

RG 44
Vol 230
#8

ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION

VOLUME XXXI

Held: November 19, 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

INDEX - VOLUME XXI

E. Alan Marshall, resumes testimony

By Mr. Spicer	5666
By Mr. Chairman	5708
By Mr. Ruby	5709
By Mr. Pugsley	5729
By Mr. Elman	5757
By Mr. Saunders	5766
By Mr. Ross	5769
By Mr. Wildsmith	5780
By Mr. Bissell	5787
By Mr. Chairman	5807
COURT REPORTER'S CERTIFICATE	AA-5

INQUIRY RECONVENED AT 9:37 o'clock in the forenoon on Thursday, the 19th day of November, A.D., 1987, at Sydney, County of Cape Breton, Province of Nova Scotia.

1 E. ALAN MARSHALL, resumes testimony, as follows:

2 BY MR. SPICER.

3 Q. There are a couple of things that you mentioned yesterday, sir,
4 that I just wanted to ask you a question or two about. You
5 indicated towards the end of your testimony yesterday afternoon
6 that your understanding of what had happened with Jimmy MacNeil
7 was that there was, I think you said, fifty-fifty that he was
8 telling the truth.

9 A. Yes, sir.

10 Q. Where did you get that idea from?

11 A. Goodness. Well, I can't really recall, but I think I must've
12 asked the polygraphist at that time, and whatever his answer
13 was led me to believe that it was a fifty-fifty chance.

14 Q. But the actual report of the polygraph in Volume 16, page 202,
15 on the second page of that report in the comments -- the
16 remarks, it says:

17 It will be noted that I gave an
18 indefinite opinion as to MacNEIL's
polygraph examination...

19 A. Yes, sir.

20 Q. And down at the bottom of the first page:

21 Throughout MacNEIL's examination
22 there were irregular and erratic
23 reactions to the test questions.
24 These variations are the type which
25 prevent an analysis of the charts
and I can render no opinion as to
whether or not MacNEIL was telling
the truth...

1 Now if that was the opinion of the polygrapher, where would
2 you get the idea that what he was saying was that it was
3 fifty-fifty?

4 A. Well, again, after the test was completed, we'd had conversa-
5 tion, and I recall him saying that the test results were
6 erratic, and he must've said something to me that caused me
7 to come to that type of conclusion, and I can't recall what
8 it was.

9 Q. I see. I believe you also indicated to me yesterday that you
10 regarded the results on Ebsary as being so positive. Again,
11 if you could look at Corporal Smith's report on page 202, he
12 says with respect to that test:

13 There were indications of truth-
14 fulness in EBSARY'S polygraph
15 recordings when he answered "No"
to the following test questions: ...

16 And then his conclusion was simply that:

17 It is my opinion, based on EBSARY'S
18 polygraph examination, that he was
telling the truth to his questions.

19 Did Corporal Smith indicate anything further to you -- anything
20 more to you other than that?

21 A. To the best of my recollection, when Ebsary's polygraph was
22 finished, Smith showed me the chart which meant nothing to
23 me except there were some peaks on it, and he had the chart in
24 his hand, and he said, "You know, there's no doubt in my mind
25 that he's telling --" he said, and that's the best that I can

1 recall, him showing me the chart and saying, "There's no doubt
2 in my mind."

3 Q. You also indicated to us yesterday when I asked you how much
4 time you spent exclusive of travelling and writing the report,
5 and you indicated to us three and a half to four days, possibly
6 longer.

7 A. Yeh.

8 Q. You also indicated to us yesterday that during the time between
9 your trips to Sydney; that is, between the 17th and the 23rd,
10 that you didn't do much, you were just waiting for Smith to
11 arrive. That's on page 5635.

12 A. Yes, sir, I recall that. I didn't do much with respect to
13 this case. I was obviously doing something else at work but --

14 Q. Right, and I'm wondering where you came up with the three and
15 a half to four days.

16 A. Oh, gosh! You know, that's to the best of my recollection,
17 you know. The day we spent down here initially, probably a
18 day after that, time spent in the office in Halifax going
19 over it, and then when I came back, I would say about four
20 days.

21 Q. When you came back on the 23rd, when the polygraph tests were
22 being administered, my understanding from what you told us
23 yesterday was that you would've been waiting in another room.

24 A. Yes, sir.

25 Q. Is that in fact what you were doing is just waiting for the

1 polygraphs to be over?

2 A. Well, again, that's my recollection, sir, but --

3 Q. Were you doing anything other than that? I mean, were you sit-
4 ting there reviewing the statements at that time, or were you
5 just waiting for it to be over -- for the test to be over?

6 A. I can't recall, sir, I'm sorry.

7 Q. I'd like to ask you some questions, now, sir, on -- concerning
8 the material that you have told us that you did have, and
9 before I do that, I'd just like to get some idea and be certain
10 that we're sure that we're talking about the same material.

11 If I understood what you said to us yesterday, the material
12 that you had and the information that you had was that you'd
13 had a discussion with Sergeant MacIntyre and you had state-
14 ments of Pratico, Chant, Gushue, and you had a transcript of
15 the preliminary. You had Roy Ebsary's criminal record. You
16 had Smith's report. Now, do you have any --

17 A. I beg your pardon? I had Smith's report.

18 Q. You had Smith's report when you came to write your report.

19 A. Oh, I see what you mean. Well, again, that's to the best of
20 my recollection, sir.

21 Q. Sure. Okay. Are you able to tell us whether or not you had
22 any other material? Any other statements?

23 A. I can't recall, sir.

24 Q. There were some other statements given in November of 1971.

25 A. Yes.

- 1 Q. And if you -- Do you have Volume 16 in front of you? The
2 red volume. If you just turn to page 171. Now, that's a
3 statement of John MacNeil that was taken on November the 15th,
4 1971. Do you remember whether or not you had that statement?
- 5 A. I honestly cannot recall whether I had it or I did not have it,
6 sir.
- 7 Q. Okay, if you flip over to 174, there's a statement there of
8 David William MacNeil also dated November the 15th.
- 9 A. I can't recall having that one either, sir. I can't recall
10 having seen that one or having it.
- 11 Q. Page 181.
- 12 A. That's not to say that I didn't, you know.
- 13 Q. Page 181. November 15 statement of Mrs. --
- 14 A. Yeh.
- 15 Q. -- Mary Ebsary.
- 16 A. No, I draw a blank on that one, too, sir.
- 17 Q. Okay. Finally, on page 191, a statement of Greg Ebsary also
18 dated November 15th.
- 19 A. I can't say if I had it or not, sir.
- 20 Q. Okay. Page 187 is a statement that you told us -- Sorry, 186.
21 It's Roy Ebsary's statement, which is a statement, I believe,
22 you indicated to us that you did have. Page 186.
- 23 A. I believe I had that one, sir.
- 24 Q. On the second page of that statement, there's a question:
25 Q. Do you carry a knife

1 | A. Yes.

2 | Q. The answer given to that question is:

3 | A. No

4 | A. Yes.

5 | Q. You knew at the time that Mr. Ebsary had a record for possession
6 | of a concealed weapon.

7 | A. Yes.

8 | Q. Did it not occur to you that there might be some question since
9 | you told us yesterday that indeed you knew that it was a knife?

10 | A. Yeh.

11 | Q. That the answer to that question might've been incorrect?

12 | A. If it did, it didn't register to the point that I did anything
13 | about it.

14 | Q. Do you think that could've been a warning signal to you if you'd
15 | taken the time to --

16 | A. It should've been.

17 | Q. Should've been? And if you go to page 1 of that volume,
18 | Volume 16.

19 | A. Page 1?

20 | Q. Page 1 of Volume 16. You see an occurrence report from the
21 | City of Sydney Police Department. In the second paragraph:

22 | Re above call:
23 | Searched the area and...

24 | -- stopped --

25 | ...Mr. Roy Ebsary at the corner

1 of Charlotte & Townsend St.

2 This is in April of 1970.

3 A. Yes.

4 Stopped and searched him &
5 found a 12" butcher knife
under his belt.

6 Do you think if you'd taken the step to query Roy Ebsary's
7 answer in his statement and gone the extra step, you might've
8 discussed it with somebody in the Sydney police department and
9 discovered that Mr. Ebsary had in fact been arrested with a
10 twelve inch butcher knife, and indeed Mr. Ebsary told us, sir,
11 that it was this sort knife that he had been found with.

12 A. And the question was?

13 Q. Do you think if you'd taken the extra step that you might've
14 begun to question?

15 A. Yes, sir.

16 Q. Yes, but you didn't take any steps --

17 A. Now, today I -- I didn't do it then, but if you ask me today
18 if I would, I certainly would.

19 Q. And do you think that having not done it then, that what you
20 did with respect to Mr. Ebsary's statement at least, was a
21 thorough review of that statement?

22 A. Not today I don't think that.

23 Q. You indicated to us, I think yesterday, that you had the
24 statement of Jimmy MacNeil. That statement is in Volume 16
25 at page 176.

1 | A. Yes.

2 | Q. And in reviewing that statment -- Just draw your attention to
3 | the last full question and answer on that page:

4 | Q. Who seen you at the house
5 | besides Roy

6 | Now, that's at the house -- at Roy Ebsary's house following
7 | the stabbing.

8 | A. His wife, daughter & son

9 | Did it not occur to you that it might've been useful to talk
10 | to those people?

11 | A. I can't recall.

12 | Q. Does it not occur to you now that it might've been useful to
13 | talk to those people?

14 | A. Absolutely.

15 | Q. And do you not think that again that that should've been a
16 | warning signal to you -- something else you should've done?

17 | A. Yes, that's correct.

18 | Q. And indeed perhaps if you had talked to Donna Ebsary -- You
19 | perhaps know that her testimony has been that she saw Roy
20 | washing blood off a knife?

21 | A. Yeh.

22 | Q. But you didn't do that? You didn't talk to her?

23 | A. No, sir.

24 | Q. Why not?

25 | A. Well, if we can go back to what I said yesterday. I came down

1 here, briefly, determined that we would use the polygraph,
2 reviewed what I could, talked to the polygraph operator,
3 determined that he would indeed come down, and then for what-
4 ever reason, and I've asked myself this a thousand times
5 myself, I went slowly until the polygraph operator arrived.

6 Q. On page 69 of Volume 16 is another statement which you told us
7 you had. It's Terry Gushue's statement. Do you have that in
8 front of you?

9 A. Yes, sir.

10 Q. The long answer about halfway through. He says:

11 ...When I was getting my jacket,
12 I seen Patricia Harriss there.
13 I said they kicked me out and
asked her to come along with me -
she did.

14 A. Yes.

15 Q. Now, you can tell from that statement that Patricia Harriss
16 was with Terry Gushue.

17 A. Yes.

18 Q. Correct? You don't say that in your report.

19 A. No.

20 Q. You refer to Gushue being with a young girl. There's no
21 reference to Patricia Harriss in your report.

22 A. Yes.

23 Q. Did it not occur that if the Sydney police department had a
24 statement from Terry Gushue, they might very well have had a
25 statement from Patricia Harriss as well?

E. ALAN MARSHALL, by Mr. Spicer

- 1 A. Yes. The answer is yes.
- 2 Q. And you didn't follow that up?
- 3 A. It seems to me that I recall reading in the transcript that
4 all the Harriss girl saw -- I'm sorry -- What she saw would
5 place Marshall in the park and that she did not witness the
6 stabbing. Now, that's how it come across to me reviewing the
7 file at the time.
- 8 Q. The notes that you're looking at there, sir, are those notes
9 that were made recently?
- 10 A. Yes, sir, I made them two nights ago when you asked me to --
- 11 Q. Oh, yeh, and a couple of nights ago; so we know that -- what
12 those notes are. I'd indicated to you as we've indicated to
13 a lot of witnesses that -- the general areas of questions that
14 we were going to ask, and I take that what you did subsequently
15 to that was to go away and make a series to notes to respond
16 to those questions. Am I correct in that?
- 17 A. That's what you asked me to do, and that's what I did, yes.
- 18 Q. I didn't ask you to do that.
- 19 A. Oh, I'm sorry, I thought you did.
- 20 Q. No. And are you telling us today that your recollection of
21 what you did at the time in 1971 with respect to Patricia
22 Harriss is what you've just told us; that is, that you went
23 and you looked at the transcript of the preliminary and
24 satisfied yourself of what she did or didn't see?
- 25 A. To the best of my knowledge, yes, sir.

E. ALAN MARSHALL, by Mr. Spicer

- 1 Q. But the one thing you didn't do was you didn't go and ask
2 the Sydney police department whether or not they had a
3 statement from Patricia Harriss?
- 4 A. No, I didn't.
- 5 Q. And you knew that she -- that they had a statement from her?
- 6 A. Yes.
- 7 Q. Because it says so at the preliminary at page 27.
- 8 A. Yes, sir.
- 9 Q. Did it -- Has it not occurred to you that if you'd asked her
10 for -- if you'd asked John MacIntyre for Patricia Harriss's
11 statement, you might've discovered that in fact there were two
12 statements?
- 13 A. Had I asked him?
- 14 Q. You certainly would've got something from him.
- 15 A. Yes, sir.
- 16 Q. Yes. But you didn't do that?
- 17 A. No.
- 18 Q. Do you not think the reference to Patricia Harriss and Terry
19 Gushue's statement again should've been a warning to you or
20 a signal to you that perhaps you ought to follow that up and
21 do something about it?
- 22 A. I do now.
- 23 Q. But you didn't at the time?
- 24 A. No.
- 25 Q. Page 46 of Volume 16 is Chant's statement of June 4th, which

1 | you indicated to us yesterday that you had.

2 | A. Yes, sir.

3 | Q. On the third page of that statement, page 48, he's referring
4 | to a conversation that he had with Junior Marshall.

5 | Q. Was there any other conversa-
6 | tion between...

7 | -- yourself --

8 | ...and Marshall at that time

9 | A. He said there were 2 men -
10 | tall one had brown hair done
11 | the stabbing.

12 | You knew from that that there was some question about there
13 | being two other people in the park. Correct?

14 | A. Yes, sir.

15 | Q. And indeed you knew from Jimmy MacNeil's statement and Roy
16 | Ebsary's statement that there was some kind of altercation?

17 | A. Yes, sir.

18 | Q. So you had before you information indicating that there was an
19 | altercation in the park that night. Not only that, you had the
20 | person who -- You had Jimmy MacNeil saying to you that he knew
21 | who it was that did it.

22 | A. Yes, sir.

23 | Q. Do you not think as a policeman, sir, that a murder in response
24 | to an attempted robbery is the sort of situation that is fairly
25 | plausible -- something that as a policeman you can look at and
say, "Well, that's something that may well have happened."?

E. ALAN MARSHALL, by Mr. Spicer

1 A. Yeh.

2 Q. And it's a lot more plausible to a policeman then just a story
3 that two people came along in the park and said, "I don't
4 like niggers and Indians," and stabbed somebody?

5 A. Well, it's plausible and so is the other story plausible.

6 Q. The robbery story's more plausible, isn't it?

7 A. If you would ask me that now, I'd say yes.

8 Q. Okay. And indeed, sir, eleven years later, the Appeal Court,
9 when the Marshall case came around again in 1982, '83, indicated
10 at page 145 of the -- Volume 4, which is page 65 of their
11 decision. You don't have that in front of you. I'll just
12 read it to you. Commenting on what Junior Marshall had done:

13 By hiding the facts from his
14 lawyers and the police Mr. Marshall
15 effectively prevented development
16 of the only defence available to
17 him, namely, that during a robbery
Seale was stabbed by one of the
intended victims. He now says
that he knew approximately where
the man lived who stabbed Seale...

18 You had an idea of who the man was and where he lived.

19 ...and had a pretty good description
20 of him. With this information the
21 truth of the matter might well have
been uncovered by the police.

22 A. Yeh.

23 Q. Is it not the case, sir, that you had that very information
24 in front of you in November of 1971?

25 A. To the best of my recollection, yes.

1 Q. And you did nothing about it?

2 A. That's right, sir.

3 Q. Should not the fact of the altercation, the knowledge that you
4 had of the altercation, have been again another warning signal
5 to you?

6 A. At this time, yes, sir, but at the time, it didn't register, or
7 if it did register, it went by me.

8 Q. I'd like you to look again at Chant's statement on page 46,
9 and I'd like you to tell me if you follow the route that Chant
10 describes in this statement, whether or not that makes sense
11 to you. He says:

12 ...I left the Acadian Lines on
13 Bentinck St. and walked down...

14 And the map is behind you.

15 ...and walked down Bentinck...

16 Now, he's going to George Street.

17 ...walked down Bentinck...to the
18 tracks. Then I started down the
19 tracks...

19 -- toward --

20 ...George St.

21 A. Yes.

22 Q. So here he is trying to get over here.

23 A. Yeh, he went down --

24 Q. The statement says he's going down here --

25 A. Yes.

E. ALAN MARSHALL, by Mr. Spicer

- 1 Q. -- and back over here.
- 2 A. Yeh.
- 3 Q. Doesn't make much sense, does it? It would've been a lot
4 quicker for him to go straight across here, would it not?
- 5 A. If he was in a hurry.
- 6 Q. Yeh.
- 7 A. Yeh.
- 8 Q. And you've lived in Sydney yourself?
- 9 A. Yes, sir.
- 10 Q. And you would've known from looking at that statement that the
11 shortest way to get over to George Street would've been to come
12 along here and go along Byng Avenue, not to go down and up
13 across the tracks?
- 14 A. That's right.
- 15 Q. Did that thought occur to you when you reviewed Chant's state-
16 ment in 1971?
- 17 A. People are wandering in the middle of the night like this. You
18 know, sometimes they just wander around. They don't take the
19 shortest route.
- 20 Q. That wasn't my question.
- 21 A. No.
- 22 Q. My question was whether or not, when you reviewed Chant's
23 statement, whether that occurred to you that that was a long
24 way of getting to George Street?
- 25 A. No, I can't say.

E. ALAN MARSHALL, by Mr. Spicer

- 1 Q. And if it had occurred to you, that might've been another warning
2 signal to you to look at it again?
- 3 A. I really don't think so.
- 4 Q. You don't think you would've looked at that?
- 5 A. No, that -- It's possible, but I'm not sure that I would've.
- 6 Q. It certainly would've been one of many things that you might've
7 looked at along with all the other things that I've just
8 referred you to?
- 9 A. Yes, sir.
- 10 Q. You knew that Junior Marshall had given a statement, did you
11 not?
- 12 A. At what time, sir?
- 13 Q. At the time of the investigation in May, June.
- 14 A. In May? Yes, sir.
- 15 Q. And you knew that because it's referred to in the preliminary?
- 16 A. Yeh.
- 17 Q. You didn't -- It didn't occur to you to ask for Junior Marshall's
18 statement?
- 19 A. I can't recall, sir.
- 20 Q. You didn't ask for it, did you?
- 21 A. No.
- 22 Q. If you can just turn to page 17, the Volume 16. Page 17, sir.
- 23 A. Sorry.
- 24 Q. That's a statement of Donald Marshall on May 30th. Just direct
25 your attention towards the end of the statement where he's

1 asked to describe the two people. Are you with me?

2 A. Yes, sir.

3 Q. Describe these fellows to me

4 A. 1 fellow - the small fellow
5 was 5-9-10 - 190 lbs. hair -
6 grey combed back. wore glasses
(black rimmed) age 50...Long...

7 -- white --

8 ...wide face. long blue
9 coat; dark blue sweater;
black shoes-rounded toes.

10 That's a pretty good description of Roy Ebsary, isn't it?

11 A. No, sir.

12 Q. It's not?

13 A. It's faulty in the most apparent thing.

14 Q. What's that?

15 A. Height.

16 Q. Apart from his height, is it not a bad description of
17 Mr. Ebsary?

18 A. But at the night, that's the most apparent thing there is.

19 Q. Would it not have occurred to you if you'd looked at Junior
20 Marshall's statement, that there was some resemblance between
21 the description in that statement and Roy Ebsary?

22 A. He says 5'9" and 190 pounds. Correct?

23 Q. Yes.

24 A. That certainly doesn't fit my idea of -- my recollection of
25 what Roy Ebsary is.

- 1 Q. Would you've been prepared to write off that description on
2 the basis of that sort of mistake, or would it not have
3 occurred that maybe it was something like him?
- 4 A. Five nine or ten and 190 pounds? In my recall, he wasn't
5 anywhere near 190 pounds.
- 6 Q. All right. Did he have a blue coat on when you saw him?
- 7 A. When I saw him? When I saw Ebsary?
- 8 Q. Yes.
- 9 A. I can't recall.
- 10 Q. He has told us here at page 360 and 361 of the transcript that
11 indeed he was wearing the same blue coat the time that he saw
12 you as he was wearing the night of the incident.
- 13 A. Well, if he was, I didn't pay attention to it.
- 14 Q. And in any event, you didn't ask for Junior Marshall's state-
15 ment, and you had no idea of the description of these people.
- 16 A. I can't recall that now.
- 17 Q. You knew that Pratico and Chant had given different stories to
18 the police when they were first interviewed?
- 19 A. Yes, sir.
- 20 Q. You didn't -- Did you ask in what respects their stories were
21 different?
- 22 A. As clearly as I can remember, Detective MacIntyre told me
23 that these two young fellows had given him a cock and bull
24 story to start with, but very soon after having heard the cock and
25 bull stories, they straightened themselves out and gave the

1 statement that MacIntyre had given me -- the statements that
2 MacIntyre had given me.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR

E. ALAN MARSHALL, by Mr. Spicer

1 Q. And I think as you told us yesterday, you took Sergeant
2 MacIntyre's word for that?

3 A. Yes, because that is a -- in my experience was a very common
4 occurrence.

5 Q. Perhaps you could just turn to John Pratico's statement, page
6 forty-one. This statement indicates that John Pratico at the
7 time was sixteen years old?

8 A. Yes.

9 Q. On the second page of that statement, the very first question:

10 Q. What did you do

11 A. I run home up Bentinck St.

12 A. Yes.

13 Q. Did it not occur to you that a sixteen year old who had seen
14 a stabbing might have talked to his parents about it or that
15 perhaps it might not be a bad idea to go and talk to them?
16 Did that occur to you at the time?

17 A. I think what I was doing was -- was getting these types of
18 things lined up in my mind so that if there was any indication
19 at the polygraph of Ebsary not being truthful that we would
20 go at this thing hammer and tong.

21 Q. But up to this point in time, sir, you've already indicated
22 to me that there were a number of warning signals which we
23 picked out from the various statements that you did absolutely
24 nothing about?

25 A. What are those, sir?

E. ALAN MARSHALL, by Mr. Spicer

1 Q. The ones that we just -- that I've just been asking you
2 about, Roy Ebsary's knife.

3 A. Oh, yeh.

4 Q. Reference to Patricia Harriss and Terry Gushue's statement.

5 A. Yeh.

6 Q. The list goes on.

7 A. Yes.

8 Q. Are you telling us that you were prepared to ignore these
9 warning signals in the event that Roy Ebsary's polygraph came
10 out truthful?

11 A. At that time, yes, sir.

12 Q. You knew that Chant was fourteen years old?

13 A. Yes, sir.

14 Q. You knew that John Pratico was sixteen?

15 A. Yes, sir.

16 Q. You didn't take any steps to talk to any of -- any one in
17 Chant's family?

18 A. No.

19 Q. Do you call that a thorough review of the case, sir?

20 A. No, sir, not in 1987.

21 Q. How could you call it that in 1971?

22 A. Well, again, you know, I'm just going over a ground that we
23 covered yesterday, but the -- in writing the report after I
24 had been down here assembling material, putting it together
25 for -- putting the report together, having gone over

E. ALAN MARSHALL, by Mr. Spicer

1 | it with MacIntyre, with McKinley, and to some extent with
2 | Donnie MacNeil and myself. That's the conclusion -- That's
3 | the word I used and realizing full well in 1987 that it wasn't
4 | the proper word.

5 | Q. Let's just go through your report on page 202 if you have a
6 | copy there in front of you -- 204, yeh. Paragraph two of
7 | that document, the last three or four lines you say:

8 | Intensive investigation by the Sydney
9 | City Police was commenced and MARSHALL
 arrested on the 4 June...

10 | --1971. What did you know about the investigation that was
11 | done by the Sydney City Police Department when you wrote that?

12 | A. Only what MacIntyre had told me.

13 | Q. And what had he told you?

14 | A. Well, I don't recall exactly what he told me.

15 | Q. Is it fair to say, sir, that you just -- you assumed because
16 | of your knowledge of John MacIntyre that any investigation he
17 | would have carried out would have been an intensive investigation?

18 | A. From my knowledge and my experience with the man and his
19 | aggressiveness I'd have to say that is the case.

20 | Q. And you're not -- Are you not able -- Are you able to tell us
21 | today whether or not you knew anything about what was actually
22 | done in connection with that murder investigation at the time?

23 | A. I can't recall, sir.

24 | Q. In paragraph -- I've already asked you about your phrase at the
25 | end of paragraph three concerning the thorough review and we'll

E. ALAN MARSHALL, BY Mr. Spicer

1 | come back to that, but in paragraph four you say:

2 | From the outset of our investigation
3 | it was apparent the use of the polygraph
 would be extremely useful.

4 | A. Yes, sir.

5 | Q. Why did you think that?

6 | A. Why did I think it would be useful?

7 | Q. "Extremely" useful.

8 | A. Because -- Well, it would certainly -- It would certainly be
9 | a useful investigative tool in this type of investigation
10 | where there's been people telling different stories. You see
11 | it -- it's -- with the polygraph it's not only the -- the
12 | polygraph instrument itself but the operator and his pre-test
13 | interrogations. As I recall the incidences of people telling
14 | the truth before they were even put on the polygraph at the
15 | time the pre-test interrogation was very, very high, and so it
16 | wasn't merely the polygraph by itself, but the fact that you
17 | had in the polygraph operator a very experienced interrogator.

18 | Q. In paragraph three of your report, about halfway through
19 | the sentence that begins "Roy Ebsary", are you with me?
20 | Towards the end of the line.

21 | A. Yeh.

22 | Q. Roy EBSARY was picked up and interviewed
23 | and he denied murdering SEALE, although
24 | he did say that McNEIL and himself were
25 | in the park, after visiting a tavern
 during the evening of the 28 May...and
 that he and McNEIL became involved in
 an altercation with two men (later

E. ALAN MARSHALL, by Mr. Spicer

1 determined through investigation to
2 be MARSHALL and SEALE).

3 What investigation?

4 A. I can't say now at this point. You know, the -- as I've said
5 before, this is my report and I wrote that sixteen years ago
6 and I just have difficulty with answering questions like that.

7 Q. The second page of your report. I asked you some questions
8 yesterday concerning paragraph five of your report.

9 A. Yes, sir.

10 Q. With respect to paragraph six and what you indicate is the
11 salient points given by key witnesses of the events leading up
12 to and following the stabbing, and with respect to Maynard
13 Chant, about two-thirds of the way through your recitation
14 of his evidence you indicate:

15 MARSHALL told the group that two men
16 had attacked he and 'his Buddy'
17 (SEALE). He also showed them a
 superficial cut on his arm, which was
 not bleeding, incidentally.

18 What's the significance of the fact -- What was the significance
19 of the fact that it wasn't bleeding?

20 A. That it was probably superficial, sir.

21 Q. And where did you get the information that it was not bleeding?

22 A. I believe Chant said that (Let's see now.) that it wasn't
23 bleeding and then it started to bleed and then later on the
24 nurse at the hospital Mrs. Davis, Volume one, page 58, said
25 that it wasn't bleeding.

E. ALAN MARSHALL, by Mr. Spicer

1 | Q. At the hospital?

2 | A. Yes.

3 | Q. The question though, sir, is at the time and here you are on
4 | Byng Avenue?

5 | A. Yeh.

6 | Q. And you're saying it was not bleeding. And I'm asking you how
7 | you came to the conclusion?

8 | A. Isn't that what Chant said. It seems to me that he said it
9 | wasn't bleeding and then it started to bleed.

10 | Q. I think if you look at the material that you say you had, what
11 | Chant said at the preliminary --

12 | A. Page 39.

13 | Q. --page 39, and I take it, sir, that your references now to
14 | these page numbers are as a result of me having indicated to
15 | you that I was going to ask you certain questions and you've
16 | gone through the material again?

17 | A. Yes.

18 | Q. Now are you telling us today that that is, in fact, what you
19 | did at the time you wrote your report?

20 | A. Well, as near as I can recall.

21 | Q. All right. Well, let's just look at page 39.

22 | A. He showed me his arm.

23 | Q. What did you observe about his
24 | arm if anything?

25 | A. It had a long cut from his
wrist up to his arm to his
elbow.

E. ALAN MARSHALL, by Mr. Spicer

1 Q. And was there any blood...

2 A. Not right at that moment but
3 after a few minutes it
4 started to bleed.

4 A. Wait a half a second would you please, sir.

5 Q. He's got the preliminary. You have volume one. Sorry, I
6 thought you had a copy of the preliminary with you.

7 A. Sorry.

8 Q. It's page 39 of the -- I was reading from the bottom of the page.
9 ...but after a few minutes it
10 started to bleed.

11 A. Yes, sir.

12 Q. And in his statement on page 47 Chant says:

13 The cut was on the inside of his
14 arm -- it was not a deep cut and
15 it was not bleeding at that time--
until we caught up to two boys
and..girls who were walking.

16 Which is -- If I read your conclusion or your Statement of
17 Facts correctly, you are referring in your statement on page 2
18 of your report to that very point in time:

19 ...met Chant along with two other
20 boys and two girls.

21 And I'm asking you how you could possibly have concluded that
22 at that point in time it was not bleeding?

23 A. Yes, I don't -- I can't recall now.

24 Q. Further on in the recitation of the facts concerning Chant
25 in your report you say in the third last line:

E. ALAN MARSHALL, by Mr. Spicer

1 Marshall took care not to stand
2 where Seale could see him.

3 Now reading that, sir, one would think that that would -- you
4 would come away with an inference that he was trying to stay
5 out of Seale's vision?

6 A. Yes, sir.

7 Q. Is that fair to say? What was it that made you conclude that
8 Marshall had taken care not to stand where Seale could see him?

9 A. Volume one, page 41, preliminary of Chant:

10 He walked around...

11 Wait now. All right. I must have an error in my note here.

12 Oh, wait a minute, wrong volume.

13 Q. I'd like to direct you to Chant's statement itself.

14 A. Is that on page 16?

15 Q. Page 47 of volume 16. On page 47 which is the second
16 page of Maynard Chant's statement, down towards the end,
17 the last four or five lines:

18 Donald Marshall got out; came over
19 near the body of Seale and stood
there.

20 A. There's some place that -- I think it's in the preliminary.
21 Well, I don't -- I don't know. I seem to recall reading it
22 in the preliminary the other night when you asked me that
23 there's a statement that Chant -- that Marshall was walking
24 around.

25 MR. BISSELL:

I think it might be volume one, page 41.

1 | Q. That's the only place it is. The last question and answer
2 | on page 41:

3 | Q. Did he come...

4 | Meaning Marshall.

5 | ...right up beside the body
6 | where you were standing?

7 | A. He walked around and I guess
8 | he went up to a house or
9 | something, I don't know...

10 | A. Yeh, that's -- that's what I was referring to and in volume two,
11 | page 91, Mr. Justice Dubinsky reading from the evidence, I
12 | think that was --

13 | Q. You told us yesterday you couldn't remember whether or not
14 | you had that.

15 | A. Yeh, that's right. I know, but -- but I seem to recall having
16 | that extract. I couldn't have had the whole thing because it
17 | wouldn't have been prepared by the time I got there.

18 | Q. Well, assuming, sir, that even -- that you had that, the
19 | comment that's made is:

20 | Q. Where did ...

21 | On page 91 of volume two:

22 | Q. Where did Marshall go when he
23 | came back? Did he go near the
24 | body?

25 | A. No.

Q. Where did he stand?

A. He stood behind the body for a
minute and then he flagged a
cop car down.

E. ALAN MARSHALL, by Mr. Spicer

1 | Where in any of that is there a statement that he took care
2 | not to stand where Seale could see him?

3 | A. There isn't.

4 | Q. No, and that's an inference that you drew?

5 | A. No. Yes, sir.

6 | Q. Why was it important to you to draw that inference and to put
7 | it in your report?

8 | A. Well, I think -- I think the inference is that perhaps
9 | Marshall did not want Seale to -- Well, you know, really
10 | I can't say. I'm sorry, I -- my mind is muddled on that.

11 | Q. Page three of your report?

12 | A. Yes, you know, why did I say that.

13 | Q. You're telling us today you don't know why you said that?

14 | A. There was some significance to it but I can't put my mind to
15 | it right now.

16 | Q. On page three of your report starting at the sentence that
17 | begins:

18 | MARSHALL wanted PRATICO to come
19 | down into the Park. (Although
20 | PRATICO never admitted or
21 | suggested that MARSHALL and
22 | SEALE were going into the park
23 | to attempt to 'roll' someone,
24 | the inference is there and it
25 | is the concensus of opinion
MARSHALL and SEALE were, at
this time, bent on robbing
someone).

24 | Where, sir, did that information come from?

25 | A. First, I think Detective MacIntyre mentioned it to me, secondly,

E. ALAN MARSHALL, by Mr. Spicer

1 Ebsary's statement to the police which I can't find right
2 now.

3 Q. It's at page 186 of volume 16.

4 A. They:

5 ...asked us if we had (any) cigarettes
6 and if we had any money.

7 A. It's in the answer to the first question.

8 Q. And if you read your report, sir, are you not in your report
9 referring to an earlier point in time, that is, before they
10 met up? "It's the consensus of opinion that Marshall and
11 Seale were at this time (That's when they were headed into
12 park.) bent on robbing someone." What possible support is
13 there for that in any of the material that you have?

14 A. What possible support is there in the material that I have?

15 Q. In the material that you have.

16 A. I can't find the -- Jesus, I wrote that and I must have wrote
17 it for a reason.

18 Q. If it's not in the material -- If it's not in the material
19 that you have, sir --

20 A. Yeh.

21 Q. --could it be that it's just as a result of a discussion that
22 you had with John MacIntyre?

23 A. Undoubtedly.

24 Q. And again you've told us many times that you took what John
25 MacIntyre said at his word?

E. ALAN MARSHALL, by Mr. Spicer

1 | A. Yes, sir.

2 | Q. Further on in that same paragraph you're referring to Pratico
3 | and you say:

4 | He testified that he was about
5 | thirty or forty feet from them
6 | at this time and that he heard
 an argument take place between
 the two...

7 | Did you do anything to satisfy yourself that Pratico could have
8 | seen what he said he saw from a distance of thirty to forty
9 | feet late at night in that park?

10 | A. You mean, did I go down there at night --

11 | Q. Did you check it out? Did you go down and see --

12 | A. Check it out, yeh.

13 | Q. Yeh.

14 | A. Well, I recall walking around the park a couple of times while
15 | I was down there and there are lights in the area, thirty
16 | to forty feet is not a long way away really.

17 | Q. My question is whether he did anything at the time to check
18 | that out?

19 | A. I can't recall.

20 | Q. Further on in the same portion of your report you're still
21 | referring to Pratico and Chant. I've already asked you about
22 | the first part of the next paragraph, that is, that they
23 | didn't tell the truth to the police. Further on in that
24 | paragraph you say:

25 | In the final analysis evidence,

E. ALAN MARSHALL, by Mr. Spicer

1 which was as outlined above
2 is believed to be factual...

3 A. What page are you reading from?

4 Q. I'm still reading from the same page, page three of your report.

5 A. Yes.

6 Q. In the first full paragraph:

7 Neither of the two aforementioned
8 witnesses...

9 About halfway down the page. Are you with me?

10 A. Not quite.

11 Q. Neither of the two...

12 At the paragraph that starts:

13 Neither of the two aforementioned
14 witnesses...

15 A. Yes, sir, I have it.

16 Q. All right. In that paragraph about halfway through you say:

17 In the final analysis evidence, which
18 was as outlined above is believed to
 befactual...

19 A. Yes.

20 Q. Is it fair to say that you believed it to be factual on the
21 basis of no independent investigation of your own?

22 A. I can't recall whether they were -- Yes, that's a fair
23 statement.

24 Q. Yes.

25 A. Yeh.

E. ALAN MARSHALL, by Mr. Spicer

1 Q. You go on to say:

2 ...and, what is just as
3 important, there was no
4 collaboration between
5 the two.

5 A. Yes.

6 Q. From where did you get that conclusion?

7 A. Well, I think I must have got it from Detective MacIntyre
8 who undoubtedly was at the preliminary and heard
9 Mr. Justice Dubinsky say the same thing only he used the
10 word "corroboration" and not -- Have you got the -- I think
11 I used the same phrase or words.

12 Q. You did no independent investigation to discover whether or
13 not there was any collaboration between the two?

14 A. No, I -- No.

15 Q. On the next page of your report, on page four, the fourth
16 line, you say:

17 While in gaol, MARSHALL removed
18 the bandage from his arm and
19 flushed it down the toilet...

19 A. Yes, sir.

20 Q. Where did you get that idea from?

21 A. From Detective MacIntyre.

22 Q. ...and even removed the sutures
23 himself...

24 There was evidence that that occurred?

25 A. No, that's -- the doctor said that.

E. ALAN MARSHALL, by Mr. Spicer

1 | Q. All right.

2 | ...suggesting that he did not
3 | want to have anything around
4 | with his blood on that could
5 | be picked up by the police
6 | from which his blood type might
7 | be determined.

8 | How did you reach that conclusion?

9 | A. I can't -- I don't recall now, sir.

10 | Q. It wasn't on the basis of any investigation that you did. Is
11 | that correct?

12 | A. What investigation could I do to determine that?

13 | MR. RUBY:

14 | You could talk to Marshall.

15 | BY MR. SPICER:

16 | Q. Precisely. You could have talked to Junior.

17 | A. Junior, yeh.

18 | Q. You then go on to say:

19 | There are on the jacket what
20 | appears to be hesitation marks
21 | caused by a knife, and I am
22 | firmly convinced MARSHALL
23 | inflicted the slight cut on
24 | his arm after he stabbed
25 | SEALE to add credence to his
 story.

26 | A. Yes.

27 | Q. What is the support for that?

28 | A. Well, the lab technician said that the cut was -- Wait a
29 | minute now.

30 | Q. The lab technician referred to the cut in the jacket.

31 | A. Yes, not one clean stroke.

32 | Q. That's the cut on the jacket?

E. ALAN MARSHALL, by Mr. Spicer

1 | A. Yes.

2 | Q. I direct your attention to page 57 of volume one which is
3 | the testimony of Doctor Virick, and he's asked at line 23:

4 | Q. Based on your knowledge at the time,
5 | your opinion is that the wound was
6 | not self inflicted?

6 | A. This point is against it.

7 | Q. Your opinion is that it was not self
8 | inflicted?

8 | A. Yeah, I would say so.
9 |

10 | And then:

11 | Q. But it could be self inflicted?

12 | The answer to that question is,
13 | doctor?

13 | A. It could be.
14 |

15 | But his opinion was that it wasn't.

16 | A. But he said right after that that it could be.

17 | Q. Well, how could you, sir, be firmly convinced on the basis
18 | of that that it was self inflicted?

19 | A. That plus the -- the location of it. I got it in my mind
20 | that -- that -- I had it in my mind that it was the self-
21 | inflicted type wound.

22 | Q. And you had that in your mind before you looked at the
23 | preliminary. Is that fair to say?

24 | A. I can't say that, sir.

25 | Q. Did you have a discussion with Sergeant MacIntyre?

E. ALAN MARSHALL, by Mr. Spicer

1 | A. Yes, absolutely.

2 | Q. And Did Sergeant MacIntyre express any view to you as to
3 | whether or not that wound was self-inflicted?

4 | A. I think he did.

5 | Q. And what was his view?

6 | A. It was his view that it was self-inflicted.

7 | Q. And having had an opportunity to review the transcript of the
8 | preliminary and see the doctor's opinion that it was not,
9 | you're still prepared to say that you were firmly convinced?

10 | A. Yeh, that's probably an overstatement, but I was convinced
11 | but probably not firmly.

12 | Q. An overstatement, sir? The only evidence at the time in the
13 | preliminary was the doctor's opinion that it wasn't self-
14 | inflicted?

15 | A. But could have been.

16 | Q. It could have been and that's enough for you to be firmly
17 | convinced?

18 | A. Well, it was at that time in the view of the circumstances.

19 | Q. What do you mean, in view of the circumstances?

20 | A. Well, at that time because of what had happened that's --
21 | I became convinced that it was self-inflicted.

22 |

23 |

24 |

25 |

E. ALAN MARSHALL, by Mr. Spicer

1 Q. Paragraph 9 of your report, the 4th line, "somewhat intoxicated",
2 you're referring to Ebsary and MacNeil being "somewhat
3 intoxicated". Are you with me?

4 A. Yes, sir.

5 Q. What material did you have before you that would indicate
6 that either Ebsary or MacNeil were "somewhat intoxicated"?

7 A. I can't recall now, sir.

8 Q. I would submit to you, sir, that there's nothing in the
9 statements that indicates anything other than the fact
10 that they were at the tavern?

11 A. At the tavern. Well, I don't recall, sir.

12 Q. If it -- if there is nothing in the material, where do you
13 think that idea could have come from?

14 A. Well, it would -- it would have to come from Detective
15 MacIntyre.

16 Q. Let's keep going in that paragraph:

17 ...somewhat intoxicated, happened
18 to walk through the park and were
19 accosted by SEALE and MARSHALL.
20 Their attacks were not successful
21 and following the altercation a
22 violent argument ensued between
23 the two attackers culminating
24 with MARSHALL stabbing SEALE...

21 A. Yes, sir.

22 Q. How did you reach that conclusion?

23 A. I can't -- I can't say today.

24 Q. ...and then inflicting a superficial
25 wound on his own (arm) forearm to
divert suspicion from himself before

E. ALAN MARSHALL, by Mr. Spicer

1 he made the pretense of summoning
2 aid for SEALE.

3 What was the "pretense"?

4 A. I can't -- I can't recall today, sir.

5 Q. Later McNEIL, because he had been
6 drinking and because of his subnormal
7 intelligence,...

8 Do you agree with me, sir, that there's no evidence that
9 McNeil had been drinking?

10 A. I can't recall. I, you know, I just don't know now. If
11 someone told me that McNeil had been drinking --

12 Q. And if that's the case, you just took their word for it and
13 you were prepared to put in your report, a report which was
14 going to go a long way to keeping Junior Marshall in gaol
15 for eleven years:

16 Later McNEIL, because he had been
17 drinking...

18 Just because somebody told you, you're prepared to put that
19 in your report?

20 A. I must have had it -- information from somewhere to put
21 that in the report and I can't recall now from where.

22 Q. ...and because of his subnormal
23 intelligence...?

24 A. Yes.

25 Q. Where did you get the idea that he had "subnormal intelligence"?

 A. Only with my conversation with him.

E. ALAN MARSHALL, by Mr. Spicer

1 Q. And even if you were right, how can you form the idea --
2 indicate that McNeil formed the idea based on his drinking
3 and subnormal intelligence? Are you a psychiatrist?

4 A. No, sir, just a policeman.

5 Q. People who have "subnormal intelligence" are capable of
6 telling the truth?

7 A. Yes, sir.

8 Q. But you say here:

9 ...McNEIL, because he had been
10 drinking...

11 There's no evidence of that:

12 ...and because of his subnormal
13 intelligence, formed the idea that
EBSARY had in fact stabbed SEALE...?

14 A. I can't recall why I said that, sir.

15 Q. If I understand your testimony correctly since yesterday, sir,
16 in summary, you read only what was given to you?

17 A. Correct, yes, sir.

18 Q. You relied whole-heartedly on the explanations given to
19 you by the original investigators?

20 A. I relied very heavily on them.

21 Q. Yes, you conducted no independant investigation of your own?

22 A. Not -- no, sir.

23 Q. Did not follow up on any of the clues or the warning signals?

24 A. No, sir.

25 Q. That should and were apparent to you in the material?

E. ALAN MARSHALL, by Mr. Spicer

1 A. Yeh.

2 Q. You never asked for the entire file?

3 A. Not that I recall.

4 Q. And you didn't have any idea what the whole picture really
5 was?

6 A. The whole complete picture, no sir.

7 Q. No. I submit to you, sir, that if you'd done at least some of
8 those things, you might have discovered the truth?

9 A. In 1987, I can that, yes, sir.

10 Q. And you know that in 1971, that's what you ought to have done?

11 A. Yes, sir.

12 Q. And at the time you completed this review, Junior Marshall
13 had been gaol for a couple of weeks?

14 A. Yes, sir.

15 Q. And if you'd done your job properly and discovered the truth,
16 that might have been the only time he spent in gaol, isn't
17 that true?

18 A. Yes, sir.

19 Q. You were described, sir, by Doug Wright, Assistant Commissioner
20 of the R. C. M. P., at page 5280:

21 (as)...probably one of your better
22 or supposedly one of your better
investigators.

23 And you have to agree with me, sir, you sure weren't that
24 in connection with this investigation?

25

E. ALAN MARSHALL, by Mr. Spicer

1 | MR. BISSELL:

2 | I object to that, My Lords, this witness has described what he
3 | did and surely that's all that this witness can do.

4 | MR. CHAIRMAN:

5 | That's a conclusion we will reach.

6 | BY THE WITNESS:

7 | A. I can answer it.

8 | MR. CHAIRMAN:

9 | Pardon.

10 | BY THE WITNESS:

11 | A. I'll answer it, if you like, My Lord.

12 | MR. CHAIRMAN:

13 | If you want to answer it, I can't stop you.

14 | BY THE WITNESS:

15 | A. The question, sir.

16 | MR. CHAIRMAN:

17 | I can, but I won't.

18 | BY MR. SPICER:

19 | Q. The question was whether or not at that time in carrying out
20 | that investigation, you consider yourself to be carrying out
21 | a good investigation?

22 | A. No, sir, I did not.

23 | Q. I just want to direct your attention now to some material in
24 | volume 20, page 26 -- 26 and 27, sir, that's a letter from
25 | Superintendent Christen, at the time writing to the Deputy

E. ALAN MARSHALL, by Mr. Spicer

1 Attorney General in 1983, following the Reference in Marshall.
2 And in the second paragraph, he's referring there to
3 correspondence -- earlier correspondence and that earlier
4 correspondence is contained on page 4 of the same volume.
5 And at that time Gordon Gale was writing to Christen and
6 asking him:

7 ...whether there (were)...any
8 instances of improper police
9 practices or procedures in regard
to the investigation by the Sydney
Police Department.

10 And Inspector Christen or Superintendent Christen is responding
11 on page 26 and I just want to draw your attention to
12 paragraph 2 for a second:

13 It is apparent all the warning
14 signals were ignored by the
15 investigators and Crown Counsel
in carrying out this investigation.

16 Would you agree with me, sir, that at the time you carried
17 out your investigation, that you also "ignored the warning
18 signals"?

19 A. Yes, sir.

20 Q. Thank you.

21 MR. CHAIRMAN:

22 Probably we -- before you -- you maybe more than a few minutes.

23 MR. RUBY:

24 About fifteen minutes.
25

E. ALAN MARSHALL, by Mr. Chairman

1 | BY MR. CHAIRMAN:

2 | Q. Before we break, there's just one question I wanted to put
3 | to this witness. Mr. Marshall, when you were instructed
4 | by your superiors to come to Sydney to -- to quote you
5 | "to check on the truthfulness of Jimmy MacNeil's statement".

6 | A. Yes, sir.

7 | Q. I presume you were aware then that if that statement was
8 | true, that Donald Marshall, Junior, would be released --
9 | would have been wrongly convicted?

10 | A. Well, I think if -- if it had been true, then we would have
11 | -- I would have said to my superior, "Now is the time to
12 | do a complete re-investigation".

13 | Q. No, I think you're missing my point. When you were
14 | instructed to come to Sydney --

15 | A. Yes, sir.

16 | Q. -- presumably you were told by your superior, "A statement
17 | has been made to the Sydney Police Force by a man named
18 | James MacNeil. That if that statement is correct, then
19 | Donald Marshall, Junior, did not commit a murder"?

20 | A. Yes, sir.

21 | Q. Well, wouldn't that in itself be sufficient to require you
22 | to bring with you this strong investigative team that you
23 | -- that you spoke of?

24 | A. Yes, and this is the dilemma that's in my mind, sir. As
25 | why I did not.

E. ALAN MARSHALL, by Mr. Chairman, by Mr. Ruby

1 Q. All right.

2 MR. CHAIRMAN:

3 We'll rise for a break.

4 INQUIRY ADJOURNED: 10:44 a.m.

5 INQUIRY RECONVENED: 11:04 a.m.

6 MR. CHAIRMAN:

7 Mr. Ruby.

8

9 BY MR. RUBY:

10 Q. Mr. Marshall, as I watched your testimony I got a sense that
11 you had strong feelings about your role in the investigation
12 concerning Donald Marshall and his subsequent imprisonment;
13 can you tell me what those feelings are? Do you want to talk
14 about that?

15 A. My own personal feelings? Well, I have some remorse. I
16 can't for the life of me figure it out -- figure out why
17 I botched the investigation. And Mr. Ruby, I don't think
18 there's been a day go by in the last, well, since -- since
19 Marshall was let out of gaol, that I haven't thought about
20 this case from the first thing in the morning until the last
21 thing in the evening, except last year for a short period;
22 we had a tragedy in our family.

23 Q. Thank you. Let me take you through one or two small items,
24 if I might. One question that arose during the examination
25 of my friend was whether or not Marshall had taken a

E. ALAN MARSHALL, by Mr. Ruby

1 lie-detector - sorry refused a lie-detector test. Can I
2 suggest to you and tell me if this is a fair inference,
3 that if, in fact, Marshall had refused a lie-detector test,
4 that would have been something that you would have certainly
5 have included in your report as one of the factors to be
6 considered and weighed?

7 A. Ordinarily, it would have been in the report. And, of
8 course, I thought about this for some time as to if -- if
9 my vague recollection is correct, why is it not in the
10 report? And this might seem like a -- like a far-fetched
11 idea but about this time in the period of the Force, the --
12 as I recall, the method of reporting things was starting
13 to change a little bit. Initially when I joined the Force,
14 the Mounted Police reported everything. We had stacks of
15 paper, this, that and everything you did for -- and there
16 was some -- some change in the reporting system. Style
17 I should say, not system, style. Not to include things
18 that were negative. Now I'm not saying a hundred percent
19 this is the case, but I'm saying it could have been a
20 factor.

21 Q. I take it then at the end of the day, what you're saying
22 to me is, "It is likely had that occurred that it would have
23 been on my report but I cannot say for certain"?

24 A. You expressed it correctly, yes, sir.

25 Q. Thank you. The other area I want to get into is this: In

E. ALAN MARSHALL, by Mr. Ruby

1 the course of your evidence you very generously characterized
2 Sergeant MacIntyre as an "honest man", and yet when I go
3 through your evidence, I have some questions about that. Let
4 me explain what I mean and you tell me what you think as I
5 go through it. You were given a certain number of statements;
6 for example, you were given Chant's statement and you were
7 told Chant had made a previous inconsistent statement. But
8 Sergeant MacIntyre did not, I suggest to you and you tell
9 me if I'm correct, tell you that in Chant's first statement
10 there was a description of two men consistent with Marshall's
11 story about two men in the Park. He didn't tell you that?

12 A. Not to my recollection, no, sir. Not the description part.

13 Q. And he gave you some statements of witnesses but he didn't
14 give you the early statement, the previous inconsistent
15 statement, of Miss Harriss?

16 A. No.

17 Q. Which contained a description of Roy Ebsary. Let me just
18 read you that description. Page 63, volume 16:

19 Describe the other men to me?

20 One man was short with a long
21 coat. Gray or white hair, with
a long coat.

22 He didn't give you that information, did he?

23 A. Not that I recall, sir, no.

24 Q. Well, surely that's not the mark of an honest man, to conceal
25 the evidence that would support MacNeil's statement and

E. ALAN MARSHALL, by Mr. Ruby

1 confirm to you the truth of the task you were investigating,
2 is it?

3 MR. PUGSLEY:

4 There's no evidence absolutely at all that Sergeant MacIntyre
5 concealed anything from this witness. Absolutely not. That's
6 an unjustified comment and quite inappropriate and improper.

7 MR. RUBY:

8 With greatest respect, My Lord, if he had these information and
9 conveniently did not give the ones that and the only ones that
10 supported MacNeil's statement, the word "concealed" is hardly
11 too strong. Whether it's corrupt or not, it's a question you'll
12 discuss at the end. But surely that's not inaccurate use of
13 language.

14 MR. CHAIRMAN:

15 But this witness said that he doesn't recall it having been given
16 to him.

17 MR. RUBY:

18 That's right, it wasn't given to him as far as he recollects.

19 MR. CHAIRMAN:

20 As far as he recollects. Now we'll have to conclude in time
21 after we've heard all the evidence whether or not it was,
22 indeed, given to him. And I would suggest that that would be,
23 depending on the evidence, a very appropriate area to raise in
24 your argument rather than ask this witness to reach conclusions
25 that we have to reach after we've heard all of the evidence.

E. ALAN MARSHALL, by Mr. Ruby

1 | BY MR. RUBY:

2 | Q. Let me try and rephrase this then leaving out that word. I'm
3 | suggesting to you that you as a police officer would hardly
4 | expect an "honest man", to use your earlier language, to
5 | not furnish you with the earlier information that would
6 | support MacNeil's statement, fair?

7 | A. Fair, yes, sir.

8 | Q. And also you were not given, as I understand it, the
9 | statements of George or Sandy MacNeil. Sergeant MacIntyre
10 | didn't give you the statements where they, at page 26 of
11 | volume 16, described:

12 | (the man as)

13 | 1 man - (as) grey haired; grey or
14 | white top coat - 5-9 - W.
15 | 180 lbs. hair (black) flat
16 | on his head no wave -
17 | straight back - round fat
18 | face trampish looking -
19 | late 50's.

20 | A. I can't recall whether I got that one or not, sir.

21 | Q. Had you had that surely you would have referred to it in your
22 | report as evidence supporting MacNeil, would you not?

23 | A. Yes, sir.

24 | Q. But the fact is you were not given any of the evidence
25 | supporting MacNeil, were you?

26 | A. Not that I recall, sir.

27 | Q. And I suggest to you that is not consistent with the behaviour
28 | of an honest police officer, do you agree with me?

E. ALAN MARSHALL, by Mr. Ruby

1 | A. Yes, sir. But, you know, could I clarify something please --

2 | Q. Please do.

3 | A. -- My Lord, Mr. Ruby. When I was asked to describe Detective
4 | MacIntyre, I described him to the best of my ability as I
5 | found him when I was working with him and I think that's
6 | when I used those phrases about this man.

7 | Q. Yes, and I'm going to suggest to you when I'm finished this
8 | bit of examination that, in fact, that description which
9 | you so generously gave, is not apt to describe the actions
10 | of the man who dealt with you as a police officer. The
11 | next point I'm making --

12 | MR. CHAIRMAN:

13 | Now that's a conclusion that we will have to reach after we've
14 | heard or after we've heard all of the evidence including Mr.
15 | MacIntyre.

16 | MR. RUBY:

17 | I want to know whether in his professional opinion --

18 | MR. CHAIRMAN:

19 | He's told you as far as I think he can expect it to go, his
20 | recollection of what happened and based on that and based on
21 | all the evidence, we will someday have to make a finding as
22 | to what information was furnished to Mr. Marshall when he
23 | arrived to carry out his investigation.

24 | MR. RUBY:

25 | All right, let me try and phrase it then in terms of the

E. ALAN MARSHALL, by Mr. Ruby

1 professional standards he would expect of a competent and honest
2 police officer because certainly he is a man who is dealing
3 with an assumption that way.

4 MR. CHAIRMAN:

5 And I think he's told -- he's told us that.

6 MR. RUBY:

7 Yes, I have some other items I want to put to him.

8 MR. CHAIRMAN:

9 All right.

10 BY MR. RUBY:

11 Q. You told my friend that the previous offense of Mr. Ebsary
12 was described to you by Sergeant MacIntyre as a "trival
13 offense"; do you recall that?

14 A. I recall that in that -- that is to the best of my recollection,
15 sir.

16 Q. You obviously were not told that it was a concealed weapon
17 offense involving a knife, or that would have been in your
18 report; is that fair?

19 A. I'm not saying that he didn't mention that a knife was
20 involved, sir. I don't think he ever said that.

21 Q. You would describe it as "trival"?

22 A. I don't think I used the word "trival", did I?

23 Q. You did but you may not feel it's appropriate now?

24 A. Inconsequential type of offense --

25 Q. All right.

E. ALAN MARSHALL, by Mr. Ruby

1 A. -perhaps would be a --

2 Q. You've had a chance to read the report at volume 16, page 1
3 of that particular offense?

4 A. Yes, sir.

5 Q. And you agree with me that is not the description of an
6 inconsequential offense?

7 A. Certainly not.

8 Q. So would it in your view have been appropriate for a
9 competent and honest police officer to have so described
10 that offense to you without giving you the true details?

11 A. Would have been appropriate?

12 Q. For a competent --

13 A. No.

14 Q. -- and honest police officer?

15 A. Certainly not.

16 Q. Would not. Not if he knew the true facts, correct?

17 A. Yeh, that's correct, sir.

18 Q. Sergeant MacIntyre persuaded you that there is "only a
19 pretense of summoning aid", is that correct, by Mr.
20 Marshall?

21 MR. PUGSLEY:

22 I'm sorry, I missed the question.

23 BY THE WITNESS:

24 A. Pardon.

25

1 BY MR. RUBY:

2 Q. Sergeant MacIntyre persuaded you that there was only "a
3 pretense of summoning aid on the part of Mr. Marshall"?
4 That's according to your report, "a pretense of summoning
5 aid"?

6 A. Could you tell me where you're reading from, sir, please?

7 Q. Page 4 of your report, page 10 of volume 18, in paragraph
8 9 about a little bit over half way:

9 before he made the pretense
10 of summoning aid for SEALE.

11 And I thought you had said to my friend that there was no
12 evidence for that that you knew of; it was merely something
13 that you got from Sergeant MacIntyre?

14 A. I can't recall that. I don't recall commenting on that
15 particular subject. On that particular phrase "the
16 pretense -- the pretense of summoning aid", I can't recall
17 giving evidence about that.

18 Q. Okay, in any event --

19 A. I did, oh, my god.

20 Q. It's okay. It's been a long day, today and yesterday. In
21 any event let me just try and deal with it this way. Do you
22 agree with me there's no support for that "pretense of
23 summoning aid" statement except what Sergeant MacIntyre told
24 you?

25 A. Yes, sir.

E. ALAN MARSHALL, by Mr. Ruby

1 Q. But Sergeant MacIntyre did not tell you that at trial
2 witnesses testified that there was, indeed, a "summoning
3 of aid", did he? And if he had, you would have mentioned
4 that in your report?

5 MR. PUGSLEY:

6 That's certainly argumentative. Excuse me, My Lord, there's all
7 kinds of evidence about what Marshall did or did not do about
8 trying to get aid for Seale and that certainly is an argumentative
9 position. I put forth through some witnesses Marshall dilly-
10 dallied around for some minutes before he attempted to get aid for
11 this boy and for him to suggest, to try and put it in evidence
12 that way is really argumentative.

13 MR. CHAIRMAN:

14 The evidence of this witness as I recall it, his evidence in chief,
15 was that he could not, in his opinion now, there's no evidence
16 to sustain the conclusion that he reached. I don't think he's
17 said that definitely, "I must -- I got the information from
18 Sergeant MacIntyre." I think the conclusion he reached was that
19 he may have. Again Mr. Ruby, would you please cease and desist
20 from being argumentative with the witness and asking him to reach
21 conclusions that we have to reach and we don't propose to reach
22 until we hear all of the relevant evidence.

23 MR. RUBY:

24 I hadn't thought that I had gotten to the stage of being argumentative
25 with this particular subject matter.

E. ALAN MARSHALL, by Mr. Ruby(Discussion between Commisson and Counsel)

1 MR. CHAIRMAN:

2 Well, the last questions was -- would be a very fine line.

3 MR. RUBY:

4 Well, Chant testified at the trial --

5 MR. CHAIRMAN:

6 Yes.

7 MR. RUBY:

8 -- that, in fact, Mr. Marshall did seek aid. And if Sergeant
9 MacIntyre didn't tell the witness that or at the same time
10 convinced him the "summoning of aid" was a pretense, I'm
11 entitled to bring that if it's correct.

12 MR. CHAIRMAN:

13 Well, this witness has already told us that on the basis of the
14 reports that are now before him, that he could not have reached
15 that conclusion based on the evidence. He was then asked, well,
16 what -- did you get that or I've forgotten the wording, did you
17 get that information from Sergeant MacIntyre and he said, "I
18 may have". But he doesn't recall. Obviously he doesn't recall.
19 Now it would be unfair for anyone of us to jump to a conclusion
20 until we've heard all of the evidence including that of
21 Sergeant MacIntyre.

22 MR. RUBY:

23 But surely I'm entitled to ask him whether or not --

24 MR. CHAIRMAN:

25 You can ask him. Oh, by all means ask him, but asking him

E. ALAN MARSHALL, by Mr. Ruby(Discussion between Commission and Counsel)

1 | factual situations and then asking him to reach a conclusion that
2 | we must reach, is, in my view, argumentative.

3 | MR. RUBY:

4 | Let me see if I can avoid it.

5 | BY MR. RUBY:

6 | Q. I had asked you and I want to know from you whether or not
7 | Sergeant MacIntyre told you that at trial Chant had
8 | testified under oath that Mr. Marshall did seek and
9 | summon aid?

10 | A. I can't recall if he told me that, sir.

11 | MR. RUBY:

12 | Now, my next question, My Lord, you tell me if I'm wrong, is:

13 | BY MR. RUBY:

14 | Q. Had he told you that, surely you would have put that in
15 | your report instead of the statement that there had been
16 | merely a "pretense of summoning aid"; is that true?

17 | A. That's a natural conclusion.

18 | Q. And would you as a police officer dealing with another police
19 | officer in this sort of investigation, have expected --
20 | give us -- my friend a chance to object before you answer
21 | this question?

22 | A. Yes.

23 | Q. Have expected an honest police officer who failed to give
24 | you that information about what happened at trial? Hold it
25 | for a second.

E. ALAN MARSHALL, by Mr. Ruby

1 COMMISSIONER EVANS:

2 Mr. Witness, would you just wait a minute. Mr. Ruby, was that
3 information not in the Preliminary and available to this
4 witness?

5 MR. RUBY:

6 At the Preliminary, My Lord, as I understand it, the statement
7 was ambiguous as to whether or not he really had sought aid,
8 but at trial, was not ambiguous.

9 COMMISSIONER EVANS:

10 And this witness had the Preliminary?

11 MR. RUBY:

12 But he didn't have the trial information locked in Sergeant
13 MacIntyre's head.

14 COMMISSIONER EVANS:

15 So it was ambiguous.

16 BY MR. RUBY:

17 Q. Would you have answered --

18 MR. PUGSLEY:

19 -- I certainly hope that my friend is not putting something to the
20 witness that is inappropriate and is not a result from the
21 preliminary.

22 MR. RUBY:

23 I hope not, too.

24 MR. CHAIRMAN:

25 Well where is the preliminary? At what page is the preliminary?

E. ALAN MARSHALL, by Mr. Ruby

1 | Resolve it.

2 | Volume 1, Chant's evidence is where?

3 | MR. SPICER:

4 | Page 31 and 39 of the preliminary and that is -- the volume pages
5 | are 34 and on.

6 | MR. CHAIRMAN:

7 | Yeh, all right.

8 | MR. RUBY:

9 | You'll see at page 41, My Lord, of Volume 1 at 17, the passage
10 | we referred to already.

11 | He walked around and I guess he went up to a
12 | house or something. I don't know if it was
13 | him who went up to the house. I'm pretty
 sure it was him that went up to the house and
 he called the ambulance.

14 | That would have been before the witness as the preliminary hearing
15 | evidence. The trial was not ambiguous.

16 | MR. PUGSLEY:

17 | Take a look at page 40. It's at the bottom of the page.

18 | MR. RUBY:

19 | Now My Lord, there's no doubt that my friend has the right to
20 | ask questions and if he finds areas that are appropriate to ask
21 | questions, that's fine with me.

22 | MR. CHAIRMAN:

23 | Well, I think -- No, I think the point that was raised by my
24 | colleague was whether or not the preliminary which was in the
25 | hands of Mr. Marshall at the time he was conducting his investigation

E. ALAN MARSHALL, by Mr. Ruby

1 | whether there's evidence in that preliminary with respect to
2 | -- or Chant with respect to Marshall or, yes, Donald Marshall,
3 | Junior seeking help and clearly there was. Now the question of
4 | the interpretation that was placed on this evidence that was in
5 | the hands of Inspector Marshall, that's set forth in his report.

6 | MR. RUBY:

7 | My Lord, I've taken the view that I -- and I don't propose to
8 | change it, but the passage at page 41 leaves it ambiguous.

9 | MR. CHAIRMAN:

10 | Assuming it does. I think the -- what we're saying is that this
11 | witness had in his hands the transcript of the preliminary in
12 | which -- during which preliminary Chant was questioned with
13 | respect to the Marshall seeking assistance. And let's assume for
14 | a moment that it is ambiguous, what I'm saying is that he did
15 | have in front of him evidence upon which he could base a conclusion.
16 | Now you and I may say that it was a very erroneous one and it maybe
17 | difficult to conceive as to how he reached that conclusion based
18 | on this, but he did have something to go on, didn't he?

19 | MR. RUBY:

20 | What I'm seeking (You rule on it) to bring out is that Sergeant
21 | MacIntyre didn't tell him about the trial testimony of Chant
22 | in this respect. That's either admissible or improper or it's
23 | not and I'll accept your ruling but that is what was asked.

24 | MR. CHAIRMAN:

25 | You can ask the question and I'm not -- I have not suggested at all

E. ALAN MARSHALL, by Mr. Ruby

1 | this morning that you can't ask the question but having asked it,
2 | if he says, "I don't recall whether I was given a transcript or
3 | told what transpired at the trial.", then it's up to us to then
4 | reach a conclusion as to whether or not, number one, he wasn't
5 | given it and, number two, if he wasn't given it, what does that
6 | say about the investigative skills or the professional ethics of
7 | a particular person involved in this investigation. That's all
8 | we're saying.

9 | Now where are we?

10 | BY MR. RUBY:

11 | Q. I think at the point where I was going to ask you whether or
12 | not Sergeant MacIntyre informed you that at the trial Chant
13 | had not been ambiguous on the question of seeking aid at
14 | all?

15 | A. I can't remember, sir, whether he did or did not.

16 | Q. I suggest to you that had he done so you would have referred
17 | to that in your report. Fair or not fair?

18 | A. Ordinarily, yes sir.

19 | Q. Secondly, Sergeant MacIntyre persuaded you, I gather from
20 | your evidence before and from your report -- If you will
21 | look with me at page three about 11 lines down on the page
22 | in number six. Page three of your report. Page nine of
23 | Volume 18 in the summary of Pratico's evidence.

24 | He testified...

25 | He being Pratico.

E. ALAN MARSHALL, by Mr. Ruby

1 ...that he was about thirty or forty
2 feet from them at this time and that
3 he heard an argument take place between
4 the two during which SEALE is alleged
5 to call MARSHALL a 'crazy Indian' and
6 MARSHALL called SEALE a 'black bastard'.

7 You accepted that that was the case, did you not?

8 A. Yes, sir.

9 Q. And did Sergeant MacIntyre tell you that at trial he had
10 not testified to the language described, 'crazy Indian'
11 or 'black bastard'?

12 A. I can't recall that sir. I'm sorry.

13 Q. Had he told you that would you have written this in this
14 way?

15 A. I don't believe I would have. No, sir.

16 COMMISSIONER EVANS:

17 May I just ask you, Mr. Ruby or Commission Counsel, my recollection
18 is that the transcript of the evidence of the trial was not
19 available at the time this re-investigation was made but that a
20 portion of the judge's Charge to the jury at least, is that
21 correct?

22 MR. MacDONALD:

23 That's correct, My Lord. The transcript is dated after Inspector
24 Marshall's investigation. I think it's December the 16th of
25 1971, predates the actual date of the report.

COMMISSIONER EVANS:

And am I also right that Detective MacIntyre did not testify at the
trial?

E. ALAN MARSHALL, by Mr. Ruby

1 MR. MacDONALD:

2 He did not testify at trial.

3 COMMISSIONER EVANS:

4 And is there evidence that he was at the trial throughout?

5 MR. RUBY:

6 To my understanding.

7 COMMISSIONER EVANS:

8 I haven't -- I don't recall whether or not he was. I don't -

9 MR. RUBY:

10 There's been no evidence he was at the trial.

11 MR. MacDONALD:

12 No, My Lord, he was the informant and I believe the instruction
13 from the trial judge was to exclude everyone from the court
14 except the informant.

15 COMMISSIONER EVANS:

16 And at the preliminary there was an order of prohibiting publication.

17 MR. MacDONALD:

18 At the preliminary hearing, yes, of course. Inspector Marshall
19 had the preliminary transcript.

20 COMMISSIONER EVANS:

21 Yes.

22 MR. RUBY:

23 And therefore Sergeant MacIntyre would have had it as well. He
24 gave it to him.

25

E. ALAN MARSHALL, by Mr. Ruby

1 COMMISSIONER EVANS:

2 The Preliminary?

3 MR. RUBY:

4 Yeh.

5 BY MR. RUBY:

6 Q. Now, the phrase 'black bastard' and 'crazy Indian' is part
7 of the description given in this statement you were given
8 by Sergeant MacIntyre but it is not part of the testimony
9 at trial and I take it you were not told that at trial
10 he did not testify to that effect at all?

11 A. I can't recall, sir. I'm sorry.

12 Q. And you except my suggestion, I take it, that had you -- had
13 he done so you would not have written that in that way?

14 A. Yes, sir.

15 Q. And lastly --

16 A. At the trial. You're speaking of the trial now, aren't you?

17 Q. Preliminary hearing as well. It didn't come up there that
18 way either. The only place that language appears is in the
19 statement you were given. On all other occasions Pratico
20 did not adopt that language at all.

21 A. I see.

22 Q. And did not adopt it under oath. You wouldn't have known
23 that because you weren't at the trial, correct?

24 A. No, sir. That's correct.

25 Q. And would you have expected police officer relating to you in

E. ALAN MARSHALL, by Mr. Ruby

1 | this way in your re-investigation to have told you, were it
2 | true, about the trial testimony being different from the
3 | statement in that respect?

4 | A. I would expect that. Yes, sir.

5 | Q. And lastly you were persuaded, to use the language of your
6 | report, that the investigation conducted by the Sydney Police
7 | was intensive. And did Sergeant MacIntyre tell you that
8 | there had never been any photographs of the scene, there
9 | had never been any autopsy and that no serious search for the man
10 | Marshall described in his statement was ever undertaken. Did
11 | he tell you those things?

12 | A. Did he tell me those things?

13 | Q. Yes.

14 | A. That there were no photographs?

15 | Q. No photographs, no autopsy and no serious search for the man
16 | Marshall described?

17 | A. I can't recall. Did he tell me whether there were photographs
18 | taken?

19 | Q. Whether -- This was an investigation --

20 | A. Yes.

21 | Q. -- that had no photographs of the scene --

22 | A. Scene. No autopsy.

23 | Q. -taken at the time, no autopsy and that there were no -- there
24 | was no serious search undertaken for the man Marshall had
25 | described, alleged to be Roy Ebsary at this date?