

I N D E X

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MEDIA POOL COPY

501.

0. MR. MacNEIL, Direct Examination

I would assume.

Q. Okay. So when you and Mr. Ebsary left the tavern, and the State Tavern, it was on George Street.

5. A. It was on George Street, right across from the Joy Supermarket.

Q. When you left the State Tavern, you come out the door, you're on George Street.

A. Um-hmm.

Q. Where did you and Ebsary go from there?

10. A. Well, we went to his place. We went . . .

Q. To his place.

A. To his place.

Q. He lived over on Rear Argyle Street.

A. Yes.

15. Q. So tell the jury what route you would take to get from the State Tavern to Mr. Ebsary's on Rear Argyle Street?

A. You come down and you cross the lights where Townsend comes out and you stay right on the right hand side and you go right down and you know just where the tracks are.

20. Q. You have to imagine the jury are all from New Waterford.

A. Oh. They're all from New Waterford. Oh, goodness, gracious.

Q. So you go down George Street.

25. A. You go down George Street, the first set of lights, there'd be a street before that, like Falmouth when you come out of the State Tavern, but you'd always be on the right hand side of the road.

30. Q. All right, Jim, you don't have to get too detailed. You go down George Street until you get to what?

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0. MR. MacNEIL, Direct Examination

Where would you turn off George Street?

A. You'd turn off at the tracks.

Q. And when you turn off there that'd take you into what?

5. A. Into Wentworth Park.

Q. Into Wentworth Park.

A. Right.

Q. All right. So then you walk through this park we have in Sydney.

A. Yeah, right.

10. Q. Wentworth Park.

A. Yeah.

Q. Go through the park.

A. Um-hmm.

Q. Across a footbridge?

A. Um-hmm.

15. Q. And up onto Crescent Street.

A. And up on Crescent.

Q. And then continue down Crescent.

A. Like you can go right across on the other side like, the side, but there's no sidewalk when you come up on the bank, you understand what I mean? Like

20. it's the road, eh, but on the other side it's the sidewalk so you cross over the road to get to the sidewalk.

Q. So once you get on Crescent Street then you go down to what street?

25. A. You could - like there was two ways to his place. You could go like up around the front, eh. Something like when you come out on Crescent well you're almost right next to Argyle, right? You know how Argyle runs down like that. So . . .

30. Q. Argyle runs parallel to Crescent Street.

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MR. MacNEIL, Direct Examination

0. A. Yeah, parallel, so you can go right like up that way.

Q. So that's the route you and Ebsary took that night.

A. Yeah, right.

5. Q. So you turn into the park.

A. Yeah, right.

Q. Get over on Crescent Street.

A. Yeah.

10. Q. Now I want you to explain in as much detail as you can remember to the jury what happened then?

A. What happened? We crossed over on Crescent like on the way home there. We were accosted like, we bumped into Mr. Seale and Mr. Marshall and . . .

Q. Did you know them at that time?

A. I didn't know them.

15. Q. You did not know who they were.

A. I did not know them. So they came close to us, like, Mr. Seale was standing right in front of Mr. Ebsary and Donald Marshall just grabbed my arm like that and he put it behind my back up like that and I just frozed. I didn't move, but we were very close together like this.

20. Q. All right, now I just want to stop you at that point. You say you and Marshall were together.

A. Um-hmm. Right.

Q. And Seale you said was in front of Ebsary?

25. A. Right in front of Ebsary.

Q. Yeah. Now how far from Seale or from Ebsary was Seale at that time? How far apart were they, Jim?

A. Very close, only a couple of feet.

Q. And did Marshall say anything to you?

30. A. Marshall never said a word to me. I'm just frozed, I just frozed and I heard Mr. Seale addressing

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MR. MacNEIL, Direct Examination

Ebsary and he said 'Dig, man, dig.'

Q. Did, man, dig.

A. And Ebsary said 'I got something for you' and then all of a sudden . .

5. THE COURT: Wait now, hold on. So far I'm at dig, man, dig. Seale said. What happened then?

MR. EDWARDS: Let's just go back.

A. Yeah.

Q. You and Marshall are there together.

A. Um-hmm.

10. Q. Marshall said nothing to you.

A. He never said nothing to me.

Q. Seale and Ebsary, how far are they from you and Marshall?

A. Just next to us, you know, standing right next to us.

15. Q. Yes. And they're a few feet apart.

A. Just a few feet apart.

Q. And you said that you heard Seale say 'dig, man dig' to Ebsary.

A. To Ebsary, yeah.

20. Q. And then Ebsary made a reply.

A. 'I've got something for you.'

Q. He said 'I've got something for you.'

A. He said 'I've got something for you.'

Q. And when he said 'I got something for you' what if anything did Ebsary do?

25. A. He just come up with his right hand like that.

Q. You're indicating an upward motion.

A. An upward motion.

Q. Yes.

30. A. And at that time I heard him scream, Mr. Seale scream and then Marshall let go of my hand and sort of like

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0. MR. MacNEIL, Direct Examination

come at Ebsary like and there was something like a motion like that and like, you know like there was, he come over at Ebsary with his . .

Q. What did Ebsary do when Marshall came . .

5. A. I don't know, there was some kind of - like, I was so like confused there like, everything was just happening.

Q. You were confused there.

A. I was really confused.

Q. Yes.

10. A. Everything was happening, because I heard the young fellow screaming and I wa's confused.

Q. Now when you heard this scream, could you see what had caused Seale to scream? Did you see anything then?

15. A. I can barely visualize in my mind, I seen him holding onto his stomach and he ran, like that. He ran. P. 508

Q. How far did he run, Jim?

A. Now this is something, I'll tell you he ran about 30 feet.

Q. And then what happened?

A. He just fell.

20. Q. He fell down.

A. He fell down, yeah.

Q. Now I'll back you up just a bit again to where Seale is standing in front of Ebsary at the time he says 'dig, man, dig.'

25. A. Um-hmm.

Q. Now at that moment when he said 'dig, man, dig' where were Seale's hands?

A. Seale's hands were right at his side.

Q. At his side.

30. A. Yeah, they were at his side.

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MR. MacNEIL, Direct Examination

Q. Now what if anything did he have in his hands then?

A. He never had nothing, I never seen nothing in his hands.

5. Q. He never had anything in his hands.

A. No, nothing. I never seen nothing.

Q. I see.

A. Not a thing. His hands were just at his sides.

Q. What tone of voice did he use like when he said 'dig, man, dig?'

10. A. Used the tone like, kind of a high-pitched like you know, like a high pitch. Not like a really violent tone but just like, you know. . .

Q. Not really violent.

A. No, just like a high pitch, like.

15. Q. Now at that point in time, where he said 'dig, man, dig' where were Ebsary's hands?

A. Ebsary's hands, one of his hands was going into his pocket. He said I got something for you. Ebsary's hands were down by his side too and he said I got something for you.

20. Q. Um-hmm. Now between the time that Seale said 'dig, man, dig' and the time that Ebsary made that upward motion, how many seconds passed?

A. Just a split second.

Q. A split second.

25. A. I'd say a split second.

Q. Was there any doubt in your mind what had happened to Seale?

30. A. In my mind at that time I knew that he was hurt, you know, I just - I didn't know what, till I heard - when I heard the scream right away I knew he was hurt.

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0. MR. MacNEIL, Direct Examination

Q. So then when Marshall let go of you.

A. He let go of my arm.

Q. Right. And what happened to him?

A. He came at Ebsary, he came up like that with
5. his hand.

Q. Who came at who first?

A. I think Marshall came after, as a matter of fact I'm positive, Marshall came at Ebsary first.

Q. That was after the scream.

A. Yeah, right.

10. Q. And then what happened to Marshall? Do you recall what happened to Marshall?

A. I don't know what came of Marshall. I don't - I just seen him coming at him and that was it. I don't recall what happened to Marshall after that.

Q. Well, what happened to you and Ebsary?

15. A. We just continued right on to his house, we went up around the corner.

Q. So where was Marshall when you and Ebsary just continued on?

A. I don't know, he just disappeared.

Q. Ran away.

20. A. Yeah.

Q. You didn't see him any more that night.

A. I didn't see him any more that night, no.

Q. Now when you and Ebsary left Crescent Street, where did you go?

25. A. We went right to his place.

Q. That's on Rear Argyle.

A. Rear Argyle.

Q. Okay. How long did it take you to get there?

A. About 15 minutes.

Q. 15.

30. A. Yeah.

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0.

MR. MacNEIL, DIRECT EXAMINATION

Q. And when you got there what did you do?

A. When we got there I walked in and I sat in this, right off the kitchen like and Mr. Ebsary was washing his hands under the sink with a knife.

5.

Q. A knife.

A. And there was an awful lot of blood on his hands. There was an awful lot. I presume it was a pocket knife but I couldn't be sure, but there was so much, there was a lot of blood.

10.

Q. You presume it was a pocket knife but you can't be sure.

A. I can't be sure.

Q. Okay. And when you first went in the house do you remember seeing anybody else there?

A. I was in kind of a hyper . .

Q. Yeah, how were you at that time?

15.

A. I was in a hyper, because you know I heard the fellow scream and it's like a dream that I seen some of his intestines come out of his stomach. You know, so I was really in - I can still see it yet sometimes. And I was hyper. Really hyper.

20.

Q. So what was your answer then when I asked you who did you see in the house when you went in?

A. I don't remember seeing anybody.

Q. You don't remember.

A. No.

Q. So do you remember how long you stayed there?

25.

A. Cripes - I don't know if it was an hour. I can't really be sure how long I stayed there. Maybe it was an hour, I can't be sure.

Q. And when you left I take it you went home.

A. I went home, yeah.

30.

Q. Where were you living at that time?

A. I was living up on 1007 Rear George Street, on

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0. MR. MacNEIL, Direct Examination

Hardwood Hill.

Q. When did you next see Mr. Ebsary?

A. I seen him the next day.

Q. The next day.

A. Yeah. I came down to his house.

5.

Q. Yes?

A. And told him that that young fellow died.

THE COURT: Wait now. You're going fast again.

A. Going too fast. I'm sorry.

MR. EDWARDS: All right, so you went down to his house the next day.

10.

A. Um-hmm. Right.

Q. What time? Do you remember if it was the morning or the afternoon?

A. I don't know if it was the morning or the afternoon.

15.

Q. So you went to his house and you and Mr. Ebsary had a conversation.

A. Yeah, right.

Q. What did you tell him at that time?

20. A. I told him that young fellow died. And he said it's self-defence, but I said you should have gave him the money. I said you should've gave him the money.

Q. You should've gave him the money.

A. Yeah.

Q. And what made you think the young fellow wanted money?

25.

A. Pardon?

Q. What made you think Seale had wanted money?

A. Well, when Marshall put his arm behind my back I knew it was a robbery right away. I figured it was a holdup like.

30.

THE COURT: Wait now, I'm sorry.

I just have one part that I missed, Ebsary said

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0. MR. MacNEIL, Direct Examination

it was self-defence.

A. Yeah.

Q. And you said you should have gave . .

A. Him the money. That's what I told him.

5. MR. EDWARDS: Now Jim, at any time that evening when the four of you, you and Ebsary and Marshall and Seale were on Crescent Street, did Ebsary pass anything over to Seale or Marshall like rings or watches?

A. No, I never seen him passing anything, no.

10. Q. So going back again then to the day after, after you had this conversation with Ebsary about you should've given him the money, how long were at the house that day?

A. I was at the house that day - I didn't stay too long, an hour or so.

Q. Um-hmm. Did you ever go there again?

15. A. No. No, that was it.

Q. That was it.

A. That was it.

Q. Did you and Ebsary remain friends after that?

A. No. No.

Q. Jim, when did you first go to the police?

20. And tell the police.

A. Well, when I first went after I heard that Donald was accused there of - sentenced to jail for stabbing Sandy Seale.

Q. It was after he was sentenced to jail.

25. A. Yeah, right.

Q. So that would've been after Donald Marshall's trial.

A. Yeah, that would be after his trial.

Q. Do you remember what month that was?

30. A. I don't remember the month.

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0.

MR. MacNEIL, Direct Examination

Q. Well, this happened in May of '71.

A. Yeah.

Q. Could you tell us how long after that in months or years?

5.

A. It was after his trial there, a week after his trial.

Q. I see. Okay. So how did you feel between the stabbing, the incident that night in May and when you finally went to the police? How did that affect you?

10.

A. Terrible. Terrible. It affected me terrible, I couldn't sleep, I was walking around. It's something, you know, you'd have to go through it, you'd have to be there yourself to see it, you know. You'd have to be in my shoes to really know how you'd feel.

15.

Q. How did it affect your drinking?

A. It affected my drinking kind of bad there too because I started hitting the bottle after that, real hard, I started hitting the bottle real hard after that.

Q. Thank you.

20.

THE COURT: Cross-examine.

CROSS-EXAMINATION

MR. WINTERMANS: Mr. MacNeil, have you ever been convicted of any crimes?

A. Pardon?

Q. Have you ever been convicted of any crime?

25.

A. Yeah.

Q. What?

A. I was put in jail for being drunk.

Q. When was that?

A. Oh, that was a few times.

Q. Other than that?

30.

A. Nothing. Not that I know of.

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MR. MacNEIL, Cross-Examination

0. Q. Now Mr. MacNeil, you were walking through the park with Mr. Ebsary on your way to Mr. Ebsary's residence, is that correct?

A. Um-hmm.

5. Q. Is that right?

A. Right. Yeah.

Q. And it was quite dark in the park back then.

A. Well, it wasn't really that dark because there was a light, there was a light there. It wasn't really pitch dark.

10. Q. And you continued through the park and you say that you - did you say bumped into Mr. Marshall and Mr. Seale?

A. Um-hmm.

Q. Could you describe where they came from, as far as you can recall?

15. A. Well, they just came up abreast on us there on Crescent Street.

Q. Did they come from in front of you or did they come from behind you?

A. I'd say in front.

20. Q. And were you and Mr. Ebsary standing around on Crescent Street or in the park or were you just walking straight through?

A. No, just walking straight through, going right home.

25. Q. And you were minding your own business, were you?

A. Right on.

Q. And these two held you up, you described it as a holdup.

MR. EDWARDS: No, he didn't.

30. MR. WINTERMANS: Well, he said a holdup, a robbery or a holdup. Is that what you said?

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MR. MacNEIL, Cross-Examination

A. Um-hmm.

Q. And you said that you didn't see any weapon in Mr. Seale's hands, is that right?

A. No, I did not.

5. Q. You don't recall having seen any weapon in his hands.

A. No, I did not. No.

Q. When Marshall put your arm up behind your back, were you afraid at that moment?

10. A. Yes, I was. I was afraid. I just frozed. I was afraid.

Q. Were you afraid that you might be hurt?

A. Yeah, I was afraid.

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

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

15. MR. WINTERMANS: My Lord, might I ask one omitted question?

THE COURT: All right.

MR. WINTERMANS: Is your father alive or dead?

A. My father just died at Christmas time.

Q. Thank you.

20. WITNESS WITHDREW.

25.

30.

514.

0. COURT RECESSED. (2:21 p.m.)COURT RESUMED. (2:46)DISCUSSION

5. MR. WINTERMANS: My Lord, I'm making an application under Section 643.1 of the Criminal Code to read in the testimony of a witness, Brian Doucette, who we have tried to find and he is a person who lived at 120 Crescent Street, the residence where help was sought and the person appears to have disappeared and he doesn't live at 120 Crescent Street. I've had a person try to find him by calling various government offices and there's no sign of his whereabouts.

10. MR. EDWARDS: The Crown is not opposed to the application.

15. MR. WINTERMANS: My learned friend is agreeable to doing that. However, I would ask that his evidence not be read in first because I have a doctor here who has an office full of patients and he's graciously obliged me by coming over here. I'd like to call him first.

THE COURT: So it is your intention then to call evidence.

20. MR. WINTERMANS: It is.

THE COURT: You don't oppose the motion?MR. EDWARDS: I don't oppose . .

THE COURT: Did he testify before? Where did he testify before?

25. MR. EDWARDS: In 1971 at the preliminary inquiry in July of '71, that'd be the preliminary inquiry in Donald Marshall's trial.

30. I guess the only difference is that we don't have a transcript which has not been highlighted so the Crown would be agreeable to Your Lordship reading it in and as we did with Constable Mroz' testimony putting in the

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0. DISCUSSION

transcript as an exhibit. When you think about it, that's all they would get really, if Mr. Doucette was here.

THE COURT: Are the provisions in 643 met?

5. MR. EDWARDS: I'm admitting - there was one there about him being near the area.

THE COURT: Is he absent from Canada?

MR. EDWARDS: Well, I don't know if he's absent from Canada or not, I don't know where he is. He might be deceased.

10. THE COURT: You're admitting . .

MR. EDWARDS: I'm admitting - I'm not contesting the application.

THE COURT: All right, we'll hear it in any event. You're not objecting to it.

Well, we want the jury in now, don't we?

15. JURY RETURNED. (2:50 p.m.)

JURY POLLED. All present.

MR. WINTERMANS: I'd like to make a very short address to the jury.

Ladies and gentlemen of the jury, my name is Luke Wintermans, the lawyer representing Roy Newman Ebsary. I'm a Legal Aid lawyer here in Sydney and with me at the table is Mr. Blair Kasouf who is assisting me in the matter. We've heard a number of witnesses from the Prosecution and I am going to call some evidence, even though I don't really have to, because the . . question comes down to whether or not you believe Donald Marshall telling the truth and nothing but the truth. So to that end, I would like to call a few witnesses and I think that I can show you that if you're not already convinced that he's contradicted himself in previous testimony, that even his testimony which you heard on Friday is wrong in certain parts, and I intend to show that as best

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0.

MR. WINTERMANS ADDRESSES JURY

I can. I apologize that I can't present more evidence but you can understand that this happened an awfully long time ago. So I'd like to call Dr. Ryba.

DR. RYBA duly sworn, testified:

5.

DIRECT EXAMINATION

MR. WINTERMANS: Doctor, could you state your name and address of where you work, please?

A. My full name is Edward John Ryba, I'm an optometrist here in Sydney and I practice at 20 Townsend Street in Sydney.

10.

THE COURT: How do you spell the Ryba?

A. R-y-b-a.

MR. WINTERMANS: And do you know Roy Newman Ebsary?

A. Only on a professional basis.

Q. Do you see him in the court room today?

A. Yes, I do.

15.

(Witness identifies accused).

Q. What is your occupation?

A. I'm an optometrist.

Q. What does that mean? Would you explain that to the jury?

20.

A. I graduated from the University of Waterloo with a degree of Doctor of Optometry in May of '83.

Q. And what does that mean, Doctor of Optometry?

A. My occupation is the diagnosing and prescribing of some aids dealing with eyes, eyesight.

Q. What about glasses?

25.

A. That's part of it, yes.

Q. What do you do in relation to glasses?

A. I prescribe them and dispense.

Q. And did you prescribe any glasses for

Mr. Ebsary?

30.

A. Yes, I did.

Q. When did that take place?

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DR. RYBA, Direct Examination

A. This morning.

Q. This morning? And do you have the results of any examination that you . .

A. I brought my records with me.

Q. Okay. Now what did you do when Mr. Ebsary came in? First of all let me ask you, have you ever examined Mr. Ebsary before?

A. No, I haven't.

Q. You haven't. Okay. So you examined him this morning.

A. Yes.

Q. And what can you say as to his vision without wearing glasses?

A. This morning, 73 years of age, his vision without glasses is 20 over 200 which makes him essentially legally blind, without glasses.

Q. And what does that mean in terms of his ability, if I could put a hypothetical position to you. Let's assume that Mr. Ebsary were in a poorly lighted area and someone within three to five feet in front of him.

MR. EDWARDS: My Lord, I'm going to enter an objection at this point. Surely my learned friend has not yet laid the groundwork for that type of question. What possible relevance has Mr. Ebsary's ability to see at this time in the hypothetical situation, and we're talking about something that happened 14 years ago. Therefore in order for a relevant hypothetical to be put to the witness there's some groundwork that has to be first laid and further I notice that the witness has some documentation in his hand and I would ask that before the witness refers to that, if he does have to refer to it in giving his evidence, that I be given an opportunity to examine it.

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0. DR. RYBA, Direct Examination

MR. WINTERMANS: Certainly, Mr. Edwards, if you'd like to examine those documents.

5. THE COURT: Well, I think that Crown counsel is right, that you haven't laid the grounds for a hypothetical question. I'm concerned about the relevance myself. A person could be blind today but no indication of what he was 15 years ago.

10. MR. WINTERMANS: I was going to ask him to - based on his examination today, whether or not he could give any opinion evidence as to Mr. Ebsary's eyesight in 1971.

THE COURT: Well, do you feel you've qualified him as an expert?

MR. WINTERMANS: Perhaps I should continue on . .

THE COURT: He can't give opinion evidence until he's qualified as an expert.

15. MR. WINTERMANS: Would you go over your qualifications in detail, please?

A. Yes. I studied six years post-secondary, two years prerequisite science at St. Francis Xavier University . .

20. THE COURT: You're going a little too fast and a little too low. I can't hear you. Six years post . . .

A. Secondary education, two years science at St. Francis Xavier University in Antigonish, and four years at University of Waterloo, Waterloo, Ontario.

25. Q. And you told me earlier you graduated in 1983?

A. Correct.

MR. WINTERMANS: And what degree did you say you held?

A. Doctor of Optometry.

30. Q. Doctor of Optometry. And have you ever given opinion evidence in a court of law before?

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DR. RYBA, Direct Examination

A. No, I haven't.

Q. What method of examination did you use this morning in relation to Mr. Ebsary?

5. A. Standard office procedures. The acuity is measured, the Snellen acuity to the chart, and calibrated for the distance which you're sitting. My office happens to be 17 feet so the letters are calibrated for 17 feet.

MR. EDWARDS: I'll admit his qualifications, My Lord.

10. THE COURT: So you admit his qualifications.

MR. EDWARDS: Yes.

THE COURT: Which entitles him to give . .

MR. EDWARDS: To give opinion evidence in the field of optometry.

15. THE COURT: Well, he's qualified then as an expert in the field of optometry.

MR. WINTERMANS: Now let me put a hypothetical situation before you. Assume that Mr. Ebsary is in a poorly lighted area with a person within 3 to 5 feet in front of him.

20. MR. EDWARDS: Objection, My Lord. It's the same objection. He's qualified him but that's only half the battle. He still hasn't gotten from this witness anything about the accused's vision in 1971 and it seems to me he's got to make some relation between the
25. examination done today and the accused's vision in '71 before he can put the hypothetical to him.

THE COURT: I don't see how, counsel, that you can - if your hypothetical is relating to today . .

MR. WINTERMANS: And then I was going to ask him . .

30. THE COURT: That's one thing, but it's a long leap from today to 1971 backwards.

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0. DR. RYBA, Direct Examination

MR. WINTERMANS: It certainly is, My Lord.

Perhaps I should just ask him . .

5. THE COURT: You can go ahead and ask your assumptions, but you're talking about - at this stage you have to be talking about today.

MR. WINTERMANS: Yes. First I'll talk about today. Then we'll go back. Let's assume that Mr. Ebsary is in a poorly lighted area with a person 3 to 5 feet in front of him today. What can you say as to Mr. Ebsary's vision?

A. Is he wearing his glasses or not?

10. Q. He's not wearing his glasses.

A. Today he'd have very much difficulty in recognizing that person at that distance in poor lighting unless the person was familiar to him. In other words if it was a friend he could tell from the outline of the body shape, the hair, possibly the colour of the clothing.

15. Who this person might've been.

Q. And with his glasses on?

A. Much better. A much better chance and probably could, with his glasses on.

20. Q. Now based on your examination of him today can you give an opinion as to Mr. Ebsary's eyesight 14 years ago?

A. Yes, I can.

Q. What can you say, first of all in normal circumstances and without any . . .

25. A. His vision would've been better 14 years ago. From his acuity today I can say that at about that time with two eyes together, vision unaided would've been about 20 over 60 which would be somewhere in the vicinity of 60% vision without glasses.

THE COURT: 16?

30. A. 60.

521.

0. DR. RYBA, Direct Examination

MR. WINTERMANS: And what can you say as to his ability to see in the hypothetical when he was 60 years old?

A. The idea is what do we expect him to see.

5. Q. When you describe first of all generally whether or not you feel you can give a strong opinion on his eyesight at that time.

A. the quality of what he can and cannot see depends on how big an object are you going to ask him to see. Could he see a fire truck or could he see an ant? There's a difference between those two things.

10. Q. Let me ask you first of all, though, whether or not you can give what you would feel a strong opinion.

MR. EDWARDS: Objection. This is his own witness.

THE COURT: You can't . . .

MR. WINTERMANS: I'm just trying to . . .

15. THE COURT: I don't care what you're trying to do. It's your witness and you cannot lead the witness. You can't ask him the question that you just asked him. in that manner.

MR. WINTERMANS: Based on your examination today of Mr. Ebsary, can you give an opinion as to his eyesight in 1971?

20. A. And I said yes, I could.

Q. What do you - could you explain how you could . . .

25. A. Today Mr. Ebsary has corrected 95% vision with his glasses which is pretty much as well as anyone else in this court room today. Now not quite but pretty close to it.

THE COURT: Today he has what?

A. 20 over 25 which is 95%.

Q. That's with glasses.

30. A. With glasses.

0. 522.

DR. RYBA, Direct Examination

And the reason why it's 2200 without glasses is because he is far sighted and far sightedness is one of the things that a body can accommodate for, there's a lens inside your eye which can change shape to focus in the image and as time goes by this lens becomes more and more rigid and loses shape; eventually when someone reaches about 45 years of age they have trouble reading. The lens can no longer change shape and they're holding things away like this and some people here can remember that happening to themselves. Well, for this far sightedness at 60 years of age, there's about one unit of accommodation left and this gentleman is about two units far sighted which means he can accommodate for about half of his correction which would give him vision somewhere in the vicinity of about 20/60.

10.
15. MR. WINTERMANS: Now you're making this, you're basing this opinion on data that you have here today, correct?

A. Correct.

Q. Are you making any assumptions when you talk about his eyesight in 1971?

20. A. Treating him as a generalization if that's what you mean, usual trend to calculate it back, assuming that his prescription hasn't changed much. Usually if there is a change it's for the worse so if anything it would've been better than that at that point in time.

25. Q. Than what it is now, you mean?

A. Yes. His correction, if you look at it, refraction is about +2 today. And in 1970 or thereabouts it may still have been +2 or it may have been +150, +175 but very, very doubtful that it was any more than that. Most changes are for the worse and not for the better.

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523.

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DR. RYBA, Direct Examination

Q. Thank you very much.

MR. EDWARDS: I have no questions, My Lord.WITNESS WITHDREW.

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0. Mrs. Strowbridge called, duly sworn, testified:

DIRECT EXAMINATION

MR. WINTERMANS: Could you state your full name, and address, please?

A. Rowena Dorcas Strowbridge, 191 Bentinck.

5. Q. And that's in Sydney?

A. In Sydney.

THE COURT: Is that Rowena?

A. Right.

MR. WINTERMANS: And do you know Roy Newman

Ebsary?

10. A. I do.

Q. Do you see him in court today?

A. Yes, I do.

(Witness identifies accused).

Q. Can you describe how you know Mr. Ebsary, what your relationship with Mr. Ebsary is?

15. A. I take care of Mr. Ebsary.

Q. You take care of him, do you?

A. Yeah.

Q. How long have you been taking care of him?

A. I was taking care of him since I came to

20. Sydney.

Q. And that was approximately when?

A. Last year, in August.

Q. Last year.

A. '83.

Q. '83, was it?

25. A. Yeah.

Q. And when you say you look after him, what do you mean by that?

A. I see that he gets his meals and that he keeps his appointments with doctors, clean his apartment for him.

30.

525.

0. MRS. STROWBRIDGE, Direct Examination

Q. I see. Now Mr. Ebsary doesn't have any glasses on, and hasn't had any glasses on throughout this trial. Could you tell the jury why that is?

5. A. Mr. Ebsary's glasses were misplaced at the City Hospital. They were on his eyes and they were taken from him and when he was brought back from the hospital he didn't have his glasses and cannot locate them.

Q. I see. Have you taken any steps to try and get glasses for him?

A. Yes, I have.

10. Q. And when did you do that?

A. I contacted D.V.A.

Q. D.V.A.?

A. Right. The Veterans Affairs.

Q. Veterans Affairs?

15. A. to obtain authorization to proceed with more glasses for Mr. Ebsary.

Q. And when did you do that?

A. I received a letter from them one day last week to make an appointment with the specialist, to get his eyes redone.

Q. I see. And when was the appointment?

20. A. For 8:30 this morning.

Q. This morning, was it? And did he receive glasses at that time?

A. This morning?

Q. Yeah.

25. A. No, he hasn't received them today, they order them.

Q. I see. Thank you very much. No more questions.

MR. EDWARDS: No questions, My Lord.

WITNESS WITHDREW.

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526.

0. THE COURT: Thank you. The only comment, Mr. Wintermans, I don't see much relevance in that testimony. We're more concerned with events that happened a long time ago. I don't want to know about his life today, unless it's relevant.

5. MR. DECKER called, sworn, testified:

DIRECT EXAMINATION

MR. WINTERMANS: Could you state your full name and occupation, please?

A. Frederick Roy Blandford Decker, I'm officer in charge of the Sydney Weather Office.

10. Q. The weather office. Where's that located?

A. That's located at the Sydney Airport.

Q. And that's how far from the City of Sydney?

A. That's approximately 10 to 11 miles in a straight line.

Q. I see. Now what are your duties there?

15. A. Well, I administer the office program and at times help with the forecasting program.

Q. Now have you had an opportunity to examine the records of weather in May of 1971?

A. Yes, I have.

20. Q. And do you have the results of that search with you?

A. Yes, I do.

Q. Can you tell the jury what the weather was like on May the 28th, 1971?

A. Any particular time?

25. Q. The evening of May the 18th, 1971. Perhaps you could just go through the weather from say noon, May 28th to noon, May 29th.

30. A. Okay. Okay. These are observations as they were observed at the Sydney Weather Office which is located at the Sydney Airport. Noon on the 28th of May,

527.

0. MR. DECKER, Direct Examination

1971 we had overcast skies with some light rain showers and the light rain showers persisted until approximately 1:45 in the afternoon when it changed to a steady rain and we also had some fog. Now the rain and fog continued through the afternoon into the evening until - one second
5. here now - 8:59 in the evening. At 8:59 in the evening the steady rain changed to just a very light rain and some drizzle and fog was still occurring and this type of condition continued until approximately 11 o'clock at night. From 11 o'clock in the evening of the 28th until
10. midnight it remained overcast with some fog at the airport and starting at about 1:30, 2:00 in the morning the clouds gradually started to dissipate and by 5 a.m. on the morning of the 29th there was just a few clouds in the area . .

THE COURT: 5 a.m. did you say?

15. A. 5 a.m.

MR. WINTERMANS: Now you said that the weather office is out by the airport, is that right?

A. That's correct, yes.

20. Q. And what can you say as to the relation between the weather there and the weather in Wentworth Park in Sydney?

A. Okay, well, I don't have a copy of the weather maps but I was talking with our regional office

THE COURT: You can't tell what anybody said. What you did as a result of any conversations.

25. A. I beg your pardon, Your Honour?

THE COURT: You can only tell what you did as a result of any conversations.

A. Okay.

THE COURT: Or saw, or observed.

30. A. As a result of conversation with my regional office, I've come to know what the weather pattern was.

528.

0. MR. DECKER, Direct Examination

MR. EDWARDS: Objection. He's just telling us in another way what the regional office told him.

THE COURT: Yes, you're going to have to be careful at this stage.

5. MR. WINTERMANS: All right. Can you answer the question . . .

THE COURT: Without any reference to . . .

MR. WINTERMANS: Without any reference to the conversations you may have had.

10. A. Okay. From looking at the records that I have in front of me, if one looks at the weather that was reported at the weather office and the type of winds and the direction of winds that we were getting at that time, it would indicate that there was a low pressure area that was giving us the weather and not just an isolated, this wasn't just isolated showers or anything, it was a weather system that was fairly
15. broad in area and I would say that this weather associated with the low pressure area encompassed all of Cape Breton Island for the day time, and as evening started to - as it progressed later into the evening and the low moved away towards Newfoundland, the
20. weather would gradually improve starting at the western part of Cape Breton, let's say the Canso area and it gradually moved eastward as the evening progressed. And then as it moved further out of our area by 5 o'clock in the morning of course our weather had substantially
25. improved, in fact very near clear conditions.

THE COURT: Gradually moved in which direction, westward did you say?

A. I beg your pardon?

THE COURT: The system gradually moved westward?

30. A. No, the system moved eastward, it cleared from the west. The weather itself cleared from the west.

529.

0. MR. DECKER, Direct Examination
MR. WINTERMANS: Can you say what the weather was like in Wentworth Park from May 28th, 1971 at approximately 10:00 p.m. until 1:00 a.m. based on your records there?
5. A. Based on what I have right here I would expect the weather to be in the Sydney area proper, Sydney proper, to be overcast with some very light drizzle, perhaps a little bit of very light rain. That's what I would expect the weather to be.
Q. Thank you very much. No more questions.
10. THE COURT: Cross-examine?
MR. EDWARDS: Yes, My Lord, if I could just have a moment, please. I believe in your direct testimony, Mr. Decker, you stated that the fog and drizzle stayed till 11 p.m. and then between 11 and 12 it was overcast with some fog at the airport.
15. A. Yes, that's correct.
Q. And the clearing was coming from the west.
A. That's correct.
Q. And Sydney is albeit slightly west of the airport.
20. A. Yes. That's true.
Q. So between 11 and 12 midnight, isn't it possible that it was fairly clear in Sydney at that time?
A. I wouldn't expect it to be clear. I would expect to see the conditions clearing in Sydney quicker or earlier than what they did at the airport.
25. Q. Than what they did at the airport. So it's possible then that if at midnight there was a slight drizzle at the airport, that it might be marginally better in Sydney?
A. Marginally better, yes.
30. Q. Thank you.

530.

MR. DECKER, Re-Examination

0. MR. WINTERMANS: Mr. Decker, how fast was this weather moving?

A. With what I have here it is impossible to say exactly.

Q. Thank you.

5. THE COURT: Thank you, Sir.

WITNESS WITHDREW. _____

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0. DAVID RATCHFORD duly called, sworn, testified:

DIRECT EXAMINATION

MR. WINTERMANS: Would you state your full name and address, please?

5. A. David Franklin Ratchford, I live at 296 Charlotte Street.

Q. In Sydney, is it?

A. Yes.

Q. And what is your occupation?

A. I'm a writer and an actor.

Q. A writer and an actor?

10. A. Yes.

Q. Now do you know Donna Ebsary?

A. Yes, I do.

Q. And when did you first know her?

15. A. I met Donna in the early part of 1974. She was a student at Sydney Academy at the time and I met her while giving a lecture to a group of students there one afternoon.

Q. What were you lecturing?

A. I was lecturing them on physical fitness and more specifically to one area of the Martial Arts system.

20. Q. And could you explain to the jury what your qualifications are in respect to Martial Arts?

A. Yes. I practiced Martial Arts since I was approximately 14 years old and . . .

25. MR. EDWARDS: My Lord, objection. He's on direct, but is this relevant? Unless he's going to qualify him to give opinion evidence in the Martial Arts . . .

MR. WINTERMANS: No, I'm just . . .

THE COURT: You're stretching relevancy pretty much.

30. MR. WINTERMANS: Okay. Did you have any kind of a school in 1974?

532.

0. D. RATCHFORD, Direct Examination
 A. Yes, I did.
 Q. What kind of a school was that?
 A. It was a school for Martial Arts, physical fitness and health.
5. Q. And where was that located?
 A. At 274 Charlotte Street.
 Q. In Sydney.
 A. Uh-huh.
 Q. And did you - you were saying how you first met Donna Ebsary, were you?
10. A. Yes.
 Q. And that was when you were giving a lecture at . .
 A. At the Academy.
 Q. Sydney Academy where she was a student?
 A. Yes.
 Q. And did you get to know her any better after that?
15. A. Yes, I got to know her very well after that. She remained a student with me for over 7½ years.
 Q. I see. And did she ever tell you . .
- THE COURT: Wait now. You want to be careful. You're leading, and think about your question so that it's not leading. You can ask him what if anything she told him.
20. MR. EDWARDS: My Lord, if I may rise on that point. I would submit that that would be the case had he put to Donna Ebsary on the stand, when she was on the witness stand in cross-examination he had said to her now you told David Ratchford X, is that correct, and she said no, I told him Y. Well, now if he was calling David Ratchford to say that she did in fact say X, that would be legitimate, had he put it to her. But my recollection is, all he asked Donna Ebsary was whether or not she had ever confided in David Ratchford and as I recall, her answer
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D. RATCHFORD, Direct Examination

was yes. And secondly, the other point I think with respect to Ratchford, he asked her whether or not she had ever accompanied Ratchford to the police station and her answer to that was 'no.' On the second point
5. it would be legitimate for him to ask Mr. Ratchford about that, but the conversation, it's not fair to Donna Ebsary.

THE COURT: Yes, I understand that.

MR. WINTERMANS: What I proposed to do, My Lord, was to put . .

10.

THE COURT: Well, wait now. I don't know how far this will go on. I think the jury should be removed.

JURY RETIRED.

15.

MR. WINTERMANS: What I was going to ask the witness, My Lord, was whether or not he had had conversation with Donna Ebsary concerning the night of May 28th, 1971, the night Sandy Seale died.

THE COURT: Okay. All right.

MR. WINTERMANS: Then I was going to ask did Donna Ebsary tell you what James MacNeil said when he entered the house.

20.

THE COURT: First, he's your witness and aren't you leading him, to start off with, and secondly, if he says what Donna Ebsary says, is it not hearsay?

MR. WINTERMANS: Well, it's a prior inconsistent statement is what I'm trying to . .

25.

THE COURT: Yes. By whom?

MR. WINTERMANS: By Donna Ebsary.

THE COURT: You can't do it that way.

MR. EDWARDS: That's right.

30.

THE COURT: This witness didn't make any prior inconsistent statements that I know of yet.

534.

0. DISCUSSION

You should have asked Donna Ebsary what she said. And then if she indicated what she said, and you came along with another witness and you say what did she say, presume you got over all other hurdles, what did she tell you? And the witness gave some different answer then you might have some grounds for it, but what grounds have you got for it now?

5. MR. WINTERMANS: Yes. Fine, My Lord.

THE COURT: You didn't ask her what she said. I checked back on my notes and the note I have is that she confided in him. You don't disagree with that, do you?

10. MR. WINTERMANS: No.

THE COURT: You don't disagree that that's what my note is correct, that's what she said.

MR. WINTERMANS: No. Well then, there are no more questions of this witness.

15. THE COURT: Well, you can't ask . .

MR. WINTERMANS: Well, I could ask one, I suppose.

THE COURT: Well, you can ask any question when the jury is here that hasn't been objected to or isn't objected to, but you cannot ask this witness what she said to him in the circumstances as they exist here. Because we have no knowledge of what she said to him and she has already testified. The system just would not permit that.

20. All right. Call the jury back.

25. JURY RETURNED.

JURY POLLED. All present.

MR. WINTERMANS: No questions, My Lord.

THE COURT: Any cross-examination?

MR. EDWARDS: No, My Lord.

30. THE COURT: All right, thank you, Sir.

WITNESS WITHDREW.

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0. DISCUSSION

MR. WINTERMANS: Well, My Lord, I would ask that Your Lordship read in the evidence of Brian Doucette from the Preliminary Inquiry evidence which he gave in 1971 in relation to the Donald Marshall charge of murder.

5. MR. EDWARDS: The Crown agrees, My Lord.THE COURT: All right.

MR. WINTERMANS: I have a copy, a Xerox copy which my learned friend has graciously agreed that Your Lordship will follow.

MR. EDWARDS: Could read in.10. MR. WINTERMANS: Could read in from. I apologize for the condition of the transcript, it's a rather old one and you'll note what appears to be print on the bottom of the first page but what it really is is a trace through from the next page, so apparently the paper must've been really thin.15. THE COURT: I'll just have a look at it. The bottom of page 44 has something on it which is illegible.

MR. EDWARDS: That's correct, My Lord. It's simply a reprint from the next page.

20. THE COURT: I see what it is. It shouldn't be on there.MR. EDWARDS: That's right.

MR. WINTERMANS: There are some other spots on the transcript too that are like that.

25. THE COURT: I just want to see that I can read it, that's all.

MR. WINTERMANS: My learned friend also has a transcript of the same and perhaps his might be better, My Lord. If Your Lordship would like to . . .

30. THE COURT: I'm all right to the top of page 47. There's a question there, it looks like 'do you know what'

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0. DISCUSSION

and something 'it was' and can you tell me what that question is?

MR. EDWARDS: 'Do you know what doctor it was?'

5. THE COURT: All right. Members of the jury, there was a witness, Brian Doucette who testified at the Preliminary Inquiry of the original trial back in 1971. That person is unavailable now and I have been asked by counsel for the Defence to read his testimony in as part of the testimony in this case and counsel for the Crown has agreed that it can be read in.

10. The witness is Brian Doucette. He was sworn, and then questioned as follows:

"Q Your name?

A. Brian Doucette.

Q. Where do you reside?

A. 120 Crescent Street.

Q. The City of Sydney, County of Cape Breton, Province of Nova Scotia?

15. A. Yes, Sir.

Q. Were you at home on the 28th day of May, 1971?

A. Yes, Sir.

Q. Can you read a plan, Sir?

A. Yes, Sir.

Q. I show you Exhibit M-1.

20. Can you show His Honour where your home is on that plan?"

(and then he indicates on the plan).

"Q. That is the house on the east side of the Crescent Apartments?

A. Yes.

25. Q. And you were there during the late evening hours at your house?

A. Yes.

Q. What if anything took place, Sir?

30. A. Between 11:30 and 12:00 I was sitting watching television and I heard two

TRANSCRIPT OF B. DOUCETTE READ

0. voices in our front porch
and I proceeded to go see
who was there, and they
knocked on the door. I
opened the door and they
asked to call an ambulance.
5. Q. Who was it, do you know?
A. Mr. Marshall and there was
a young fellow with him.
Q. Donald Marshall was there
when this conversation
took place?
A. Yes.
Q. What did they ask?
A. They asked if I would call
an ambulance.
10. Q. What did you do?
A. I asked them what happened
and they said there was a
person lying over there
hurt, please call an
ambulance, and I said I
will call the police first
and ask for an ambulance
later, after the police were
called.
15. Q. And then what took place?
A. After I phoned the police
station I proceeded to go
outside over to where the
victim was lying on the
street.
20. Q. What took place while you
were there, if anything?
A. There was a young fellow
down alongside of him
comforting him.
Holding him down, and I
proceeded to keep him
still. He tried to get
up, I held him in place,
then we waited for the
ambulance to arrive.
25. Q. Did the ambulance arrive?
A. Yes.
Q. What took place then?
A. We proceeded to put him
on the stretcher and we
put him in the ambulance
and I went in the ambulance
to the hospital with him.
- 30.

538.

TRANSCRIPT OF B. DOUCETTE READ

0. Q. What happened at the hospital?
- A. He was taken to the Outpatients room where his clothing was removed and a doctor was present.
5. Q. Who was removing his clothing?
- A. Leo Currie, the doctor, orderly and I.
- Q. Do you know Mr. Leo Currie?
- A. Yes.
- Q. What is his occupation?
- A. He operates an ambulance service.
10. Q. Did you remain there until someone else arrived?
- A. I remained there until the commissionaire came in and told me to leave.
- Q. Were you there when the doctor arrived?
- A. Yes.
- Q. Did you see that doctor give evidence here today?
15. A. Yes.
- Q. Do you know what doctor it was?
- A. I don't know his name."

THE COURT: Now those questions were asked by . .

MR. EDWARDS: Mr. MacNeil.

20. THE COURT: Mr. MacNeil. And Mr. Rosenblum, I presume this is cross-examination?

MR. EDWARDS: Yes.

THE COURT: Mr. Rosenblum on cross-examination was questioning the witness:

25. "Q. Did you notice any wound on Mr. Marshall?
- A. Yes, he showed a wound on his arm when he came to the door.
- Q. A long cut, from the wrist to the elbow?
- A. Yes.
30. Q. Was there any blood?
- A. There was no sign of blood.

539.

STATEMENT OF B. DOUCETTE READ

0. Q. But this cut was noticeable and it appeared to be very recent?
A. Yes.
- Q. It was Marshall who asked you to call the ambulance, was it?
5. A. And the young fellow with him.
Q. Do you know who the other fellow was with Marshall?
A. No.
Q. Do you see him here today?
A. Yes.
Q. Was he already a witness?
A. Yes.
Q. Did Marshall remain there until you made the phone call?
10. A. No, they left as soon as I went to the phone and closed the door.
Q. When you came to where Mr. Seale was lying on the ground, was Marshall there then?
A. No.
Q. Did you see Mr. Marshall any time after that, after he requested that you call an ambulance?
15. A. Yes, when I was coming out of the house I seen him taken in the police car.
Q. Were the sleeves of the jacket Mr. Marshall was wearing rolled up?
20. A. It seemed like one of them was, the one with the cut.
Q. Were you outside of the house when the ambulance arrived?
A. I was alongside of Seale when the ambulance arrived, yes.
Q. Who arrived first, the police or the ambulance?
25. A. The police.
Q. Was Marshall there when the police arrived?
A. I was on the phone when the first police car arrived.
Q. You saw him getting into the police car anyway?
A. No, I didn't see him get in.
30. But when I was going out the

540.

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STATEMENT OF B. DOUCETTE READ

front door of my home
I saw him in the police
car.

Q. It would appear to you
he remained there until
the police arrived?

5.

A. Yes.

Q. Were you close up to
Marshall when he asked
you to call the ambulance?

A. Yes.

Q. Was there anything to
indicate the use of liquor?

A. I did not notice at the time.

Q. Did you smell liquor off his
breath?

10.

A. No, I didn't."

THE COURT: And that was the testimony of Brian
Doucette, which is now part of this trial as is the
testimony of Constable Mroz which I read earlier. You'd
better mark it as an exhibit, Mr. Wintermans.

15.

MR. WINTERMANS: Yes, My Lord.

MR. EDWARDS: I have no objection, My Lord.

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MRS. MERLE DAVIS called, sworn, testified:

DIRECT EXAMINATION

MR. WINTERMANS: Could you state your full name and occupation, please?

A. Merle Faye Davis, Registered Nurse.

5.

Q. Speak up a little bit please.

THE COURT: Sorry, Merle is it?

A. Yes. M-e-r-l-e.

MR. WINTERMANS: Merle Faye Davis, is that right?

A. Yes.

Q. And what is your occupation?

10.

A. I'm night supervisor at the City Hospital.

Q. And which City Hospital is that?

A. Sydney City Hospital on Hospital Street.

Q. And what was your occupation in 1971, May 28th, 1971?

A. I was acting night supervisor.

15.

Q. At the City Hospital?

A. At the City Hospital.

Q. In the City of Sydney.

A. Yes.

Q. And do you recall having seen Donald Marshall that evening?

20.

A. Yes.

Q. Do you recall what the circumstances were on seeing him?

A. Well, I remember him being brought in and he had a laceration on his left arm.

25.

Q. When you say a laceration, what do you mean?

A. Well, it's a tear or break in the skin.

That's what a laceration is.

Q. And did you notice anything about the laceration, the cut?

30.

A. Nothing unusual, no. It was approximately 3"

542.

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MRS. DAVIS, Direct Examination

long.

Q. Three inches long.

A. And it was what we would call superficial.

Q. Superficial. And . . .

5.

A. It wasn't bleeding at the time, it was just, you know it was just the skin was broken.

Q. It was not bleeding?

A. It was not bleeding, no.

Q. Was there any sign of blood at all?

A. No.

10.

MR. EDWARDS: Objection.

THE COURT: That's pretty leading.

MR. WINTERMANS: All right.

MR. EDWARDS: You're on Direct now, Sir.

MR. WINTERMANS: What can you say as to - you said it wasn't bleeding. Can you be any more specific than that?

15.

A. Well, it was just an open, a very superficial open wound. There was no blood so I just left him there until the doctor came to suture him.

Q. Did you also have occasion to see Sandy Seale that night?

20.

A. Yes.

Q. And what can you say if anything about what you had done in relation to him?

A. Well, he was brought in, very shocky, he was complaining of pain. He had a wound in his abdomen and part of the bowel was protruding through the wound, probably about the size of my fist.

25.

Q. Do you recall him having said anything at that time?

A. No, Sir, he didn't.

30.

Q. That's alal the questions I have.

0. 543.

THE COURT: Cross-examine?

MR. EDWARDS: Yes.

CROSS-EXAMINATION

MR. EDWARDS: Mrs. Davis, as far as you know
Donald Marshall's arm was sutured?

5. A. It was apparently sutured. I was not there
when it was done.

Q. Yes. Who treated him, Doctor Virick?

A. Yes, Sir.

Q. Thank you.

THE COURT: Any re-examination?

10. MR. WINTERMANS: Nothing, My Lord.

THE COURT: Did you say none? All right.
Thank you.

WITNESS WITHDREW.

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544.

0. DISCUSSION

MR. WINTERMANS: My Lord, my next witness is a witness who could not be here until tomorrow. I have a message that he will be here at 9:00 tomorrow morning.

5.

THE COURT: Well, he'll have to sit and wait till 9:30 because I'm not coming until 9:30 tomorrow morning.

MR. WINTERMANS: And since it's . .

THE COURT: Is he your last witness or do you have other witnesses?

10.

MR. WINTERMANS: He's the last witness I intend to call. Perhaps since we started at 1:30 the jury is getting a little tired now anyway.

COURT ADJOURNED. (3:50 p.m.).

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0. DISCUSSION

MR. WINTERMANS: My Lord, my next witness is a witness who could not be here until tomorrow. I have a message that he will be here at 9:00 tomorrow morning.

5.

THE COURT: Well, he'll have to sit and wait till 9:30 because I'm not coming until 9:30 tomorrow morning.

MR. WINTERMANS: And since it's . .

THE COURT: Is he your last witness or do you have other witnesses?

10.

MR. WINTERMANS: He's the last witness I intend to call. Perhaps since we started at 1:30 the jury is getting a little tired now anyway.

COURT ADJOURNED. (3:50 p.m.).

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COURT OPENED - JANUARY 17, 1985 - 9:30 a.m.

JURY POLLED - ALL PRESENT

THE COURT: Mr. Wintermans?

(10) MR WINTERMANS: Yes Milord, I might indicate at this time that the Defence is resting, decided not to call any further evidence, prepared to begin the summation.

THE COURT: Any rebuttal evidence?

MR EDWARDS: There is not, Milord, no.

(20) THE COURT: All right, the evidence is now closed and we'll move into the next phase of the trial which is the address of counsel to the jury. Now, before we start and for the audience, what we will do is we will.. one counsel will make his address and then we will have a short recess and the other counsel will give his address and the practice that we're following is that nobody leaves and nobody comes in during the address of counsel to the jury. That's just so the jury will not be distracted. So if there is anyone who intends to leave in five or ten minutes, they'd better leave now. All right. Well you've presented evidence, Mr. Wintermans, so you go first.

(30) MR WINTERMANS: Ladies and gentlemen of the jury, my name is Luke Wintermans and it's been my privilege to represent Roy Ebsary in relation to this matter. As jurors, you have a very great responsibility in this case to see that justice is done. It's a difficult case in some respects because it happened such a very long time ago. On the other hand, because of the way that the evidence has come out in this case, I feel that it's a rather simple matter and that I don't think that you as jurors will have very much difficulty. I apologize for my feeling nervous, but this case has taken a long time..it's been very difficult. Fortunately our law does not require that the person accused prove to a Court that he's innocent,

otherwise in a case like this it would be extremely difficult given that it happened such a long time ago. People, as you probably know from your own experience, are very wary of getting involved in things like this. Their memories are very shaky after such a very long time and therefore, I feel very..quite confident that you will not place any burden on the Defence to prove

(10) anything. The burden of course is on the Crown to prove beyond a reasonable doubt that..that Mr. Ebsary is guilty of something here. I would like to refer to my notes. I apologize for doing so. As I say, jurors often have a very difficult task to perform, but I feel that your task in this case is quite simple because this is a clear case of self defence. Your duty is to determine the facts; the Judge will instruct you as to the law. The central question in this case - I believe this is the central question; and that is, was there

(20) a robbery or wasn't there? Or should I say, might there have been a robbery? And that was really the key question here. A robbery is defined as an assault with an intention to steal. In other words, an assault is when violence or threats of violence is applied to a person of another..of another person or threat. So an assault with an intention to steal. No weapons are required. The burden of proving that it was not self defence is on the Prosecution. In order to find Mr. Ebsary guilty, you must be convinced beyond a

(30) reasonable doubt that James MacNeil and Mr. Ebsary were not attacked. The law does not require Mr. Ebsary to prove anything. The bulk of the evidence in this case points clearly to robbery. Only Donald Marshall says there wasn't a robbery. His testimony on that point is not supported by any other witness. His testimony that there was no robbery is not even supported by his own previous testimonies in several previous hearings. Donald Marshall is not on trial here. It is acknowledged that Roy Ebsary most likely

- (10) stabbed Sandy Seale. All the evidence supports that, but the stabbing of Sandy Seale was not a crime because it was done in self defence. You may feel Mr. Ebsary made a mistake; you may feel that he might not have been himself killed or even beaten up, but you must find him not guilty if you allow that he might possibly have thought that he would be beaten up or injured - that's the law. The law says clearly that a person may cause death if he is in possible danger of being beaten up. A finding of not guilty does not require the finding that Donald Marshall is definitely lying. If you allow for the possibility that Marshall might be lying on the question of his intentions that night, then you must find Mr. Ebsary not guilty. Clearly that possibility exists. Remember, you can believe all, part or none of a witness' testimony. If you have any doubt, it is your sworn duty to resolve
- (20) that doubt in favour of Mr. Ebsary's innocence - that principle applies to every piece of evidence, not just the question of guilt or innocence. So for instance, if you're not sure who is telling the truth as between James MacNeil and Donald Marshall, then you must find the James MacNeil account is the truth because that's.. that's resolving any doubt in favour of the innocence of the accused. Now I'd like to review the evidence, the testimony of the witnesses as briefly as I can. First of all, you heard from Mr. and Mrs. Seale -
- (30) their evidence was that with respect to a coat or a jacket that no longer exists, but the coat that Mr. Seale was wearing. The important evidence from them, I suggest is in relation to the size of..of Mr. Seale - surely a person's father knows exactly how..what..what his son's size is. His father said that Sandy at that time was 17 years old, five foot, eight and a half, and between 158 and 162 pounds - that's five foot, eight and a half, 158 to 162 pounds - that he was very strong, that he was in very good shape. Roy Gould testified

- that he took Donald Marshall from the Halifax area where they had been for a few days to the reserve or ah..MicMac Reserve on the outskirts of Sydney and not to the liquor store. Staff Sargeant Wheaton testified and he confirmed that only two visits by the R.C.M.P. were made to Ja..to Donald Marshall at Dorchester and that they were a couple of weeks apart. He..his evi-
- (10) dence also was that he picked up these ten knives from the Ebsary residence in 1982 and sent them to the lab. Now, one important point to note with respect to the testimony of Staff Sargeant Wheaton is that you will recall that Donald Marshall tried to say and did say that his statement to the R.C.M.P. that he made when he was in Dorchester was..was not true and that he was in some way pressured or told or something to..to say that there was a robbery and you'll recall that.. that he didn't explain anything about his sources.
- (20) Corporal Carroll who testified after Donald Marshall - he said that..that there was nothing told to Mr. Marshall that only..only he had possession of the..the R.C.M.P. files and that although there was a letter from a lawyer for..for Donald Marshall that shortly before the visit to Dorchester, there was absolutely no mention of James MacNeil who you'll recall went to.. to the police right after Donald Marshall was found guilty and told his story on..about the robbery. So the point is that Donald Marshall could not have known,
- (30) there was no way that Donald Marshall knew anything about what James MacNeil had said or anything about anybody saying a robbery. Of course the burden is on the Crown to prove that in fact Mr. Marshall did have some information from somewhere. The Crown could have brought that out through Staff Sargeant Wheaton who was not recalled to the witness stand. If there was any evidence that Marshall could have known about MacNeil's statement, he would have known and he was not called back by the Prosecution - that's an important

- point to remember. Now, Greg Ebsary testified that his parents separated in 1979 or 1980. In 1971, the family lived at Rear Argyle Street and around 1974, moved to Mechanics Street. He says that Roy was in better shape back in 1971 than he is now. Well if you look at Mr. Ebsary now, I'd suggest that that's not saying a whole lot. He testified about how the
- (10) ten knives that you see before you here were all over the house for about ten years before the police took them. Ah in use all over the house, in the kitchen, the dining room, upstairs - his letter opener ah...I think that is an important piece of evidence in relation to any suggestion that any of these knives was involved, but the whole question of the knives I suggest to you is meaningless and irrelevant anyway because it doesn't matter what knife it was. But he testified that the knives were still in use until the 1980's at
- (20) some point when they were put into a basket and down into the basement where they stayed until the police came. He testified that his father worked, that he was..he is..he was five foot, two, a little stockier than he is now - that's back in 1971. Mr. Mac Alpine from the R.C.M.P. lab testified that he examined all of these knives for blood and he said there was absolutely no sign of blood on any of them, but that ..that fresh blood could be..be very easily washed off under water, so his evidence doesn't help us.
- (30) Next, I'd like to deal with Maynard Chant's testimony. Maynard Chant admitted that, in 1971, he testified that he actually saw Donald Marshall stab Seale and now he says that he didn't. I suggest that his credibility is somewhat questionable. He is coming to court in 1971 and swore under oath that he saw another person murder someone and when it wasn't true, certainly he would have some guilt feelings about that and I suggest, a tendency to..to want to help Donald Marshall at this point in time. He testifies

- that he missed the 11:45 bus and around midnight he bumped into Donald Marshall who was running towards him. He and Marshall then ran into two couples and then they started looking for help, flagged down a car, got in, drove around and..and then got out of the car on Crescent Street near where..where Seale was lying. Mr. Chant says that he put his shirt on
- (10) Seale before the police came. He testified that at the time he was 14 years old in Grade 6, that he had repeated Grades 2, 5 and 6. As I say, he probably feels guilty over what he's already done to Mr. Marshall. But nevertheless, Mr. Chant does give us one interesting piece of evidence and that is, he says that Marshall was standing behind Sandy Seale and that Sandy Seale could not see Marshall from that angle. And I ask you to consider why. He testifies.. Mr. Chant testifies that five minutes later the
- (20) ambulance arrived to him. His evidence is totally wrong on that when you consider Police Officer Mroz's testimony that first the police came and then it was 20 or 25 minutes before the ambulance came, but.. Next I'd like to deal with Donna Ebsary's evidence. She describes her father as bigger than her brother, Greg, does. She said that he weighed about 160 pounds at the time. Well, you have the photograph which Mrs. Ebsary says was taken around 1971 and I think you can figure out for yourselves that if he was
- (30) five foot, two, and as lean as he appeared in that photograph, then certainly that evidence is totally off. And I pointed out to her that she had said in 1982 in another hearing that he was slight with no meat on his bones and a typical little old man. There's an obvious contradiction there. Anyway, she goes on to say that her father was in good shape, that he walked every day, that he worked every day and..and drank a lot on his off time; that he liked to call himself Captain because he worked on ships

- and reverend because he had studied the bible a lot and later received the title, reverend. She says that he was good at fixing things and she described how he had fixed some of those knives that you see before you. She says that she remembers the night of May 28, 1971, being in the living room watching the news on television with her mother when Roy and James
- (10) MacNeil came home...I'm not sure what she said on the time - I believe she said something like 11:00 or 11:30, perhaps I will..the Judge has better notes on that than I do. Anyway I pointed out that previously she said, between..some time between 10:00 p.m. and 12:00 midnight and then she explained that she is now relating the time to when the news was on television. Well there's no evidence of exactly when the news was on television, but.. She said that James MacNeil was very excited or hyper and said to her
- (20) father words like, "You did a good job back there." And I point that out - I'd like you to consider that she was 13 at the time and the words, "You did a good job back there," is a positive statement - I'd just ask you to consider that, it's positive, okay. I..I doubt very much that her recollection is perfect on that. And then she says her father went into the kitchen and MacNeil and her followed and she saw him washing what appeared to be blood off a knife that she describes as having had a brown handle. She
- (30) said, "It wasn't any of the ten knives that we have on the table." But ah..she looked at Knife Number 8 and said that it looked like it might be the same size blade. I pointed out that she had said in 1982 that she wasn't as sure as she was sitting here that it was blood as she says, she never had it analyzed. I would remind you that she was only 13 at the time. Dr. Naqvi testified (he's the doctor who saw Seale), he was relying on his notes to a great degree, but he said that some time before 2:00 a.m. Dr..or Mr.

- Seale was brought in, there was only one stab wound which is a very important factor. He was in bad shape, he lost a lot of blood, he did two different operations and at 8:05 p.m. on May the 29th, Sandy Seale died of hemorrhage and shock. So he was in the hospital for about 18 hours or so before..before passing away. He indicated that the minimum length
- (10) of a knife, if it was a knife, to cause the wound would be three inches and that's important. He said, the maximum it could be anything. And if it was from a knife, it was one stab three inches deep maybe although he admits that it wouldn't..there was no measurement done, he was more concerned of course about trying to save Mr. Seale's life. He also explained - perhaps you as jurors are concerned that it must have been a gigantic hole in Mr. Seale in order to have his intestines coming out - but the
- (20) Doctor explained that a hole going right through into.. went through the abdominal cavity would cause the pressure from inside to force the..the small intestines out and so there's no indication of..of there having been a huge hole or anything like that and the fact that this horrible description does not mean that.. that..that there was a large gash in..in the young man at the time - so it would appear a lot worse than perhaps it really was. He indicated that he had done about 15,000 operations and that he was just going
- (30) by his records. There was no autopsy which is unusual. There..no pictures were taken, no measurements were made and there was no suggestion that there was a particularly large injury. Next I'd like to deal with Mr. Evers' testimony, he's the R.C.M.P. Hair and Fibre Expert. He indicated that he examined these ten knives. He said that four of the knives had no fibres, that six had some..one or more fibres - he couldn't positively identify any of the knives as being the knife used. Of course you have to remember

- that he had ten knives that had been in various places over an eleven-year period, with varying uses. He did indicate that Knife 8 had more fibres than the rest, but he also said that it had fibres that were not from either of the..of the coats. He could say..he couldn't say that any of these knives were used. I remind you that Donna Ebsary also said that none of
- (10) these..these knives was the same. I also remind you that there were no yellow fibres found at all and that of course the jacket that Marshall was wearing was yellow. That all the fibres that were found, it's very possible that they came from other sources than..than from the two jackets because they were kind of materials and clothing during the 1960's and 1970's. So I suggest to you that with respect to all..all the knife evidence, so what? It doesn't prove anything. And furthermore, who cares because it
- (20) doesn't make..doesn't matter what knife was used. Next I'd like to deal with Corporal Carroll. Corporal Carroll, the R.C.M.P. for some 20 years, testified that he took over this..the re-investigation in 1982, that he had all information from all sources, that he..that only the R.C.M.P., no other police officer from any other police force were involved in the matter. This was all of course before the Donald Marshall interview at Dorchester. He testified that he had seen Mr. Ebsary on several occasions between
- (30) February and October of 1982, that Mr. Ebsary was often drinking, under the influence of alcohol. That he describes October the 29th, 1982 when the tape recorded statement, which was played for you, was taken - he says that it was late morning, Mr. Ebsary had obviously been drinking wine before and that, I believe he said that he actually was drinking during or after..I believe after the..the interview. He also indicated that Mr. Ebsary was crying at a couple of points during..during the re-

ording. The really important part of Corporal Carroll's evidence was that he was in charge of the investigation of the Seale death since 1982. He had all the files and information from the 1971 investigation right through to the present. He established that Donald Marshall could not have known about James MacNeil's statement in 1971 - that they were robbed. Because

(10) no other police officer from the R.C.M.P. or any other force visited Marshall before the 1982 statement and no civilian would have had access to his files. The letter from Marshall's lawyer dated January, 1982, said nothing about James MacNeil or robbery although Ebsary's name was mentioned. Carroll says that the robbery story came from Marshall and the facts of the investigation were not made known to Marshall before that. This is very important; because it contradicts any suggestion that Marshall was told about the

(20) robbery story before the 1982 statement he gave and remember one thing - the burden is on the Prosecution to prove that he did know and the Prosecution had the opportunity to..if there was any question, they could have recalled any of your witnesses or they could have called any new witness, but they didn't. And the reason is because they can't prove it. Even Marshall did not say where or why or anything - I'll tell you why he told that story in 1982 - because it was the truth. He had his opportunity to explain it and he couldn't explain it. And Corporal Carroll had

(30) an opportunity to explain it and he couldn't explain it. Therefore, Marshall did not know anyone else had described the robbery and therefore the statement is most likely true. Now I'd like to deal with Constable Mroz's testimony which was read to you by the Court. And one thing he does is he describes the size of Mr. Seale as being about 5'6", between 5'5", 5'7" and he says 5'6", that he was slight, but in good shape and a good athlete. Now one thing that..

(10) that I would like to be able to say concerning Constable Mroz - when he says, slight, it's unfortunate that we haven't been able to see Constable Mroz, he's passed away, but Constable Mroz is a..if I could say, robust man or was a robust man himself, so when he says slight then perhaps that could be taken into account. He says that he was a Sydney police officer for 20 years, that he responded to a call, arrived at 11:55 to 12:00 midnight, that he was the first police to arrive at Crescent Street where Seale was lying. He says from his recollection that it wasn't raining, from his recollection that it was a clear and season..that it was a clear and seasonable, but ah.. he said both times, "from my recollection," which perhaps would indicate that he wasn't quite sure on that. But it is in contrast to the weather report which was given by the Defence witness from Environment Canada. On the other hand, it might not be in contrast with it either and I'm going to come to that later. But the important point is that it wasn't raining..

(20) THE COURT: There's some noise that you'll have to stop.

(30) MR WINTERMANS: The important point on the weather was that Constable Mroz was there from approximately 12:00 to 12:30 when the ambulance arrived and at that time it was not raining and this may be an important point to remember. He says he knew that it was a Seale boy, he knew Seale's family by name, but he didn't know Sandy's first name. He says he was a black youth. He also says that Seale was heard to say, "Oh God no, oh Jesus no," and then slipped into unconsciousness. He called the ambulance which didn't arrive until 12:20 or 12:25 so there was quite a delay there. Then Seale was taken to the hospital. Dr. Naqvi was there..yes he said that Seale was 5'6", 145 pounds, extremely good condition, slight and well built.

- Another interesting point from Constable Mroz's evidence is as to the location of where Marshall was. You recall that..that he said, five to seven minutes after Constable Mroz had arrived at the scene, he saw Donald Marshall "two to three hundred feet from where Seale was lying, he was leaning against a tree with his hand on his arm in a very dark spot." And
- (10) the only reason that he saw him is because another police car was coming and the headlights of the on-coming police car showed Donald Marshall leaning against this tree "two to three hundred feet away from where Seale was lying" and I think that that is another important clue in this..in this matter. The lighting conditions he describes very well. It's nice to have a transcript of what Constable Mroz said last time. He says, "The lighting conditions, it was basically dark and fairly poorly lighted. There was
- (20) a heavy tree growth in that area and it obscured the little light that did exist at that time. Since then there has been major improvements and it's considered lighter." And later he says, "And it's just brilliant there as compared to the time as described." That's another very important factor to keep in mind. Now the next witness I'd like to deal with is Mary Ebsary. She describes Roy as being healthy at the time. She show..introduced the picture of him which she says was taken around 1971. You'll note that..two
- (30) things from the picture: (1) that he's not fat like Donna indicated and (2) that his glasses appear to be very thick. I think this is something that you should keep in mind. She said that Roy was a constant complainer; of course, you have to keep in mind that they're separated now so there would be some of that feeling, but she did say that Roy had complained of being mugged a couple of times before. She says that she didn't see any physical signs like bruises or whatever, but another important factor that...this..this was..

- I can't say that..okay..the question of the relationship between Mary Ebsary and Roy Ebsary in 1971, you'll recall perhaps from the evidence of either Greg or Donna Ebsary, they described that Roy had his own room. And..I can't say anything more than that because unfortunately the evidence is a little unclear on that, but I just suggest to you that if Roy had
- (10) his room, then there's a..certainly a possibility that.. and that they're separated around 1979 or 1980, that perhaps it's fair to say that they were sleeping in separate bedrooms, perhaps she wouldn't have seen.. much of her husband's body at that time. Anyway, she does though support part of Mr. Ebsary's statement that he'd been mugged before and that's certainly an important factor. She says that she remembers the night of May 28th, 1971..that Roy and Mr. MacNeil came home. Mr. MacNeil was in an excited, agitated state
- (20) and she recalls him saying words to the effect, "Roy did a good job on that fella, he saved my life." And that is a very, very important factor. "..he saved my life." She..she says that she stayed in the living room and couldn't see into the kitchen and that MacNeil left in 20 minutes or so. So the two really important factors in Mary Ebsary's evidence is that Roy had complained of being mugged before and that MacNeil, as soon as they got home said that..that Roy had saved his life which is obviously important.
- (30) Now, next I'd like to deal with the testimony of Donald Marshall, Jr. He testified that on direct examination that he was out of school in Grade 5 at the time, that he was..I believe he said he was 17 back in 1971; that he had been in the Halifax area and came back after three days with Roy Gould on the evening of May 28th, 1971, the night in question, at 9:30 p.m. which is confirmed by..by Mr. Gould who had testified earlier. Mr. Marshall says that he was dropped off at the liquor store. That he had Roy Gould's jacket on which was in

- good condition. This is in contradiction to what Mr. Gould testifies - Mr. Gould says that he didn't drop him off at the liquor store; however, maybe that's not that important except as an indication that..that Donald Marshall, age 17, after being away from home for three days goes directly to the liquor store. He says that after the liquor store, he went
- (10) to Intercolonial Street, was drinking and left there at 11:30 p.m., two hours later that he was chased out or told to leave, something to that effect. It's difficult to understand everything that Mr. Marshall was saying because he has a tendency to mumble. He says he had one drink of rum and that he hadn't been drinking earlier that day. Well I ask you to consider the..the logic of that - you get dropped off at the liquor store rather than go home and see your family and in a two-hour period you have one drink of rum.
- (20) Anyway, he says he usually drank on weekends, that May 28th, '71 was a Friday night, that at the time he was 5'10" and 145 pounds and in good shape. Now he says he's 6'1". After Intercolonial Street, he went to the Keltic Tavern, he didn't stay and then headed towards the dance hall on George Street and went into the park instead and met Sandy Seale. Now that's interesting because at first he says..like one of the points that I think my..that the Prosecutor is going to suggest is that Donald Marshall is telling..
- (30) telling the truth...this trial even though he's lied in all kinds of other testimonies. So just for the sake of argument, let's just look at his testimony this time to see how..how consistent or how much sense it makes. First of all, if he left Intercolonial Street at 11:30, and went to the Keltic Tavern and then he'd head for the dance hall, why would he go into the park? I'd suggest to you why because he left, I suggest he left Intercolonial Street long before 11:30 and that he may have been heading for the

dance hall, but he didn't have any money -this is my theory, that he didn't have any money and he didn't have money to get into the dance. He had spent the money on liquor and he wanted to go to the park to mug somebody, possibly to get money to go..to go to the dance. That become..that the whole stabbing incident happened considerably earlier than the evidence (10) of some of the witnesses suggests, at least Mr. Marshall suggests. He..he went into Wentworth Park, he says he went into Wentworth Park and met Sandy Seale in the middle of the park. Now this is interesting. He says this time, "I told Seale I was going to scrape up some money to go to the bootlegger." And then he said that he..he usually.."usually bummed money." Just consider that: "..I was going to scrape up some money to go to the bootlegger's." And then he says, "usually bummed money." I wonder what his (20) other methods of getting money are? He says he saw two people, one asked if he had a cigarette, that it was Terry Goosu and Patricia Harris asked for a cigarette. Seale went to two people on Crescent Street, the suggestion being that it was Mr. Ebsary and Mr. MacNeil. He testifies that he knew Patricia Harris and Terry Goosu before, that he didn't know the two people that Seale was with. He said, "One of them was about 50 with white hair and a cape or navy coat on." He had conversation..he says that, "The old (30) fella invited Sandy and I home, he said that he had a quart of rum." And then..then he says something strange. Mr. Marshall says that he refused because, "Indians stuck together for gang reasons."..whatever that means. Then he says that Ebsary and MacNeil left. He says there was nothing notable about their walking, so there's no suggestion that they were staggering so bad that..that they were so drunk that they couldn't possibly now recall what..what happened. They had walked about two court lengths away and.."..and.."

- "..one of us called them back"and that"they walked back towards us." He says that, "Seale was on his right behind him." He says, "Neither of us were carrying weapons." He says,he "Couldn't see their hands." He says, "The only conversation was Ebsary asking Seale if he wanted everything he had." Now why would Mr. Ebsary say that? That doesn't make sense.
- (10) I'll get to that later. He says that, "Sandy's hands were in his coat pocket," and that "Seale said nothing." He said, "Ebsary put his hand on Seale's shoulder and appeared to punch him in the stomach." Well that is a questionable liklihood;however, the only point that I would place any reliance on there is that a punch in the stomach would indicate that no one saw what was in anybody's hands, nobody could see what was in anybody's hands..nobody saw Mr. Ebsary with a knife and nobody knew at that point that..that Mr...Seale
- (20) had..has been stabbed rather than punched. Then he says and this is really difficult to believe that, "MacNeil came toward me and I grabbed him and I threw him towards the sidewalk." Now can you imagine James MacNeil at 6..around six feet tall and 105 pounds coming after..after Marshall? And then Eb..and then he says, "Ebsary came towards me and said, I've got something for you too Indian.." or whatever. And then he demonstrates the swing that he says Ebsary made towards him..he went through a little demonstra-
- (30) tion with the Prosecutor. Of course you have to wonder why..if Mr. Marshall didn't see any weapon and he thought that Seale was being punched, why..why he would grab Mr. Ebsary's hand rather than just do something else, but the whole story is just ridiculous anyway. Then he says that he got this cut in his arm there, that he gave his jacket to his father the next day..she showed you the scar, you'll recall the evidence of..of some of the other witnesses which would indicate that..there shouldn't have been any scar, he removed the stitches himself and tried to

- make it look worse than what it was. Then he..anyway after this..this fight with Mr.-Ebsary he says he ran away and ran into Chant and they went for help. In cross examination, Mr. Marshall indicated that he was 17 at the time, that he quit school at age 14, he drank on weekends, came back from Shubenacadie, that there had been some drinking up there ah...he
- (10) says he feels like he's testifying what other people want to hear. He says that he didn't see the knife or didn't realize the knife until he was running away; in other words, he didn't see that..any knife in Mr. Ebsary's hands. He said he couldn't recall having given his evidence in a preliminary hearing, but after reading it for several minutes, he said that he did remember. And you'll recall later in his evidence that he testified that he had all his transcripts and he'd studied all his transcripts, that
- (20) the testimony..this is an unusual case in that Mr. Marshall has had all his transcripts from all previous hearings and studies them and has all kinds of advice on..and he is trying to create this legend - I'll get to that later. But he..he said he twisted his story so people would believe him. He said he didn't think that he had told untruths. He...acknowledged that he couldn't identify Mr. Ebsary. He indicated that he had a criminal record at that time when he was 17, that he had spent some eight months in jail.
- (30) He didn't go into the details of his criminal record, but I think it's a fair thing to say that a person normally does not accumulate any criminal record or go to jail until attaining the age of 16, so it gives you some indication that between 16 and 17, he's got this..bad enough criminal record that he's gonna spend eight months in jail. He said on cross examination that his arm was bleeding when he was at Brian Doucet's house and he says his arm was bleeding when he got to the hospital. He admits that it was a superficial

wound probably because he doesn't know what superficial means, the word means. He admits removing the stitches himself and he tries to explain that. He admits that he had a tatoo at the time that said, "I hate cops". He was very evasive, well he was evasive throughout his entire testimony. He said that at Doucet's that he asked for an ambulance and the

(10) police. You'll remember hearing the Judge read Mr. Doucet's testimony - that they didn't ask for..that they didn't ask for the police, that it was him that insisted on the..on the police. Then he said he never tried to roll anyone. He said his gang used to beat up on other gangs. He... You'll remember perhaps late Friday afternoon when Mr. Marshall was.. was on the witness stand and I asked him if he had ever robbed or rolled or tried to rob or roll anybody before and he was being very evasive and he looked..

(20) he looked at me with a smile on his face and he said, "I'm gonna say no." You perhaps recall that. I think that that was a really beautiful illustration of his evasiveness, his lying and his reliance upon his reading of transcripts and all that. And I also..also he admitted that he's received \$270,000.00 in compensation from the Province, about \$100,000.00 of which went to legal fees and another \$50,000.00 or so from another trust fund - he's got close to a quarter of a million dollars out of this. He also acknowledged

(30) that he's become famous over the years as the man who spent 11 years in jail for a murder he didn't commit. I pointed out to him that he's trying to say that he was lying when..when he said it was a robbery in previous hearings and that now he's telling the truth when..when he says it wasn't. I pointed out to him that he was out of jail and he was acquitted before any testimony was ever given in relation to Mr. Ebsary and..he acknowledged that he's had an opportunity to read and examine the transcripts and that he has lawyers.

Now I pointed out in a rather complicated procedure, when a witness testifies different in a previous hearing then the only way that you can get him to comment on it or to expose it is that you have to ask him the questions, do you recall having testified at such and such a time and then the page and then you have to read the question and you have to read the answer and you have to ask him if he said it, you have to ask him if it was true. It's kind of a complicated and confusing..I apologize for that, but unfortunately that's the only way that it can be done. I pointed out.. I just want to point out about 20 times where he has.. where he has contradicted himself in previous hearings and the important point here is that it's not just in relation to the 1982 R.C.M.P. statement. Don't.. don't get confused on that - he's been lying about all kinds of other things too. All right...he..at one time he testified that...well first of all he denied the plan to..to rob. He acknowledges that in the preliminary hearing, he said, "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. Seale and Ebsary had a conversation and I never understood what they were talking about." He acknowledges having said that and now he's saying something different. Now that's got nothing to do with any R.C.M.P. statement which is supposedly not true. And in November of 1983, he said he couldn't recall if he grabbed a hold of MacNeil. He said, "Either he grabbed me or I grabbed him, I can't straighten that out, I can't say yes or no, who grabbed who." But now he says, he's come up with this totally new story that he grabbed..MacNeil somehow in order to throw MacNeil in front of Ebsary or something..I didn't quite follow that. He acknowledges that in November '83 he said the following was true that he couldn't remember what happened because

his memory just went, he got stabbed, he doesn't remember much after that. He couldn't understand conversation between Seale and Ebsary - now he says that..that that's not true, that he can recall. He says he identified Mr. Ebsary and he said he couldn't identify Mr. Ebsary. In September of 1983, he testified that he couldn't recall if he grabbed MacNeil. He said, "~~I~~ don't remember." then. Now he says he does remember and..that he did..that he did, but under different circumstances. In August of '83, he said he didn't know what happened between Ebsary and Seale, he has no memory except Ebsary saying, "I got something for you right here." And now he says he has this new or different memory. In August of '83, he acknowledges having said, "I was..I don't know if I should say I was fighting and holding the other guy." He's indicating MacNeil. "I was..I don't know if I should say, I was fighting and holding the other guy." And now he says that that's not true. In November of 1983, he acknowledges having said that Seale nodded his head after Ebsary asked him if he wanted everything he had. Now..now he denies that. On August..of '83, he said that the R.C.M.P. statement in 1982 that he made admitting the robbery..he says it was true, but he tries..he qualified it then by saying that he didn't..directly say, let's go rob somebody. Now he denies that. September of '83, he acknowledges having said that he suggested to Seale that they roll somebody and that Ebsary and Seale would have known they were being rolled or robbed and now he denies that. In August of '83, he says he was asked if the 1982 R.C.M.P. statement was the truth and he said, "Yes." His answer was yes and now he says "No." And then later in his..August 1983, he acknowledged having said he doesn't remember what happened - now he says he can remember what happened. In September of 1983, he said that the R.C.M.P. state-

ment was true. In September of 1983 he said that, "A robbery is when you are armed." Then that he wasn't armed. In September of 1983 he says, "I just grabbed onto MacNeil." In November of '83, he acknowledged that he couldn't explain why he wrote the 1982 statement to the R.C.M.P. In 1982 before the Appeal Court, he acknowledged having said he was a heavy (10) drinker and would get drunk pretty fast and now he tries to explain that. In 1982 in the Appeal Court, he said, "Seale could have said something to Ebsary.." and that his intentions were to get money regardless of how he got it. And now he's saying that..that that's not the case. In 1982 the Appeal Court, Mr. MacNeil or Mr. Marshall said, "The 1982 R.C.M.P. statement was a reliable, truthful statement." in 1982, he indicated the difference between rolling and robbing, whether if you're robbing somebody, that (20) means you're armed and if you're rolling somebody, that means you're using violence, but you're not armed and as the Judge will tell you, robbing or rolling are both robbery. Whether you're armed or not has got nothing to do with it. Now next I'd like to deal with Mr. MacNeil's testimony, James MacNeil, who I suggest to you is an honest..an honest, but simple person. He's 39; at the time he was 25 years old and about 105 pounds, so he was a real skinny person. He..he says he'd known Ebsary for a few months before that, that (30) he had met him in the State Tavern, had six or seven beers and Ebsary might have had the same although he couldn't really say, just assuming that. I'm just gonna say one thing at this point now - it's not all that important where they were coming from, whether it was from the State Tavern or whether it was from some other place because a person isn't going to remember what happened 15 years ago or 14 years ago before something like this happened. It was just an ordinary day. The important point in time is when

- Marshall put MacNeil's arm up behind his back, that's the kind of memory that you never lose. What happens before that, you know, what difference does it make? The only important thing is that they were..they were coming from drinking somewhere. Well they both said the State Tavern anyway, but.. He says they left the State Tavern, he thought around 10:00 o'clock, but he
- (10) wasn't sure. He doesn't..he didn't know. They walked down George Street on the way to Ebsary's house. They cut through Wentworth..Wentworth Park..sorry, up to Crescent Street which is directly on route to..to Mr. Ebsary's residence on Rear Argyle Street. He says they were approached by Marshall and Seale. Marshall said nothing. Marshall put his arm up behind his back and he showed you what he meant by that and Seale was in front of Mr. Ebsary and he heard the words, "Dig man dig." And he says that it was in a high-pitched..
- (20) it wasn't all that violent, but it was a high pitch like, "Dig man dig." I don't know, I believe it was a black youth I think he..perhaps try and imagine how he might have said it..perhaps in a cocky kind of way. He says he was afraid. He says he froze. He says he knew it was a robbery; he knew it was a holdup. He says he was afraid, he froze, he was confused. He says he heard Ebsary say, "I've got something for you." And he saw Ebsary swing at Seale. Again, he didn't see any knife at that point. And then he says, "Marshall
- (30) let go of him and Marshall went for Ebsary." And then he said that he was positive that Marshall came at Ebsary rather than Ebsary going at Marshall. Course it all happened in a split second he said and Seale ran about 30 feet and dropped and Marshall disappeared, presumably he ran away too. Then Ebsary and MacNeil went to the Ebsary house. He says he can't remember seeing Donna or Mary Ebsary at all; he was probably so excited, I suggest to you..such shock that..he just can't remember. Now the really important thing about

Mr. MacNeil's evidence though is that I suggest to you that the one point that Mr. MacNeil would never forget would be..being attacked and having his arm put up behind his back. The rest of the details aren't all that important. He..he says he saw Ebsary wash blood off his hands in the kitchen. He says that he didn't.. I'm not sure what he said on the knife, but he said

(10) that..that he thought it was a..or presumed it was a pocket knife. He left, maybe an hour later - he wasn't sure. He said the next day he went back to Ebsary and said, "That young fellow died and you should have given the money." And Ebsary answered that it was self defence. He says he never went back to Ebsary's house ever after that. And there's no evidence that they were ever together again. Then he.. he didn't go to the police at first, but he certainly was the first to go to the police. He says that about

(20) a week or ten days after Marshall was found guilty and sentenced and that of course would be November '71, he went to the police and told his story. I suggest to you that he's a simple and honest and mild-mannered, passive sort of person who it would be very difficult to imagine him attacking Donald Marshall or anybody else. Apart from a couple of times in the drunk tank, he has no criminal record and public drunkenness is not a crime anyway, it's not a criminal offence anyway like theft or robbery or something like that. There's

(30) not one shred of evidence of dishonesty in relation to Mr. MacNeil. He was straightforward, not evasive. He seemed honest and very much unlike Mr. Marshall. He might be wrong on what happened before and after, but not on the robbery itself. Now there were..there's no burden upon the Defence to call any evidence, but I felt that a couple of witnesses should be called to clear up a few things. You'll recall the eye doctor testifying that Mr. Ebsary at the moment is legally blind, but that with glasses on he would have 95 per

- cent normal vision. He gave an opinion as to his..Mr. Ebsary's probable eye sight in 1971 at age 60 as being 20 over 60 which isn't too bad if he has his glasses on, but he did allow for the possibility that Mr. Ebsary's sight was much worse than 20 over 60. It could have been 20 to..20 over 150 which would be poor and of course..it's..he was relying on..on certain
- (10) assumptions which may not be the case. Well you have the statement of Mr. Ebsary where he describes his eye sight at the time and you have the picture of Mr. Ebsary - you can see his glasses, they appear very thick. Then I called Rosie Strobridge, she's the woman who looks after Mr. Ebsary at the moment, does his chores for him and the only reason I did that was because I was worried that you as jurors may have been wondering if Mr. Ebsary's eye sight is so bad, then why is he sitting in the courtroom with
- (20) no glasses on? And the explanation was given and that is that his glasses were lost and that he had.. had to go through the D.B.A. to get the approval, to get free glasses and that takes a couple weeks so.. Mr Ebsary really can't see very well except..I guess he has his glasses now. And then the weatherman, I thought the weatherman provided some very interesting and revealing evidence, that there was a..the weather of May 28th and May 29th, 1971, that there was rain and fog until 8:59 p.m. - that's 9:00 o'clock - then
- (30) steady rain, changing to light rain and drizzle and fog until 11:00 p.m. and then between 11:00 and 12:00 midnight, it was overcast and foggy and at 1:30 a.m. to 2:00 a.m. clouds dissipating gradually and cleared by 5:00 a.m. So the weather, I suggest, confirms what Mr. Ebsary says about..about it being a fine mist and (inaudible)..and having to take his glasses off because that they were wet. And the timing of the weather change doesn't conflict with..with Leo Mroz either because by the time Leo Mroz got there,

- it was after midnight and..there..from midnight until 12:30 when he was there, it had stopped raining by then, so there's no conflict there. Brian Doucet, he had his..the evidence was read in because Mr. Doucet is..has disappeared like, I might add, a lot of people who may be able to shed light on this matter. But fortunately his testimony was available from..from
- (10) 1971 and it was read in. He is the man who..who was at the house where Marshall and another individual went to..to call..for help. They asked for an ambulance, but Mr. Doucet insisted on calling the police. He said that he saw Marshall's arm, that he said..that Marshall showed him that cut on his arm and he said that there was no blood which is in contradiction to ..to Marshall - a small point granted. That he saw Marshall in the police car, that he helped put Mr. Seale into the ambulance and went to the hospital.
- (20) Then the nurse, Mrs. Davis testified that she saw Donald Marshall at the hospital in 1971 - that it was a superficial cut, there was no bleeding and she presumed that the doctor put some stitches in it, that it was only a three-inch long cut. And I believe that was all the evidence. Now there are a number of..a few topics that I would like to discuss and one is the significance of the 1982 R.C.M.P. statement of Marshall, where he said and I'm going..and it was put to him and I'm going to read the portions that were put to him
- (30) which he indicated..under oath on the stand in other hearings that were true.

"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 the George Street side of.."

"..the park. The short old guy I now know as Ebsary."

And then carrying on:

"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."

And the other one:

(10) "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."

(20) And that's.. Now, the 1982 R.C.M.P. statement was given to Corporal Carroll and Staff Sargeant Wheaton at Dorchester Penitentiary. They testified that there were only two trips made to Dorchester since 1971 by any police officer. Carroll said, "No facts of the investigation were made known to Marshall. Marshall's lawyer's letter did not say anything about MacNeil or about a robbery, so his lawyer couldn't have known. Only the police know and no police saw Marshall before Carroll did in 1982." As Corporal Carroll said, the story of the robbery came from Marshall. You'll note that Staff Sargeant Wheaton testified before Marshall. I of course didn't expect Marshall to deny the truth of his statement concerning

(30) the robbery or try to say that he hadn't..committed a robbery, but the Prosecutor whose duty it is, whose burden it is to clear up all these questions failed to clear it up, failed to clear up the question of how Marshall could possibly have known anything about James MacNeil's story told to the police in 1971. Therefore, absolutely..there's absolutely no way that Marshall was not telling the truth in 1982 when he admitted to..to the robbery because it's consistent with what every other witness says. Now the question

of..of the knife used is another matter that the.. the Prosecution is trying to make something of and I suggest to you that it doesn't matter. Mr. Ebsary says it was a pen knife that was three inches long. This is consistent with the medical evidence which says that the wound was three inches deep. Everyone agrees that it was a small knife and there's no conclusive evidence of any kind from anybody that it was not a..as Mr. Ebsary described. And furthermore, it doesn't really matter anyway. But MacNeil said he presumed it was a pocket knife. Donna Ebsary said it was not any of the knives on the table. She thought that it was a straight knife. She says that she saw the handle and the length of the blade she says, was similar to Number 8 there which is..highly questionable given..given some of her other testimony. All three said that it was a small knife. The hair and fibre

(10) evidence is totally inconclusive and speculative, it could not say that any of those knives was the knife and..and the Doctor's evidence that it was a three-inch wound is consistent with what Mr. Ebsary said. Therefore, there is no proof that it wasn't a three-inch pen knife as Mr. Ebsary said. Besides, it doesn't matter what kind of knife it was. All we know for sure is that Ebsary had a small knife in his pocket, I'm certainly not denying that. Now the question of robbery - robbery is as I said, an assault

(20) for the purposes of theft. Both Seale and Marshall were parties in a robbery - the Judge will explain that. The violence used by Marshall against MacNeil in the words of Seale, "Dig man dig," constitutes a robbery of Mr. MacNeil and Mr. Ebsary. It's like two teams, whatever one does to a member of the other team, he does to both. In other words, Marshall and Seale ganged up on MacNeil and Ebsary. Even if Sandy Seale didn't actually touch Mr. Ebsary, the assault on Mr. MacNeil and the words, "Dig man dig." clearly

(30)

constitute an assault for the purposes of theft, a robbery and in relation to Mr. Ebsary. One very, very important factor that you have to consider here is you have to..you have to look at it..you have to judge from the point of view of the accused person, Mr. Ebsary. You have to try and put yourself in the shoes of Mr. Ebsary, a 5'2", 60 year old, small man

(10) who had had a few drinks. Now it's interesting if you look around to see that there are no old people on this jury, which I believe is an unfortunate situation. Now, the Prosecution has more control over the selection of jurors than I do and I suggest to you that the reason that there are young people..all young people on the jury is that the Prosecution knows that..if this was a jury of 60 year old people, that you would be back in here in two seconds saying you're not guilty. I'd like you to consider the

(20) conditions that took place. The weather - you can't argue with Environment Canada's records of what the weather was like. There was a fine rain, it was misty and foggy, just like Mr. Ebsary says. The lighting - we looked at Constable Mroz's testimony where he says, "It was basically dark and fairly poorly lighted. There was a heavy tree growth.."..a heavy tree growth in that area and it obscured the little light that did exist at the time. Since then there has been major improvements." "It's just brilliant

(30) there as compared to May 28th, 1971." Now Mr. Ebsary says, "At that time it was one of the darkest areas in the city." And..and it's true. Then there's the question of..Mr. Ebsary had his glasses off. Mr. Ebsary says he had taken his glasses off because of the weather, he said they were fogged up and misty which is totally consistent with the..with the..the weather evidence. And you consider that the eye doctor says that he's legally blind now, but that back then he probably had much better vision - but probably

- is..is not absolutely definitely. And if you look at the picture, you look at the thickness of those glasses, you can imagine how..Mr. Ebsary says in his statement that his eye sight was poor back then - I'll tell you one thing, there's no proof in this courtroom that..that the contrary was the case - there's no proof that in 1971 that Roy Ebsary's eye
- (10) sight was ~~really~~ good without glasses on. And the drink - well Ebsary and MacNeil both agreed that they had quite a bit to drink and that would affect your powers of observation I would submit. And the question of whether anybody was armed - no one saw knives or weapons on anyone. We're acknowledging that Mr. Ebsary had a small pocket knife, but nobody saw that even when he took it out and swung it at two people and yet not one of these people that were there ever said that they could see a knife at that time. So
- (20) if you try and put yourself in Mr. Ebsary's position, how can he know..how can he possibly know if..if any of them were armed? You know, Mr. MacNeil says, "I didn't see any weanons." There's a big difference between I didn't see any weapons and nobody had any weapons. So I suggest to you that if nobody could see Mr. Ebsary's knife, then Mr. Ebsary couldn't possibly know whether..whether anybody else was armed. Now memory is another factor. This happened 14 years ago. I think that you have to take into consideration,
- (30) this is one of the rarest cases in the history of this country and the big thing is that we're talking about something that happened 14 years ago and people are getting on the witness stand and saying, I'm absolutely positive that it happened like this, you know, 14 years ago under very poor conditions for observation, people who are not very smart..and when.. then when with the fear and the shock involved in a situation like this..then there's the motives involved in Mr. Marshall..is now rich and famous and I

suggest to you he wants to be..he doesn't want to be remembered just as the man who spent 11 years in jail for a murder he didn't commit. He wants to be remembered as the man who spent 11 years in jail for the crime he didn't commit. And I'll tell you that he committed a crime back there. I have to acknowledge that there's not much proof that it was murder, but

(10) if any one person is responsible for Sandy Seale's death, it's Donald Marshall because it was his idea to..to attack these people and Mr. Ebsary was just a poor innocent victim, a little old man who couldn't see very well, who was afraid and he just..rather than being beaten up again, he..he struck out and the law allows that as the Judge will tell you. On the question of what the law is, listen clearly to what the Judge tells you. Mr. Ebsary gave a..he called up the R.C.M.P. and he gave a voluntary statement in

(20) 1982. He says he levelled with them. He felt sorry for Marshall after 11 years. Mr. MacNeil..Mr. MacNeil is the one who went to the police first and he told the story about the robbery. I mean that was back in 1971. I've obviously given this case a lot of thought and there are some serious discrepancies in relation to time and..and I have a theory on that. And here's my theory - and that is that the stabbing took place before 11:30 and that Marshall didn't return to Seale with..with Mr. Chant until almost mid-

(30) night and the reason..the reason is that Marshall was afraid because there was a robbery..he committed a robbery and he was afraid of the police and probably what really happened here is that Marshall ran a short distance after this incident with Mr. MacNeil and Mr. Ebsary. It was very, very dark so all he'd have to do is run to the nearest..nearest bush or something...he..until he was a safe distance from.. from where..where Mr. Ebsary and Mr. MacNeil were and wait until they left..wait until Ebsary and MacNeil

left and when he was sure that they were gone and when no one was around, he went back to Mr. Seale. Maybe he removed something from Mr. Seale, maybe he removed a weapon, maybe he removed stolen goods from Mr. Seale, maybe he hid them. Then he saw Mr. Chant coming. He started running towards Mr. Chant pretending that the stabbing had just happened and

(10) that explains how Mr. Ebsary and Mr. MacNeil were home well before midnight and why Marshall ran into.. into Chant just before midnight and anyway nobody will ever know for certain what happened here. But you can be sure of one thing and that is that Donald Marshall was up to no good that night, there's no question about that. There's not one piece of evidence that supports Donald Marshall when he says there was no robbery. And you have to remember another thing, that there's no burden on..on Mr. Ebsary to prove any-

(20) thing. He can't be expected to prove what happened 14 years ago. I just want to leave you with a few basic points and that is; first of all, all the witnesses..all the witnesses in this entire trial support that..that there was a robbery except for one and that's Donald Marshall. Marshall has never denied that there was a robbery until last Friday. Marshall, if believed this time, admits to over 20 times that I pointed out to him and..admits to over 20 times of lying under oath in several courts. Marshall, if

(30) believed this time, then he must have been lying other times. Marshall's present story that no robbery occurred is not supported by any other witnesses. It is directly contradicted by several witnesses: obviously Mr. Ebsary's own voluntary statement; James MacNeil, who is about the only person in this trial who has absolutely no motive, no reason for anything except to tell the truth - he's obviously an honest person - he may not be right on on every little detail. Marshall's testimony is contradicted by Mr.

Ebsary's...James MacNeil's testimony. James MacNeil's testimony is supported by Donna and Mary Ebsary when they described the shape that James MacNeil was in at the second he walked in the door, moments after this thing had happened, when he said, Roy saved my life tonight or words to that effect..a positive statement on what Roy had done to..to help him and get

(10) him out of that mess. Corporal Carroll denies that.. that anything was said to Donald Marshall about robbery. The fact that Sargeant..Staff Sargeant Wheaton was not recalled by the Crown, which they could have done before closing their case, was further evidence that nothing was ever..ever told to Donald Marshall about any robbery. Other details of his latest story are contradicted by other witnesses: Mr. Doucet and Nurse Davis, who both say that there was no sign of blood which shows that Mr. Marshall's

(20) trying to exaggerate this..this thing and trying to make himself look like a saint. Other details of his latest story are also inconsistent with other..other evidence. He says..he says he was out to scrounge money that night and he says that he stood behind Seale and the evidence of Maynard Chant that he stood behind Seale and the evidence of Constable Mroz that he was two to three hundred feet away from where Seale was lying when..when..when the police car came well before any ambulance came. Consider the sizes of

(30) the people involved and figure out who was most likely to attack who? Mr. Ebsary is 5'2" and 100.. and ah..he was 5'2" and 60 years old and you saw this picture - he wasn't fat. Mr. MacNeil was tall, but only 105 pounds, very frail. And then you look at Donald Marshall's, 17 years old, around six feet tall and tough, in a gang and a bad record, a bad actor, putting it mildly. And Sandy Seale was 5'8 1/2" and 148 to 152 pounds in very good shape. So who..which pair is most likely to be the aggressors? I feel

sorry for Sandy Seale..because he got mixed up with Donald Marshall. But to suggest that there is proof, I'm sorry.. I can't say anything more..(inaudible)...

THE COURT: All right. Thank you Mr. Wintermans.
COURT RECESSED (11:10 a.m.)

COURT RESUMED (11:25 a.m.)

(10)

THE COURT: Mr. Edwards, you had some matter you wished to raise?

MR EDWARDS: Yes, Milord, just very briefly I'm concerned that the record may not be absolutely clear on whether Mr. Wintermans had an opportunity to complete his address and I'd just like..

THE COURT: Well we'll give him an opportunity if he wishes any more opportunity.

MR EDWARDS: Yes.

(20)

THE COURT: Do you wish anymore..

MR WINTERMANS: My address is completed, Milord.

THE COURT: Address completed? All right. All right, bring in the jury.

JURY POLLED - ALL PRESENT

THE COURT: Mr. Edwards?

(30)

MR EDWARDS: Thank you, Milord. Mr. Foreman, ladies and gentlemen of the jury, may I begin by thanking you very sincerely for your attentiveness and patience throughout this trial. You people have been chosen carefully. This case obviously has generated a lot of publicity and talk in the community and therefore likely has spawned a lot of preconceptions about the

(10) behaviour of some of the participants (inaudible)... As I say, you people were selected carefully with the confidence that you could divorce yourself from any preconceptions that either you may have had or that you may have heard others express and to decide the case simply on the evidence that you heard in this court. The Crown is confident that you can do that and I just want to focus in my address on the central issue in the case, which is self defence. Obviously we in the Cape Breton community, the Nova Scotia community

(20) generally are a civilized community. You people are the representatives of that civilization and we take the taking of a human life very seriously unlike possibly some other cultures where it's not taken that seriously and the defence of self defence may be categorized, I suggest to you, as a last resort, type of proposition. Really somebody is only justified in taking somebody else's life when there is virtually no other alternative. I'd like for you to keep that principle in mind as we explore the

(30) evidence. Before I focus right on self defence, I want to with you just analyze some aspects of the evidence which will be helpful when we come to answer the questions which bear directly on the defence of self defence. I want to look at the actions and compare the actions of Marshall and Ebsary immediately after the stabbing. I want to focus on the evidence which indicates the type of weapon that Ebsary was carrying that night. And I want to focus on the evidence which points to whether or not there was a

prior conversation among the four participants; that is, between Marshall and Seale and Ebsary and MacNeil. Whether they had a prior conversation because that will bear directly as you will see on whether or not Mr. Ebsary did in fact act in self defence that night. Now, the significance of comparing the action that.. in any criminal matter it's important to assess what

(10) was in the mind of the person accused, did he have a guilty mind? And what often illustrates that better than anything is what the party in question did immediately after the alleged crime. Well what did Marshall do? Well it seems he was struck in the arm, he ran, met up with Chant and then came back, summons an ambulance. We read Constable Mroz's testimony - there's nothing in there to suggest that Marshall tried to flee from the police - he was standing there by a tree and albeit two or three hundred feet

(20) away. The point is, he wasn't trying to run away, he was there holding his arm. And the fact that Constable Mroz didn't see him until five to seven minutes after arriving there tells you only that Constable Mroz was preoccupied as anyone would be with what he found on the street there that night...Mr. Seale who was mortally wounded and that explains, I submit to you, why that he didn't see Donald Marshall right away. But what did Roy Newman Ebsary do? He got away from the scene. He never called the police

(30) about it. He hid out and never came forward until 1982 in the re-investigation when the case was about eight months old. So consider that, if he really had been helpless old man who had been pounced upon in the park and who as a very last resort or within the confines of what our law says you may do in self defence, why didn't he call the police right away or at least, within the next several days? Because surely he would realize that he had nothing to fear, if that were really the way it had happened. So..and

when you're considering his actions, just ask yourself three questions. In that situation, what would an innocent man do? And what would a guilty man do? And what did Roy Ebsary do? Then when you consider the rest of the evidence and harken to those three questions, I submit to you, you'll come up with the answer that self defence is a very, very doubtful

(10) proposition in this particular case. However, as my learned friend correctly stated, it's not up to him to establish self defence, as I told you in my opening address, the Crown intended to prove beyond reasonable doubt that Roy Ebsary was not acting in self defence that night. That is the duty of the Crown and it is hereby acknowledged. Now, what about the type of knife he was carrying that night? I submit to you that there is enough evidence before you so that you can make a conclusion about the type

(20) of knife, if not the exact knife. You may not be 101 per cent sure that Knife Number 8 was the one, but failing that (inaudible)..there's abundant evidence to prove that if it wasn't Knife Number 8, it was one just like it and in fact with Mr. Evers' evidence concerned that it was one of those ten - none of which you will see when you examine them is a folding knife which a person could innocently have in their pocket. You expect a person for purposes which are quite legitimate to have a small folding

(30) penknife in his pocket. But the abundance of the evidence tells us and tells us beyond a reasonable doubt, I submit, that Roy Ebsary was not carrying an innocent penknife that night. Perhaps the strongest..well not perhaps, but definitely the strongest evidence on that point comes from Donna Ebsary who although she was 13 years old at the time is obviously a person possessed of very great intelligence and strong recollection and who did not budge on her recollection of what type of knife it was.

Now what did she say? She saw her father washing a fixed blade knife, not a folding knife, similar in size and she pointed to that Knife Number 8, similar in size to that one. Not only that, she said that he was in the habit of carrying a knife on his person at the time. Those aren't her exact words, I'm going by memory and you'll have to go by yours.

- (10) I submit to you, that's pretty close to what she said. So, what else suggests it wasn't a folding blade knife? Well Mr. Ebsary's evidence itself, his tape recorded conversation and you'll have both the tape which you'll be able to play in there if you wish or the transcript and you'll see that he suggests that at the crucial time, just prior to the stabbing, he opened the knife in his pocket - just consider the difficulty of doing that in the circumstances he suggests existed at that time. What about Evers'
- (20) evidence? Well, my learned friend suggests, well the knives have been laying around the house for years and those fibres could have been picked up from other sources. But when you're considering that possibility, consider the last question I asked Mr. Evers when he was on the direct examination. I remember there's a full courtroom and I said something like, if you took fibres from each of the people in this room, what would be the chances of coming up with the fibres that are on those knives and I recall he said not(in-
- (30) audible).. Now remember, those fibres..to find those..the stereo microscope..they just didn't appear and that's the point too - if that..if the knife didn't come in contact with those two jackets, really where else could those fibres have come from? I guess that's the central question when you're considering that evidence. Consider also in Mr. Ebsary's tape recorded conversation. What I suggest to you was his attempt to decoy the police away from or draw attention away from those knives that he's

obviously very concerned will be linked with the stabbing and I refer you there to where he gets Corporal Carroll to turn the tape back on and tells him that he has buried the blade of the knife over on Rear Argyle Street and thrown away the handle. Well I'm submitting to you, the significance of that is that that was..a decoy operation to draw attention

(10) (inaudible).. But if, you know, on the other hand, if you think that he..there may be some truth to that, just consider - if it was such an innocent, little knife that he had on his person that night, why did he bury the blade in one location and throw the handle away? This is because he was worried that the police would be concerned with the authenticity of his alleged self defence if they knew that the type of knife that he had on him at that time? And another question, don't be overawed by..by experts or

(20) legal technicalities. You people are chosen to decide this case, you're the ultimate judges, you're in charge as far as deciding the facts are concerned. So you bring to bear your own intelligence, common sense and experience when deciding the facts in this case and consider the fact that there are a couple of the knives, 8 and..7 which are both sharpened on each side. I suggest to you that if you were wanting to carry a knife for protection, that'd be a very handy type of knife because no matter what way you swung it,

(30) it would cut. If you were a person, try to put yourself in Mr. Ebsary's shoes for a minute who as he alleges, had sworn by Christ that the next man who struck you would die in his tracks - would you carry a little penknife to dispatch him? No. So when you consider all those facts in total, is there any doubt, let alone a reasonable doubt that Mr. Ebsary was carrying a formidable weapon that night? He just didn't, as he said..says in the tape, he just didn't discover when he was confronted by Marshall and Ebsary

- that he had this knife in his pocket. He had that knife, damnit he was ready, he was at the ready. The prior conversation, just let me briefly recall for you what Donald Marshall's evidence was on that point. I'm going to say a little bit of Donald Marshall in a few moments. Now, again you have to go by your recollection, but our notes say that
- (10) Donald Marshall on direct says when he joined up and after he spoke with Harris and Goosu..remember he said that Seale had gone to the two guvs who had called him up for the cigarette. So then he leaves Harris and Goosu, he walks over where Seale, Ebsary and MacNeil are and he says now they had some conversation then, which I take it lasted at least several minutes and Marshall said to Ebsary, "I said he looked like a priest. He said he was a preacher of some kind and a sea captain." There were four
- (20) items of conversation there: "He told me he was from Manitoba." "He asked if there was anv women in the park." "He offered us to go to his home." "He said he had a quart of rum." You heard Mary's evidence about him inviting people home or taking people home from time to time. "He told me he lived around the corner from Crescent Street." Now, did that conversation (we'll consider the significance of it later), but for the moment, let's consider whether or not that conversation did in fact take place. Well there were
- (30) only really two people who've given evidence on that point: that's MacNeil and Marshall and I called them both. It's up to you to decide about that conversation. Now what does MacNeil say? He says that after he and Ebsary left the State Tavern, they were walking straight through, minding their own business, that's what he said on cross examination by my learned friend. Now he..there's no mention there of whether or not there had been prior conversation, but on face value, you get the impression that there was

not. Cause he didn't mention it. And my learned friend didn't..didn't cross examine him on that point, but..as my learned friend also said quite correctly and properly in his address that MacNeil was really, especially now 14 years later, would have no reason to recall what had happened prior to his arm being placed up behind his back as he says

(10) it was by Marshall. See..so then when you consider MacNeil's drinking habits and the amount that he had had to consume that night, the combination that that fact was brought up by my learned friend - then, you have to then say, well as far as MacNeil is concerned, the conversation could have taken place. So then we have to look to Donald Marshall and his credibility on that point. Donald Marshall admitted on the stand and...read to him from the different transcripts, he admitted that he had lied, there's no..no question

(20) about that. There may be reasons for that that we could get into, but for our purposes here...he admitted he lied and His Lordship will likely instruct you as is the custom of Judges when they have a situation like this, that he will correctly instruct you that when you have a witness such as Donald Marshall who has been proved to have lied on other occasions, then you must treat his evidence with great care and the Crown agrees, that's what you should do - treat it with great care. But, having said that, Donald

(30) Marshall had to be telling the truth about something. We know now that Donald Marshall is telling the truth when he said he didn't stab (inaudible)...Ebsary did. He's truthful on that point. So, consider whether he's also truthful about this conversation and there's two very key factors there which bear directly on his truthfulness on that point. Number one - that conversation was not rebutted on cross examination, okay? See, if he had learned since 1971 of preacher and the sea captain..well my learned friend could have asked

- him on cross examination, well why didn't you mention the preacher or the sea captain in 1971, but that wasn't asked. So the point is, he's not rebutted on that part of his conversation. Remember, he said, "I said he looked like a priest." This is what Marshall says he said to Ebsary. "He said he was a priest of some kind and a sea captain." If the conversation..that conversation hadn't really taken place, how would Donald Marshall have known that? Remember Donna Ebsary said in 1971, her father was referred to as the captain or the reverend captain. He had this interest in religion - you see, that ties right in with Marshall's story. How could Marshall have possibly known that unless this prior conversation among the four of them had taken place? So the significance, if you accept that that conversation did take place, the conversation is significant because it rebuts
- (10) the suggestion that Marshall and Seale just jumped out of the bushes and pounced on these guys and..Ebsary as sort of a reflex stabbed Seale - no there had been this conversation beforehand. Now, if the conversation took place, if you find that, then doesn't it also establish that therefore after the four had this conversation, Ebsary and MacNeil walked away from Seale and Marshall? And if you accept that they did walk away and that is important because they've walked away - why did they come back when..when they were
- (20) called? Why did Ebsary come back if he was in fear of grievous bodily harm or death? Why did he come back and not run away, he was in good physical condition according to Greg, Mary and Donna at the time, but he didn't - he did come back. Now coming back like that, would that be the action of a man who was at the ready or a man who was ready to dispatch his antagonist with the knife he had in his pocket? So, having dealt with those three areas and I submit to you, you know, when you get into the jury room..of course it's up to you to establish your own procedure
- (30)

on how you approach the evidence, but I submit to you that if you break it down and analyze it, you know, focus on the evidence of what kind of knife he had. Focus on the evidence of whether this prior conversation took place. Focus on the evidence of what Ebsary did afterwards. I submit to you that that would be more helpful to you than just (inaudible)...the evidence

(10) in one block. Because you have..you'll hear the law given by His Lordship and you will have to apply the evidence to that law and when you get to that, our law defines self defence in what is known as Section 34 of the Criminal Code. His Lordship will read you that section and explain it to you. That Section 34 has two sections - Section 34(1) and I submit to you that you will see that it has very dubious relevance in this case, but His Lordship will be obliged to give it to you because 34(1) basically would apply

(20) to the situation where Ebsary had not intentionally stabbed Seale. This case revolves around your application of the facts to Section 34(2) of the Criminal Code. Now, for Section 34(2) of the Criminal Code to be brought into operation, you must find that MacNeil and Ebsary were being unlawfully assaulted at the time of or just prior to the stabbing. Because Mr. Ebsary can't take advantage of the provisions of Section 34(2) unless he and MacNeil were being unlawfully assaulted first. This is very important because this is the case. An assault is defined in

(30) law or one of the definitions is, "when a person attempts or threatens by an act or gesture to apply force to another person if he has or causes the other person to believe upon reasonable grounds he has the present ability to (inaudible)....." That's..that's the legal definition. What that means if Marshall and Seale were carrying out a threatening gesture or act there, then there was an assault and the Crown concedes that there was an assault if you accept..if you

accept that Jimmy MacNeil is correct when he says, "Marshall put his arm up behind his back and at the same time Seale said, "Dig man dig." That is in law a technical assault of Seale against Ebsary..to take that as a given, but you know, that depends on your assessment of James MacNeil's evidence - I'm not going to argue whether there was or was not. But

(10) that is the first step. Once you find that, that brings Section 34(2) into operation, that that assault has taken place. Before I leave that, you have to remember that the force with which this assault was being pursued bears directly on the amount of force which can be used in self defence. And you have to remember that although if you find that MacNeil is correct, there was a technical assault - you have to remember also that Jimmy also said that Seale's hands were down by his side. Marshall said Seale's hands

(20) were in his pockets, the thing was the hands weren't up threatening or gesturing toward Mr. Ebsary and that Jimmy also said (and this is significant) that the tone of voice - I believe he used words like, it wasn't a very violent one. So, then you have to consider after that..as I say, that first assault would bring 34(2) into operation. Then you have to consider whether or not Ebsary did intentionally stab Seale and then the next question if he intentionally did, at the time that he stabbed Seale, was he under a

(30) reasonable apprehension - that is Ebsary - did Ebsary at that time when he stabbed Seale, was he under a reasonable apprehension of death to himself or grievous bodily harm to himself? Cause if he wasn't, then he wasn't justified in plunging a knife into Seale's midriff. Also, in order for him to benefit from the defence of self defence, not only must he have been under a reasonable apprehension of death or grievous bodily harm to himself, but he must also have believed on reasonable grounds that he could not

- otherwise preserve; that is, Ebsary had to believe that he could not otherwise get out of that situation - preserve himself from death or grievous bodily harm. I'll take that in step, let's look first, let's go back and look at the evidence which bears upon whether or not the stabbing was intentional by Ebsary or as he says in his evidence, was it a blind swipe? Be-
- (10) cause if it was a blind swipe, of course that's more favourable to the self defence. Now, if it was intentional, you have to consider the kind of weapon that he had - that's why it was important to settle that question before you get here. Because if he had a fixed blade knife like Number 8 in his pocket at that time, then doesn't that add to the probability of an intentional use of that knife? Because he would have had that type of knife specifically for that type of purpose. You have to consider when Ebsary says,
- (20) "I swore by my Christ that the next man who struck me, would die in his tracks." Doesn't that bear on his.. on the fact that it was an intentional stabbing? Consider his words at the time. Two people have told us what Ebsary said at the moment or second of the stabbing. MacNeil said Ebsary said, "I've got something for you." Marshall said, "You want everything I had." And then there's the upward thrust. You see, those words combined with the upward thrust bespeak a deliberate, conscious movement on Ebsary's
- (30) part - not a blind swipe. Then you have to consider Ebsary's truthfulness in the statement when he says, "Well I just discovered the penknife." And I've already mentioned that. You have to consider the fact that Seale was only two or three feet away and the location of the wound. Where..where would the upward thrust be aimed? Jimmy MacNeil, who was there that night, he says it wasn't really that dark, there was a light there and then you have to compare that with Constable Mroz and then you have to deal with the

suggestion that Ebsary's eyes may not have been so good at the time. Now we've really got no evidence to suggest that he couldn't see what was happening, that he literally made a blind swipe. But if that were the case..if Ebsary..let's say he had his glasses off, we don't know from the evidence unfortunately whether they were on or off, but let's say for the sake of argument that his glasses were off that night.

(10) If his eyes were really that poor that he would literally have to make a blind swipe rather than the intention to stab, then why didn't the Defence ask Mary Ebsary, his wife at the time? All he had to do was say: Mrs. Ebsary, you were living with your husband at the time, what was his vision like when his glasses were off? If he really was so blind,.. he doesn't have to prove anything, he's right about that, I'm not suggesting he does, but certainly he

(20) had the opportunity to ask that question. So if there was any validity in that type of suggestion, that's..that's where it could have been cleared up, but it wasn't. So I suggest to you that the evidence is overwhelming that Ebsary intentionally stabbed Seale (inaudible)... Now, the next element..it's Section 34, in order for that intentional stabbing in that place with those results which fatally wounded him,inorder for it to be justified, Ebsary would have had to have apprehended death or grievous

(30) bodily harm at the time. Now Ebsary in his defence which is contained in the tape, states that part of his justification or this is the implication is he.. well I've been mugged umpteen times in the park before. And therefore, that leaves you with a suggestion that okay well maybe he did have a reasonable apprehension of death or grievous bodily harm, but you know, you have to remember that..that tape recording was largely self serving, given after he had had 14 years to think about a story to give. And you have to compare his

story that he had been mugged umpteen times with his wife..wife's story and she..she seemed very clear on this, that he had been mugged twice before, at least he had complained he had been mugged twice before and that there was no sign of physical injury on him from those previous alleged muggings. So therefore, how would the previous muggings have justified his reasonable apprehension of death or grievous bodily harm? If he had been pounced upon, like if they had been jumped from behind - all right (inaudible).. partly in that light in those circumstances..sure, who wouldn't reasonably apprehend? But Jimmy says they came from..from in front. And this is where the significance of that prior conversation - see they had been talking there, it was a very amiable conversation and then they walked away and then they came back. There was no apprehension whatever on Ebsary's part, let alone apprehension of grievous bodily harm or death. And then again, you have to consider the nature of the initial assault, the fact that Seale was standing away from him and his hands were at his sides or in his pocket, he was unarmed and really not a violent (inaudible).. So once you get beyond that section and finally then you have to consider whether Ebsary on reasonable grounds believed that he could not otherwise preserve himself from death or grievous bodily harm. Ladies and gentlemen, Mr. Foreman, I suggest to you that it is clear..we now have a picture of what happened in the park that night and how he could otherwise preserve himself did not even enter Ebsary's mind that night. Thank you.

COURT ADJOURNED (12:15 p.m.)

COURT RESUMED (1:30 p.m.)

JURY POLLED - ALL PRESENT

CHARGE TO THE JURY (January 17, 1985) (1:40 p.m.)

- THE COURT: Mr. Foreman, and Members of the Jury,
- (10) the evidence in this matter has been concluded and counsel for both the accused and the Crown have addressed you upon the evidence. It's now time for me to instruct you on the law and relate the law and the facts to each other so that you may arrive at your verdict. You have been attentive during the trial and I'm sure you will perform your duties in accordance with the oath you have taken. As jurors, you have a direct and deciding role to play in the administration of justice and are engaged in one of the most important
- (20) duties in which a Canadian citizen can be called upon to perform. Obviously, it is of fundamental importance that no innocent person should ever be found guilty of a criminal offence. Nevertheless, you are the guardians of the legal rights of this community and this community has a right to expect that those who commit crimes be strictly, but fairly dealt with. Therefore, your responsibility as jurors is to protect innocent persons from unjust convictions and to protect the safety and security of the community by finding
- (30) guilt against persons who have committed crimes. The law makes no distinction between accused persons and I instruct you to give this accused the same treatment as any other person who had a well established position in society. You are to deal with this case on the evidence; that is, the evidence of the witnesses you have heard and the exhibits filed and on that evidence alone. As I told you at the outset of this trial, our roles are quite different. You are the final judges on issues of fact. I on the other hand, instruct you as

to the applicable law. You must take the law as I give it to you. Put aside any notions you might have as to the relevant legal principles. It's your duty to be guided by my explanation of the law. If I am in error, there are procedures to correct that error, which you need not consider. In the course of my charge, I shall refer to some of the evidence and in

(10) doing so, I may fail to mention something which you believe to be important or conversely, mention something that you believe to be unimportant. Should you.. should that occur, you must remember that my view as to the significance of any evidence is in no way binding upon you nor is the opinion of counsel. It is your duty to make your own decision as to what is relevant and important in this case. You are the triers of fact. Further in the course of my charge I may express an opinion with regard to the evidence

(20) of any witness. Under Canadian law, a Judge is permitted to express opinions on whether witnesses are worthy of belief and on the facts in issue. You are in no way bound or obliged to accept my opinions on such matters because they are questions of fact and all questions of fact are for you to decide and you must make your own decisions. There are several general areas of the law which I must bring to your attention. The first of those is credibility of witnesses. In deciding the facts of this case, you

(30) are the sole judges of the truthfulness of the witnesses and the weight to be given to the testimony of each of them. To decide whether a witness is worthy of belief, you should bring to bear your common everyday experience in such matters; in other words, you should use and exercise good common sense. You may believe all of the evidence given by a witness, part of that evidence or none of it. To help you in making your determination as to whether you believe a witness in whole or in part or not at all, you should consider

a number of things: including the witness' ability and opportunity to observe the events recounted; the witness' ability to give an accurate account of what he saw or what he heard; the witness' appearance and manner while testifying before you; the witness' power of recollection; any interest, bias or prejudice that the witness may have; any inconsistencies in the testimony; and the reasonableness of the testimony when—

(10) considered in the light of all of the evidence of the case. You are not obliged to accept any part of the evidence of a witness just because there's no denial of it. Should you have a reasonable doubt about any of the evidence, you will give the benefit of that doubt to the accused with respect to such evidence. Witnesses see and hear things differently. Discrepancies do not necessarily mean that testimony should be discredited. Discrepancies in trivial matters may be

(20) and usually are unimportant. A deliberate falsehood on the other hand, is an entirely different matter, always serious and one which may well taint a witness' entire testimony. Once you have decided what evidence you consider worthy of belief, then you will consider all of the believed evidence as a whole in arriving at your verdict. I mentioned to you at the outset of the trial that in every criminal case there's a presumption of innocence. And this presumption while of utmost importance, has a very simple meaning. It means that

(30) an accused person is presumed innocent until the Crown has satisfied you beyond a reasonable doubt of the accused's guilt. It is a presumption which remains with the accused and for his benefit from the beginning of the case until the end. You heard counsel refer to a burden of proof. In a criminal case, the burden of proving or the onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown throughout the case and never shifts. An accused has no burden to prove his innocence. The Crown must prove

beyond a reasonable doubt that an accused is guilty of the offence with which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused is guilty of the offence with which he is charged, it is your duty to give the accused the benefit of the doubt and find him not guilty. I mentioned the expression, "reasonable doubt". It is

(10) rarely possible to prove anything with absolute certainty, so the burden of proof on the Crown is only to prove guilt beyond a reasonable doubt. This expression, "reasonable doubt" has its ordinary, natural meaning and is not a legal term having some special meaning. A reasonable doubt is an honest and fair doubt based upon reason and common sense. It is therefore a real doubt, not an imaginary or frivolous doubt. One cannot evade one's duties as a juror by conceiving some frivolous doubt and using that as..as the basis. Now

(20) if I refer to the Crown proving or establishing something or to your making some finding or being satisfied of something or some other expression of like nature, I mean in all cases, proof beyond a reasonable doubt. We have two types of evidence in any court case: one we call direct and the other circumstantial. Direct evidence is evidence which if accepted is the truth, proves the fact without the necessity of drawing an inference. Circumstantial evidence on the other hand, is evidence which does not directly prove a fact, but

(30) which may give rise to an inference of the existence of a fact. In this particular case for example, you look at the knives - there's no direct evidence that any knife was involved..I shouldn't put it that way - there was some evidence that maybe some of the knives were involved or one of the knives were involved, but there is circumstantial evidence, evidence of fibres and so on which may give rise to an inference that indeed one of those knives was the knife involved - I say may give rise. Now, a fact can be proven equally

effectively by using direct or circumstantial evidence. However, before basing a verdict of guilty on circumstantial evidence, you must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from those proven facts. In this case we had a number of expert witnesses. Ordinarily, witnesses are permitted to give evidence only of facts they themselves have seen, heard or otherwise perceived with their senses. They are not permitted to give their opinions when testifying in court. However, duly qualified experts are permitted to give opinions in matters in controversy at trial. To assist you in deciding the issues, you may consider such opinions with the reasons given for them, but just because these opinions are given by an expert, you are not bound to accept them if in your judgement they are unsound. I'll now deal with the offence with which the accused is charged. Particulars of the offence and where and when it is alleged to have been committed are set forth on the indictment which you will take with you into the jury room. The indictment is this document that I have in my hand and it is not evidence, it is only the charge. The indictment reads:

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(30) THAT Roy Newman Ebsary, of Sydney in the County of Cape Breton, Province of Nova Scotia, stands charged that he at or near Sydney in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May, 1971, did unlawfully kill Sanford (Sandy) Seale by stabbing him and did thereby commit manslaughter contrary to Section 217 of the Criminal Code.

Because of the rather unusual nature of this particular case and the length of time that has gone on since it occurred and because of the events that have taken place; namely, the conviction and term served in penitentiary by a person who was later acquitted, I feel I must tell you that you must banish that from your mind. You cannot consider the fact that the accused, who now stands charged of the offence, is now coming..is now on trial where someone else had

served a significantly long period of time in penitentiary. That has no bearing on this case whatsoever and I would ask you to banish that from your mind. You swore that you would consider this case on the basis of the evidence presented in court and only on that evidence presented in court. Counsel for the Defence gave you a rather thorough summary of the

(10) facts themselves. We had 17 witnesses called by the Crown and seven by the..or six by the Defence. It's not my intention to review now again the testimony of all of those witnesses. I'm sure that that testimony is fresh in your mind. Some of the witnesses played a very minor role. For example, the first witnesses, Mr. and Mrs. Seale, Mr. Marshall Sr., Mike MacDonald, the policeman or the retired policeman, Roy Gould - those witnesses testified primarily as to what the..the two boys, Seale and Marshall Jr. were

(20) wearing that day. They also gave some testimony as to the..to the size of the boys and their physical condition. Staff Sergeant Wheaton, he..his essential testimony was that he conducted a search of Mary Ebsary's house and brought forth the knives which you have as Exhibit 1. I don't think, as I say, that I need review the evidence of each of the parties. Greg Ebsary, he testified as to the knives and where they were and what his father had done with knives in the past. You had Richard Mac Alpine, the serology

(30) man, who was looking for blood and..on the knives to try and prove that one of these knives was involved in that particular event and he..he found no evidence of that. The witness, Maynard Chant, he was one of the youths who happened to come upon the scene and he testified as to what he saw, but again, most of these witnesses are to surrounding events. The evidence of Chant was gone into very carefully by counsel and there's no reason for me to repeat it. The key evidence in this particular case, to the law

as it applies, is the evidence of Donald Marshall Jr. and you will remember Donald Marshall Jr.'s evidence as to what took place on that particular night and I'm going to go over it in a little more detail with you later so I can reserve that. I should point out to you that while I am going to go over it later, his evidence on cross examination, it was established

(10) that Donald Marshall had testified to substantially different events in a number of other occasions where he has appeared in court under oath and given testimony as to the events of that night. And in at least four other occasions he gave statements under oath substantially different than the statement that he gave this time. The substantial difference was, in the other events, one of which was his hearing which led to his own acquittal, he gave clear evidence that there was a robbery in progress and in this event,

(20) he did not. Donald Marshall Jr. is an important witness as to the events for this trial, a very significant witness. And again, his testimony was gone over in considerable detail - I'll touch on it a little later. Donna Ebsary, her testimony related to the physical condition of her father and also the events that took place that evening - her recollection of his washing his knife or his hands and the knife and that there was blood on it. She also testified as to a statement that she heard MacNeil say when they came back into

(30) the house and she says that MacNeil said, "You did a good job back there." And the father, Ebsary, said, "Shut-up." She also testified that MacNeil was very excited. You have Mr. Evers who gave his testimony as to the existence of fibres on the knives - he went over each knife, he told you how many fibres, what kind they were and he told you that a number of them were consistent with the fibres that were worn in the jackets of both Seale and Marshall on that particular evening, but he is unable to say which knife

of course, if any, actually was the knife that was used. Corporal Carroll - essentially his testimony related to the taking of a statement from Mr. Ebsary and I can suggest to you at this time that on the matter of credibility, it is open for you to accept all of the statement, part of the statement or none of the statement, just the same as any other evidence that you may have. I think also I should caution

(10) you that the statement itself is given in 1983..1983?

MR WINTERMANS: '82, Milord.

THE COURT: Yuh I'm sorry, the Fall of '82, October of '82 and that is 11 years after the event itself and that's a fact for you to take into consideration. Now we also had the evidence that I read in of Constable Mroz and basically he was talking about the weather and where the people were when he arrived and so forth. I'm not gonna comment on..well we had Mary

(20) Ebsary, she testified not..not to any great significance on anything perhaps with the exception that..as to what was said, what she heard MacNeil say when..when Ebsary and MacNeil arrived home that night and her recollection was that MacNeil said, "You saved my life." Now the next very significant witness is MacNeil himself. MacNeil in his evidence relates a different set of events than Marshall now relates. According to MacNeil, there was a robbery in progress, it happened very quickly, they came upon the two men, one of them Marshall without saying anything grabbed

(30) his arm, twisted it up behind his back and Seale said to Ebsary while standing in front of him, "Dig man dig." And whereupon Ebsary, according to MacNeil, said words, "Do you want everything I've got?" or words to that effect and came up with a knife and hit him in the stomach with the knife, stabbing him and giving him a wound which later resulted in his death. MacNeil's testimony was that he was afraid, that he had no doubt that there was a robbery in progress and his after statement, whichever one you may accept:

"You did a good job back there." or "You saved my life."
Particularly the latter if you accept that one, would be indicative of a fear that he may have had for his life. With regard to the evidence of the Defence, not too significant there, perhaps some clarification of the weather, what the weather might have been at that particular time, some indication as to what Mr. Ebsary's
(10) sight is..his eye sight. Now, it's a little difficult to charge you on the law in this particular case because I have to give you one notion and then take you all the way through that and then go back on another notion. In this case the issue of self defence is clearly raised. Now, the charge was manslaughter and it was a charge under Section 219 of the Criminal Code:

"Every one who commits manslaughter is guilty of an indictable offence.."

And I'm going to deal with manslaughter down the road a little way, because there's another section of the
(20) Criminal Code, Section 34 and Section 34(2) of the Criminal Code provides:

"Every one who is unlawfully assaulted and who causes death or grievous bodily harm is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose.."

So he has to have a reasonable apprehension of death or
(30) grievous bodily harm and grievous bodily harm has no significant, special meaning, it means..it means serious bodily harm, but serious bodily harm could be a punch, depending upon where it was inflicted and upon whom, the age of the person and so on or it could be something far more serious than that.

"..and

(b) he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

So that's the provision. If the provision is met either by the Defence or on the facts or is not disproved negative by the Crown beyond a reasonable doubt, then self defence will constitute a justification or a manslaughter or a murder or whatever other offence might occur to which this defence applies. So I'm going to give you first...I'm going to charge you on self

(10) defence. I just read the section, it has an (a) and a (b) and I've read those parts to you. Since the issue of self defence is clearly raised, if it has been shown that the accused would otherwise be guilty.. otherwise be guilty of manslaughter, then before he can be convicted, you must also be satisfied beyond a reasonable doubt that he was not acting in self defence according to law. If you conclude that the accused did cause Seale's death in self defence as I shall explain it or if there be any reasonable doubt

(20) in your minds as to whether he did or not, then in either case you must acquit him. In law, self defence is not a loose term. It is defined by the Criminal Code and the conditions under which it may prevail are there rigidly laid down. Any defence which rests on the theory of self defence must strictly come within the provisions of the Code. I must emphasize to you that there is no burden on the accused to establish self defence. The burden is on the Crown to prove beyond a reasonable doubt that the accused did not

(30) act in self defence as I am about to explain it. To understand my explanation of self defence, it is necessary in the circumstances of this case to refer you to two other provisions of the Criminal Code. Section 302 of the Criminal Code states in part and I'm only going to read..of any of these sections, I will only read to you the parts that are relevant.. Section 302 states:

"Every one commits robbery who..
(c) assaults any person with intent
to steal from him;.."

Under Section 244(1)(b) of the Criminal Code:

"A person commits an assault when..
(b) he attempts or threatens, by an act or gesture, to apply force to another person..if he has or causes that other person to believe upon reasonable grounds that he has the present ability to effect his purpose:.."

- Now if you believe the evidence of MacNeil, that a
- (10) robbery was in progress, then in law, Ebsary was being assaulted. According to MacNeil, Marshall assaulted MacNeil in pursuing with Seale the common, unlawful purpose of robbery - consequently, at law, Seale is a party to that offence. Seale, an athletic, strong young man stood over the much smaller, older man and said, "Dig man dig." Obviously there was a clear indication of 'or else'. By that act in that place, at that time and in those circumstances, Seale was threatening Ebsary and in law, was assaulting him.
- (20) Marshall and Seale, in carrying out their common purpose were thus jointly assaulting MacNeil and Ebsary. If you believe MacNeil, you need pay no attention to the evidence of whether Seale's hands were at his side or whether there were any gestures made by Seale - you must, if you believe MacNeil, accept that Ebsary was in law, being assaulted. And then you must concentrate on whether the Crown had proved beyond a reasonable doubt that no defence under Section 34(2) had been established. Under Section
- (30) 34(2) of the Code, you are not to consider whether Ebsary was actually in danger of death or grievous bodily harm or whether the causing of death or grievous bodily harm by him was in fact necessary to preserve himself from death or grievous bodily harm, as the test for self defence for that is not the requirement of Section 34(2). I told you that defence is strictly and rigidly limited. Rather you are to consider whether Ebsary caused death or grievous bodily harm under a reasonable apprehension of death

or grievous bodily harm. And, the second element, and he believed on reasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm. The accused is entitled to be acquitted if upon all the evidence, there is reasonable doubt whether or not the blow was delivered under reasonable apprehension of death or

(10) grievous bodily harm and if he believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm. The accused has to prove nothing. Rather the Crown must prove beyond a reasonable doubt that the accused did not so act. Section 34(2) obviously provides for an acquittal, despite the fact that an accused means to cause death or grievous bodily harm, that he knows it's likely to cause death so long as the Crown had not negatived the elements of Section 34(2) beyond a reasonable

(20) doubt. The question of excessive force does not arise in this case and I tell you not to consider it. As to reasonableness of apprehension of death or grievous bodily harm, let's look at the circumstances. First, it was 1971 and there was some evidence before you of the existence of gangs in Sydney at that time. Secondly, there was evidence that the accused, Ebsary, was mugged several times in the park before. Ebsary and MacNeil, after drinking beer all evening, were walking to Ebsary's home, in the course of which they

(30) walked through Wentworth Park. It was dark and may very well have been overcast and raining. Suddenly they were met by two young men, a Black and an Indian. Marshall grabbed MacNeil's arm and twisted it behind his back. Seale said, "Dig man dig." They were committing a robbery and there was violence. MacNeil froze, was afraid and knew that they were being robbed. In the course of putting his hand in his pocket, Ebsary discovered a knife and he struck out with it, stabbing Seale and then to assist MacNeil, he slashed at Marshall

thus foiling the robbery. Prior to that, there was no conversation between Marshall or Seale and Ebsary and MacNeil. Following that, MacNeil at Ebsary's house said after the event..after they had gotten home, "You did a good job back there." Or he said, "You saved my life." Now you must take into account all the other circumstances that you know and you've

(10) had in evidence such as the age and physical condition of Marshall and Seale and the age and physical condition and state of sobriety of Ebsary and MacNeil. Now the test on these facts that I've just recited to you is, did they constitute a reasonable apprehension of death or grievous bodily harm? And then did Ebsary believe on reasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm? He may have been mistaken as to the imminence of death or grievous

(20) bodily harm or as to the amount of force necessary to preserve himself from death or grievous bodily harm, but if his apprehension of death or grievous bodily harm was reasonable, and there was reasonable and probable grounds for his belief that he could not otherwise preserve himself from death or grievous bodily harm, then his use of force was justified in self defence. Remember that all of these events took place in a very short interval of time. There was little time for cool thought. While it is for you

(30) to determine the facts, if you accept the evidence of MacNeil and those facts that I've just indicated to you, you may very well decide there was a reasonable apprehension of at least grievous bodily harm and that belief was on reasonable and probable ground. However, you need not go that far because the burden, as I have said, is upon the Crown and the Crown must satisfy you beyond a reasonable doubt that Ebsary did not have a reasonable apprehension of death or grievous bodily harm or that he did not believe on reasonable

and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm. On the facts as I've just presented them to you, the evidence of the knives, what type he carried on that night and his earlier statements as to what would happen to the next person who accosted him, have little or no relevance. A person may say any number

(10) of things and then get confronted with the very situation that he spoke about, but he didn't plan the situation to develop from the evidence as it's indicated here. One is not obliged to part with his property in such a situation and even parting with the property does not remove a possibility of death or grievous bodily harm in a robbery situation. Remember, the law of self defence proceeds from instinctive and intuitive necessity for self preservation. If you have any reasonable doubt as to whether

(20) the accused acted in self defence, you will find the accused not guilty of manslaughter cause the Crown has failed to prove that the accused's acts were not justified. If on the other hand you are satisfied beyond a reasonable doubt that the Crown has proved that the accused's acts were not justified as coming within the meaning of Section 34(2), then of course the defence of self defence does not exist and you must consider whether or not the Crown has proved the offence charged, of manslaughter. Before turning

(30) to the offence of manslaughter itself directly, I must tell you that if you disbelieve MacNeil and accept the evidence of Donald Marshall Jr., then the defence of self defence does not arise as there would be no robbery and no assault by either Seale or Marshall, which would give rise to the operation of the self defence provisions of the Code. According to Marshall, he met Seale at the park, he was going to try to scrape up some money by bumming or borrowing and as they walked through the park with

no intention of rolling or robbing anybody, they saw two men some distance away. He described the distance as approximately four lengths of the courtroom. One of those men asked for a cigarette and they walked toward them. There was a diversion when another couple asked for a cigarette. Seale went to the two men and Marshall went to the other couple first and (10) then went to join Seale and the two men. The two men turned out to be Ebsary and MacNeil. According to Marshall, there was a conversation, a conversation about the coat he was wearing, about him looking like a priest, about him being a sea captain, about his coming from Manitoba, about whether or not there were women in the park, about an offer to go home and that there was a quart of rum at home. After this, Ebsary and MacNeil walked away, a distance of about two (20) lengths of the courtroom and either Marshall or Seale called them back. As they came together, Ebsary said to Seale, "Do you want everything I've got?" and he put one hand on Seale's shoulder and stabbed him with the other. Now there was no explanation given as to why Seale or Marshall called them back. If you accept as facts the details as given by Donald Marshall Jr., as I have said, you need not consider self defence. You must then consider the offence of manslaughter which is the offence with which the accused is charged. Manslaughter, the section under which the accused is (30) charged is 219:

"Every one who commits manslaughter
is guilty of an indictable offence.."

Section 217 of the Criminal Code says:

"Culpable homicide that is not murder..
is manslaughter."

Section 205 of the Code states, subsection (1):

"A person commits homicide when,
directly or indirectly, by any means,
he causes the death of a human being."

Subsection (2):

"Homicide is culpable or not culpable."

"Homicide that is not culpable is not an offence."

(10) For example, just to explain that to you, if a doctor were performing, somebody is in extremis and he's operating trying to save and the person dies, it in effect is a homicide - the person has died and his death has been caused by what the doctor was trying to do, but that's not culpable homicide. Now, subsection (5) or subsection (4) says:

"Culpable homicide is murder or manslaughter.."

(20) And we'll knock off murder right away. Murder is the.. there's two kinds, the planned and deliberate murder - that's one kind and the second kind is the intentional killing somebody. So murder is out in this particular thing, we're not talking murder, we're talking manslaughter.

"A person commits culpable homicide when he causes the death of a human being,
(a) by means of an unlawful act,..."

The unlawful act alleged here is assault for the manslaughter..what the assault is that Ebsary assaulted Seale. Under Section 245 of the Code, every one who commits an assault is guilty of an indictable offence or summary conviction offence, so that's an unlawful act. Section 244(1):

(30) "A person commits an assault when
(a) without the consent of another person...,he applies force intentionally to (that)..person....,directly or indirectly;"

Now what I'm about to say on manslaughter applies throughout the..your whole deliberation on this case. I gave you the defence of self defence first. Normally, I suppose one would cover manslaughter, tell you what that all is and then..and then go on and say, well there's a defence to that. I've taken the other route and what I'm saying about manslaughter applies in both

cases. You would consider manslaughter and if you find that there was indeed a manslaughter, you're satisfied beyond a reasonable doubt as to the guilt of the accused, then on that, then you would have to consider the defence of self defence which may justify the manslaughter and if so, then of course he is not guilty of manslaughter. Or if you don't pay any attention to the self defence

(10) at all, you discard that as a..from your finding of the facts, then you have to make your finding of manslaughter. So what I'm about to say really applies in both situations, whether you accept Marshall's testimony or MacNeil's testimony except that the offence is justified if you find that the Crown has not negatived beyond a reasonable doubt the defence of self defence. If it has or if you accept Marshall's evidence as to the events, then the law of manslaughter really can be explained to you as follows. Under the Criminal Code,

(20) a person commits homicide when directly or indirectly by any means he causes the death of a human being. Now as far as the evidence is concerned here, there can be little doubt that Ebsary stabbed Seale. It's for you to find, not me, but you must consider the evidence and come to the finding yourselves beyond a reasonable doubt. MacNeil says Ebsary stabbed Seale. Marshall says Ebsary stabbed Seale. Ebsary himself in his statement says he stabbed Seale. The medical evidence supports one wound in Seale and that Seale died as a

(30) result of that wound. I don't think that you would have any difficulty on the evidence that you have in front of you in coming to the conclusion, being satisfied beyond a reasonable doubt that Ebsary stabbed Seale. When I read the definitions to you, there's a few things that I should explain. I used the term that homicide is either culpable or non culpable. The word, culpable, simply means blameworthy. Homicide is blameworthy or it's not blameworthy. A person commits culpable homicide when he causes the death of

a human being by means of an unlawful act. If you accept that Ebsary came up to Seale without any question and without ado and without any provocation or assault by Seale, merely put his hand on his shoulder and took the other hand out of his pocket and stuck the knife in Seale's stomach, then he was in the course of an assault, it's an unlawful act and that would be culpable homicide. In this case the Crown contends that the accused caused the death of Sandy Seale by the unlawful act of assaulting him. I don't think I need to define assault any more than I've said, but just to make it perfectly clear, an assault is committed when a person directly or indirectly applies force to the person of another without his consent or attempts or threatens by an act or gesture to apply force to the person of the other...if he has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose. So an assault may consist of an intentional application of force such as a punch or a punch in a hand that has a knife which results in a stabbing and an assault is an unlawful act. If you are satisfied beyond a reasonable doubt that the accused, Ebsary caused the death of Sandy Seale by striking him with a knife in the stomach, then those acts of the accused constitute an assault which was an unlawful act and which caused the..which act caused the death of the deceased. The accused thus would have committed culpable homicide because he caused Seale's death by an unlawful act and I don't want to leave you there because it's always unless the Crown has satisfied you that self defence has been negatived beyond a reasonable doubt. Now a person commits manslaughter when he causes the death of another by an unlawful act even though he did not intend to cause death or bodily harm that he knew was likely to cause death. A stab does not necessarily mean that it was an intention to cause death, but

that's not necessary. You must be satisfied beyond a reasonable doubt that the accused intentionally assaulted the deceased, but the Crown does not have to prove that the accused intended to cause the death or to cause him bodily harm; however, the use of a knife.. one can deduct one's intentions from one's acts to a large extent and the use of a knife would certainly suggest the possibility of bodily harm, but that

(10) doesn't matter. It doesn't matter what his intention was as far as manslaughter is concerned. Now if you are satisfied beyond a reasonable doubt that the death of Sandy Seale was caused by the assault of the accused, an unlawful act, then you will find the accused guilty of manslaughter if you are satisfied beyond a reasonable doubt that the accused did not act in self defence. Essentially this case boils down to an issue of credibility. Do you accept the evidence of

(20) MacNeil or do you accept the evidence of Marshall? I spoke to you earlier on the issue of credibility. I now must add that the evidence discloses that Marshall testified under oath on four previous occasions relating to the events of this evening of May the 28th, 1971 and on those occasions has testified substantially differently than he did before you. On those occasions he testified that there was a robbery in progress. On each occasion he was under oath and was purporting to tell the truth. I must caution you that it is

(30) dangerous to rely on evidence given by a person who on so many occasions all under oath gave so substantially different evidence. In effect, the theory of the Crown just in a few words, it was put to you by Mr. Edwards is that Marshall was telling the truth and that the events happened basically as Marshall outlined them. The theory of the Defence is basically that it was self defence. And I believe the issue boils down right to that particular point or to that..to that much of a nicety. Now as to possible verdicts that you may

reach, I would suggest to you that there are only two possible verdicts. One is guilty as charged and the other verdict is not guilty. Now this is the end of my charge to you and I'd like to conclude by dealing with your duties as jurors in the jury room. When you go into your jury room, it's your duty to consult with one another and to deliberate with a view to reaching a just verdict based on the evidence that you have heard and seen. Your verdict will be based, as I have stated earlier, on the facts as you find them and on the law as I've explained it to you. You will be given the exhibits to take with you to the jury room so that you may consider them there. I already indicated to you that I would let you have the indictment, but I again make clear to you that that is not evidence. Now when you go in, do not take a dogmatic position. When you enter the jury room and commence your deliberations, I ask you to make no emphatic expressions of opinion or express a determination to stand for a particular verdict. If you proceed in that way, it makes it difficult for you to consider the wisdom of your fellow jurors. Keep an open mind. Listen in a calm and impartial manner to what is said by your fellow jurors and put your own views forward in a reasonable way. Your function is not that of advocates whose duty it is to argue one side or the other. The advocates are out there. They presented their cases and they've argued the one side or the other. Your function is that of a judge. You are judges and if you approach your deliberations calmly, putting forward your own views and listening attentively to the views of others, you will be able to arrive at a just and proper verdict. Since this is a criminal trial..perhaps before that, I should suggest to you the function of the foreman in the jury room.. The foreman should act as the chairman and preside over your discussions. He should give

every juror an opportunity to state his or her views, but he should try to keep the discussion from wandering too far afield or from becoming repetitive on any one point. And when you've arrived at your verdict, of course the foreman will announce it to the Court. Now since this is a criminal trial, you must be unanimous in your verdicts. In other words,

(10) it's necessary that each and all of you agree on the verdict that you see fit to return. Now it's the right of a jury to disagree, but I know that you will do your best to come to an agreement. This trial has involved considerable time, considerable expense and considerable disruption of your own lives as well as the lives of the witnesses and particularly, this matter is now 14 or 15 years old. I am certain that no other jury could deal with the matter better than you. You've heard all the evidence, you have the

(20) opportunity of seeing the exhibits and you've heard everything that there is to know. After you retire now, I'm going to be discussing my charge with counsel and they may have some matters that they wish corrected or some matters on which they wish me to give you further instructions. This is a perfectly proper procedure and it's quite possible that I may have made some error or have overlooked something. If I call you back to deal with such matters, I ask you not to give any special emphasis to what I say

(30) to you on that occasion. I would ask you to simply regard it as something that I would say now if I had thought of it or something that I would have said correctly if I have said something incorrectly. So you would treat it as though I said it to you now. In considering your verdict, you must not concern yourselves with the consequences of it. This is completely irrelevant to your deliberations and to your responsibilities. In determining the guilt or innocent of the accused, the subject of penalty or punish-

ment should not be discussed by you. If there is anything about which you're not clear, I will be available to answer your questions. If you have any questions, I would ask your foreman to put them in writing, deliver them to one of the Sheriff's officers and he'll deliver it to me. I'll again repeat to you what possible verdicts - guilty as charged or not guilty.

- (10) And on the indictment which you will take it..can I have it..do I still have it? Should and whether I do is another matter. In any event, I'll come up with it in a minute. On the back of the indictment, there is a place where the verdict is to be written in and you would write in either guilty or not guilty and then the indictment will be signed by the foreman as foreman of the jury and we'll see that you get it. The pleasant part for you now is as follows - you will now remain together and you will not be separated until such time
- (20) as you reach a verdict. And if you listen to the oath that's being given to the Constables, you will understand what his duty is and where you will be kept while you are deliberating. Can we swear the Constables now.

CLERK SWEARS CONSTABLE IN CHARGE OF JURY

THE COURT: All right, members of the Jury, you may now retire to consider your verdict.

(30)

JURY RETIRES FOR DELIBERATIONS (2:37 p.m.)

THE COURT: Now I noticed you were busily writing there, Mr. Edwards, do you have any comments?

MR EDWARDS: Yes I do, Milord. Milord, I regret, but I must register an objection to that charge in the strongest possible terms. I say with trepidation that it would be hard to imagine how a charge could have been any more unfair than that one.

613. DISCUSSION

THE COURT: In what way?

MR EDWARDS: In several ways, Milord, mainly in the way that you presented the evidence to them and said that it was simply a choice of whether they believed MacNeil then..there's no self defence..or..or they must believe Marshall (inaudible)....as false.. you said..you said at the beginning of your charge
 (10) that they could believe all, some or none of what any witness said, but that was more than counteracted by the way you put the..the evidence of..of MacNeil and Marshall. So..a few of the points. You said for example, if you believed MacNeil, you need pay no attention to whether Seale's hands were at his sides.

THE COURT: That's right.

MR EDWARDS: That is..that is so dead wrong, Milord.

THE COURT: It's not dead wrong.

MR EDWARDS: Yes it is, Milord, it..it's a mis-
 (20) interpretation by Your Lordship of what the Appeal Court said in the..in the appeal decision ordering a new trial here. What they said was that you didn't need to consider whether his hands were at his side or not in order to determine whether in fact an assault was taking place, but certainly the force of that assault, you know, when they're determining the force with which that assault..

THE COURT: They don't have to consider the force of the assault, that's..that's the difficulty..

(30) MR EDWARDS: Doesn't Section 34(2)(a), doesn't that bear on here?

THE COURT: Not for force.

MR EDWARDS: "...from the violence with which the assault was originally made..", that that doesn't call them to measure the..

THE COURT: No measurement, where does the measurement come in?

MR EDWARDS: "...he causes it (that is the damage) under reasonable apprehension of death or grievous.."

"..bodily harm from the violence with which the assault was originally made..", so..so..

THE COURT: The violence..

(10) MR EDWARDS: So they..that..they have to determine what was going through Ebsary's mind and therefore they had to put their selves in his position and, you know, what reasonable grounds did he have? What did he reasonably perceive at that time? The violence with which the assault was originally made. Do..do you agree, Milord, that in the Appeal Court decision.. you see, the Appeal Court stated, I believe wrongly, but they stated that I had argued in the second trial that no assault was taking place. That is not what I said, but that's the way they interpreted it and therefore, they said, you know, it didn't matter whether his hands were at his side or not because I.. his hands didn't have to be moving in order for there

(20) to be an assault. Well here, I mean that's why I went out of my way to say, all right if you believe MacNeil, then there was an assault, but the nature of that assault - they have to consider what was Seale doing? He was standing there with his hands at his side or his hands in his pocket..

THE COURT: If they believe MacNeil, he was robbing him.

MR EDWARDS: But that..

(30) THE COURT: If they believe MacNeil, he was robbing them, that's what he was doing.

MR EDWARDS: He was robbing them sure, but then, you know like you said, are..you believe MacNeil, he was robbing them, but you didn't..you didn't..I submit, present MacNeil's evidence fairly. MacNeil did not close the door on whether or not that prior conversation, which I submit is crucial, had taken place.

THE COURT: How is it crucial? He could have said..he could have said, next fellow that comes along, I'm gonna give it to him and a year later, a month later,

six weeks later, six years later somebody comes along and he does exactly that...so long as he is confronted with the assault upon him..

MR EDWARDS: No that's not the prior conversation..

THE COURT: Which prior conversation are you talking about?

(10) MR EDWARDS: The prior conversation I'm talking about is the one that Marshall says he had with Ebsary and MacNeil.

THE COURT: And MacNeil denies any prior conversation.

MR EDWARDS: MacNeil does not deny it..

THE COURT: MacNeil..

MR EDWARDS: He doesn't specifically deny it.

THE COURT: He was never asked what the conversation was before the..

MR EDWARDS: That's right.

(20) THE COURT: Yuh.

MR EDWARDS: The door wasn't closed on that conversation, it's still an open question.

THE COURT: It's not open..

MR EDWARDS: My learned friend said himself, MacNeil had no..no reason to recall what happened until his arm was placed up behind his back by Marshall. The Crown didn't run away from that.

MR WINTERMANS: MacNeil did say there was no conversation.

(30) THE COURT: That's what..that's my impression that ..that he did..I was just going to look to check. MacNeil's evidence is they came upon them suddenly, quickly, they saw them coming and all of a sudden they were in front of them and without any conversation, they grabbed him and..Marshall grabbed him, put his hand behind his back and..and held him.

MR WINTERMANS: Walking through..and walking through the park without stopping.

MR EDWARDS: He said walking straight through minding..minding your own business,"They just came up.."

"..abreast of us, I'd say from in front of us." That's.. that's what he said. Now, the point is MacNeil could have been referring to when the two..when the four came back together again after that conversation. After.. after Ebsary had ample time..

THE COURT: Wasn't brought out..pure absolute speculation.

(10) MR EDWARDS: How is it pure, absolute sn..I don't understand that, Milord.

THE COURT: Can't test..

MR EDWARDS: You know..

THE COURT: I can't tell them what he didn't say.

MR EDWARDS: And then you're saying that, you know this is most damning of all, you said, ladies and gentlemen, the theory of the Crown is that Marshall was telling the truth.

THE COURT: Isn't it?

(20) MR EDWARDS: I didn't say that, no.

THE COURT: Isn't that your theory?

MR EDWARDS: No.

THE COURT: What is it?

MR EDWARDS: I..I put it to them that if they believe James MacNeil, then the assault was taken place. What I said to them was that they should focus on that part of Marshall's conversation dealing with that prior conversation and I put it to them that he has never been contradicted on that and how else would
(30) he know that Ebsary was called reverend or captain unless that conversation had taken place.

THE COURT: I don't know..

MR EDWARDS: Your Lordship..

THE COURT: The difficulty is there's 15 years of.. of newspaper clippings, newspaper evidence as to what was taken place at all of these hearings, I have no idea..no idea where he may have gotten it. Maybe he didn't get it from something else, maybe he got it from that time, but I gave..given the evidence that my..my

summary of MacNeil's evidence is there was no conversation. They never had a prior conversation.

MR EDWARDS: Yuh as opposed..as opposed to Marshall, you know you said that Marshall had lied on previous occasions.

THE COURT: And he has.

MR EDWARDS: But he has never lied about that.

(10) It's not in evidence in this trial that he's ever lied about that part and had I been able to redirect him on the '71, we could have shown that that's what he said in 1971.

THE COURT: Fine.

MR EDWARDS: Milord, I..I feel constrained to say I'm very concerned about the appearance of this.

THE COURT: Okay you give me..

MR EDWARDS: You know..

(20) THE COURT: You tell me what you think I should.. what..what points..list them as points, there's no sense going to a long discussion over this, what points you think I should charge them with that I have not or that I was in error?

MR EDWARDS: Well Your Lordship has your notes on.. on my address and I submit to you that that was as fair a summary of the evidence on the crucial facts as you could get and if Your Lordship is gonna give them the theory of the Crown, then I submit that..that..

THE COURT: You tell me..

(30) MR EDWARDS: It should accurately reflect that..

THE COURT: Okay I've got your issue, if they believe MacNeil that there was an assault, and then what? If they believe MacNeil's evidence you told me your theory was that there was an assault, you told them there was an assault taking place and then where did you go from there?

MR EDWARDS: I told..I told them that they had to consider that..that conversation, whether that in fact had taken place or not. I mean I could give my address

over again..

THE COURT: No I don't want you to do that.

MR EDWARDS: But I submit that that's not my function here.

THE COURT: Consider whether that conversation took place?

(10) MR EDWARDS: And that the Crown..the Crown wasn't asking them to believe Marshall wholus bolus.

THE COURT: But some part of it?

MR EDWARDS: I directed their attention to a specific part of Marshall's evidence.

THE COURT: Which part, which part do you want me to..

MR EDWARDS: Well Milord..

(20) THE COURT: Look I gave them a short a summary as I possibly could give on the theory, so you tell what parts you want me to say without repeating the whole.. I've got, consider the conversation that took place. What else do you want me to say? You don't want me to give your..give your address all over again?

MR EDWARDS: No.

THE COURT: Well surely you can give me a summary what..what your address is.

MR EDWARDS: Give me ten minutes, then I'll prepare something.

MR WINTERMANS: Milord, can I say one thing?

THE COURT: Well we have one first.

(30) MR EDWARDS: You know I mean, there at the end you said it boils down to credibility - do you accept the evidence of Marshall, do you accept the evidence of MacNeil - black or white, you know, if you take MacNeil - gone, don't believe anything Marshall says, that's what..that's the effect of what you told them.

THE COURT: And isn't that..

MR EDWARDS: On the other hand, if you reject..

THE COURT: If you have two opposite stories to a set of events, if you take one, you don't take the other.

MR EDWARDS: Those stories as presented in this trial are reconcilable. You know, the door wasn't closed on Jimmy MacNeil in this trial the way..

(10) THE COURT: You don't have to argue with me, I mean I just want you to tell me what you want me to say to the jury. And if you have some things you want me to say, fine I'll consider..I'll consider anything that you tell me and I may say some of the things and I may not say some of the things to the jury and I'll tell you why. But do you want to take a few minutes and say, here I'll..I'll..I want you to say these? I'll consider it. Do you want to..do you mind hearing what Mr. Wintermans'..

MR EDWARDS: No, no, love to hear it.

THE COURT: In the meantime?

(20) MR WINTERMANS: Just with the respect to the relevance of the prior conversation, I..I would submit, Milord, that whether or not there was some small talk before this happened or not does not materially effect the..the nature of the subsequent robbery. Let's assume for the moment that the four of them were sort of walking along together for..for a minute and then.. and talking about whatever Marshall says they were talking about and then Marshall grabbed..grabbed MacNeil's arm and Seale said, "Dig man dig.". It's still a robbery. Maybe they were casing their..their victims first trying to size them up for the first (30) couple of minutes and if that's the case, it's still a robbery and it's still justifiable homicide and self defence. So I would submit that whether or not there was a conversation beforehand is not..is not relevant.

THE COURT: All right, are you satisfied from the Defence point of view with what I've said?

MR WINTERMANS: I'm satisfied.. Well, Milord, the..the subjective element of..of the self defence test and the mistake of fact element involved and the..

the fact that with respect to whether you believe Marshall or believe MacNeil, the way that was put, I would have preferred that you put it that if you feel that MacNeil might be telling the truth and that Marshall might be not telling the truth, then self defence stands. Because, you know, the question of resolving doubt in favour of..of innocence. I..I..

(10) THE COURT: I thought I told them..

MR WINTERMANS: Basically I'm satisfied..

THE COURT: As many times as I could that..

MR WINTERMANS: To leave it the way it is..

THE COURT: They had to make their findings beyond a reasonable doubt and they had to be satisfied on the evidence on a reasonable..beyond a reasonable doubt.

MR WINTERMANS: But as far as the prior conversation, I believe that it's irrelevant because even if they did have a little chit chat first, if Marshall
(20) then had sized them up and realized they were easy targets, then it's still..still a robbery.

THE COURT: The notes I have just for your benefit of MacNeil..

MR EDWARDS: Yes.

THE COURT: Is we talked about..they were drinking at the..at..his drinking habits and..talked about Ebsary that he had six or seven drafts and that Ebsary had about the same. That after they left, they were going to Ebsary's place. You asked him the direction
(30) and he indicated to you, the route was go right down George Street, turn off at the tracks into Wentworth Park, through the park, across the footbridge, then up on Crescent, across Crescent to the sidewalk and then go to Argyle, that's the way they were going. Then he said, when they crossed on Crescent, they bumped into Seale and Marshall, did not know them, they came close, right up..right up to them. Seale in front of Ebsary, Marshall grabbed his arm and twisted it behind his back, he froze..Seale and Ebsary were only

a couple of feet apart. Marshall said nothing to him and Seale said, "Dig man dig." Now that's..that's the evidence that I have from..from MacNeil at that crucial time and the reason why I didn't get into the conversation is, that evidence seems to deny any conversation having taken place before them.

(10) MR EDWARDS: And I..and I stated that in my address. I said, on the fact of it that..that seems to be the case, but I asked them to consider MacNeil's condition at the time, his drinking habits at the time and the very human factor that, you know, somebody who'd just been six or seven hours in a tavern, he'd be going along on his merry way under the serenity of drink. He'd have no occasion to..to really come awake until he was grabbed. My learned friend said that in his address.

THE COURT: Well I didn't say it in my charge..

(20) MR EDWARDS: You know, so there's less than the complete denial..much less than a complete denial of conversation.

THE COURT: I don't agree with you and I'm not gonna charge them on any possibility from MacNeil's evidence that there was a prior conversation. On..on Marshall's evidence there was and I told that. I told them what the conversation was.

MR EDWARDS: Mm.

(30) THE COURT: I'm not going to do it on..on MacNeil's and I'm not going to speculate that because he had six or seven beers that evening that he might not have been able to remember that. Now if there's any other points, fine. You want to take some time and..

MR EDWARDS: I'd like ten minutes or so, Milord, to draft something up..

THE COURT: All right and we'll just adjourn for ten minutes. You can let me know when you're ready.

COURT ADJOURNED FOR TEN MINUTES

COURT RESUMED

THE COURT: Mr. Edwards?

MR EDWARDS: Milord, there are three matters that I'd like you to re-instruct the jury on.

THE COURT: All right.

MR EDWARDS: First, I would like you to correct your statement to them that if you believe MacNeil, self defence does not arise. The Crown submits
(10) that that statement is clearly wrong. It negatives the wording of the section and telling them that..

THE COURT: I'm sorry, if you believe?

MR EDWARDS: I..I had in my notes that you said, if you believe MacNeil, self defence does not arise.

THE COURT: No, if you believe Marshall..I said MacNeil..it was Marshall. If you believe Marshall.

MR EDWARDS: If you believe Marshall, self defence does not arise? Well even..even if that's the case, then you know, I'd ask for the same..same re-instruction
(20) because..

THE COURT: That if you believe Marshall, self defence..

MR EDWARDS: If you believe Marshall, self defence does not arise.

THE COURT: Yes.

MR EDWARDS: So in other words, if Marshall says..

THE COURT: There was no assault. Marshall in effect says there was no robbery.

MR EDWARDS: Mm.

(30) THE COURT: Therefore there was no assault.

MR EDWARDS: Okay.

THE COURT: Therefore there was nothing unlawful..

MR EDWARDS: Are you sure you didn't say MacNeil on.. I was sure you said MacNeil.

THE COURT: I..

MR WINTERMANS: I hope you didn't say that Your Honour.

THE COURT: I presume I said Marshall, but I'll make it very clear..I'll go back to...my own notes here.

No, I said if you disbelieve MacNeil and accept the evidence of Donald Marshall, then the defence of self defence does not arise.

MR EDWARDS: Mm, okay.

THE COURT: You agree with that, don't you? That if Marshall's testimony is accepted, there is no question of self defence, doesn't enter the picture at all.

(10) MR EDWARDS: Right, right okay.—Then..

THE COURT: But I'll..if you have any doubt, I'll.. I'll certainly correct it..or repeat it again to them.

MR EDWARDS: No I mean if that's what your notes say, because I..I didn't get good notes on that point, but I would ask for a redirection under Section 34(2)(a) because of what you said about..that they're to pay no attention to whether Seale's hands were at his side.

THE COURT: I said those factors were not...

(20) MR EDWARDS: That if you believe MacNeil, you need pay no attention to whether Seale's hands were at his sides. Now that clearly, I submit, goes against the words of Section 34(2)(a).

THE COURT: All right and..

MR EDWARDS: And then..

THE COURT: And do you want to elaborate on that or not? On why it goes against the..34(2)(a)?

(30) MR EDWARDS: Well, generally I would think you'd.. you'd have to read them the Section, break it down and say that when Ebsary stabbed Seale, he must have had reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made..

THE COURT: But the..

MR EDWARDS: And then when..

THE COURT: But the assault was a common one wasn't it? Assault of both Marshall and..

MR EDWARDS: Right.

THE COURT: And Seale..

MR EDWARDS: So..

THE COURT: At which..if you take..if you accept his evidence at which time Marshall has already started the violence.

(10) MR EDWARDS: Yuh, but that section, "..from the violence with which the assault was originally made.." makes it incumbent upon the accused in that situation to measure, although there is the standard instruction, he need not measure to a nicety, but there's an onus on him to measure the violence and when they're putting themselves in Ebsary's shoes, which they..they have to do, they have to consider the violence of the assault. And so they have to consider what Marshall was doing to MacNeil and what Seale was doing to Ebsary, so they have to consider that Seale was just standing there, hands at sides according to MacNeil or hands in pocket, according to Marshall, not speaking very violently according to MacNeil, apparently unarmed according to MacNeil. That's the way they consider from the violence with which the assault was originally made. To leave it as it is now, that is tantamount to saying that the fact..the mere existence of a legal, technical assault means that you could execute your aggressor on the spot and that's certainly not the law. So I would ask for a redirection on that point and I would ask Your Lordship to put the theory, to restate the theory of the Crown, tell them that you have misinterpreted it, the theory of the Crown and that (20) the following is the theory of the Crown. That is it's not necessary for the jury to believe the entirety of the evidence of either James MacNeil or Donald Marshall in order to conclude that at the time of the stabbing, Ebsary was not acting in self defence. The Crown says that the jury should analyze the evidence of each in order to determine whether Marshall or MacNeil has the best recollection or what (30) happened immediately prior to Marshall putting MacNeil's

arm up behind his back. That is the position the Crown took during my address and in front of the jury throughout the trial and I submit that that would be the fairest way to undo what I'm afraid may have already have been done.

THE COURT: Well I have no difficulty with saying.. saying that to the jury. Okay, now there was a
(10) question come in from the jury in the interval, which I'll read to you so you can understand it. "What reference, if any, was made by the Defence or Prosecution to the 1971 transcript of the trial? Of interest is, if there is any reference to a conversation between the two parties, was it stated in this trial or from a transcript of Marshall referring to Ebsary as a captain? Is this information available to the jury?" Now my recollection of the evidence is that there was no reference by either Crown or the Defence to the
(20) 1971 transcript and that would answer that question.

MR EDWARDS: There was..I almost said an oblique reference by me, but I really detest that word now.

THE COURT: Well there was the reference when you started to ask the question and..on the 1971 transcript on the re-examination of..

MR EDWARDS: Yes, that..I was thinking of during my address when I..when I was putting it to them about the believability of Marshall's story about the prior conversation and I told them to note that he wasn't
(30) contradicted on that in cross examination, if that was a recent fabrication..I think these were the words I used or words to the effect..I said, then surely Defence counsel would have put it to him - well why didn't you say that in 1971?

THE COURT: Maybe that's where the question came from. I..my..

MR EDWARDS: Could be.

THE COURT: My intention would be to answer them that subject to any correction by yourselves that...that

there is no evidence before them of the 1971 transcript of the trial and therefore they can make no conclusions one way or the other on that. I don't see any other answer that I can give them on that.

MR EDWARDS: That there is no..

THE COURT: There's no evidence of what the 1971 transcript was.

- (10) MR EDWARDS: But surely having said that, they may consider whether or not that story was a recent fabrication and they can consider the fact that he was not contradicted on that point in cross examination, it wasn't even raised with him.

THE COURT: But that's implying that he said something in 1971 and there's no evidence of what he said in 1971.

- (20) MR EDWARDS: Mm, but surely that last part that I just gave you puts it in context because if..if you just leave it as you put it, then that virtually wines out the possibility in their minds that he could have testified that way in 1971.

THE COURT: That's what I think I should do on..on the evidence.

MR EDWARDS: I think they should be left with.. with the impression that he may or may not have and the only way of doing that..

THE COURT: Which doesn't help them. He may or may not have.

- (30) MR EDWARDS: I think, you know, they've got enough evidence before them to find that that wasn't recent fabrication and..

THE COURT: Well I'm not..I'm not..

MR EDWARDS: I submit that's..

THE COURT: Concerned of whether..on the notion of recent fabrication or not..I'm concerned as to whether or not there's any evidence before the jury, the jury has to decide on the evidence at this trial.

MR EDWARDS: Mm.

THE COURT: And at this trial I don't see any evidence at all on the 1971, so they can't..if they presume that he did say it in 1971 and go on and make a finding, then they're making a finding on evidence not before them in the court and the presumption may be entirely wrong. Or if they presume that he did in 1971 say what he had been saying earlier, the presumption
(10) might be entirely wrong.

MR EDWARDS: Read the question again, Milord, please?

THE COURT: "What reference if any, was made by the Defence or Prosecution to the 1971 transcript of the trial? Of interest is if there is any reference to a conversation between the two parties. Was it stated in this trial or from a transcript of Marshall referring to Ebsary as a captain? Is this information available to the jury?"
(20) My view is that there's no information available to the jury of the 1971 transcript from which they could make any conclusion whatsoever. All right, would you call the..

MR WINTERMANS: Could I respond to the first re-direction that..

THE COURT: All right.

MR WINTERMANS: There's one..one thing that was..was ignored and that is that Mr. Ebsary in his tape recorded statement made reference to the..the fact that from his
(30) view Mr. MacNeil was being strangled by Mr. Marshall. And...

MR EDWARDS: Well wait now..well I'll respond when he finishes.

MR WINTERMANS: I'm sorry, Milord, what exactly was it that you were going to say..that Mr. Edwards wanted you to say, could you just read it to me please?

THE COURT: He wanted me to say that it was not necessary for the..I indicated to them that the Crown's position really was that they should believe Marshall.

That may have been too..obviously was too short a suggestion and he's indicated that I should charge them that it's not necessary for the jury to believe the entirety of the evidence of either James MacNeil or Donald Marshall, in order to conclude that at the time of the stabbing Ebsary was not acting in self defence. The Crown says the jury should analyze the
(10) evidence of each in order to determine whether Marshall or MacNeil has the best recollection of what happened immediately prior to Marshall putting MacNeil's arm behind his back and I presume is suggesting that..that may have been that conversation beforehand.

MR WINTERMANS: You might add that whether or not there was a conversation beforehand does not affect whether there was a robbery afterwards and that the assailants could have been casing their subjects briefly beforehand during the brief conversation which
(20) may or may not have existed and that if following a brief conversation, the robbery commenced, then it..it would still be self defence. In other words, whether or not there was a prior conversation is..is not relevant.

MR EDWARDS: Well we're getting into argument now, that's for argument.

MR WINTERMANS: No, I..I don't think so, I..

MR EDWARDS: That's a point that..

THE COURT: See I've indicated to them that in
(30) MacNeil's testimony there was no conversation. That's what I concluded from MacNeil's testimony. And from my notes, that's what I had there - they just came upon them and the events occurred. Marshall's testimony, which I also alluded to, indicated that they came upon them or they..they were walking through the park, they saw them at four courtroom lengths away, one of them asked for a cigarette, Seale went to them, Marshall went to the other couple who asked for a cigarette at the same time and then Marshall walked over to where

Ebsary and MacNeil and Seale were and there was a conversation. I don't want to confuse them, it's difficult enough to give them the..the self defence, the elements that are involved.

(10) MR WINTERMANS: My point is that whether there was or was not the prior conversation does not affect that if..that..that it would still be a robbery if the short conversation were followed by an attack.

THE COURT: Just one minute, you don't have to get up..I just want to get a decision.. I have difficulty, Mr. Edwards, with your suggestion on 34(2)(a).

MR EDWARDS: 34(2)(a)?

THE COURT: This is the one that I have difficulty with. 34(2)(a):

(20) " ..causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes.."

It is in my view impossible to disassociate Seale from Marshall.

MR EDWARDS: No I'm not trying to, but my point, Milord, may..you know..

THE COURT: And..

MR EDWARDS: Perhaps I'm not making myself clear..

(30) THE COURT: Well what..what I thought I had said.. I'll try to find the spot..I thought I had said it was the fact that Seale had his arms at his side was of no significance or words to that effect.

MR EDWARDS: Yes,"you need pay no attention to whether Seale's hands were at his sides."

THE COURT: Yes because there was a robbery taking place, which is..with..with Marshall, with the other fellow tied up, with either his hand behind his back or if you took Ebsary's statement, with his arm around his neck, that's the violence. It is a robbery and there is violence.

MR EDWARDS: Well there's a robbery and the Crown didn't run away from that, I mean well I told them that if they believed Jimmy MacNeil when he says that Marshall put his arm behind his back and at the same time Seale said, "Dig man dig." Then I said, well then I concede that's an assault if you believe MacNeil on that point, but what I'm saying is that on the

(10) 34(2)(a) ~~when the violence with which the assault was reasonably made, there the factors that have to be considered at that moment, what was Marshall doing to MacNeil, what was Seale doing, you know and there he is..there you have to get into the factors I mentioned about his hands, what..what did Ebsary say he saw - my learned friend pointed that out - fair ball, in the tape Seale said or..Ebsary says that he saw Marshall trying to strangle Seale. All of those factors have to be measured in order to determine~~

(20) whether there was reasonable apprehension of death or grievous bodily harm from the violence with which the assailant, Seale and Marshall, you know, the pur..

THE COURT: Okay, so Marshall says Seale's hands were at his side.

MR EDWARDS: No, Marshall says Seale's hands were in his pocket. MacNeil says Seale's hands were at his side.

THE COURT: I'm sorry yuh, MacNeil says..MacNeil says that Seale's hands were in..were at his side.

(30) MR EDWARDS: Yes. Marshall...I mean to be completely fair about it, Marshall says Seale said nothing or he didn't hear Seale say anything. MacNeil says Seale said, "Dig man dig." MacNeil described the tone of voice used at that time by Seale as non-violent or words to that effect.

THE COURT: High-pitched.

MR EDWARDS: High-pitched, but there was something there about not being violent too. Excuse me..

THE COURT: We've only got ourselves it seems to

me in..in getting the jury confused. I'm prepared to tell that event, but I..

MR EDWARDS: He said, "not really violent"..sorry Milord. "Not really violent tone, just kind of high-pitched," that's what he said.

THE COURT: But I feel..I feel that I'm still going to have to tell..

(10) MR EDWARDS: No it's..it's always unfortunate to have to call them back..

THE COURT: Them that if they..if they find that Marshall did have a hold of MacNeil, that's what they find and that Ebsary says, "Dig man dig," that that is.. that is..

MR EDWARDS: That's an assault..

THE COURT: It's an assault with a degree of violence which would (inaudible)...two way.

(20) MR EDWARDS: Well with a degree of violence which would be measured by the jury considering what each of the parties was doing. For example, what Seale was doing what he said, what Marshall says he was doing, what MacNeil says Marshall was doing, what Ebsary says Marshall was doing. That's how the violence, I mean they have..they have to apply the facts to..to that particular part of the subsection and those..

(30) THE COURT: Yuh but what I'm saying is if they.. if they determine..telling them what everybody said, if they determine that Marshall grabbed MacNeil and Seale said, "Dig man dig,"..

MR EDWARDS: Mm.

THE COURT: That that would constitute the degree of violence which would..fall within to 34(2)(a).

MR EDWARDS: No, no, not that it would constitute the degree, it's for them to determine what the degree of violence is..

THE COURT: I have to tell them the law is I suppose, the law is that there's some..that..that..

MR EDWARDS: There's some violence there sure.

MR WINTERMANS: But there's a danger of getting into..

MR EDWARDS: But it's up to them to measure it.

MR WINTERMANS: Into the question of excessive force if you put it the way my learned friend is suggesting.

THE COURT: That's what I'm trying to avoid,
(10) I'm not going to get into whether the force was excessive.

MR EDWARDS: Oh no, but..

THE COURT: Because I'm not applying that section at all.

MR EDWARDS: But I..but I submit it's incumbent upon you to correctly give them that section and as it stands now, where you've already told them that they need pay no attention to what..where Seale's hands were at his sides, I mean that..that statement just cannot be reconciled with a proper instruction on
(20) 34(2)(a) and there must be a redirection unfortunate as a redirection is because it often causes confusion, but in this case, I submit, it's unavoidable. A redirection, not the confusion..

THE COURT: But it's still..when I tell them he has to have a reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made and I tell them again the events of the assault as told by each of the parties, it's still incumbent upon me or open to me to say
(30) that if you accept certain of that evidence, that it would constitute the degree of violence or a degree of violence which would satisfy that section. I can't let them go as to..to have no idea what would constitute the violence.

MR EDWARDS: No, well that is..

THE COURT: And I'm saying the robbery alone is the violence with the..with the assault of Marshall and the dig man dig which consti..it's a joint assault.

MR EDWARDS: I submit, Milord, that it's legiti-

mate for you after reviewing those factors to tell the jury that it is for them to weigh those factors in order to determine whether there was a degree of violence which justified a reasonable apprehension of death or grievous bodily harm in Ebsary, that's..that'd be the proper way to put it..

(10) THE COURT: That's open for me to say that a robbery in a dark night in the park where ~~one~~ person grabs your associate and the other indicates to you the dig man dig that that would constitute a degree of violence.

(20) MR EDWARDS: Well you've already said that in another section, why..why introduce that in here because you know, that gives the jury the impression, well look I'm going to give you the formalities of this, but you know, then you're giving the opposite argument. I..I.. just give them the neutral, look here are the factors to consider and you weigh those factors in order to determine whether the degree of violence justified reasonable apprehension of death or grievous bodily harm,period.

THE COURT: Okay, I understand that. All right, bring the jury in.

JURY RECALLED (Polled - All Present)

CHARGE TO THE JURY CONTINUED

(30)

THE COURT: Mr. Foreman, Members of the Jury, there are a number of matters that we have discussed, I've discussed with counsel with regard to the charge and there's been some suggestion to me of areas that I either forgot or..didn't elaborate on enough and one of the areas for example was the theory of the Crown. I made..I indicated to you very briefly the theory of the Crown and I may have..I may have misstated it and if I have, I want to correct that. The Crown

raised one point and it was just..it was just concern as to whether I had slipped the wrong name in at the wrong time and when I had been talking to you on Section 34(2) on self defence, and I was moving to the area of manslaughter, I said to you that..I thought I said to you, before turning to that matter, I must tell you that if you disbelieve MacNeil and
(10) accept the evidence of Donald Marshall Jr. then the defence of self defence does not arise. Now, that's what I meant to say. I may have slipped and substituted and reversed MacNeil and Marshall, but I want you to be clear that if you disbelieve MacNeil and you accept the evidence of Donald Marshall, the defence of self defence does not arise at all because there.. at least in the key parts of Donald Marshall's testimony, there would be no assault, there would be no robbery, there would be nothing which would have in-
(20) cited or given a possibility of justification for Mr. Ebsary to act. So I want to make that one clear. Now, on 34(2) of the Code, the..the defence of self defence. 34(2)(a) reads and I'll read it again to you:

"Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes,.."
(30)

I don't believe I really talked to you about the phrase, "..from the violence with which the assault was made.." and I want to just have a few words with you on that. I want you to understand clearly though I put two situations to you, that if you believe MacNeil's evidence and I summarized his evidence, then one situation occurs; if you believe Marshall's evidence, then another situation occurs and I thought I had told you - certainly at the outset I have - that you can believe all or part of none of a witness' evidence. So there's a

possibility that you would believe some of MacNeil's, some of Marshall's, some of somebody else's, some of Ebsary's as to this whole event. Just to review with you for a moment, it's up to you to decide whether or not the accused, Ebsary, has a reasonable..that he's acting, that he does the stabbing under a reasonable apprehension of death or grievous bodily harm from

(10) the violence with which the assault was originally made. Now, if you accept the evidence of Marshall, at the time of Ebsary's stabbing, Seale's hands were in his pockets; if you accept MacNeil's evidence, he says that Seale's hands were at his sides and I had told you that it really didn't make much difference in that circumstance as to whether his hands were at his sides or not. Marshall says that Seale said nothing; MacNeil says that Seale said, "Dig man dig." MacNeil also said that the tone of voice that Seale used was

(20) not really violent, it was kind of high-pitched. All of these are facts that you can consider in determining whether or not that the accused had a reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made. I think I must tell you though that according to MacNeil's testimony, if you accept that, Marshall had his hand around behind MacNeil's back and had him by the arm and was twisting his arm behind his back. Ebsary in his statement indicated that Marshall had

(30) his hand around MacNeil's neck and was holding onto him. You have to decide which of all of this you accept. I think I have to suggest to you that there are situations where an assault could take place where there was not enough of a violent situation in order to bring into effect Section 34(2)(a). There are any number of assaults where the violence would not be to..to the degree to bring that section into operation. I don't think that it would be fair for me to leave you with just to figure out whether or not you thought

- which of those particular statements of the events you accept and then flail around to see whether or not that they would constitute a violent situation. I would suggest to you that if you find that there was the robbery and if you find that Marshall did in effect assault MacNeil and that Seale did say, "Dig man dig," and was standing in front of him, you can
- (10) take into account the fact that his hands were at his sides which may not have appeared to be too violent, but you have to also take into account that those factors not only constitute an assault, but they constitute the offence of robbery. And a robbery in the park, in the dark at night, if you so find that it was in the dark, might very well be found by yourselves to constitute a violent situation to the degree necessary for the application of that section. Now, as to the theory of the Crown which I said I may have
- (20) misinterpreted, I should advise you that the Crown's theory is that it's not necessary for the jury, for you to believe the entirety of the evidence of either James MacNeil or Donald Marshall in order to conclude that the time of the stabbing, Ebsary was not acting in self defence and I agree with that. I agree that it's not..and I told you at the beginning and I'll tell you again, it's not necessary for you to believe all of the testimony of any witness - you can believe all or some. The Crown says that you should analyze
- (30) the evidence of each of the witnesses in order to determine whether Marshall or MacNeil has the best recollection of what happened immediately prior to Marshall putting MacNeil's arm behind his back. Now, I'll just again repeat it briefly as I've already told it to you and but just to make sure, Marshall indicated that he saw the two people some distance away, that he..that one of the two people called and asked for a cigarette, that Seale and he started to walk over to give the cigarette, that another couple

asked for a cigarette, Marshall went to the other couple, Seale continued on to the two men who were Ebsary and MacNeil, he had some..standing there talking to them, had some conversation and that Marshall came over and they had a conversation and I've recited what the conversation was about - the coat, the priest, the reverend, the sea captain, the quart of rum, the

(10) coming home, the women in the park - all this conversation. MacNeil, from my notes, does not talk about that conversation and merely talks about having come upon them and recites the actual stabbing and according to my notes, they came upon, saw them coming, came upon them and they were right in front of them and then the events took place, I won't repeat those. So the Crown says analyze each of the witnesses, each bit of evidence, see who has the best recollection and that's a consideration that you

(20) always have to make in determining credibility, who's got the best memory of the situation. Now, you asked a question which you've sent into me and I've discussed that with counsel as is the practice if you send in a question, I advise counsel as to what the question is and I either indicate to them what my answer is or ask them for some assistance if..if it's the type of situation where I need assistance or ask them what their view is to the answer that I'm going to give. The question that you sent in was: "What

(30) reference, if any, was made by the Defence or Prosecution to the 1971 transcript of the trial? Of interest is if there is any reference to a conversation between the two parties? Was it stated in this trial or from a transcript of Marshall referring to Ebsary as a captain? Is this information available to the jury?" The answer to your question is there was no reference by any of the witnesses in this trial to the 1971 transcript of the trial. So since there was no reference to the 1971 transcript, we have

DISCUSSION

- no idea of what is in it and..it is not part of the evidence that you have in this case and I'm afraid you can't speculate on it. So any reference to conversation you have to take from the evidence that you've heard here and with regard to was it stated in this trial or from a transcript of Marshall referring to Ebsary as captain, I certainly can indicate to you that Marshall in this trial testified as to the conversation, saying that he referred to..that one of the things they talked about was him being captain, so that's the only information that you have and I can't add anything to it and it's not part of the evidence. So I don't think there's anything else. I hope I haven't confused you any and if I have, I certainly expect that you'd tell me that I've confused you on some point and I'll start from the beginning on that point and try and straighten you out. So I'll
- (10) let you go back in to resume your deliberations.
- (20)

JURY RETIRES FOR DELIBERATIONS (3:45 p.m.)

MR WINTERMANS: I asked Your Lordship if you would indicate with respect to that conversation, that alleged conversation that it doesn't matter if there was or was not a conversation before the..the attack. If there was an attack that followed a conversation, then it's still robbery, I..

- (30) THE COURT: The difficulty that I have with all this is that MacNeil doesn't say there was a conversation and Ebsary does. The existence of the conversation would not go in any way to the robbery, it may go to the credibility of..

MR WINTERMANS: Right. That's just one thing that I'm very concerned about.

THE COURT: Marshall, but it would only go to..

MR WINTERMANS: If the jury gets the idea that if there was a conversation then there was no robbery..

THE COURT: No no, I don't think that's possible. I think they..they may decide if there was a..if there was such a conversation, that it's possible for them to conclude that maybe they accept Marshall's testimony or some of his testimony. It's a credibility matter. I think I've told them that..pretty clearly that if one person says there was a robbery and one (10) person says there wasn't, the existence of a conversation is not going to remove the robbery, I don't think you need to worry about that.

MR EDWARDS: The Crown agrees, Milord.

COURT RECESSED (3:50 p.m.)

(20)

(30)

COURT RESUMEDJURY RETURNS FOR REPLAY OF J. MACNEIL EVIDENCE

THE COURT: I would ask you to reconsider now and go back in, but before you do, we usually provide a meal at some stage of the hearing and I think that..

(10) I don't know and I don't want you to make any comment now in your deliberations, but if you could just give us fifteen minutes notice as to when you're ready to go, we can make the arrangements in that time and I would suggest that you do not leave it too late because the restaurants close and I don't want you here too late eating..without eating anyway. So with that in mind, you can let the Sheriff's officer know, just knock on the door.

(20) JURY RETIRES FOR DELIBERATIONS
COURT RECESSED
COURT RESUMED

JURY RETURNED (Polled - All Present)

THE CLERK: Mr. Foreman, have you agreed upon your verdict?

FOREMAN OF JURY: We have.

THE CLERK: Do you find the accused, Roy Newman Ebsary, guilty or not guilty?

(30)

FOREMAN OF JURY: Guilty as charged.

THE CLERK: Mr. Foreman and Members of the Jury, harken onto your verdict as the Court has recorded it. You find the accused, Roy Newman Ebsary, guilty as charged, as one say, so say you all?

(Jury members indicate their agreement with verdict as read by Clerk.)

THE COURT: Members of the Jury, may I first thank you for the conscientious way in which you performed

your duties during the course of the trial. I appreciate that there has been a disruption of your lives which was caused by your coming to court to perform your civic duty as jurors. You can have the satisfaction of knowing however, that you've assisted in the orderly and democratic government of our country. It is unnecessary for me to comment on your verdict

(10) and I would consider it inappropriate for me to do so. You have sworn to do your duty and you listened attentively to the evidence and you've returned a verdict, a verdict which was capable of being returned on the evidence that you had presented to you. Before discharging, I should point out to you again that everything that was said by you in your deliberations in the jury room must be kept secret. No one has the right to know what was said in the jury room or how you arrived at the verdict. You must keep to yourselves

(20) your deliberations and your vote. If you disclose them, such disclosure constitutes a criminal offence under the Criminal Code and I have to bring that to your attention. So this now completes your duties as jurors and in this particular case and you're discharged. Before you go, we have the panel coming in tomorrow morning, you've had a long session and it's now late at night, I'm prepared to excuse you all from coming in tomorrow if you so desire. If there's anyone who volunteers as being willing to come back

(30) in tomorrow, then let me know. You all wish to be excused for tomorrow's? All right, perhaps you could.. you have all of their names, Miss Bezanson?

THE CLERK: Yes I do..

THE COURT: And you will not have to come in tomorrow, but what's our next day?

THE CLERK: Well that depends on how long (inaudible).....starting the White case on (inaudible)...

THE COURT: Supposed to be Tuesday isn't it, the next panel is coming in, so I'll have to ask you

to come back on Tuesday of next week at 9:30 in the morning, so you're discharged and thank you very much.

(Court excused jurors until January 22, 1985.)

(The proceeding was then adjourned to Wednesday, January 30, 1985 at 9:30 a.m. for sentence.)

(10) THE COURT: Now, what about ~~the~~ accused between now and then?

MR EDWARDS: The Crown has no problem with him being released on the same conditions, Milord.

THE COURT: And do you have any idea what those conditions are? They..they are downstairs. Do you know what they are, Mr. Wintermans, do you know..

MR EDWARDS:.....Well, that he not leave the area that he..

MR WINTERMANS: Perhaps just that he..

(20) THE COURT: Has he been reporting?

MR WINTERMANS: Your Lordship said that the present informations continue that have been on him all along.

MR EDWARDS: He hasn't been reporting ah..that I said that he not leave the City of Svdney, that he abstain absolutely from the use of alcoholic beverages and non-prescriptive drugs and I..I submit that in view of the conviction, that he report say on, Monday and Friday between now and the sentencing by telephone to the City Police. They shouldn't..those conditions shouldn't work too great a hardship I wouldn't think.

(30) THE COURT: All right, Mr. Ebsary, a conviction has been entered against you and we have scheduled sentencing to take place on Wednesday, the 30th of this month. All right, between now and then, you're to stay on the same..you're on your own recognizance on the same terms as you've been before, but particularly, you are to abstain from liquor and alcoholic and.. non-prescriptive drugs, you are to report (this may be new), you are to report to the..

MR EDWARDS: The Sargeant on duty at the City of Sydney Police Department.

THE COURT: To the Sargeant on duty at the City of Sydney Police Department on..by telephone on Monday and Friday of each week until the 30th.

MR EDWARDS: Perhaps we should set a time for that, 2:00 p.m., Milord?

(10) THE COURT: Is that satisfactory, at 2:00 p.m. on Friday and on Monday and that you're not to leave Sydney. Are there any other matters.

MR EDWARDS: No, Milord.

COURT CLOSED

(20)

(30)

I, Tara L. Cody, Court Reporter, hereby certify that the foregoing transcript of evidence is a true and accurate transcript of the evidence and verdict of the court in the matter of HER MAJESTY THE QUEEN AND ROY NEWMAN EBSARY, (taken by way of tape), transcribed by me as such Reporter.

Tara L. Cody
COURT REPORTER

Halifax, N. S.

May 22, 1985



IN THE SUPREME COURT OF NOVA SCOTIAAPPEAL DIVISION

B E T W E E N:

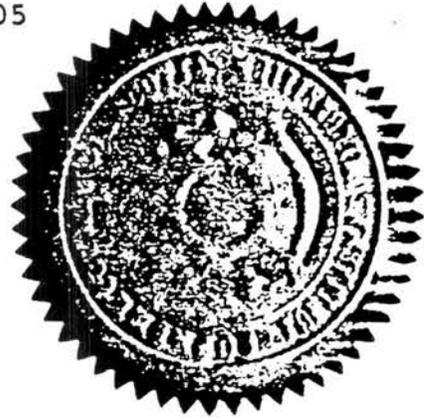
ROY NEWMAN EBSARY

appellant

-and-

HER MAJESTY THE QUEEN

respondent



REASONS FOR JUDGMENT having been delivered this date by Macdonald, J.A., Morrison and Matthews JJ.A. concurring.

IT IS ORDERED that the appeal against conviction herein be and the same is hereby dismissed; that the application for leave to appeal against sentence be and the same is hereby granted; that the appeal against sentence be and the same is hereby allowed and that the sentence be varied to a term of imprisonment of one year in the Cape Breton County Correctional Center.

DATED this 6th day of May, 1986.

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.

I hereby certify that the foregoing is a true copy of the original order on file herein.

Dated the 12th day of May

A. D., 1986

DEPUTY REGISTRAR

Bernice Macdonald
Registrar

Bernice Macdonald

S.C.C. 01205

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

ROY NEWMAN EBSARY

-and-

HER MAJESTY THE QUEEN

ORDER

S.C.C. 01205

IN THE SUPREME COURT OF NOVA SCOTIAAPPEAL DIVISIONMorrison, Macdonald and Matthews, J.J.A.

BETWEEN:

ROY NEWMAN EBSARY)	Allan F. Nicholson
)	for the appellant
appellant)	
)	Dana Giovannetti
-and-)	for the respondent
)	
HER MAJESTY THE QUEEN)	Appeal Heard:
)	January 13, 1986
respondent)	
)	Judgment Delivered:
)	May 6, 1986

THE COURT: Appeal against conviction dismissed, appeal against sentence allowed and sentence varied to one year imprisonment.

MACDONALD, J.A.:

The appellant Roy Newman Ebsary was convicted on January 17, 1985 after a trial before Mr. Justice Nunn and a jury on a bill of indictment alleging that he:

"at or near Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May 1971, did unlawfully kill Sanford (Sandy) Seale by stabbing him and did thereby commit manslaughter contrary to Section 217 of the Criminal Code of Canada."

This was the third trial of Mr. Ebsary on such charge. The first trial was held in September 1983 and resulted in the jury being unable to agree on a verdict. A second trial later that year resulted in a conviction which was overturned on appeal by this Court by judgment reported in (1984), 65 N.S.R. (2d) 16. The Court ordered a new trial. It is from the conviction that resulted from the latter trial that the appellant now appeals.

The facts are well summarized in the judgment of this Court in Ebsary #1 and for the purposes of this judgment need only be highlighted by me.

The facts in capsule form are that on May 28, 1971 Donald Marshall and Sandy Seale were in Wentworth Park in Sydney Nova Scotia. They there encountered the appellant and one James MacNeil. Seale was killed by the appellant with one knife blow to the abdomen. The appellant and Mr. MacNeil contended that the stabbing of Mr. Seale was a result of an attempt by Marshall and Seale to rob Mr. Ebsary and himself. Mr. Marshall who on several occasions has given different versions of the incident under oath told the jury in the present case that no robbery was in progress and that in effect the appellant for no apparent

reason stabbed Mr. Seale. The tragic aspect of this matter is twofold. One of course was the death of Mr. Seale. The other was that Mr. Marshall was charged with and convicted of the murder of Mr. Seale and spent eleven years in a federal institution for a crime that he did not commit.

The appellant has raised six grounds of appeal which are as follows:

1. That the Learned Trial Judge erred in ruling the statement of Ebsary admissable.
2. That the Learned Trial Judge erred in not declaring a mis-trial after the Crown's references to Marshall's 1971 testimony.
3. That the Learned Trial Judge erred in law both when he charged the jury and later when he re-charged the jury.
4. That the Learned Trial Judge erred in law when he failed to review the evidence with the jury, relying instead on the review given by defence counsel.
5. That the verdict was perverse.
6. That the Learned Trial Judge erred in dismissing the Appellant's application under Section 24(1) of the Charter of Rights and Freedoms.

Under the circumstances I think it appropriate that I deal with the last ground first. The argument is that the appellant should not have been placed on trial - "because doing so would violate his rights under s. 7 because of the excessive passage of time the appellant was not able to defend himself. He had to rely completely on the information that the Crown and police gave to his counsel. No meaningful independent investigation was

possible. Therefore the appellant was unable to 'present his case' or 'make full answer and defence' or 'meet the opposite case'. Because of the excessive and extreme prejudicial publicity the appellant was not able to 'receive a reasoned decision from a tribunal free of bias and not the subject of a reasonable apprehension of bias'."

This same argument was raised on the first appeal and rejected by this Court. MacKeigan, C.J.N.S. speaking for a five man court said at pp. 24 and 25:

"The appellant also appealed from the rejection by the trial judge of his application under the Charter before and during the trial. He contended that the prosecution infringed or denied his rights under s. 7 (right not to be deprived of life, liberty or security 'except in accordance with the principles of fundamental justice') read with s. 11(b) (right 'to be tried within a reasonable time') and s. 11(d) (right 'to be presumed innocent until proven guilty according to law in a fair and public hearing').

"I find no merit in the objection under. s. 11(b). It is true that the charge against Ebsary was laid and the trial held over ten years after Seale was killed and that the Crown had available from November 1971 its principal evidence, that of James MacNeil. Prima facie such delay is excessive. But in this case Ebsary suffered no apparent prejudice from delay.

"The situation as to 'reasonable time' is similar to that in *R. v. Rahey* (1984), 63 N.S.R. (2d) 275; 141 A.P.R. 275, and in the leading United States case of *Barker v. Wingo*, 407 U.S. 512, discussed in *Rahey*.

"The objection under s. 11(d) of the Charter is based mainly on the extensive local and even national publicity which made Marshall's name a household word as a man who spent over eleven years in prison 'for a crime he did not commit' or words to that effect. He has been pictured as a completely innocent victim of maladministration of justice. Ebsary has been frequently referred to as the 'killer'. His counsel claims that the presumption

-4-

of innocence was violated and that a fair trial was not held and indeed cannot be held. He argues that Crown counsel at the trial (who was not the Crown counsel on this appeal) violated the principle of fairness which should govern the conduct of Crown prosecutors by overemphasizing the innocence of Marshall and exaggerating the lies of Ebsary.

"Defence counsel claims that the trial judge failed to counter the prejudice and failed to correct the Crown prosecutor.

"In my opinion the jury was adequately instructed by the trial judge to disregard anything heard outside the courtroom and to base their verdict solely on the evidence. The usual jury selection process was properly followed. I am not prepared to say that a jury properly instructed, after a trial properly conducted on evidence properly admitted, would have been unable to give Ebsary a fair trial. The trial judge thus did not err in refusing to quash the indictment for violation of the Charter."

I agree entirely with such comments and indeed under the circumstances am bound by them. I therefore reject each and every argument advanced on this appeal based on the Charter of Rights and Freedoms.

I turn now to a consideration of the submission that a taped statement given by the appellant to Cpl. Carroll of the R.C.M.P. should not have been received in evidence. In support of this submission counsel for the appellant raises two issues:

1. the mental state of Mr. Ebsary
2. that the statement was obtained as a result of inducements.

A re-investigation of Mr. Seale's death was begun in February 1982. S/Sgt. Wheaton and Cpl. Carroll were in charge of the investigation. On February 22nd these police officers

went to Mr. Ebsary's home and advised him that they wanted to discuss Mr. Seale's death and requested that Mr. Ebsary come with them to the R.C.M. Police office. The police officers described him as being sober at the time and quite jovial. At the police headquarters Mr. Ebsary was given the standard police warning and advised of his s. 10 Charter rights. He did not request a lawyer. A rather lengthy conversation then took place between the officers and the appellant, who talked generally of his life. He was shown a statement given by James MacNeil that alleged that Mr. Ebsary had stabbed Mr. Seale. The appellant however, would not commit himself to being directly involved, although he did say something to the effect that he knew much more than he was saying and that he did have knowledge of that particular night's activities and that he would give it some thought. According to the police officers they then left the interview room to see if Ebsary "might come around to our way of thinking". However when they returned to the room Mr. Ebsary did not provide any further knowledge or involvement of the incident. The appellant was then driven to his home by Cpl. Carroll. Later that day Mr. Ebsary phoned S/Sgt. Wheaton and admitted to stabbing Mr. Seale and asked to speak to Cpl. Carroll. Cpl. Carroll went alone to Mr. Ebsary's home where according to Cpl. Carroll the appellant informed him that the incident was self defence and that he had used a small penknife. He said that Mr. Seale took his money and ran away. Mr. Ebsary refused to give a statement but said he would like to meet Mrs. Marshall "to see her eyes and to more or less assess her, to see what

kind of a person she was."

A meeting was arranged between the appellant and Mr. and Mrs. Marshall. This took place February 23rd. The police officers picked Mr. Ebsary up at his home around 11:00 in the morning at which time he showed obvious signs of having been drinking. He was taken to the R.C.M.P. office where he met in private with Mr. and Mrs. Marshall. Apparently the conversation was simply a general one and did not touch the issue of the death of Mr. Seale.

Mr. Ebsary was a patient at the Nova Scotia Hospital from March 30 to April 29 as a result of a remand issued by His Honour Judge O'Connell of the Provincial Magistrate's Court. The remand related to a charge unconnected with the death of Sandy Seale. Dr. Aktar a psychiatrist in charge of the forensic unit at the Nova Scotia Hospital found that Mr. Ebsary was unfit to stand trial. On May 7th Mr. Ebsary was again admitted to the Nova Scotia Hospital under a Lieutenant Governors warrant. He again was examined, his condition was found to have improved and it was decided by the medical staff at the hospital that he was fit to stand trial. Dr. Aktar diagnosed Mr. Ebsary as suffering from chronic brain syndrome and chronic alcoholism in addition to several other physical illnesses. He said that Mr. Ebsary was "not lucid all the time" and sometimes confabulates.

On October 26th, 1982 Mr. Ebsary called Cpl. Carroll who along with S/Sgt. Barlow went to the appellant's home. Mr. Ebsary told the officers that he was concerned about a friend of his by the name of Mr. Doyle. According to the police officers

they at that time knew nothing about Mr. Doyle. Apparently he had been arrested and was in the County jail in Richmond County. Mr. Ebsary had previously met him at the Nova Scotia Hospital and was concerned about him. According to the officers Mr. Ebsary said that he would "give Carroll the Marshall case if the police would get Mr. Doyle out of jail." S/Sgt. Barlow testified that Cpl. Carroll's reply was:

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

The officers promised to check into it. They did so and found that Mr. Doyle had been remanded to the Nova Scotia Hospital and was either in the hospital or on his way there. They communicated this information to Mr. Ebsary who they say appeared quite upset but said that he wouldn't go back on his word about the Marshall case and that he would write up a statement. He never did write up a statement giving as his reason the fact that he had broken his glasses. On October 29, 1982 Cpl. Carroll went to Mr. Ebsary's home and taped a conversation he had with the appellant in which Mr. Ebsary described the circumstances surrounding the death of Mr. Seale. The tape was later transcribed and the relevant portions thereof are as follows:

"I remember the night vividly. It was a kind of misty night, a fine rain was falling, so I had to take off my glasses, but I can't see very well anyway, but with the glasses off, I couldn't see at all. So, I went over to visit Mr. O'Neil. Now, not the young O'Neil, his father, and we sat and we consumed, it was a few days before my birthday, so, the wife bought me a couple

bottles of wine, so naturally, I put the two bottles of wine in my pocket and I went over to visit Mr. O'Neil. His son wasn't home, so, okay, we consumed one bottle of wine, Mr. O'Neil and I, then his son came home and we consumed the second one. Now then, when I was about to leave to go home, the boy said he wants to go down to the State Tavern to meet someone, I don't know who, but he didn't have any success because (talking to his animal), 'Now darling, now darling', ah, so we decided to go home and we walked, let me see, we, we must have came up George and I've gone through the park several times with the police, but Went...Wentworth Park at that time, Cres...Crescent Street at that time was one of the darkest areas of the city, it was. There was no lights there, right. So, when the police asked me down there who attacked me, I wasn't able to, I wasn't able to even tell them the color. I said two men attacked me. Okay, he turns around and he says to me, give me everything you've got in your pocket, and I gave him everything I had in my pocket, but when I put my hand in my pocket, I discovered I had a pen knife. Now it was only a pen knife. It was no knife that you took from my home and it was a pen knife and that pen knife was given to me by young Jacques Brittan, a young Frenchman that the authorities here had placed in my care, and I was training him to be a cook, and he wanted, he said he wanted to live somewhere where there was a family, so I took him home with me, okay? But he gave me this pen knife. The blade was about three inches long, three inches long, so, when this bastard said to me give me everything you got in your pocket, I said listen, you fucker, you're going to get everything I got in my pocket. So I gave him everything I had in my pocket, everything, my watch, my ring, but the fucking knife was in my fucking pocket and I opened it in my pocket and I said brother, you asked for everything, you're going to get everything and I gave him everything. Now, the blade was that small that that boy that night, ran, he ran. In the meantime, Marshall was strangling the other boy across the road, that young O'Neil, because Marshall was a thug and so was Seale. So thugs become heroes and honest men become what? Honest men become what? You don't know, I do. Okay. How am I doing?"

Mr. Ebsary then went on to say that he acted in self defence and "I just made a blind swipe, but he ran" -- "probably I got him, probably I got him in the guts, probably I got him in the guts."

He said that he had been mugged before coming through the park but had never complained to the police about it. He went on to say "but I swore by my Christ, I swore by my Christ that the next man that struck me would die in his tracks." Mr. Ebsary did not testify on the voir dire held to determine the admissibility of this statement. The defence did introduce a transcription of the evidence given by Dr. Aktar before Judge O'Connell which resulted in Mr. Ebsary being found unfit to stand trial. Mr. Justice Nunn found that the statement had been given freely and voluntarily and also that it was the product of an operating mind and that he was satisfied that the accused had the capacity to give the statement. On that aspect of the matter the Learned Trial Judge said:

"All right. With regard to the admissibility of a statement a Voir Dire has been conducted and the Crown has produced evidence from all members of the R.C.M.P. who were investigating the Marshall matter who had any contact with Mr. Ebsary the accused in two periods, February and October of 1982.

"Ebsary himself was in the Nova Scotia Hospital from March 30th to April 26th, 1982 and on May the 7th a finding was made that he was unfit to stand trial and was returned to the Nova Scotia Hospital on a Lieutenant Governor's warrant. A finding that he had recovered and was fit to stand trial was made and he was discharged on July 30th, 1982.

"The Defence produced only the evidence of Dr. Aktar. I have reviewed all of the evidence and submission of both Crown and Defence counsels.

Nothing in the Crown's evidence would indicate any lack of lucidity on the part of Ebsary in February. He was given the standard police warning when taken to the police office before any conversation and understood it. All of the evidence re the February event clearly shows that there were no threats, promises or inducements of any kind on these occasions. Even if there were, they would only be relevant if they led to the October statement or put in another way, were still operating in October. There's no such evidence of that.

"There is sufficient evidence as to what took place in October with regard to the meetings between the police officers and Mr. Ebsary so that a finding can be made. I'm satisfied again beyond a reasonable doubt the statement does represent the operating mind of the accused. There's no indication of lack of intellect or insanity. While there is some evidence of consumption of alcohol at all relevant times I'm satisfied that there was no degree of impairment which would come close to question the capacity of the accused to give a statement or to question its reliability or to have any effect on his will."

In R. v. Owen (1983), 4 C.C.C. (3d) 538, 56 N.S.R. (2d)

541 this Court in referring to the majority judgment of the Supreme Court of Canada in R. v. Rothman, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 57 C.C.C. (2d) 30, said p. 547 C.C.C. report, (pp. 550, 551 N.S.R.):

"...Mr. Justice Martland, speaking for himself and five other members of the court, said of the confession rule (p. 45 C.C.C. report):

'In my opinion, the effect of the judgments in this Court as to the admissibility of confessions is that in order to render the confession admissible the Crown must meet the requirements stipulated in Ibrahim v. The King, [1914] A.C. 599. Even when this has been done, there may be circumstances involved in connection with the obtaining of the confession from which the Court may conclude that the confession was not free and voluntary, e.g., as in Horvath, supra, and Ward, supra, where there is a reasonable doubt as to whether the statement was the

utterance of an operating mind. In such a case, the confession is not admissible.'

"The effect of such pronouncement is to elevate once again to the front rank of importance the elements of fear of prejudice or hope of advantage in determining whether a confession is admissible or not. Statements therefore that do not offend the Ibrahim rule will apparently be excluded only if they are not the product of an operating mind such as the situation in the Horvath case (hypnosis); or in Ward (shock); extreme drunkenness (R. v. Richard (1980), 56 C.C.C. (2d) 129) (B.C.C.A.), and possibly oppression R. v. MacLeod (1968), 5 C.R.N.S. 101 (Ont. C.A.), Andrews v. R. (1981), 21 C.R. (3d) 291, at 294 (B.C.C.A.).

"In the present case the trial judge found that the statements had been given 'freely and voluntarily'. This conclusion should not be disturbed unless, as Mr. Justice Rand said in R. v. Fitton, [1956] S.C.R. 958; 24 C.R. 371; 116 C.C.C. 1, at p. 5. 'It is made evident or probable that he (the trial judge) has not weighed the circumstances in the light of the (Ibrahim) rule or has misconceived them or the rule ...'

"To like effect is the judgment of the Ontario Court of Appeal in R. v. Precourt (1976), 39 C.C.C. (2d) 311, where Mr. Justice Martin said at p. 318:

'Whether a statement made by an accused is voluntary is essentially a question of fact, and unless it appears that the trial judge had failed to consider and weigh the relevant circumstances or has misconceived the governing rule or failed properly to apply it, his conclusion that a statement was made voluntarily ought not as a general rule be disturbed.'

See also D.P.P. v. Ping Lin (1976), 62 Cr. App. R. 14 (H.L.) per Lord Hailsham at p. 21 and per Lord Salmon at p. 26."

I have carefully considered all the evidence touching on the mental capacity of the appellant to give a statement that could be classified as emanating from an operating mind.

To use the words of Mr. Justice Martin in R. v. Precourt I am not convinced that Mr. Justice Nunn "failed to consider and weigh the relevant circumstances or has misconceived the governing rule or failed properly to apply it." In addition I am not persuaded that Mr. Ebsary lacked the mental capacity to give a free and voluntary statement.

With respect to the contention of counsel for the appellant that the statement was the result of inducements made to Mr. Ebsary by the police the Learned Trial Judge in his decision on the voir dire said:

"The activities of Constable Carroll re the Marshalls and arranging the meeting between the Marshalls and Ebsary do not in my view constitute an inducement.

"With regard to the evidence concerning Mr. Doyle Ebsary himself initiated the request to get Doyle out of jail and was told immediately by Constable Carroll that he could promise nothing but that he would look into it. Constable Carroll knew nothing about Doyle at the time. Ebsary did say, if you get Doyle out I'll give you the Marshall case and after he learned that Doyle was on the way to the Nova Scotia Hospital on a 30-day remand and in the words of Constable Carroll 'that nothing could be done' he said he would not go back on his word. I'm satisfied beyond a reasonable doubt that the evidence clearly disclosed that no promises were made by persons in authority that could constitute an inducement in these circumstances."

In my opinion the evidence clearly supports the conclusion of the trial judge. I have carefully read the evidence with respect to the Doyle incident and that involving the Marshalls. I find nothing in the testimony that would indicate the existence of an inducement within the meaning of such conduct as expressed in the various cases such as Ibrahim v. The King (1914), A.C. 599. It follows that in my opinion the alle-

gation of inducement has not been made out. For all the foregoing reasons I would dismiss the challenge to the admissibility of the conversation between the appellant and Cpl. Carroll as taped by the latter.

The second issue raised by the appellant was that there had been a reference made during the testimony of Mr. Marshall with respect to his 1971 trial. A reference that left with the jury the incorrect impression that the evidence he gave at the present trial was exactly the same as that given by him in 1971. The background of this submission is that upon the re-examination of Mr. Marshall, Mr. Edwards obtained an admission from Mr. Marshall that he had testified in his own defence at his trial in 1971. Mr. Edwards, the Crown Prosecutor, then put the following question to Mr. Marshall.

"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?

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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 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."

The Trial Judge after hearing argument from counsel ruled that Mr. Marshall could not be asked about the nature and content of the evidence he gave at the 1971 trial. Mr. Justice Nunn then went on to give the following instruction to the jury:

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

Up to this point on this ground of appeal I find no merit.

What does concern me, however, is that Mr. Marshall in giving evidence at the present trial described meeting who he now knows to be Mr. Ebsary together with a younger man. He

went on to say that he had the following conversation with Mr. Ebsary:

"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 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 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 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 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 stick together for gang reasons or whatever it was."

In his address to the jury Mr. Edwards referred to the conversation that Mr. Marshall says he had with Mr. Ebsary.

This is what he said:

"...when you have a witness such as Donald Marshall who has been proved to have lied on other occasions, then you must treat his evidence with great care and the Crown agrees, that's what you should do - treat it with great care. But, having said that, Donald Marshall had to be telling the truth about something. We know now that Donald Marshall is telling the truth when he said he didn't stab (inaudible)..."

Ebsary did. He's truthful on that point. So, consider whether he's also truthful about this conversation and there's two very key factors there which bear directly on his truthfulness on that point. Number one - that conversation was not rebutted on cross examination, okay? See, if he had learned since 1971 of preacher and the sea captain .. well my learned friend could have asked him on cross examination, well why didn't you mention the preacher or the sea captain in 1971, but that wasn't asked. So the point is, he's not rebutted on that part of his conversation."

This comment by Crown Counsel could be interpreted as coming close to telling the jury that Mr. Marshall in 1971 gave substantially the same evidence as he did in the present case. This issue takes on added significance because the jury after retiring to consider their verdict sent the following question to the Trial Judge:

"What reference if any was made by the Defence or Prosecution to the 1971 transcript of the trial? Of interest is if there is any reference to the conversation between the two parties, was it stated in this trial or from a transcript of Marshall referring to Ebsary as a captain. Is this information available to the jury?"

An examination of the transcript however indicates that Crown Counsel went no further than to ask Mr. Marshall what he had said when testifying at the 1971 trial. The only reference to Mr. Marshall saying that Ebsary referred to himself as a captain occurred in the present trial. However the jury's question may well have been based on the comment made to them by Crown Counsel that I have set out above.

Mr. Ebsary's statement makes it clear that he called himself Captain Ebsary and the importance of Mr. Marshall's

evidence about the conversation really is that it supports the Crown's position that a conversation did take place between Ebsary, MacNeil, Marshall and Seale. Both MacNeil in his evidence and Ebsary in his statement deny any such conversation.

The reference in re-examination by Crown Counsel to the 1971 trial was unfortunate and his comment to the jury was improper and is to be deplored. However on an overview of all the circumstances of this case it is my opinion that these matters did not result in any substantial wrong or miscarriage of justice and I would therefore invoke the provisions of s. 613 (1)(b)(iii) of the Code and reject this ground of appeal.

The remaining grounds of appeal relate to alleged errors in the Trial Judge's charge to the jury. The only defence raised was self defence and the instructions on such defence given the jury by Mr. Justice Nunn were in my opinion extremely favourable to the appellant. So much so in fact that at the conclusion of the charge the Crown Prosecutor said:

"Yes I do, Milord. Milord, I regret, but I must register an objection to that charge in the strongest possible terms. I say with trepidation that it would be hard to imagine how a charge could have been any more unfair than that one."

The complaint of the appellant is that the jury were instructed in such a way that their verdict depended on whether they believed the evidence of Mr. Marshall or that of Mr. MacNeil and failed to bring home to them that if they were unable to resolve the conflict in the evidence of these two witnesses and hence were left in a state of reasonable doubt they should have given the benefit of the doubt to Mr. Ebsary and acquitted him.

In support of this submission counsel for the appellant relied upon the judgment of the Supreme Court of Canada in Nadeau v. The Queen, [1984] 2 S.C.R. 570, 15 C.C.C. (3d) 499. In that case the accused killed another man with a rifle shot. The incident occurred in the apartment of the accused's girlfriend. The accused was charged with first degree murder and relied upon the defence of self defence. His version of the facts was supported by his own testimony and that of his girlfriend. The Crown's case depended upon the evidence of a Mr. Landry who testified that he was in the apartment at the time of the shooting and apparently his evidence negated self defence. The accused and his girlfriend both testified that Mr. Landry was not there at the time of the shooting.

The trial judge in that case told the jury that they had to choose between the two versions and then went on to say (p. 572 S.C.R., p. 501 C.C.C.):

"You have heard the analysis given of the two versions throughout the day, and I do not intend to repeat it. I will simply say that in deciding how you make your choice, you must have one thing clearly in mind: you must choose the more persuasive, the clearer version, the one which provides a better explanation of the facts, which is more consistent with the other facts established in the evidence.

"You must keep in mind that, as the accused has the benefit of the doubt on all the evidence, if you come to the conclusion that the two versions are equally consistent with the evidence, are equally valid, you must give -- you must accept the version more favourable to the accused. These are the principles on which you must make your choice between the two versions."

[My emphasis.]

The Supreme Court of Canada in a judgment delivered by Mr. Justice Lamer found this direction to be erroneous. At p. 572, 573 S.C.R., p. 501 C.C.C. Lamer, J. said:

"With respect, this direction is in error. The accused benefits from any reasonable doubt at the outset, not merely if 'the two versions are equally consistent with the evidence, are equally valid'. Moreover, the jury does not have to choose between two versions. It is not because they would not believe the accused that they would then have to agree with Landry's version. The jurors cannot accept his version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, unless a fact has been established beyond a reasonable doubt, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation."

In the early part of his charge in the present case Mr. Justice Nunn correctly told the jury that the onus rested on the Crown to prove the guilt of the accused beyond reasonable doubt and that the Crown had the burden of establishing that the appellant did not act in self defence. He also told the jury that:

"...You may believe all of the evidence given by a witness, part of that evidence or none of it. To help you in making your determination as to whether you believe a witness in whole or in part or not at all, you should consider a number of things: including the witness' ability and opportunity to observe the events recounted; the witness' ability to give an accurate account of what he saw or what he heard; the witness' appearance and manner while testifying before you; the witness' power of recollection; any interest, bias or prejudice that the witness may have; any inconsistencies in the testimony; and the reasonableness of the testimony when considered in the light of all of the evidence of the case.

You are not obliged to accept any part of evidence of a witness just because there's no denial of it. Should you have a reasonable doubt about any of the evidence, you will give the benefit of that doubt to the accused with respect to such evidence. Witnesses see and hear things differently. Discrepancies do not necessarily mean that testimony should be discredited. Discrepancies in trivial matters may be and usually are unimportant. A deliberate falsehood on the other hand, is an entirely different matter, always serious and one which may well taint a witness' entire testimony. Once you have decided what evidence you consider worthy of belief, then you will consider all of the believed evidence as a whole in arriving at your verdict."

The trial judge then went on to say:

"... on cross examination, it was established that Donald Marshall had testified to substantially different events in a number of other occasions where he has appeared in court under oath and given testimony as to the events of that night. And in at least four other occasions he gave statements under oath substantially different than the statement that he gave this time. The substantial difference was, in the other events, one of which was his hearing which led to his own acquittal, he gave clear evidence that there was a robbery in progress and in this event, he did not."

The defence of self defence is defined by s. 34 of the Criminal Code which reads as follows:

"34.(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and

(b) he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. 1953-54, c. 51, s. 34."

The trial judge told the jury that there was no burden on the accused to establish self defence but rather the Crown had the burden of proving beyond reasonable doubt that the accused did not act in self defence when he stabbed Sandy Seale. He then went on to say:

"Now if you believe the evidence of MacNeil, that a robbery was in progress, then in law, Ebsary was being assaulted. According to MacNeil, Marshall assaulted MacNeil in pursuing with Seale the common, unlawful purpose of robbery - consequently, at law, Seale is a party to that offence. Seale, an athletic, strong young man stood over the much smaller, older man and said, 'Dig man dig.' Obviously there was a clear indication of 'or else'. By that act in that place, at that time and in those circumstances, Seale was threatening Ebsary and in law, was assaulting him. Marshall and Seale, in carrying out their common purpose were thus jointly assaulting MacNeil and Ebsary."

. . .

"...The accused is entitled to be acquitted if upon all the evidence, there is reasonable doubt whether or not the blow was delivered under reasonable apprehension of death or grievous bodily harm and if he believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm. The accused has to prove nothing. Rather the Crown must prove beyond a reasonable doubt that the accused did not so act. Section 34(2) obviously provides for an acquittal, despite the fact that an accused means to cause death or grievous bodily harm, that he knows it's likely to cause death so long as the Crown had not negatived the elements of Section 34(2) beyond a reasonable doubt."

After properly instructing the jury on the law relating to the offence of manslaughter and self defence the learned trial judge said:

"...If you have any reasonable doubt as to whether the accused acted in self defence, you will find the accused not guilty of manslaughter cause the Crown has failed to prove that the accused's acts were not justified. If on the other hand you are satisfied beyond a reasonable doubt that the Crown has proved that the accused's acts were not justified as coming within the meaning of Section 34(2), then of course the defence of self defence does not exist and you must consider whether or not the Crown has proved the offence charged, of manslaughter. Before turning to the offence of manslaughter itself directly, I must tell you that if you disbelieve MacNeil and accept the evidence of Donald Marshall Jr., then the defence of self defence does not arise as there would be no robbery and no assault by either Seale or Marshall, which would give rise to the operation of the self defence provisions of the Code."

Far from telling the jury that they must convict the appellant if they believed the evidence of Mr. Marshall, the learned trial judge said to the jury:

"...If you accept as facts the details as given by Donald Marshall Jr., as I have said, you need not consider self defence. You must then consider the offence of manslaughter which is the offence with which the accused is charged."

After again instructing the jury with respect to the law relating to manslaughter Mr. Justice Nunn said:

"...if you don't pay any attention to the self defence at all, you discard that as a..from your finding of the facts, then you have to make your finding of manslaughter. So what I'm about to say really applies in both situations, whether you accept Marshall's testimony or MacNeil's testimony except that the offence is justified if you find that the Crown has not negatived beyond a reasonable doubt the defence of self defence. If it has or if you accept Marshall's evidence as to the events, then the law of manslaughter really can be explained to you as follows."

In light of the instructions as a whole I interpret this latter direction not as an instruction to the jury that they must convict the appellant of manslaughter if they reject self defence, but rather as a direction that if the Crown has negated self defence then they must consider whether or not the offence of manslaughter has been proven beyond reasonable doubt.

Later however the trial judge did say to the jury that if they were satisfied that the appellant did stab Seale and was not then acting in self defence "then you will find the accused guilty of manslaughter".

Although such direction removed the element of reasonable doubt it is my opinion on the facts of this case that such direction does not amount to reversible error and if necessary I would invoke the provisions of s. 613(1)(b)(3) of the Criminal Code and hold that such direction did not amount to a substantial wrong or miscarriage of justice. The impugned passage occurred during the following directions:

"...Now if you are satisfied beyond a reasonable doubt that the death of Sandy Seale was caused by the assault of the accused, an unlawful act, then you will find the accused guilty of manslaughter if you are satisfied beyond a reasonable doubt that the accused did not act in self defence. Essentially this case boils down to an issue of credibility. Do you accept the evidence of MacNeil or do you accept the evidence of Marshall? I spoke to you earlier on the issue of credibility. I now must add that the evidence discloses that Marshall testified under oath on four previous occasions relating to the events of this evening of May the 28th, 1971 and on those occasions has testified substantially differently than he did before you. On those occasions he testified that there was a robbery in progress. On each occasion

he was under oath and was purporting to tell the truth. I must caution you that it is dangerous to rely on evidence given by a person who on so many occasions all under oath gave so substantially different evidence."

During the course of re-charging the jury Mr. Justice Nunn told them:

"...I want you to understand clearly though I put two situations to you, that if you believe MacNeil's evidence and I summarized his evidence, then one situation occurs; if you believe Marshall's evidence, then another situation occurs and I thought I had told you - certainly at the outset I have - that you can believe all or part or none of a witness' evidence. So there's a possibility that you would believe some of MacNeil's, some of Marshall's, some of somebody else's, some of Ebsary's as to this whole event."

The submission of counsel for the appellant is that the total effect of the foregoing directions left the jury with only two options - "believe Donald Marshall and convict the accused or believe James MacNeil and acquit the accused".

The evidence of Mr. Marshall was diametrically opposed to that of Mr. MacNeil as to whether a conversation took place between Messrs. Ebsary, MacNeil, Marshall and Seale and whether a robbery was in progress at the time Seale was stabbed. Unlike the situation in R. v. Nadeau supra, the jury were not directed that if they rejected MacNeil's evidence they had to accept that of Marshall and convict the appellant. Indeed on the recharge the trial judge emphasized to the jury that they could believe all or part or none of a witness' evidence - "so there's a possibility that you would believe some of MacNeil's evidence, some of Marshall's...".

Both Marshall and MacNeil were Crown witnesses but Mr. MacNeil's evidence certainly supported the position of the defence. I have read and reread the charge to the jury and am not persuaded that they were left with two alternatives only, namely believe Marshall's evidence and convict the appellant or believe that of MacNeil and acquit Mr. Ebsary.

As I read the charge the learned trial judge instructed the jury that they must acquit the appellant if they found he was acting in self defence at the time he stabbed Seale; but that if they rejected the defence of self defence then they had to consider whether Ebsary's conduct amounted to manslaughter. It is true that at one time Mr. Justice Nunn told the jury that if they rejected the defence of self defence "you will find the accused guilty of manslaughter". However, when the charge is read in its entirety I am satisfied that the jury were not left with the impression that if they accepted Marshall's evidence they had to convict the appellant. They were told on more than one occasion that they could accept some or all or none of the evidence of the witnesses including MacNeil and Marshall. I am not persuaded that when the charge is considered as a whole that the error that occurred in R. v. Nadeau supra was repeated in this case.

Mr. Marshall is a self confessed perjurer and Mr. Justice Nunn properly instructed the jury that it was dangerous to rely on his evidence. How the jury arrived at its verdict we of course will never know. The evidence indicated that Seale was unarmed and that his hands were by his sides when he

was stabbed by the appellant. It well may be that the jury rejected Marshall's evidence and accepted that of MacNeil and Ebsary that they were being robbed when Seale was stabbed but that the appellant used more force than was necessary to defend himself. In other words the jury may well have concluded that Mr. Ebsary did not kill Seale under reasonable apprehension of death or grievous bodily harm from the assault of Seale and Marshall, or that he did not believe on reasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm (Code s. 34(2)). On such analysis the statement of Ebsary that "I swore by my Christ, I swore by my Christ that the next man that struck me would die in his tracks" is not irrelevant. For all the foregoing reasons I would dismiss the appeal against conviction.

I turn now to a consideration of the application for leave to appeal against the sentence of three years imprisonment.

The appellant will be seventy-four years of age on June the 2nd of this year. He has a previous criminal record consisting of a conviction in 1970 under what is now s. 85 of the Criminal Code (possession of a weapon dangerous to the public peace) and in 1982 of carrying a concealed weapon.

In imposing sentence Mr. Justice Nunn said in part:

"The evidence disclosed that that night you were armed and perhaps ready to take drastic measures if any situation presented itself. Even so, unless you orchestrated a situation, those facts need not be held against you. If you did orchestrate the situation or attack when unprovoked, it would have been murder. In my own mind, I do believe that these events did occur in a marginal self-defence situation, at least in the

public perception of self-defence. It may have been that your reaction was too violent, but there was some element of self-defence involved and I am entitled to take that into account in sentencing."

Later the learned trial judge said:

"...Taking into account your health circumstances, mental and physical, taking into account your age, taking into account the previous record that has been indicated to me, particularly the offence before this offence for which you stand convicted, and taking into account the circumstances surrounding the incident itself, taking into account the time since you've first been charged, I still am of the view that deterrence is a strong factor here; deterrence for yourself, who is still believed by some to have a violent nature, and for the public. It is repugnant to our system and one just cannot accept that a person can take matters into his own hands and become an executioner in situations such as you encountered.

"Also on the rehabilitation side, there are some pretty strong requirements for rehabilitation. Your use of alcohol, drugs, your inclination to violence all require a period of time to correct. As I said, all of the circumstances have to be taken into account and in so doing, it is my view that the protection of the public can best be served by a period of incarceration in a federal institution.

"Considering all of the factors that I've indicated, and giving you the benefit of what I suggest may be a public perception of a marginal self-defence situation, I think the Crown's recommendation is too long, and I can't agree with the Defence submission on probation, so I sentence you to confinement in a federal institution for a period of three years."

As pointed out by this Court in R. v. Myette (1985),

67 N.S.R. (2d) 154 at 162, 163:

"The offence of manslaughter carries a maximum sentence of life imprisonment. The range of sentences imposed in Nova Scotia has been from suspended sentence (e.g., R. v. Cormier (1974), 9 N.S.R. (2d) 687 (N.S.C.A.)), to twenty years' imprisonment (R. v. Julian (1973), 6 N.S.R. (2d)

504 (N.S.C.A.)). Lenient sentences have been imposed only where very strong mitigating factors exist or where the act, though culpable, was close to being an accident. In the great majority of manslaughter cases sentences range from four to ten years."

We have had the benefit of post-sentence medical reports with respect to Mr. Ebsary. On February 18, 1986 Dr. M. T. Ryan wrote to the appellant's solicitor as follows:

"I became familiar with Mr. Ebsary in Aug/Sept 1985. Prior to this period the late Dr. Abe Gaum attended him medically.

Since I have been treating Mr. Ebsary, I have been involved with the following conditions:

1. Surgery for small bowel obstruction in Oct/85. Since this time he has had chronic abdominal pain.
2. Chronic Degenerative Disease of the cervical spine. He currently has problems with his right arm secondary to nerve root compression. Since he has had two previous operations for the same, it is unlikely anything else will be attempted.
3. Cancer of Prostrate, prior to my taking over the case, with resection of the prostrate by Dr. Lawrence Schneiderman in July/85(?).
4. Chronic Lung Disease due to heavy smoking, he has been treated by myself for the same.

As far as his medical condition is concerned, Mr. Ebsary certainly does have major complaints. However I believe his major problem appears to be his neck, however I feel it is unlikely this would lead to surgery because of his two prior operations."

On February 13 Dr. H.G. Malik a neuro-surgeon forwarded a report to the appellant's solicitor in which he said in part:

"As you will recall, Mr. Ebsary had sustained a fracture dislocation at the C5-6 level and was treated for it in 1983. He also has cervical

spondylosis. He has a residual weakness in his right arm. He complained to me of pain in his neck and weakness in his right arm. He mentioned that he gets dizzy at times and has been told by another surgeon that he may have narrowing of the blood vessels, going to his brain, and giving rise to the dizziness because of decreased blood supply to his brain. He has had surgery recently for a problem with his bowels. A prostatectomy has been performed for a malignancy as well."

"...I believe that the pain in his right arm and the weakness in his right arm is due to compression of the nerve roots and possibly the spinal cord in his cervical spine. This is a potentially correctable problem and may require a decompressive cervical laminectomy and foraminotomy. It is nevertheless a major undertaking and there would be serious risk of complications with regard to his cardio-respiratory system and also there are, of course, the inherent risks of the operation itself with regard to injury to his spinal cord and nerve roots. I had discussed with Dr. A. Gaum, in February 1985, that Mr. Ebsary should perhaps be referred to a larger centre. Following my examination in January 1986, I still feel that this should be done."

Letters were also received by Mr. Ebsary's counsel from Dr. Schneiderman and Dr. Dunn dated respectively February 7 and February 11, 1986. They really add nothing to what Dr. Ryan and Dr. Malik said in their reports.

As Mr. Justice Nunn pointed out there may well have been an element of self defence present at the time Seale was stabbed. I agree entirely because it appears inconceivable to me that the appellant would stab Mr. Seale for absolutely no reason. Mr. Marshall on other occasions testified under oath that Seale and himself were engaged in attempting to rob Mr.

MacNeil and the appellant at the time Seale was stabbed. This to me is the far more likely version of why the stabbing took place.

In light of the post-sentence reports, the circumstances both of the incident itself and of the appellant and bearing in mind that justice must always be tempered with mercy it is my opinion that a fit and proper sentence for this offence by this offender would be imprisonment for one year in the Cape Breton County Correctional Center. In result I would dismiss the appeal against conviction, but would allow the application for leave to appeal against sentence, allow the appeal and vary the sentence as indicated.

James L. MacDonald

J.A.

Concurred in:

Morrison, J.A. *[Signature]*

Matthews, J.A. *[Signature]*