is that it was a windbreaker and when he got to me the sleeves were rolled up even with the elbows. Other than that it seemed like it was in half decent . .

Q. I have no further questions, Mr. Chant, but Mr. Wintermans may have some.

CROSS-EXAMINATION

MR. WINTERMANS: When this incident occurred back in 1971 you say you were 14 years old and in grade 6 at the time?

A. Um-hmm.

Q. And I believe that you had repeated grades 2, 5 and 6 at that time?

A. Yes.

Q. Donald Marshall Jr., when you returned back to where Mr. Seale was lying, where did you say that Mr. Marshall went? You say he went to a house?

A. Yes.

Q. Did you see that or were you looking at Mr. Seale?

A. I seen him run up the steps towards the house.

Q. But as to what he did you don't know for sure.

A. Not that I could remember.

Q. And when he came back you say that he was standing behind where Mr. Seale was?

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MR. CHANT, Cross-Examination

A. Yes.

Q. How far behind?

A. Just a couple of steps.

Q. Was it rather dark in that spot?

A. It seemed to be fairly dark.

Q. Fairly dark. And when you say behind Mr. Seale do you mean if Mr. Seale were lying on the ground, above Mr. Seale's - in the direction of behind Mr. Seale's head or behind his back or what?

A. Between like his back, between like his shoulders and his head, around that area. Up that way.

Q. Could you indicate as to whether or not Mr. Seale appeared to look towards Mr. Marshall at that point?

A. No.

Q. Was Mr. Marshall positioned in such a way that Mr. Seale wouldn't have been able to see him?

A. See.

Q. Is that right?

A. Yes, that's right.

Q. Did Mr. Seale say anything as to what had happened to him?

A. No.

Q. He was conscious, though.

A. Yes.

Q. He could talk at that time.

A. Yes.

Q. You remained there until the ambulance arrived?

A. Yes.

Q. How long a period was that, do you recall?

A. Like I really couldn't say because you know, maybe five, somewhere around that area. It was - it all

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MR. CHANT, Cross-Examination

happened pretty fast.

Q. Five minutes you say?

A. At the longest anyway.

Q. That's the longest?

A. Like I really couldn't say as far as time.

Q. Thank you.

THE COURT: Any re-examination?

MR. EDWARDS: No re-examination.

WITNESS WITHDREW

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0. MR. D. MARSHALL, JR. called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: Sir, your name is Donald Marshall, Junior?

A. Yes.

5. Q. What is your age?

A. 31.

Q. Speak up a little louder.

A. I'm 31.

Q. 31? Now Mr. Marshall, what was your address in 1971?

10. A. 38 Micmac Crescent.

Q. And you were living with your parents?

A. Yes.

Q. Your father is Donald Marshall, Senior, is that correct?

A. Yes.

15. Q. So you would have been how old in 1971?

A. 17.

Q. 17. And were you in school or out of school at that time?

A. I was out of school.

Q. And what grade had you reached?

20. A. Grade 5.

Q. So were you employed?

A. I was working with my father.

Q. And what kind of business was he in at the time?

25. A. Drywall.

Q. The drywall business. Okay. Had you been a lifelong resident of Sydney?

A. Pardon?

Q. Had you lived in Sydney all your life up until that time?

30.

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0. MR. MARSHALL, Direct Examination

A. I lived in Eskasoni for about two years.

Q. Yes.

A. I lived in Sydney most of my life.

Q. Now Mr. Marshall, in 1971 you were charged
5. with the murder of Sandy Seale.

A. Yes.

Q. And in November of 1971 you were convicted.

A. Yes.

Q. And sentenced to life imprisonment.

A. Yes.

10. Q. And you served how many years in prison?

A. 10 years and 10 months I served.

Q. And that was in Dorchester Penitentiary in New Brunswick?

A. Yes. And in Springhill.

Q. It's very important that all of us hear you,
15. Mr. Marshall, so do your best to speak up. Now you served 10 years and 10 months, you say?

A. Yes.

Q. And then you were released.

A. Yes.

Q. And in May of 1983 you were found innocent
20. of the murder by the Appeals Division of the Supreme Court of Nova Scotia, is that correct?

A. Yes.

Q. Now Mr. Marshall, I want to take you back to the 28th of May, 1971. Would you describe for the jury
25. please where you were early that day?

A. I was in - I went to Halifax, Shubenacadie. I came home May 28th at 9:30 in the evening and I got a drive down with a friend of mine, accompanied by another friend of mine and . .

30. THE COURT: I'm sorry, I can't hear what you're

0. MR. MARSHALL, JR., Direct Examination

saying.

A. Okay.

THE COURT: All right, you got a drive downtown with a friend after you came home from Halifax.

5. A. Yes.

MR. EDWARDS: Who did you come home from Halifax with, Donald?

A. Mr. Roy Gould.

Q. Roy Gould. So he let you off where?

A. He let us off at the liquor store in Sydney.

10. Q. Yes.

A. And we went to - after the liquor store we went to Intercolonial Street.

Q. What were you wearing?

A. I was wearing a yellow jacket I borrowed off of Roy Gould that night.

15. Q. Yes. And what condition was the jacket in when you got it from Roy Gould that evening?

A. It was good condition.

Q. So after he left you off you went where?

A. I went to - after the liquor store we went to Intercolonial Street.

20. Q. Who was travelling with you at that time?

A. Arthur Paul from Membertou.

Q. Art Paul?

A. Yes.

Q. Okay.

25. A. And after that there was - we were all drinking in the back of the house on Intercolonial and one of the - the mother of the house was dying in the hospital and the man that owns the house, he didn't like the idea of us people drinking around his property and his wife was dying in the hospital so . .

30.

0. MR. MARSHALL, JR. Direct Examination

Q. Okay. Well, we don't have to get into that. So you left Intercolonial Street.

A. Yeah.

Q. All right. Before we go on from there let's get some approximate times if you can recall them.
5. Approximately what time was it when you got back from Halifax?

A. About 9:30.

Q. 9:30 p.m. What time would it have been when you left Intercolonial Street?

A. I would say about 11:30.

10. Q. 11:30. Now during that period of time how much did you have to drink?

A. I had one drink of rum at that time because the person that owned the house, he got mad and I left.

Q. Now prior to that, that day how much had you had to drink, if anything?

15. A. I wasn't drinking that day.

Q. You weren't drinking that day. What were your drinking habits at the time, generally speaking?

A. I don't know.

Q. Well, how many times a week would you drink?

20. A. Usually on the weekends because I worked with my father all week and my father doesn't drink so I don't think I shoudl be drinking around him so I wasn't really allowed to drink.

Q. Now what night of the week would this have been, do you recall? May 28th, do you know what night
25. it was?

A. It was a Friday night.

Q. Friday night. So at that time how big were you, Donald? Your height.

A. 5.10.

30. Q. 5.10? How tall are you now?

MR. MARSHALL, JR., Direct Examination

A. 6.1.

Q. And what was your approximate weight?

A. About 145 lbs at that time.

Q. You were in good physical condition.

A. I was working.

Q. You were sufferieng from no illnesses, I take it.

A. No.

Q. Now after you left Intercolonial Street you say it was around 11:30.

A. Yes.

Q. Where did you go from there?

A. From there I went with two friends and we headed to the Keltic Tavern and we walked in there and I was under age at that time so I just walked out the back door of the Keltic Tavern by myself. I left them two people there and I headed down towards the dance hall in Sydney.

Q. What dance hall were you going to?

A. St. Jo's.

Q. And where was that located?

A. On George Street, I think. I think that's the name of the street up there.

Q. Now to get to there did you have to go by Wentworth Park?

A. Yes.

Q. From where you were?

A. Yes.

Q. So do you remember the route you took from Intercolonial Street to get to St. Joseph's Hall?

A. I walked down from the Keltic Tavern, I walked straight down George Street till I got to the park. I took the route down George Street from the Keltic Tavern,

0. MR. MARSHALL, JR. Direct Examination

I don't know the name of the street where the Keltic Tavern was.

Q. Your voice is getting soft again.

A. On George Street, I took the route on

5. George Street to the park. That leads to the park.

Q. And did you go to St. Joseph's Hall?

A. No, I didn't make it there.

Q. Where did you go?

A. I went to the park to see if any of my Indian friends were there at the park that time to

10. join up with them and I met Sandy Seale at the park.

Q. Yes. Now had you known Sandy Seale prior to that day?

A. Yes, I met him in dance halls. I knew him.

Q. So you met Sandy Seale exactly where in the park?

15. A. In the center of the bandshell area and the pond there. I met him around the middle of the park. And I asked him where he came from and he told me he came from a dance and he was heading home.

Q. You can't tell us what he said to you.

A. Okay.

20. Q. But you and he had conversation.

A. Yes.

Q. You can tell us what you told Sandy but you can't tell us what he told you. Do you recall what you said to him at that time?

25. A. I asked him where he came from and he told me where he came from and . .

Q. Just take your time. What if anything did the two of you decide to do or did you go your separate ways at that time?

30. A. We didn't go our separate ways. I was down

there to see if I could find my Indian friends down there and I told him I was ogoing to try to scrape up some money for later on and . .

Q. And what did you want the money for?

A. Probably head out to the bootleggers or something when we get home on the Reserve.

Q. And how did you intend to get the money?

A. Like I usually do. I bum it down there. Like I bum it off people.

Q. You're saying you usually bum the money off somebody in the park.

A. Yes.

Q. All right. So where did you and Sandy proceed after you met him in the bandshell area?

A. We walked to the footbridge in the park up there.

Q. That's a bridge which spans a creek there?

A. Yes.

Q. Yes?

A. And at that time we were - I don't know what we were talking about at that time and two people, one of the people there was on Crescent Street, asked me to give him a cigarette at that time.

Q. Now you said two people.

A. Yes.

Q. Where were these two people that you're referring to?

A. They were on Crescent Street.

Q. And you and Sandy were down at the footbridge.

A. Yes.

Q. So what'd be the approximate distance between these two people and you and Sandy Seale?

A. About . .

0. MR. MARSHALL, JR. Direct Examination

Q. Well, take lengths of this court room. One, two, three, four lengths of this court room or what?

A. Three or four. Four maybe.

Q. About four lengths of the court room. Yes?

5. A. And one of them asked me if I had a cigarette on me and I had one so we were going to go, we were going up to where these two people were and I met this other couple that were on Crescent Street.

Q. Now this was before you got to the two who had asked you for the cigarette?

10. A. Yes.

Q. Now who were these other two people you met?

A. Terry Gushue and Patricia Harris.

THE COURT: Is that Terry?

A. Yes.

MR. EDWARDS: Terry Gushue.

15. A. And they asked me for a cigarette at the same time. I went to see Terry Gushue and Patricia Harris and Sandy Seale walked up to the . .

Q. To the two that called you in the first place.

A. Yes.

20. Q. Okay. Now you are in location with Gushue and Harris.

A. Yes.

Q. Then there's the two guys, the two people who asked you for the cigarette. Where is Sandy at the time you're with Gushue and Harris?

25. A. He's with the two men that asked me for the cigarette already.

Q. So we've got two groups of three.

A. Yes.

Q. Now how far are those two groups of three

30. apart?

0. MR. MARSHALL, JR. Direct Examination

A. Two lengths of this court house.

Q. The court house or the court room?

A. The court room, I mean.

Q. Now where you were with Gushue and Harris were the other three visibile to you?

5. A. Yes.

Q. Describe the lighting there that night?

A. I don't remember the lighting. I can't recall that.

Q. Could you or did dyou observe what Seale and the other two were doing?

10. A. No. They were just standing there.

Q. And what about you and Gushue and Harris? What were the three of you doing?

A. After I gave them a cigarette I asked them where they came from and they told me they came from the dance.

15. Q. Again you can't tell what anybody told you. So you were having a discussion.

A. Yes.

Q. So how long were you with Gushue and Harris?

A. A few minutes.

20. Q. Pardon me?

A. A couple of minutes.

Q. A couple of minutes. Yes. So then did they leave you or did you leave them?

A. We both left each other. They were going home. They were on their way home.

25. Q. Yes. Now Terry Gushue, what kind of condition was he in that night?

A. He was drunk.

Q. He was drunk. What about Patricia Harris?

A. She was in pretty good shape. I don't think

30. she was drinking, or if she was she didn't drink too much.

MR. MARSHALL, JR. Direct Examination

Q. Had you known Gushue and Harris prior to that evening?

A. Yes.

Q. Okay. So after you and Gushue and Harris left each other, as you say, where did you go from there?

A. I went to join up with the other party that called Sandy Seale and I up.

Q. Sandy Seale and the other two.

A. Yes.

Q. Now up to this time, when you left Gushue and Harris, did you know who the two people were with Sandy Seale?

A. No.

Q. No.

A. I met them when I walked in through the park area. They were talking to a man and woman in the park at that time. That's where I first seen them.

Q. This is before you even met Sandy Seale.

A. Yes.

Q. Do you know who they were talking to at that time?

A. One of them was - when I was in the Air Cadets he was one of the officers that took care of the groups and I was in his group so I knew him.

Q. Do you know his name, first or last?

A. I don't know his name.

Q. Okay. Do you know who the other person was these two were talking to?

A. No. It was a woman that was with the person I knew.

Q. Okay. So when you first went in the park you saw these two people who later asked you for a cigarette.

0. MR. MARSHALL, JR., Direct Examination

A. Yes.

Q. Talking with two other people.

A. Yes.

Q. One of whom you had known from Air Cadets.

A. Yes.

5. Q. Did you recognize either of those two people at that time?

A. No.

Q. Were they two men or two women or one of each?

A. The people we were with?

10. Q. No, no. The people who later called you up for a cigarette.

A. I knew they were men.

Q. Yes. Had you known them prior to that evening?

A. No.

15. Q. Did you get a look at them, or how good a look did you get at them when you first went into the park?

A. A pretty good look. I walked past them, they were only a short distance from me when I walked through the path area.

20. Q. Was there any discussion between you and them at that time?

A. No. They were talking to the people that they were with.

Q. How - well, could you just generally describe these two men? Take height first. How would you describe

25. their height?

A. Well, after seeing them on Crescent Street I can describe it that way, I didn't really . .

Q. You didn't take note of it at that time.

A. No.

30. Q. All right. So let's jump back then to where

0. MR. MARSHALL, JR., Direct Examination

you have left Gushue and Harris and you're going up to join Seale and these two men who asked you for a cigarette.

A. Yes.

Q. Take it from there. What happened to

5. them?

A. When I joined up with them I started talking to the older person that was there and I asked him how are you doing and whatever, and . . .

Q. All right. Now before we get into that conversation, describe this older person. I take it

10. you're saying that one of the men was older than the other.

A. Yes.

Q. Describe the older person. How tall was he, what colour hair did he have, if you saw that, how was he dressed?

15. A. At that time he was about 50 years old or whatever and he had white hair, glasses on and he had some kind of a navy coat on, some kind of a cape he had on at that time.

Q. A navy coat or a cape.

20. A. Yes.

Q. Yes?

A. And . .

Q. Did you know him when you saw him?

A. No.

25. Q. Do you know who he is now?

A. I think so, yes.

Q. Is he in this court room?

A. Yes.

Q. Would you point him out?

A. He's right there.

30. Q. What's he wearing?

0. MR. MARSHALL, JR., Direct Examination

A. Wearing a brown coat with a blue shirt.

Q. The record shows he's pointing to Mr. Ebsary. All right. So you and Mr. Ebsary had some conversation when you joined up with the three.

5. A. Yes.

Q. Now can you tell us what that conversation was?

A. I asked him about his coat he had on, I told him you look like a priest with that coat on, he told me he was a preacher or something, I don't know, and he said
10. that he was a sea captain and he was a priest or some sort of a priest, I don't know what kind of a priest he was, and we were talking and . .

Q. What were you talking about? What type of things were you talking about?

A. I asked him where he was from and he told me
15. he was from Manitoba, right, and he asked me if there was any women around the park area and at that point I hung around the park for about three years at that time and I told him there was all kinds of women in the park and whatever, and he . .

Q. Take your time, try to remember everything that
20. was said as best you can.

A. The only things I remember is he told me he was a priest and a sea captain, and he offered me, he offered us, Sandy Seale and I, he offered us to go to his home while we were talking and he told us he had a quart
25. of rum up there at that time and . .

Q. And what did you or Sandy say to that invitation?

A. I said no to him because I didn't know the person and in '71 the Indian friends I had, we had to
30. stick together for gang reasons or whatever it was.

MR. MARSHALL, Jr.,. Direct Examination

Q. Are you explaining now why you didn't go to this man's home?

A. I wasn't interested in going to his home.

Q. So when you refused the invitation to go to his home, was there any conversation after that?

A. He told me he just lived around the corner where we were at on Crescent Street and he proceeded to go home, right?

Q. He proceeded to go home.

A. Yeah.

Q. Now what way did he walk?

A. What way?

Q. Yes. How did he proceed to go home?

A. He walked - he was on Crescent Street and he walked towards Bentinck Street. I think it's Bentinck Street.

Q. Bentinck Street is another street that borders Wentworth Park.

A. Yeah.

Q. Now before we leave that part of the sequence of events, what about the other man who was with Mr. Ebsary at that time? Did you know him before?

A. No.

Q. Was he taller or shorter than Ebsary?

A. He was taller.

Q. Yes. And could you - do you remember how he was dressed?

A. He had a brown corduroy coat on, that's all I remember of him.

Q. Now what could you say about his condition at the time?

A. He appeared to be feeling pretty good. Apparently he was drinking, I guess.

0. MR. MARSHALL, JR., Direct Examination

Q. What made you think that?

A. Just by his condition, I guess. I could tell he was drinking.

Q. When you and Ebsary were having the conversation, did this other man have any conversation with you?

5. A. No.

Q. You already told me you didn't know who he was at the time.

A. I didn't know him.

10. Q. Have you seen him since?

A. Yes, I seen him.

Q. Yes. And do you know his name?

A. Yes.

Q. What is it?

A. Jimmy MacNeil.

15. Q. Jimmy MacNeil. All right. So let's go back then to where Mr. Ebsary you say started to walk away from you and Sandy Seale. You said he started to go home.

A. Yes.

Q. Where did MacNeil go when Ebsary left?

20. A. He went with him.

Q. He went with Ebsary.

A. Yes.

Q. So that left you and Sandy Seale standing on Crescent Street.

25. A. Yes.

Q. Now Ebsary and MacNeil walk away form you. Were you watching them as they walked away?

A. Yes.

Q. Describe how MacNeil walked?

30. A. I don't think I can describe how he walked. I don't remember.

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MR. MARSHALL, Jr., Direct Examination

Q. So what about Ebsary's walk, anything . .

A. No.

Q. So the two ofthem walked away from you. How far did they get?

A. About two lengths of this court room.

Q. About two lengths of the court room. Okay. Now what happened then?

A. One of us called him back.

Q. Do you remember which of you, you or Sandy called him back?

A. I don't remember who.

Q. Do you remember what was said when you called them back?

A. No.

Q. So when either you or Sandy called Ebsary and MacNeil back, how did they respond? What did they do?

A. They came back. They walked back towards us.

Q. They walked back towards you.

A. Yes.

Q. Now you already said that you and Sandy were standing on Crescent Street. Now what positions were you in, side by side, were you in front of him or in back of him, or just what position were the two of you in when Ebsary and MacNeil started coming back towards you?

A. We were standing side by side but I was in front of Sandy Seale, beside him but in front of him.

Q. Beside him but in front of him.

A. Yes.

Q. So how far were you from Sandy?

A. Five feet anyway.

Q. Well, can you show us be spreading your arms the distance that you and Sandy were apart?

0. MR. MARSHALL, JR., Direct Examination

A. I'd say about five feet.

Q. Now you and Sandy were about five feet apart and Ebsary and MacNeil are coming back towards you.

5. A. Yes.

Q. Are they coming together or is one in front of the other or just . .

A. They're coming together.

Q. They're coming together.

A. Yes.

10. Q. I forgot to ask you. Is Sandy Seale standing to the right of you or to the left of you?

A. He's standing on the right of me.

Q. He's standing on your right. So Ebsary and MacNeil are coming back towards you and you say they're coming together.

A. Yes.

15. Q. Now were either you or Sandy Seale carrying any weapons that night?

A. No.

Q. When Ebsary and MacNeil were coming back towards you, could you see their hands?

20. A. No.

Q. Was there any conversation among the four of you as they came back towards you on Crescent Street?

A. The only conversation that went on, Mr. Ebsary told Sandy Seale if he wanted everything he had.

25. THE COURT: Sorry, Mr. Ebsary told Sandy Seale . .

A. If he wanted everything he had.

MR. EDWARDS: If he wanted everything he had.

A. Yeah.

Q. Now How far from Seale was Ebsary when he asked him do you want everything I have?

30.

MR. MARSHALL, JR., Direct Examination

A. He was standing almost together with him.

Q. Almost together with him. All right. Now you would've been standing slightly in front of Sandy Seale.

A. Yes.

Q. Were there any words spoken between you and Ebsary as he - he must've passed you to get to Seale?

A. No, there was no words between him and I.

Q. Now when Ebsary spoke those words where were Sandy Seale's hands?

A. In his coat pocket.

Q. And was Sandy Seale saying anything?

A. When Mr. Ebsary asked him if he wanted everything he had, I guess he didn't - he didn't say nothing.

Q. Sandy Seale didn't say anything.

A. No.

Q. Okay. So what happened then?

A. He put his hand on his shoulder.

Q. Who put whose hand on . .

A. Mr. Ebsary put his hand on Seale's shoulder, right.

Q. Yes.

A. And at the first time when that happened I thought he punched him in the stomach but apparently he stabbed him in the stomach.

Q. So he puts one hand, you say Ebsary puts one hand on Seale's shoulder.

A. Yes.

Q. What does he do with the other hand?

A. He had it in his pocket.

Q. He had the other hand in his pocket.

A. Yes.

MR. MARSHALL JR., Direct Examination

Q. Yes?

A. And he stabbed him at that point and at the same time this happened pretty fast so when he asked him if he wanted everything he had at the same time he had him on the shoulder and at that time he stabbed him.

Q. I'm sorry, I missed what you said. At the same time he put his hand on his shoulder he what?

A. He stabbed him at the same time.

Q. Now show the jury the way Ebsary's hand that had been in his pocket moved. Show us the motion he made or he must've made towards Seale. Do you want to stand up?

A. They were pretty close together. He had him on the shoulder. He said do you want everything I have and before he could say anything he put the knife in him.

Q. All right. Now you took your hand out of your pocket and you made an upward motion with your hand and that's what you're saying the motion was that Ebsary made.

A. Yes.

Q. Okay. When Ebsary did that to Seale how did Seale react?

A. He bent over.

Q. Did he stay there or did he go away?

A. He fell down at that point.

Q. Seale did.

A. Yes.

Q. All right. Now that's what two of the people are doing. You were standing slightly in front and to the side of Sandy Seale. Now when this happened, when Seale apparently got stabbed, what were you doing at that

precise moment?

A. I was looking at Mr. Ebsary doing what he was doing and MacNeil was coming, MacNeil was with me.

Q. MacNeil was with you at that point.

A. Um-hmm. Well, he came towards me, right.

Q. Okay.

A. I grabbed him and I threw him and it was at that point Mr. Ebsary was coming after me at that point.

Q. Well, let's just - I know it all happened fast but if we could break it down step by step. You say that when MacNeil made contact with you, you threw him.

A. Yes.

Q. Now describe the motion there. How did you make contact? When he made contact with you where were his hands?

A. I don't remember.

Q. You don't remember that.

A. No.

Q. So how did you grab hold of him, where on his body?

A. I grabbed him right here.

Q. All right, now you're indicating two hands against MacNeil's chest area.

A. Yes.

Q. Yes?

A. And . .

Q. And then?

A. I threw him towards the sidewalk and . .

Q. You threw him towards the sidewalk.

A. Yes.

Q. Was there any conversation between you and

MacNeil at that time?

A. No.

Q. Up to that point in time had you heard Sandy Seale say anything to either MacNeil or Ebsary?

A. No.

Q. Although he may have been the one who called him back. You don't know if it was you.

A. I don't know if it was him or I.

Q. So now you throw MacNeil away from you, Seale is stabbed and down and you said that when you threw MacNeil Ebsary was coming for you. What did you mean by that? Describe what Ebsary was doing at that point?

A. At that point he - after him stabbing Seale he come towards me and in different words, he said I got something for you too, you Indian.

Q. I'm sorry, I got something for you too what?

A. He called me an Indian, right? And he made - he come towards me and he had something in his hand and he walked towards me, I was about five feet from him at that point and he walked towards me and he had something like that and he went to stab me here and I blocked the knife and he got me here.

Q. So he called you an Indian, and Sandy Seale, he was black.

A. Yes.

Q. What if anything was said about Sandy's race?

A. I don't remember. The only thing I remember Mr. Ebsary saying, do you want everything I have? That's all I remember him saying to him.

Q. Now Mr. Campbell, could I have the . .? Just stand down a minute, Mr. Marshall. Now I am Ebsary and you say-I want you to put my hand in the position his was in when he came at you.

MR. MARSHALL, JR., Direct Examination

Down low. Now do you remember if it was in his right hand or his left hand?

A. It was in his right hand.

Q. His right hand. Okay. So then you say that he lunged towards your stomach.

A. Yes.

Q. All right. So just grab hold of the blade here and pull my hand the way the knife came.

A. He came towards there and . .

Q. All right. Now so the ruler is going towards your abdominal area. Now how did you move when the knife was coming towards your abdominal area?

A. I pushed his arm . .

Q. All right, now you are hitting my right hand with your left hand. All right. So you pushed the knife aside.

A. Yes.

Q. Now show us - previous evidence indicates that you had a cut arm that night. Which arm was cut?

A. My left arm.

Q. Do you have a scar from that?

A. Yes.

Q. Will you show wit to the jury?

Okay. The record shows there's a scar on the inside of Mr. Marshall's left forearm about three inches in length. Would you show that to His Lordship? Okay. All right. So I'm Ebsary coming at you. I want you to show what you did.

A. (Answer inaudible)

Q. Now how did you get the cut in your left arm? I'm coming at you like this, okay. Show us how the knife makes contact with your left arm.

A. I grabbed him by the arm there and . .

0. MR. MARSHALL, JR., Direct Examination

Q. Up like that. Yes. Now . .

THE COURT: I wonder are you going to be moving to any other area or are you going to continue on in this area?

5. MR. EDWARDS: Perhaps this would be a good place to stop.

THE COURT: All right. We'll recess now until 2 o'clock.

COURT RECESSED (12:40 p.m.)

COURT RESUMED (2:14 p.m.)

10. MR. MARSHALL, JR., Direct Examination (Cont'd)

MR. EDWARDS: Mr. Marshall, just before we adjourned for lunch you were demonstrating the movements you made when Ebsary lunged at you and I of course at that time was playing the part of Ebsary. Now I'd like you to take the ruler and you take the part of Ebsary and show us how his arm moved. You don't need me.

15. When he went for you, I'll stand here facing you. When he went for you how did his arm move?

A. Like this.

Q. So yours is showing an upward sweeping motion. Thank you.

20. Now when he did that to you and you showed us your arm, you had your arm cut, what about the jacket? What happened to the jacket?

A. It was cut. There was two cuts on it when I passed it to the Sydney Police. One cut was about that

25. long.

Q. Now you are indicating in the area where you showed us the scar on your arm and you're showing us a cut of approximately five or six inches, are you?

A. Yes.

Q. Yes?

30. A. When I got to the REservation I had this coat

on that had elastic sleeve on it and after I come from the hospital I asked a f riend of mine to cut the elastic band off which he did with a butter knife or a little knife. That was on the Reserve in Membertou.

Q. Now you showed us where that tear was that was in the jacket. You say there was another one?

A. Yes.

Q. Where was that? Point that out to the jury.

A. From the - from where the cut I got from the stab wound, from here to the end of the jacket was cut by a friend of mine on the Reserve.

Q. That's afterwards. But immediately after Mr. Ebsary made the lunge at you, there was that one cut you showed us in your forearm. Was there another one?

A. I don't remember.

Q. So after Mr. Ebsary did that what happened then? After you got your arm cut.

A. I ran down the direction he was going down before, down Bentinck Street and I ran up towards the bridge on Bentinck and I met Maynard Chant there and I asked him to help me out, to go back and he asked me what happened and I told him.

Q. You can't tell us what Maynard asked you. You met Maynard Chant at that point.

A. Yes.

Q. Now you and Maynard Chant had some discussion. Where did you go from there?

A. I ran down towards Byng Avenue down towards George - well, I met some people of Byng Avenue and a girl gave me a handkerchief to wipe the blood off my arm and there was a car coming and I stopped him and there were about four people in the car, which I knew

0. MR. MARSHALL, JR., Direct Examination

the driver of the car and I aasked them to come down and help me out, there was a guy stabbed in the park and we drove down and we went back to Crescent Street.

Q. Onto Crescent Street. So when you arrived on Crescent Street who got out of the car?

5. A. I did. We all did. And . .

Q. Was Maynard Chant with you at that time?

A. Yes.

Q. And where was Sandy Seale?

A. He was on the pavement.

Q. And do you recall whether he was conscious

10. or not at that time?

A. I don't recall because I ran to a house to call the ambulance.

Q. And how long were you gone to call the ambulance?

A. A couple of minutes.

15. Q. Do you remember whose house it was?

A. A guy named Mr. Doucette, I think.

Q. So after you asked Mr. Doucette to summon an ambulance where did yougo from there?

A. I went back to where Mr. Seale was laying

20. and the people that were there, and somebody pointed out, I don't know who it was but somebody pointed to me and they told the Sydney Police that I was . .

Q. Well, you can't tell what anyone said.

A. Okay.

25. Q. When you got back after calling the ambulance, sometime after that the ambulance arrived.

A. Yeah.

Q. Were you there when the ambulance arrived?

A. No, the Sydney Police took me to the City Hospital.

30. Q. The Sydney Police took you to the City Hospital.

0. MR. MARSHALL, JR., Direct Examination

Okay. Do you remember what policemen?

A. I don't remember.

Q. Sorry?

A. I don't remember.

5. Q. So you were at the hospital for how long?

A. About a half hour.

Q. A half an hour. And where did you go from there?

A. I went home.

Q. When were you arrested and charged?

10. A. It was a week later.

Q. A week later. And during that week you were out on your own.

A. No, not really. I was told to go to the police station everyday to report and I was under police protection.

15. Q. Now what happened to the jacket that you were wearing that night?

A. The Sydney Police called my father up and wanted the jacket and my father returned it to Roy Gould which I borrowed it off.

Q. How did it get to your father?

20. A. I gave it to him.

Q. You gave it to your father. How long would that have been after the night of the stabbing?

A. It was the next day.

Q. Thank you, Mr. Marshall.

25. THE COURT: Cross-examine?

CROSS-EXAMINATION

MR. WINTERMANS: Mr. Marshall, you were 17 years old at the time, is that correct, that this happened on May 28th, 1971 and you at that time had been out of

30. school for about three years, is that right?

MR. MARSHALL, JR., Cross-examination

A. Yeah, about that.

Q. You left school when you were 14, in grade 5?

A. Around that, yes.

Q. You were a heavy drinker back then, for your age?

A. I can't say I was. I worked with my father through the week and I went out drinking with my friends on the weekend.

Q. Of course you were only 17 and you weren't allowed to drink in those days at that age, is that correct?

A. Yes.

Q. So you're saying now that you weren't a heavy drinker then?

A. I wouldn't say.

Q. You're not saying that you were or you're not saying that you weren't.

A. I'm not saying either. I didn't keep track.

Q. You indicated that you were coming back from Halifax, is that right?

A. Shubenacadie, yes.

Q. Shubenacadie?

A. Yes.

Q. And that you arrived back in Sydney earlier that evening, around 9:30 you said?

A. Yes.

Q. Had you gone up to Halifax area or Shubenacadie or wherever in the company of other people?

A. Yes.

Q. And you'd been up there for a few days, is that correct?

A. It was two days. Or three days. Two days.

Q. Three days?

A. Two days.

0. MR. MARSHALL, Cross-Examination

Q. And I understand that there was some drinking going on up there at that time. Is that right?

A. Not too much.

Q. Not too much?

A. No.

5. Q. And that - were you yourself drinking up there?

A. I had a couple.

Q. Now I asked you if you were a heavy drinker at that time and you said, you didn't say you were and you didn't say you weren't. I refer you to your testimony; do you recall having given evidence in September 12th,

10. 1983 and on page . .

THE COURT: Where and what was that? It's pretty hard to remember.

MR. WINTERMANS: That was in the Supreme Court, the first of these three trials in relation to Mr. Ebsary. Do you recall having testified here in this same

15. building?

A. I recall you asking me if I was a heavy drinker and that the R.C.M.P. report that you kept repeating, asking me if I was a heavy drinker. I can't answer that.

20. Q. I'd like to read a question and answer to you from the September 12th, 1983 testimony which I'll refer to as the first trial in relation to Mr. Ebsary, on page 41 at the bottom of the page:

> "Q. I understand that you described yourself at one time as being a
>
> 25. heavy drinker at that time.
>
> A. Yeah, I was."

Are you now saying something different than that?

A. Well, you kept repeating that question, maybe I just answered you the way you wanted me to answer you, that's all I did.

30. Q. Is that the way you're giving your testimony,

that you're answering the way people want you to answer?

A. It appears that way.

Q. You were a bad young guy that time, were you?

A. I explained earlier, when I was growing up there was gangs in Sydney and we had to keep together.

Q. You were involved in that.

A. Yes, I was.

Q. And the group, the gang that you were involved in, you described yourselves as bad young guys at that time?

A. You had to be bad to live in Sydney anyway.

Q. A bad crowd?

A. There was a lot of bad crowds in Sydney.

Q. My Lord, I apologize for any delays that are caused by the procedure that I am required by law to follow, that I have to refer the witness to the time and the exact - I have to find the pages and then refer him to the question and the answer and then have him comment on it.

THE COURT: No problem with me, counsel.

MR. WINTERMANS: Now you recall having given evidence in 1982 before the Supreme Court Appeal Division in Halifax in December of 1982?

A. Yes.

Q. You recall that you were there.

A. Yeah, I recall that I was there.

Q. You recall that you gave evidence?

A. Yes.

Q. You were under oath at the time?

A. Yes.

Q. I refer you to page 26, some questions or the question near the very top of the page.

> "Q. Could you describe what your drinking habits were generally around that time?
> A. I was a heavy drinker."

Do you recall having said that?

A. I answered your question a little while ago.

MR. MARSHALL, Cross-Examination

You're bringing that back to me.

Q. When you drank back then did you get drunk fairly easily on not too much liquor?

A. I don't remember.

Q. You don't remember? I'll just continue with that same series of questions and answers so that it makes sense. Page 26, 1982 Appeal Division:

> "Q. Could you describe what your drinking habits were generally around that time?
> A. I was a heavy drinker.
> Q. You were a heavy drinker?
> A. Not too heavy, but heavy.
> Q. So it wouldn't have been unusual if on that day you did have a lot to drink?
> A. No, I think I can hold my liquor whether I want it or not.
> Q. No. That's not the question. The question is, would it have been unusual for you to have a lot to drink that day?
> A. Unusual?
> Q. Yes.
> A. I get drunk pretty fast. I wouldn't have too much anyway."

Do you recall having said that?

A. Yeah.

Q. So do you, back at that time did you in fact get drunk quite fast on not very much liquor?

A. You're confusing me a little bit.

Q. I'm trying not to.

A. If I was a heavy drinker, what you're saying now doesn't fit in. If I drank pretty fast, if I drank a little bit, I got drunk fast.

THE COURT: Maybe you don't understand what counsel is doing. Counsel has asked you certain questions here which you've answered today. Now counsel has a right to make inquiries of you if he has any other previous

0. MR. MARSHALL, JR., Cross-Examination

statements given by you under oath which he feels might be different from what you said today. Everybody appreciates that these events initially happened in 1971 and this is now 1985 so that's almost 14 years ago and one's memory has a habit of not being so good at
5. different times, but what he's doing is he's referring you, after you have said something, he's then saying do you recall giving testimony at a particular hearing and on the occasion that he's asked you your answer apparently was yes, you recall giving testimony at those hearings. Then he's giving you the testimony, reading
10. you the testimony that you gave at those hearings under oath and he's saying to you, do you remember saying that? And then he's asking you what do you say now or is that different from what you say now? This is the process he's going through. Do you understand that?

A. Yeah.

15. Q. All right. So go ahead, counsel.

MR. WINTERMANS: Thank you, My Lord. Now isn't it true that it was quite dark in the spot where this incident occurred? I'm referring to Sandy Seale being stabbed. It was quite dark in that spot where it
20. happened.

A. It was dark, but it wasn't really dark.

Q. And you were unable to describe the alleged knife that you're suggesting that Mr. Ebsary had because you were unable to see it at that time, is that not
25. right?

A. It happened too fast. I couldn't see the knife coming. I couldn't explain if it was a knife or not.

Q. Pardon?

A. I couldn't explain whether it was a knife or
30. not. But apparently it was a knife.

0. MR. MARSHALL, JR., Cross-Examination

Q. And you're basing that conclusion, are you not, on the fact that you had a cut on your arm?

A. Yes.

Q. And when you were running awaya it occurred
5. to you that it must've been a knife.

A. Yes.

Q. Correct?

A. Yeah.

Q. Now isn't it true that you can't recall precisely what was said between Mr. Seale and
10. Mr. Ebsary, yourself and Mr. MacNeil during the period immediatley preceding the fatal injuries that Mr. Seale received?

A. Just before? I recall him saying yes, Mr. Seale - if he wanted everything what he had.

Q. But the question is, isn't it true that you
15. can't recall what other conversation took place at that time?

A. Yeah, I recall. Between myself and Mr. Ebsary?

Q. Yeah. Between Mr. Seale and Mr. Ebsary?

A. I don't think they were even talking.
20.

Q. You don't think they were even talking. Isn't it true that in spite of what you told the jury here today, that really you can't remember what happened, what was said or what happened, that all you know is that you got cut and you hurt your arm and ran
25. away, isn't that true?

A. No.

Q. No?

A. No.

Q. I refer you to the transcript of - perhaps
30. I should ask you first, do you recall having testified

0. MR. MARSHALL, JR., Cross-Examination

at the preliminary hearing on August the 4th, 1983 downstairs in this building in relation to the preliminary hearing against Mr. Ebsary?

A. I don't . .

5. Q. Do you recall having testified downstairs in this building in another court room at the preliminary hearing in August of 1983?

A. The little court house or the big one over there?

Q. In this building, downstairs. The

10. preliminary hearing. The first time that you gave testimnony in relation to Mr. Ebsary. Before Judge O'Connell.

A. I don't recall which court house, I've been walking in and out for three years now, I don't know which one I'd be walking in.

15. THE COURT: I'm not worrying about the court house. That wasn't the question that was intended. Do you remember giving testimony before Judge O'Connell at the preliminary inquiry is all that he's really asking you, which occurred in August of 1983, last August?

20. A. I don't recall.

MR. WINTERMANS: You don't recall. Surely you recall the first time that you testified in relation to a charge against Mr. Ebsary.

A. Maybe I was there. I don't recall.

25. MR. EDWARDS: My Lord, this is the 5th time in three years that he's testified. Surely it would be in order for my learned friend to allow him to look at the preliminary transcript to refresh his memory.

MR. WINTERMANS: I have no objection to that

30. either. I have a dissected version of the preliminary

transcript but there is one as an exhibit before Your Lordship. perhaps if I could just show him . .

THE COURT: There isn't an exhibit before me.

MR. WINTERMANS: The preliminary hearing.

THE COURT: I don't have any preliminary hearing. There may be one somewhere in the court file.

MR. WINTERMANS: It was filed in relation to earlier matters.

THE COURT: Perhaps you'd tell him what it is before you get to the page.

MR. WINTERMANS: This is a preliminary hearing transcript signed by Charles O'Connell, Provincial Judge in and for the Magisterial District, Province of Nova Scotia.

THE COURT: What date is it?

MR. WINTERMANS: It's August the 4th, 1983 and it's certified by the court reporter August the 16th, 1983.

THE COURT: Is there a list of witnesses in the beginning of it?

MR. WINTERMANS: List of witnesses, Donald Marshall's name is first on the list of witnesses.

THE COURT: Let him look at the book and show him the pages that are his testimony. All of it, from the beginning where he starts. Let him look at it, if it helps to refresh his memory.

MR. WINTERMANS: I'll ask you at this point whether you recall.

A. Okay.

Q. You do recall. Page 11, line 7, I want to read you a series of questions and answers and just ask you to comment on it, Page 11, line 7.

MR. MARSHALL, Cross-Examination

"Q. Would you take it step by step and describe exactly what happened as they came towards you and Sandy Seale?

A. It is difficult for me to really tell you what happened, I think, there were too many stories already and I think I jeopardized my whole story.

Q. Well, then, would you tell it from your memory as best you can recall?

A. They came back and I don't know what happened between them. My memory just went after that. I got stabbed and I don't remember too much.

Q. Well, do you remember what if anything happened to Sandy Seale?

A. The older fellow with the light hair was with Sandy. They had a conversation and I never understood what they were talking about. All I can remember is the old fellow told Sandy "I got something for you right here and he knifed him."

Do you recall having giving that evidence?

A. I recall him saying that I got something for you.

Q. I suggest to you that you did give that evidence under oath at that time.

A. Yes.

Q. And I suggest to you that it differs from what you told this jury today earlier in your evidence. Do you agree with that?

A. Yeah, I agree with it.

Q. Now you recall having given evidence back on the trial of November 4, 1983, the last time in this same court room.

A. Yes, I recall that.

Q. I refer to page 60 and 61. Now page 60, line 37, line 36:

Q. Now you recall giving evidence at the

MR. MARSHALL, JR., Cross-Examination

preliminary inquiry into this matter on August the 4th, 1983 at the Magistrate's Court?

A. Yes.

Page 11, start about line 3:

Q. Could you take it step by step and describe exactly what happened as they came towards you and Sandy Seale?

A. It is difficult for me to really tell you what happened. I think there were too many stories already. I think I jeopardized my whole story.

Q. Well then, would you tell it from your memory as best you can?

A. They came back, I don't know what happened between them. My memory just went after that. I got stabbed and I don't remember too much.

Q. Well, do you remember what if anything happened to Sandy Seale?

A. The old fellow with the light hair was with Sandy. They had a conversation and I never understood what they were talking about. All I can remember is the old fellow told Sandy "I got something for you right here" and he knifed him.

Q. Now do you remember those questions and answers?

A. Yes.

Q. Are they true?

A. Yes, they are true."

Do you recall having said that under oath last time at trial?

A. Yes.

Q. Are you saying now that it's not true or are you saying it's true?

A. I'll explain something to you, okay?

Q. Just answer my question, yes or no.

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MR. MARSHALL, JR., Cross-Examination

MR. EDWARDS: Let him answer.

THE COURT: Let him answer.

A. I stuck to my story for 8, 9 years and nobody believed me when I told them what happened and I had to twist it around to let people believe what they wanted to hear.

MR. EDWARDS: My Lord, I'm going to rise at this point because I believe my learned friend may have succeeded only in confusing the issue because the two passages he put to him and suggested were different than what he said in direct. I can't see where they are. He says I can't remember too much, the other fellow with the light hair was with Sandy, they had a conversation, I never understood what they were talking about. All I can remember is the old fellow told Sandy I got something for you right here and he knifed him. Well, how is that in any material sense different than what the witness testified on direct?

MR. WINTERMANS: I'd like to be able to answer that, My Lord. I have the witness today testify that he-that his memory is clear on what happened on the events leading up to it. On previous occasions or on one previous occasion at least he testified that he couldn't remember what happened, all he could remember was one line but suggesting that there may have been conversations prior to that between Sandy and Ebsary saying that they had a conversation but that he can't remember what it was except for the one line. Now today he's coming into court and he's saying that all there was, was the one line.

THE COURT: All right. You go ahead. Continue on.

MR. WINTERMANS: And the reason I went through it again, I suggest, My Lord, is that . .

0. MR. MARSHALL, JR., Cross-Examination

THE COURT: I'm not worrying about why you went through it again, I'm saying you may continue. I don't agree with Mr. Edwards' position.

MR. WINTERMANS: So with respect to the last statement of questions and answers I put to you from your trial in November 4, 1983 you indicated that it was true what you said at the preliminary hearing, that there was this conversation that you can't remember exactly what it was and that your recollection is vague on what happened at the time of the stabbing. You indicated in November I suggest to you that that was true. Now I'd like you to comment on it. Was it or wasn't it true?

A. My memory is pretty clear about it.

Q. Your memory is clear about it.

A. Yeah.

Q. You indicated in your answer to me just a minute ago that you had a story for 8 or 9 years and that you changed it to what you thought people wanted to hear.

A. Yes.

Q. Is that what you're saying?

A. Yes.

Q. Are you saying that you testified under oath falsely because you thought people wanted to hear that?

A. I don't understand you.

Q. I'm asking you, did you commit perjury,knowingly commit perjury because . .

THE COURT: I don't know whether that's a question. You don't commit perjury until you're convicted of committing perjury.

MR. WINTERMANS: Did you tell untruths under oath in previous judicial proceedings?

A. I don't think so.

0. MR. MARSHALL, JR., Cross-Examination

Q. You didn't.

A. No.

Q. Now the older person you referred to today is Mr. Ebsary. You said in your identification of him that you now know him to be Mr. Ebsary.

5. A. Yes.

Q. But at the time you didn't know who he was.

A. No. That's the first time I met him.

Q. Is that right?

A. Right.

Q. And so he was a stranger to you at that time.

10. A. Yes.

Q. And you identified him here today.

A. Yes.

Q. I refer you back to the August 4th, 1983 preliminary hearing testimony which you had an opportunity to examine on the witness stand and indicated you recalled

15. having given - on the bottom of page 9 and crossing into page 10:

> "Q. The older fellow, is he in court today?
> A. There is only one old man, older man.
> Q. There is only one older man here. What do you say about him?
> A. What do I say about him? Do you mean identify him?
> Q. Yes.
> A. I don't know if I can identify him today."

Do you recall having said that?

25. A. Yes.

Q. You couldn't identify him now, I suggest to you, or if you couldn't identify him then I suggest to you that your identification of him now is just simply you're saying that's . .

30. THE COURT: Well, give him an opportunity to

0. MR. MARSHALL, JR., Cross-Examination

explain it.

MR. WINTERMANS: Go ahead. Explain. Explain how you can identify him at one time or you can't identify . .

5. MR. EDWARDS: Well, will you be quiet long enough while he does?

A. Ask that question again.

MR. WINTERMANS: Explain how you were unable to identify Mr. Ebsary at the preliminary hearing in 1983 and today you are able to identify him.

10. A. Yes.

Q. How is that possible?

A. I don't know.

THE COURT: Do you understand what he's asking you? He's saying to you that you gave a statement on August 4th that you were not able to identify Mr. Ebsary. Today you can.

15. A. I met Mr. Ebsary 12 years after he committed a crime.

MR. WINTERMANS: I ask you the question. How are you able to identify him today if you indicated that you couldn't identify him a year and a half ago

20. at the preliminary hearing?

A. If they had shown him to me in 1972 when they had him I would have identified him.

Q. That's not what I asked you.

A. That's what I'm telling you.

25. Q. They showed him to you in 1983 and you couldn't identify him, is what I'm saying, and now you come into court and say that's Roy Newman Ebsary. Is that not true?

A. I can identify him.

30. Q. I suggest to you that you're identifying him

0. MR. MARSHALL, JR., Cross-Examination

because you've seen him in court.

A. He wrote me a letter, before the court ever started.

Q. Now the older person who you identify now
5. as Mr. Ebsary who was in the park that night, you described him as having a blue coat or a dark coat hung over his shoulders like a cape, is that right?

A. Well, it was a trench coat or whatever it was, it was a heavy coat.

Q. A heavy coat. Was it hung over his shoulders?

10. A. I don't know. I don't really know.

Q. You don't remember?

A. I said it was a coat. I don't know if it was a cape coat or a trench coat or what it was.

Q. A cape coat, did you say?

A. A trench coat or a cape coat. I don't know
15. what it was.

Q. What do you mean by a cape coat?

A. I just finished saying it had a cape on it.

Q. A cape.

A. Or whatever it was.

Q. In other words . .

20. THE COURT: We're getting nowhere here, I'm sorry. You might as well put the question to him another way. What he asked you was whether he had a coat, you said he did on direct examination and he asked you whether he was wearing a coat or just put over the person's
25. shoulders or whether he had his arms in it. That's all he's asking.

A. I believe he had a coat.

Q. You think he had a coat. Not a cape?

A. He had his hands in his pockets.

30. Q. Did he have his hands through the sleeves of

0. MR. MARSHALL, JR., Cross-Examination

his coat, in the sleeves of his coat, or was the coat draped over his shoulders with his arms on the inside, not through the sleeves?

A. I only seen it once and that was a long time

5. ago.

Q. So you can't . .

A. I can't explain what kind of coat it was.

Q. All right. I'm just asking you and your answer is you're not sure, right?

A. It was a dark coat, a heavy coat.

10. Q. Did you indicate in your evidence today, did I hear you correctly when you said something to the effect that at the time that you say you saw Mr. Ebsary appear to punch Mr. Seale in the stomach that Mr. MacNeil came towards you? Is that what you said here today?

A. I didn't say he came towards me.

15. Q. You didn't say he came towards you? What did you say?

A. I said he was beside me.

Q. He was beside you.

A. Yeah.

20. Q. So you're not saying that Mr. MacNeil came at you, attacked you, are you?

A. No.

Q. Okay. Isn't it true that you grabbed a hold of Mr. MacNeil?

A. I grabbed him and threw him on the side.

25. Q. Put his hand up behind his back?

A. No.

Q. This kind of a motion? Is that true?

A. No.

Q. What did you do then? How did you grab him?

30. a. I grabbed him and I threw him.

MR. MARSHALL, JR., Cross-Examination

Q. You grabbed him and you threw him?

A. Yes.

Q. You didn't grab a hold of each other? You and Mr. MacNeil?

A. As far as MacNeil goes I wasn't worried about MacNeil, I was worried over Mr. Ebsary coming after me.

Q. I see. Now so you're saying that Mr. MacNeil didn't grab you. You grabbed him.

A. All I was worried about was that man over there came after me with a knife.

Q. Just answer the question, yes or no. Did you or didn't you grab a hold of Mr. MacNeil?

A. To get him out of my way.

MR. EDWARDS: He's already said that, My Lord, about three times, that he grabbed a hold of Mr. MacNeil.

MR. WINTERMANS: Did you grab Mr. MacNeil because you thought he was drunk and falling down off the curb?

A. I grabbed Mr. MacNeil to protect myself against Mr. Ebsary.

Q. Were you fighting with Mr. MacNeil and holding him?

A. No.

Q. No? Okay. I refer you again to your testimony in September 12th of 1983 being the first trial in this court in relation to Mr. Ebsary. You've already indicated that you recall having given evidence there. Page 50. I'm sorry, page 43. Page 43, line 25.

> "Q. You say that when just before this incident took place that night in the park, that you had a conversation with these two gentlemen that you refer to and didn't you grab on to Mr. MacNeil, grab a hold of him?
> A. I don't recall.
> Q. You don't recall?
> A. I don't recall."

MR. MARSHALL, Cross-Examination

Do you recall saying that?

A. Yes.

Q. Is it true?

A. I don't remember, but I recall. I do remember what happened.

Q. You do remember what happened.

A. Yes.

Q. Do you agree that the testimony I just referred you to is different from what you said here today? That you do recall?

A. I recall grabbing Mr. MacNeil. I said I grabbed Mr. MacNeil.

Q. You're saying that it was for the purposes of protecting yourself from Mr. Ebsary, is that it?

A. Yes.

Q. Again you indicated you recall having given evidence before the Appeal Court in Halifax in December of 1982, page 16, the middle of the page.

> "Q. Then what happened?
> A. They were walking. When we called them back they did come back and they joined up with us and the younger guy, the taller guy walked on my right hand side. I guess he had a few drinks that night because when they did come back he had his head down, he had his hands in his pocket and to me he looked like he was ready to pass out or he was drunk or something and the curb of that road, street, sidewalk, he slipped off that and I grabbed him and at the same time I heard the older fellow . . ."

etc., etc., so you indicated there, do you recall having

said that, the story about MacNeil falling off the curb and that's why you grabbed him? To keep him from falling down? Do you recall having said that?

A. At that point I seen Mr. Seale getting stabbed, it's pretty hard to explain what I'm trying to get . .

Q. It's pretty hard to remember, maybe.

A. No, no, no, no, no. I was there.

Q. You were there.

A. Yeah.

Q. Okay. Now you've indicated, you've been shown your preliminary transcript evidence from August 4, 1983 downstairs before Judge O'Connell, the one that you examined briefly. I refer you to the bottom of page 11 and the top of page 12:

> "Q. Where were you when the old fellow knifed Sandy Seale and what were you doing?
> A. I was - I don't know if I should say, I was fighting and holding the other guy. No one was on my side, eh. No one was hurt, physically harmed.
> Q. So you were with the younger fellow?
> A. Yes."

Do you recall having said that?

A. Yes.

Q. You were under oath when you said that?

A. Yes.

Q. True?

A. Yes.

Q. It is. I refer you again to your testimony before the Appeal Court in Halifax in 1982, page 48 where you were asked a series of questions and gave a series of

answers:

> "Q. Is it possible that Sandy Seale could have said something to Ebsary at that point and you not heard it?"

That's referring of course to immediately prior to the stabbing.

> " Q. Is it possible that Sandy could have said something to Ebsary at that point and you not heard it?
> A. It's possible, I don't know."

Do you recall having said that?

A. Yes.

Q. Was it possible and you don't know or are you now saying . .

A. He didn't say nothing to him when he came back.

Q. That's what you're saying now.

A. I'm saying it and I said it before.

Q. And your testimony before the Appeal Court in 1982 that I just read to you, you were under oath. And you testified differently. Do you agree?

A. He never said nothing to him.

Q. In other words you're disagreeing.

A. Yes, I'm disagreeing.

Q. I suggest to you, Mr. Marshall, that Mr. Sandy Seale at least after you say that Mr. Ebsary asked him if he wanted what he had, that Sandy Seale nodded his head. Do you agree with that?

A. He didn't nod his head.

Q. He didn't nod his head.

A. No.

Q. I refer you to your testimony last time, November, 1983 the last time you testified in this same

building, page 27:

"Q. This is the position the two parties were in right now my left shoulder is next to your right shoulder or maybe a foot between them, and this is the position they were in when Ebsary asked Seale if he wanted everything he had.
A. Yes.
Q. And what happened then?
A. Seale nodded his head."

Do you recall having said that?

A. Nodded his head in what way?

Q. I'm just asking if you said it, that's all.

A. Yeah, that's what I said.

Q. Did you say that last time?

A. I said he nodded his head. That don't mean yes or no. I don't know what he did. You know.

Q. I think nodding your head means yes?

A. I don't know.

Q. Doesn't shaking your head mean no and nodding your head mean yes?

A. I don't know.

Q. I won't argue with you about that. Now you said earlier in your evidence today that you were 5'10 back in 1971 at age 17, is that correct?

A. Yes.

Q. Now you're 6'1?

A. Yes.

Q. I refer you to your testimony once again in the Appeal Division in 1983 up in Halifax, page 49:

Q. You were 17 at the time?
A. Yes.
Q. How tall were you, you were over 6 feet then, weren't you?
A. I don't know. I don't know.
Q. You don't know?
A. I don't know.

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D. MARSHALL, JR., Cross-Examination

Q. You were big for 17, would you agree with that?
A. Tall.

Do you recall having said that, that you didn't know how tall you were?

A. I said I was tall.

Q. You didn't say you were 5'10, you said "I didn't know how tall I was." Isn't that right?

A. I was measured when I went away to prison so I know how tall I am.

Q. How long did you know Sandy Seale before this incident?

A. I just used to meet him and other people at dance halls.

Q. How long?

A. I don't know. Approximately a year probably.

Q. Could it have been three years?

A. I don't know.

Q. Now you recall having given a statement to the R.C.M.P. in 1982 when you were in Dorchester Penitentiary?

A. Yes.

Q. That statement was freely and voluntarily made by yourself, was it not?

A. Yes.

Q. That statement you indicated was true, did you not?

A. The whole statement, you say?

Q. Yes.

A. No, it's not true.

Q. Not true.

THE COURT: Perhaps we'll have our afternoon break now. We'll recess for 10 minutes.

COURT RECESSED (3:15 p.m.)

0. COURT RESUMED (3:40 p.m.)

JURY POLLED. All present.

D. MARSHALL, JR., Cross-Examination (Cont'd)

MR. WINTERMANS: Just before the break, Mr. Marshall, I asked you if you recalled having given a statement to
5. the R.C.M.P. in 1982 when you were still in Dorchester Penitentiary and you said that you did, correct?

A. Yes.

Q. And then I asked you whether or not the statement was freely and voluntarily given, you indicated that it was.

10. A. Yes.

Q. Then I asked you if the statement was true and I believe your answer was to the effect that parts of it were true and parts of it weren't true, is that what your answer was?

A. Can I read my statement over?

15. Q. I'm showing you the handwritten version of the statement that I'm referring that you say you voluntarily gave to R.C.M.P. officers while in Dorchester Penitentiary in 1982. You're reading it now. Is that the statement you recall having given?

A. Yes.

20. Q. I asked you whether or not it was true. What was your answer?

A. Most of it is not true.

Q. Most of it is not true. Is that what you're saying?

25. A. Yes.

Q. I show you again page one. Is that your signature at the bottom?

A. Yes.

Q. Page two, is that your signature on the side?

30. A. Yes.

D. MARSHALL, JR., Cross-Examination

Q. Page three, is that your signature on the side?

A. Yes.

Q. Page four, is that your signature at the end?

A. Yes.

Q. So parts of it are true and parts of it aren't, is that what you're saying?

A. Yes.

Q. I want to read you part of it and ask you whether or not it's true or not. The first page:

> "I guess you could say I was a bad young guy. I drank a lot and generally hung around."

True?

A. I answered that earlier. I worked all week and I drank with my friends on the weekend.

Q. Just answer the question yes or no.

A. I answered it.

Q. This part of the question is true.

A. It's true.

Q. Then further along in the statement, quoting from the statement:

> "I asked Sandy if he wanted to make some money. He asked how and I explained to him that we would roll someone. I had done this before myself a few times. I don't know if Sandy had ever rolled anyone before. We agreed to roll someone so we started to look for someone to roll. The first time I saw the two fellows we later decided to rob was on the George Street side of the park. The short old guy I now know as Ebsary."

A. That's not true.

Q. That's not true?

A. No.

Q. I refer you to the testimony that you gave

in 1982 before the Appeal Court in Halifax which you indicated earlier that you recall having given, page 69:

> "Q. Therefore it's a reliable statement. Well, let me rephrase that, Mr. Marshall. Therefore when one reads that statement one can take it as being truthful, is that right?
> A. Yes."

Do you recall having said that?

A. Yes.

Q. Under oath.

A. Yes.

Q. Okay. Do you recall having given evidence in the preliminary hearing in 1983, August of 1983 for the first time downstairs here, I showed you the blue folder, you looked it over. Page 20. I ask you to comment on these questions and answers:

> "Q. Do you recall having given a statement to the R.C.M.P. in Dorchester Penitentiary on March 3rd, 1982?
> A. Yes.
> Q. Do you recall having stated at that time, and I quote a part of the paragraph and ask you to comment on it. "I asked Sandy if he wanted to make some money. He asked how and I explained to him we would roll someone. I had done this before myself a few times. I don't know if Sandy had ever rolled anyone before. We agreed to roll someone so we started to look for someone to roll. The first time I saw the two fellows we later decided to rob was on George Street side of the park."

And then you go on to say "the short old guy I now know

as Ebsary." Do you recall having said that to the R.C.M.P.?

A. It is the truth, but speaking, you know, I didn't say rolling anybody, I said we were going to get some money. I asked him to get some money with me. I didn't directly say 'let's go rob somebody.'

Q. So you are saying that this statement is not the truth then?

A. I didn't say that. It was - I said it was true. When you put my statements together I think there is more than one answer anyway.

Do you recall having said that?

A. Yes.

Q. Is that the truth, what you said there?

A. What you just read?

Q. Yeah.

A. Yeah.

MR. EDWARDS: My Lord, I'm going to rise on this point. I don't think my friend is doing this quite properly. Fair ball for him to cross-examine the witness on the contents of the March, 1982 statement. That is no surprise to anybody, but what he's doing now is putting to the witness the cross-examination of the witness on the March, 1982 statement and it seems to me that it's only legitimate for him to do that if he says something different during this cross-examination than he said during the previous cross-examination.

THE COURT: I wouldn't think it is limited to the cross-examination but it's as I understand it, open for him, if the witness says anything today which appears to be different from what he may have said at a previous time under oath, then he can ask him if he remembers and if he remembers then he can put the question to him and then he asks him to explain the difference if there is a difference.

0. MR. MARSHALL, JR., Cross-Examination

MR. EDWARDS: And that's well taken. What I'm saying is that I submit the proper way for him to go about it would be to put a portion of the '82 statement to the witness. Let's say he gave him a portion and the witness said that's the truth, but at an earlier trial said when referred to that same portion that's a lie. Then I think I submit it's legitimate for him to go to the earlier cross-examination and say well, you testified that that was a lie earlier and then ask him to account for it. But it seems to me my learned friend is skipping the first step.

THE COURT: Well, I think you've lost me somewhere along the way. He's entitled to go to any previous prior statement under oath, if there's a difference between it - if he believes there's a difference between it and what is said here, and puts it to him, gives him the opportunity to read it or reads it to him, asks him if he remembers the testimony and if he remembers the testimony then he can ask him how come it's different or explain the difference. I think he can do that.

MR. EDWARDS: Okay, My Lord. I won't belabour that. I was just trying to clarify the issue.

MR. WINTERMANS: The next time you testified was in Supreme Court here in Spetember 12th of 1983, the first trial in relation to Mr. Ebsary, and you've already indicated you recall that. On page 45 you were asked the question:

> "Q. Do you recall having given a statement to the R.C.M.P. In Dorchester Penitentiary back in 1982, March the 3rd, 1982? Do you recall that?
> A. Yes.
> Q. That statement is true, is it not?
> A. Yes."

Do you recall having said that?

0. M. MARSHALL, Cross-Examination

A. Yes.

THE COURT: Sorry, did you answer that or not?

A. I said yes.

MR. WINTERMANS: I'm going to read you a couple of other parts of your statement before I go any further, your testimony of last time, and ask you to comment on them. Further in the R.C.M.P. statement which you indicated you gave to the R.C.M.P. in 1982 at Dorchester Penitentiary, the statement 'the two guys started to walk away from us and I called them back. They then knew we meant business about robbing them. I got in a shoving match with the tall guy, Sandy took the short old guy. I don't remember exactly what was said but I definitely remember Ebsary saying "I got something for you" and then stabbing Sandy.' Do you recall - you read that. I'd like you to comment on whether or not that's true. True or false?

A. It's not true.

Q. And one last part. "When questioned about this, I did not mention that Sandy and I were robbing these two as I thought I would get into more trouble. I never told my lawyers or the court. I just thought I would get in more trouble. I felt bad about Sandy dying as it was my idea to rob these guys."

A. It's not true.

Q. Not true?

A. Can I comment now?

THE COURT: Yes. You were asked a question. You answer the question.

A. I did not go follow Ebsary. Ebsary asked me for a cigarette when I was in the park. The same which somebody else asked me for a cigarette that time. I wasn't out to rob him at all. But I was at the end forced to almost say that I had - that's what it boiled down to.

0. MR. MARSHALL, Cross-Examination

Q. I apologize to the jury for these delays but unfortunately the only way that I can put these things to this witness is by looking through these piles of materials and finding the exact page and reference. At the preliminary hearing in August, 1983,. the blue folder that I showed you earlier, page 34, I already asked you if you recall giving a statement to the R.C.M.P. in Dorchester Penitentiary in 1982 and your answer 'yes.'

"Q. You stated that that was the truth.
A. Yes.
THE COURT: I don't think we'll go into that again.
Q. MR. WINTERMANS: Do you recall in that statement, page 2 stating that they knew we meant business about robbing them. I got in a shoving match with the tall guy and Sandy took the short old guy.
A. You mentioned that awhile ago, I think.
THE COURT: Just answer the question.
Q. MR. WINTERMANS: Are you denying that.?
A. I am not denying nothing. I am just asking that certain people come on the stand."

And then on the next page:

"Q. In your statement you said they knew we meant business about robbing them. I got in a shoving match with the tall guy and Sandy took the short old guy. Can you deny that that is the way it happened or not?
A. I don't remember. There are so many stories about what happened I don't know, I can't answer that."

Do you recall having said that?

A. Yes.

Q. Now with reference to your plan to make some money that night, you testified in the Appeal Division

in Halifax in 1982, page 11:

"Q. Could you give an example of how you might have considered making money?
A. Bumming it, breaking in a store probably, taking it off somebody."

Do you remember having said that?

A. Yes.

Q. True?

A. What I said? No, it's not true.

Q. Not true. In September of 1983 you testified at the first trial here, upstairs, in relation to Mr. Ebsary, you already recall having testified. On page 45:

"Q. There was discussion between yourself and Seale as to how you would make some money.
A. Uh-huh.
Q. You suggested to him that you would roll somebody.
A. Yes.
Q. Is that right?
A. Yes.
Q. And roll someone, is it fair to say that roll someone, that means rob someone?
A. No, robbing is different subject altogether. Rolling somebody is different."

And continuing:

Q. I see. But the people that you rolled or tried to roll, they would have known that you were trying to rob them at a certain point right before this incident with the knife took place, wouldn't they?
A. They would know?
Q. They would know that you intended to rob them.
A. Yes. Roll them.
Q. Roll them?
A. Yes."

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MR. MARSHALL, JR., Cross-Examination

Q. Do you recall having said that?

A. Yes.

Q. Is that true or false?

A. It's not true.

Q. It's not true. So you're saying that you came into this court, the Supreme Court before a jury and swore to tell the truth, and you told that and it's not true?

A. I told the truth the first time.

Q. All right. I referred you to a few quotes from that statement and you said they were not true. Now I'd like to refer you to your - continuing on your September 12th, 1983 testimony that you gave in this court at the first trial. On page 47, I'll read you the phrase, a couple of questions and answers and ask you to comment on it. Do you recall in that statement, page 2, stating that:

> " They then knew we meant business about robbing them. I got in a shoving match with the tall guy and Sandy took the short old guy.
> A. You mentioned that awhile ago, I think.
> THE COURT: Just answer the question.
> Q. MR. WINTERMANS: Are you denying that?
> A. I'm not denying nothing.
> Q. Do you recall having stated that at the preliminary?
> A. Yes."

Q. Now would you explain the difference between rolling someone and robbing someone?

A. Not really.

Q. Not really. I refer you to your September 12th, 1983 testimony before a jury in this case on page 48:

"Q. You were finally released from

the penitentiary after speaking to the R.C.M.P. ultimately.

A. Yes.

Q. Isn't that the way it really happened?

A. Yes.

Q. You finally admitted that there was a robbery taking place.

A. A robbery is when you are armed. I wasn't armed."

Q. Do you recall having said that?

A. Yes.

Q. Is that true, that was the difference in your mind at that time, between rolling and robbing?

A. I would say, yes.

Q. That robbing somebody is when you take their money and you're armed with a weapon, whereas rolling is when you take money or something from a person and you're not armed?

A. I didn't rob nobody and I didn't roll nobody. A person bummed me a cigarette and that's what happened.

Q. Now you recall last time when you testified here, in November of 1983, the Crown Prosecutor cross-examined you in relation to that R.C.M.P. Statement in Dorchester, page 53, he asked you in relation to the differences between your testimony that you were giving then and the contents of your statement:

"Q. Now can you explain why there is a discrepancy between what you are saying today and what you told the police on March 9th, 1982?

A. The difference.

Q. Yeah.

A. When I wrote this statement, I can't explain.

Q. Pardon?

A. I can't explain.

340.

MR. MARSHALL, JR., Cross-Examination

Q. You can't explain. Thank you, Mr. Marshall."

Q. Do you recall that exchange?

A. Yes.

Q. Is it true?

A. What's true?

Q. What I just read you.

A. That I can't explain.

Q. Now when you testified before the Appeal Division back in 1982, you've already indicated you recall that, page 58, the bottom of the page, Mr. Edwards asked you:

"Q. So we are just making sure we have our terms straight, Mr. Marshall, when you use the term 'to roll somebody' that means to beat them or grab a hold of them for the purpose of forcing money from them. Isn't that what it means?

A. Yes.

Q. Right. Now had you ever rolled anyone prior to that night?

A. I can't answer that.

Q. You can't answer that?

A. No. Because whether I did or not, I don't think it's anybody's business what I did as far as me rolling anybody before or after because the night we met Ebsary and MacNeil our intention was to get money and the intentions were there but the attempt as far as me grabbing MacNeil or Sandy Seale grabbing Ebsary, nothing like that happened. He said I jumped him from behind. I don't think I jumped him from behind.

THE COURT: You were asked a question. You haven't answered it.

MR. MARSHALL, JR., Cross-Examination

A. I did. I have no answer."

Q. Do you recall having said that?

A. Yes.

Q. Is that true?

A. I didn't roll nobody.

Q. Had you ever rolled, robbed anybody before that night, that is May 28th, 1971?

A. I'm going to say no.

Q. You're going to say no?

A. Yes.

Q. Do you recall page 60 of your Appeal Court evidence in Halifax that you already acknowledged:

> "Q. You're saying that that's no one's business, it's not the Court's business?
> A. It's my business. I was not caught for it so why do I have to deal with it? I wasn't summonsed for it, I don't have to deal with it."

Q. Do you recall having said that?

A. Yes.

Q. All right. I'll just continue.

MR. EDWARDS: Were you just reading from page 60?

MR. WINTERMANS: No.

> "Q. THE COURT: Now you've been asked now, Mr. Marshall, you've been asked a question now, you must answer it.
> A. I might have. I may have not.
> Q. MR. EDWARDS: You might have. Mr. Marshall, you realize that to roll someone or to rob someone, to use the legal term, is very serious business. Do you realize that?
> A. Sure it is.
> Q. Yes. Would it also be fair to say

MR. MARSHALL, JR., Cross-Examination

that unless you were doing it on a daily basis you would remember it?

A. Yes. But I didn't do dit on a daily basis.

Q. No. Exactly the point. So therefore you should remember whether you had ever rolled anyone before. Is it possible that you did?

A. It's possible.

Q. Yes. Is it possible that you did more than once before?

A. It's possible I robbed somebody. I don't know whether it was once or not.

Q. Is it possible you may have rolled five or six people prior to that night?

A. I don't know.

Q. You don't knwo? So then it is possible?

A. It is possible."

Q. Do you recall those questions and answers?

A. No.

Q. Are they true?

A. What's true?

Q. What you said there, is it true?

A. No, it's not true.

Q. It's not true?

A. No.

Q. Okay. Have you ever been convicted of a criminal offence prior to May 28th, 1971?

A. Yes.

Q. On June 12th of 1971 you were convicted of theft . .

THE COURT: I don't know how far you can go. Unless he was convicted.

MR. EDWARDS: The Crown has no objection to him putting the specific offence, date and disposition, My Lord.

0. MR. MARSHALL, JR., Cross-Examination

THE COURT: All right. Just hold on a minute, will you, Mr. Wintermans?

MR. WINTERMANS: There's just one other question that I really care to ask.

5. THE COURT: Well, I'm not stopping you, I'm just holding you up.

MR. WINTERMANS: I don't really wish to pursue it, My Lord.

THE COURT: All right.

MR. WINTERMANS: I would just like to ask the question to Mr. Marshall. Had you ever been sentenced to jail

10. prior to May 28th, 1971?

A. Yes.

Q. Is it true that you spent 8 months in jail on one occasion?

A. Yes. But it doesn't show on my parole record.

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

THE COURT: All right. Any re-examination?

MR. EDWARDS: My Lord, I intend to be a little bit of time on re-examination and I would like to have a few minutes to prepare it so as it's 20 after 4 may I ask

20. Your Lordship to adjourn for the day?

THE COURT: All right. We'll adjourn until Monday. You've got a weekend ahead of you, Mr. Foreman and members of the jury. I have to advise you not to talk about the case or discuss the case and as I said

25. before keep in mind the evidence that you've heard so when we come back on Monday we'll be able to continue right on. I also have to tell you, Mr. Marshall, that you're not to discuss your evidence with anybody between now and the time you come back on the stand on Monday morning and be back here Monday morning at 9:30. All

30. right?

COURT ADJOURNED (4:20 p.m.)

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

JURY POLLED. All present.

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

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

THE COURT: All right.

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

JURY RETIRED (9:36)

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

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

20. brief cross-examination.

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

MR. EDWARDS: Well, I wonder if since technically speaking he's finished his cross-examination, if we

25. could have some notice of what the questions are going to be.

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

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

0. DISCUSSION

granted it to him, so . .

MR. EDWARDS: Um-hmm.

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

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

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

JURY RETURNS. (9:38)

10. JURY POLLED. All present.

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

MR. MARSHALL, JR., sworn, testified:

MR. WINTERMANS: Mr. Marshall, do you agree that the cut that you had on your arm that evening was not

15. bleeding at the time that you went to the house of Brian Doucette in order to call for help for Mr. Seale?

A. Yes, it was bleeding.

Q. Is that true?

A. It was bleeding.

20. Q. It was bleeding?

A. Yes.

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

25. A. There was blood.

Q. There was blood?

A. Yes.

Q. You received 10 stitches, is that right?

A. Yes.

Q. Would you agree that the wound would be

30. fairly described as being superficial or minor?

MR. MARSHALL, JR., Cross-Examination (Cont'd)

That you received that night?

A. Superficial.

Q. Superficial?

A. Yeah.

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

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

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

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

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

A. Most of them were out anyway.

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

A. It has nothing to do with it.

Q. Did you have that at that time?

A. It has nothing to do with it.

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

A. Yes, I had it.

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

A. Where the cut?

Q. Yes.

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

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

MR. MARSHALL, Cross-Examination

Show the jury the other side of your arm.

Is that where the tattoo was?

A. Yes.

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

A. Yes.

Q. Did you ask for an ambulance?

A. I asked for an ambulance and the police.

Q. You asked for the police, did you?

A. Yes.

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

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

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

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

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

A. No.

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

A. No.

Q. No?

A. No.

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

MR. WINTERMANS: He said no.

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

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

Q. You ~~said~~ a gang.

A. Yes, I said a gang.

MR. MARSHALL, Jr., Cross-Examination

Q. And that you were in trouble. You didn't say a bad young group?

A. I said we were all bad, groups.

Q. Yeah. Did this group or gang ever beat people up in or around the park, Wentworth Park before this night?

A. Other gangs.

Q. Other gangs? Were there other gangs of Indians?

A. No, other gangs of other people.

Q. Were there other gangs of Indians?

A. No, just one.

Q. Just one?

A. Yes.

Q. Now if I could just recap what I thought you said last time, yesterday I should say or Friday, you testified on Friday that although you admit giving a statement to the R.C.M.P. in 1982 stating that you tried to rob Ebsary and MacNeil, and that in 1982 and 1983 you testified in court under oath that that statement indicating that you were attempting a robbery was true, you are now saying that you weren't trying to rob anyone, is that correct?

A. That's correct.

Q. Or roll anybody.

A. That's right.

Q. Or use any violence against MacNeil or Ebsary.

A. That's right.

Q. That's right? Okay. Now you received compensation from the Province of Nova Scotia?

A. Yes.

Q. For $270,000.00?

A. $170,000.

Q. $170,000. And how much did your lawyers get then?

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MR. MARSHALL, JR., Cross-Examination

A. $97.

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

A. Yes.

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

A. Yes.

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

A. Pardon me?

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

A. That has nothing to do with this trial.

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

A. Tell me what you're asking.

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

A. Yes.

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

A. Yes.

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

A. Yes.

Q. And you received that as well?

A. Yes.

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

0. MR. MARSHALL, JR., Cross-Examination

A. Yes.

Q. Between 1982 and 1985?

A. Yes.

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

A. I didn't say I was famous.

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

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

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

A. Yes.

Q. And you were out of jail.

A. Yes.

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

A. Yes.

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

A. I don't know.

Q. You're not denying it.

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

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

MR. MARSHALL, JR., Cross-Examination

A. My own.

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

A. Yes.

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

A. No, I didn't study it.

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

A. Yes.

Q. You said $97,000, right?

A. Yes.

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

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

Q. You had another one before.

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

THE COURT: I would agree with that.

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

A. No.

Q. No?

A. No.

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

THE COURT: Re-examination?

RE-EXAMINATION

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

A. Yes.

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

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

Q. Yes.

A. And we . .

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

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

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

THE COURT: Well, that's the problem.

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

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

THE COURT: Yes.

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

0. MR. MARSHALL, REDIRECT EXAMINATION

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

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

JURY RETIRED (09:50 a.m.)

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

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

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

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

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

0. MR. MARSHALL, Redirect Examination

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

THE COURT: Page?

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

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

10.

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

15.

THE COURT: You didn't . .

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

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

20.

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

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

25.

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

30.

0. MR. MARSHALL, JR., Redirect Examination

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

MR. WINTERMANS: My Lord, can I reply?

THE COURT: Yes.

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

MR. MARSHALL, JR., Redirect Examination

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

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

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

COURT RECESSED (10:01 a.m.)

COURT RESUMED (11:00 a.m.)

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

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

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

0. MR. MARSHALL, JR., Redirect Examination

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

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

5. play it back?

(Tape played back for Mr. Wintermans).

JURY RETURNED (11:15)

JURY POLLED. All present.

THE COURT: All right, Mr. Foreman and members

10. of the jury, I'm going to just give you a short instruction now and that short instruction is that you are to disregard and put out of your minds anything that Mr. Edwards has said, any questions he's asked or any responses or partial responses that were given so we'll start the re-examination again and anything

15. that you may have heard is not evidence, not legally admissible evidence and therefore you can disregard it. So would you start your re-examination again, Mr. Edwards?

MR. EDWARDS: Thank you, My Lord. Mr. Marshall, after you were released form the penitentiary in 1982

20. what month was it?

A. It was March.

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

25. A. Yes.

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

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

Q. It was in December of '82.

30. A. Yes.

Q. Now during your direct examination do you

0. MR. MARSHALL, JR., Redirect Examination

recall your lawyer at that time was Mr. Aaronson?

A. Yes.

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

5. A. I told him . .

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

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

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

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

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

THE COURT: Page what?

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

Q. What happened concerning Patricia Harris and Terry Gushue?

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

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

JURY RETIRED (11:16 a.m.)

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

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

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

30.

0. MR. MARSHALL, JR., Redirect Examination

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

MR. WINTERMANS: My Lord . .

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

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

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

0. MR. MARSHALL, JR., Redirect Examination

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

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

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

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

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

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

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

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

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

MR. WINTERMANS: May I respond to that?

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

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

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

0. MR. MARSHALL, JR., Redirect Examination

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

5. permit that.

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

MR. EDWARDS: The record will also show that you

10. made no objection to that fact.

THE COURT: All right. Now I'm going to restrict you very severely on your re-examination because I'm not going to open the door for you to go into each particular statement given at the time. I think on re-examination limit yourself to the matters that are

15. raised don cross-examination which are proper matters for re-examination and I think that the caution that counsel has indicated, that he's already asked him to explain the statements and given him an opportunity to do so. And the answers are there.

MR. EDWARDS: Fine, My Lord. I understand your

20. ruling and I will certainly abide by it. That being the case, there is but one question that I wish to put to the witness and perhaps we can avoid another shuffle. I'll tell you what it is now and perhaps if there's any objection you can rule on it. During his testimony on

25. Friday, the witness said under cross-examination: "I was not going to rob them. I was almost forced to say that. That's what it boiled down to." Now my recollection is there was no explanation of that. I had two points I wanted to query him on that: a) when he says that, what

30. is he referring to; and b) what did he mean by that

0. MR. MARSHALL, JR., Redirect Examination

statement. Allow him to explain that.

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

All right, we'll bring the jury back.

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

JURY POLLED. All present.

THE COURT: All right, Mr. Edwards?

MR. EDWARDS: Thank you, My Lord.

Q. Mr. Marshall, during your cross-examination on Friday in response to my learned friend, you said

10. "I was not going to rob them, I was almost forced to say that. That's what it boiled down to." Mr. Marshall, what were you referring to when you said that?

A. Would you ask it again?

Q. Sure. The statement that you made: "I was not going to rob them. I was almost forced to say that.

15. That's what it boiled down to." What were you referring to when you said that?

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

Q. Well, you can't tell us what you were told but you can tell us - put it this way. Let me ask you,

20. what did you mean when you said that? "I was not going to rob them, I was almost forced to say that." What did you mean by that?

A. I meant that I knew beforehand what the accused told people and other information I got that

25. that's the side of his story, and I said the only way I'm going to have to challenge him is to agree what he says.

Q. That there was a robbery.

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

30. said it.

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MR. MARSHALL, JR., Redirect Examination

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

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

Q. Pardon me?

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

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

A. In Dorchester Penitentiary.

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

A. Yes.

Q. No further questions.

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

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

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

THE COURT: All right.

JURY RETIRED (11:35 a.m.)

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

THE COURT: Is there a section under the Code iinvolving . .

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

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

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

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

THE COURT: McWilliams?

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

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

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

THE COURT: Try to make as succinct . .

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

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

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

THE COURT: Try and get there quickly.

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

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

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

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

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

MR. WINTERMANS: But . .

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

20. MR. WINTERMANS: It's not . .

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

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

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

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

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on between Mr. Edwards and myself.

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

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

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

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

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

THE COURT: Why so late in the game, Mr. Edwards, that you want to call another witness? This story has gone on for 13 years now and all the participants have been known and all of them, sure, you have statements from everybody two, three and four times, some

15. consistent and some not consistent. Why would you wait this late?

MR. EDWARDS: Well, My Lord, I guess the simple answer to that is that after the trial began my impressions, my thinking on the case changed. Patricia

20. Harris really has nothing to do, I mean if Patricia Harris is called or if she's not called, that has nothing to do with whether or not the theory of the Crown will be that there was or was not a robbery. The fact is that she was there that night. Donald Marshall mentioned her in his evidence and it seems to me that . .

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

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

30.

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

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

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

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

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

THE COURT: Yes, but the Crown . .

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

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

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

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

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

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

MR. EDWARDS: Yes.

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

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

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

MR. EDWARDS: That's correct, My Lord.

15. THE COURT: Certainly as two of them. I think in view of the nature of this trial and in view of the apparent public knowledge that everybody has of the thing, that it is incumbent upon you this time to produce at least the same witnesses that you produced

20. before, particularly Mr. MacNeil. And I'm - I don't want to get into - I've never gotten into this aspect of the case before of directing the Crown, but I think it is incumbent upon you by virtue of this case, in order to give the accused a fair trial that it is

25. incumbent upon you to at least call MacNeil. Now there may be others that I'm not too aware of but I think the duty of the Crown is to present the evidence fairly and impartially, it's not a matter of winning or losing as far as the Crown is concerned. The Crown presents what would be in their view credible testimony to the court.

30. Because a witness' testimony may be different from

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

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

MR. EDWARDS: May I respond, My Lord?

THE COURT: Yes.

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

THE COURT: Go ahead.

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

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

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

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

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

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

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

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

MR. EDWARDS: But it is important.

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

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

10. MR. EDWARDS: No question.

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

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

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

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

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

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

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

5. THE COURT: No. There's no way that you're going to cross-examine him. I think it's your duty to call him. I'm suggesting it's your duty to call him and you'd have to examine him on direct.

MR. EDWARDS: Well, My Lord, as I stated before with greatest respect, having given the matter a lot

10. of thought, as much thought as possible without becoming redundant, the Crown will not call Jimmy MacNeil unless Your Lordship so orders. If you do so then of course you're the boss here, but short of a direct order I will not call him.

MR. WINTERMANS: My Lord, I move for a mistrial at

15. this point.

THE COURT: Now why would you ever move for a mistrial?

MR. WINTERMANS: If my learned friend . .

THE COURT: Just a minute now. Just a minute. Just a minute. Let's start. Why would you move for a

20. mistrial? The jury has not heard any of this.

MR. WINTERMANS: Because I have no idea what my learned friend is getting at when he questions the credibility of Mr. MacNeil. Mr. MacNeil has never been cross-examined by anybody on his credibility, and if my

25. learned friend knows something . .

THE COURT: We haven't got to that point yet.

MR. WINTERMANS: Anyway, I strongly object. I don't care if Mr. Edwards doesn't call him as long as Mr. Edwards is not allowed to cross-examine Mr. MacNeil

30. on his credibility.

DISCUSSION

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

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

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

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

MR. WINTERMANS: I don't think . .

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

MR. EDWARDS: Oh, yes.

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

Bring in the jury.

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

JURY POLLED. All present.

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

DIRECT EXAMINATION

MR. EDWARDS: You're Donna Ebsary?

A. I am.

Q Where do you reside, Donna?

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

Q. And you are formerly of Sydney?

A. Yes, I am.

Q. And your age at the present time?

A. 27.

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

A. Yes, I am.

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

A. He's sitting over there with the medals on

15. his chest, just behind and to the left of Mr. Wintermans.

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

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

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

20. Q. '79?

A. Yeah.

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

A. Yes, I did.

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

A. Yes.

Q. Now in 1971 where was the family resident?

A. 126 Rear Argyle Street, Sydney.

30.

0. D. EBSARY, Direct Examination

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

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

Q. 10 or 15 minutes?

A. Yeah, 10 or 15 minutes.

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

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

Q. '72?

A. Yeah, I think so.

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

A. 46 Mechanic Street.

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

A. Yes. They are.

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

A. About 13 years old, around that.

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

25. A. Probably grade 8.

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

A. Manager of a furniture company.

Q. And what formal education do you have?

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

D. EBSARY, Direct Examination

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

Q. When did you graduate from school?

A. '75.

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

A. Yes.

Q. Did you ever fail any years in school?

A. No.

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

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

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

A. Oh, 9, 9½.

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

A. Yeah.

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

A. The Isle Royale.

Q. At the Isle Royale, as a what?

A. As a cook.

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

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

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

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

D. EBSARY, Direct Examination

don't know exactly which one he worked at.

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

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

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

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

THE COURT: Well, all right.

JURY RETIRED (12:20 p.m.)

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

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

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

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

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

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

0. DISCUSSION

time, they can't all be proper.

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

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

MR. WINTERMANS: He's asking though questions like

10. how - what did he do before 1971 for a living.

MR. EDWARDS: Big deal.

THE COURT: What harm is there ien that?

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

THE COURT: Well, I'll tell you, I'm getting a

15. little tired of some of the points that are being brought up because I want this trial to continue and we're going to waste all morning with the jury going in and out as though they're on a string. Now I'm going to caution you both to restrain yourselves to think before you talk and think before you make an objection

20. so that we don't have the jury going out on some silly point. All we lose now is 10 minutes time. The jury is gone home and it's now 20 after 12. I have no other choice now than to adjourn the trial.

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

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

MR. EDWARDS: But I'd like to respond to what

30. Your Lordship - you know, you urged us to think before we

0. DISCUSSION

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

THE COURT: The record will show that and we

5. will adjourn until 2:00.

COURT RECESSED (12:22 p.m.)

COURT RESUMED (2:03 p.m.)

THE COURT: All right, Mr. Edwards, before we start again I want to get back to the question of calling of the witness MacNeil. As I understand it MacNeil was

10. the main witness used in the Court of Appeal to testify to facts which caused the release of Marshall.

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

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

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

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

MR. EDWARDS: That's correct.

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

MR. EDWARDS: Yes, My Lord.

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

25. MR. EDWARDS: Um-hmm.

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

MR. EDWARDS: Yes, My Lord.

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

0. DISCUSSION

In Wu (alias Wu Chuck) v. The King.

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

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

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

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

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

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

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

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

And Kerwin went on and said:

> "Of course the Crown must not hold back evidence because it would assist an accused but there was sno suggestion that this was done in the present case or to use the words of Lord Hankerton, 'that the prosecutor had been influenced by some oblique motive' which was one of the tests set forth before."

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

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

0. DISCUSSION

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

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

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

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

MR. EDWARDS: Well, My Lord, I'd like to deal first with some of the authorities that Your Lordship cited, if

5. I may very briefly. The one where you quoted Rand, J., p. 763, the beginning of that paragraph starts out:

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

and I take it that the Court of Appeal had held there

10. that there was a duty on the crown to call all the witnesses and I submit that when he goes on, he says:

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

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

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

20. MR. EDWARDS: Yes.

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

25. From then to now.

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

THE COURT: It's not for you to assess credibility

30. of all witnesses.

0. DISCUSSION

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

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

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

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

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

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

0. DISCUSSION

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

MR. EDWARDS: Yes.

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

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

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

10. MR. EDWARDS: Well, for the defence.

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

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

THE COURT: Is it material?

20. MR. EDWARDS: Of course.

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

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

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

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

0. DISCUSSION

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

THE COURT: Fine. That's your position.

MR. EDWARDS: That's my position.

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

MR. EDWARDS: I will not be calling him.

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

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

15. heard and allowed to get back to his very busy schedule.

THE COURT: I have no problem with that.

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

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

MR. WINTERMANS: With the understanding of course

20. that Donna Ebsary is going to be back on the stand.

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

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

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

JURY RETURNED (2:19 p.m.)

25. JURY POLLED. All present.

DR. NAQVI, called, duly sworn, testified:

DIRECT EXAMINATION

MR. EDWARDS: My Lord, I'll be seeking leave of the court to qualify this witness to give opinion evidence

30. with respect to general medicine and surgery.

0. DR. NAQVI, Direct Examination

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

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

Now members of the jury, before we start on this witness in order to accommodate Dr. Naqvi who has a busy schedule and not have him sit around outside, we

10. have stood aside the previous witness, we'll do Dr. Naqvi and then the previous witness will be recalled and her testimony will be heard then.

All right, Mr. Edwards?

MR. EDWARDS: Thank you, My Lord. Dr. Naqvi, you were on duty at the City of Sydney Hospital on the

15. night of May 28th and early morning of May 29th, 1971?

A. Yes, I was.

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

A. Sandford Seale.

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

A. That's correct. 17.

Q. Yes. And could you indicate to the jury at approximately what time that night you first saw him and

25. what was his condition when you first saw him?

A. 29.5.71, after midnight.

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

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

30.

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

Q. You mean outside the . .

A. Yes, outside the . .

Q. The abdominal cavity.

A. The abdominal cavity, yes.

Q. Right. Yes?

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

Q. A very what?

A. His pulse was markedly weak.

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

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

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

A. I . .

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

A. He survived the initial operation.

Q. Yes.

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

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

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

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

Q. Um-hmm.

A. But he died that evening.

Q. He died that evening.

A. Yes.

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

A. Hemorrhage. And shock.

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

A. With a sharp pointed object.

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

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

Q. The width of your palm. And I believe on a previous occasion we measured your palm and it was 3½ inches wide, is that correct?

A. I couldn't tell you. Really.

MR. WINTERMANS: I'll acknowledge that it is 3 or 3½. There was some discussion between Mr. Edwards as to whether it was 3 or 3½.

0. DR. NAQVI, Direct Examination

MR. EDWARDS: That was the minimum length.

A. Yes.

Q. What would've been the maximum length or can you give an opinion?

A. The maximum length I can't tell you.

5. Q. Okay. Were there any other wounds?

A. One wound.

Q. One wound.

A. Yeah.

Q. And exactly where was it located, would you point. . .?

10. A. Somewhere around the belly button.

Q. Thank you, Doctor.

THE COURT: Cross-examine?

CROSS-EXAMINATION

MR. WINTERMANS: What was the approximate time of death, Doctor?

15. A. Time of death is 8:05 p.m.

Q. 8:05 p.m.

A. That's right.

Q. I notice you're looking through some documents there.

20. A. They are all the hospital records.

Q. They are?

A. That's right.

Q. 8:05 p.m. on the 29th of May, 1971?

A. That's correct.

25. Q. So therefore if he had arrived there around midnight or I believe at one time you testified that as far as you knew it was somewhere between midnight and 2 a.m.

A. That's right.

Q. That you had an inscription saying 2:00 in the

30. morning was when a record was actually written down,

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

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

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

A. That's right, yes.

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

A. That's right, yes.

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

A. That's right.

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

A. That's right.

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

A. That's true.

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

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

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

0. DR. NAQVI, Cross-Examination

A. That's right.

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

A. Yeah.

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

A. Well, the body is - during the development phase is the bowel that grows around the artery and the bowel all stays inside the abdomen. What happens is the abdominal pressure and the chest pressure that

10. controls most of the abdominal content, if there is no opening outside the bowel will remain inside the abdominal cavity but once that aortic opening is made the pressure inside the abdomen leads to the extrusion of the bowel outside. It's called the . . . intra-abdominal pressure that would lead to the bowel being

15. sterilized. The same thing happens as people who have hernias perhaps and the hernias get bigger and bigger because it's the pressure that causes those opening in people. However, in this particular case that was not the reason the bowel was outside because the pressure

20. inside built up.

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

A. Push the bowel out.

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

A. That's right.

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

402/

0. DR. NAQVI, Cross-Examination

A. Yes.

Q. Now there's no way that this injury went right through this boy, in other words there was no hole in the back.

5. A. No. Because the hole was as far as to the aorta. The aorta lies right over the bone, the backbone.

Q. I see. And a lot of times when you think of aorta you think of your heart, but actually the aorta is a long . .

A. The aorta doesn't start from the heart. The aorta originates from the heart, that is from the first

10. two vessels that originate from the aorta is the coronaries supply the heart, then the aorta divides and as it goes down it has various names. In the chest cavity the aorta is called thoracic aorta, in the abdominal cavity the aorta is called hte abdominal aorta.

Q. And we're talking about the abdominal aorta.

15. A. The abdominal aorta, that's right.

Q. So in other words we're not pointing around the area . .

A. The abdominal aorta.

Q. Around the area of the belly button.

20. A. Yes. And in order to control the bleeding in this particular boy we had to make two upward incisions; one was into the chest and one was into the abdomen so we controlled the thoracic aorta first. We were able to repair the abdominal aorta.

25. Q. I see. And is it not true, doctor, that there were no measurements taken of this injury?

A. That's correct.

Q. Is it also not true that there was no autopsy done in relation to Sandy Seale?

30. A. That's true. In fact you asked me the last time, that when the boy came in he was in so bad shape

0. DR. NAQVI, Cross-Examination

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

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

A. That's true.

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

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

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

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

Q. 15,000 operations.

A. Yes.

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

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

Q. Right.

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

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

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

THE COURT: All right. Thank you, Doctor.

WITNESS WITHDREW.

30.

0. DONNA EBSARY RECALLED, testified:

DIRECT EXAMINATION (Cont'd)

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

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

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

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

Q. Why would he call himself Reverend?

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

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

A. He used to carry a knife on him.

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

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

Q. Yes.

A. And he carried that with ~~him.~~

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

0. DONNA EBSARY, Direct Examination

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

A. Probably.

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

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

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

A. Yes.

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

A. He'd get dressed up if he was going out. He'd put on a pair of dress slacks and a shirt, and he'd put a scarf on and tie it and flip over around his neck

15. and he had a blue like trench coat that he'd wear and he'd put it over his shoulders, he wouldn't put his hands out in the arms, he'd just put it over his shoulders and he'd go wherever he was going.

Q. Okay. And what about your father's hair at

20. the time, what colour was it? Well, how was it compared to his hair colour today?

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

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

25. A. He used to have a goatee.

Q. A goatee.

A. Chin whisker.

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

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

30.

D. EBSARY, Direct Examination

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

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

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

A. Yes, I was.

Q. Who was home with you?

A. My mom and I were at home.

Q. That's Mary Ebsary.

A. Yes.

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

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

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

A. I don't know.

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

A. It was around 11 o'clock in the evening. I know the news was on television when he came in so whatever the late news would be on he came in.

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

A. Himself and James MacNeil.

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

A. 62, 63.

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

A. Um-hmm.

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

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

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

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

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

Q. And it was what colour?

A. Blue.

Q. Light or dark?

A. Dark.

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

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

Q. I see. And what about your dad?

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

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

A. You did a good job back there.

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

A. He went into the kitchen.

Q. He went into the kitchen.

A. Yeah.

Q. Where did you go?

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

Q. You followed behind them.

A. Yes.

D. EBSARY, Direct Examination

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

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

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

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

Q. Now could you describe the knife for us?

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

Q. A fixed blade or folding?

A. Fixed blade.

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

A. It's about the same size.

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

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

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

A. I recall him going upstairs.

Q. Um-hmm.

A. I figured he had the knife with him.

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

A. I did, after that. Yes.

Q. Did you ever find it?

A. No, I did not.

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

A. The next day, probably.

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

contact with the Sydney City Police after that night?

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

Q. In November, '71.

A. Yes.

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

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

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

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

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

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

Q. You're picking up knive #10.

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

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

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

Q. Yes.

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

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

D. EBSARY, Direct Examination

A. This knife here is . .

Q. This is knife #7.

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

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

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

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

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

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

A. I don't know exactly, no.

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

THE COURT: Cross-examine?

CROSS-EXAMINATION

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

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

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

A. That is true.

D. EBSARY, Cross-Examination

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

A. That's right.

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

A. That's right.

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

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

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

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

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

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

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

A. Yes.

Q. Is that right?

A. Yes.

Q. Okay. And he was washing something off this

knife, is that right?

A. Yes.

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

A. There was a red substance on the knife.

Q. There was a substance on the knife.

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

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

A. Um-hmm.

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

A. I would agree with that.

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

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

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

A. I believe it was in 1972.

Q. 1972?

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

Q. 1972. The coat that you described your father

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

A. Yes.

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

A. Yes.

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

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

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

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

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

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

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

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

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

A. I don't know.

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

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

D. EBSARY, Cross-Examination

Q. David Ratchford?

A. I think so.

Q. And when would that have been, approximately?

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

Q. It was a few years later, right?

A. Um-hmm.

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

A. He was my teacher.

Q. And you confided in him, did you?

A. Yeah.

Q. You trusted him?

A. Um-hmm.

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

A. He was Martial Arts instructor.

Q. Martial Arts?

A. Um-hmm.

Q. And was he also your school teacher?

A. No.

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

A. No.

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

A. Yes.

Q. And you recall having been asked the question:

> "Q. Can you describe the knife?
> A. The knife is a small knife, it had a short blade and a brown handle with tape around the bottom of the handle.
> Q. How certain are you of that?
> A. I'm as certain as I am that I'm sitting here now."

0. D. EBSARY, Cross-Examination

Q. Do you recall having said that?

A. Um-hmm.

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

5. "Q. Can you say whether you saw anything on that particular knife?
A. There was definitely something on the blade of the knife. I have - it seems to me there was blood on the blade of the knife.
Q. I'm sorry?
A. I said there was blood on the blade of the knife.
10. Q. How certain are you of that?
A. I'm not as certain as I am of the fact that I'm sitting here but I'm pretty certain that is what it was."

Q. Do you recall having said that?

A. Yes.

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

A. I'm as certain.

Q. As certain.

THE COURT: I'm sure those statements were inconsistent with anything, Mr. Wintermans.

MR. WINTERMANS: Fine. Just the question of the
20. degree of certainty, I guess, My Lord.

THE COURT: She sounded pretty certain when she said it here.

MR. WINTERMANS: Would you agree that with respect to your father's physical appearance that he was a small
25. man, he was maybe 5'2, kind of slight, he didn't have any amount of meat on him . .

THE COURT: What are you referring to?

MR. WINTERMANS: I'm just asking the question.

MR. EDWARDS: No, you're not. You're reading from
30. the transcript.

D. EBSARY, Cross-Examination

THE COURT: You're reading in something.

MR. WINTERMANS: Okay, I'm going to ask her whether she agreed or disagreed with a description, that's all.

THE COURT: Well, ask her to describe him or do it properly, and again you don't have to . .

MR. WINTERMANS: Describe your father's physical appearance as far as size and - exact size?

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

Q. Did you say 160 lbs?

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

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

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

Q. Do you recall having said that then?

A. No, not in that manner.

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

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

Q. Are you questioning the accuracy of that

description?

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

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

A. If you say . .

MR. EDWARDS: The Crown admits the accuracy of the transcript, My Lord.

MR. WINTERMANS: You indicated that the time that your father and Mr. MacNeil came home that night was 11 o'clock, did you say?

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

Q. Could it have been 10 o'clock?

A. The late news didn't come on at 10 o'clock.

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

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

MR. EDWARDS: Page?

MR. WINTERMANS: 114.

"Q. Okay now, how late at night? You said it was late. Can you say approximately what time it would've been?
A. It may have been 10 o'clock or later. It was just late. I know that I was up late, so . .
Q. Okay, so could it have been 12 o'clock?
A. It could have."

Q. Do you recall having said that?

A. Um-hmm.

Q. Is that true?

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

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

been sometime between 10 and 12.

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

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

A. Yes.

Q. And do you recall having stated:

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

Do you recall having said that?

A. Yes.

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

A. You did a good job.

Q. What?

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

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

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

A. No, I did not.

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

A. Yes.

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

THE COURT: What page?

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

D. EBSARY, Cross-Examination

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

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

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

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

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

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

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

Q. Did you tell him the truth?

A. Yes.

Q. That's all the questions I have.

THE COURT: Re-Examination?

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

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

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

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

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

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

MR. WINTERMANS: My Lord, I have a problem and
5. that is that there is a witness here, Mr. MacKay. Would you kindly come forward please? This witness whose name is Scott MacKay and he's subpoenaed to be here this afternoon to give evidence and it would appear that the Crown's case will end early tomorrow at the latest and Mr. MacKay informs me that he has a very important
10. meeting that he's been waiting for 10 months to get in Port Hawkesbury at 1 p.m. tomorrow. He will be back here on Wednesday but it would appear that he'll be needed tomorrow and I put the problem before Your Lordship. Mr. MacKay is indicating that he's going to leave unless the Court says otherwise and I need him as a defence
15. witness, on calling defence evidence which I intend to do and I need him as a material witness.

THE COURT: Can this meeting be changed?

MR. MacKAY: No, Sir.

THE COURT: Why not?

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

THE COURT: Bring in the jury.

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

JURY POLLED. All present.

0. ADOLPHUS EVERS called, duly sworn, testified:

DIRECT EXAMINATION ON QUALIFICATIONS

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

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

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

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

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

Q. Now Mr. Evers . .

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

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

20. THE COURT: Do you admit his qualifications?

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

MR. EDWARDS: My Lord, I appreciate my learned friend's courtesy on that point. However, the qualifications of the witness are germane to the weight

25. which the jury will attach to his evidence and therefore while I will attempt not to be lengthy I do wish the jury to hear about his qualifications.

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

30. comparison of clothing fibres.

0. MR. EVERS, Direct Examination on Qualifications

MR. EDWARDS: Thank you very much.

Q. What is your formal education, Mr. Evers?

A. I have received a Bachelor of Arts Degree from Carleton University in Ottawa with a major in

5. Biology.

Q. Yes. And generally how were you trained for the work you now do?

A. I had training in two forensic laboratories in the R.C.M.P. Laboratory in Ottawa and Vancouver. This training was in the examination, identification

10. and comparison of hairs and fibres.

Q. And you have previously given evidence or expert opinion evidence in the courts of this province and other provinces?

A. Yes, I have.

Q. And that would be in the Supreme Court or

15. all levels of court.

A. All levels of court, yes.

Q. In the four Atlantic Provinces?

A. I've given evidence in the courts of Ontario. British Columbia, the Yukon, Prince Edward Island, Nova Scotia, New Brunswick, Newfoundland and Labrador.

20. Q. And in each case your qualifications to give such opinion evidence was admitted.

A. Yes.

Q. Now Mr. Evers, you testified at the trial of Donald Marshall in 1971, is that correct?

25. A. Yes, I did.

Q. And prior to giving that testimony you took possession of certain items of clothing, is that correct?

A. Yes. On the 16th of June, 1971 I received

30. two articles of clothing from a Sergeant MacDonald. I

0. MR. EVERS, Direct Examination

examined these articles of clothing.

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

A. He was at that time.

Q. Yes.

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

THE COURT: 197..?

A. '71.

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

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

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

A. I examined both articles for the presence of any fresh appearing cuts. The brown jacket I found

20. one cut present on the left side of the jacket. This would be on the selvage edge or flap of the jacket. The cut was 5½" from the bottom of the jacket. It was 2-33/4" in length in the shape of a '7'. The cut continued through the interlining or interfacing of the

25. jacket and through the back flap of the jacket. The cut was 13/16" in length on the back of the jacket and the cut was fresh in appearance.

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

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

the shape of an irregular '7'.

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

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

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

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

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

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

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

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

Q. Yes.

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

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

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

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

Q. On the cuff of hte jacket.

A. Yes.

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

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

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

A. Yes, I did.

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

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

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

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

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

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

0. MR. EVERS, Direct Examination

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

THE COURT: And that's exhibit what?

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

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

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

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

10. A. Court EXHIBIT 4 is a slide which I identify by my case number and my writing. This slide was a small sample of the interfacing or pellon of the jacket, of the brown jacket which I received on June 16th, 1971. Court EXHIBIT 5 I identify by my case number and writing. This is a sample of the brown wool which I removed from the brown wool jacket, court exhibit which

15. I received on the 16th of June, 1971, and court EXHIBIT 6 is a slide which I identify by my case number and writing as being a small sample that I put in from court EXHIBIT #2 which I identified previously.

THE COURT: Which was?

20. A. The sample of the yellow jacket.

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

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

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

Q. Step down and have a look then.

A. I identify each of the knives by my initials, date and case number appearing on the red laboratory tag

30. On the 17th of March, 1982 I received a sealed box from

0. MR. EVERS, Direct Examination

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

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

A. He did, yes.

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

A. Yes.

Q. Okay.

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

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

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

20. fibres on glass slides, examined and identified the fibres and compared them to the samples which I had removed from the 1971 jackets.

Q. Now you say you used a stereo microscope to locate these fibres. I might be asking the obvious but

25. are the fibres at all visible to the naked eye?

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

30. visible to the naked eye unless one were determined, knew

0. MR. EVERS, Direct Examination

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

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

A. Yes, I do.

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

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

Q. This is your number here?

10. A. Yes, it is.

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

A. From knife #1 I removed one synthetic fibre, I found this synthetic fibre to be consistent with the interfacing or pellon of the brown jacket which I received in 1971. Knife #2 contained one synthetic fibre,

15. again I found this to be consistent with the interfacing or pellon of the brown jacket which I received in 1971. Knife #3, 4 and 6 I found to be negative for the presence of any fibres. Knife # - I'm sorry, that was knives #3, 4, 5 and 7 were negative.

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

A. Yes.

Q. Yes?

A. Knife #6 I removed 4 synthetic fibres which I found to be consistent with the interfacing or pellon

25. of the brown jacket which I received in 1971. Knife #8 contained 8 synthetic fibres consistent with the interfacing or pellon of the brown jacket which I received in 1971. It also contained one wool fibre consistent with the brown jacket which I received and it contained 3 white acetate fibres consistent with the

30. interlining of the yellow jacket which I received in 1971.

0. MR. EVERS, Direct Examination

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

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

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

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

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

15. or pellon of the brown jacket.

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

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

20. Q. And how many fibres in total on that?

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

Q. Yes?

A. I did remove additional fibres from the knife,

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

30. Q. Okay. So there were 12 in total.

MR. EVERS, Direct Examination

A. I found 12 to be consistent.

Q. Yes?

A. I found an additional three wool fibres.

Q. Yes?

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

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

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

Q. Yes?

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

Q. And they were all on knife #8.

A. Yes.

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

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

Q. All of them.

A. All of the fibres which I removed and found to be consistent, there were 26 in total. Out of those 26 fibres there were 12 different types of fibre. The type, maybe the colour, the diameter of the fibre, the cross-section of the fibre or the delustrant added to the fibre but there were 12 distinct types of fibres. In order for those fibres to come from a source such as contamination I would ocnsider to be very remote. The fibres if dealing with the 26 fibres in total in my opinion they would have to come from an article or articles of clothing consisting mainly of the 12 fibre types which I have identified.

0. MR. EVERS, Direct Examination

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

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

10. come from contact with one, two or three articles composed mainly of the types of fibres which I have identified.

Q. In the two jackets.

A. Yes.

Q. Well, put it this way. Do you think that if

15. you took a fibre from each of the persons in this court room, would they be consistent with the fibres you took from the knife?

A. No.

Q. Thank you.

CROSS-EXAMINATION

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

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

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

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

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

MR. EVERS, Cross-Examination

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

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

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

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

Q. Where are those . .

MR. EDWARDS: Let him finish his answer.

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

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

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

0. MR. EVERS, Cross-Examination

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

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

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

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

A. That's correct.

Q. Thank you. No more questions.

THE COURT: Any re-examination?

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

A. The fact that I found no yellow fibres does not affect my opinion. Had I found yellow fibres my opinion would've been stronger. The yellow fibres

20. composing the nylon shell would not shed as readily as the acetate fibres.

Q. Okay. Thank you, Mr. Evers.

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

25. WITNESS WITHDREW.

30.

0.

CPL. JAMES CARROLL called, duly sworn, testified:

DIRECT EXAMINATION

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

5. A. That's correct, yes.

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

A. That's correct.

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

A. Yes.

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

15. A. I did.

Q. Would you point him out, please?

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

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

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

A. I am.

Q. And both of those locations are located in the

25. City of Sydney, County of Cape Breton, Province of Nova Scotia.

A. They are.

Q. Now Corporal Carroll, in October of 1982 you taped a conversation between yourself and the accused,

30. Roy Newman Ebsary at his home?

CPL. CARROLL, Direct Examination

A. I did.

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

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

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

A. Yes, I did.

Q. Approximately what time did you get there?

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

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

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

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

A. Yes. That's correct.

CPL. CARROLL, Direct Examination

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

A. It is.

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

A. Yes.

Q. And you initialled it on that date.

A. Also put the date on it as well.

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

A. Correct.

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

A. I did.

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

A. Yes, it is.

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

A. Yes, I have.

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

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

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

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

MR. EDWARDS: Well, whatever the Court wishes.

CPL. CARROLL, Direct Examination

THE COURT: I think that would probably be better.

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

A. Yes.

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

THE COURT: Might as well.

(Tape recording of conversation played).

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

COURT ADJOURNED (4:30 p.m.)

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?

CPL. CARROLL, Direct Examination

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

A. Yes.

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.

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.

A. Yes, that's correct.

THE COURT: He dropped him?

MR. EDWARDS: He dropped him and ran.

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.

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?

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

CPR. CARROLL, Direct Examination

Q. Where was he?

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

Q. Outside the court room.

A. Yes.

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?

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

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?

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.

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

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

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.

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?

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.

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.

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?

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

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.

A. Certain pages I do recognize, yes. The conversation when Mr. Ebsary called Staff Wheaton on the 10. 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.

Q. Okay. Without going into detail of what everything says in there, after all it is a report and 15. 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.

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 20. you if you would read that to yourself.

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 25. 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.

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

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

10. 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.

JURY RETIRED.

MR. EDWARDS: Perhaps I'll elaborate on my

15. objection, My Lord.

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 . .

20. 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

25. to it before the jury and the one that Donald Marshall denied and then I want to ask him about the circumstances of the . .

THE COURT: Why are you showing him that? Why couldn't you ask him that? He's a witness, it's cross-

30. examination. You ask him if he was present at a certain

0. DISCUSSION

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

MR. EDWARDS: Or show him the 1982 statement itself. Why show him Sergeant Wheaton's report? He
5. 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.

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

MR. WINTERMANS: I will show him the statement.

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
15. 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,
20. 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
25. 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.

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
30. time and has been since 1982, I was going to ask him

DISCUSSION

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 . .

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.

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.

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?

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?

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.

0. 447.

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 . .

A. I'd have to see the date eon the original statement to give the exact date. Roughly a week or 10 days later that we went back and interviewed Marshall

10. the seocnd time, which resulted in that statement being taken.

Q. So it was a week or 10 days.

A. Yes, the reason for that was we arrived there to see Mr. Marshall initially and as we entered the

15. penitentiary we found a bunch of young males being removed form 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 cir-

20. cumstances 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.

Q. During that first interview was anything at

25. all discussed concerning the Seale death?

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.

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.

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?

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.

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.

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.

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.

Q. Right.

A. I was, yes.

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. 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.

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.

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?

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 typewritten one.

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

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?

A. As I recall it the robbery aspect came from
5. 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.

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

A. Sorry?

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
15. statement.

A. Yes, they are.

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

A. Yes, they are.

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

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

MR. WINTERMANS: You've already indicated that you're the officer presently in charge of this investigation and have
25. 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.

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.

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?

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?

A. Not that I know of.

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

THE COURT: Re-examination?

REDIRECT EXAMINATION

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.

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

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 . .

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

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.

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

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.

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.

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

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?

A. I don't think it came to us on 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.

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.

Q. Now the letter requests that the - well, it indicates that this lawyer Steven Aronson was retained by Mr. Marshall and it's reqeusting 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.

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?

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.

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. Yes, his name is mentioned there.

Q. Thank you.

THE COURT: All right, thank you.

WITNESS WITHDREW.

DISCUSSION

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.

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?

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 trasncript 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 ayou read it to the jury.

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

0. DISCUSSION

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

10. 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:

"Q. You are Constable Leo Mroz, is that correct?
A. That's correct, Sir.

15. 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.
Q. And in fact you were on duty as such on the evening of the 28th of May, 1971, is that

25. correct?
A. That's correct, Sir.
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?

30.

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.
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?
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?
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?
A. We travelled by way of Bentinck, Ssouth Bentinck to Crescent.
Q. Yes?
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?
A. On close examination I knew the victim was a surname Seale, a given one, I didn't know. He

CST. MROZ' STATEMENT

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?

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? 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.

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.

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

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 form 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

CST. MROZ' STATEMENT

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?

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.

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.

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 Bentinck 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

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.

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.

BY THE COURT: I wonder if that's

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.

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."

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.

A. That's right, Sir. The victim

was positioned in an angular position with his feet extended over the curb and Marshall was approximately at this point. That's - (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.

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. 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.

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 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 improvements and it's considered

CST. MROZ' STATEMENT

lighter.

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

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

"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.

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.

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.

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?

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?

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

0. CST. MROZ' STATEMENT

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

20. 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

25. want to . .

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

30. 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?

MR. WINTERMANS: My Lord, first of all I would request that Your Lordship Mr. Edwards to call James MacNeil and

15. 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?

MR. WINTERMANS: Yes, James MacNeil and Mary

20. 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 . .

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

30.

DISCUSSION

What evidence does Mary Ebsary . .

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

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

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.'

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

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

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:

> "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."

DISCUSSION

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

> "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."

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. 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.

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."

DISCUSSION

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 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:

> "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 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 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.

MR. WINTERMANS: I looked up the word 'oblique.'

10. 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:

> The Prosecutor's reason for not
> 15. 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
> 20. 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
> 25. 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."

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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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.

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.' 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 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 againsst 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 . .

THE COURT: Is this another matter?

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

THE COURT: Obliquely.

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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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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COURT 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 re ccrd why you don't want to call Mary Ebsary?

5. 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.

10. 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,

15. 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

20. motive to be imputed there it doesn't come on me. 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 profferred, from the Attorney General or anyone

25. 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 profferred him as a truthful witness osn several occasions before. As a result of a conversation I had with Donald Marshall, a lengthy

30. 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
5. about other parts of his testimony which bear directly on the defence of self-defence.

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

MR. EDWARDS: Ebsary stab Seale. I have serious reservations about other parts of his testimony or
10. 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
15. 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
20. 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
25. 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
30. 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 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 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 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 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 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 testitied, 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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then - well, there's no more I can say. My intentions here are entirely honourable and I find it rather dismayaing that Mr. Wintermans, you know, who accuses me of gamesmanship, sees as his only out to try to put 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 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 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 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 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 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
5. 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
15. 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
20. 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
30. 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:

5.

> "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 Marshalal 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.

15.

20.

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

25.

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

THE COURT: He said a lot of things differently.

30.

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Different times. Not only in March, 1982.

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
5. 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.

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

MR. EDWARDS: Of course, My Lord.

THE COURT: What's the difference?

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
15. why not just read the jury the trasnscript of the second trial?

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
20. matter. Is there a difference in what discretion you should exercise?

MR. EDWARDS: I would say . .

THE COURT: As to the calling of witnesses.

MR. EDWARDS: I would say, My Lord, that the answer
25. 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.

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

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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 discretion has to rest on my assessment of the evidence.

20. 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 Chant, 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.

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

10. 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.

THE COURT: Some witnesses have given evidence as to the events that have taken place; Marshall, MacNeil,

20. Mary Ebsary particularly, let's take those three.

MR. EDWARDS: Um-hmm.

THE COURT: They testified before.

MR. EDWARDS: Yes.

THE COURT: And Marshall in this trial has said

25. 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?

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

30.

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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.

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 referrable directly to that March, 1982 statement.

THE COURT: Whatever they're referrable 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.

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.

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.

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 as I possibly can. This matter I find personally dis-

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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.

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

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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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
5. Walker didn't and other things, I'm not sure, and the Crown although their names were on the indicement, 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
10. 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
15. 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
20. 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
25. 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 . .

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

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

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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.

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.

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

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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.
10. at p. 90, where LaMont, J. said at p. 101:

> "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
15. 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
20. case or not."

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
25. quote those cases. Several of them are referred to at 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:

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

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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
5. 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
10. material witnesses."

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
15. 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
20. 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,
25. 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
30. 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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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 quashing of a possible conviction, if the evidence as it stood
30.

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 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 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?

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.

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?

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

0. 490.

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 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 . .

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.

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, 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 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 says. He testified as to facts.

DISCUSSION

MR. 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.

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 . ."

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 scn later too.

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.

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.

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

MR. EDWARDS: You are Mary Ebsary?

A. I am.

0. MRS. EBSARY, Direct Examination

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

A. Yes, I was.

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?

5. 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?

15. A. My daughter Donna.

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

20. the afternoon.

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?

0. MRS. EBSARY, Direct Examination

A. His condition was very good.

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

A. Well, apart from being a chronic complainer

5. 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.

A. That '76 is possibly when this picture was

15. 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.

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

25. 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

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.

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?

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.

A. It would be months.

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

A. No, it would be months.

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.

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.

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

0.

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.

5. 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.

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

A. Yes, he had.

Q. On how many occasions?

A. Oh, probably six or more.

Q. And other than Mr. MacNeil,l 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.

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

25. 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.

Q. And what about your husband, how would you

30. describe his demeanour or outward bearing at the . .

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?

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

20. 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?

A. Yes.

30.

0. 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.'

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?

5. A. She was in the living room with me.

Q. Did she leave the living room?

A. Yes, she did.

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

10. A. No, I couldn't.

Q. I see. Thank you very much.

WITNESS WITHDREW.

15.

20.

25.

30.

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 gcod 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?

30.

499.

MR. MacNEIL, DIRECT EXAMINATION

(Witness points to accused).

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

A. I do.

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.

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.

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?

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.

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.

Q. That's your estimate.

500.

0. MR. MacNEIL, Direct Examination

A. That's my estimte, 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
5. day prior to that I had a few drinks.

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
10. good because my mother was dying with cancer and . .

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.

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

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
20. 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 . .

Q. No.

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

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.