SDS Case Number 87-312

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

VOLUME XXX

Held: November 18, 1987

At: St. Andrew's Church Hall
Bentinck Street
Sydney, Nova Scotia

Before: Chief Justice T. A. Hickman, Chairman
Assoc. Chief Justice L. A. Poitras, Commissioner
Hon. G. T. Evans, Commissioner

Counsel: George MacDonald, Q.C., Wylie Spicer, & David Orsborn:
Commission Counsel

Clayton Ruby, Ms. Marlys Edwardh, & Ms. Anne S. Derrick:
Counsel for Donald Marshall, Jr.

Michael G. Whalley, Q.C.: Counsel for City of Sydney

Ronald N. Pugsley, Q.C., Joel Pink, Q.C.,:
Counsel for John F. MacIntyre

Donald C. Murray: Counsel for William Urquhart

Frank L. Elman, Q.C., & David G. Barrett:
Counsel for the Donald MacNeil estate

Jamie W. S. Saunders, & Darrel I. Pink:
Counsel for Attorney General

James D. Bissell: Counsel for the R.C.M.P.

Al Pringle: Counsel for Correctional Services Canada

William L. Ryan: Counsel for Evers, Green and MacAlpine

Charles Broderick: Counsel for Carroll

S. Bruce Outhouse: Counsel for Wheaton & Scott

Guy LaFosse: Counsel for Davies

Bruce H. Wildsmith, & Graydon Nicholas:
Counsel for Union of Nova Scotia Indians

E. Anthony Ross, & Kevin Drolet: Counsel for Oscar N. Seale

E. Anthony Ross, & Jeremy Gay: Counsel for Black United Front

Court Reporters: J. Graham Robson, & Judith M. Robson, OCR, RPR

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INQUIRY RECONVENED AT 9:33 o'clock in the forenoon on Wednesday, the 18th day of November, A.D., 1987, at Sydney, County of Cape Breton, Province of Nova Scotia.

MR. MacDONALD:

My Lords, the next witness will be Bruce Archibald.

BRUCE ARCHIBALD, being called and duly sworn, testified as follows:

MR. MacDONALD:

I've had marked My Lord as Exhibit 82 a copy of a Cirriculum Vitae for Professor Archibald, and I've had marked as 83 at Volume 26 of the evidence, which is an Opinion prepared by Mr. Archibald.

BY MR. MacDONALD:

Q. Just let me highlight if I can, Professor Archibald, some of the contents of your C.V. You're a graduate of Dalhousie University in -- with a Bachelor of Laws degree.

A. That's correct.

Q. And then a Master of Laws from Columbia University in New York.

A. Yes.

Q. Having studied comparative law.

A. Yes.

Q. And you've taken post-graduate work at University of Paris --

A. Yes.

Q. in 1975 and '76?

A. That's right.

Q. Okay. You're a member of the Bar of the Province of Nova Scotia?

A. Yes.

Q. And were admitted to the Bar in 1977?

A. Yes.

Q. And during your articles, you spent three months in the prosecutor's office?

A. That's correct.

Q. Correct? Tell us about your teaching career, if you will. Generally. Briefly.

A. Well, I've been teaching at Dalhousie Law School from 1976 until the present. I've taught primarily criminal law, criminal procedure, and related subjects including evidence, although I've taught a number of other courses as well. Legal process, legal development, family law, comparative law, these sorts of things.

Q. Yes. You've been associated with the Law Reform Commission of Canada?

A. I have been consultant to the Law Reform Commission of Canada in their present Criminal Code Review.

Q. Yes. And you were the principal consultant in one particular area, is that correct?

A. In the law of arrests, compelling appearance, things of that nature, yes.

Q. Now, Professor Archibald, at my request, you've carried out some work in connection with this trial -- this -- the trial of Donald Marshall, is that correct?

A. That's correct.

Q. Generally, what have you done?

A. As you requested, I reviewed the transcript of the trial in 1971

to determine whether there were any errors in evidentiary rulings, and I've also made certain recommendations, which I think flow from the analysis which I made of the trial.

Q. Other than reading the transcript of evidence given at the trial of Mr. Marshall, what other materials have you looked at?

A. In preparation of the formal, written Opinion, I looked at the transcript and the indictment. Subsequent to preparation of this Opinion, I have also examined the transcript of the preliminary inquiry. But, of course, following the examination of these documents, I did research on the various legal points which I thought were raised in relation to the issues I identified as being problematic.

Q. Okay. Before we get to the actual rulings that were made in this trial that you wish to -- to which you wish to refer, I want you to just generally describe certain concepts in order that people may better understand your comments on the actual trial. Would you tell us what is meant in law -- in law of evidence by the concept of relevance?

A. Well, the principle of relevance is really the first principle of evidentiary law, and it has a very general defintion. The idea being that a matter or a piece of evidence -- a statement is relevant where it tends to prove that a given fact in issue exists in the sense that it's more likely that the fact in issue exists when you know this or have been told this than before you were told it or knew it. That's very general, I

realize, and it may be useful to contrast the idea of relevance with the idea of weight. You see, there may be relevant evidence, which is far from being conclusive. For example -- An example which I give in the Opinion is that the evidence that the gun which killed a victim, for example, in a criminal trial, the fact that that belonged to the accused is obviously relevant. It, however, is not conclusive unless there is other evidence to demonstate that the accused used the gun or had a motive to kill the victim or what have you. So the simple fact that the gun belonged to the accused is certainly relevant, but its weight is not conclusive.

Q. And is it the general principle of evidence law in this country that any evidence which is relevant is admissible unless otherwise excluded?

A. That's right. The principle long ago expressed by the American writer, Thayer is that only relevant evidence is admissible at trial and that unless there is another exclusionary rule, all evidence which is relevant is admissable at trial.

Q. Okay. What is hearsay evidence?

A. Well, I provide -- There are a number of definitions of hearsay. Two which I suggest are sufficient to deal with the issues here are found on page 13 of my Opinion. The first is put forward by the Federal/Provincial Task Force on the Uniform Rules of Evidence and it says that:

"'Hearsay" means a statement by a

person other than one made while testifying as a witness at the proceeding, that is offered in evidence to prove the truth of the matter asserted."

So it's not merely a statement made outside the courtroom or while the person is not testifying, but in order to qualify as being hearsay and, therefore, exluded under a rule which excludes hearsay evidence, it must also be a statement which is asserted to prove the truth of the matter contained in the statement.

Q. Give us an example.

A. Well, there are a number which we'll deal with specifically, I suppose, in the trial, but a general one, which I've pointed to in my Opinion, might flow out of a simple motor vehicle accident. In a motor vehicle accident, it might be asserted that the defendant saw a mechanic who told him that his brakes were fine. All right. Now -- And he might -- The accused might want to say -- or the defendant might want to say on the witness stand; "The mechanic told me that my brakes were all right." Now, that is an out-of-court statement by the mechanic not given under oath, all these kinds of things. If that statement were to be used for the purpose of proving that the brake failure caused the accident, then that statement would be hearsay because it would be used for the purpose of asserting the truth of the matter contained in it.

Q. But if --

A. My brakes were okay or they weren't.

Q. If it were being used --

A. On the other hand, if it were being used to say that the defendant was not negligent because he'd checked with a mechanic to see whether or not his brakes were okay, and the mechanics had told him that they were, that really goes to whether the accused had been negligent or had taken care in the circumstances and there it would not be hearsay.

Q. Hearsay --

MR. MacDONALD:

I'm sorry, My Lord?

BY COMMISSIONER POITRAS:

Q. Excuse me, I've got a small problem with that. Would it not be necessary in either event to look to the mechanic to have him testify in court?

A. It would certainly be necessary if the purpose were to use the mechanic's evidence to prove the cause of the accident.

BY MR. MacDONALD:

Q. Or to prove that the brakes were okay.

A. That's right.

Q. Okay. If you were introducing it to prove that the brakes were okay --

A. Yes.

Q. -- you would have to call the mechanic to give that evidence himself.

A. That's right.

Q. Is that correct? But His Lordship is interested in your second purpose, that you wouldn't have to call him if you were using it for what purpose?

A. For the -- merely that the -- the question of whether or not the defendant in those circumstances was negligent or had taken some -- made some efforts to determine the condition of his brakes.

BY COMMISSIONER POITRAS:

Q. But wouldn't the better evidence be that you bring in the mechanic to testify in court that indeed the defendant had looked to him for advice on the braking mechanism of his vehicle?

A. Well, I -- Yes, it -- You might say it would be better, and you would certainly say that the evidence from the mechanic, being an independent witness, to the effect that, "Yes, the defendant consulted me, and I told him his brakes were okay."; that would be more weighty, but still the statement could be given by the defendant, and it would be admissible. It would not be hearsay. It just would not carry the same weight, but it would be relevant. It would not be hearsay. It would be admissible.

COMMISSIONER POITRAS:

But it would not be hearsay. Yeh.

MR. MacDONALD:

Pardon?

MR. RUBY:

It's a state of mind issue.

THE WITNESS:

Yes.

BY MR. MacDONALD:

Q. It's a state of mind issue.

A. Okay.

Q. Okay. See, we're getting complicated already.

A. That's right.

Q. Hearsay evidence obviously can be relevant. Is that correct?

A. If -- It must be relevant if it's to be admitted or it's even discussed, let's put it that way.

Q. Listen to my question, now. Hearsay --

A. Yeh.

Q. Hearsay evidence is not admissible, is it?

A. No.

Q. But hearsay evidence can be relevant -- could be relevant?

A. Oh, sure.

Q. So it's being excluded for reasons other than relevance?

A. Yes.

Q. Why is it not admitted? Why can't you bring hearsay evidence before the court?

A. There are a number of reasons which are put forward. That -- The oldest or one of the most traditional reasons is that the evidence is not given under oath and therefore the person is

not under the same moral pressure to tell the truth. That's one reason. I think the most often cited reason today is that the out-of-court statement of the declarant -- the declarant is not available to be cross-examined, and so the person who made the statement cannot be challenged to see whether they had an opportunity to observe the events they say happened or whether their memory of the events is clear, whether what they said they really meant to say. Was the statement ambiguous? All of these things are thought to be best challenged through cross-examination if one is to get at the truth, and when you've got a witness on the witness stand saying, "So and so told me that," then there's no way to get at so and so to ask directly and cross-examine that person.

Q. So that's the purpose for excluding it? Generally accepted purpose?

A. The major purpose and the most commonly accepted purpose.

Q. Yeh. All right. Could you give me an example of the -- of other exclusionary rules other than hearsay?

A. Well, I guess one could say that most of the law of evidence is composed of exclusionary rules, the purpose of which is to exclude relevant evidence for other reasons. Now, there are a whole series of examples. I suppose one that arises frequently in the criminal law context is the rules concerning confessions. A statement made by an accused person to someone

in authority saying, for example, that they committed the offence, is highly relevant, but there are rules to say that that statement by an accused to a person in authority is only admissible if it is freely and voluntarily given and so that there the idea is that even though this admission is, in a sense, a statement which from points of view might be hearsay, and we won't perhaps -- We need not get into that. That primary concern is that an accused may make statements with hope of gaining some advantage from the person in authority or because they've been threatened in some way and that even though the statement is relevant, it ought not to be admitted if it can't be proved to be voluntarily given. I mean, there are a whole series of other examples as well of exclusionary rules. We now have in the Charter of Rights and Freedoms a whole series of controversial rules about -- Charter-based rights which lead to the potential for exclusion of evidence, not because it's not relevant but because there's been a breach of a Charter right. In the area of private litigation, one can think of rules excluding statements made by parties who are trying to reach a settlement, for example. They may be highly relevant. They may be admitting lots of statements which would be important to prove a trial, but because the statements are made in the course of a bona fide effort to settle the matter, we should encourage those efforts at settlement and not prejudice them by later having those kinds of things

admissible at trial.

Q. Okay. Let me ask you -- In your report, you refer to something that I -- I think I have the correct phrase here, "a limiting instruction to a jury." What is that?

A. Well, it may arise that evidence which is not admissible under one rule might be admitted under another rule. In other words, evidence in the example of the car mechanic given earlier -- The evidence of the statement made by the defendant that he or she saw the mechanic would be inadmissible on the issue of proving the cause of the accident but admissible on the issue of whether the accused had been negligent. What was the accused's state of mind? And in that circumstance, the -- a jury ought to be told by the judge that that statement can be taken into account only for a -- for the purpose of assessing the defendant's state of mind, but they can't take that statement into account in determining what the cause of the accident was.

Q. Now, realistically, Professor Archibald, is a lay person on a jury supposed to understand that I look at a piece of evidence for one point of view, but I can't look at it for another point of view? Is that what the law of evidence says?

A. The law of evidence says that, and it's invoked quite commonly and limiting instructions are also used in circumstances where a piece of inadmissible evidence has inadvertently been admitted in court or a statement has been made by a witness, and a judge will tell the jury to disregard that statement in coming

to their conclusions. Now, you're right -- At least the assumption underlying your question -- If I can put it that way -- that there's a good deal of skepticism about whether or not jurors are able to make those kinds of distinctions, but there's some argument that in fact they do.

Q. Okay. In any event, that's part of the law?

A. That's right.

Q. And finally, the last phrase I want you to describe for us is "adversarial trial process."

A. Well, the -- In the common law tradition, if I can put it that way, the form of trial in both civil and criminal matters is primarily adversial. And by that, we mean that the judge or the trier of fact, which would be the jury in a jury trial -- and both of them are to remain neutral and to a certain degree impassive really while the litigants, the opponents, present one side of the case and then the other side of the case. The idea is that the judge is to remain impartial and really to act as an umpire in regulating the course of events so that the jury, the trier of fact in a jury trial, can come to a decision based upon the theory that two opposing sides going at one another will uncover the truth most efficiently.

Q. Yes. If you -- In your Opinion, you refer to a quotation given in 1971 by Mr. Justice Evans, and if I can just quote one part of that. It said:

"This procedure assumes that the

> litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial judge a dispassionate and impartial consideration in order to arrive at the truth of the matter in controversy."

MR. CHAIRMAN:

Law of Ontario.

BY MR. MacDONALD:

Q. Is that a statement -- It's the law of Ontario. Is that also the law of other parts of this country?

A. I would say that this description of the adversarial system is widely accepted by evidence writers and others in Canada as a good general description of the adversarial process through a brief one.

Q. Yes.

A. It is perhaps important to point out a qualification which is implicit in the comment which follows the citation of that passage, in my Opinion, and the qualification is that this particular case involved a civil trial -- was not a criminal matter, and I think it's fair to say that there are some significant differences between civil trials and criminal trials in this regard, and that is first, as I mentioned, that the trial judge has a duty to intervene perhaps a little more actively in a criminal trial where the judge thinks it's

necessary to do so in the interests of, what we might say in old fashioned language to be the liberty of the subject. I mean, in a criminal trial, somebody's liberty is at stake, and in the event that counsel for the defence, for example, may not be taking all the measures which are clearly necessary to give a defence here, then I think criminal court judges feel a greater pressure to intervene and have a duty to intervene to present -- to prevent the administration of justice from being brought into disrepute or injustice from occurring in an individual case. This may go so far as to call a witness, for example, in criminal cases.

Q. The judge?

A. The judge, we're talking about.

Q. Let me put it from the point of view of counsel.

A. Yeh.

Q. The quotation I read to you says that it:

> "assumes...the...counsel, will... diligently present all the material facts...in support of their respective positions..."

Now, from a prosecutor point of view in a criminal case, is it the law in this country that he is to present only the facts in support of a conviction?

A. The ethical duties, and in fact the legal duties, of the prosecutor are not the same as the counsel for a plaintiff in a civil action. The Code of Professional Conduct of the Canadian

Bar Association, which has been adopted here in Nova Scotia and which really sets out the traditional view in its Rule 8, talks about the requirement for Crown counsel in a criminal proceeding to present the facts fairly and dispassionately and to raise issues which may not be favorable to the prosecution -- if those come to the attention of the prosecutor.

Q. And to that extent then, the traditional view of the adversarial system does not apply in a criminal case, if you consider in the traditional sense the Crown Prosecutor represents the Crown in seeking a conviction.

A. The Crown Prosecutor does not simply represent the police. The Crown Prosecutor does not simply represent the victim. The Crown Prosecutor represents the public interest in seeing that trials are conducted fairly and that justice results.

Q. Thank you. And I just wanted to refer you, finally, before we get into the specifics, on page 3 of your Opinion, the Summary that you've noted there, that:

> The law of evidence consists of a large and sometimes confusing body of rules which regulate the adversarial trial process and balance a number of competing interests in this process, including: ...

And the interests you relate are:

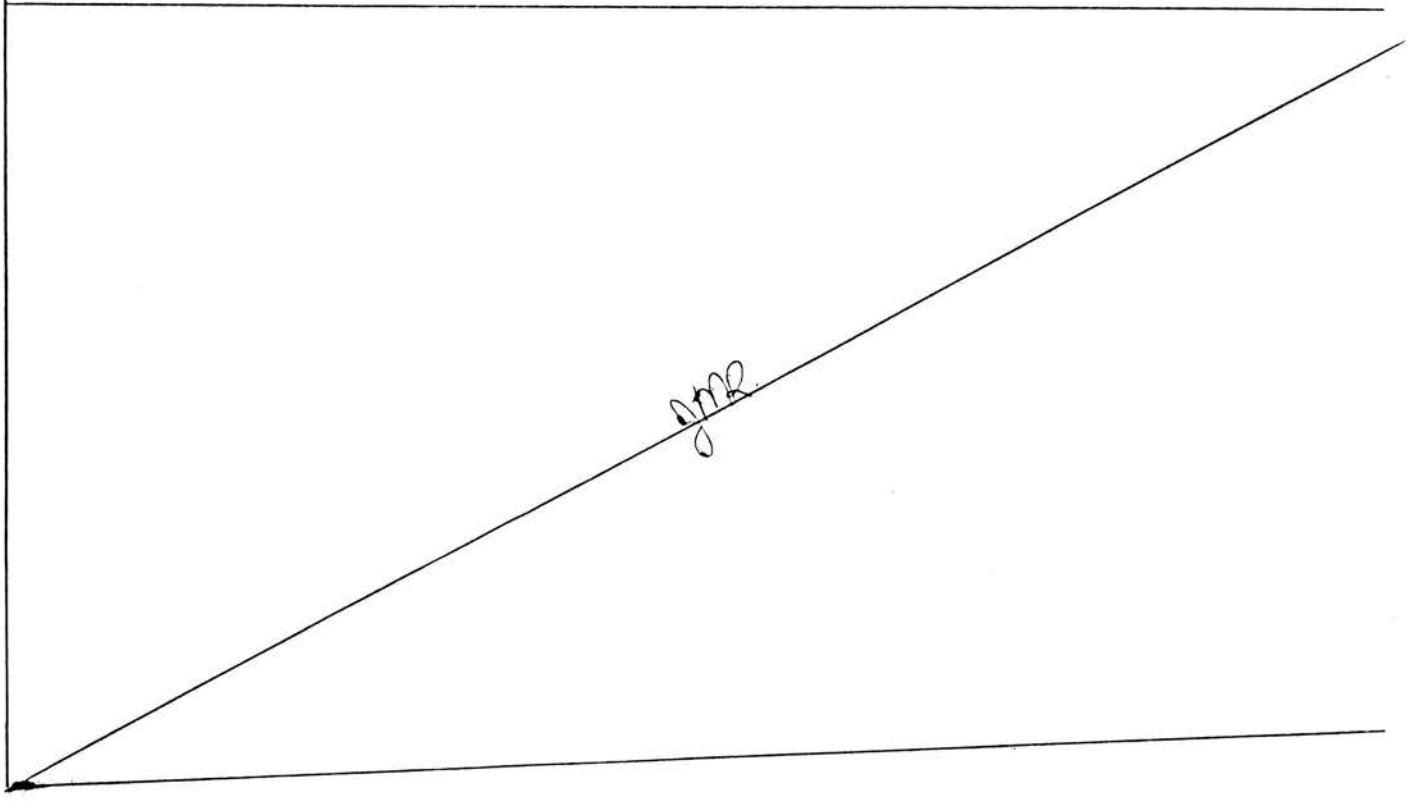
> ... the ascertainment of the true facts at issue...assuring fairness as between Crown and defence in the presentation of evidence... assuring public confidence in the

fairness and impartiality of a criminal trial; and...the elimination of an unjustifiable expense and delay.

That is an accurate statement of the purpose of the law of evidence, but in particular in a criminal trial, is that correct?

A. Yes, I believe it is.

Q. All right. Let's to to this particular trial then and, Professor Archibald, there were certain points that you've made in your Opinion to which I wish to address your attention. I've put in front of you certain volumes of evidence, and I'm going to refer you to portions of them.



The first evidence that you have -- to which you refer is the evidence given by a Mrs. Merle Davis and that's found in volume one of the evidence at page 134. This is the evidence of the trial. Now you are referring to your own copy of the transcript and -- at which --please do. I'll just make sure you've got the same thing. Now Ms. Davis -- Mrs. Davis, as I read her evidence, was called to give evidence that she saw Donald Marshall, Jr., at the hospital on the night of the incident and that he had a laceration on his left forearm which did not have any blood in it and that she saw him wearing a jacket which she wouldn't be able to identify again. Given the fact that Doctor Virick, the man who sewed that up, that cut, had already given evidence that he saw the laceration and no blood, was there any probative value at all to the evidence of Mrs. Davis at that trial?

A. Well, insofar as the two proported eyewitnesses to the event had observed someone wearing a yellow jacket, I would think that it's -- it's relevant and has probative value to say that the accused when he arrived at the hospital on the night in question was wearing a yellow jacket. I don't see that there would be any controversy on that. As to the nature of the laceration, to the extent that they -- there might be allegations that this was a self-inflicted wound, then descriptions of the nature of the wound would be relevant and I should think that merely because there had been another

witness who had described that, would not preclude one from bringing a second witness to make statements about it.

Q. Okay. But there's another portion of her evidence that you take issue with?

A. Yes.

Q. Is that correct?

A. That's right.

Q. Would you tell us about that please?

A. In her evidence she -- and this is on the following page. I guess it's --

Q. That's page 134.

A. --page 134 (That's right.) of the transcript that you're using. And she says:

> Q. Did you notice anything else about his arm?

This is the question in examination in chief by Mr. MacNeil. She answers:

> A. I noticed a tatoo today on his arm.

Q. So it's not something she saw at the hospital. Something I saw today?

A. That would be a -- Yes, you could interpret it that way.

Q. Okay.

A. And then she is asked:

> Q. Can you tell us what that tatoo is?

And she says:

A. "I hate cops".

Q. So she was pointing out that the tatoo on Marshall's arm that she saw today, and I could refer you to the evidence where Junior Marshall was asked to display to Doctor Virick his arm earlier on that day?--

A. Yes.

Q. --to show the cut. So she said, "I saw a tatoo on his arm today that said, 'I hate cops'." Now what do you say about that evidence?

A. Well, you'll notice that inadvertently I did not put the word "today" in the -- when I copied it into my opinion. Maybe that's a Freudian slip in that I don't think the word "today" is significant, now whether she saw it the day of the trial or saw it back on the day in which she looked at his arm in order to give treatment. The statement, "I hate cops" is -- is not relevant to the proof of any matter at issue in this trial. It -- At least then one -- one can say that it is character evidence to the extent that it can be argued that character evidence is relevant. In other words, that people of bad character are likely to commit criminal offenses, there is a clear rule limiting character evidence and the use of character evidence. The first aspect of that rule is that character evidence is inadmissible when put forward by the Crown as part of their evidence in chief, and that --

Q. But -- I'm sorry.

A. And that character evidence in the nature of reputation evidence can be put forward by the defence and then can be rebutted and there again reputation evidence has to be used, but individual instances of behaviour or items such as this, "I hate cops" statements, and if you can say that this is a statement from the accused, are not admissible in the Crown's case because they really are -- if they are relevant at all they go to the accused's character as the kind cf person who might be likely to commit offenses.

Q. Was that an improper question?

A. Yes, in my view it was.

Q. Let me direct you to look at volume two of the evidence as well if you would?

A. What page?

Q. Page twenty-five.

A. Yes.

Q. That is the question by Mr. MacNeil at around line ten. And he is cross-examining Donald Marshall, Jr. He says:

> Q. Let me see that arm again. Pull your sleeve up. That is where you see the wound is about three inches. Just let the jury have a look at that please.

The witness complies. And then he says:

> Q. Would you turn your arm around and see if there is any other wound on your arm?

Isn't that another attempt to get in the same inadmissible

evidence?

A. It may indeed be. I have not seen Mr. Marshall's arm and do not know the proximity of the wound to the tatoo. So I don't know whether you can cover up the tatoo and view the wound or not, but --

Q. It's hard when you're turning your arm around to cover your whole arm.

A. Well, as I say, I don't know, but if -- if in viewing the wound the tatoo is obviously visible and necessarily visible at the same time, it seems to me that you -- that the strategy from the Crown Prosecutor here may be trying to get that tatoo before the jury once again. I don't know. That's a matter of speculation.

Q. Is that evidence prejudicial, the evidence about the "I hate cops" prejudicial to Marshall?

A. Yeh, I believe it is, certainly.

COMMISSIONER EVANS:

I'll just ask you: Line 25 where the prosecutor asks, on that same page, he wants to show the whole arm,(where Mr. MacNeil is,) around 23, 24.

MR. MacDONALD:

Yes. Yes.

BY MR. MacDONALD:

Q. That's on volume two around line 25?

A. Yes. Right.

Q. I suggest, Professor Archibald, there's no question that what he's trying to do is get that tatoo right in the eyes of the jury. Now if -- if we assume that, and let's assume that, is that an improper line of questioning as well?

A. I would say that if-- if the purpose is to display the statement, "I hate cops", that that statement would be inadmissible evidence.

Q. Should the defence have objected the evidence being introduced through Mrs. Davis about the tatoo on the arm?

A. Should.

Q. Or could. They obviously could have?

A. Yes, I would say that the defence counsel could have objected to it. Whether or not defence counsel should have objected would be a matter of -- of counsel's assessment if the -- as a matter of strategy. If the arm has been viewed by the jury do you want to emphasis that or de-emphasize that. To object to the evidence you may be bringing attention to it and -- but certainly if your view was that you want to object to that evidence because it's clearly inadmissible and you think that it's in your client's interest to do so, you should.

Q. Should the judge have intervened and prevented the evidence from being introduced?

A. I think the judge should have, certainly he could have.

Q. Should the judge in his Charge to the jury have made some reference to that evidence and told the jury in use of your phrase, "a limiting instruction" to disregard that evidence

entirely?

A. The judge could have done that and it would have been proper for the judge to do that. Here again I -- I suppose that it may be -- the judge may be making an assessment of whether it might be more prejudicial to the accused to highlight that evidence by bringing it to the attention of the jury once again. The problem is that a judge who fails to point out evidence which is inadmissible, leaves open the possibility that there would be a successful Appeal because of the admission of that inadmissible evidence.

Q. Now in this case there's no question, is there, that the character of Junior Marshall is important because you have a-- really the determination of credibility between him on one hand and Chant and Pratico on the other?

A. Yes.

Q. And the Crown would know that the character of Marshall is fundamentally important in this case?

A. Yes.

Q. In those circumstances --

A. The credibility of Mr. Marshall --

Q. Well, and character certainly goes to credibility, does it not?

A. Well, character evidence is inadmissible at -- at a criminal trial. It may go to credibility in a sense in -- in the eyes of the general public, but from the point of view of a criminal

trial, character evidence is simply inadmissible because it's felt to be so prejudicial that it's unfair to an accused to introduce evidence which impugns the accused's character.

Q. Okay, and in this case, the evidence of that tatoo falls into that category?

A. Yes, in my view it does, clearly.

Q. Now you've talked about an Appeal. And in your Opinion on page ten you quote Section, I guess it's 613 of the Code in 1971?

A. Yes.

Q. And you put in quotes the phrase:

> ..."substantial wrong or miscarriage of justice"...

A. That's right. That's --

Q. Well, what does that -- Where does that quote come from and why is it -- why is that of importance?

A. It comes from Criminal Code Section 613 (1) (b) (iii) of the Criminal Code, and that section provides that an Appeal can be dismissed by a Court of Appeal even when there's been a wrong ruling on a matter of law, such as, a wrong evidentiary ruling, if the Court is of the opinion that there is no substantial wrong or miscarriage of justice resulting from that error. Now that has been intrepreted by the Supreme Court of Canada to really mean that if there is any possibility that a jury would have a reasonable doubt in the event that there

had not been this wrong ruling on a matter of law, then the Court should not affirm the conviction.

Q. You've read the Appeal Decision in the Junior Marshall case, have you?

A. Yes, I have.

Q. And there is no reference in that opinion at all to this evidence of the tatoo, is there?

A. No.

Q. Okay. Next you in your Opinion make reference to evidence called through Mr. and Mrs. Oscar Seale. Their evidence, as I understand it, was called only for the purpose of proving the continuity of the clothing worn by their son on the night of the -- of this incident. Is that correct?

A. That's the inference which I draw from the kind of testimony which they gave and the brief reference that Mr. MacNeil made in his summation or in his --

Q. Now was the clothing worn by Sandy Seale on the night of the incident of any relevance at all here?

A. I don't see how it is relevant. There was no issue as to the identity of the victim here in this case so far as I can see. The victim had been identified by doctors and so on; by other witnesses. I don't see that this evidence is -- is necessary or relevant to any matter.

Q. Okay. Now what issue do you take with the fact that they were called to give evidence?

A. Well, if the evidence is not relevant then it's not admissible. And it seems to me that what one has is -- is the calling of two people whose son has been the victim of a gruesome homicide and that the effect may be to garner the sympathy of the jury for the parents of the victim without putting forward any relevance for that testimony whatsoever, so that in essence without being relevant the -- that evidence may have caused some emotional response from the jury which would be prejudicial to the accused.

Q. You've also in your report raised the calling of evidence of Patricia Harriss and Mr. Gushue but conclude, as I understand it, that that was proper evidence to be called in the circumstances of this case?

A. Yes, I do. I -- From what I understand from merely reading press reports of what occurred while -- here in this Inquiry. From the evidence of Ms. Harriss it -- it may appear that the-- the evidence that came out in trial was not the evidence which she gave here, but the manner in which that evidence was elicited at the trial seemed to me to be entirely proper and there were no wrong evidentiary rulings made in relation to it.

Q. Okay. Now we come to the question of hearsay, and the general approach at the trial to that subject. Let me just ask you a couple of specific questions on that. Is it a fact or is it the law in this country that any statement which is made out

of Court not in the presence of the accused is hearsay?

A. No. Hearsay is a statement made by a person other than the witness who is testifying which is put forward to prove the truth of the matter asserted in the statement and the presence of the accused is not relevant to the definition of what is hearsay and what is not.

Q. So the presence of the accused has no bearing on the matter at all?

A. No.

Q. Is that the view in this case of counsel and the trial judge?

A. It was certainly not the view of Crown Counsel. Mr. MacNeil asserted on numerous occasions that a statement made out of court which was not made in the presence of the accused was inadmissible. Now it seems -- The basis for his assertion is unclear. I know of no such rule and he doesn't explain why that is the case, although the general discussion during the course of the examination and cross-examination of a number of witnesses would lead one to believe that both Mr. MacNeil and ultimately the trial judge were of the view that such evidence was hearsay.

Q. And if I could just quote to you from what the trial judge said at one part of the trial, that's on page 202 of the volume one and continuing on to page 203.

A. Now what is it in my transcript?

Q. It's at page 169 and 170.

A. Yes.

Q. Where the trial judge on the top of page 203 said:

> That is the law, Mr. Khattar. Now then, he cannot tell in court what somebody said to him because it was not in the presence of the accused.

There's the trial judge saying that is the law.

COMMISSIONER POITRAS:

Which page?

MR. MacDONALD:

The top of page 203, My Lord.

BY THE WITNESS:

A. Yes, this statement is made at that point and it appears to be a ruling based on a hearsay concept here. That is not the ruling that the trial judge, however, made on page 153 of my transcript.

BY MR. MacDONALD:

Q. Let me get that now. That's on page 186, My Lords, of volume one. What ruling are you talking about there?

A. Line 19 would be the judge's statement beginning at page -- line 19:

> Mr. MacNeil, it is absolutely proper for the witness to be cross-examined on a previous statement made by him irrespective, irrespective of where he made it. This is not hearsay. This is going basically and essentially to the credibility of the witness...

This is a truthful witness.

BY COMMISSIONER POITRAS:

Q. Of course, at that time the evidence was being adduced by Mr. MacNeil, whereas on page 203 the attempt was being made by Mr. Khattar?

A. Yes, although, you see, when the matter of the hearsay rule initially arises the argument is put forward by Mr. Rosenblum and it's in relation to the cross-examination of Sergeant MacDonald, and at that time Mr. MacNeil raises this argument about matters not being -- statements -- out-of-court statements not made in the presence of the accused are hearsay. Gosh, I don't have, but what --

BY MR. MacDONALD:

Q. I'll get it for you.

A. There is a rejection of that approach by Mr. Rosenblum. What's interesting, however, is that at page 161 of my original volume and I don't know now what it is in the numbering system.

Q. That would be 194.

A. Yes. If we've got the page, at line eleven Mr. Khattar says:

> The ruling, Your Lordship has made with respect to conversations in the absence of the accused, statements made by others --

So at that point Mr. Khattar invokes this, what I would call non-existent Rule of Evidence in his favour so that at one point the judge rejects the rule as do -- as does Mr. Rosenblum for the defence when we're at the stage of Mr. MacDonald's

testimony. At this -- at a subsequent stage the rule is rejected by the judge in the examination of Mr. Pratico. Further on in the re-direct examination of Mr. Pratico, defence counsel invoke this rule which they see that the Court is now apparently using and they stuck with it. And then there's what seems to me at the end of the re-direct examination of Mr. Pratico, we have the final capitulation of the judge to what I view as the non-existent rule.

Q. Do you have any sense at the end of all this, Professor Archibald, whether the judge and counsel in that courtroom had any idea of the concept of hearsay evidence at all?

A. I think that there was a fundamental misapprehension of the nature of what is hearsay -- what are hearsay words and non-hearsay words if I can put it that way. They -- The general view seemed to be that any out-of-court statement made by someone other than the witness and even by the witness was thought to be hearsay, regardless of the purpose for which it was put forward, and, of course, it is the purpose for which the out-of-court statements are put forward which determines ultimately whether they are hearsay or not.

Q. Let's talk about the evidence of Sergeant MacDonald. Now Segeant MacDonald, My Lords, you may recall is the Investigating Officer on the night in question who was at the hospital when Maynard Chant was either brought to the hospital or not. It is hard to know that from what we've heard, but that's what was

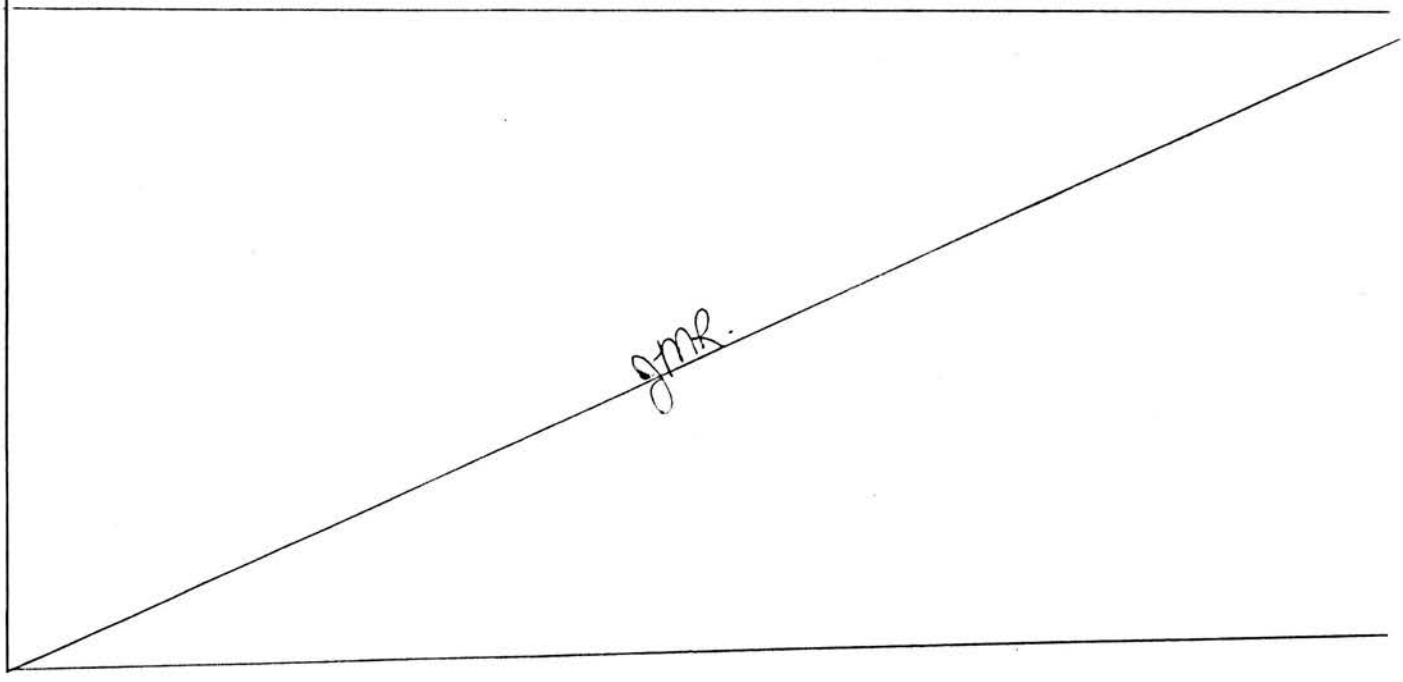
understood at the trial. Now what is it about the evidence of MacDonald or the attempt to get evidence from MacDonald that you take issue with, Professor Archibald?

A. Well, Sergeant MacDonald was really called by the Crown for the purpose of proving the continuity of -- of exhibits. But, of course, when a witness is called for a particular purpose by the Crown, this does not limit the kind of cross-examination which is engaged in by the defence counsel. Our rule, for example, is unlike what I understand the American Rule to be where there is that sort of limitation. In other words, that cross-examination is only in relation to the evidence given by that particular witness. In our system cross-examination is very broad ranging and the purpose of -- there are two purposes of cross-examination, one is to elicit from the opposing witness statements or evidence which are favourable to your case, the substance of your case, whether or not the witness saw the crime being committed or not; or whether or not the witness observed some aspect of an accused which would provide a defence. So the first purpose of cross-examination then is to elicit from the opponent's witness matters which are directly relevant to the case to be proved. The second purpose in cross-examination, however, and a very important purpose is to -- to sap the credibility of that person as a witness, to indicate that that witness's testimony is not as credible as it might have appeared from the way in

which it was put forward in the direct examination by the Crown Prosecutor.

Q. Okay. Now it was MacDonald we're dealing with first. We're trying to get something out of him, or Rosenblum is, something out of him that would be of benefit to his defence, isn't that correct?

A. What Mr. Rosenblum really is doing here is questioning Sergeant MacDonald about whether or not Mr. Chant implicated the accused when Sergeant MacDonald met Chant at the hospital. Now the purpose for doing that can -- the admissible purpose for doing that is to really challenge Chant's credibility by demonstrating that Chant did not make an accusation against the accused, Mr. Marshall, when he had the first opportunity to do so.



Q. Okay, let me direct you to the transcript. It's on page -- of your copy, if you like, page 58.

MR. MacDONALD:

It's page 138H of our transcript, My Lords, volume one.

BY MR. MacDONALD:

Q. And down at the bottom of that page Mr. Rosenblum is in conversation with the Court and the other counsel during a voir dire, he's saying I want to ask him:

> ...what he didn't say. I'm asking what he didn't say...not what he said.

And if you go over to the next page, here is Mr. MacNeil's objection:

> I'm saying, of course, he is making it with the word "accusation" that he is asking what the witness said. And I am submitting to you that it is completely inadmissible unless the accused was present. And I know of no rule that would allow a conversation to go in that may work to the detriment of the accused when he wasn't present.

Now that's what you've talked about before. That's the basis for the objection. There is no such rule, is there?

A. No, as I have stated I know of no such rule.

Q. And even if there were such a rule, would it be -- would the Crown be able to raise it saying that the accused is being prejudiced here? If counsel for the accused want to ask a

question that's prejudicial to the accused, what business does the Crown have interfering?

A. In terms of our normal understanding of the dominately adversarial nature of a criminal trial, none.

Q. The judge upheld that ruling, didn't he? He would not permit the question?

A. Yes, that's right.

Q. Now this is why I had a little problem with what you said earlier that it wasn't until later on in the trial that the judge sort of indicated his misconception of the rule?

A. Well, it's not clear to me why the judge excludes it. The judge-- the judge upheld -- upholds the objection.

Q. Well, there's the objection?

A. Yeh, there's the -- I know what the objection is but the reasoning is rather difficult to fathom. And I think one has to assume that -- that it's being excluded because it's being characterized as hearsay. I think that's the most plausible explanation of -- of why the ruling is made.

MR. CHAIRMAN:

And-- and not the traditional fear that trial judges have of Appeal Courts as referred to in 138I by Mr. MacNeil.

MR. MacDONALD:

138 which, I?

MR. CHAIRMAN:

138I.

MR. MacDONALD:

Oh, yes, he refers to the -- that the Appellate Division may very quickly overturn this.

MR. CHAIRMAN:

That strikes terror into the hearts of every trial judge.

MR. MacDONALD:

Does it? You speak with experience, My Lord, I'm sure.

MR. CHAIRMAN:

Oh, yes.

COMMISSIONER EVANS:

Just new ones.

BY MR. MacDONALD:

Q. Now if you go to page 138J and which is page 60 in your transcript.

A. Yes.

Q. The line 13 or so, you can see where the judge again is -- is adopting that practice or that non-rule. Anything that has to do with the conversation inasmuch as the accused man was not there. He's adopting that. It's -- it's inescapable that that's the reason he would not permit that evidence to be called? Isn't that correct?

A. Yes, but to character -- I don't know if that's hearsay. I don't know what the basis of that rule is. You see, it's not a rule and I don't know what it's -- what it's all about. It's just --

Q. I understand that but I'm merely having you agree that relying on the non-rule, the judge wouldn't allow the evidence to be called?

A. Yes, yes.

Q. Thank you. But what about that, wouldn't that type of ruling -- and that wasn't a singular ruling throughout the trial, was it? That was -- that application of a non-rule occurred on more than one occasion?

A. Yes.

Q. What about that in the Appeal? Wouldn't that be the substantial miscarriage of justice test that you talked about?

A. Well, the -- I would argue, yes, that the consistent use -- exclusion of evidence or the failure to allow cross-examination on matters of credibility, in my view is an error and one can't say that it's not a substantial wrong or a miscarriage of justice. I think that it--indeed it would be characterized as such by a Court of Appeal. The problem, of course, is the reluctance of Courts of Appeal to -- to raise issues arising out of a transcript when these matters are not raised in the grounds of Appeal or argued before them.

Q. Okay, and we'll come to that. Let's go to the examination of Maynard Chant. You make comment of the evidence given by Maynard Chant and I want to direct your attention to page 22 of your Opinion and this is the -- where he's talking about the fact that Mr. Chant had given inconsistent statements to

the police, is that -- that's correct isn't it, where Mr. Rosenblum's cross-examining him?

A. Yes.

Q. What I want to direct your attention to, Professor Archibald, is the bottom of that page where you say:

> However, Mr. Rosenblum asked no questions about what the police said to Maynard Chant in their interrogation. This may be because of a fear that the hearsay rule would apply.

Now are you talking about the real hearsay rule or this non-rule?

A. I guess I'm really referring to the non-rule there that the prevailing understanding of the hearsay rule which seemed to dominate the proceedings, would be applied and that Mr. Rosenblum, therefore, was constrained not to make a searching cross-examination to get at the kinds of things which may have been said to Maynard Chant either by the police or by others before he gave this statement.

Q. Let me ask you to look at another document and I would suggest that there may have been another reason that Maynard -- that Mr. Rosenblum didn't want to do that. In volume one which is before you, and you wouldn't have seen this document before, just turn to page 79, volume one yes. You've not seen that document before, Professor Archibald?

A. No, I have not.

Q. That is a Statement of Facts which we are advised is the document that would be prepared by the Crown and used by the trial judge in instructing the Grand Jury, you're familiar with that type of document?

A. Yes, I am.

Q. It was in use in Nova Scotia?

A. It was in common use in Nova Scotia during the period prior to the abolition of the Grand Jury, that's right.

Q. I want to direct you to page 80 and it's the last couple of sentences before --

A. Page -- what page?

Q. Page 80.

A. Eighty.

Q. 8 - 0. The last couple of sentences before the reference to Doctor Gaum, do you see where it says, that paragraph:

> The accused showed Mr. Chant his forearm that was injured but no blood was in appearance. These two men stopped a passing automobile, the operator unknown, and were taken back to the scene where Mr. Seale was still alive, but beyond reasonable senses. Help was then summoned.

Now this is the point:

> Mr. Chant at first related to the police the story the accused gave him but later advised that he related the false story because of fear of the accused.

Now if you assume that Mr. Rosenblum was aware of that

statement, I suggest that's a good reason not to go on and ask Mr. Chant on the witness stand why he made the inconsistent statement? Would you agree with that?

A. Yes, that may have -- that would be -- if Mr. Rosenblum believed that that would be the kind of answer that he would get, it would be imprudent for him as defense counsel to -- to intentionally bring that out.

Q. But in any event, it's your opinion, as I understand it, that if Mr. Rosenblum had tried to question Chant as to what the police said to him when they were interrogating him, it would have been inadmissible because the accused wasn't there?

A. Yes.

Q. Ruled inadmissible?

A. Based -- based on the ruling which had been made concerning Mr. Justice or Sergeant MacDonald's testimony, then yes, I think that the defense counsel here would have been prevented from examining -- cross-examining fully on the matters of -- of how the police had dealt with Mr. Chant.

Q. And do you think they would have been permitted to call the police and ask them what they said to Chant?

A. That would have been inconsistent with the approach taken by the trial judge and by Crown Counsel as well. And apparently ultimately acquiesced in by defense counsel.

Q. Now let's go to the evidence of Mr. Pratico and that starts on page 25 of your Opinion and it relates to the statement

that was made by Mr. Pratico out-of-court.

A. Yes.

Q. And that is in the afternoon prior to his giving evidence. Now just in general terms advise the Commissioners, if you will, what problems you have with the way that was handled in the courtroom?

A. Well, clearly the evidence of John Pratico was essential and key to the prosecution's case. He was one of the two eyewitnesses. As such, defense counsel clearly has the right to be able to fully cross-examine such a witness in order to, not only as I suggested before, try to elicit statements about the offence which are favourable to the defense case; but to fully explore why the accused has stated the things he has in evidence. What opportunity there was for the accused to observe the events which he now relates to the Court. What is the accused's mental capacity. Is he -- all these kinds of things.

Q. You mean Mr. Pratico's mental capacity not --

A. I'm sorry. I beg your pardon, indeed.

Q. Yes.

A. Yes.

Q. The judge limited and limited very much the cross-examination of Pratico on this statement that was made in the court -- outside of court the afternoon prior, isn't that a fact?

A. Could you repeat that?

Q. The judge limited the extent of cross-examination of Pratico on -- with respect to the statement that was made out-of-court?

A. Yes, and in other areas as well. In particular in relation to that statement made to the group of people outside the courtroom prior to his giving evidence.

Q. Okay, and he did so with respect to that statement he made in the hall the afternoon before by the wrong application of the provisions of the Canada Evidence Act, isn't that correct?

A. Yes, that's my view.

Q. In page -- on page 26 of your Opinion you quote from a section of the Canada Evidence Act. Does that section have anything at all to do with the questioning of Pratico with respect to the statement he made in the hall the afternoon before he took the witness stand?

A. To explain that fully I think I have to explain the ways in which you get at the credibility of witnesses. There are two ways in which to challenge the credibility of witnesses, one is through cross-examination and the other is by bringing in another witness who says the first witness' testimony is wrong. In other words, that second situation would be the case if somebody was called to say that Pratico here was lying, for example. Now the difficulty is that in criminal trials the person who is on trial in -- is the accused and not witnesses so that there is a rule against bringing in

all sorts of other people to challenge a witness when the testimony is not relevant to the facts in issue, not relevant to the case; but only relevant to the credibility of the -- of that witness. So you couldn't have large numbers of people testify that Pratico is not credible if their testimony didn't relate at all to the events on the night in question of the murder. Now, so that gives us -- but nevertheless, we have two technics, the cross-examine technic -- cross-examination technic and the possibility of bringing in other witnesses. Now what Section 11 of the Canada Evidence Act deals with is -- is to allow other witnesses to challenge the -- the principal witness, if I can call him that, and -- under certain circumstances and that is where that witness under cross-examination gives a prior inconsistent statement and denies having made that prior inconsistent statement. You can bring in other witnesses to say, "Yes, the witness did made that statement". But you see that's creating a whole trial of the witness and the argument is that that's not necessary where the accused admits to having made that statement. And so that if the accused admits -- admits to having made the statement, you just carry on and can cross-examine fully.

Q. Let me bring it to the facts of this case. In the afternnon prior to his giving evidence, John Pratico in the hall and later in the barrister's room, is reported to have said to

Simon Khattar and then Sheriff MacKillop and then in the presence of Donald MacNeil and I think, Chief MacIntyre and Lewis Matheson; he said to all of them, "I did not see Donald Marshall stab Seale. And when I said that before, I was lying". Yeh, that's what happened. Now if Pratico went on the witness stand and denied saying that out in the hall and you wanted to call Sheriff MacKillop to prove that he did say it, that is what Section 11 provides for, isn't it?

A. Yes, that's right.

Q. It's got nothing at all to do with the questioning of Pratico?

A. No, and it -- it indeed is intended to allow the calling of those witnesses who heard the statement out in the hall in order to get around this restriction on those kinds of collateral witnesses or witnesses on collateral issues.

Q. But the judge used that section to say, "You're not allowed to examine Pratico other than with respect to the time, place, and manner in which he gave that statement". Isn't that correct?

A. That's right.

Q. And that's totally wrong?

A. The trial judge used this provision of the Canada Evidence Act to limit cross-examination.

Q. And that's wrong?

A. And this section has nothing to do with limiting cross-

examination. It has to do with allowing evidence to be brought in from other witness to -- other witnesses to impeach the person who's on the stand.

Q. Okay, now one of the questions that's arisen and it's not dealt with in your report and I'd like to have you comment -- comment on it if you would. Immediately Mr. Pratico was put on the witness stand. The Crown Prosecutor attempted to get into the evidence of what was said by Pratico the afternoon before and he was stopped by the trial judge.

A. Yes.

Q. Who told him, "I'm not interested in what happened yesterday. I want to hear about the night of the crime". Is that an improper ruling by the trial judge?

A. No, in my view, it is not. The trial judge -- the trial judge's duty is to ensure that evidence is given on the matters in issue from the witnesses. The trial judge took the view that he was not interested in what happened yesterday outside the courtroom; what he was interested in was what happened on May 28th, the night of the murder. That strikes me as being entirely proper. That -- that what-and that Mr. MacNeil ought to have presumably asked questions -- begun his questioning about the night in question. Now then, if Mr. MacNeil, however, was -- received answers, the same answer that happened -- that was given by Pratico outside the courtroom door, then Mr. MacNeil would

have been faced with a problem in the sense that he either has to believe that evidence, this new evidence, this statement consistent with the one outside the courtroom door or he has to say that there is some sort of inconsistency and perhaps get into the problem if he -- if he, Mr. MacNeil, believes the story that was given at the Preliminary Inquiry and the story that he had -- was building his case on; then he would have the opportunity to challenge Pratico perhaps by having him declared as an adverse witness. But it strikes me that what Mr. MacNeil was doing was trying to get around that problem and try to roll that process up into one by getting at what happened out in the courtroom first rather than getting a statement from the witness as to what happened on the night in question and then see if it was contrary to what was said outside the courtroom. You see, the statement made outside the courtroom, and here we come back to the hearsay rule, is in the eyes of some, hearsay. It's -- it's a statement made by a witness out in the hallway it has nothing to do with that witness's evidence as to -- of the events on the night in question.

Q. But the witness is on the witness stand?

A. Yeh, I know, and there's a great disagreement in among writers as to whether or not that kind of situation should come under the hearsay rule or not.

Q. I want to read to you some of the evidence that's been given

here at trial with respect to what took place in the hall and the intention of the various persons. First from the evidence of Lewis Matheson who was Co-Prosecutor with Donald MacNeil. And this is found on page 5002 of the evidence. And he's talking here, Professor Archibald, about the discussion with Pratico in the barristers' room where all of the counsel and Sergeant MacIntyre and the Sheriff were present. And he said:

> ...it was communicated to Pratico that he was -- that it was a very important matter, that we all realized he was young and that the burden -- that every -- the burden on him and what everybody expected of him was to tell the truth so far as he could recall it, and if he couldn't recall it to say nothing, and...to tell the truth. And there may have been a reference to perjury because I remember the last thing that was said in the room, Mr. MacNeil said, "About the perjury and about anything you've said before", he said, "forget about that; you don't have to worry about it".

Later Matheson said he questioned MacNeil on that. He said, "I hope you can made that stick because somebody else may -- may have different views on the question of perjury." And then Simon Khattar in his evidence, and I'm referring to page 4744, so -- this is a question:

> So you weren't able to ask him ---

And he answered:

> Any of the questions other than the

two statements that "Marshall didn't stab Seale", and "The statement is not true".

Q. You wouldn't have been able to say, for example, you told me (you being Pratico) you told me that Marshall didn't stab Seale?

A. That's right.

Q. And when you told the Court that you ...were lying? ...when you (Pratico) told the Court that you...were lying?

A. That's right.

Q. And that you (Pratico) never saw that at all? You weren't even in the park that night?

A. Right.

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

A. Those are questions which you -- that (you) would probably...put to him if I had been permitted.

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

And the answer was:

Yes, certainly.

And then from the evidence of John Pratico and this is found on page 2102:

I told my story that I gave to the police because I was afraid and I figured -- Well, if Mr. Khattar had went about it the right way and questioned me, the truth would have come out and we wouldn't be here today.

Q. Did you want to tell Mr. Khattar the truth?

A. Yes, sir.

Now that's evidence that you've not heard before and you wouldn't have had it when you made -- gave your Opinion. I want to direct you to page 29 where you give a conclusion with respect to the ruling on the Pratico matter. In your last sentence in the final paragraph of Pratico you say:

> Given that the trial rested on the credibility of witnesses, it cannot be said that this curtailment of the cross-examination and re-examination of John Pratico might not have contributed significantly to "a substantial wrong or miscarriage of justice".

Now given the evidence that I've just read to you, would you agree with this statement that it is, in fact, an inescapable conclusion:

> that this curtailment of the cross-examination and re-examination of John Pratico ...contributed...

directly to the conviction of Donald Marshall, Junior, and that it was

> "a substantial wrong or miscarriage of justice".?

A. Well, I think that in the -- with regard to the kinds of standards which we've mentioned employed by Courts of Appeal, in relation to criminal matters, that the Court of Appeal before whom this matter had been raised would inevitably have had to grant a new trial on the basis that there had been an erroneous ruling and it could not be said that there was no possibility that this did not lead to a substantial wrong or a miscarriage of justice --

Q. Given that --

A. -- so that there's a low threshold as a test for whether or not the matter should be -- conviction should be confirmed or not.

Q. Given that Mr. Pratico wanted to tell the truth and given that Simon Khattar wanted to ask him questions that supposedly would have elicited the truth: that he didn't see Marshall stab Seale, isn't it just an inescapable conclusion that that wrong ruling by the judge which prohibited that evidence from being called lead directly to the conviction?

A. No, I think there's no question that it was -- significantly contributed to the conviction, Yeh.

Q. Thank you. When you read this transcript did it not just jump out at you that this is a wrong application of section 11 of the criminal -- of the Canada Evidence Act? It's not buried, it jumps out at you.

A. I think that one can say that as you read through it it's

clear that section 11 of the Canada Evidence Act is being applied in a matter for which it was not intended, for a purpose for which it was not intended.

Q. Would you classify this as a serious blunder?

A. It's clearly an erroneous ruling on a matter of evidentiary law and I've stated that I think it significantly contributed to the wrongful conviction.

Q. Why wouldn't that be commented on or dealt with by the Appeal Court?

A. An Appeal Court just as a Trial Court operates on the basis of an adversarial system. Just as a Trial Court has a duty to ensure in criminal matters that the adversarial system does not -- operates properly and does not lead to injustice so I think an Appeal Court has to be aware of that kind of problem so that certainly an Appeal Court could comment on such a matter, that there had been an erroneous ruling but I think that quite rightly there is a reticence of Appeal Courts to decide cases on the basis of issues which are not argued before them or which are not found in the grounds for appeal and my reading of the appeal decision from the Appeal Division of the Supreme Court of Nova Scotia would lead me to the conclusion that this matter was not raised on appeal and faced with that kind of situation, in fact there is some authority to say that the courts have a not to hear matters which are not raised in the grounds of appeal.

Now it would be, I would think, in situations where an obvious injustice would result in a court -- court would not do that. But it seems to me quite normal for a court to say: here is an error made but I -- it was not argued by counsel on the appeal. I guess the error can't be significant in the eyes of counsel for the Appeal. Now, on the other hand if the matter were thought to be significant an Appeal Court has the discretion to allow new evidence to be heard so that more evidence could have been taken on appeal if the matter were thought to have be significant.

Q. Okay.

BY COMMISSIONER POITRAS:

Q. I just have one question, if I may. On the premise that the exclusion of this testimony significantly contributed to the wrongful conviction of the accused was there an obligation on the part of anybody to draw this to the attention of the Court of Appeal?

A. My view would be that it's certainly the obligation of defense counsel and it would be my view that it is also the obligation of crown counsel.

BY MR. CHAIRMAN:

Q. May I take that a step further? Given the fact that defense counsel and counsel for the Crown did not draw it to the attention of the Court of Appeal and given the fact that the exclusion of this evidence, even in the kindest words, may have

contributed to the wrongful conviction of the accused. Do you-- don't you feel it is then -- would be an obligation on the Court of Appeal to go, not simply to comment on it, but to allow the Appeal and set aside the conviction --

COMMISSIONER EVANS:

And direct a new trial.

BY MR. CHAIRMAN:

and -- that's right -- and direct an new trial?

A. Certainly it would be within the discretion of the Court of Appeal to do that and I would view it as an appropriate exercise of discretion. I would say it's the right thing to do. I -- But insofar as the matter was not argued, no factual matters were, as I understand it, brought to the attention of the Court of Appeal to suggest that the testimony from the eye witnesses was -- had been obtained in improper ways then I hesitate to say that there is a duty on the part of the Court of Appeal to do that. It certainly is within their discretion and I would think it a proper exercise of discretion but when the parties have not raised it I'm reluctant to call it a duty.

BY COMMISSIONER EVANS:

Q. Professor, we're dealing with a murder trial.

A. Yes.

Q. And even if the matter is not argued before the Court of Appeal and not raised in the factum, that does not foreclose,

I suggest to you, the right of the Court of Appeal to review the matter.

A. I agree with that and I think I've stated that.

Q. What we are differing in --

A. Yes.

Q. -- is whether there is a duty about it?

A. That's right.

Q. But if in reading the transcript and there are two or three serious rulings -- evidentiary rulings and if they practically jump out at you would that not change the right to a duty? I'm assuming when they read it, they couldn't miss it or shouldn't miss it.

A. Look, I think that there may have been, what I would call, a moral duty for the Court of Appeal to so that. I think that the Court of Appeal should have done that. I think it was wrong for the Court of Appeal not to have done that but I'm not willing to say that there is a legal duty that they have to even though the matter has not been thought to be significant by -- I guess I -- The adversarial system is in there as important in my view.

Q. Adversarial system, I grant you that it's very important, but there is an overriding duty too, isn't there?

A. Yes.

Q. And the more serious a case, I suppose, the more serious one has to look at the matter.

A. And the question would be just as the trial judge has the discretion to call a witness where there is some matter which is clearly problematic and it hasn't been raised by crown or defense counsel it may be that the Court of Appeal could have exercised the discretion to hear evidence on this issue.

Q. Yes.

A. Or send it back for a new trial, either one and I would argue should have.

Q. Both of those options were available?

A. Yes. I mean it would be my opinion that they should have. I --

Q. They should not?

A. They should have.

Q. Should have.

A. Yes.

BY MR. CHAIRMAN:

Q. Are you imposing a heavier duty on a trial judge than on the Appeal of Courts on a case of this kind because you've suggested that if a -- that a trial judge should exclude evidence that's clearly prejudicial to an accused even though crown counsel and counsel for the accused doesn't object. Why shouldn't that same responsibility apply to a Court of Appeal?

A. I think perhaps it should. The question is I'm not convinced that it does on the basis of the law but I think it should.

BY COMMISSIONER EVANS:

Q. If for no other reason and there are at least three of them

instead of one.

A. Yes.

MR. CHAIRMAN:

Numbers --

COMMISSIONER EVANS:

Sometimes count.

MR. CHAIRMAN:

Yes, I suppose.

BY MR. MacDONALD:

Q. Professor Archibald, just to finish up sir; you have made a couple of recommendations in your report. For the consideration of the Commission would you just like to summerize what those are, please, and why you were making those recommendations?

A. Well, as you read the transcript of this trial, it seems -- it seemed to me as I read it that this is a dramatic illustration of the need for the reform and the clarification of the law of evidence in this country. We have three experienced lawyers who are obviously unclear about important doctrines in the law of evidence. We know that the Law Reform Commission of Canada has stated that there is a need for what they call available, clear and flexible evidentiary rules. We know that there has been a Federal/ Provincial Task Force into the law of evidence following upon Law Reform Commission reports. We know that as a result of a long process of public debate

and public consultation there is available now a text of a uniform evidence act which is the result of the work of not only the Department of Justice but activities or representatio from Provincial Ministers of Justice. I think it's important that the law of evidence be simplified so that it can be understood and applied not just by the cream of ligation counsel, not just by the high-flyers, the people who are the specialists but by people who are lawyers trying to do their best for clients in the trenches and I don't think that the law of evidence as it stands serves that purpose and I think that the Commission could properly within it's mandate recommend that the efforts of those involved in putting forward this uniform evidence legislation be brought to fruition. In other words, that the federal government ought to adopt the uniform act for use in federal matters, including criminal trials and the provincial government ought to adopt it for use in provincial matters so that we would have a unified and simplified law of evidence which can be understood and operated by the ordinary lawyers of this country, the lawyers to whom most people go when they seek legal advise.

MR. MacDONALD:

Thank you.

BY COMMISSIONER EVANS:

Q. Professor, are you referring to the proposed evidence act

that was -- came out of the Dominion Law Reform Commission when Mr. Justice Hart was chairman?

A. No, I'm not referring to the Law Reform Commissions code. I'm referring to the Uniform Evidence Act which followed consultations, and -- It was originally introduced as Bill S-33 and then went through a process of public consultation with representatives of the federal government, provincial governments and the Canadian Bar Association. And it strikes me that we've spent literally hundreds of thousands of dollars, I should think, in this country trying to come with a workable reform of evidence. We've got something which may be less then perfect in the eyes of many but a great improvement on the present law and I think it would be appropriate for the Commission to advocate it's adoption.

BY MR. CHAIRMAN:

Q. Just before we recess, there is one thing I want to bring out if I may before I forget to. If you would turn to volume one page 194 Professor Archibald? You see where what you referred to as the capitulation by Mr. Khattar to the ruling of the trial judge. May I direct your attention to what flows there immediately thereafter. Questions by the Court.

A. Yes.

Q. Did you -- Does that leave any impression with you as to possibly raising an extraneous issue that again might be prejudicial to the accused?

A. It does not, in formal terms, raise any problems but it does in terms of the impression left. This is the kind of matter which I think is properly explored in cross-examination and would have been properly explored by counsel in cross-examination. However when it is -- when the Court has limited cross-examination and then engages in those kinds of issues subsequently it--and particularly in the kinds of questions asked which may leave the impression that there was some impropriety on the part of Donald Marshall Senior, for example. I think it's unfortunate that those questions were not asked, as they should have been, by counsel but they were asked by the Court. But in and out of themselves I don't think that they are wrong questions because they go to the credibility of Pratico and they're the kind of questions that should or can be asked in a criminal court.

Q. Except for one fact, that originally counsel for the Crown had attempted to introduce evidence as it related to what had transpired in the corridor of the court house the day before and was not allowed --

A. Yes.

Q. -- so to do but the jury had heard something about it.

A. Yes.

Q. This seems to me that to leave a jury with the inevitable conclusion that whatever it was that they were not permitted to hear, that that evidence had been obtained as a result of

undue pressure being brought upon this witness.

A. That's right.

Q. By counsel -- by the father of the accused?

A. Yes. Yes, I agree with that and I think I mentioned that in my written opinion. It didn't come out in our discussion today but that -- that is my view.

Q. All right.

A. But it's because of the, in a sense, the failure of the judge to allow the play of the adversarial process to get that kind of -- all of the evidence, pro and con, out on the table on that issue that those questions are improper, in my view. They're not improper in or of themselves but they become improper in the context because of the limitation of the give and play on cross-examination and re-examination which proceeded them.

MR. CHAIRMAN:

All right. We'll take a short recess.

INQUIRY ADJOURNED: 11:16 a.m.

INQUIRY RECONVENED AT 11:33 a.m.

BY MR. RUBY:

Q. Professor Archibald, let me thank you first of all for your thoughtful and very interesting opinion which I've enjoyed very much and I know you put a great deal of work into it and I want to just indicate that at the outset that I very much enjoyed it. One of the things you didn't do, and I gather

it's because at page one of -- If you look at page one on the first paragraph you, line four, you say:

> ...I review the transcript of the trial in order to comment on the various rulings on evidentiary points and also on objections which might have been made but were not.

You don't appear to have spent a substantial time looking at, or any time for that matter, the address to the jury by Mr. MacNeil. I'm wondering --

A. That's correct.

Q. It's unfair to ask you questions about it since instant opinions are what trial counsel get paid for but not for Professor's of Law.

MR. RUBY:

I was wondering whether I can get some guidance from the Commission. I have some questions about that. I could put them on record now so that they're here or I can give them in a letter to Commission counsel or but some point I should be able to raise this. Maybe something should come in argument at the end. I'm not sure of how you want to deal with it.

MR. CHAIRMAN:

Well, maybe you can submit them to Commission counsel and if appropriate they in turn could refer them to Professor Archibald.

MR. RUBY:

That sounds like a fair way of doing it.

MR. CHAIRMAN:

He's doing a great deal of research for the Commission in other areas of criminal law.

BY MR. RUBY:

Q. The other question I had was that you said that you didn't examine the judgement of the Court of Appeal?

A. It was -- No. I looked at it in order to have a better rounded sense of what had occurred but I did not -- I was not asked and did not do a critical analysis of the Court of Appeal decision.

Q. Okay. We've not general been respecters of persons here be they judges of the Court of Appeal or anything else. Have you formed a view on whether or not that judgement is full of errors or that it's correct judgement or otherwise or have you just not looked at it?

A. Other than the matters which we discussed here I -- my general sense was that in relation to the matters raised the issues were dealt properly by the Court of Appeal. The difficulty was that these significant issues which we discussed this morning were not raised in argument by counsel or by the Court of Appeal in it's decision.

MR. RUBY:

If I might make a suggestion to the Commission at this point. It would seem to me that we ought not to be excluding from purview the rulings of the appellate judges anymore than we

excluded the trial judge because of their correctness.

BY MR. RUBY:

Q. I don't wish to raise anything with you now but perhaps you might be good enough to take a look at that and let us know whether or not you have any considered opinion on the correctness of that judgement on the issues raised and dealt with there.

MR.RUBY:

Would that be acceptable to you?

MR. MacDONALD:

Well, My Lords, I'm subject to your direction, I didn't consider that the Appeal Court made any rulings as such on evidence or whatever. They have filed the decision and I have always taken it as accepted, that once their decision is filed and if you don't appeal it and that would be a burden on somebody who filed the appeal as opposed to what I did ask Mr. Archibald to do, to look at actual rulings that were made in the course the trial and perhaps could have been raised and were not. I'm quite happy to do whatever you direct me to do but I don't know that that solves or serves any useful purpose to have a critical analysis of the actual decision of the Appeal Court but I'm open to --

MR. RUBY:

Perhaps the best thing for me to do is now that I've raised the -- let me think about it over lunch hour and we'll come back at it.

MR. CHAIRMAN:

But also it may be a matter, Mr. Ruby, that you would -- that you may decide to at least seek to raise in argument and it would be an unusual position for us to be in and to review the decision of the Court of Appeal.

MR. RUBY:

True. But in any event, now, let me just -- now that I've heard Commission counsel's position, indicate that I would like some time to think about it and I will come back on the matter again at a later time.

BY MR. RUBY:

Q. At page five of your judgement-- you judgement -- your opinion, in the middle of the page you site the "Wray" case in the rule on "Wray". See that passage?

A. Yes.

Q. You don't make clear that the 'Wray' rule only applies to evidence offered by the Crown and that there is no such discretion for defense evidence. Do you agree with that?

COMMISSIONER EVANS:

Would you go over that again?

BY MR. RUBY:

Q. That the rule on "Wray" limits the Crown and it's a rule of exclusion that can be applied to crown evidence but cannot be applied to evidence offered by the defense. You cannot exclude defense evidence on the ground that its probative value,

though real, is trifling.

A. That would --

Q. Justice Govern in the Court of Appeal.

A. As a matter of principle I think you're correct on that I've never thought of the "Wray" case in that way but I think you must be right on it but --

Q. I've forgotten the name of the case but Justice Govern wrote a judgement to that effect in the Court of Appeal about 5 years ago, but "Wray" itself only applies in its terms to Crown evidence obviously. The limiting instruction rule that you talked about where a judge says, look this is admissible for this purpose and you can consider it for that purpose but you mustn't consider it for another. Would you agree with me when I suggest broadly that that's largely of fiction, that juries in fact don't follow such instruction?

A. I guess I wouldn't. I don't know the answer to that question. I have been told by some people who have experience with jury trials and seem to have somehow broken the secrecy of supposed secrecy of jury deliberations that some juries in fact do make those kinds of distinctions but I think it's the general opinion by large numbers of the legal profession that these limiting instructions are not effective.

Q. Are there not American studies to that effect, criminological studies?

A. I believe there are, yes.

Q. Now the more damning the prejudice created by the evidence the less likely a jury is to follow a limiting instruction?

A. That seems on the face of it to have some validity but I'm not aware of the precise studies that would make that statement in that way.

Q. Are you familiar with the rule of evidence that any rule of evidence which would prevent the defense from adducing material which, if not adduced would work an injustice to the accused in a criminal trial are to be relaxed, not waived but relaxed? Are you familiar with that rule?

A. State the rule again. What is it?

Q. Certainly. That if the exclusionary rules would prevent the accused from raising a matter which would, if you were prevented, cause him substantial injustice; that the rule of evidence permits that rule to be relaxed, not waived but relaxed in order to allow the accused to bring forward a matter which might tend to show that he was innocent?

A. I guess I'd have to say that I'm not aware of that as a particular rule. It sounds like the kind of practise which may occur.

Q. All right. You focused at one point about Mr. MacNeil being prevented from telling the jury at the outset that Pratico had told a different story. As I read the passage of the judge's instruction there what he was telling him was; I wanted to hear first about the night and then later if you want to, you can bring out this. Is that your

understanding as well?

A. That would be my understanding of how the matter should be carried out. Now, I don't -- My reading of the transcript is -- perhaps I don't draw that inference but that would be consistent with what ought to be done in the circumstances. Perhaps we can look at that --

Q. I thought that's what was done?

A. -- passage.

Q. Can you remember Mr. --

COMMISSIONER POITRAS:

Yes, page 156 and the Court says, "That may come later."

BY MR. RUBY:

Q. That's what I thought was happening.

A. Yeh.

Q. I'll give you a moment to find that. Can you find that passage?

A. What is the little number up in the corner there? 119? Okay, yes, at line 31. I think that your inference from that statement is a reasonable one.

Q. Okay, and I think I'd be fair in suggesting to you that while now judges are more restricted in dictating the order of evidence that is to be called; in those days judges at trial were much more free about telling counsel how they were to present their case. Is that fair? In terms of the order of evidence, not what evidence to lead.

A. I'm in no position to make a judgement on that, Mr. Ruby.

Q. All right.

MR. CHAIRMAN:

Would you refer to the last paragraph?

COMMISSIONER EVANS:

Mr. Ruby, on page 156 to which you were referring a few minutes ago, the last paragraph also indicates that -- well, the Court said:

> That may come later. I don't know. I think, Mr. MacNeil, for the moment you better confine yourself to the evidence concerning the events on May 28, 1971.

MR. RUBY:

Yes, he's directing the order of evidence.

COMMISSIONER EVANS:

> Then later if for any good reason you have for bringing up the events of today, we will go into it.

BY MR. RUBY:

Q. And to be fair to Mr. MacNeil --

A. But that -- that surely -- Now if that's what you are raising, if that's the point you are trying to make (Pardon me, I don't mean to be critical.) then, I think that it's more than a practice of directing when evidence would be admissible and when it would not be. It strikes me that the evidence of what was said yesterday may be argued to be inadmissible. It's not just a question of ordering the presentation of the evidence. What was said yesterday may be inadmissible until there is some question of getting from the witness the direct testimony about the events.

Q. And I heard you as treating that passage as being a direction to that effect and discussing whether it was appropriate.

A. Yes.

Q. But I'm just simply drawing attention that that doesn't appear to be what happened. No, Mr. MacNeil understood. He seemed to understand, as I read it, that he could raise it later. He was merely directing the order of evidence and not the admissibility of it.

A. Well, it -- it seems to me that the outcome here ought to be that if evidence is given by Pratico, as in fact it was which is inconsistent with the statements made outside the court room, that puts Mr. MacNeil in the position where he has a dilemma and he has what one might call to be an ethical problem.

If he believes the evidence which was -- the statements made outside, then surely he's faced with an adverse witness, and ought to bring before the Court some sort of testimony from the others who heard the statement and ensure that what he believes to be the right evidence comes out. On the other hand if he does not believe what -- the statement made by the witness out in the hallway, then one can say that it falls to defense counsel to raise that as a matter of the credibility of the witness.

Q. But to be fair to Mr. MacNeil, let me raise a third alternative which is that he might say as many Crown counsel I suggest would; "Look, I'm not here to judge the truthfulness of Pratico. That's the jury's job. My job is to make sure that this jury knows what went on in that hallway and he might well have chosen (Would you agree with me?) the order of evidence that he did; that is, first the hall statement and then the substantive events so the jury would know when they heard the account of what happened that night that this was a man who had just recently said it wasn't true, if he decided to give that account. And so he's being really fair here. He wants the jury to have all the information he has right at the beginning so that when they hear the substantive account, they can evaluate it properly. And since counsel for the defense seems to concur on that proposal, there would not seem to be any bar to doing it that way. Would you agree?

A. I would think if counsel agree that it could be done that way, yeh.

Q. All right. There's a maxim in evidence and I'm coming back to the question of the duty on appellate courts or indeed any court to prevent a miscarriage of justice; I'm going to act in a way that sees that no miscarriage of justice is taking place in the court. The maxim, ex debito justiciae, and would you agree with me that that has been used (I can think of a case that I argued.) to see a relaxation of limiting rules on time, time limits, to extend the time within which appeal can be brought, to permit fresh evidence to be called when the ordinary rules of fresh evidence would not permit the evidence to be adduced. The ex debito justiciae principle as a matter of a debt owing by the justice system is used to relax various rules that might operate against an accused in a criminal trial.

A. I think that's true.

Q. It does not however appear to have been a rule that's applied at the trial or appellate level in this case.

A. No, that's right.

Q. You're quite -- excuse me just a moment, My Lords. At page 21 you make a statement that I want to challenge if I may, about one-quarter of the way down page 21:

> In the trial of Mr. Marshall, the presiding judge was faced with the relatively rare circumstance of ruling on the admissibility of a question which would elicit an answer barred by the hearsay rule if offered for the truth of its contents, but

justifiable if accepted as a challenge to an important Crown witness who had yet to testify.

With respect, isn't that really a rather common place occurrence, occurring every day across this Country in criminal trials?

A. It's not as common as challenging the witness who is there. It seems to me that it's -- the statistically more prevalent situation is you're challenging the credibility of the witness who's on the stand and probably most easily a witness who has already testified but when you're challenging the credibility of somebody who is yet to testify, you -- that's the situation which I guess is governed by the joint sense of trial tactics, the understanding that the Crown is going to call that witness. You know that to be the case.

Q. Doesn't that happen every day?

A. I think it does, yes.

Q. So it's not rare. I just inviting you to take back the word "rare".

A. I see that "rare" may be an over-statement but it certainly it's not as prevalent as challenging the witness who is there or the witness who has already testified. That's what I meant by the statement or the word "rare". I can see it has connotations which you perhaps rightly reject.

Q. Thank you. The suggestion is made at page 23 among other places, just about the half-way mark, that Mr. Rosenblum seems to have concurred in the hearsay ruling or the creation

of the new rule about the presence of the accused being required for statements being admissible; the out-of-court statements. Is it not fairer to say that Mr. Khattar and Mr. Rosenblum having argued correctly the law in each of these instances and having been over-ruled in each of these instances whereby our law required to accept the ruling of the trial judge or bound by it as we use the phrase, and had to insist that it be applied fairly throughout the trial?

A. It seems to me that the word "acquiesced" may be one which I could have used and would perhaps describe more accurately the general tenor of what occurred but they did invoke the rule in their favour; at least, Mr. Khattar did.

Q. And they would have been remiss, would they not, had they failed to do so on behalf of an accused once the trial judge had made his ruling clear?

A. That's an interesting question.

Q. Okay. The -- Let me just tell you, trial judges get very angry when you keep on making the same objection again, and again, and again.

A. Oh, in practical terms there's no doubt that, you know, if you keep on making the same objection again and again you may get yourself in trouble in pratical terms, yeh.

MR. CHAIRMAN:

I take we are entitled to assume, or I am, that the practice in Ontario is that in a criminal trial when a -- if early in a trial,

the trial judge makes a ruling and counsel for the accused accepts it without further comment.

MR. RUBY:

That's correct unless there's something new that you wish to argue that you haven't already raised and think Justice Evans will confirm that -- that well as to rules --

COMMISSIONER EVANS:

I was going to.

MR. RUBY:

-- they have been breached from time to time.

COMMISSIONER EVANS:

Breached. Occasionally is.

BY THE WITNESS:

You notice, however, that Mr. MacNeil did not do that. He did not acquiesce --

BY MR. RUBY:

Q. No, Mr. MacNeil was not very good at that sort of --

A. -- in rulings against him on these matters.

Q. The point that I'm making I suppose is here that of the three parties, the judge, defense counsel, and crown counsel, you said that all three of them seem to have misapprehensions about the law of evidence and really it's not fair. Mr. Khattar and Mr. Rosenblum don't ever where -- anywhere betray a misunderstanding of the law of evidence other than acquiescence to rulings already given. It's the crown

prosecutor and the judge who share this erroneous view of the evidence.

A. Well, it's -- I -- in part perhaps that's an inference that I draw and perhaps this is unfair and goes beyond what I say I have done in the opinion and that is the failure to raise these issues on appeal.

Q. Yes.

A. And it seems -- And I guess I draw from that that they must have agreed with the rulings or thought them insignificant.

Q. Let me take you up on that. Defense counsel quite often look at a case and say, "Well, you know, I was right about this evidentiary ruling but I'm not going to get past the no-substantial wrong hurdle on this." And courts of appeal then and as now were very free with that proviso. I think you'll agree with that? Yes?

A. Yes, "the patch", it's called.

Q. The patch. Could not a court of appeal have very easily said in this case and could not defense counsel have thought (I don't know if they did or didn't.) yes, there was an error of law here, (but not knowing what we now know about the false evidence and the perjury), but Chant wasn't successfully attacked. He was an eye witness. The defense evidence was contradicted by Miss Harriss as to how many people there were. Quite clearly the jury would not have come to any other conclusion because the evidence apart from that of Mr. Pratico

for example was overwhelming. You heard that line -- that line of reasoning in a number of cases. Do you agree that it might have been applied here by the court of appeal?

A. It's a matter of speculation but I certainly wouldn't exclude it.

MR. CHAIRMAN:

While you're still on that page, Mr. Ruby, maybe Professor Archibald would let us have the benefit of his -- an expansion of his views on that -- on the evidence, the examination -- the re-direct examination of Mr. MacNeil who seemed to me to be embarking, albeit somewhat limited,upon a line of examination that would go to the credibility of Chant, and then Mr. Rosenblum intervened and seemed to object to that line of questioning.

MR. RUBY:

Yes.

BY MR. CHAIRMAN:

Q. I'm not sure that my interpretation is correct but you --

A. See, I would say that is the -- yeh, that's the interpretation that I make of that passage as well. And in the context it seems understandable in that Mr. Rosenblum has just had his cross-examination limited and now there's full scope given to the re-examination and in a sense of fair-play would say; "Well if you're going to limit the cross-examination, shouldn't you limit the re-examination as well?" The problem of course is that one shouldn't have limited the cross-examination in

the first place.

Q. But the re-examination seemed to be heading in the direction that Mr. Rosenblum had attempted to achieve on cross-examination.

A. Exactly, that's right. Yes, I agree with that and so that I think it's a problem because I think I point that out in a brief paragraph later on that -- Yes, on page 28. You see where I say on that first paragraph after the citation from the transcript:

> The reasoning is flawed. It begins from the premise that Mr. Khattar had exercised a "right to bring out the inconsistent statement"...

for which he did but in a limited way. He was only able to bring out the fact that the statement had been made but not to explore the reasons why it had been made and the facts behind it because cross-examination had been improperly limited on that one. Then it goes on, you see:

> ...to declare inadmissible out of court conversation which might explain the motive for making the prior inconsistent statement, on...(this)...incorrect interpretation of the hearsay rule...

or what we've begun to call here today the "non-rule" on the hearsay problem, and it adopts the, you know, the fact that the accused is not present as the basis, (the rationale) for the rule which is equally wrong. And after having done all that, then it accords Crown counsel his full right of re-examination which normally would be proper but seems unfair in the context given the restriction on cross-examination.

BY COMMISSIONER EVANS:

Q. Having shut the door for the defense, he now opens it on the re-examination.

A. Exactly, yes.

Q. And that's the unfair part of it.

A. Yes.

BY MR. RUBY:

Q. Let me deal with the area of hearsay evidence first of all. The hearsay rule, I think you'll agree, has a number of exotic exceptions.

A. Yes.

Q. And as I remember you spend a month or two of those or so in law school learning these rule and its exceptions.

A. About six weeks in my course on evidence, yes.

Q. And students have difficulty with them because they're a bit arcane. But the hearsay rule itself is very simple. Not the exceptions but the rule.

A. The rule -- the statement of the rule is simple. The application in fact as I think I mention that in the book Phipson, which was -- which the trial judge used, there is a definition of the hearsay rule and right after the passage cited by the judge, there is the statement that the most significant problem with the hearsay rule is understanding what is hearsay and what is not. That is the problem that the court had here, that counsel were wrestling with here, and

it's that passage which was omitted in the judge's citation of it and I thought that was significant perhaps.

Q. The purpose of codification is to set out the rules clearly; correct?

A. Yes.

Q. And you'll agree with me that the rule itself is clear. It's the application of it that's difficult. Correct?

A. By and large that's true.

Q. Then codification, it follows logically, would not assist the problems of this trial where the problem was not with the rule itself but with the application of it.

A. Well, that's a matter of judgement and I guess I would disagree to the extent that the various proposed codifications that we've seen have attempted to state the law of hearsay and its exceptions in one convenient statutory area. Instead of having to scurry through hundreds and hundreds of cases to learn the law, there you have it on a page. You can figure it out and in a sense you're not scared of it and this is -- this is what -- and here we're draw -- we're speculating or I'm speculating even more. My sense of it is that the whole hearsay area was one which the court dealt with in a kind of global way. Any time there was an out-of-court statement, it was hearsay and sort of took a hands-off attitude whenever there was an out-of-court statement on because they were afraid it might be hearsay. I think that arises not only from the definition/

application problem but from the complexity of the whole area of law including not only the definition and application of hearsay but its exceptions and how they are applied as well.

Q. But the problem is that none of the exceptions were relevant here.

A. Oh, that's -- yes.

Q. All you needed was the simple basic rule that any person could understand who reads and understands English, especially after your six weeks in law school.

A. Well, but -- But this is why I here again engage in some degree of speculation about the possible origins of Mr. MacNeil's "non-rule" and it seems to me that the "non-rule" arises out of a twisting of certain exceptions to the hearsay rule. And for example, the case of "Christie" which you're probably familiar with, --

Q. Yes.

A. -- the notion of adoptive admissions, for example, statements made in the presence of an accused which are not denied are said to be his or her statements and can be attributed to the accused because they're admissions which are adopted, it is said. Now --

Q. But the point I'm making is this is that Mr. MacNeil understood the rule that he thought he was applying, if it was the "Christie" rule. The rule was clear in his mind. He just didn't know where to apply it. The problems here are problems

of application, not of lack of clarity in the statment of the rules. And codification, I put it to you, is a solution not for problems of application but for problems in not understanding the rules clearly.

A. No, the problem here is not merely the question of application. It was a question of understanding the rule, figuring out what the rule was and applying it. I mean the "non-rule" --

Q. As you would apply it.

A. The "non-rule" was not a rule but it was the one that was applied if I can put it that way.

Q. Okay.

A. I realize that may sound a little silly but it's a question of knowing the rules and applying them. It's not a question of clear rules that were improperly applied in my view.

Q. This judge had the benefit of Phipson which is a leading textbook on the law of evidence.

A. At the time it certainly would have been viewed as the leading textbook on the law of evidence, yes.

Q. I meant a leading textbook and certainly then it was a leading textbook as well.

A. Yeh

Q. And it contains clear statements of these rules. Do you agree?

A. Yes, I do.

Q. It's a well-written text.

A. It contains clear statements of the rule, yes.

Q. If you codify the rules, aren't you really just doing what Phipson has already done for you? Set them out clearly in language that anyone can understand? And why would codification help you beyond the work of that learned text writer or anyone of a dozen other texts you could have chosen?

A. I shouldn't argue with you, Mr. Ruby. I mean it seems to me --

Q. I'm inviting it so feel free.

A. -- that this -- This is a misapprehension that the -- The Attorney General of Ontario seems to me to be in the same camp as you on this --

Q. I think we're together.

A. -- issue and that is that really codification and reform of the law is not really necessary. The rules are really there to be found in the books and people can apply them without any difficulty if they just, you know, apply themselves and learn the rules. I just think that's not true. I think that it may be that you can apply the rules and it may be that many of the leading counsel in this Province can apply the rules but I think there are large numbers of lawyers who have difficulty with law of evidence because it's so complex and would benefit from a codification.

Q. But if these lawyers and this judge were too stupid to understand the language of Phipson, why would they be better off with a codification? The language is exactly the same.

A. No, it's not exaclty the same. I -- and you will recall that

I did not agree that I thought that Phipson was a well-written text. I think --

Q. Or another text that you choose.

A. -- that a codification would improve significantly over Phipson.

Q. And yet in the case of Section 11 of the Canada Evidence Act -- First of all you agree with me that that is a codification of the common law?

A. Yes.

Q. It's precisely what you're calling for as a solution to this kind of problem, yes, a codification for common law?

A. What one has in the Canada Evidence Act and the problem with the present Canada Evidence Act, it is a partial codification of the common law.

Q. Is --

A. So what one has is the codification of an exception to the rule but not the codification of the rule itself so that it's -- it seems to me that there is no general statement in the Canada Evidence Act of the scope of cross-examination but I --

Q. The scope of cross-examination as you stated it was you can cross-examine on anything that's relevant.

A. That's right.

Q. All you need are the exceptions. The rule itself is simple beyond belief.

A. But the uniform evidence act provision which I cite in my recommendation at the end, cites the general rule and then is

followed in the text by the exceptions and it strikes me that when you set out the full law that people are less likely to make mistakes than when you highlight in a Statute the exceptions but don't talk about the general rule.

Q. You'll agree with me that the partial codification that was used in this trial, Section 11 of the Canada Evidence Act, was of no assistance in getting the law straight in this case.

A. It was positively misleading in the way in which it was applied by the judge. I'm not saying the Statute is misleading but the way it was applied.

Q. Yes, and --

MR. RUBY:

I've done as well as I can do?

MR. CHAIRMAN:

One thing you've done is you've answered a question that I'm sure is puzzling Mr. Archibald as to why it is whenever recommendations come from uniform -- the uniformity commission and others for great improvements in the law that the objections to it always seems to come from Upper Canada.

MR. RUBY:

I must say that I was, and I think Justice Evans was -- I think we were both at the meetings, the consultations in Ontario about the proposed Canada Evidence Act reviews, and I recollect there was one judge and one judge only who thought they were a good idea and one lawyer -- and no lawyers at all who thought that.

COMMISSIONER EVANS:

I think they may have changed their minds, some of them, now. They learn, but slowly.

MR. RUBY:

You've been very patient with me, Chief Justice, and thank you, Mr. Archibald.

MR. PUGSLEY:

I have no questions, My Lord, thank you.

MR. MURRAY:

No questions, My Lord.

MR. ELMAN:

I had several questions but I don't think I have any any more.

BY MR. SAUNDERS:

Q. Only one area, Professor Archibald, and that is with respect to the -- The only area I have a question for you, Professor Archibald, is with respect to the drawing of the Court of Appeals attention to the fact that John Pratico had given inconsistent statements in the corridor compared to what he had said both at the preliminary hearing and at the trial. We

do not have a transcript of the arguments made by Mr. Rosenblum and Mr. Veniot in the Court of Appeal in 1972; so we have nothing with which to refer as to the thoroughness of the arguments presented. In preparing your opinion, Professor, did you have regard to the Crown factum filed by Mr. Veniot on behalf of the Attorney General's Office?

A. No, I did not.

Q. You did not?

A. No.

Q. I would refer you, sir, to Volume 2 of the evidence at page 155, and this, Professor Archibald, is the factum filed by Crown counsel and the argument of the appeal before the Court of Appeal in 1972, and I draw your attention to the second-to-last paragraph at page 155 in the factum and in particular the statement:

> There followed immediately an accurate summary of the evidence on cross examination...

A. Hold it.

> ...bringing to the attention of the jury...

Are you with me?

A. I am not with you on this.

Q. Okay. Page 155 --

A. Yeh. In Volume 2?

Q. Volume 2.

A. Yeh, okay. What line?

Q. The sentence that begins:

> There followed immediately...

A. Oh, yes, here we go.

Q. Yes.

A. Okay.

Q. You're with me now?

A. Yes, sir.

Q. All right.

> There followed immediately an accurate summary of the evidence on cross examination, bringing to the attention of the jury the condition of the witness at the material times...

And this is the portion I draw your attention to:

> ...his statements subsequent to the event, some of which were inconsistent with his testimony before the Court, and the necessity for jury to come to their own decision with respect to the credibility of the witness.

And I take it, sir, that you have not seen that comment by the Crown in the factum filed with the Court of Appeal before today?

A. That's correct.

Q. And it's obvious from the written record that I've just put to you that certainly Crown counsel in the factum addressed that bit of evidence in its written submission to the Court of

Appeal, correct?

A. Yes.

Q. All right. Thank you, Professor.

A. Well, it depends on what the "that" is. It doesn't --

MR. CHAIRMAN:

Yes, but if you would only look at first sentence in that paragraph.

MR. SAUNDERS:

Yes, My Lord.

MR. CHAIRMAN:

Maybe --

THE WITNESS:

It doesn't -- It seems to me it doesn't identify the various statements made by Pratico after the event. There are a number of statements to which that could refer.

BY MR. SAUNDERS:

Q. Precisely. And -- But at least -- would you agree with me that the record discloses that the attention of the Court of Appeal was drawn to the fact that there were a number of statements given by Pratico? Because you will see that in the factum:

> ...his statements subsequent to the event, some of which were inconsistent with his testimony before the Court...

So I suggest to you that that is at least a written indication by Crown counsel to the Court of Appeal that there were inconsistent statements made by the witness, Pratico.

A. It's that.

Q. Pardon me?

A. It's that.

Q. It is that?

MR. CHAIRMAN:

Well, would you read into the record the first sentence in that paragraph --

MR. SAUNDERS:

Yes, My Lord.

MR. CHAIRMAN:

-- Mr. Saunders.

MR. SAUNDERS:

> With respect to the evidence of the witness Pratico, it is submitted that the trial judge's Charge was unexceptionable in law.

MR. CHAIRMAN:

Yes.

MR. SAUNDERS:

Yes.

MR. CHAIRMAN:

That having been said, the relevancy of the rest of it is certainly diluted, wouldn't you say?

MR. SAUNDERS:

A point for argument, My Lord, but I did wish to find out from this witness whether he had in fact referred to the written factum filed

by the Crown and whether he knew that this kind of submission had been made to the Court of Appeal.

BY MR. CHAIRMAN:

Q. Well, I guess the answer is, you hadn't seen the --

BY MR. SAUNDERS:

Q. The answer is no?

A. No.

BY MR. CHAIRMAN:

Q. Do you agree with that first sentence, Mr. Archibald?

A. I don't know that I would use the word, "unexceptionable," but I have not addressed the Charge to the jury. I haven't thought about the Charge to the jury, quite frankly, for some time, and I'm unwilling to --

Q. Look at it.

A. -- say things which I haven't thought out and was not directing my Opinion to when I wrote it.

MR. SAUNDERS:

Fair enough. It may be then, My Lords, that the best thing for me to do would be to join with my friend, Mr. Ruby in submitting certain questions to Professor Archibald on this point if he hasn't taken the opportunity to review the Judge's Charge on the matter, and obviously hasn't referred previously to the Crown factum on the point. I'd be quite happy to do that.

MR. CHAIRMAN:

Yes, that -- But that doesn't -- You know, the -- That question

there -- that first sentence, I suspect, could be answered without having read the Charge to the jury at all. But anyway, that's a matter of argument, I guess. You're right.

COMMISSIONER POITRAS:

There's something else, Mr. Saunders, If I can

draw it to your attention, in that same paragraph.

> There follow immediately an accurate summary of the evidence on cross examination, bringing to the attention of the jury the condition of the witness at the material times, his statements subsequent to the event, some of which were inconsistent...

But his statements subsequent to the event were never revealed to the court. The court prevented such statements from being disclosed to the court; that is to say, the statements that were made outside the courtroom.

MR. SAUNDERS:

Yes.

COMMISSIONER POITRAS:

And I wonder if whether that constitutes an accurate summary of the evidence because in point of fact, there is a part of the evidence which was excluded as not having been revealed or disclosed before the court.

MR. SAUNDERS:

It's impossible to answer, My Lord. Presumably, the writer of the

portion of the factum to which I quote will be here at a later date and can explain what was meant by it -- by that. I did wish to find out from the Professor whether he had addressed himself to the written submission filed by the Crown.

COMMISSIONER POITRAS:

Okay.

MR. SAUNDERS:

No further more questions. Thanks, sir.

MR. ROSS:

Just one question, My Lord.

BY MR. ROSS:

Q. Professor Archibald, in your evidence this morning, you indicated to Mr. MacDonald, as I write, that there was no legal duty to your knowledge on the Court of Appeal to address matters not raised in the grounds for appeal and I take it for them even to suggest that there were not any grounds for appeal, it is unlikely there'd be any factum. Does this mean that the concept of the liberty of the subject would end at the first trial level?

A. I would think that would be an exaggeration to say that.

Q. Well then, how would it get before the Appeal? What -- Are you suggesting then that although there's no legal duty on the Appeal Court, there might be a moral duty to address such matters?

A. Well, I -- In my brief research on the issue, which is not

included in the Opinion, which I -- And it goes beyond -- outside the scope of the Opinion which I was asked to prepare, I was unable to find a clear statement of a duty of the Court of Appeal either than the most general term such as -- Well, Mr. Ruby refers to general duties to ensure that there is no miscarriage of justice. And I think that we might all agree on that level of principle, that there would be a duty on a Court of Appeal to try to ensure that there is no miscarriage of justice. On the other hand, to then interpret that principle to mean that a Court of Appeal must send the matter back for re-trial or hear new evidence when it perceives that there has been an error but where this error has not been the subject of argument by -- particularly by defence counsel, I think that that's pushing that principle too far in the sense that I may agree that that might be a good thing but I've not been able to find any statements which hold that as the law.

Q. Well, in light of the case that's now under review and led to the subject of this Inquiry, don't you agree that it might be appropriate that a broad statement be made as to the duty of the Appeal Court in matters of review of -- particularly of a criminal nature as opposed to trying to find a difference between a legal and moral duty -- just a general duty to review?

A. Well, the problem is that -- What I suppose what you're doing

is taking issue with the present wording of Section 613 of the Criminal Code and the issue of what Courts of Appeal should do when they find that there are errors but when they don't find that these are sufficiently substantial to overturn a trial. And the question -- It's a matter of judgment, I guess, when the Court of Appeal perceives that there had been no substantial wrong or miscarriage of justice and they can say, "We'll ignore that error," and when they find that there is an error which does represent a substantial wrong and therefore a miscarriage of justice. I mean, it strikes me that to have a rule which is drawn so tightly that every trial in which there is an error of law made and an evidentiary ruling must be overturned would creat chaos.

Q. Absolutely. But on the other hand, wouldn't you agree that had there been a new trial back in 1971, 1972, you might not be here today? Based on what you've read?

A. That's entirely possible, yes.

Q. Okay.

MR. ROSS:

Thank you very much. That's the extent of my questions.

BY MR. WILDSMITH:

Q. I do have a few questions, Professor Archibald, but perhaps before I start, I'd just like to clarify that you and I haven't spoken about your evidence here today. Yes, this is correct?

A. This is true, yes.

MR. CHAIRMAN:

Now, Mr. Wildsmith, I'm not going to be imprudent enough to ask you to define seniorities between you and Professor Archibald, but in your capacity as counsel for the Union of Indians, you may wish to ask Mr. Archibald to decide whether the rule of relevancy applies.

MR. WILDSMITH:

With respect to my questions.

MR. CHAIRMAN:

With respect -- Yeh, I -- Could you give us some indication, seriously, at to the questions that are -- the line of questioning?

MR. WILDSMITH:

I'm sorry, you'd like to know the line of my questioning?

MR. CHAIRMAN:

Yes.

MR. WILDSMITH:

I propose to ask him a series of questions directed at the connection of Tom Christmas and Artie Paul to the -- ultimately to the instructions given by the trial judge to the jury and by the prosecutor in his address to the jury.

MR. CHAIRMAN:

Yeh, that's relevant. With the caveat that Professor Archibald said he hasn't directed his research or attention to the Charge to the jury.

MR. WILDSMITH:

Yes, and there are only a couple of passages I'd like to direct his attention to.

MR. CHAIRMAN:

All right. Fine.

BY MR. WILDSMITH:

Q. I'd like to start, Professor Archibald, by leading into this by directing your attention to page 194 in Volume 1. At the bottom of page 194, about line 25, you see a reference to Mr. MacNeil, to Mr. MacNeil asking a question, and in the context of that question you see the name of Tom Christmas and a reference to a conversation with Tom Christmas.

A. Yes.

Q. Do you see that portion?

A. Yes.

Q. And immediately after that, you see the Court suggesting, "Do not answer that question," and at that point, the trial breaks into a voir dire, is that correct?

A. Yes.

Q. And can you clarify for us -- I'm sure we all know the answer to this, but put it on record -- what the purpose of a voir dire is?

A. The purpose of a voir dire in general is to determine the admissibility of evidence which is sought to be adduced by one or other of the parties and over which there is a controversy

about its admissibility.

Q. And is it fair to say that with respect to that voir dire, the ultimate ruling of the trial judge -- looking at page 203, now -- with respect to Tom Christmas, Artie Paul, Theresa Paul, and Donald Marshall, Sr., is given in about the fourth line, which says:

> He cannot say what Donald Marshall...said to him or ...Theresa Paul -- Mary Theresa Paul or Tom Christmas.

A. Yes.

Q. In other words, the ruling on the voir dire was that no elements of the conversation should be related to the jury.

A. Yes.

Q. And if you review the testimony on the earlier pages in the voir dire, you will see -- I'm correct, I think, in suggesting this -- that there is some evidence given in front of the trial judge on the voir dire about the nature of those statements.

A. Yes.

Q. And your understanding of the thrust of this ruling is that the content of those conversations and statements are not to be related to the jury?

A. That's right. My view of that is based on the -- an erroneous understanding of the proper --

Q. Yes.

A. -- scope of cross-examination --

Q. Yes, and if I understood --

A. -- and re-examination based upon it, yes.

Q. If I understood your evidence correctly and your opinion, what you're suggesting is that conversation should've come out.

A. Yes.

Q. Okay, but -- Accepting the ruling in the way in which it was made for the purposes of this trial, the ruling of the trial judge was that none of that information was to go to the jury.

A. Yes.

Q. Now, I'd like to direct your attention to page 207 and 8. This is now out of the voir dire and in the presence of the jury. And at the bottom of page 207, you see some reference to -- by the Court, now -- by Mr. Justice Dubinsky taking over the conduct of this re-direct examination. The question by the Court:

> Q. Mr. Pratico, Mr. MacNeil asked you why you made the statement outside yesterday to Mr. Khattar, to the sheriff.

A. Sorry, Mr. Wildsmith, I've lost you. Where are you?

Q. 207.

A. Okay.

Q. Bottom of 207, about line 24.

A. Yes.

Q. It says:

BY THE COURT:

A. Yes.

Q. And the question is -- posed by the court:

> Q. Mr. Pratico, Mr. MacNeil asked you why you made the statement outside yesterday to Mr. Khattar, to the sheriff. You now say you made it because you were scared of your life.
>
> A. Yes.

Next question:

> Q. Now, your being scared of your life, is that because of anything the accused said to you at any time?

And the answer is:

> A. No.

And that line of questioning, would you agree, is consistent with the trial judge's ruling? There's nothing improper about asking the question of whether the accused had threatened the --

A. That's right. There's -- This kind of questioning from counsel would be proper, and one should go on and explore it further would be my view, but having limited the exploration of it --

Q. Yes.

A. -- then the problem is --

Q. And indeed it --

A. It causes a problem of fairness in my view, the Court having said this when it had restricted examination and -- cross-

examination and re-examiration on that very issue.

Q. Okay. Well, let me take you a little farther along in the same direction. You see that Mr. MacNeil, the prosecutor, says:

> I take it that concludes that line of questioning on that meeting on Saturday.

And if you continue on to page 208, now, and I'm going about halfway down again to line 20 and to what the Court says. Perhaps I could back up to what Mr. MacNeil says in the line above.

> The question, My Lord, would be to the witness, what is the basis for this fear. He said that he had fear.

And again consistent with the ruling of the trial judge, he is saying:

> We ought not to get into the basis for that fear. We ought not to have threats given to the witness related to the jury.

And you'll agree that this discussion is now taking place in front of the jury between Court and counsel?

A. Yes.

Q. And if we go down then to the Court, the Court says:

> He answered not due to anything the accused said. Now if anybody else said anything to him, I'm not interested.

Again, that's consistent with the Court's ruling.

A. Yes, and it's bound up with this whole business of statements made in the presence of the accused and so on, which we've said was problematic.

Q. Yes. And then there's a discussion that follows that by Mr. MacNeil, which it says he was:

> ...pursuing the matter just on the basis of whether his fear was justified...but I accept your Lordship's ruling. That's all.

And then the Court says:

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

Mr. Rosenblum adds:

> And Mary Theresa Paul.

And the witness adds:

> Artie Paul.

A. Yes.

Q. Now, I'm going to suggest to you that the Court ought not to have asked those questions in light of its ruling on the voir dire.

A. It's inconsistent for the court to have, in my view, gotten into those issues where it's limited cross-examination. Those would be proper subjects for cross-examination and re-examination but having restricted cross-examination and

re-examination on those very issues, it now seems unfair for the Court to explore them.

Q. And I put it to you even further than that that there was no reason to bring out the meeting with any of the individuals mentioned or the names of any of those individuals except to leave the impression with the jury that the reason Mr. Pratico was scared for his life was because of the contact with those named individuals.

A. I think that that's an obvious inference to draw, and it's --

Q. Okay.

A. I think it's a real problem, and I state so in my Opinion.

Q. Yes, and in fact I wanted to draw your attention to that. On page 29 in your Opinion -- after going through some of the material that I've just gone through with you -- page 29. You say:

> In the result, the jury might draw the conclusion that the witness had been threatened, and in all likelihood by acquaintances of the accused...

A. Yes.

Q. And indeed I'm suggesting to you that there is no other reason that any of us can think of as to why to bring up the individual's names and the fact of the meeting except to lend credence to the drawing of that inference.

A. Well, certainly that phrase:

> ...and in all likelihood by

acquaintances of the accused...

is -- My reason for making that statement is based primarily on that passage from the transcript that you -- to which you drew my attention.

Q. Yes. And in fact the only suggestion that they were acquaintances of the accused would appear in the voir dire and not in the evidence in front of the jury.

A. I think that's right, but I --

Q. Okay. Now, I'd like to draw your attention to the Charge to the jury on page 98 in Volume 2. Page 98, about halfway down. I suppose it's about line 16. The sentence starts:

> I may say that he was a nervous witness...

referring to John Pratico.

> That's my opinion. You don't have to accept that. He was a nervous witness. There's no doubt about that in my mind. And he explained why at times he had told the story that Donald Marshall did not stab Sandy Seale. His explanation was, "I was scared of my life; I was scared of my life." He had spoken to a man by the name of Christmas he told you. He had spoken to a man by name of Paul - Artie or Arnie, I don't know; I've just forgotten, Artie Paul. He spoke to a woman too but he did say that there was nothing as far as this woman was concerned. He had spoken to Christmas, to Artie Paul and the day of the incident, he spoke to Donald

Marshall, Sr., the father of the accused, after which he approached Mr. Khattar one of the defence counsel who very properly and correctly in accordance with the best tradition, would not talk to him unless there was somebody there as a witness. He told Mr. Khattar, brought the sheriff out, that Donald Marshall did not stab Sandy Seale. Why did he tell that story? He said, "I was scared, scared of my life. I was scared, scared of my life." That's what the witness tells you here in this court.

Now, would you agree with me that the trial judge, in his Charge to the jury is in fact drawing for the jury the very inference you fear may be drawn on page 29 of your Opinion?

A. Yes, I would agree with that.

Q. Thank you. And that it was improper for the trial judge to have done that?

A. Insofar as the -- some of those matters not being in evidence, that's right, it is improper.

Q. And insofar as -- It is inconsistent with his ruling on voir dire as well?

A. Yeh.

Q. Now, with respect to that voir dire that I referred you to, I'd like to direct your attention now back to page 197.

A. This is in Volume 1?

Q. Yes. And it's in the course of the voir dire and in the

course of an exchange between Mr. MacNeil and the Court and in about the second or third line, the Court says:

> Mr. MacNeil, I would agree with you that it is vitally disturbing and may very well be the subject of another proceeding.

And this is with respect to the threats. I might --

> I would think it amazing if a witness's life was threatened or his well being, and the Crown did not take steps against the person who made these threats.

And I direct your attention particularly then to Mr. MacNeil's response, which is to say:

> An information was laid, My Lord.

Now, we have evidence in front of the Commission, Professor Archibald, that by the time this statement was made by the prosecutor, a charge and information had in fact been laid against Tom Christmas, only one of the people mentioned, and that that information was in fact -- that charge was dismissed because no evidence was offered by the Crown. Now, I'm going to ask you about your view about the role of a prosecutor in providing information to a trial judge, and I'm going to suggest to you that it was improper for Mr. MacNeil to have stated the little bit of information he did and not to have gone the extra distance of clarifying that in fact the charge had been laid and was dismissed.

A. It seems to me that it's not proper to raise the matter at all, let alone go into explaining it.

Q. Yes. Assuming that Mr. MacNeil chose to respond, would you not think that it's his role as a prosecutor to be full and candid with the Court and to provide all of the information?

A. If, indeed it -- the matter had been dropped for want of prosecution by the time the statement was made --

Q. No evidence was offered.

A. No evidence was offered? I find it surprising that that would not be stated there.

Q. And in light of the passage in the Judge's Charge to the jury that I've just shown to you, would you not agree that this -- a full and proper response at this point might have caused the trial judge to take a different perspective?

A. That's possible, yes.

Q. Thank you. Something a little different than what we've talked about so far in Mr. Rosenblum's address to the jury, one of the first points that he makes is about the order of arguments of counsel. Now I'm wondering if in your experience in teaching evidence and in criminal law whether you have any views about whether it is a better course of conduct for the accused to always have, as opposed to the Crown, the last word to the jury?

A. I have no views on that.

Q. Okay.

MR. WILDSMITH:

I've got a couple of other passages, My Lords, in the address by

Mr. MacNeil to the jury on this issue of Tom Christmas and Artie Paul. Would you prefer that I followed the same mode that Mr. Ruby and perhaps Mr. Saunders have adopted. I mean my preference would be just to put the passages out and get his comments and get it over with.

BY MR. WILDSMITH:

Q. I would like to direct your attention now to page 56 in volume two. And if you could start at the -- towards the bottom of page 56, you see that in Mr. MacNeil's Charge to the jury he's -- This is about line 28. It starts out:

> But gentlemen, my learned friend Mr. Rosenblum forgot to mention to you a little conference that Pratico had with Donald Marshall, Sr.! Now what was that conference? What was that conference? Immediately thereafter, defence counsel was sent for. And then, gentlemen, this is when the statement was made. You heard Pratico on the stand, himself - and remember his age too, gentlemen. A man who is trying to match wits with Mr. Rosenblum and Mr. Khattar - remember his age when he said, "I said that. I made that statement or those statements I have made that are inconsistent with my evidence." He didn't use these words and I can't give you the words that he said but I can give you his meaning. "I made those statements simply because I was scared of my life!" "I was scared of my life!" And he also said to you the names of the people whom he spoke to or spoke to him before this trial and before the Preliminary Hearing. I believe their names to be, if my notes serve me correctly, a Mr. Thomas Christmas, Miss Paul and another man whose name escapes me...I didn't write it down in my notes. Gentlemen, these two

young youths were scared to death. He admitted he was scared. He admitted that is why he told the statement.

Now would you again agree with me that it was improper for the prosecutor to link the names of Christmas and Paul to being scared of your life when no evidence of that fact came out in front of the jury?

A. Yes, I would agree with that and I would -- I would go farther and say that this passage exemplifies the problem with not allowing full cross-examination and re-examination on these issues. What the Court allowed was some -- it allowed there to be put in evidence the fact that statements were made without finding the circumstances, and so in -- and, in fact, encouraged this kind of speculative approach to what might have been the motivation behind making these statements without allowing counsel to bring out in evidence what those motivations or factors were.

Q. Okay, and you've also told Commission Counsel that it was the prosecutor's role, the role of the Crown to present if my quotation is right, "present facts fairly and dispassionately"?

A. Yes.

Q. Is this an example of presenting facts fair and dispassionately?

A. It's an example of -- of -- it seems to me, drawing inferences which are not supported by the evidence before the Court.

Q. And is that fair?

A. No.

Q. And is the degree of emphasis in there about Artie Paul and Tom Christmas and being scared for your life dispassionate?

A. Yeh, I would say it's not, but there are -- but this -- the degree to which tone of voice and all of these things can be contrclled or ought to be controlled is a difficult issue. The Crown Counsel should present the case for the Crown it seems to me vigorously, but not unfairly. And the line between vigor and unfairness is one that may be difficult to draw from time to time.

Q. Let me draw your attention to another passage then and see if that might reinforce the first one. Looking at page 64 now. On the second line of page 64:

> And what would give Mr. Pratico the impression as he told you the explanation for that remark yesterday after consultation with Donald Marshall, Sr., that he was...

And the transcript underlines this word for emphasis.

> ...scared for his life!

That was his explanation.

> Now gentlemen if you believe that, if you believe that this young youth was in fear of his life and there is no reason to dispute that because he has said it - there's been no arguments against it - he was scared for his life. I don't blame him one bit for trying to do what he could to get off the proverbial hook.

That's an unfair characterization of Donald Marshall, Sr., is

it not?

A. There's no basis in evidence for it and--yes, that's right.

Q. And the linkage of consultation with Donald Marshall, Sr., and being scared for your life is pretty apparent there?

A. Yes.

Q. This is blatantly unfair and prejudicial to the accused in that it was his father?

A. There's no doubt in my mind that it's prejudicial to the accused.

Q. I'd also like your comments on the balance of that passage which is on a different issue, in which Mr. MacNeil appears to be relating to the Court what happened in the corridor. In other words, he appears to be giving extra information, shall we say, or evidence not under oath to the Court as part of his representations on the meeting outside the courtroom. Do you have any comments on whether that is proper?

A. It's improper to -- to present to the Court matters which are -- in that way matters which are not admissible in evidence.

Q. And finally, and again just to reinforce, but I'll draw your attention to page 65. The tenth line or so, the new paragraph starts:

> Then you have the other men that were named and girl that was named, coming to Pratico and seeing Pratico. And after these people had spoken to Pratico, Pratico told you on the stand yesterday that he was scared of his life.

He was fear -- I think he used the word "fear" or "scared".

I won't continue with the rest of that passage but would you agree that the same comments apply that this is not a fair comment?

A. To the extent that these comments are based on matters which are not properly in evidence it is unfair.

Q. Yes.

A. Let's be clear though that in Canada, unlike other jurisdictions it is deemed to be proper for the judge to express his or her opinion on the evidence --

Q. This is the Crown.

A. Oh, this is the Crown. Oh, I'm sorry. All right. Sorry. So it's the question then of the degree to which the Crown must be dispassionate and we've addressed this already.

Q. And the degree to which it's proper and fair to leave these innuendos of threats without any evidence in front of the jury?

A. Oh, yeh.

Q. In other words, the jury has no way of knowing what was said in the conversations except the representations that the Crown and in the other passage the judge made to the jury?

A. Well, it's unfair and it's improper.

Q. Thank you. Do you think that it would meet the test under the

Criminal Code for overturning an Appeal -- overturning the conviction on Appeal?

A. If you're asking me how I would act as a -- as a member of the Court of Appeal, I guess I would think that this kind of thing would lead me to say that there ought to be a new trial.

MR. WILDSMITH:

Thank you. Those are my questions.

MR. MacDONALD:

No re-direct for this witness.

MR. CHAIRMAN:

Thank you very much, Professor Archibald. You've been very helpful. We'll adjourn until two o'clock.

(WITNESS WITHDREW)

INQUIRY ADJOURNED AT: 12:49 p.m.