

SIMON J. KHATTAR, Q.C., by Mr. MacDonald

1 INQUIRY RECONVENED: 2:08 p.m.

2 MR. MacDONALD:

3 The next witness will be Simon Khattar, my Lord.

4 SIMON J. KHATTAR, Q.C., being called and duly sworn, testified
5 as follows:

6 BY MR. MacDONALD:

7 Q. Your name is Simon Khattar?

8 A. Simon John Khattar.

9 Q. Mr. Khattar, you're a member of the Bar of the Province of
10 Nova Scotia?

11 A. Yes, sir.

12 Q. When were you admitted to the Bar?

13 A. November 17th, 1936.

14 Q. And you're a Queen's Counsel?

15 A. Yes, Queen's Counsel?

16 Q. And when -- and when did you get that designation?

17 A. 1953.

18 Q. Practiced in Sydney your whole career?

19 A. Yes, sir.

20 Q. Okay, and how would you describe your practice generally?

21 A. General practice of law in all fields of law with the exception
22 of divorce -- divorce and family law.

23 Q. Okay, and in particular have you had a practice in criminal
24 law?

25 A. An extensive criminal practice in criminal law.

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1 Q. And has that been throughout your career?

2 A. Throughout my career. Even up as to the present.

3 Q. Okay, have you served or did you serve for a time as Crown
4 Prosecutor?

5 A. I did for the County of Cape Breton and for the County of
6 Richmond.

7 Q. What time would that have been?

8 A. In Richmond County it would be in 1950 -- '50's, for a period
9 of five years. And in the Cape Breton County during the
10 reign of -- call it reign, of Donald Findlayson and I take
11 that to be in the sixties during his illness, Donald
12 Findlayson.

13 Q. Was he a --

14 A. Prosecutor -- Crown Prosecutor.

15 Q. Would you have been then as an assistant Crown or how would
16 you be designated?

17 A. During his illness, I would took over the terms of the court.

18 Q. Okay, during --

19 A. As Prosecuting Officer.

20 Q. During the time you were Prosecuting, it wouldn't have
21 been a full-time practice for you?

22 A. No, on those -- on those occasions when I was Prosecuting
23 Officer for the County in Richmond and for the County of
24 Cape Breton, they were part-time appointments.

25 Q. When was the last time you would have served as a Prosecutor?

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1 A. Oh, that wouldn't be -- my recollection would be about 1965.

2 Q. Thank you. You've been associated over your career on
3 numerous occasions I understand with the late Moe Rosenblum?

4 A. Yes, sir, a most able and competent lawyer.

5 Q. Yes, and he was admitted to the Bar in -- before you?

6 A. Oh, yes, in 1926, I believe, or '27; I'm not sure.

7 Q. Mr. Rosenblum also had experience, I believe, as Crown
8 Prosecutor?

9 A. He was Prosecuting Officer for the County of Cape Breton for
10 a number of years.

11 Q. Was that a full-time with him?

12 A. Full-time.

13 Q. He practiced as a sole practitioner, did he not?

14 A. For some time he practiced with the late J. W. Madden, Q.C.
15 Mr. J. W. Madden is noted by some of the old timers as an
16 outstanding criminal lawyer. Probably one of the best in
17 Canada.

18 Q. Yes, but other than that, Mr. Rosenblum was a sole --

19 A. Practiced alone.

20 Q. -- practitioner? Did he have any other lawyers in his office
21 that you're aware of?

22 A. Not -- not of I'm -- of anyone of which I am aware.

23 Q. Okay, now you were retained, Mr. Khattar, I believe, as
24 counsel for Donald Marshall, Junior, in this particular
25 matter?

1 | A. That's correct.

2 | Q. Who retained you?

3 | A. Donald Marshall -- the Band -- the Indian Band. I was asked
4 | by one Lawrence Paul, a member of the Membertou Reservation,
5 | to go to see Mr. Marshall at the County Gaol. The County Gaol
6 | at that time was on Welton Street, in the City of Sydney,
7 | County of Cape Breton. And he told me that the Band -- the
8 | Indian Band would look after my fees.

9 | Q. Okay, now had you experienced representing members of the
10 | Indian or Indians?

11 | A. Oh, I had a considerable number of Indian clients at that time
12 | and for many years previous to that and subsequent to that.

13 | Q. Yeh, okay. And did you have particular experience with Mr.
14 | Paul the person who asked you to go see Junior?

15 | A. Yes, his family particularly. So much so that I have -- did
16 | I do work for the Paul's? well, when I was having my house
17 | built, that Mr. Paul, Senior, help poured the cement for
18 | the foundation. In those days didn't have these ready-
19 | mixes. You mixed them and you poured the -- with the
20 | wheelbarrows.

21 | Q. Okay, had you ever been involved prior to that time with a
22 | -- the defense of a murder trial?

23 | A. Yes, I think it was prior to that. I was involved in a
24 | murder charge against another Indian in the Victoria County
25 | area. In fact the trial was up Baddeck and it was during the

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1 | time in which Illsley was -- Mr. Justice Illsley was Chief
2 | Justice of the Supreme Court of Nova Scotia.

3 | Q. And had you any other murder trial experience?

4 | A. No, those are the only two. That was the only one rather.

5 | Q. And other than -- then the Donald Marshall and this one in
6 | Baddeck, have you had any others?

7 | A. No, I had no other murder trials.

8 | Q. When you were retained, can you tell us when that would have
9 | been?

10 | A. I would say it's about approximately a week to ten days after
11 | the fatality. And that the fatality as I recall was on May
12 | 28th, of 1971.

13 | Q. That's correct. Mr. Marshall was charged with that crime on
14 | June the 4th?

15 | A. Well, it would be after he was charged. It wouldn't be before
16 | that. It was while he was in gaol -- the County Gaol.

17 | Q. Had he been there for some period of time?

18 | A. Prior to my seeing him.

19 | Q. Yes?

20 | A. I'm not certain of that.

21 | Q. Okay, did you go to see him at the gaol?

22 | A. I saw him at the gaol. In a private room made available for
23 | the lawyers when they interview their clients.

24 | Q. At that time had anyone else been retained on behalf of Mr.
25 | Marshall?

1 A. No, sir.

2 Q. Do you recall the visit to the gaol when you saw him?

3 A. I'm sorry, I didn't hear you.

4 Q. Do you recall the visit that you made to the gaol; do you have
5 a --

6 A. Yes, I do, very well.

7 Q. And can --

8 A. Very vividly.

9 Q. Would you tell us as best you can --

10 A. Yes.

11 Q. -- what you were told by Mr. Marshall at that time?

12 A. I got into the -- I asked the jailor to bring Mr. Marshall
13 forward that I would like to speak with him. And he
14 arranged to get me into a conference room where we could be --
15 where we could interview -- where I could interview him alone.
16 He came in and I introduced myself. He says, "I expected you".
17 I said, "Lawrence Paul told me to come up to see you that you
18 wish to consult me in connection with a charge against you".
19 He says, "That's correct". I said, "Would you like to tell
20 me what took place"? Should I make -- I understand my position.
21 I'm released as I recall from the solicitor and client
22 privilege.

23 Q. Yes.

24 MR. RUBY:

25 Just let me indicate for the record, my Lord, that I have written

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1 to my friend and advised them on behalf of Mr. Marshall that
2 solicitor/client privilege is waived.

3 MR. MacDONALD:

4 Thank you, Mr. Ruby.

5 BY THE WITNESS:

6 A. I said, "Would you like to tell me, then, Junior, what
7 you can about this charge?" And he proceeded to tell me. He
8 said that he'd been at the park with his friend, Seale. I
9 forget. I used to know the name. I can't place it right
10 in the back of my mind.

11 BY MR. MacDONALD:

12 Q. Sandy Seale. Sandy?

13 A. Sandy Seale, and that while there, they encountered two
14 people. He described them. He described one as a short man.
15 Wore a long blue coat. And the other man, a tall man, he says,
16 "I thought they were priests". And I said, "What made you
17 say that that you 'thought they were priests'". Well, he
18 said, "They looked like priests". "Did you talk to them?"
19 Oh, he says, "I asked them if they were priests. And the
20 younger of the two men said, 'Yes, we are priests'. And
21 one of them said they were from Manitoba". In any event,
22 one wanted a light, the other wanted a cigarette and they
23 -- he gave him a cigarette, gave him the light and in the
24 course of just immediately after the cigarette and the
25 lighting episode was completed, the short man said, "I don't

1 | like Blacks and I don't like Indians". And then he comes
2 | out with a knife and he stabs Seale. He said, "I tried to
3 | avoid him and when I did, I put my arm up", and he says, "I
4 | got slashed in my arm -- my left arm".

5 | Q. That's Marshall who got slashed in the left arm?

6 | A. Pardon me.

7 | Q. Marshall got slashed?

8 | A. Marshall -- this is Marshall with whom I carrying on this
9 | conversation. And he said, -- I questioned him when he
10 | mentioned they being priests and they had -- they'd asked
11 | "If there were any women around and where could they get
12 | any liquor or any bootleggers". I said, "Now, do you mean
13 | to tell me that these people you saw. One -- that you
14 | thought they were priests and they told you they were priests"?
15 | He said, "Yes". And actually I was a little disturbed because
16 | I am a former Catholic myself and I found it very strange. In fact
17 | I am a very close Catholic, one that would appear to be
18 | offended when somebody makes such a statement and I questioned
19 | him a little on that. He said, "I'm telling you what took
20 | place". And he was very -- well, I was going to say very
21 | vehement in explaining to me that these fellows looked like
22 | priests and they admit they were priests -- admitted they
23 | were priests.

24 | Q. And --

25 | A. Pardon me.

1 Q. I'm sorry.

2 A. Go ahead. I say well, that's about the substance of the
3 conversation.

4 Q. How long were you there?

5 A. Oh, I'd say I was there about a half hour.

6 Q. Now would you have questioned him, "if these people were priests
7 why they would be looking for women", for example?

8 A. Those were the things I said to him and it strikes me strange
9 that you would find priests here in a City like the City of
10 Sydney and going to a park and looking for women, as you put
11 it, and looking for a bootlegger.

12 Q. Did you --

13 A. However, I didn't want to dwell on that. I merely wanted to
14 clarify in my own mind the basis of them making those
15 statements.

16 Q. Did you believe him?

17 A. I had my doubts. I didn't say, "I don't believe you". I
18 had my doubts.

19 Q. At any time during -- during the -- your representation of
20 Junior Marshall, did he ever tell you any different story?

21 A. No, I must say that the story that he gave me in the gaol
22 is the same story reported to me by Mr. Rosenblum after
23 he interviewed him alone. It's the same story that Marshall
24 gave in the trial -- in his trial. And it was the same
25 story that appeared, of course, in the -- when the case went

1 on Appeal to the Appeal Court.

2 Q. Okay, now having visited him in the gaol, what did you do next?

3 A. Next I indicated to him, "that we'll need an awful lot of help
4 to help you. So if there is anybody can help us in this,
5 give us names of any persons, any witnesses, get them to come
6 and see me".

7 Q. Okay.

8 A. Apart from that I told him before I left, "Now", I said, "I
9 don't want you to give any statements to anybody. Don't
10 talk to anybody about this case. If they wish to talk to
11 you, you tell them that you retained me and that I insisted
12 upon being present if there's going to be any talking with
13 you".

14 Q. Did you know --

15 A. I did not -- excuse me and I must say it. At that time I
16 was not aware that -- whether he had given any statements.

17 Q. That was my next question. You weren't aware?

18 A. No.

19 Q. Did you ask him if he did?

20 A. No.

21 Q. Okay, so you instructed --

22 A. Not at that time, no.

23 Q. -- so you instructed him "don't give any statement"?

24 A. That seems to lead me to think that I was not aware that any
25 statement was made when I said, "Don't -- don't give any

1 | statements to anybody. Police or anybody".

2 | Q. And you asked him "to get anybody who knew anything about it
3 | to contact you"?

4 | A. Yes, and further to that -- supplementing that, I had seen
5 | the man who asked me to go and see him. And I told him, I
6 | says, "This man has quite a story. And it maybe difficult
7 | to believe. And I'll need an awful lot of help. So if there
8 | is anybody that you know can give me any evidence about this
9 | incident, you let me know or have them come to my office".

10 | Q. Now that's Lawrence Paul you're talking about?

11 | A. That's Lawrence Paul, yes.

12 | Q. Was money any object to this defense? Did -- were you going
13 | to be hampered in any way conducting a defense by concern
14 | about not having fee, for example?

15 | A. Very shortly after I was retained, Mr. Rosenblum was retained.
16 | He was tained -- retained, I believe, by the Department of
17 | Indian Affairs. I'm not clear on that. In any event, he was
18 | retained by a different group from the one's who retained me.
19 | And we both indicated that we'll have a hard job to -- to
20 | defend this man and we need a lot of help. We both had
21 | made the comment, "We're not restricted or hampered by
22 | way of money".

23 | Q. Okay, so you --

24 | A. And we were not. We're -- there was no restrictions on us.

25 | Q. Did you give any consideration to retaining some sort of an

1 | investigator to help you?

2 | A. No, sir.

3 | Q. Okay.

4 | A. I might say that in my practice I've never engaged an
5 | investigator.

6 | Q. Okay, and did you have any discussions with Mr. Rosenblum
7 | as to whether or not you should seek assistance from an
8 | investigator or someone of that type?

9 | A. No, both Mr. Rosenblum and I discussed the approach that we
10 | would make. We both indicated we will talk with the Indians,
11 | as many as we can and any persons who will come forward to see
12 | what they can tell us. And in fact, Mr. Rosenblum and I went
13 | to the so called place, the scene of the fatality. Went
14 | through the motions. I went behind the tree and Mr. Rosenblum
15 | stood where the people were supposed to have been standing.
16 | And we re-inacted the scene among ourselves to see what
17 | observations what visibility the -- each would have.

18 | Q. Okay, let me get back, Mr. Khattar, to Mr. Rosenblum. You
19 | say he was retained shortly after you were?

20 | A. Yes.

21 | Q. And you understood he visited Junior Marshall as well?

22 | A. Yes.

23 | Q. And you understood from your discussion with Mr. Rosenblum
24 | that the story he heard from Junior Marshall was the same
25 | story?

- 1 | A. Exactly the same story. In fact, we discussed it. He says,
2 | "What do you think of this story about these priests"? He
3 | says, "What do you think of that?", he said. He said, "How
4 | will the jury take to that"? I said, "Well, we'll worry
5 | about those things later".
- 6 | Q. Okay, now did you and or Mr. Rosenblum or each or both of
7 | you see Marshall again?
- 8 | A. Yes, on many occasions.
- 9 | Q. Okay, and on each occasion would you discuss with him again,
10 | "Tell us the story"?
- 11 | A. The same incident? No, we were discussing again what
12 | potential evidence there is available to assist him.
- 13 | Q. Okay. What witnesses then were Mr. Marshall and the other,
14 | Paul and others, able to find for you?
- 15 | A. They mentioned a Tom Christmas. I didn't -- I'm not sure
16 | now whether I interviewed Tom Christmas, but the information
17 | was given to me of what Tom Christmas will tell me.
- 18 | Q. Yes.
- 19 | A. And then there was a Mary Paul. Again, there was an indication
20 | of what Mary Paul would be able to tell me. I think there was
21 | another person, I can't place that name in the back of
22 | my mind at the moment. But I believe I interviewed each
23 | of these people and asked them what they knew about it. And
24 | they would -- they referred me back to conversations had
25 | with Pratico. Now I'm not clear at this stage whether this

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1 information came to me after the Preliminary Inquiry. I
2 think it most likely came after the Preliminary Inquiry.

3 Q. Okay, just for the record, Mr. Khattar, you no longer have
4 any file materials on this case, do you?

5 A. No.

6 Q. And those were destroyed in just -- in your normal practice,
7 is that correct?

8 A. That's right, sure.

9 Q. Would you keep files for a period of years and then -- then
10 get rid of them?

11 A. I have in my basement of our offices files going back forty
12 years -- forty-five years. I, in fact, I make it a habit
13 of keeping most of my files.

14 Q. Yes.

15 A. About five -- six years ago, we started to renovate the
16 office. At the time of the Marshall trial, I occupied or
17 had two offices in the building where are -- we have our
18 offices now. One was for the secretary and the other office
19 was for myself. And we had some difficulties to make room
20 for my article clerk which turned out to be my son, to get
21 him another room. Now we occupy four floors. In the course
22 of the renovations some of our criminal files were destroyed.
23 Didn't appear to be of no value. Now at that time, of course,
24 I had no indication in any of these criminal cases that there was --
25 that they'd ever be resurrected so to speak.

1 Q. Okay, did you and Mr. Rosenblum, were you aware who the
2 Crown Prosecutor would be for the case?

3 A. Oh, yes, no question about that.

4 Q. That would be --

5 A. That was Donald C. MacNeil.

6 Q. -- Donald C. MacNeil. Did you attend on Mr. MacNeil. Did you
7 visit him to ask him what have you got, any of this sort of
8 thing?

9 A. In those days, the practice was to await the opportunity
10 and -- at the preliminary inquiry and you guided your steps
11 from what would come out there.

12 Q. Okay.

13 A. It was not the practice to go and talk with the Prosecutor and
14 say--"Now look what kind of a case do you have against him?".

15 Q. Okay, so you did not, then, approach --

16 A. Mr. MacNeil.

17 Q. -- Mr. MacNeil, and to your knowledge neither did Mr.
18 Rosenblum?

19 A. Not of which I have any knowledge.

20 Q. And have you discussed that with Mr. Rosenblum within the last --

21 A. Frequently.

22 Q. Frequently.

23 A. Frequently. Frequently.

24 Q. And your understanding is --

25 A. My --

1 Q. You think that he did not visit him either?

2 A. That's right.

3 Q. Okay. Did you ever ask Mr. MacNeil or anyone if they took a
4 statement from your client?

5 A. With respect -- no. My recollection now is that at the
6 Preliminary Inquiry, Sergeant Detective MacIntyre had a
7 statement. I don't think it -- it wasn't introduced as I
8 recall.

9 Q. It was marked for --

10 A. But not been used.

11 Q. -- for identification?

12 A. That's it.

13 Q. Yes.

14 A. That's the first information I -- I had that there was such
15 a statement.

16 Q. And did you get a copy of it then?

17 A. No, we did not have one in our file.

18 Q. Okay, now let me just back up a moment. When you were Crown
19 Prosecutor --

20 A. Yes.

21 Q. -- at the time -- your experience. Was it your practice to
22 divulge to the defense the information you had?

23 A. During the period in which I was a Prosecuting Officer we --
24 that was not the practice to make available or to divulge
25 the fact that we had statements.

1 Q. Okay.

2 A. I might have at times, said, "Well, look now we have some
3 -- some information against your fellow. We've got him cold
4 and ..." something like that but we've never made
5 available those statements.

6 Q. And during the period of time that Mr. Rosenblum was a
7 Prosecutor, I take it, you would have defended cases?

8 A. Same practice followed. We were not given statements and
9 we're not even advised that there were statements.

10 Q. Okay. Did you have any experience with, just generally now
11 forgetting -- we'll come to this case specifically but --

12 A. Sure.

13 Q. -- did you have any experience with the Sydney Police when
14 you were Prosecutor?

15 A. Considerable.

16 Q. And what about specifically with Sergeant MacIntyre or
17 Chief or Detective Urquhart?

18 A. Both of them were -- I found MacIntyre a tougher officer
19 than Urquhart. You could talk to -- you could talk to both
20 of them. I found MacIntyre as I say as a very tough officer
21 but from my own personal experience, an honest officer.

22 Q. Was it your experience with MacIntyre that he would bring
23 to you as Prosecutor, he's entire file?

24 A. That was my experience.

25 Q. And did you have the same experience with Detective Urquhart?

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1 A. Yes, the same thing.

2 Q. Okay, did you ever have an experience where you discovered
3 that you were not, in fact, given the entire materials
4 that those gentlemen had?

5 A. I've had no instance of that.

6 Q. Thank you. How did you and Mr. Rosenblum decide to conduct
7 this defense between yourselves?

8 A. Before the Preliminary Inquiry, we knew what witnesses were
9 being called. And Mr. Rosenblum would say, "Well, I'll
10 take this one and you take this one". Frankly, Rosenblum
11 took the lead in what -- what witnesses would be examined
12 by each of us. When it came to the trial itself that's
13 referred to the Preliminary, we concluded that there would
14 be three essential -- not -- two essential witnesses. The
15 two important witness would be Pratico and Chant.

16 Q. Yes.

17 A. Rosenblum says, "I'll take Chant". I says, "All right, I'll
18 take Pratico". The other witnesses while they were there
19 in our view they were unimportant in so far as the actual
20 proof of the alleged commission of the offense.

21 Q. Did you together discuss prior to the Preliminary. Let's
22 just deal prior to the Preliminary if we can. Did you discuss
23 together the strategy that you would follow in the Preliminary?

24 A. I'm going to tell you that it is the practice of the Cape
25 Breton lawyers as it was in those days and probably still is

1 that you asked very few questions on the Preliminary.

2 Q. Is that correct, okay --

3 A. That was our practice anyhow. My practice and Rosenblum's
4 practice. And somethings merely to clear up but don't give
5 away your potential defense.

6 Q. And that was the practice that was followed?

7 A. That was the practice in those days.

8 Q. Okay. Would you have had to discuss that then or that would
9 just be known by both of you when you went to court?

10 A. It was almost automatic.

11 Q. This visit you talked about going to the Park and one of you
12 standing behind the "tree" you said, did you mean bush?

13 A. Yes.

14 Q. Okay, and the "other up by the apartment", was that before the
15 Preliminary or --

16 A. Oh, yes, all of this is true.

17 Q. Okay. And you said you had a knowledge of the witnesses who
18 would be called at the Preliminary, where would you get
19 that information?

20 A. I did not have a list, no. We knew the doctors would be
21 called. It was almost automatic they're going to call the
22 doctor who was there at the last minutes. And we -- I'm
23 not sure where we heard about Chant or where we got that
24 information. It maybe that they were there in court and
25 we knew that these people are supposed to have been eyewitnesses.

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1 Q. Were your -- the people that you had asked to go find you
2 witnesses or --

3 A. Yes.

4 Q. -- get you what any information -- whatever information they
5 could. Were they able to give you any indication about who
6 would be witnesses?

7 A. No.

8 Q. But were you aware when you went into the Preliminary that,
9 in fact, there were going to be eyewitnesses called?

10 A. No. Actually, my own experience what they'll do at the
11 Preliminary is call a number of witness to enable them to
12 get a committal. And then they'll say, "Look, we have
13 other witnesses who will be called". That was the practice
14 too. There would be other witnesses called.

15 Q. Yes.

16 COMMISSIONER EVANS:

17 Q. Do they give the names of those witnesses who were to be
18 called?

19 A. Yes, they do. And they usually -- what the Prosecutor would
20 say, "These are the witnesses I'm putting forward here today,
21 Your Honour, but there will be other witnessess, John Jones,
22 Mary Black and Susan So and So, will also be called later in
23 the event of -- in the event of a committal".

24 Q. And they were available if you wanted to question them as
25 well too?

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1 A. Yes, too.

2 BY MR. MacDONALD:

3 Q. What's -- what was the -- what is the purpose, Mr. Khattar,
4 of a preliminary inquiry?

5 A. In those days and I assume it still applies, that the -- just
6 determine whether there is a sufficient amount of evidence
7 to warrant a committal of the person for -- on the charge.

8 Q. Okay, and --

9 A. And in those days then following the committal there was still
10 the Grand Jury to deal with.

11 Q. Yes, and I'll come to that. From the defense point of view,
12 speaking now as a defense counsel, what's the purpose of the
13 preliminary?

14 A. The purpose of the -- we have a pretty fair idea of what
15 the Crown -- how the Crown proposes to establish it's case.
16 And that's without going into testing the credibility and
17 so on and from that we should be ready to answer those
18 charges if we have an answer -- answer that evidence rather.

19 Q. Are you able to tell me now what was your theory of the
20 defence? How were you going to defend this boy?

21 A. We had to rely entirely on what Marshall told us. That it
22 was -- it was something that we befriended somebody, but
23 these people misunderstood our friendliness and took advantage
24 by stabbing Seale and also stabbing Marshall.

25 Q. Now -- I'm sorry.

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1 A. There's no--right up to that point there's nothing to indicate
2 to us an argument over anything at all because it's merely
3 a chance acquaintance sort of speak of some people and in the
4 course of some discussion, one of them has a feeling towards
5 the other type. Doesn't like Indians and doesn't like Blacks
6 and this precipitates what followed. That was there -- the
7 whole thing.

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1 Q. Let me get you to look at some documents. I've put
2 certain volumes in front of you. Now, let's start
3 with volume one, I guess.

4 MR. MacDONALD:

5 You need volumes one and two, My Lords. And 16, I think.

6 COMMISSIONER EVANS:

7 I'm a little curious just to what experience Mr. Rosenblum had in
8 murder trials because all I know so far there were very few
9 murder trials in this area.

10 BY MR. MacDONALD:

11 Q. Are you able to tell us, Mr. Khattar, what experience Mr.
12 Rosenblum would have had in murder trials prior to the
13 Marshall matter?

14 A. Mr. Rosenblum as I said earlier was practising with
15 J. W. Madden and Mr. Madden in this area had -- he and
16 the late A. D. Gunn were the two prominent criminal lawyers
17 in this area and the number of murder cases -- I don't
18 know the number but there are a great number of murder
19 cases over the years and either Mr. Madden or Mr. Gunn
20 handled those murder cases. And I would say Mr. Madden had
21 the major number of them. When Mr. Rosenblum went in to
22 the practise with Madden he assisted Mr. Madden in some of
23 the murder cases and handled some on his own. So I would
24 say that Mr. Rosenblum had a very extensive criminal practise
25 and had handled a number of murder cases.

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1 | MR. MacDONALD:

2 | Is that sufficient My Lord?

3 | COMMISSIONER EVANS:

4 | Fine.

5 | BY MR. MacDONALD:

6 | Q. In volume one I've opened up to page three, Mr. Khattar.

7 | A. Yes.

8 | Q. And all that is is an index of the witnesses to be called --

9 | A. Yes.

10 | Q. -- at the preliminary hearing. You, do I understand, would
11 | not have been given a copy of that list prior to --

12 | A. No.

13 | Q. -- the hearing?

14 | A. No, sir.

15 | Q. Now, would you also -- You have volume 16 there.

16 | A. Volume 16?

17 | Q. Yeh. On page 157. Volume 16, 157. Those will be identified
18 | later Mr. Khattar. Those are notes that were made by Lew
19 | Matheson.

20 | A. Yes.

21 | Q. Who was the -- assisting Mr. MacNeil in prosecuting this
22 | case.

23 | A. He never never examined a witness. I didn't even know
24 | he was on it until this thing was re-investigated sort to speak.

25 | Q. But these are --

1 A. But that's another matter.

2 Q. These are his notes from the -- taken at the time of the
3 preliminary hearing and Mr. Matheson -- or Judge Matheson
4 now will speak to those. But I wanted to just direct your
5 attention to the -- I guess it's the second full paragraph
6 where it says:

7 MacNeil informs that court that exhibits are in
8 Sackville. Will inform defense of results of
9 tests. Ground rules re witnesses who establish
continuity of possession of exhibit and court orders.
No publication now.

10 I wanted to direct your attention to that comment: "that
11 exhibits are in Sackville." And the defense will be
12 informed of the results.

13 A. That did not surprise me at all because that was another
14 practise that's pretty well that -- if something's going to
15 the crime labs, the results of these crime lab matters are
16 usually brought to our attention but I'm not referring to
17 witnesses. Now, these people would be witnesses. But these
18 are crime lab results that are usually brought to your
19 attention. So that didn't surprise me.

20 Q. And in fact in this case would the results of the test
21 carried out in the crime lab have been made -- brought
22 to your attention?

23 A. I don't recall ever seeing them.

24 Q. Okay. But do you recall this being --

25 A. Being said.

1 Q. -- said that --

2 A. Yes, they would be supplied.

3 Q. -- the defense would be advised?

4 A. Yes.

5 Q. Do you know if you contacted the crown to obtain copies
6 of the results of those tests?

7 A. No, sir.

8 Q. Now, what does this mean, if you can recall. This "Ground
9 rules" "Witnesses who establish continuity of possession
10 of exhibit" Was that the practise here?

11 A. Yes. The practise in the Cape Breton area is, for example, is
12 be more -- Those involved in liquor prosecution and defense
13 would be more familiar with it. Once a seizure is made and
14 -- by the police and the exhibit is taken what they usually
15 do in the courts is establish first the seizure. When the
16 seizure was made and indicate a continuity of possession of
17 the exhibit from the time it was first seized until it
18 was brought back to court and introduced as an exhibit.

19 Q. And would that have been the "Ground rule" for this
20 case? That it was clear that the defense were going to
21 require proof of the continuity of all exhibits?

22 A. Not that the defense was going to require it. This was the
23 practise to establish that.

24 Q. Okay. And -- And I put that poorly. That is the "Ground rules"
25 that were going to be filed in this case that you would have

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1 | accepted?

2 | A. He called them the "Ground rules" but that's the practise.

3 | In other words, as if we were to prove a continuity possession
4 | of the exhibits -- We sent certain exhibits to the crime
5 | lab and we will establish a continuity of possession of
6 | this exhibit from the seizure to the crime lab and back
7 | to us.

8 | Q. Okay. And you would have expected that?

9 | A. Yeh.

10 | MR. MacDONALD:

11 | Now, the reason, My Lords, I've directed you to this is:that's
12 | not contained in the transcript of the preliminary inquiry. These
13 | comments that took place just before they called the witness.

14 | COMMISSIONER EVANS:

15 | As I understand it there was no waiver by the defense --

16 | BY THE WITNESS:

17 | No.

18 | COMMISSIONER EVANS:

19 | -- of their right to have the continuity established in evidence.

20 | BY MR. MacDONALD:

21 | Q. That was trying to say and I should have asked you that. So -

22 | A. No, we did not waive any of the -- our rights at all with
23 | respect to any part of the trial.

24 | MR. MacDONALD:

25 | Thank you, My Lord.

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1 BY MR. MacDONALD:

2 A. In fact we didn't agree with ruling but that didn't do us
3 any good.

4 Q. Any surprises come out of that preliminary to you? Any surprises --

5 A. Any -- at the trial you mean?

6 Q. No, at the preliminary. Any surprises?

7 A. No, there was nothing that came out in the preliminary at
8 all. No.

9 Q. In that preliminary and I want to refer you to a couple
10 of parts. There was no cross-examination of Mr. Chant
11 or Pratico and that was -- would be your practise to not
12 do that, is that correct?

13 A. It's my practise with any witness if the witness doesn't
14 hurt me and the cross-examination may hurt -- may help
15 somebody else then no questions are asked.

16 Q. No. But I'm thinking particularly at the preliminary.
17 When Chant and Pratico both said that they saw Marshall
18 stabbed, I mean, that would hurt you I suppose?

19 A. Oh, yes.

20 Q. But your practise at the preliminary was you would not --

21 A. Not necessary to cross-examine at the moment, no.

22 Q. Thank you.

23 A. Well, decide how we're going to attack this fellow later.

24 Q. Okay. There was cross-examination of Patricia Harriss?

25 A. Yes. At the preliminary?

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1 Q. At the preliminary, yes.

2 A. Yes.

3 Q. And if I could get you to look at page -- just to -- starting
4 on page 23 of volume one, Mr. Khattar. That is the --
5 That's Patricia Anne Harriss and you can see it's --

6 A. Page 23?

7 Q. Yes. 23. And see half way down it says by Mr. Rosenblum.

8 A. You can't be sure there was anyone with Donald
9 Marshall at the time?

10 Q. Yeh, I just wanted to show that it's Mr. Rosenblum that
11 who's questioning.

12 A. Oh, Yes.

13 Q. Now, if you look at page 26. If I can take you over to there.
14 There's some comments there I want to take you through.

15 A. Yes.

16 Q. Starting about line 17.

17 A. Yes.

18 Q. Miss Harriss is being asked about her dealings with the
19 police and do you see -- I guess it's line 22:

20 Who was the next person you spoke to?
21 Sergeant MacIntyre?

22 Yes.

23 How many times have you spoken to him
24 about this evidence you are giving today?

24 Twice.

25 When was the last time?

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1 Last Tuesday.

2 And I suppose you signed a statement?

3 Yes.

4 Was that on the first occasion you spoke to
Sergeant MacDonald or the second?

5 The second time with Mr. MacIntyre.

6 The second interview with Sergeant MacIntyre
7 you gave a written statement?

8 Yes.

9 Were you asked to give a written statement
before that?

10 I don't think so.

11

12 Now having elicited the fact that she gave a written
13 statement, would any request be made to get that statement
14 from the police?

15 A. No, sir.

16 Q. Thank you. And let me take you to the evidence of Mr.

17 -- Detective MacIntyre. That starts on page 68.

18 A. 63?

19 Q. 68.

20 A. 8 -- I'm sorry. I have it.

21 Q. And actually if you go over to 69 -- that's what you would
22 refer to earlier where the statement taken from Junior
23 Marshall --

24 A. Yes.

25 Q. -- was actually marked for identification at the preliminary.

1 Now, that's something -- it's perhaps because of my --

2 A. M - 6.

3 Q. -- my experience in civil practise as opposed to criminal but
4 what does "marked for identification" mean?

5 A. It's marked there so if you wish to use it -- tender it as
6 a -- use it as an exhibit. Well, that's -- he marks it.
7 He intends to lead evidence on that exhibit. He has it marked.
8 And assuming that it's not one of these where you have
9 to go to a voir dire, the witness will refer to the statement.
10 On this day I interviewed Mr. John Jones and Mr. John Jones
11 gave me the statement which is marked exhibit six and what
12 did he say and so on. You go through the maneuvers of what
13 takes place and any ordinary documents you put in a civil
14 case but if it was one which involves some question on
15 admissibility then you'd go through a voir dire as to
16 whether it be admitted.

17 Q. Now, I ask you again. I may have asked it earlier but
18 I forget. Was that document, the statement that Mr Marshall
19 gave that was marked for identification, was that given to
20 you?

21 A. Not until that time. Not until --

22 Q. And was it given to you at that time?

23 A. Yeh, I think it was.

24 Q. But that would be the first time you saw that --

25 A. First time that I ever seen it. Same to Mr. -- Mr. Rosenblum

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1 and I at the same time.

2 Q. Now, your experience with Sergeant MacIntyre when you
3 were prosecutor --

4 MR. MacDONALD:

5 Sorry, My Lord.

6 MR. CHAIRMAN:

7 The bottom of page 76.

8 MR. MacDONALD:

9 76? Thank you.

10 BY MR. MacDONALD:

11 Q. The bottom on page 76 indicates that Mr. MacNeil noted
12 he was not tendering this statement and it is marked for
13 identification purposes only.

14 A. Yes. That's right.

15 Q. I take it --

16 A. It was not tendered.

17 Q. Yeh. I take it from what you said that that was not an
18 unusual thing?

19 A. No.

20 BY MR. CHAIRMAN:

21 Q. I appreciate that but, Mr. Khattar, can we conclude though
22 that, from what you've said, that the crown prosecutor even
23 though he didn't tender Donald Marshall Junior's statement
24 in evidence, he provided you with a copy of this?

25 A. Yeh, of that. That's the only statement that we received.

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1 Q. And that would be in accordance with criminal practise that
2 prevailed in Cape Breton in 1971?

3 A. At that time. Yes.

4 BY MR. MacDONALD:

5 Q. Your experience as a prosecutor and in particular with
6 Sergeant MacIntyre, did you know him to be a fairly -- as
7 a policeman to be someone who took statements from witnesses?

8 A. Yes.

9 Q. And --

10 A. I found him to be a very belligerent officer who took
11 statements.

12 Q. Who took statements. Okay. Now, when you heard the evidence
13 of people like Chant and Pratico and knowing that Sergeant
14 MacIntyre was the investigating officer would you have
15 assumed that he would have taken statements from those
16 people?

17 A. Yes.

18 Q. But you didn't ask for copies of those?

19 A. That's correct.

20 Q. Thank you. And further you would have assumed that Sergeant
21 MacIntyre would have given those statements to the
22 Prosecutor?

23 A. Prosecutor. Yes. In my practise I got statements from
24 the police all the time and everything that they had.

25 Q. Now, you said your practise at the preliminary wasn't --

1 -- it was really just to find out, I guess, what you had
2 to meet?

3 A. Correct.

4 Q. And the case you will have to meet. Now, after you had the
5 preliminary and heard the evidence what did you then do to
6 get ready for the trial?

7 A. Then we began to see if we could get anybody to assist us
8 in contradicting the evidence which seemed to connect Marshall
9 up with the crime. And this --

10 Q. This specifically how did you go about that?

11 A. Well, we would ask the people who were in contact with us, in
12 particular the Indians; whether they knew anybody who could
13 help us in refuting these claims so to speak or this
14 evidence.

15 Q. So you would ask somebody like Lawrence Paul --

16 A. Yes.

17 Q. -- Is there anyone can?--

18 A. Marshall himself.

19 Q. And you would be asking him can you get us any witnesses that
20 will help us?

21 A. Can you tell us anything? This is pretty damaging evidence.
22 Do we have anybody to help us in answering this?

23 Q. Now, does anybody come up with anything to help you?

24 A. No. Everything that we had we put forward.

25 Q. Now, did you yourself or Mr. Rosenblum contact Chant or

1 Pratico or Harriss?

2 Q. Those were crown witnesses and I'd indicated to you in our
3 personal conversations before being called, it was not
4 my practise to interview any crown witnesses. I kept away
5 from the crown witnesses. I took my chances on the preliminary
6 inquiry and relied on what information I got without seeing
7 them. I've had cases where people -- accused people talked
8 with crown witnesses and were charged with interfering with
9 them and I didn't, in all my practise, I've never talked
10 with crown witnesses prior to the trial.

11 Q. And do you know if Mr. Rosenblum followed the same practise?

12 A. My understanding was that was his practise as well. Not to
13 talk to them.

14 Q. Now, as a crown prosecutor yourself did you consider that
15 a witness who was going to be giving evidence for the Crown
16 or for the -- to be called by the prosecution that somehow
17 you had property in that witness and the defense shouldn't
18 talk to him?

19 A. No, what I have done on some occasions where I wanted to
20 interview a witness I've arranged to obtain a subpoena for
21 the witness. And having had the subpoena served on the witness
22 I usually had somebody accompany me while I interviewed the
23 witness. My authority for interviewing them was a subpoena.
24 Now, I had him subpoenaed for the purpose of my case and
25 taking somebody was merely insurance.

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1 Q. Okay. Now, if you go to my question, when you were
2 crown prosecutor if a defense counsel contacted and spoke
3 to one of your witnesses would you take offense at that?

4 A. I would not, no. But I had experience some years ago when
5 Mr. Rollie Ritchie, who's retired Supreme Court of Canada
6 Judge, was practising law and defending a gentleman at the
7 naval base. We went to see somebody at the naval base.
8 We didn't know whether they were witnesses. We went over
9 to see them to see whether they could give us any evidence to
10 help us in our case and on the way over we felt that we
11 were being trailed and it turned out that we were being
12 followed by two R.C.M.P. officers. So we went to the
13 crown prosecutor and told him that we were trying to do the
14 best we can in defending our client but we didn't think it
15 was proper that we should be trailed everywhere we were
16 going by the R.C.M.P. He said, "what makes you think that
17 they were following you?" There was no doubt, they followed
18 us right into the base. But they never followed us after
19 that so that's an indication in those days that the impression
20 was that you can't -- you shouldn't go near crown witnesses
21 although I don't think there's any specific prohibition.

22 Q. But in any event it was your practise and as far as you
23 know Mr. Rosenblum's practise that you didn't go near a
24 Crown witness?

25 A. That's correct, sir.

1 Q. And in this case in particular no attempt was made to
2 interview Chant or Pratico or Harriss?

3 A. That's correct, sir.

4 Q. Were you aware that John Pratico was in the Nova Scotia
5 Hospital for a long period of time between the time of the
6 preliminary inquiry and the trial?

7 A. The only -- I was not aware of it. The only knowledge I
8 had of Pratico was a considerable amount of drinking on
9 the night in which offense --this event took place.

10 Q. If you had been aware that Pratico had spent, I think it's
11 two months approximately in the Nova Scotia Hospital between
12 the time of the preliminary and the trial, do you think
13 that would have been use to you in conducting your
14 defense?

15 A. I think it might have helped us. I would have then consulted
16 a psychologist or psychiatrist to determine the nature of
17 his illness, his treatment, and how it might affect what
18 evidence he would be giving and it may have been a good
19 defense to the -- his alledged knowledge of the events.

20 Q. Okay. What information was brought to your attention between
21 the time of the preliminary and the time of the trial that
22 would assist you in the conduct of the defense?

23 A. The only information that I can recall and I'm only doing
24 this -- I'll have to reconstruct it from what's happening
25 since that time is the -- my cross-examination of Pratico.

1 I would assume that I had to get that information from
2 somebody else and reconstructing it I would say that that
3 information came to me following the preliminary inquiry
4 and the information came to me from the Indians. That's
5 the only information we had on Pratico. Nothing further
6 than that. We had no -- We and I say we that Mr. Rosenblum
7 and I are discussing the case had no information on
8 Chant whatsoever.

9 Q. Okay. Did you and Mr. Rosenblum get together to discuss
10 how you were going to cross-examine your witnesses?

11 A. He attacked them -- our proposed attack, yes. We would.

12 Q. And did you get together -- did you have as you went into
13 trial again, did you have some theory of the defense that
14 you were going to try and develop?

15 A. This is a rather vulgar way of putting it. He didn't do it.

16 Q. No, I realize that.

17 A. I didn't have anything particular, yes.

18 Q. Pardon?

19 A. When I say it was a vulgar way of putting it, he just didn't
20 do it.

21 Q. Yeh, and that was going to be your defense.

22 A. No, we had nothing. No, we had no -- no particular defense
23 other than the unreliability, as you put it, about the
24 evidence of Chant and Pratico.

25 Q. Look at volume one, Mr. Khattar, at page 79.

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1 Now, that is something that's entitled --

2 A. The statement of facts.

3 Q. Statement of Facts, and it continues on to page 83.

4 MR. MacDONALD:

5 Unfortunately, My Lords, the copy on page 81 isn't very clear.

6 I have a good copy of that if you want me to read it into the
7 record some time. It's also found then in Volume 16 at page 166,
8 the same page, and it's clearer there.

9 COMMISSIONER EVANS:

10 What page in volume?

11 MR. MacDONALD:

12 Sixteen at 166.

13 BY MR. MacDONALD:

14 Q. What is that document, Mr. Khattar?

15 A. The volume 16 that you drew to my attention is called
16 an exhibit book and the tag prior to the reference to
17 the statement of fact on page 166 says Bill of Indictment
18 and Statement of Facts.

19 Q. Now, what is --

20 A. At the time of the Marshall case Grand Juries were in existence
21 following the preliminary and the committal the prosecuting
22 officers would prepare a statement of the facts for the
23 presiding judge who would use the statement of facts in
24 charging the Grand Jury with respect to a bill -- an indictment,
25 True Bill or No Bill.

- 1 Q. Now, If I can just elaborate on that a little bit.
- 2 A. Yes.
- 3 Q. That would take place publically.
- 4 A. That would take place publically in the court room.
- 5 Q. As the term opened?
- 6 A. That the term opened and when the Grand Jury were called.
- 7 Q. Okay. The Grand Jury would be called and the trial judge
- 8 would instruct them of their role that they had to decide
- 9 whether the case went to trial or not.
- 10 A. Whether to find a True Bill or No Bill.
- 11 Q. Yes. And that in instructing them he would tell them
- 12 the nature of the case against the accused?
- 13 A. Yes.
- 14 Q. He would use this statement of facts for that purpose?
- 15 A. Yes, he would do so.
- 16 Q. Would the statement of facts that was prepared by the
- 17 prosecuting officer, would that be given to the defense
- 18 counsel?
- 19 A. No, sir. It was not the practise to give that to us at all --
- 20 to the defense at all.
- 21 Q. Okay. But the judge would use it in charging the Grand Jury?
- 22 A. Yes.
- 23 Q. And defense counsel would be present at that time?
- 24 A. Yes.
- 25 Q. And was it the practise in this area for the judge to read

1 out the statement of facts or would he summerize it?

2 A. He'd be giving the statement of facts as if he was giving
3 it from his own memory.

4 Q. Okay. But he would --

5 A. As if he was giving a talk.

6 Q. But in effect he --

7 A. He had that before him as a guide.

8 Q. In effect he'd use it --

9 A. Yes. He has the list of witnesses as well and he will tell
10 in his Charge to the Grand Jury, tell them: "Now you will have
11 the list of witnesses, and in order to find a True Bill, you
12 do not have to interview every one of these but if -- in
13 order to find No Bill, you will have to interview every one
14 of the witnesses."

15 Q. Yes. Okay.

16 A. It's merely a charge of the law.

17 Q. And having been charged the Grand Jury went in to the jury
18 room by themselves, didn't they?

19 A. That's correct.

20 Q. There was no lawyers in there?

21 A. No lawyers present.

22 BY MR. CHAIRMAN:

23 Q. The crown prosecutor did not go into the Grand Jury room?

24 A. No.

25 Q. No.

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1 MR. MacDONALD:

2 No, he did not.

3 COMMISSIONER EVANS:

4 He'd already got his story across through the Judge, I mean.

5 MR. MacDONALD:

6 Through the Statement of Facts, probably but --

7 BY MR. MacDONALD:

8 Q. There was no questioning --

9 A. Is there? I don't think. No.

10 Q. -- in that Grand Jury room by a Prosecutor.

11 A. No.

12 Q. That was done by the jury themselves.

13 A. I see some heads nodding that that's right.

14 Q. Well, you never went in the Grand Jury room --

15 A. I -- And it's not in any time in which I was the prosecuting
16 officer.

17 Q. Exactly.

18 A. And if I had that right, I'm sure there's some occasion in
19 which I would have liked to have been there.

20 Q. Look at the second page of that Statement of Fact. It's
21 actually titled three. It's on page -- depending on what
22 volume you're in -- It's either on page 80 or 167, I guess.

23 A. Yes.

24 Q. Down at the bottom of the second full paragraph it says:

25 The accused showed Mr. Chant his forearm that was

1 injured but no blood was in appearance. These
2 two men stopped a passing automobile. The
3 operator, unknown, and were taken back to the
scene were Mr. Seale was still alive but beyond
reasonable senses. Help was then summoned.

4 Now, here is the question -- statement I'm interested in.

5 Mr. Chant at first related to the police the
6 story the accused gave him but later advised that
7 he related the false story because of fear of the
8 accused. He knew and can identify both men
involved in the offense.

9 Now, were you aware prior to Chant taking the witness stand,
10 you and Mr. Rosenblum, that Chant in fact had given a false
story to the police first and then gave a second statement?

11 A. I was not aware of what Chant had told the police at all
12 and I was not aware of whether he had given them any written
13 statements. And if he had given them any written statements
14 I was not aware of their contents.

15
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just

1 Q. Okay. Let me just while we're on the point then, take you to
2 page 151 in volume one. And this is a portion of the trial
3 transcript, the cross-examination of Maynard Chant and Mr. Rosenblum
4 cross-examined him. Is that correct?

5 A. Yes.

6 Q. Okay. Do you see -- If we start down towards the bottom of
7 that around line 30:

8 A. The police didn't tell me Donald
9 Marshall did it at all.

10 Q. No, and you didn't tell the
11 police that he did it?

12 A. Not until afterwards. You
13 see I told them a story that
14 wasn't true.

15 And Mr. Rosenblum then said:

16 Q. Oh, I'm coming to that. When did
17 you tell this untruthful story?
18 When did you tell them that?

19 And then after the Court interjected for a moment.

20 Q. When did you tell the untrue story
21 to the police, Maynard?

22 A. Sunday afternoon.

23 Q. When?

24 A. Sunday afternoon, and that was in
25 Sydney.

26 And then he goes on to say later that he gave a second statement
27 in --

28 A. Yes.

29 Q. So Mr. Rosenblum at least in examining Mr. Chant was aware that

1 he had given an untrue statement?

2 A. Yes.

3 Q. And then had changed his statement?

4 A. Yes. The statement? I --

5 Q. I'm sorry. It --

6 A. It doesn't say a written --

7 Q. It's a story.

8 A. It's a story, yeh, because I gather -- Well, it's obvious
9 from the -- reading the evidence that they were being interviewed
10 by the police frequently. Now whether they were giving
11 statements frequently it's not clear until it's brought out
12 in the evidence, "You did give a written statement".

13 Q. Sure.

14 A. Yes.

15 Q. But your knowledge of -- of MacIntyre is that he took
16 statements?

17 A. Yes, that was his practice.

18 Q. Okay. Thank you.

19 A. I mean it's his practice of which I was aware, not all his
20 practices.

21 Q. Now let me come to the selection of the jury. Did you have
22 any discussion with Mr. Rosenblum as to how you would
23 approach that task?

24 A. Well, any lawyer who practices before the Criminal Court and
25 is going before juries looks over the list and he looks at the

1 persons who were on the list and sees -- determines -- make
2 a judgement decision on whether this particular witness would
3 be favourably disposed towards the type of evidence that you
4 will be introducing for the Defence and whether this type of
5 juror would be impressed with the type of evidence that would
6 be given by Crown witnesses and looking for those who may
7 have feelings towards ethnic groups, things of that nature
8 and whether there might be a little bias towards a Black, an
9 Indian, an Asian.

10 Q. How could you check -- How could you check to challenge that?

11 A. Generally -- Sometimes, you know, if you ask people, "Look, I
12 have John Pink on my list here, now what about this John Pink"?
13 "What kind of a fellow is he"? "Do you think he'd be a good
14 man on my jury"? You question people. You have the list of
15 the jurors in advance of the -- not the jurors, of the panel
16 in advance of the trial and you -- you try to get as much
17 information as you can on them to make a judgement.

18 Q. Now in this statement in particular would it be a concern
19 to you whether any prospective juror would be somebody who
20 would be bias against Indians?

21 A. Yes, in this case.

22 Q. Is that -- In this case, yes.

23 A. Yes.

24 Q. Is that something that you would have asked individual jurors
25 as they were called?

1 A. If I had that feeling, yes. If I had that feeling, I'd question
2 the witness.

3 Q. Do you recall if on the panel, the group of prospective jurors,
4 that there were any Indians who -- who might be prospective
5 jurors?

6 A. I don't believe there were any in the panel. I've never known --
7 Now that you mention it, I have no recollection in all my
8 practice of ever seeing an Indian juror. Now that doesn't
9 mean they were not but I have no knowledge of any.

10 Q. Would you have liked to have an Indian or more on this jury?

11 A. Well, at times I think it might not be a bad idea.

12 Q. On this particular jury?

13 A. Oh, on this particular jury I think I would have liked to have
14 an Indian on it.

15 Q. What about a Black? Were there any Blacks on the panel?

16 A. I think I would have liked a Black on it too.

17 Q. If you would have --

18 A. Yes, not necessarily because a Black was killed, because it
19 might assist us in our argument that the Black and the Indian
20 were not unfriendly, they were actually friendly. We have
21 no objection of putting a Black on the jury for that reason.

22 Q. Okay. There were -- Were there any Blacks on the jury?

23 A. No, not that I recall.

24 COMMISSIONER EVANS:

25 Were there any on the panel?

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1 | MR. MacDONALD:

2 | I was going to ask that.

3 | THE WITNESS:

4 | Well, I don't recall. I don't recall. I don't think there were
5 | but I don't recall.

6 | BY MR. MacDONALD:

7 | Q. In your experience in the practice in Cape Breton --

8 | A. Well, I don't recall too many Blacks on any of the juries that --
9 | in which I was involved.

10 | Q. Have you ever had any in the trials you've done?

11 | A. In fact I don't recall any.

12 | Q. Okay. Now it was your witness -- Pratico was going to be
13 | your witness at this --

14 | A. Pratico was the man I was going to cross-examine.

15 | Q. And of the two key guys, he was yours?

16 | A. He was, yeh.

17 | Q. And in preparing for him I think you said you were able to
18 | determine that he had drank a lot that day?

19 | A. Oh, yes. Yes.

20 | Q. And whatever other information you could get about him?

21 | A. Right.

22 | Q. Now a rather startling thing occurred just before Pratico was
23 | to give evidence?

24 | A. Yes.

25 | Q. Would you tell us about that?

1 | A. While in the court room I believe while Mr. Rosenblum was
2 | examining -- cross-examining a witness one of the court attendants
3 | said I was wanted in the corridor. When I got out in the
4 | corridor he said, "This fellow wants to talk to you". I said,
5 | "What do you want, Pratico"? And he says, "Donald Marshall
6 | didn't stab him". I said, "Just a minute". "Just a minute,
7 | don't -- don't say anything here". Get me the Sheriff.
8 | So we got the Sheriff. MacKillop was the Sheriff. I said,
9 | "Now you can tell me what you wanted to say". Then he started
10 | again, "Donald Marshall didn't stab him". "What I said was not
11 | true". "What was said in the Court was not true". The Sheriff
12 | said, "Hold it, don't say anything now, just a minute". He
13 | went out and got Donald MacNeil the Prosecutor. So we then
14 | adjourned into the Barrister's Room. My recollection of the
15 | people who were there in the Barrister's Room and what took
16 | place is what I'm now about to give you. Pratico, the Sheriff,
17 | Donald MacNeil, and Sergeant MacIntyre, those are the only
18 | people I recall were there. There may be others who claim to
19 | have been there but I have no recollection of anybody else
20 | being there. We went through it again. I said, "Pratico, what
21 | were you trying to tell me"? He said, "What I said before in
22 | the Court was not true". "Donald Marshall didn't stab him".
23 | Well, I said to him, "Well, why didn't you tell the truth"?
24 | He said, "Well, I was afraid". And Donald MacNeil, and I
25 | don't want to go into the dramatics of it, was a very heavy

1 man, he stood up and he says, "Pratico, did I threaten you in
2 any way"? And he says, "Oh, no", he says, "you didn't".

3 Sergeant MacIntyre went through the same process and he
4 says, "Did I scare you or threaten you"? The same thing, and
5 he said, "No". So that stopped the conversation from

6 Pratico. I said to him just before I left, "When you go into
7 that court room, you tell the truth, don't you be afraid of
8 anybody". That's the way I left him.

9 Q. Now let me just deal with that a little bit. That must have been
10 a pretty startling thing for you to --

11 A. I thought we had the case won. We got it now. We got it now.

12 Q. --yeh, and to be confronted in the hall by someone who earlier
13 had testified that he'd seen it and said, "I didn't". Why
14 wouldn't you have just said, "Let's sit down, John, and have
15 a chat". Why -- Why were you nervous about talking to him
16 alone?

17 A. Well, number one he was the chief Crown witness -- one of
18 the two chief Crown witnesses and if I talked to him alone
19 and he went in and repudiate --He could repudiate it for any
20 number of reasons. It could be suggested that I talked to
21 him and prevailed upon him to change his testimony, any number
22 of things, going back again that I would not talk to Crown
23 witnesses without somebody being with me, and it was not in
24 my practice. I felt that the safe thing to do is to have
25 somebody with me and particularly this case, in a major Criminal

1 charge, to have the Sheriff.

2 Q. Okay. Now you left it by saying, "I want you to tell the truth"?

3 A. "You tell the truth".

4 Q. "You go in there and tell the truth"?

5 A. "Don't you be afraid of anybody, you tell the truth".

6 Q. Was Mr. Pratico being told the same thing by other people?

7 A. If he said it -- I never heard anybody say it.

8 Q. And specifically did you hear Donald MacNeil say, "You tell the
9 truth and never mind -- don't be worried about what you said in
10 Court before"?

11 A. My recollection is that I was the last man to talk to Pratico
12 when we left to go back into the corridor, and I was the one
13 that said to him, "When you go in that court room, you tell
14 the truth". "Don't you be afraid of anyone". Now if anybody
15 else talked to him they must have talked to him out of my
16 presence.

17 Q. Okay. So you must have been pretty high when you left that room
18 after --

19 A. Oh, yes, I couldn't get to Rosenblum fast enough to tell him,
20 "We've got it". "It's in the bag".

21 Q. Oh, I'm sorry. I didn't understand. Rosenblum wasn't in the
22 room with you?

23 A. No. I don't know where he was and he wasn't in -- Now that
24 I'm thinking of it -- He wasn't there anyhow.

25 Q. Okay.

1 A. He did not get in on this conversation.

2 Q. Let me get it again. You recall Donald MacNeil, the Sheriff,
3 MacIntyre and yourself?

4 A. That's right.

5 Q. Well, what happened between the time you walked out of that
6 room and the time Pratico got off the stand?

7 A. I can't figure out -- I don't know what happened because when
8 that fellow got on the stand Donnie MacNeil, if you recall,
9 breached the evidence and wanted to get at that part right away
10 and the Judge stopped him. He said, "Let's get on with the
11 trial now". "Let's get on with the evidence".

12 Q. The Judge wouldn't let him?

13 A. He wouldn't. He wanted to start off with that incident as I
14 recall now. I checked the evidence.

15 Q. Let's go to it.

16 A. "Let's get back to..."

17 Q. On page 155 I think. Wait now. Yes. Starting on page 155 of
18 volume one.

19 A. Yes, there we are. Look at -- If you look at --

20 Q. The very first -- The very first thing that Mr. MacNeil asked
21 Pratico after he found out who he was was:

22 Until you were excluded -- When you
23 left this court room did you discuss
 this case with anyone?

24 And he tried to get into it?

25 A. Yes, right away. "Would Mr. Khattar..." Anyone else?

1 Mr. Marshall --

2 Q. Yes.

3 A. And he goes on.

4 Q. And that's -- And the Judge then prevented that line of
5 questioning and told him to get on with the case?

6 A. That's right.

7 Q. That's on page 157?

8 A. Yeh.

9 Q. Proceed with the evidence. I have nothing
10 before me that would warrant my listening
11 to what has been up to now your questioning,
so proceed with the questioning of the
events of that night.

12 The Judge prevented MacNeil from introducing what Pratico had
13 said?

14 A. That's right. He permits him later on it, but of course at
15 that time, yeh --

16 Q. Immediately he prevented that line of questioning?

17 A. Yes.

18 Q. Why didn't you get up then and start screaming?

19 A. I had my pattern of how I was going to cross-examine him and
20 I did not want to give way of my method either. If you recall,
21 when it came to my cross -- Well, you don't recall. I'll tell
22 you . When it came to my cross-examination I didn't immediately
23 go into the conversation either. I wanted to get certain
24 facts out before the jury and then in the end confront him of
25 what took place out in the corridor.

1 Q. Okay. Let's go then to your attempts --

2 COMMISSIONER EVANS:

3 From reading the transcript it would appear that the Judge had
4 some _inkling of what had gone on out in the corridor, that
5 something at least had gone on out in the corridor.

6 MR. MacDONALD :

7 I think there was -- there's some inkling. Mr. MacNeil was able
8 to ask a couple of questions but the line of questioning was --

9 COMMISSIONER EVANS:

10 I was wondering if there had been a recess about that time because
11 somehow or other Mr. Rosenblum apparently was made aware of it.

12 THE WITNESS:

13 No MacNeil would -- The Sheriff brought MacNeil into the picture
14 immediately.

15 BY COMMISSIONER EVANS:

16 Q. Well, did the Court stop at that time?

17 A. Oh, they -- As far as I understood they had to stop for
18 MacNeil to come out. Nobody else was in the court room. They
19 must have had a recess then although that thought wasn't in
20 the back of my mind. They had to stop. MacNeil wasn't there
21 and Matheson wasn't participating in the examination of any
22 of the witnesses or cross-examination.

23 COMMISSIONER POITRAS:

24 On the top of page 157. "The Court proceed...with the evidence of..."
25 etcetera. And the Court says: "I have nothing before me that would

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1 | warrant my listening to what has been --

2 | THE WITNESS:

3 | Up to now.

4 | COMMISSIONER POITRAS:

5 | --up to now your questioning so proceed with the questioning of
6 | the events of that night.

7 | THE WITNESS:

8 | That's right.

9 | MR. MacDONALD:

10 | That's what I referred to earlier, My Lord.

11 | COMMISSIONER EVANS:

12 | No, but then he says, "Mr. MacNeil, as Your Lordship pleases the
13 | Court, I will give you every opportunity if necessary to bring up
14 | what happened today".

15 | MR. MacDONALD:

16 | Yes.

17 | COMMISSIONER EVANS:

18 | Well, unless he had mental telepathy, there must have been a recess
19 | or something so that he became aware of this.

20 | MR. MacDONALD:

21 | Well, I think if you read a couple of pages before you'll know that
22 | something happened today. That's what he starts to ask him, "What
23 | happened today out in the hall"? And the Judge says, "I have
24 | nothing before me to let you -- let you go along with that now".

25 | "Later on you can talk about what happened today, but get to the

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1 | night in question! At least that's the way I have read that, My
2 | Lord.

3 | BY MR. MacDONALD:

4 | Q. Let's go to page 181 then Mr. Khattar.

5 | A. Yes, sir.

6 | Q. Just a moment.

7 | MR. CHAIRMAN:

8 | I'm still having difficulty with that as well, page 156.

9 | Mr. MacNeil, "There's a purpose in this, My Lord". "My learned
10 | friend's perfectly aware of it". The Court, "Is this man to tell
11 | about what happened"? "That may come later". It's certainly an
12 | implication that the Trial Judge was aware that something had
13 | happened.

14 | COMMISSIONER EVANS:

15 | It says there was an adjournment.

16 | MR. MacDONALD:

17 | Does it? I can --

18 | COMMISSIONER EVANS:

19 | On page 156. I think that's what it means, about line 19.

20 | MR. MacDONALD:

21 | I see what you're saying. That was after an adjournment though.

22 | Let me deal with it this way.

23 | BY MR. MacDONALD:

24 | Q. Mr. Khattar, do you recall if there was an adjournment and if
25 | there was any approach to the Judge as to what happened?

1 | A. No.

2 | Q. As to what happened?

3 | A. The sequence of events insofar as the whole episode is concerned
4 | was I was called out from the trial while it was in session.
5 | Now what took place afterwards I didn't know until we were
6 | through with the -- the talking with Pratico, the Sheriff,
7 | the Prosecutor, and the Sergeant Detective MacIntyre. And
8 | when we came back, I guess, we were -- then I might have been
9 | aware that there was an adjournment.

10 | Q. Well, as you've -- you've indicated before obliquely that
11 | Mr. Matheson didn't do any examination --

12 | A. I didn't see Mr. Matheson there. He -- I don't say he wasn't
13 | there. I don't recall him being there at all.

14 | Q. I'm sorry. He didn't examine any witnesses?

15 | A. Oh, you mean in the trial. He never examined one witness --
16 | Oh, no, cross-examined any witness.

17 | Q. If Mr. MacNeil then was out in the room with you, I suppose
18 | we can assume that there --

19 | A. Mr. Matheson carried on.

20 | Q. Or there had been an adjournment?

21 | A. Or an adjournment. But there's no where in the evidence that
22 | Mr. Matheson conducted any part of the proceedings other
23 | than the reference to him being present.

24 | MR. MacDONALD:

25 | Well, I can advise you, My Lords, that Mr. Matheson will advise that

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1 | he also was in the room.

2 | COMMISSIONER EVANS:

3 | He was in the room?

4 | MR. MacDONALD:

5 | In the room with Pratico and Mr. Khattar.

6 | COMMISSIONER EVANS:

7 | Yes, because the transcript on 153 doesn't indicate there was
8 | any break in the sense that a different Crown Attorney took over
9 | the questioning.

10 | MR. MacDONALD:

11 | And the evidence from Mr. Matheson will be that they revoked it,
12 | he and MacNeil, so I think we can probably assume that there was
13 | a break of some sort.

14 | BY Mr. MacDONALD:

15 | Q. But there was no -- As far as you know, Mr. Khattar, there was
16 | no approach to the Judge to tell him what had happened in the
17 | hall?

18 | A. No. And let me remind you again that when I was cross-examining
19 | Pratico about the persons to whom he made -- or in whose
20 | presence he made the statements, I identified them, the Sheriff,
21 | Sergeant Detective MacIntyre, and MacNeil.

22 | Q. Yes.

23 | A. I went through it and I did not -- And of course, that doesn't
24 | mean there weren't others there. And I repeat that I was
25 | not aware if Mr. Matheson was in the room.

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1 Q. Okay. It starts on page 181 where you start to talk to
2 Mr. Pratico about the events that took place out in the hall.
3 In fact, it looks like it's the day after. See at line 20:
4 "Do you recall talking with me yesterday afternoon"? The
5 answer is, "Yes", and you go through and say who was present.
6 And he says:

7 I said that Mr. Marshall didn't stab
8 Mr. Seale.

9 That's what he -- he told you on page 181?

10 A. Yes.

11 Q. And then on page 182, you said on line ten -- This is your
12 question:

13 You just said that Marshall didn't
14 stab Mr. Seale.

15 Did you say anything further about--

16 Tell us all the conversation that took
17 place then ...

18 And the Court said, "No, Mr. Khattar". "No, Mr. Khattar, your
19 cross-examination is directed to something he said at the time
20 which is inconsistent to what he says today". "Now confine
21 yourself to that statement". "It is only to that that I have
22 any interest and it is only to the extent that the conversation
23 took place". That was your reply. Now he said to you out in
24 the hall, "Donald Marshall didn't stab Sandy Seale".

25 A. He went a little further to that. "What I said in the Court

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1 before was not true".

2 Q. "And what I said in the Court before was not true".

3 COMMISSIONER EVANS:

4 That had to be at the Preliminary Hearing.

5 MR. MacDONALD:

6 Yes, at the Preliminary.

7 THE WITNESS:

8 Yes, at the Preliminary, yes. Yes.

9 BY MR. MacDONALD:

10 Q. And that's what you said to him -- to Mr. Pratico at the
11 bottom of 182. You say:

12 Q. The conversation you had with me in
13 the presence of the Sheriff concerned
14 the evidence that you gave before
15 John -- Judge John F. MacDonald on
16 June 5 in this court house, this year.
17 Is that right?

18 A. Yes.

19 So you're directing him to say, "That's when you told the lie?"

20 A. Yes.

21 Q. Okay, and that is when the jury is asked to step out of the --of
22 the room and you go into a legal argument with the-- with the
23 Judge. Now I appreciate that this is a long time ago, Mr. Khattar,
24 but if you had been allowed to proceed and do a complete cross-
25 examination with no interruptions at that stage by the Trial
Judge, what type of questions did you intend to ask or would
you have asked?

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- 1 A. I would go into detail as to why he made this statement on
2 the first instance and whether he had been approached by
3 anybody to make these statements, what advantage he got or
4 these people got in asking him to give this untrue statement
5 and so on. I would have gone into ridget details to find
6 out why and to explain that he was unjustly charging a man
7 or accusing a man and for which he may be incarcerated for
8 life. I would have gone into all the details.
- 9 Q. And you were prevented from doing that?
- 10 A. Correct.
- 11 Q. By the Trial Judge?
- 12 A. By the Trial Judge, yes.
- 13 Q. Over your objection. You objected. You wanted to continue?
- 14 A. Yes, well --
- 15 Q. In fact --
- 16 A. Yes, all right. Go ahead. I'm sorry.
- 17 Q. What did you think of the Trial Judge's ruling?
- 18 A. Well, if you look at the page on 183:
- 19 Q. And now you tell His Lordship or
20 His Lordship and the jury about
that conversation.
- 21 A. Every part? Every part I said to him?
- 22 That's at the top of the page question --
- 23 Q. I've got the wrong page. What page did you say?
- 24 A. 153, I'm sorry, question 115.
- 25 Q. Yes. Just let me see.

- 1 A. I'm looking at --
- 2 Q. I got the wrong page. Volume one, page 183?
- 3 A. Yeh. And the question -- I'm sorry, do you want to get your
4 page 183, question 115. Then the next question:
- 5 Q. Concerning the evidence that you had
6 given on June 5 of 1971?
- 7 A. Well, I said yesterday--
- 8 And then the Judge says, "Wait now, Mr. Khattar". "Confined
9 with respect to...go into the details about the stabbing and
10 so on". Then the jury stepped out and here we are.
- 11 Q. Now the -- you then went into a --
- 12 A. That's only part -- It's on page 184.
- 13 Q. You've read this transcript recently yourself?
- 14 A. Yes.
- 15 Q. Okay. What is -- What was your understanding then and what
16 is your understanding now as to why the Trial Judge was
17 preventing you from doing what you wanted to do --
- 18 A. The Trial Judge was of the opinion that unless the examination
19 was directed towards to proving inconsistent statements with
20 respect to what took place in the hall only, I couldn't go
21 any further with my cross-examination.
- 22 Q. So you weren't able to ask him --
- 23 A. Any of the questions other than the two statements that
24 "Marshall didn't stab Seale", and "The statement is not true".
- 25 Q. You wouldn't have been able to say, for example, you told

1 me that Marshall didn't stab Seale?

2 A. That's right.

3 Q. And when you told the Court that you did you were lying?

4 A. That's right.

5 Q. And that you never saw that at all? You weren't even in the
6 park that night?

7 A. Right.

8 Q. You weren't allowed to ask him any of those questions?

9 A. Those are questions which you -- that would probably be
10 put to him if I had been permitted.

11 Q. If you had been permitted you would have put all those questions
12 to him?

13 A. Yes, certainly.

14 Q. Thank you. Did you consider that to be a very serious error
15 in law by the Trial Judge?

16 A. After the case was completed and unfortunately Marshall was
17 convicted, discussions were not in my presence with respect
18 to an Appeal. I was not retained on the Appeal. So
19 Mr. Rosenblum alone was retained by the Department to consider
20 the Appeal and I was not involved in the Appeal whatsoever.
21 So I could not -- I did not address those particular points
22 of law.

23 Q. But at the time the ruling was made by the Trial Judge?

24 A. I was under the impression that he may have been -- he was
25 mistaken but I couldn't give him anything to establish that

1 I was right.

2 COMMISSIONER POITRAS:

3 That is page 187?

4 MR. MacDONALD:

5 Yes, My Lord.

6 BY MR. MacDONALD:

7 Q. On 187 --

8 COMMISSIONER POITRAS:

9 Lines 11 to 29.

10 MR. MacDONALD:

11 Yes.

12 BY MR. MacDONALD:

13 Q. The Trial Judge gives you his ruling and he's quoting from the
14 Canada Evidence Act at that time. It's a particular section
15 of the Act. Did you accept that ruling as being correct?

16 A. I had to. I did.

17 Q. Thank you.

18 A. There was nothing I could do. I don't think any lawyer could
19 do -- That's the ruling. If you don't like the ruling, well,
20 Judge tells you any time there's an Appeal Court.

21 Q. Okay.

22 MR. CHAIRMAN:

23 Just another point before we leave it.

24 BY MR. CHAIRMAN:

25 Q. At the commencement, Mr. Khattar, of the examination of

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1 Mr. Pratico, the Crown Prosecutor attempted to -- to lead
2 evidence with respect to what had happened out in the
3 corridor?

4 A. Yes.

5 Q. And it would appear as if the reason why he didn't continue
6 was that the Trial Judge directed him to -- to bring this
7 out at a later stage in the trial?

8 A. Yes.

9 Q. And in -- in examination?

10 A. Yes.

11 Q. Are we entitled to assume when I look at 186, this is during
12 the voir dire that the Crown Prosecutor apparently changed
13 his mind and was now objecting to your attempt to -- to
14 cross-examine Pratico as to what had occurred out in the
15 corridor? I'm not --

16 A. Yes.

17 Q. Is that a fair interpretation of what happened?

18 A. If you confine yourself only to the one statement in the
19 evidence.

20

21

22

23

24

25

SMR

1 Q. Having read the evidence of Pratico now in -- the evidence he
2 gave at trial and in particular the re-direct that was done
3 by Mr. MacNeil after you had cross-examined about what took
4 place in the hall, I had the impression that Pratico was
5 telling the Court, "I was frightened out in the hall, and I
6 was frightened by Donald Marshall, Sr."

7 A. Yes.

8 Q. Did you have the same impression?

9 A. Certainly I did because I brought back - MacNeil got into the
10 evidence that there's somebody -- and he was having dif-
11 ficulty getting him, and he finally said, "Well, Mr. Marshall
12 was there."

13 Q. Yes.

14 A. "And you spoke with the youth." So I take it that the jury
15 got the impression that Marshall was talking with Pratico and
16 following the discussion he had with Pratico, they sent for
17 me because apparently the impression was that -- I assumed
18 that Marshall had prevailed upon him to change his testimony.

19 Q. Yeh, that's --

20 A. It didn't say that.

21 Q. That's the same impression I had.

22 A. Yeh.

23 Q. From the evidence. Now -- And I'm interested that you would
24 have the same. Why then didn't you call Donald Marshall, Sr.,
25 to tell what had taken place out in the hall?

1 A. Well, I think the judge stopped all the cross-examination on
2 his rulings.

3 Q. Okay. So, it was just based --

4 A. That's my impression of it.

5 Q. All right. Then based on the judge's rulings then, --

6 A. Yes.

7 Q. -- you would not have called Donald Marshall, Sr.?

8 A. I got -- That was the interpretation I have of his ruling.

9 Q. Okay. Even though the clear impression is left with that jury --

10 A. Yes.

11 Q. -- that out in the hall --

12 A. That's right.

13 Q. -- Donald Marshall, Sr., persuaded Pratico to go to you and say,
14 "I lied."?

15 A. It's just left. It's unsaid. Marshall is there and he's
16 talking, and of course I think the charge to the jury brings
17 it in there in some way.

18 Q. Yes.

19 A. MacNeil's charge to the jury brings that in when he makes the
20 reference to it.

21 BY COMMISSIONER EVANS:

22 Q. Was Mr. Rosenblum in the court during the process of this legal
23 argument and the rulings made by the judge?

24 A. Oh, yes. Mr. Rosenblum and I -- You mean the rulings?

25 Q. Yes.

1 | A. Mr. Rosenblum and I were present at all the rulings made with
2 | the judge.

3 | Q. So that he would be aware of these rulings and when he prepared
4 | for --

5 | A. The appeal papers.

6 | Q. -- the appeal?

7 | A. No question about it.

8 | Q. But you had no part in that?

9 | A. That's right. He made reference in his Charge to comments --
10 | not the rulings, but he made reference to it. In fact, the
11 | appeal from the guilty verdict before Mr. Justice Dubinsky
12 | went before the Appeal Court of Nova Scotia, and one of the
13 | grounds of appeal was consideration of the judge's Charge to
14 | the jury with respect to rulings on inadmissible evidence.
15 | I think, if my recollection is correct, that was Chief Justice
16 | MacKinnon's decision or --

17 | Q. Yes.

18 | A. Yeh, written by him.

19 | BY MR. MacDONALD:

20 | Q. Let me take you to page 206 of that transcript then. Just to
21 | direct their Lordships to the part of the transcript where I'm
22 | suggesting the impression is clearly left that Donald Marshall,
23 | Sr., did something here. And this is the redirect examination
24 | by Mr. MacNeil where he says:

25 |

SIMON J. KHATTAR, by Mr. MacDonald

1 Q. All right. Yesterday, did you
2 see anybody -- anyone else --
3 discuss this case with anyone
4 else?

5 A. Mr. Khattar.

6 Q. No, before you discussed it with
7 Mr. Khattar.

8 A. Mr. Marshall. Donald Marshall --

9 Q. All right, now why did you --

10 A. --Senior.

11 Q. That's Donald Marshall, Senior?

12 A. Yes.

13 Q. Now why did you make that statement
14 yesterday that Mr. Khattar referred
15 to as being made? Why did you make
16 the statement which is inconsistent
17 with your evidence as given before
18 these gentlemen and His Lordship in
19 this trial?

20 A. Scared.

21 Q. What's that?

22 A. I was scared.

23 Q. Scared of what?

24 A. Of my life being taken.

25 MR. MacDONALD:

That's why I was left with the impression myself, My Lords, as I
read that that it was Donald Marshall, Sr., who scared him.

COMMISSIONER POITRAS:

I think that's more than an impression that we read from this.

BY MR. MacDONALD:

Q. Were you advised, Mr. Khattar -- Were you advised by Mr. Rosenblum

1 | that a call had been made to his office after Pratico had
2 | given evidence saying that Pratico could not have been at the
3 | scene of the crime? We know that. Did some young girl call
4 | him?

5 | A. No, sir. My first knowledge of that was, I believe, from you
6 | or reading it in some place. We weren't aware at that time
7 | at all.

8 | Q. From your knowledge of Mr. Rosenblum's office, was there any
9 | male in that office -- any man in the office --

10 | A. M-a-l-e?

11 | Q. -- other than the -- Yes -- other than Mr. Rosenblum?

12 | A. No, I'm not aware of any male persons working in his office.

13 | Q. From your knowledge of Mr. Rosenblum, if he had have received
14 | a call advising him that this person could give evidence that
15 | this key witness was not there, would you have expected him
16 | to say, "It's too late," and hang up the phone?

17 | A. I'd certainly think -- I would certainly not credit that at
18 | all. Knowing Mr. Rosenblum -- We collaborated an entire
19 | defence, and my recollection -- To the best of my recollection,
20 | he informed me of everything that -- every feeling he had
21 | about the case, and I in turn did the same with him. If
22 | such a thing took place, I'd be completely surprised. No
23 | indication that that ever took place.

24 | Q. Thank you.

25 |

1 COMMISSIONER EVANS:

2 At 208, "The question," -- MacNeil, down at line 18:

3 The question, My Lord, would be
4 to the witness. What is the basis
5 for his fear? He said that he had
6 fear in the court. He answered,
7 "Not due to anything the accused
8 said."

9 The accused wasn't even near him.

10 Now, if anybody else said anything
11 to him, I'm not interested. He has
12 given you an explanation; namely, he
13 was scared of his life.

14 MacNEIL:

15 I was pursuing the matter just for
16 the basis of whether his fear was
17 justified or not, but I accept your
18 Lordship's ruling, that's all.

19 MR. MacDONALD:

20 Okay.

21 BY MR. MacDONALD:

22 Q. And given that type of statement by the trial judge, you weren't
23 inclined to put Donald Marshall, Sr., on the witness stand?

24 A. Precluded.

25 COMMISSIONER EVANS:

Then he kept on though.

BY THE COURT:

Q. That man's name was Tom Christmas,
was it?

A. Yes.

1 Q. And Mary Theresa Paul?

2 WITNESS:

3 Artie Paul.

4 And he's talking about something --

5 MR. MacDONALD:

6 Something entirely different.

7 COMMISSIONER EVANS:

8 -- entirely different than what went on out in the hallway.

9 BY MR. MacDONALD:

10 Q. Did you consult with Mr. Rosenblum on the Charge that was to
11 be made to the jury? I wouldn't --

12 A. You mean after the Charge was made?

13 Q. No, before it was made as to --

14 A. Oh, no. I think -- Yes, but very briefly. He indicated to me
15 how he proposed to address the jury on what the content would
16 be and I'm not -- I don't recall now whether I made certain
17 suggestions to him or not. I may have, but I don't recall
18 specifically whether there were any particular ones.

19 Q. Okay. Now, when that matter -- When the evidence was con-
20 cluded and it's time to address the jury, you would be aware
21 that Pratico had told the story and then had said, "I was
22 lying. That was not the truth." And you were aware that
23 Chant had told stories inconsistent to the police. This was
24 knowledge that you had, that Mr. Rosenblum had, and that you
25 were able to tell the jury, isn't that correct?

1 A. That's correct. And my opinion, Mr. Rosenblum very ably
2 presented those matters to the jury explaining Pratico's
3 condition, so to speak, and the contradiction, so to speak,
4 of what Chant had --

5 Q. Exactly.

6 A. -- given in his evidence.

7 Q. On page -- In Volume 2, page 47, he said this:

8 A. Forty?

9 Q. Forty-seven.

10 A. Yes.

11 Q. The top of the page, the first full paragraph:

12 They arrested Marshall.

13 On what evidence?

14 A. Yes.

15 Q. On the evidence on statements --
16 on statements that were highly
17 contradictory by Chant because
he told them different stories.

18 And then over on page 50:

19 Chant, I told you about. He
20 lied. He's of inferior men-
21 tality. He lied to the police.
He never accused Marshall. Never.

22 So he knew, and you both knew, I take it that Pratico -- Chant
23 lied to the police, first of all, and he gave them highly
24 contradictory statements. That's just using the phrase from
25 Mr. Rosenblum's. And he went on to talk about Pratico and the

1 fact that Pratico had "as late as yesterday" had told some-
2 thing different. How could you rely on evidence of people
3 like this?

4 A. It seemed to be a strong -- It seemed to be a good case in
5 credibility.

6 Q. Were you surprised by the verdict?

7 A. I was. I thought that we had it.

8 Q. Did you ever have any suspicion during the trial or at any
9 time that the fact that Donald Marshall, Jr., was an Indian
10 had anything at all to do with this?

11 A. I must say I had that reservation, but I never made the comment
12 of it.

13 Q. Why would you have had the reservation?

14 A. I just wondered whether here was the case where there's an
15 Indian involved, and if we believe the story of Chant and
16 Pratico, the two eyewitnesses, and if you don't believe --
17 notwithstanding the contradictions, so to speak, in their
18 testimony. He's an Indian and most likely he would've done it.
19 He's a bad Indian; so let's get -- He probably did commit it.
20 He did commit the offence.

21 Q. How was he as a witness?

22 A. Terrible witness. Bad witness. Poor witness.

23 Q. Was it necessary to put him on the stand?

24 A. That's a decision we had to make. We talked to -- deliberated
25 about that for some time. He -- We were in the position of

1 denying this, notwithstanding what we thought were the con-
2 tradictions Chant and Pratico's testimony, leaving the impres-
3 sion of we won't put him on let the jury take the feeling.
4 He never denied it what the jury would say, and -- Well,
5 Rosenblum and I, in particular, Rosenblum, told him now,
6 "We want striaght answers. Don't hesitate. Tell the truth.
7 Your life is at stake." And that unfortnate habit he had of
8 holding his hand over his mouth, and you see throughout the
9 evidence, "Take you hand, Donald. Take your hand down." And
10 even MacNeil having to tell him the same thing. He did not
11 make a good witness. He was not an impressionable witness
12 by any chance.

13 Q. After the trial, Mr. Khattar, you had no involvement in the
14 appeal, is that --

15 A. Not in the appeal.

16 Q. And no discussion with Mr. Rosenblum as to what points should
17 be raised on the appeal?

18 A. No. None whatsoever.

19 Q. Do I understand then from what you've told me so far that the
20 defence in this case was directed to try and win the case
21 by cross-examination of two key witnesses?

22 A. Weakening the credibility of the witnesses.

23 Q. Yes. And you've told us of your discussions with Mr. Marshall.
24 You had many with him, and he never changed his story?

25 A. No.

- 1 Q. What other witnesses or what other people did you interview
2 in preparation for the defence?
- 3 A. I have a recollection, merely a faint recollection of inter-
4 viewing someone at the hospital with respect to Marshall's
5 injuries.
- 6 Q. Yes.
- 7 A. And to get the recollection of what that person saw on his
8 arm and so on. And I think I also have a recollection of
9 talking with somebody on Crescent Street and asking them if
10 Marshall had been there and had called an ambulance. But
11 neither of those witnesses were of any assistance to us, and
12 we decided not to call them.
- 13 Q. Okay. So that -- Is it fair --
- 14 A. Of those two witnesses, I mean.
- 15 Q. Is it fair for me then to say that your efforts were primarily
16 directed to what you did in the courtroom?
- 17 A. Correctly.
- 18 Q. Thank you.
- 19 A. I must say we followed every lead that was given us, and
20 the only leads we got were the references to those witnesses
21 in the Pratico cross-examination.
- 22 Q. Yes. You were relying on your client or his associates to
23 bring you leads?
- 24 A. Correctly.
- 25 Q. Thank you. You had no involvement in preparation of the Notice

1 of Appeal? That -- Have you ever seen the Notice of Appeal?

2 A. No, have not, but I read the decision and the grounds of appeal
3 were set out in the decision of Chief Justice MacKinnon.

4 Q. Were you aware in November of 1971, that Jimmy MacNeil
5 approached the Sydney police and told them that Roy Ebsary
6 had stabbed Sandy Seale?

7 A. No, sir, I was not aware of that at all. I was not aware of
8 a MacNeil's existence or Ebsary's. In fact, I think as a
9 result of something that appeared in the newspaper, I went to
10 the prosecutor, and I said, "What's all this story about
11 Marshall not being guilty?" I said, "This is a strange thing
12 coming up after all these years." And he said, "There's a
13 great deal of truth to that, Mr. Khattar." I said, "Is there
14 any truth to all this investigation?" "Oh, yes, very much so."
15 I said, "Do you have a copy of the evidence of the trial?"
16 He said, "Yes." "I'd love to see that," I said. "I'd to check
17 my examination of some of those witnesses because of things
18 that are coming out." And he made available for me the trial
19 evidence.

20 Q. "He" is Frank Edwards you're talking about, is it?

21 A. Yes, Frank Edwards, the present --

22 Q. That was in 1982?

23 A. Yes.

24 Q. Okay. But in '71, were you aware --

25 A. Knew nothing whatsoever of it then.

1 Q. Were you contacted by the R.C.M.P. in 1971?

2 A. No, sir. At no time in connection with this trial -- in con-
3 nection with the Marshall trial, I mean.

4 Q. If you had been contacted in 1971 by the R.C.M.P. and asked
5 if you would consent to Donald Marshall giving a lie detector -
6 undergoing a lie detector examination, what would you have said?

7 A. I would've said, "No."

8 Q. In 1971 after the trial?

9 A. Yes, I would have said, "No."

10 Q. Why is that? After the trial?

11 A. Because first of all I had the view prior to the decision of
12 the Supreme Court of Canada that -- I don't believe -- First of
13 all, I didn't believe in lie detector tests, and secondly,
14 I've consistently told my clients they're under no obligation
15 to undergo a lie detector test and I'm not so sure whether
16 they're foolproof.

17 Q. Okay. Now, just so I make sure understand you --

18 A. Yes.

19 Q. We're talking -- I'm talking about after the trial.

20 A. After the trial, yes.

21 Q. Okay. That's fine.

22 A. I just said that.

23 Q. Okay. That's fine. Were you ever contacted by the -- anyone
24 in the Correctional Services during the time of Mr. -- that
25 Mr. Marshall was in gaol?

1 A. No, sir.

2 Q. I want to show you an exhibit that's been introduced. Get the
3 right number here now. Sixty-nine. Exhibit 69, Mr. Khattar,
4 this is a report that was filed by the Correctional Services with
5 respect to Donald Marshall, Jr., and I want to particularly
6 direct your attention to page 2 of the typewritten report that's
7 appended to that document. If I just can read that to you.
8 And this is a person that's doing an assessment to determine
9 if Mr. --

10 A. Yes.

11 Q. -- Marshall should be allowed out.

12 Mr. C.M. Rosenblum, who represented
13 Marshall during his trial in 1971,
14 was contacted. Mr. Rosenblum was
15 quite cynical in discussing this
16 case and indicated that the mother
17 and father were still trying to
18 appeal the case and that they had
19 set up an appointment with him
20 about two weeks ago and then did
21 not show up. As far as an appeal
22 goes, Mr. Rosenblum stated that
23 there were no grounds whatsoever
24 for appeal, and he had attempted
25 an appeal to the Supreme Court of
Nova Scotia, but this was turned
down. In Mr. Rosenblum's opinion,
the case was proven conclusively by
the Crown, and in this instance
there were two eyewitnesses. He
states they may as well have had
the incident on video tape.
Mr. Rosenblum indicated that there
was absolutely nothing that can be
done, and he is quite frankly sick
of hearing Donald Marshall's name
mentioned. I see no benefit in con-
tinuing any contact with Mr. Rosenblum

1 from our point of view.

2 Did you ever discuss with Mr. Rosenblum of --

3 A. No, sir. I'm amazed to read that.

4 Q. Have you ever seen that before?

5 A. I had never seen it before.

6 Q. If you had been contacted by the Correctional Services, would
7 you have been in support --

8 A. I would not give them such a statement.

9 Q. Okay. And were you of the opinion that the case was proved
10 conclusively by the Crown?

11 A. No, sir, I was not.

12 Q. Thank you.

13 A. I may have had my doubts, but certainly not that conclusion.

14 Q. Were you aware that Mr. Rosenblum actually acted as special
15 prosecutor with Donald MacNeil in June of 1971, in fact in
16 a case that you were defending? I didn't show you this before.
17 I just found it so --

18 MR. CHAIRMAN:

19 That's number?

20 MR. MacDONALD:

21 Seventy-eight, My Lord. Seventy-eight is an extract, My Lord --

22 THE WITNESS:

23 Yes, I'm aware of this case.

24 BY MR. MacDONALD:

25 Seventy-eight is an extract from the Cape Breton Post of 2nd

1 June, 1971, which is in around the time the investigation was
2 going on and in fact Mr. Marshall was charged on the 4th of
3 June. In that case, you're acting as defence counsel,
4 Mr. Khattar, as I see and --

5 A. Yes.

6 Q. -- Mr. Rosenblum is special prosecutor appearing with Crown
7 Prosecutor, Donald MacNeil. What sort of a relationship was
8 that?

9 A. Well, the story on that case is that Mr. Rosenblum was acting
10 on the civil side.

11 Q. Is that it?

12 A. He was on the civil side of the case, and it was in his best
13 interest to see that my client was convicted of the particular
14 criminal charge because if my client was convicted, it would
15 help him considerably in the civil action; so he had no special
16 status as far as I can understand under the law. I'm quite
17 sure he didn't have anything from the Attorney General to
18 qualify him, and I'm sure that Mr. MacNeil would've objected
19 to anybody being asked to assist him in prosecution and
20 vanity would be affected there. In any event, Mr. Rosenblum
21 sat in as I take it with Mr. MacNeil in order to make sure
22 that MacNeil wouldn't miss anything in the conviction.

23 Q. So when it --

24 A. And we lost the case.

25 Q. Did you? When it says then that:

SIMON J. KHATTAR, Q.C., by Mr. MacDonald

1 C.M. Rosenblum Q.C., appeared with
2 Crown Prosecutor, Donald C. MacNeil,
as special prosecutor.

3 A. They must have been reading these American cases where they appoi :
4 special prosecutors.

5 Q. Okay.

6 BY COMMISSIONER EVANS:

7 Q. Rosenblum was there just to make certain nothing went wrong
8 with his civil case.

9 A. That's right.

10 Q. He wasn't there to help you in those events?

11 A. Yeh. No, he wasn't there to help me.

12 MR. MacDONALD:

13 No, the reason I thought it may have been significant, My Lord,
14 is that he's working together with Donny MacNeil at the same these
15 statements are being taken in - from the various witnesses. That
16 was the only thing. My Lord, I would be going on to another
17 matter with Mr. Khattar that will take a few minutes. It shouldn't
18 be very, very long, but I know we want to break at four.

19 MR. CHAIRMAN:

20 Yes. It's probably preferable to adjourn now, and we will adjourn
21 until Monday next at 9:30. The -- Assuming that there's no
22 misbehavior on the part of Counsel, and there hasn't been this
23 week and that we can complete the evidence of some other witnesses
24 who are scheduled for Monday and Tuesday, the plan is that as
25 Wednesday is a holiday, Remembrance Day, that we won't sit on

SIMON J. KHATTAR, Q.C., by Mr. MacDonald

1 Thursday of next week or Friday; so there will be two days
2 of sittings next week, and in that regard, we're in the hands
3 of reasonable Counsel.

4 MR. MacDONALD:

5 May I advise, My Lord, that the witnesses for next week would be --
6 once we conclude with Mr. Khattar, which I hope won't take too
7 long, we will recall Mr. Burke at the request of one counsel that
8 he didn't have the opportunity to examine, and then we will pro-
9 ceed with Judge Matheson and then Judge John F. MacDonald. That
10 would be the evidence for next week.

11
12 INQUIRY ADJOURNED at 3:55 o'clock in the afternoon on the 5th day
13 of November, A.D., 1987.
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COURT REPORTER'S CERTIFICATE

I, Judith M. Robson, an Official Court Reporter, do certify that the transcript of evidence hereto annexed is a true and accurate transcript of the Royal Commission on the Donald Marshall, Jr., Prosecution as held on the 5th day of November, A.D., 1987, at Sydney, in the County of Cape Breton, Province of Nova Scotia, taken by way of recording and reduced to typewritten copy.


Judith M. Robson
Official Court Reporter
Registered Professional Reporter

Sydney Discovery Services
November 5, 1987