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**ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION**

Volume 68

Held: May 25, 1988, in the World Trade and Convention
Center, Halifax, Nova Scotia

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

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David
Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:
Counsel for Donald Marshall, Jr.

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

Mr. Donald C. Murray: Counsel for Mr. William Urquhart

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

Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the
Attorney General of Nova Scotia

Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P.
and Counsel for the Correctional Services of Canada

Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and
MacAlpine

Mr. Charles Broderick: Counsel for Sgt. J. Carroll

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel
for Staff Sgt. Wheaton and Insp. Scott

Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for
the Union of Nova Scotia Indians

Mr. E. Anthony Ross: Counsel for Oscar N. Seale

Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black
United Front

Court Reporting: Margaret E. Graham, OCR, RPR

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MR. EDWARDS, EXAM. BY MR. MACDONALD

1 May 25, 1988 - 9:34 a.m.

2 MR. CHAIRMAN

3 Mr. MacDonald.

4 MR. MacDONALD

5 Thank-you, My Lords.

6 MR. FRANK EDWARDS, recalled and still sworn, testified as follows:

7 EXAMINATION BY MR. MacDONALD [Cont'd.]

8
9 Q. Mr. Edwards, I want to spend a few moments looking at the
10 decision that was filed by the Appeal Division following the
11 reference. Do you have Volume 4 there?

12 A. Before we proceed with that, could I?

13 Q. I certainly...I do remember that that's my first question
14 every time. Yes.

15 MR. CHAIRMAN

16 Obviously you didn't pay much attention to the hockey game
17 last night.

18 MR. EDWARDS

19 The lights went out, had to do something.

20 No, I just want to go back to my answer yesterday where I
21 was articulating my apprehension that the order for a new trial
22 was definitely in the cards. You recall my answer on that. What I
23 wanted to say at this point was that I think it's important, at least
24 I think it is, to understand...in order to fully understand that
25 answer, to understand the context in which that apprehension

1 | arose. And, what I mean by that is that just going back to the
2 | beginning of the investigation, February, March and April, and
3 | April in particular, it was my view during that period, and talking
4 | especially now in April, that this was all quite straightforward.
5 | That the evidence was so overwhelming that anybody who heard
6 | it would be as convinced as I was that there had been a
7 | miscarriage and that the wrong man was in jail.

8 | Well, I mean, at that time and maybe I had solidified my
9 | views on it prematurely, but I don't think so. But at that time it
10 | was just not conceivable to me that anyone could really look at all
11 | this evidence and have another view.

12 | Well, then after it became public, the case, the facts
13 | generated a lot of discussion in the community at large. And, I
14 | soon realized that my impression of it wasn't universally shared,
15 | and that there were a lot of...a lot of people who took the opposite
16 | view, that it wasn't a straightforward miscarriage. In fact, that
17 | there was no miscarriage at all. And, now, I'm talking about a
18 | cross-section of opinion in the community.

19 | Indeed, from my experience with the case and that's
20 | stretched over six years now, it's...if you went looking for
21 | somebody who was neutral on this case you would have to look
22 | hard. And, you know, we found that out when we starting
23 | selecting Ebsary juries. I think each time we went through some
24 | eighty people on the panel, challenging for cause.

25 | And, my perception through this period, so we're talking

1 now through April of '82 through to December of '82, my
2 perception was that really there was a polarization of opinion. On
3 the one hand you had those, particularly in the media, who felt
4 that there had been a gross miscarriage of justice and that no
5 blame at all attached to Donald Marshall and that it was all the
6 system's fault. And, then at the opposite end you had those who
7 felt that Donald Marshall was the author of his own misfortune
8 and that he was really to blame for it all. I think the importance
9 of understanding that is to appreciate that Gordon Coles'
10 sentiment, for example, was not an isolated opinion. You know,
11 you would get that from taxi drivers to policemen to members of
12 the community generally. And, that added to my apprehension
13 that this miscarriage wasn't going to...wasn't going to sell. That I
14 could very well find that attitude, the attitude that Donald
15 Marshall was the author of his own misfortune, on the bench.

16 Now, it's been my experience that very often judges being
17 members of the community obviously, will react to evidence in
18 the same way, or you can get some indication from general
19 community reaction as how...as to how Judges will react.

20 And, so it was in that context that the apprehension arose
21 and then in that milieu when the case developed, as we've already
22 described, that's why after December 2nd, you know, that in
23 combination with the other factors I mentioned yesterday, made
24 the possibility that a new trial would be ordered very real in my
25 mind.

MR. EDWARDS, EXAM. BY MR. MacDONALD

1 MR. MacDONALD

2 Thank-you.

3 MR. CHAIRMAN

4 But, Mr. Edwards, you had reached the conclusion in April of
5 that year that there had been a miscarriage of justice.

6 MR. EDWARDS

7 Yes, My Lord.

8 MR. CHAIRMAN

9 On the basis of the evidence that you had before you, that
10 had been produced as a result of the reinvestigations, et cetera.

11 MR. EDWARDS

12 Yes.

13 MR. CHAIRMAN

14 If that same evidence had been brought before the Court of
15 Appeal, could you not reasonably assume that regardless of public
16 opinion that the Court being bound by the evidence before it
17 would have reached the same conclusion as you had?

18 MR. EDWARDS

19 If it had been possible to get it all before the Court, say
20 under 617 (c), I think that that would be a reasonable expectation
21 and, indeed, that would have been my expectation after the June
22 meeting with Mr. Rutherford. But as things...as it developed, the
23 possibility of getting all of that evidence before the Court was
24 remote. But on the other hand, although a lot of that evidence
25 wasn't actually admitted as evidence there is very little of which I

MR. EDWARDS, EXAM. BY MR. MacDONALD

1 was aware, as a result of the investigation, that the Court was not
2 aware of through the affidavits that were filed. For example, they
3 had the affidavits of the police, and they had the affidavits of
4 most of the other major players, e.g., the defence lawyers. And so
5 technically speaking those items did not become evidence but to
6 me it's a bit artificial perhaps to suggest that, well, because they
7 actually weren't tendered as evidence that as far as the Judges
8 were concerned, they didn't exist. I mean, there was...there was an
9 awareness both through the affidavits and living in the
10 community, my goodness, all of this was publicized every day on
11 TV and radio and everything else.

MR. CHAIRMAN

12
13 So, there are two or three factors that we can assume caused
14 you concern that a new trial would be ordered rather than an
15 acquittal of Donald Marshall, one being the change from 617 (c), to
16 617(b) for the inquiry.

MR. EDWARDS

17
18 Yes. As I say, I was perplexed...

MR. CHAIRMAN

19
20 Yes.

MR. EDWARDS

21
22 ...by that...it being narrowed...

MR. CHAIRMAN

23
24 Another, that some of the evidence, including the police
25 evidence, was not either admitted or called before the Court of

MR. EDWARDS, EXAM. BY MR. MacDONALD

1 Appeal, and thirdly, comments or rulings that had been made
2 during the hearing of the evidence. Is that a summary of what
3 you've been saying?

MR. EDWARDS

4
5 Perhaps I could...it's a summary but I...

MR. CHAIRMAN

6
7 There may be others.

MR. EDWARDS

8
9 ...don't agree with part of it, My Lord, with respect. Number
10 one, I mean, and I think it's very important because you, for
11 example, My Lord, you're coming in and hearing it fresh. You're
12 not in the community, so you wouldn't be aware of the extreme
13 positions that were in the community. That's why I think it's
14 important that I give you some sense of the context of this, that
15 the apprehension. So, that would be the first point. That, I think,
16 the context, the community feeling about it.

17 Then number two would be the development of the thing
18 starting with the change from 617(c) to (b).

19 Then getting into the July and October applications, the
20 Court making it abundantly clear that this was going to be an
21 ordinary appeal, pretty well, except I mean they loosened up on
22 the fresh evidence rules to allow Marshall to testify. But other
23 than that it was pretty well an ordinary appeal, and was deemed
24 to be treated as such.

25 Then the next would be the...my assessment that the

MR. EDWARDS, EXAM. BY MR. MacDONALD

1 evidence which was heard by the Court on December 1st and 2nd
2 did not play well, if I can put it that way, and didn't come out
3 near as well as I thought it would. And I gave the illustration of
4 Adolph Evers' evidence yesterday.

5 And then the next would be just my gut reaction trying to
6 assess how the judges felt about it. And, all of those factors
7 combined made me feel that the order for a new trial was in the
8 cards.

MR. CHAIRMAN

10 Thank-you.

COMMISSIONER EVANS

12 Mr. Edwards, do I understand from your evidence this
13 morning that you were of the opinion that the evidence that was
14 offered by way of affidavits and which was rejected by the Court,
15 still played a part in the decision?

MR. EDWARDS

17 I think I haven't myself done a close analysis of the decision
18 to determine that. I believe there are a couple of references to
19 affidavits in it that that...

COMMISSIONER EVANS

21 That were rejected?

MR. EDWARDS

23 That were rejected. Now, a closer scrutiny may prove that
24 wrong. But that's...that's my feeling now. But I guess the point I
25 was making about the affidavits was that, you know, they were

MR. EDWARDS, EXAM. BY MR. MacDONALD

1 | seen and they were read, certainly prior to the October application
2 | because they were the meat on which the October application was
3 | argued. I mean, we're talking about the same judges except for
4 | one, I mean, the only difference is that Mr. Justice Morrison had
5 | been replaced in December. So, although technically you would
6 | call it a different panel, it was four out of the five were the same.

7 | So, I don't know, I appreciate that a judge has to separate
8 | out what is evidence and what is not evidence, but to say that
9 | they could then write the decision and pretend that they didn't
10 | know anything about the reinvestigation or the police point of
11 | view, as I say, I think lay people and even I, as lawyer, have
12 | some difficulty with that.

COMMISSIONER EVANS

13 |
14 | And you also stated that the public perception and the
15 | polarization that took place...

MR. EDWARDS

16 |
17 | Yes.

COMMISSIONER EVANS

18 |
19 | ...would have an effect upon the judiciary. Or is that more...

MR. EDWARDS

20 |
21 | No.

COMMISSIONER EVANS

22 |
23 | ...applicable to a jury panel than to Court?

MR. EDWARDS

24 |
25 | No, no, I'm glad you brought that back because that's not

1 what I meant to imply.

2 COMMISSIONER EVANS

3 It had an effect upon you.

4 MR. EDWARDS

5 It had an effect upon me.

6 COMMISSIONER EVANS

7 That's right.

8 MR. EDWARDS

9 To me it was illustrative of the argument at the other pole
10 from where I was standing. As I was saying, in April I couldn't
11 conceive that anybody could hold another opinion. But as we
12 progressed through to December, it became very apparent to me
13 that not only were there others who held the opposite view, but
14 my feeling at the time was that outside of the media, the majority
15 view was going the other way. And so what I am saying is that
16 the judges, being members of the community, would be subject to
17 having those same attitudes, not being influenced by them but
18 just as members of the community could very well hold them.

19 COMMISSIONER EVANS

20 Thank-you.

21 MR. MacDONALD

22 Q. Having said all of that, Mr. Edwards, I take it you're
23 still...will agree to your answer yesterday, for whatever
24 reason.

25 A. Yes.

1 Q. It was your assessment that the Court of Appeal of Nova
2 Scotia was not going to acquit Junior Marshall unless they
3 could blame him.

4 A. Yes.

5 Q. The affidavits, I just want to clean up one point on those,
6 other than what's contained in the transcript of the
7 reference, and concessions that you made or statements of
8 agreement you made in your factum.

9 A. Yes.

10 Q. There was no agreement by you to have affidavits filed. Is
11 that correct? Have affidavits become part...

12 A. Of the evidence.

13 Q. ...of the record. Of the record.

14 A. I think that's correct.

15 9:52 a.m.

16 Q. Thank you.

17 A. Except insofar as they were, portions were adopted by
18 witnesses.

19 Q. Thank you. And, in particular, do you know if you agreed,
20 can you recall whether you agreed to the introduction of the
21 affidavit of Dr. Mian as forming part of the record of the
22 reference?

23 A. I think the transcript is a little ambiguous on that. My recall
24 is yes, my recollection is that the trade-off not calling Pratico
25 is that we make Dr. Mian's affidavit part of the evidence...

1 Q. And that was your...

2 A. And possibly John Pratico's affidavit for that matter, but I
3 think Dr. Mian's for sure.

4 Q. Certainly your intention was to have Dr. Mian's affidavit form
5 part of the record.

6 A. Yes.

7 Q. Thank you. Let me take you to the reference decision. Now
8 it's in Volume 4, it starts at page 80 but I want you to go to
9 page 143. Page 143.

10 A. Yes. This is the decision, is it?

11 Q. Yes.

12 A. Yes, okay.

13 Q. At the bottom of page 143 and continuing to page 144 it is
14 stated, "MacNeil's evidence, although unfortunately not
15 adequately tested by rigorous cross-examination by Crown
16 counsel, is clearly evidence that it's capable of being
17 believed."

18 A. Yes.

19 Q. I read that as being a criticism of the way you conducted the
20 examination of Mr. MacNeil in any event.

21 A. That's how I read it, too.

22 Q. Did you consider that, is that perhaps other evidence of your
23 belief that you were being criticized for not being
24 adversarial?

25 A. Well, when I took that, when I read that rightly or wrongly,

1 what rang to me was Mr. Justice Pace saying, "Tell me one
2 witness that we can believe," and I said, "Jimmy MacNeil."
3 And what I read into that was, when they got to the evidence
4 of Jimmy MacNeil they couldn't get around it, or that's
5 unfortunate wording. They had to deal with the fact that his
6 evidence hadn't been shaken and so I was criticized for not
7 cross-examining him rigorously enough. And I have to
8 concede, to be perfectly honest about it, that I didn't do, I
9 didn't try to devastate to Jimmy MacNeil, and the main reason
10 was because I believed him. I don't know if that answers
11 your question.

12 Q. Your explanation, either yesterday or the day before, of your
13 role as you saw it in the Court of Appeal was to test the
14 evidence.

15 A. Yes.

16 Q. And you consider that you did test the evidence of MacNeil?

17 A. I do. I do. And as, when I was preparing to give my
18 evidence, of course, that comment, quite frankly, has always
19 rankled me. And so I thought, well, what I'll do is read a
20 thorough cross-examination of Jimmy MacNeil. So I read Miss
21 Edwardh's cross-examination and it was a very, very capable
22 cross-examination. But at the end of the day Jimmy MacNeil
23 was still on his feet even after that searching cross-
24 examination. So I guess what I'm saying is what was the
25 point of cross-examining Jimmy MacNeil there. Now, of

1 course by the time of Ebsary three I wanted to cross-examine
2 Jimmy MacNeil to really give him a test on the conversation
3 prior to the stabbing.

4 Q. But you never doubted his story that Seale...

5 A. I never...

6 Q. Was stabbed by Ebsary.

7 A. Never doubted, exactly.

8 Q. And you don't today.

9 A. No.

10 Q. I assume from what you've told us in the last day or so that
11 you certainly weren't surprised by the decision of the Court of
12 Appeal on this reference.

13 A. No, I wasn't surprised. I suppose I was, if anything, a little
14 bit relieved that he had been acquitted.

15 Q. And would you agree with me that the Court of Appeal is
16 saying there was no miscarriage of justice in this case.

17 A. That's what they're saying, yes.

18 Q. And that Donald Marshall is to blame, he's the author of his
19 own misfortune.

20 A. I don't know if they actually come out and say that but that
21 is...

22 Q. That's what you understand them to be saying.

23 A. Yes. But I don't think those words actually appear in the
24 decision, do they?

25 Q. Not those actual words.

1 A. No.

2 Q. Would you agree also that what the Court of Appeal has done
3 to Donald Marshall is convict him of a robbery?

4 A. No. I wouldn't go that far with you.

5 Q. You don't believe that they have said that he did commit
6 robbery?

7 A. They said that he did commit a robbery but that's not
8 convicting him.

9 Q. Okay, perhaps not in the technical sense.

10 A. No.

11 Q. But you were saying yesterday, I believe, when we were
12 looking at that statement that was taken at Dorchester and
13 that was used to cross-examine Mr. Marshall.

14 A. Yes.

15 Q. That he wasn't on trial for robbery, he wasn't in any jeopardy.

16 A. Yes.

17 Q. But I put it to you that the result is that he's been, in effect,
18 convicted in the general sense of that word of that crime
19 without ever having had the opportunity of having a trial on
20 that charge.

21 COMMISSIONER POITRAS

22 I might draw the witness to the attention, draw the witness'
23 attention to the second last paragraph at page 145.

24 MR. MacDONALD

25 Thank you, My Lord.

1 MR. EDWARDS

2 By planning a robbery?

3 COMMISSIONER POITRAS

4 Yes.

5 MR. EDWARDS

6 A. Yes. No, I mean my evidence is that they certainly said he
7 committed a robbery, that's the unmistakable gist of the
8 decision. I just had a little trouble with the word "convict."

9 Q. I understand that and you, that word means something to you
10 as a prosecutor...

11 A. Yes.

12 Q. I'm talking, using it more in the, perhaps in the popular sense
13 that he's been found guilty of something without ever having
14 had the opportunity of being tried for it.

15 A. Fair enough.

16 CHAIRMAN

17 Again, do you interpret the decision of the Court of Appeal
18 as one of finding Donald Marshall, Jr. not guilty or, rather, finding
19 that on the evidence a jury would have been presented with a
20 reasonable doubt as to his guilt.

21 MR. EDWARDS

22 Not guilty of the murder.

23 CHAIRMAN

24 That's right, but I'm having some difficulty with that finding
25 on page 144 ...

MR. EDWARDS, EXAM. BY COMMISSIONERS

1 MR. EDWARDS

2 Which part specifically, My Lord?

3 COMMISSIONER EVANS

4 First paragraph.

5 CHAIRMAN

6 It says, the first paragraph.

7
8 No doubt that in light of all the evidence now
9 before this court no reasonable jury could, on
10 that evidence, find Donald Marshall, Jr. guilty of
11 the murder of Sandy Seale. That evidence, if
12 much is not believed, makes it impossible for a
13 jury to avoid having reasonable doubt as to
14 whether the appellant has been proved to have
15 killed Seale.

13 MR. EDWARDS

14 Yes.

15 CHAIRMAN

16 And putting it another way, "The new evidence causes us to
17 doubt the correctness of the judgement at the trial."

18 MR. EDWARDS

19 Yes.

20 CHAIRMAN

21 Is there a distinction between that finding and a simple
22 statement that, I gather from your evidence, particularly if it had
23 gone under 617(c)...

24 MR. EDWARDS

25 Yes.

MR. EDWARDS, EXAM. BY COMMISSIONERS

1 CHAIRMAN

2 Donald Marshall, Jr. did not murder Sandy Seale.

3 MR. EDWARDS

4 Is there a distinction between what they said there...

5 CHAIRMAN

6 Yes.

7 MR. EDWARDS

8 And saying specifically that Donald...

9 CHAIRMAN

10 Yes.

11 MR. EDWARDS

12 I suppose when you look at it that way there is a distinction
13 and it would have been better had they said he didn't do it.

14 COMMISSIONER EVANS

15 It would have been a lot better if they had said that on any
16 ground there was a miscarriage of justice.

17 MR. EDWARDS

18 No question about that.

19 COMMISSIONER EVANS

20 As I understand 613, they had the alternatives which you
21 discussed the other day.

22 MR. EDWARDS

23 Yes.

24 COMMISSIONER EVANS

25 And they allow the appeal where,

1 The opinion the verdict should be set aside on
2 the ground that it is unreasonable or cannot be
3 supported by the evidence to the judgement of
4 the trial court. Two, the judgement of the trial
5 court should be set aside on the grounds of a
6 wrong decision on a question of law. Or third, on
7 any ground there was a miscarriage of justice.

8 MR. EDWARDS

9 Yes.

10 COMMISSIONER EVANS

11 That would have made it very clear that he was not guilty,
12 not that there was a reasonable doubt in the minds of any jury
13 and, therefore, he should be acquitted.

14 MR. EDWARDS

15 There's no question, My Lord, that that would have been the
16 preferred outcome.

17 COMMISSIONER EVANS

18 And it was open to them.

19 MR. EDWARDS

20 And it was open to them, sure, but again, my position, my
21 feeling was that there was no way I could get both so...And I, it's
22 interesting and perhaps it's just because he was taking it in
23 chronological fashion, but when I reread Mr. Aronson's factum the
24 other day I note that he seems to stress acquittal on the basis of,
25 not supported by the evidence, and he says, "In the alternative I
argue that..." the miscarriage argument is his secondary argument

MR. EDWARDS, EXAM. BY COMMISSIONERS

1 although perhaps he was just taking it chronologically. I don't
2 know it that reflected that he had the same appreciation I did or
3 not...

COMMISSIONER EVANS

5 Maybe he read the court in the same fashion as you did.

MR. EDWARDS

7 That's possible. I don't know, was that ever put to him?

MR. MacDONALD

9 I don't know either, My Lord. I didn't examine Mr. Aronson.

10 Q Let me take you back to page 144, if I can just follow along
11 the line that Mr. Justice Evans was just dealing with. The
12 Court says, "We must accordingly conclude that the verdict of
13 guilt is not now supported by the evidence..."

14 A. Yes.

15 Q "...and is unreasonable and must order the conviction
16 quashed. In such a case a new trial should ordinarily be
17 required."

18 A. Yes.

19 Q I, perhaps mis-, don't understand the criminal law that well
20 but I would expect if there's no evidence or if the evidence
21 now available cannot support a conviction why would you
22 ever order a new trial?

23 A. I can't answer that.

COMMISSIONER EVANS

25 Many a defence lawyer has wondered about many Courts of

1 Appeal.

2 MR. MacDONALD

3 Perhaps you can answer, My Lord.

4 COMMISSIONER EVANS

5 At one time I could have.

6 CHAIRMAN

7 Again, that sentence on page 144 in the second last
8 paragraph. "We must accordingly conclude that the verdict of
9 guilt is not now supported..." The implication is that the evidence,
10 at one time, did support a verdict of guilty.

11 MR. EDWARDS

12 Yes.

13 CHAIRMAN

14 Do you share that view that there was ever sufficient
15 evidence before the Court to warrant a conviction of Donald
16 Marshall?

17 MR. EDWARDS

18 I wish I could answer some of these in one word. I think
19 that I have to premise my answer to that by saying that I don't
20 think that any blame should ever be attached to the people sitting
21 on the jury in that trial. I think that given what was presented to
22 them that it was a verdict open to them to make. But having put
23 that rider on it, the short answer to your question is no. And I
24 think when I read the transcript, when I completed reading the
25 transcript of the trial, and then of course in light of what I knew

1 at that time, there was no doubt in my mind then that there had
2 been a miscarriage.

3 CHAIRMAN

4 What would you have done if you had been the prosecutor
5 at the original trial when John Pratico, if John Pratico had come to
6 you in the corridor before he went into the witness box and told
7 you that he had not seen Donald Marshall murder Sandy Seale?
8 That he wasn't there that night. How would you have brought
9 that to the attention of the Court and the jury?

10 MR. EDWARDS

11 Perhaps the best way I can answer that it's hard to say what
12 I would have done but surprisingly I had a parallel situation
13 two years ago in a murder trial where after the addresses of
14 counsel, I was leaving the courthouse and a lady approached
15 me very flustered and was directed to me by a CBC reporter,
16 as a matter of fact, George Garland, and she was on the verge
17 of tears and shaking and she said, "Mr. Edwards, what you
18 just said in there was all wrong." And I had just finished
19 arguing to the jury that the victim had died on Saturday night
20 and that was the whole theory of the Crown. She said,
21 "Because I spoke with the victim the next day and I told that
22 to the police and," she said, "not only that there are two
23 others that I know of who also spoke with her the next day."
24 So what I did was advise defence counsel of the information,
25 then we went in and saw Mr. Justice Hallett, told him. He

1 heard her evidence that evening at 7 o'clock. We convened a
2 special session and I led the evidence out of her and after
3 hearing that he asked for motions. I moved for a mistrial.
4 And the defence concurred and that's what he did. I think
5 that's a parallel and I think that may have been an option
6 open at that time.

7 MR. MacDONALD

8 Q. I have a little difficulty, and perhaps I didn't understand your
9 answer to the question just before. But are you saying that,
10 in your view, given the evidence at trial of Junior Marshall...

11 A. Yes.

12 Q. With the two eyewitnesses and the evidence given by Mr.
13 Marshall and the whole thing, that there was a miscarriage of
14 justice when he was convicted? Did I understand you to say
15 that?

16 A. Yes. Because that evidence was so tainted that it shouldn't
17 have been put before a court.

18 Q. Okay, but I didn't understand that. I thought that question
19 was the evidence that was before the Court, that was before
20 the jury, that you did say could certainly support a conviction.

21 A. Yes. What I'm saying is...

22 Q. But what you're saying is the evidence, perhaps, shouldn't
23 have been put before the Court or more or additional
24 evidence should have been put or something to that effect. I
25 don't understand your...

1 A. Yeah, I know...

2 Q. What you're saying to us.

3 A. And it's difficult. I have a tough enough time answering
4 some of the questions I've anticipated. But what I'm saying
5 is that the, in my view, the root of the miscarriage lies in the
6 fact that that evidence was placed before a jury.

7 10:13 a.m.

8 Q. And now does that answer the question I believe the Chief
9 Justice asked, if at any time there was evidence that would
10 support a conviction. I believe that's, that was your
11 question.

12 A. Yes.

13 Q. And I put that to you. I think your answer was, yes, the
14 evidence that actually was presented to the jury could and
15 did support a conviction.

16 A. Yes. But on the other hand, what I'm saying is that had that
17 evidence been properly assessed prior to going to Court that
18 it wouldn't have been placed.

19 Q. I understand that.

20 A. Yeah.

21 Q. Okay, thank-you. And we've been through that, I think,
22 earlier in your evidence. But I want to go back now to page
23 144. Just following the sequence here. The Court of Appeal
24 says, "Accordingly we must take the alternate course
25 directed by 613(2)(a) and direct that a judgement of

1 acquittal be entered in favour of the appellant." Isn't that
2 the end of it? Why does the Court have to go beyond that
3 at all? In first year law term isn't that what is known as
4 from then on obiter dicta, or gratuitous remarks?

5 A. Yes. I think you're correct in saying that, but at the same
6 time let's assume for a moment that there had been no
7 miscarriage for the sake of argument.

8 Q. Yes.

9 A. Then I would think, and let's assume that the Court had that
10 view which they obviously did, then I would think that that
11 would invite some comment from the Court in the public
12 interest and, so I don't think one should be critical of that
13 being tacked on as gratuitous because to my mind that flows
14 from a bona fide, not to overwork that term, belief that
15 there had been no miscarriage. But again, you know,
16 maybe I'm interpreting the rationale of the Court, but that's
17 my own feeling on it.

18 Q. But you did tell us earlier that you really couldn't assess
19 whether there has been a miscarriage unless you had a
20 broad ranging inquiry into all of the facts.

21 A. Well, that's my opinion, yes.

22 Q. And that didn't happen.

23 A. No.

24 Q. Well, I'm suggesting to you that the comments of the Court
25 after they have directed that an acquittal be entered are

1 strictly gratuitous and shouldn't have been made at all.

2 A. They could have stopped there, but I can't go that far and
3 say that they were strictly gratuitous, because I think that a
4 Court hearing this and if they were convinced that there was
5 no miscarriage, even if, you know, you can argue whether
6 they were mistakenly convinced or they didn't have enough
7 evidence before them to be convinced, but if they were
8 genuinely convinced that there had been no miscarriage,
9 then I don't think they remarks that follow would be
10 unreasonable. Now, of course, that's prefaced by the "if." In
11 fact, I believed there was a miscarriage and on that basis,
12 you know, believing there had been a miscarriage, then
13 those remarks are gratuitous.

14 Q. To come back to what you told us yesterday and confirmed
15 this morning though.

16 A. Yes.

17 Q. Your assessment was that the Court would not have reached
18 that first decision directing that a judgement of acquittal be
19 entered unless they could go on with the balance of the
20 decision and place the blame on Marshall.

21 A. Yes.

22 Q. Thank-you. Let's go to Volume 32, please. You were asked
23 to review the decision of the Appeal Division and to
24 determine the evidence that might exist to support charges
25 of perjury, is that correct?

1 A. Yes.

2 Q. And on page 152 of that volume there is a memorandum
3 from Mr. Herschorn to the file where he indicates that that
4 instruction was given to you.

5 A. Yes.

6 Q. Your...the request of you was restricted to that extent, was
7 it, you were only to review the decision of the Court to
8 determine what evidence exists to support charges of
9 perjury and a charge of attempted robbery against Donald
10 Marshall, Junior.

11 A. My memo in response, the May 16th memo.

12 Q. Yes, that's on page 154.

13 A. Now, my difficulty here, I'm just checking the memo to see
14 what I did give opinions on because I...yeah, I think that
15 was the request. Charges of perjury and attempted robbery.

16 Q. Prior to giving your opinion, did you have any discussions
17 with any of the people involved, Marshall, Chant, Harriss,
18 Pratico?

19 A. No.

20 Q. Yesterday we talked about, a little bit about perjury. My
21 understanding of the offence is that someone tells a lie, tells
22 an untruth to a trier of fact, under oath, with intent to
23 mislead, is that a fair definition?

24 A. Yes.

25 Q. Now, you concluded that Junior Marshall...what did you

1 conclude? Did he commit perjury in 1971 or did he not?

2 A. I think the bottom line was that, yes, he did in a very
3 technical sense but there shouldn't be a charge.

4 Q. Now, you go on, on page 155, you talk about the comments
5 of the Court, and then you quote from a comment of the
6 Court and then you say, "The Court seems to treat Marshall's
7 omission of facts pertaining to the attempted robbery as
8 lies."

9 A. Yes.

10 Q. Is that what you understand Marshall didn't do at trial is he
11 didn't tell the story about the robbery?

12 A. Yes.

13 Q. That's what his "crime" was.

14 A. Yes.

15 Q. He didn't tell about the robbery.

16 A. You have the Code there open, I'm sure, at 120.

17 Q. Yes.

18 A. And you see there's a succinct quote there from the Farris
19 case, and there's a ...

20 Q. "There is no defence if the accused's statement is literally
21 true, if he well knew and intended that the statement
22 should be taken in another sense."

23 A. Right. That's the sense I'm talking about there.

24 Q. So, is it, and was it your conclusion then that Marshall's
25 crime, well, at trial, was not telling enough, not telling about

1 an attempted robbery?

2 A. I can't improve upon the words of Farris. Giving a
3 statement that was literally true, but intending for it to be
4 taken in another sense. In other words, saying we met
5 these two individuals, and they were dressed like such and
6 such, and the implication being that they then without
7 provocation attacked us. That would be the literal sense of
8 his testimony. By omitting to say that he was in the process
9 of committing a robbery, the literal correctness of his
10 testimony was misleading. That's why I say it's a very
11 technical and I think I used the word "extension" of the
12 word perjury. Again, when I was asked to give these
13 opinions on perjury, I'm sure what went through my mind is
14 you can't be serious, you know, but I will. And, so I
15 satisfied the request but admittedly with a minimum of
16 research.

17 Q. On page 156 you are advising Mr. Herschorn, and this is the
18 first full paragraph, that Donald Marshall under cross-
19 examination refused to adopt those portions of the
20 statement given to the RCMP at Dorchester dealing with the
21 robbery.

22 A. Right.

23 Q. And that's been his position throughout, hasn't it?

24 A. No question.

25 Q. He has never adopted what he told the RCMP in Dorchester.

1 A. Right.

2 Q Thank-you.

3 A. The only...the only qualification you can put on that, he has
4 never adopted the statement, but if you read closely his
5 direct evidence at...on the reference it could be construed as
6 an admission of a robbery. I think I wrote down the page
7 references if you want to get into that. But suffice to say
8 perhaps that I think any fair reading of his direct evidence
9 on the reference is arguably an admission of the robbery. It
10 was to me an attempt to avoid being confronted with the
11 statement perhaps. Now, to admit but not admit, I don't
12 know, that's speculative.

13 Q. Okay. Now, let's go to the other witnesses. Let's take the
14 two eyewitnesses, Chant and Pratico.

15 A. Yes.

16 Q. Chant told the jury at the trial that he saw Donald Marshall
17 stab Sandy Seale, yes?

18 A. Yes.

19 Q. And Chant intended, I would expect, that the jury would
20 believe that.

21 A. Yes.

22 Q. How could that not be perjury, having him now say that he
23 never saw that? He was lying when he said it.

24 A. Well, again, technically speaking it is perjury.

25 Q. And the same with Pratico.

1 A. And the same with Pratico.

2 Q. And the same with Patricia Harriss, she told something on
3 the witness stand that she knew was not the truth.

4 A. That's right.

5 Q. Intending the jury to believe.

6 A. Technically, yeah.

7 Q. Now, but their's is not an act of omission.

8 A. That's right.

9 Q. Where Marshall's may have been not going far enough or
10 not telling them. Their's is a direct lie.

11 A. Yes.

12 Q. So, if it's perjury in the technical sense, it satisfies the
13 requirements of perjury, why is it that you concluded that
14 no charge should be laid? Can you just explain, just
15 generally if you want to, or explain at whatever length you
16 want why you would say there should not be perjury
17 charges laid against those three individuals?

18 A. Well, I think I recognized that it could be a technical
19 perjury, but I try not to be too technical and perhaps I let
20 quote unquote "common sense" prevail sometimes and I
21 think that's what happened here. That taking them one by
22 one, Pratico, given the mental background and background
23 and mental problems he had, the fact that he tried to recant
24 during the trial, looking at the fact that he had been
25 interrogated twice, had given two written statements, was

1 obviously open to suggestion, and again that related, I
2 suppose, to his mental condition. Really how could one
3 seriously recommend a prosecution for perjury there,
4 recommend that a perjury charge be laid?

5 Patricia Harriss, a fourteen-year-old girl, kept from,
6 was it eight or eight-twenty until 1:20 a.m., who gave a...the
7 first written statement and then, after what I judged to
8 have been very intensive interrogation, changes it. I have
9 great difficulty in impugning criminal intent to her.

10 Q. That's not the time that she committed perjury, is it? The
11 perjury...

12 A. No.

13 Q. ...is committed when she takes the witness stand.

14 A. Yes, but surely...surely you just don't look at the lie in a
15 vacuum. I mean, I can't divorce from my mind what had
16 gone on before. So, maybe I'm wrong on that, and there are
17 lots who argue I am. But my ...that was my belief and my
18 opinion.

19 And Chant, again the same sort of situation, in the
20 sense that he had given two statements. Well, the first one
21 was a lie, of course, as was the second, but again looking at
22 his age and the manner in which his second statement was
23 elicited, and no doubt we will get into that again about those
24 circumstances, but just the fact that he had a prior record,
25 that his probation officer was present, his mother was

1 present, and the Sheriff was present and two policemen.
2 And, as came out in the reference he believed Marshall was
3 guilty anyway and I'd have difficulty impugning the
4 necessary intent to him.

5 Q. Let me read you from your opinion and it's on page 157,
6 about Chant. This is the end of the first paragraph about
7 Chant, "No doubt he was acquainted with the fact that
8 earlier that morning Pratico had given a statement in which
9 he said he saw Marshall stab Seale." Now, first of all your
10 notes of July 12th, 1982, when you were interviewing...

11 A. Right.

12 Q. ...the police, contained a statement that Chant was not told
13 anything about the Pratico statement.

14 A. Yes.

15 Q. Did you subsequently get evidence or were you told
16 anything which would lead you to change or to make the
17 statement that I've just read to you that you made in 1983
18 in May?

19 A. No. No. I...July 12th I had difficulty believing that but I
20 didn't have then, nor do I have now, a basis for saying "John
21 MacIntyre, you're a liar on that point."

22 Q. But you believed it enough to tell Martin Herschorn that no
23 doubt.

24 A. Yes.

25 Q. Pratico or Chant was told about Pratico's statement given

1 earlier that morning.

2 A. That's right.

3 Q. And can you...you had no doubt of that.

4 A. No.

5 Q. Okay. In these circumstances...

6 A. Now, it may have been a situation where the opinion should
7 have been asked by someone else. Perhaps I was too close
8 to it.

9 Q. Okay.

10 A. And I acknowledge that.

11 Q. Let me continue the quote. "In these circumstances, he
12 likely saw no alternative to telling the police what he
13 believed they wanted to hear."

14 A. Right.

15 Q. And that, I'd suggest to you, is your reasoning for saying
16 "Chant didn't have any criminal intent, he was only telling
17 the police what he thought they wanted to hear him say."

18 A. Yes.

19 Q. And then when we go on to Harriss, it's on page 158, just at
20 the bottom of that first full paragraph, "It is probable that
21 after such extensive questioning, she, like Chant, told police
22 what she believed they wanted to hear."

23 A. Yes.

24 Q. And you then conclude that, in your conclusion:
25

1 With respect to both Chant and Harriss, it
2 is the opinion of the undersigned that neither
3 had the criminal intent necessary to support a
4 conviction for perjury. In other words, they
5 probably did not have the 'intent to mislead'
because they believed they were telling the
Court what the police were convinced was the
correct version.

6 10:36 a.m.

7 A. Right.

8 Q. Did you, at any time, give thought to whether charges of
9 counselling perjury should, would be supported in this case?

10 A. No.

11 Q. You were never asked to do that?

12 A. No.

13 Q. And you never have.

14 A. No, I've considered it since hearing Harry Wheaton's
15 testimony but not at that time.

16 Q. And counselling of an offence is merely getting someone to
17 commit an offence or, isn't it?

18 A. Yes.

19 Q. If these youngsters were only, as you said, telling the Court
20 what the police were convinced was the correct version...

21 A. Yes.

22 Q. Isn't that, in effect, saying that the witnesses are doing what
23 someone else has asked them to do or convinced them to do.

24 A. Yes, I suppose you could say that.

25 Q. And if what they did was perjury, commit perjury...

1 A. Yes.

2 Q. Isn't, aren't they committing perjury on the advice of
3 somebody else or on the coercion of somebody else?

4 A. Yes.

5 Q. Thank you. And you said yesterday, and I can turn up the
6 document for you if you want, but I'm sure you don't need it.
7 It's the January letter...

8 A. Yes.

9 Q. That you wrote to Martin Herschorn where you said, "The
10 police acted bona fide throughout..."

11 A. Yes.

12 Q. "...because they honestly believed that Junior Marshall had
13 committed this crime."

14 A. Yes.

15 Q. Are we then, in this situation, where the police believe that
16 Marshall commits the crime...

17 A. Yes.

18 Q. And they convince a couple of witnesses to tell the Court what
19 the police believe?

20 A. See, when you were taking me through it there a couple of
21 minutes ago, and just now, I think you're stopping one step
22 short...

23 Q. And don't let me do that. Please take me the last step.

24 A. Oh no, I was waiting for it.

25 Q. That seems to me to be a real sort of a "Catch-22" situation.

1 Somebody starts off with the belief...

2 A. Yes.

3 Q. That something happened.

4 A. Yes.

5 Q. That, is it then they can do whatever they like?

6 A. No.

7 Q. Is it free game from them on?

8 A. No.

9 Q. What are the limits?

10 A. There's a whole bunch of issues that you've probably raised.

11 Let's deal with the counselling perjury issue...

12 Q. Okay.

13 A. Head on. Okay? And I guess really what we're leading up to

14 is whether or not there's a case to be made that John

15 MacIntyre is guilty of counselling perjury. Is that fair?

16 Q. Yes.

17 A. Okay. Well, if he is counselling perjury then he is not only

18 urging Patricia Harriss, for example, to give a false story. But

19 in my view to be guilty of counselling perjury he would have

20 to be urging her to give a false story, and this is the crucial

21 part, which he knows to be false, and with intent to mislead.

22 Now if you accept, as I do, that John MacIntyre honestly

23 believed that the true story was that Marshall had committed

24 the stabbing, then it seems to me that that rubs out the

25 necessary ingredient to say that there's a case to be made

1 that he's guilty of counselling perjury.

2 Q. Even if, if...

3 A. Yes.

4 Q. He convinced Harriss and Chant to tell the Court what the
5 police were convinced was the correct version. They didn't
6 know, they didn't have this, remember they lied. They never
7 saw this...

8 A. That's right. And Chant and Pratico or Chant and Harriss,
9 right.

10 Q. They never saw it.

11 A. Um-hmm.

12 Q. Even in those circumstances if John MacIntyre convinced
13 them to tell a story that was a lie...

14 A. Yes.

15 Q. There's no criminal act by him...

16 A. Where...

17 Q. Because he believed, he believed...

18 A. He has ...

19 Q. That Marshall stabbed Seale.

20 A. Yeah. Criminal law, and I don't mean to be didactic but
21 criminal law hinges on the word "intention." And you have to
22 have evidence of intent to mislead on the part of John
23 MacIntyre in order to saddle him with counselling perjury.
24 Now if he bona fide believes that he's getting the truth out of
25 these witnesses, that he's cracked the case, then I can't

1 understand how you could make any inference of intent to
2 mislead in that circumstance.

3 Q. You have a circumstance here...

4 A. Yes.

5 Q. Of two witnesses who are unconnected, live 22 miles from
6 each other...

7 A. No question.

8 Q. Don't know each other.

9 A. Right.

10 Q. Haven't spoken to each other...

11 A. Yes.

12 Q. Who both say they saw Donald Marshall stab Seale, which is a
13 lie...

14 A. Yes.

15 Q. That they were involved in an altercation. That there were,
16 there is a thread running throughout their evidence of
17 common things that they both saw, none of which they did.

18 A. Um-hmm.

19 Q. Now isn't the only possibility, the only set of possibilities,
20 either that they did, in fact, see that occur, or that they
21 conspired, one with the other to concoct a story, or that
22 someone put the words in their mouth. Is there any other
23 possibility?

24 A. No.

25 Q. And if we accept, just for the basis of our discussion, that

1 someone put the words in their mouth...

2 A. Right.

3 Q. Are you saying that because the person who puts it in their
4 mouth believes that's what happened that that is acceptable
5 behaviour in our criminal justice system?

6 A. Again, context is everything. And to state it as succinctly as
7 you have, it's hard to disagree with that proposition. But if
8 you try to assess what's going on there. I mean this isn't just
9 anybody, this is a man who's investigating a murder. I think
10 you can take it for granted that, and I speak from experience
11 of having been close to several murder convictions, or
12 investigations, in Sydney. I take it as a given, that there is
13 intense pressure on the investigator to find a perpetrator. I
14 don't know, I'm operating on the premise that it was the same
15 way in '71. The investigator, you mentioned before. Is he
16 entitled to believe anything he wants? Of course not. But at
17 the same time, and I don't, I'm not professing to be a know-
18 it-all but I've spent really the last ten years of my
19 professional career, in a sense, analyzing police investigations.
20 And when they're presented with a situation they have to
21 start somewhere. Now it's all right for us to sit here and be
22 critical and say, "Well, you know, he arrived at a conclusion
23 and then went out and looked at evidence, which supported
24 that conclusion." That may be fair but, on the other hand, you
25 have to come up with some working theory to start with in

1 my view. You have to assess at least a possibility. Now
2 unfortunately, John MacIntyre assessed the possibility that
3 Marshall was the guilty party. And he convinced himself that
4 that's, in fact, what happened. So it wasn't just somebody
5 pulling an answer out of the air and say, "Well, I'm going to
6 hang it on this guy", in my view. And what did he have? I
7 mean he had Chant who he knew had lied to him. That's an
8 undisputed fact.

9 Q. Yes.

10 A. So he got overzealous. His tactics should be censored but I, in
11 that context what happened I don't think you would get past
12 preliminary inquiry if you charged him with counselling
13 perjury.

14 Q. Isn't it a bit ironic, though, that a man can go to jail for 11
15 years...

16 A. Yes.

17 Q. Based on the evidence of two people who lied...

18 A. Yes.

19 Q. Who, according to your belief, merely told the Court the story
20 the police wanted them to tell...

21 A. Yes.

22 Q. And after he gets out and finds out about all this, all we can
23 tell him is, "You can't do anything. The system can't do
24 anything to these people who put you away for 11 years."

25 A. No, I can't adopt that proposition.

1 Q. Well the system, you're telling us the system can't.

2 A. No, I'm not. I'm not.

3 Q. The criminal system now.

4 A. No, I think you have to dissect it. What I'm telling you is that,
5 in my opinion, and my logic may be all wet, but you have it
6 such as it is, in my opinion, John MacIntyre can't be held
7 criminally responsible.

8 Q. Neither should Harriss.

9 A. He is deserving of criticism for the way in which he conducted
10 the investigation but not a criminal charge. The system, you
11 know, the next logical progression is to say, well, if it's not
12 John MacIntyre where do we go from there. And I am of the
13 view, and I know that a contrary theory has been proffered
14 through questioning here but I am of the view that the first
15 statements of Chant, Pratico and Harriss were never disclosed
16 to the defence.

17 Q. And that's...

18 A. And if fault is to be assessed anywhere, then it is on that non-
19 disclosure.

20 Q. Okay.

21 A. Okay?

22 Q. All right.

23 A. Because my view, and again, that's all it is, is that the
24 disclosure of those statements would have prevented the
25 conviction. And then to carry it right through, that after the

1 conviction the 11-year incarceration could have been
2 prevented had the re-investigation been disclosed.

3 Q. Or had it been carried out in the same manner as the 1982
4 re-investigation.

5 A. Or had it been carried out in the same manner as the 1982
6 re-investigation.

7 Q. With all of these...

8 A. So, you know, to get back to your point, in view of what I've
9 just said, I don't think I'm throwing up my heads to Donald
10 Marshall and saying, "Too bad, pal. You know, you spent 11
11 years in jail."

12 Q. But the system has, the Court told him. "In spite of all that,
13 it's your own fault. You're the guy who is to blame."

14 A. And the Appeal Court said that, yes.

15 Q. Okay.

16 COMMISSIONER EVANS

17 May I just ask one question dealing with MacIntyre and the
18 witnesses. The witnesses didn't tell him the truth to start with
19 and as you say he was a little aggressive. But leaving aside...

20 MR. EDWARDS

21 Well Chant didn't...

22 COMMISSIONER EVANS

23 Well leaving aside the aggressiveness...

24 MR. EDWARDS

25 Or, and Pratico.

1 COMMISSIONER EVANS

2 MacIntyre, what he did was he didn't accept their story and
3 he made suggestions to them...

4 MR. EDWARDS

5 Yes.

6 COMMISSIONER EVANS

7 As to how their story was impossible.

8 MR. EDWARDS

9 Yes.

10 COMMISSIONER EVANS

11 And they adopted his suggestions.

12 MR. EDWARDS

13 They adopted, yes.

14 COMMISSIONER EVANS

15 Now he didn't actually tell them lies...

16 MR. EDWARDS

17 No.

18 COMMISSIONER EVANS

19 He just made suggestions to them and when they adopted
20 those suggestions, on their own, and came back to him after
21 whatever brainwashing, if you want, took place, that was the
22 crime, if there was any, by the witnesses, when they repeated
23 those stories in the Court.

24 MR. EDWARDS

25 Yes.

1 COMMISSIONER EVANS

2 But it's not MacIntyre who told them to tell those stories,
3 they believed that's the story that MacIntyre and the police
4 wanted them to tell.

5 MR. EDWARDS

6 Yes. And on that, the thrust of Mr. MacDonald's questioning
7 was that the words of Chant, Pratico and Harriss had been actually
8 put in their mouths by John MacIntyre. Well, I think it's fair ball
9 for an interrogator to say to a witness, "Well look, did it happen
10 this way?" Subject to, and this is the problem, and this is what's
11 reprehensible here, subject to the consideration being given for
12 the person you're questioning, ie. the youth of the witness, the
13 mental frailty of the witness, that type of thing. But given the
14 questioning of a quote, unquote normal adult, I don't see anything
15 wrong with police digging in that manner.

16 MR. MacDONALD

17 Q. All right, I think we've perhaps spent long enough, at least
18 you and I, on this. Look at page 209 of Volume 32, please.
19 That is a memo, I believe, written by Mr. Coles, Mr. How,
20 sorry.

21 A. Mr. How. Okay.

22 Q. And where he says, "He decided not to press any charges
23 against Marshall or the other witnesses and will hold action
24 re Sydney Police until we know the outcome of the civil
25 action." Was any of that ever discussed with you?

1 A. Never.

2 Q. The next page, 210, and continuing on. That is a memo that
3 was made by Judge Cacchione to his file and there's a couple
4 of points in there that refer to you...

5 A. Oh, yes.

6 Q. That I think I should give you the opportunity to address.

7 A. Okay.

8 Q. He's talking about the preliminary hearing for Mr. Ebsary and
9 then the first and second trials and on page 210 he says,

10
11 At no time has the Crown made any
12 arrangements for Donald's transportation to and
13 from Sydney. To the best of my knowledge he
14 has paid. (I believe he means has not paid) any
15 conduct money whatsoever. It is almost as if the
16 Crown did not want him to appear.

17 Now, would you like to comment on that?

18 A. Here are the receipts.

19 Q. The receipts for what?

20 A. His travel to and from Sydney, hotel accommodation, meals,
21 all paid for over my signature.

22 Q. So Mr. Marshall was paid to attend in Sydney as a witness.

23 A. On every occasion.

24 COMMISSIONER EVANS

25 To whom were the payments made, to Mr. Cacchione or to
Marshall?

1 MR. EDWARDS

2 One of the payments went through Mr. Cacchione and a
3 couple of them went directly to Donald.

4 MR. MacDONALD

5 Q. What about the expenses for Mr. Cacchione? Was he there as
6 well?

7 A. He was there, I don't believe I paid his expenses.

8 Q. Did you want Donald Marshall to appear, to be a witness at
9 the preliminary and at the Ebsary trial?

10 A. On one of the occasions, I don't remember if it was the second
11 trial or the third trial, the sheriff, in Halifax, was having
12 difficulty finding Donald and phoned me and advised that he
13 thought Donald was avoiding service and I requested him to
14 put Donald's residence under surveillance day and night if he
15 had to until he got him. So I think that answers your
16 question. That was reflective of my attitude throughout.

17 Q. Was his...

18 A. He was coming to Court.

19 Q. Was his attendance secured at subpoena?

20 A. Yes.

21 COMMISSIONER POITRAS

22 Should those receipts not be filed, Mr. MacDonald?

23 MR. MacDONALD

24 I'm sorry, My Lord.
25

1 EXHIBIT 151 - PHOTOCOPIES OF EXPENSE VOUCHERS PAID BY

2 CROWN ON BEHALF OF DONALD MARSHALL

3 BREAK

4 11:26 a.m.

5 Q. Mr. Edwards, when we broke I had directed your attention to
6 Volume 32, page 210 and thereafter which is the memo Judge
7 Cacchione made and to which we made brief reference. I
8 understand there are a couple of points in that memo that
9 you would like to address and discuss so I would just ask you
10 to tell us where they are make whatever comments you like.

11 A. Okay. I'm using my own copy which I highlighted for
12 convenience. What volume...

13 Q. You have it open in front of you.

14 A. Okay. All right. Okay, well we've dealt with the issue on 210
15 there the transportation money and, so Mr. Cacchione is
16 mistaken about that. He says, "It is almost as if the Crown did
17 not want to appear." And I think we've touched on that.

18
19 This attitude prevailed throughout the three
20 hearings and culminated on November 4 when
21 there was, in my opinion, a definite attempt to
22 assassinate Mr. Marshall's character or at least paint
23 him in such a bad light that sympathy could be
24 drawn to the accused.

25 I'm not sure exactly what he means by that.

There are other references in the memo which seem to
be critical of the fact and I guess this is what he's referring to

1 here. That Donald was cross-examined on his statement and
2 all I can say to that is that that statement was in the
3 possession of the defence so you would take it as a given that
4 that statement was going to be used to confront Mr. Marshall,
5 if not by the Crown, then certainly by the defence. And it has
6 been, I mean Mr. Marshall is not the first time I've had a
7 witness that I've presented, that I've done a Section 9(2)
8 application on and the strategy and, in particular, before a
9 jury is that it is better, makes a more credible case if the
10 Crown contradicts the witness rather than leave it for the
11 defence. The jury then, I think gets the impression that the
12 Crown is being forthright with them and is presenting the
13 evidence, warts and all. So I can understand Mr. Cacchione's
14 sympathy for Mr. Marshall being confronted with the
15 statement, but I make no apology for having confronted him
16 with it. And, as a matter of fact, I used different strategies at
17 different times.

18 The first trial I didn't confront Marshall with his
19 statement but left it to the defence and they did it with fairly
20 devastating effect. So having seen that, and in the second
21 trial, I decided I'd take the sting out of it as much as I could
22 by doing the 9(2) myself. So that's the reasoning there.

23 He is critical on page 2, which would be page 211, of
24 the fact that I called only the minimum of evidence at the
25 first trial and seems to be imputing almost that I was trying

1 to lose the case or assist Ebsary to get an acquittal. Well the
2 fact of the matter is that, well there's two points that have to
3 raised. Number one, prior to the first trial, the charge of
4 murder had been reduced to manslaughter at the preliminary
5 inquiry. And it was my view that that was the very least that
6 could be proven or, to put it another way, that manslaughter
7 would be easy to prove. Added to that the comments of the
8 Appeal Court in the reference decision with respect to the
9 other witnesses.

10 Like he's critical of the fact that A.J. Evers wasn't
11 called on that first occasion and, in fact, wasn't called on the
12 second trial either. Well A.J. Evers had evidence which the
13 Appeal Court, in its decision, had said was, at best,
14 speculative. So if Ebsary had been convicted with that
15 evidence in, I feared at the time that that might present a
16 ground of appeal. That there was a danger that that evidence
17 would be viewed as being prejudicial but not probative by
18 the Appeal Court. And the same is true with several other
19 witnesses. They made very critical remarks of the evidence
20 of Chant and Harriss at the reference decision. So that was
21 the reason.

22 I didn't use the tape-recorded conversation of Ebsary
23 for the simple reason that, and he refers to that, that there
24 was, in my view, a vulnerability of that statement because
25 Ebsary had been drinking at the time and also because there

1 was an inducement argument because, as came out in the voir
2 dire in the third trial, but I was aware of it before, there had
3 been a discussion between Ebsary and Carroll that if you help
4 my friend, Mr. Doyle, then I'll give you what you want. That
5 type of thing. So those are the only reasons that I didn't lay it
6 all out on the first trial.

7 He says on page 3 he's critical, the second full
8 paragraph on page 212.

9 Staff Sergeant Wheaton was a witness who
10 would give very (I think that should be
11 favourable) evidence on behalf of Donald, has
12 never been called as a witness in either trial.

13 Well what possible evidence could Staff Sergeant Wheaton
14 give in the context of a criminal trial? That he believed
15 Donald Marshall? Not admissible. That he felt sorry for him?
16 The only evidence that Staff Sergeant Wheaton could offer in
17 the context of a criminal trial would be on the voir dire
18 respecting the admissibility of Ebsary's statement. And he
19 was called for that purpose at the third trial. So I really don't
20 understand where Mr. Cacchione, His Honour Judge Cacchione
21 is coming from from there.

22 He was critical of the fact, I can't put my finger right
23 on it, but he's critical of the fact that I didn't interview Donald
24 Marshall prior to putting him on the witness stand. Well,
25 there were several reasons for that. Number one, I knew

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 preliminary, and I couldn't find in there any finding of fact
2 that a robbery was being attempted by Seale and Marshall.
3 Is that something...

COMMISSIONER EVANS

4
5 Line 6 and 7?

MR. MacDONALD

6
7 Line 6 and 7. Yeah, I understand, My Lord, he's making a
8 statement what the evidence said.

COMMISSIONER EVANS

9
10 Yeah, okay.

MR. MacDONALD

11
12 The statement in Mr. Edwards' letter is that His Honour did,
13 in fact, find that there was a robbery in effect.

MR. EDWARDS

14
15 A. I think that's the unmistakable conclusion one would draw
16 from his decision.

17 Q. Okay.

18 A. "The evidence against the accused is that when a robbery
19 was in progress he stabbed Sanford Seale with his death
20 ensuing. " And then he said, page 232, line 24, I just noticed
21 this sentence so it might be out of context. But there's a
22 sentence there, "The accused has become responsible for a
23 killing, that's what we have here." So...

24 Q. There are no...

25 A. That was my impression anyway.

1 Q. There are no written decisions of Judge O'Connell other than
2 this one we have here, other....

3 A. No.

4 Q. On the preliminary.

5 A. No.

6 Q. Okay. That was the main point I wanted to find out. You, in
7 your letter... Okay. Let's just leave that alone.

8 A. Yeah, well, I mean, all I'm saying there is that I recognize
9 the possibility or even a probability that murder would be
10 reduced to manslaughter by a jury and there was...there was
11 not much point in preferring an indictment there, but...

12 Q. At any time, Mr. Edwards, have you had discussions with
13 any members of the media concerning this, your role in the
14 Marshall case so-called? Let's say Michael Harris. Have
15 you...did you sit down and meet with Michael Harris?

16 A. I sat down and I spoke with Michael Harris. I know I didn't
17 discuss with him any of the internal Department discussions
18 that we had, otherwise I'm sure, for example, the January
19 25th meeting would have showed up in his book. But I
20 remember showing him the knives at one stage. I think it
21 was after the second Ebsary trial. But I've got no
22 recollection and I don't believe I told him anything that
23 wasn't on the public record at that point.

24 Q. Staff Wheaton testified before the Commission that he was
25 of the view that charges should be laid against Detectives

1 MacIntyre and Urquhart.

2 A. Right.

3 Q. For their role in this...in the investigation.

4 A. Yes.

5 Q. Did he ever tell you that?

6 A. No.

7 Q. At no time has he...

8 A. No.

9 Q. ...said that to you?

10 A. Well, not until December 10th of 1987.

11 Q. And that was after the evidence.

12 A. That's when John MacIntyre was on the stand.

13 Q. And that related to a concern that...of Wheaton's or a
14 statement of Wheaton that during his evidence Chief
15 MacIntyre had not been...

16 A. Committed perjury.

17 Q. Yes. But I'm talking about...

18 A. Counseling perjury.

19 Q. Yeah. I'm talking about the activities of the investigators
20 during the initial investigation.

21 A. Yes.

22 Q. At any time did Staff Wheaton say to you that he believed
23 that charges should be laid against John MacIntyre or
24 William Urquhart?

25 A. No.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 Q. Thank you. And just to clean up on one point, just that we
2 talked earlier this morning. You were saying that if a
3 policeman honestly believes something occurred that
4 he...there is nothing wrong with him putting it to other
5 witnesses or potential witnesses, isn't this what you thought
6 happened and this, so...

7 A. He's got to do so with great caution. He's got to consider the
8 subject he's dealing with.

9 Q. How far can he go though? He believes that something
10 happened. What are...how far can he go?

11 A. I don't think he can do more than suggest it. I don't think
12 he should...should press it or, in effect, cross-examine the
13 witness, particularly at any length. But if he does that
14 doesn't necessarily make it criminal. It makes it
15 inappropriate and perhaps subject to discipline under the
16 Police Act but that would be it.

17 Q. You had no involvement in the...

18 A. Probably kill the admissibility of any statement he got
19 thereby.

20 Q. You had no involvement in the Donald Marshall matter at
21 the compensation level, did you?

22 A. None. Never discussed with me directly or indirectly.

23 Q. After the reference decision was down and after you gave
24 your opinion on the perjury matter...

25 A. Yes.

1 Q. You've had no involvement in the Donald Marshall case as
2 such.

3 A. No.

4 Q. Prosecution...

5 A. Just in the prosecution of Ebsary.

6 Q. Yeah.

7 A. You know, I don't...I didn't separate the two. It was all part
8 of the same...

9 Q. Okay. That's fair.

10 A. The same file.

11 Q. In particular, though, you had nothing to do with the
12 compensation.

13 A. Right.

14 Q. And your advices were not asked at any time during that...

15 A. I think it would have been inappropriate to ask me for
16 advice on compensation, compensation to my mind was a
17 political issue and the last thing that I wanted any...any
18 contact with was any political matter.

19 Q. Do you have Volume 28?

20 A. Yes. And there I guess I did step into the arena, not on
21 compensation, but my May of '83 letter, I believe it is, I did
22 suggest that there should be an inquiry because only by that
23 means would the evidence of Chant and Pratico and the
24 others ever be resolved. But other than that I gave no
25 opinion on any political matters.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 Q. In October of '84, and for..I guess a month or so thereafter,
2 you and Mr. Gale got into another difference of opinion.

3 A. Coles.

4 Q. Coles. Coles, sorry.

5 A. Gordon Gale and I never had any argument about this. We
6 had a difference of opinion on whether or not the
7 investigation should proceed into the city police, but that
8 was it.

9 Q. In October of 1984 you were being asked why you had
10 given the police reports prepared by Staff Wheaton to
11 Stephen Aronson.

12 A. Right.

13 Q. Now you told us yesterday you gave those documents to
14 Aronson so he could carry the reference hearing.

15 A. So he could carry the reference hearing and so that he
16 would be assured that he had had it all.

17 Q. You're being asked in 1984 to explain why you gave the
18 documents, because the documents had become public...

19 A. Right.

20 Q. ...during the course of an election campaign. That was the
21 context, wasn't it?

22 A. That was the context.

23 Q. And your letter of October 29, 1984, which is found on page
24 2 of Volume 28 explains why you were giving those
25 documents to Mr. Aronson or why you did give them.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. Yes.

2 Q. I just want to refer you to a couple of the comments in the
3 letter. On the top of page 2 of your letter.

4 A. Yes.

5 Q. You say that you believe it is...that it was proper given the
6 very unusual circumstances of this case to give Mr. Aronson
7 a copy of the report.

8 A. Right.

9 Q.

10 The reference to the Court of Appeal was under
11 617 (b), thus requiring Mr. Aronson to carry the
12 ball. It therefore likely seemed obvious to me,
13 then, that he should be privy to every aspect of
14 the new investigation including the details of the
15 report.

14 A. Right.

15 Q. And that was your belief at the time and still is?

16 A. Yes.

17 Q. "This case had engendered (and continues to engender)
18 considerable suspicion about the disclosure practices of the
19 police and the Crown."

20 A. Yes.

21 Q. You followed your normal procedure practises with Mr.
22 Aronson on this case, you gave him everything, didn't you?

23 A. Yes.

24 Q. The second last paragraph I'd like to direct your attention
25 to.

1 A. Yes.

2 Q

3 The disclosure of the report should cause us to
4 re-examine the role of the Crown during a police
5 investigation. In hindsight, it is clear to me that
6 the decision to question or not to question Chief
MacIntyre should have been solely the
investigator's prerogative.

7 A. Yes.

8 Q The investigator being Wheaton.

9 11:49 a.m.

10 A. That's right.

11 Q And he shouldn't have had to come to the Attorney General's
12 to ask if he should be permitted to do that.

13 A. That's right.

14 Q "This is not the first time where the police have been able to
15 avoid making an uncomfortable decision by having us make it
16 for them."

17 A. Yes.

18 Q You've had other experiences like that, have you?

19 A. Yes, not as dramatic as this one, but it's not unusual. Or I
20 shouldn't say "not unusual," but it has happened on a couple
21 of occasions where, for example, you'd have a complainant in
22 a sexual assault case and after reviewing the matter, I give
23 the police the advice that, in my opinion, no charges are
24 warranted. Well, the police then pass that on to the angry
25 complainant and whether it is told directly to her or by

1 inference, the message is, well, look, the Crown told us not to
2 do it, eh. So then the complainant ends up on my door
3 wanting to know why I stopped the police when, of course,
4 what I've done is give the police advice. But they were free
5 to lay the charge. That's an illustration of what I'm getting at
6 there. See, in this circumstance, what... If I had it to do over
7 again, when I advised Wheaton that the investigation should
8 now go to John MacIntyre, and when he came back and said,
9 "Well, we want a direction from the Attorney General," I
10 should have said, "You don't need any direction from the
11 Attorney General. You have my advice. Now you can accept
12 it or reject it. That's it." That's what I should have done. But
13 I was being pragmatic about it and I took the position, well,
14 nothing is going to happen unless I try to move them along.

15 Q. And it would be your recommendation, I take it today, that a
16 police force, or the R.C.M.P., in particular, should not have to
17 have to the approval of the Attorney General before they
18 conduct an investigation of events they suspect are criminal.

19 A. I think that goes without saying. I mean that's...

20 Q. No matter who's involved.

21 A. That's clear, right. There's no special status under the law for
22 investigating police departments. It's the same as if they
23 were investigating Company X, as far as I'm concerned.

24 Q. That's what there should be.

25 A. Right.

1 Q. But today, and I think you've told us before that, in fact, there
2 is special status for other police forces.

3 A. Yes, not under the law, but as a matter of attitude, I suppose.
4 Mr... Staff Wheaton referred to it. I think he acknowledged
5 that there is sort of a fraternal feeling among police and they
6 don't like investigating one another.

7 Q. Let's go to Mr. Coles' reply to you. That's found on page four
8 of Volume 40... 28.

9 A. Right.

10 Q. And he didn't seem to be convinced with your position, and
11 let me take you to page five.

12
13 Lest there be any doubt, you are to understand
14 that police reports prepared and delivered for
15 the use of the Attorney General, his Deputy and
16 agents, are not to be copied to other persons
17 without the expressed authorization of the
18 Attorney General or your superiors in the
19 Department.

20 Is that the position that you understand you are under today?

21 A. No, my position is outlined in the, in my reply.

22 Q. You replied to...

23 A. November 26th.

24 Q. Mr. Coles on November 26th.

25 A. Yes.

26 Q. What is your position then?

27 A. Well, Number one, confidential memos for the Attorney

28

1 General don't normally come into my possession and this one
2 was not a confidential report for the Attorney General,
3 technically speaking. But aside from that, and that's the
4 technical point, but aside from that, I take the position that,
5 as the prosecuting officer for Cape Breton County, that I'm the
6 one who's responsible for the proper carriage conduct of
7 criminal matters arising in that jurisdiction. And any
8 documents that come into my possession, subject to the
9 safeguards, like witnesses being harassed, with that type of
10 exception omitted, are going to be disclosed to the defence.

11 Q. If you had it all to do over again...

12 A. Yes.

13 Q. And we're talking about the R.C.M.P. reports here.

14 A. Yes.

15 Q. And Aronson has the carry of the ball, carriage of the case in
16 the reference, would you give him the reports?

17 A. Yes.

18 Q. And in doing so, do you understand you would be violating
19 the instructions from Mr. Coles?

20 A. I'd take the chance.

21 Q. In fact, you've told Mr. Coles on page seven... Or page two of
22 your letter, but it's in page seven of the volume, the third
23 paragraph, that, in fact, you consider you have a duty to
24 disclose that report to Mr. Aronson.

25 A. Yes. You know, that letter, it basically sums up my thoughts.

1 It's, the tone of it is angry. I wasn't in a very good mood after
2 I got his letter of November 20th. But taking out the vitriol, it
3 still discloses my feeling on it.

4 Q. Mr. Coles replied to your letter again on November 30th.

5 A. Right.

6 Q. In the final paragraph of that letter... The second final
7 paragraph, he explains why he would have taken you off the
8 reference case if he had had time to brief other counsel.

9 A. Yes.

10 Q. In the final paragraph, he's directing you, is he not, to follow
11 the instructions of the Attorney General's office?

12 A. Yes.

13 Q. And, subsequently, there was a directive issued over the
14 signature of Mr. Herschorn. That's found on page 11.

15 A. Yes. Before we pass on to that. I mean I don't want to leave
16 the impression that I think I can do whatever I want in Cape
17 Breton County. And I feel that it is legitimate for the
18 Attorney General's office in Halifax to have general
19 supervisory power, such as saying, look, this is what we think
20 you should do in the case of a drunk driver who is caught for
21 a second conviction. We look for jail. Or this is how we think
22 spousal assaults should be handled. That's all perfectly
23 legitimate. What I'm saying is that in the conduct of
24 individual cases, the intervention from Halifax can only be on
25 very restricted grounds and if I'm acting improperly, well,

1 then they should take me off it and put somebody else there.

2 Q. On page 11 of Volume 28 and on page 13.

3 A. Yes.

4 Q. Which is explaining or adding to the document on page 11,
5 the procedure to be followed by a prosecuting officer, and I
6 take it that includes you.

7 A. Yes.

8 Q. With respect to release of police reports is set out. And you
9 would have received copies of those two documents?

10 A. Yes, the one of November 21st, I haven't read them lately, but
11 as I recall, it's clarified by the December 3rd.

12 Q. That's correct.

13 A. And broadened. It was recognized that the interpretation or
14 possible interpretations on the November 21st document
15 would make the practices very restrictive.

16 Q. Do you consider that the procedures which are set out in
17 those two documents would prohibit you from giving Steve
18 Aronson copies of the R.C.M.P. reports today, if the same facts
19 were in existence?

20 A. That, again, perhaps should be asked of somebody else. In my
21 mind, if the report to Aronson issue arose again, there may be
22 disagreement and possibly a standoff. Because
23 notwithstanding those instructions, I would still feel under a
24 duty to give that report to Steve Aronson.

25 Q. I understand that.

1 A. Yeah.

2 Q. What I'm asking you is something different.

3 A. Okay, I'm sorry.

4 Q. I'm asking is the policy of the department, as reflected in
5 these two statements, in your understanding, would the
6 policy prohibit you from giving those documents to Aronson?

7 A. It might. Yes, it probably would.

8 Q. Okay. There's one final topic I'd like to...

9 A. And further to that. I had a case recently where the police
10 report contained investigator's opinions and this was told to
11 me by the investigator. And I said, "Well, I'm not interested
12 in your opinions. So take those paragraphs out dealing with
13 your opinions and send it on to me."

14 Q. The last topic I want to deal with arises out of some
15 comments you've made and others have made. And,
16 specifically, that if Junior Marshall had told the truth at the
17 time he was, in May of 1981, none of this ever would have
18 happened.

19 A. 1971.

20 Q. 1971.

21 A. Right.

22 Q. First of all, I want to refer you to some evidence that was
23 given by Mr. Marshall the last time he gave evidence. The
24 third Ebsary trial was the last time Marshall gave evidence,
25 wasn't it?

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. Yes.

2 Q. And that evidence is found, My Lords, in Volume 9 of the
3 transcript. Perhaps Your Lordships should have that.

4 MR. PINK

5 What page?

6 MR. MACDONALD

7 Q. Volume 9. I'm going to refer Mr. Edwards to various pages.
8 Do you have a copy of that transcript with you?

9 A. Yes.

10 Q. Okay. I want to refer you, first of all, to pages... For people
11 who have Volume 10, My Lords, it's page 121 and 126. Why
12 don't you give the witness that, so we'll all have the same
13 volume that we're looking at?

14 A. What was the page again?

15 Q. 121. You were involved at that stage in a discussion with Mr.
16 Justice Nunn, and counsel for the defence, because of the
17 position you were adopting that you did not intend to call
18 Jimmy MacNeil as a Crown witness.

19 A. Right.

20 Q. And the court was asking why and so on. I want to direct you
21 to your remarks at the bottom of page 121. You say:

22
23 On the other hand, it is the duty of the Crown to
24 call all credible evidence. Now on Thursday
25 night, without getting into the details, I had a
discussion which told me that I preferred the
evidence of Donald Marshall, Jr. to that of James

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 MacNeil. So I had to make a decision at that
2 point about who was the most credible in my
3 view.

4 A. Right.

5 Q. "At that point, I decided I would go with the evidence of
6 Donald Marshall, Jr."

7 A. Right.

8 Q. And also on page 126, at Line 15:

9 Let me say that on Thursday evening, it was the
10 first time that I could speak to Donald Marshall,
11 who was obviously suspicious of prosecutors and
12 who can blame him? But that was the first time
13 that I had over a two-hour discussion with him
14 and, as a result of that discussion, I cannot, in
15 conscience, now at this time urge a jury to
16 believe everything James MacNeil says over
17 what Donald Marshall says. Certain portions of
18 MacNeil's evidence are believable, but it is a
19 matter of conscience. I'm trying to give the
20 accused a fair trial and, at the same time,
21 present the jury with as accurate a picture as I
22 can possibly to what happened in part in 1971.

23 That's what it comes down to.

24 A. Right.

25 Q. And also I'll come to your address to the jury later. Now let
me, first of all, give you the opportunity, Mr. Edwards, to
explain to Your Lordships. You were advising the court that
you preferred the evidence, at least in part, of Donald
Marshall over MacNeil.

1 A. Right.

2 Q. And this was after having spent a couple of hours with Donald
3 Marshall, which is the first time you've ever had the
4 opportunity to meet and discuss it with him, is that fair?

5 A. That's what I'm saying. I mean, of course, I had the
6 opportunity before...

7 Q. Yes, but I'm...

8 A. To speak with him, but...

9 Q. But this is the first time...

10 A. But that was the first time I took the opportunity, I suppose.

11 Q. And having done so.

12 A. Yes.

13 Q. You were telling the court that you had to decide which
14 evidence you preferred—MacNeil's or Marshall's.

15 A. Yes.

16 Q. And you made the assessment that you were going to prefer
17 Marshall's.

18 A. Yes.

19 Q. And not call MacNeil.

20 A. Right.

21 Q. Do you want to elaborate on that for the benefit of Your
22 Lordships, why you would...

23 A. Okay.

24 Q. Take that position?

25 A. Firstly, I think it's important to realize that here we are at the

1 third trial, and this is really going to be the last opportunity
2 to try to get to the truth, or as near to the truth as one could
3 get as to what actually happened that night. The first trial,
4 of course, had been a hung jury. The second trial
5 overturned on the question of self-defence.

6 The self-defence, of course, was the pivotal issue in
7 every trial but it was magnified here because the second
8 trial had been overturned on that issue. I think anyone
9 looking at this would recognize the inherent problem of
10 presenting a case where your two primary witnesses,
11 Marshall and MacNeil are at odds over the very nub of
12 evidence which is crucial to self-defence. That was my
13 thinking at the time. And what I'm referring to, of course, is
14 Jimmy MacNeil saying, in effect, that he and Ebsary had just
15 been pounced upon and Eb...and Marshall saying that there
16 had been a conversation and then they walked away and
17 then walked back again. That sequence and which sequence
18 you accept or you convince a jury to accept is crucial in
19 determining whether or not self-defence is a viable issue.

20 Now, I had...I had tried in two previous trials to
21 present the two of them, their evidence together. And, who
22 knows, I mean, what goes on in the jury room. But the
23 probability was real to me that this conflict in the evidence
24 may be really what would cause this jury most trouble.

25 12:10 p.m.

1 Q. You told...

2 A. So...

3 Q. I'm sorry.

4 A. So I made the decision, after talking with Donald, I suppose
5 a better way for me to have expressed it to Mr. Justice Nunn
6 would have been that I'm going to put all my eggs in this
7 basket and go for it and demonstrate to the jury, at least
8 through cross-examination, if I wasn't able to budge Jimmy
9 MacNeil and in view of Miss Edwardh's cross-examination I
10 probably wouldn't have been able to budge him on that, that
11 I was going to demonstrate that the Crown wasn't accepting
12 that there was no prior conversation prior to the stabbing.
13 That was the rationale, now he ordered me to call MacNeil
14 and I presented them as I had before pretty well and there
15 was a conviction. And it probably, you know, that was a
16 good thing.

17 Q. The evidence that you called from Donald Marshall was
18 being presented by you as evidence that you believed to be
19 the truth.

20 A. Yes.

21 Q. Thank you. Let me take you the evidence then, if I can, at
22 least in part. At page 37 of Volume 10, would you turn that
23 up. Volume 9, sorry, Volume 9, page 37.

24 A. Volume 9.

25 Q. Page 37.

1 A. Okay.

2 Q This is the evidence of Mr. Marshall on direct. I'm just going
3 to highlight certain parts of the evidence.

4 A. Yes.

5 Q Around page...line 10 you're asking him if he had known or
6 how he met Sandy Seale in the Park and if he had known
7 him before. And he said he met Sandy Seale around the
8 middle of the Park on that night of the occurrence.

9 A. Yes.

10 Q And then down at the bottom of this page, you were asking
11 him "What, if anything, did the two of you decide to do?"
12 And this is what Mr. Marshall said, "We didn't go our
13 separate ways. I was down there to see if I could find my
14 Indian friends down there, and I told him I was going to try
15 to scrape up some money for later on." And you asked,
16 "What did you want the money for?" "Probably head out to
17 the bootleggers or something." Then you said, "How did you
18 intend to get the money?"

19 A. Yes.

20 Q "Like I usually do. I bum it down there. Like I bum it off
21 people. " "You're saying you usually bum the money off
22 someone in the Park?" "Yes." Then he goes on to talk about
23 meeting or being called up to Crescent Street by two people
24 and asked to give a cigarette. Do you see that? That
25 continues on at page 38.

1 A. Yes

2 Q. And over to 39 he's asked who these two people were and
3 he says, "Terry Gushue and Patricia Harriss."

4 A. Yes.

5 Q. And on page 40 he says, around line 17 and continuing, that
6 he was with Gushue and Harriss for a couple of minutes,
7 meantime he has said that Sandy Seale had gone up and met
8 these other two people.

9 A. Yes.

10 Q. Now on page 43. He's now joined up with Seale and these
11 other two people.

12 A. Yes.

13 Q. He says he started to talk to the older person and he
14 describes, starting on page 15, that older person. "At the
15 time he was about 50 years old or whatever, he had white
16 hair, glasses on and he had some kind of a navy coat on,
17 some kind of a cape he had on at that time." And then over
18 on page 44, on line 7, "Can you tell us what the conversation
19 was?" Answer,

20
21 I asked him about his coat he had on. I told
22 him, 'You look like a priest with that coat
23 on,' and he told me he was a preacher or
24 something. I don't know. And he said that
25 he was a sea captain and he was a priest, of
some sort of a priest. I don't know what
kind of a priest he was, and we were
talking.

1 A. Yes.

2 Q.

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

5 A. I asked him where he was from and he told
6 me he was from Manitoba. Right. And he
7 asked me if there were any woman, women
8 around the Park area, and at that point I
9 hung around the Park for about three years
10 at that time and I told him there were all
11 kinds of women.

12 Then he goes on to say he was asked, he offered them to
13 take him home and give him a drink and so on. On page 45
14 he describes the other man, down around page 20...line 20.
15 "He was taller than Ebsary, he had a brown corduroy coat on
16 and that's all I remember of him." Then he goes on to
17 describe on the subsequent pages of how these men walked
18 away and he called them back and when they came back,
19 down at the bottom of page 48, "How far from Seale was
20 Ebsary when he asked him 'Do you want everything I
21 have?'" Over on page 49 around line 12.

22 When Mr. Ebsary asked him if he wanted
23 everything he had I guess he didn't say
24 anything.

25 Okay. What happened then?

He put his hand on his shoulder. Mr. Ebsary
put his hand on Seale's shoulder and at the
first time when that happened I thought he

punched him in the stomach, but
apparently he stabbed him in the stomach.

And he goes on again to explain that everything happened
very quickly.

A. Yes.

Q. And he says that two or three times. That was the evidence
that was given. You didn't apply to cross-examine him at
that stage on the statement he had given to the RCMP in
Dorchester.

A. That's why I was just thumbing ahead. See, I've done this
five times and I can't recall whether at Ebsary 3 whether I
cross-examined him on the statement on that occasion or
didn't.

Q. You didn't.

A. If you say I didn't.

Q. You didn't.

A. Fine.

Q. Now again...

A. And I explained before why sometimes I did and sometimes
I didn't.

Q. But I just want to get out the fact that this evidence was
presented through Mr. Marshall or by Mr. Marshall through
you and it was being presented as a plausible and a credible
story.

A. Yes, but it's being presented with the knowledge, you know,

1 I think it's stronger than an expectation that he's going to be
2 confronted with that statement, you know, for strategic
3 purposes in the trial I left it to Winterman to do at that
4 time.

5 Q. Yeah. I understand that. But my question to you is that you
6 presented the evidence.

7 A. Yes.

8 Q. And you told the Judge and subsequently told the jury that
9 you considered it credible evidence and plausible, his story
10 as a plausible story.

11 A. The gist of what I told the Judge and the jury was that I
12 believed him on those parts of his evidence which bore on
13 the defence of self-defence. Now, unfortunately we don't
14 have the same number system, but a subsequent discussion
15 on page 481 of the transcript, line 14.

16 Q. Okay. Well, you can find that in Volume 9 because the
17 numbers are here as well.

18 A. Okay. Sorry, I didn't notice that.

19 COMMISSIONER EVANS

20 231 or 481.

21 MR. EDWARDS

22 481. Yes, and it will be 231 on the exhibit.

23 A. And that's just an example I've been able to find here. You
24 see line 14 where we're discussing, you know, what I'm
25 believing and what I'm disbelieving and I make it clear on

1 the parts of his evidence which bear directly on the defence
2 of self-defence I believe Marshall over James MacNeil. I, at
3 no time, in that trial indicated that I was abandoning the
4 robbery theory, although Mr. Wintermans apparently took it
5 that I was, but I wasn't. And, you know, that's my position
6 on it.

7 Q. Well, did you believe Marshall when he testified that, "I
8 was...Seale and I talked about getting some money, we were
9 going to bum it."?

10 A. No. I believed there was more to it than that, and I believed
11 that that was going to come out in cross. And I believed
12 that I was going to be putting the robbery theory to the
13 jury.

14 Q. Did you think it was believable when he said, "We come up
15 to these fellows and I said, 'You look like a priest.'?"

16 A. Yes.

17 Q. And that these fellows told him they're from Manitoba.

18 A. Ebsary is capable of saying something like that. I didn't
19 have any difficulty with that. I believed the prior
20 conversation.

21 Q. Yeah. Okay. And that they asked about...

22 A. He was capable of saying something...

23 Q. ...are there women down in the Park and this sort of thing?

24 A. Pardon me?

25 Q. Talked about whether there were women down in the Park,

1 Ebsary...

2 A. I believe that.

3 Q. Sure. Look at page 114 of Volume 9. This is your re-direct
4 examination.

5 A. Okay.

6 Q. Of Mr. Marshall. And this is after he has been cross-
7 examined on the statement that was given by him to
8 Wheaton and Carroll at the prison.

9 A. Yes.

10 Q. Now let me just take you through this. Your question,

11

12 Mr. Marshall, during you cross-examination
13 on Friday in response to my learned friend
14 you said, 'I was not going to rob them, I was
15 almost forced to say that, that's what it
16 boiled down to.' Mr. Marshall, what were
17 you referring to when you said that?

18 And he asked you to repeat it.

19 A. Right.

20 Q. Mr. Marshall says, "I was referring to the reason I said that
21 and other things, I was told one time." You told him he
22 couldn't say what he was told. And then he says,

23 I meant that I knew beforehand what
24 accused told people and other information I
25 got that that's the side of his story and I
said the only way I'm going to have to
challenge him is to agree what he says.

1 Q. That there was a robbery.

2 A. Yes, that's what he said and that's why I
3 said it.

4 Q. When did you first say that, that that was a
5 robbery, that there was a robbery?

6 A. When I was visited by the RCMP in 1981
7 when I was released out of prison.

8 A. Right.

9 Q. Did Mr. Marshall tell you that during that couple of hour
10 examination or talk you had with him before you put him on
11 the witness stand?

12 A. I don't recall whether he did or not. I can't remember the
13 specifics of that conversation.

14 Q. But you did, in effect, put before the jury in this trial the
15 suggestion, or the evidence, that the statement given by
16 Ebsary[sic] to the RCMP at Dorchester was one that he was
17 saying it "Because I had to say that to get out of there. I was
18 telling them what I had to hear...what they wanted to hear."

19 A. Yes, I let him say that, right.

20 Q. Did you believe that?

21 A. Not totally, but it was...I couldn't reject it either. I thought
22 that it was reasonable to let him bring that out.

23 Q. Now, have you looked at the evidence that Marshall gave at
24 his first trial?

25 A. Not recently.

1 Q. Recently. Have you ever looked closely at the statements
2 that he gave to the police?

3 A. I think what...maybe we can save time, you're asking me
4 whether his evidence has been consistent through the piece,
5 is...

6 Q. Yes.

7 A. Yeah.

8 Q. I'm suggest...I'll suggest to you that what, the evidence that
9 you presented to the Supreme Court in Ebsary 3.

10 A. Yes.

11 Q. Of meeting two people on Crescent Street.

12 A. Yes.

13 Q. Talking about them looking like priests, being told they're
14 from Manitoba.

15 A. Was totally consistent with what he had said on other
16 occasions, yes.

17 Q. Totally consistent. And totally consistent, also, I can show
18 you if you like...

19 A. Yes.

20 Q. With what he told the police immediately after the event.

21 A. Yes. And, of course, that led to the big to-do about my
22 wanting to re-direct him on the 1971 transcript when
23 defence counsel was, in effect, arguing recent fabrication by
24 Mr. Marshall.

25 Q. But in your factum that you filed with the Appeal Court, and

1 I'd liked to show you, I'd like you to quote from it. It's in
2 Volume 4 at page...I just...on page 41.

3 A. Right.

4 Q. The first full paragraph, you say this. "Instead he told the
5 police and his lawyers about an attack by two priests from
6 Manitoba who did not like niggers or Indians."

7 A. Yes.

8 Q. "It is not difficult to speculate upon how believable either
9 the police or defence counsel found that story."

10 A. Yes.

11 Q. But that's the same story told in, you know, in essence about
12 two people from...looked like priests from Manitoba that
13 asked him about women, they had a talk...

14 A. Uh-hum.

15 Q. They walked away and they come back and stabbed Seale.

16 A. Yes.

17 Q. Is that any more plausible than what he told in the first
18 instance?

19 12:30 p.m.

20 A. I mean...

21 Q. That's the evidence he gave at Ebsary 3.

22 A. Maybe I had lost you, but what I was arguing was that
23 evidence, which is on the prior conversation, should be
24 accepted and that was consistent. My point of departure was
25 on the robbery. When I say that "he wasn't being forthright",

1 I'm saying by giving a story of a motiveless attack, the
2 robbery provides the motive for the attack.

3 Q. But the... What part of Marshall's evidence given at Ebsary 3
4 do you say is not believable?

5 A. Well, see, I haven't read that through but the absence of the
6 admission that there was a robbery in progress.

7 Q. Well, do you accept that they met and they just had a
8 conversation?

9 A. Yes.

10 Q. And do you accept that Ebsary and MacNeil then walked
11 away?

12 A. Yes, and I argued that forcefully, I think, yeah.

13 Q. And that they were called back?

14 A. Yes.

15 Q. And that they came back.

16 A. Yes.

17 Q. And that.. What do you say happened after that?

18 A. What I say happened after that was that Marshall grabbed
19 hold of Jimmy MacNeil, put his arm up behind his back. I
20 don't accept his story when he says that he merely supported
21 Jimmy MacNeil when Jimmy stumbled on the curb. I find
22 that impossible. That at the same time he was doing that, Mr.
23 Seale was saying, "Dig, man, dig," to Roy Ebsary and got the
24 tragic response.

25 Q. And if that had been told to the police...

1 A. Right.

2 Q. Are you saying initially that if he had said, in addition to
3 what he told the police, "We called, before they stabbed us,
4 these fellows walked away and we called them back and said,
5 'Dig, man, dig,' and they stabbed Seale."

6 A. Uh-huh.

7 Q. That that would have made all the difference? People
8 would...

9 A. Well, that's not all he said. He said, in his statement, they
10 knew then that we meant business. You know, again, we're
11 getting...

12 Q. But you yourself...

13 A. Yes.

14 Q. And before the Supreme Court of Nova Scotia introduced the
15 evidence through Marshall, that he gave that statement for
16 one reason and one reason only, and that was to get out of
17 jail. He was telling them what Ebsary had said.

18 A. You're talking about when I re-directed him...

19 Q. Yes.

20 A. On Ebsary 3.

21 Q. Yeah.

22 A. I asked him those questions. I let him explain, yes.

23 Q. He doesn't talk...

24 A. If I may. In view of that re-direction and having the benefit
25 of analyzing it now, it would have been more appropriate for

1 me in that circumstance to do the Section 9(2) myself and I
2 take the criticism for not doing that. But, you know, that was
3 not an easy trial and we all have them and that was a
4 decision that I made during the course of the trial. It was not
5 a perfect game.

6 Q. In the trial in Ebsary 3, Mr. Marshall relates a story that
7 when they called back what happened is that Ebsary placed
8 his hand on Seale's shoulder, gave a motion that could be
9 consistent with punching him in the stomach...

10 A. Yes.

11 Q. Or stabbing him.

12 A. Yes.

13 Q. And, at that time, he and MacNeil got into a, he grabbed
14 MacNeil. There's nothing about stumbling off the curb.

15 A. Uh-huh.

16 Q. Is that not a plausible story?

17 A. It may be. I don't accept it and perhaps I've fallen into the
18 trap of others who have been associated with this case for
19 many years. I have an opinion now on what happened and I
20 just can't stand back from it. I gave you my view of what I
21 thought happened.

22 Q. Are you saying, and is it your belief, that Junior Marshall
23 should be blamed in some measure for what happened here
24 because he did not tell the police when he gave his
25 statements immediately after the event and on May 30th,

1 that he and Seale were going to try to get some money off
2 somebody.

3 A. I can't do any more on that than I explained yesterday and
4 the essence of what I said yesterday was that some
5 responsibility should attach to him for that lack of
6 forthrightness, that he may have been able to save himself,
7 and I pointed to what I saw as the three possibilities, if not
8 probability -- police, lawyers, jury. And in that sense, he
9 bear some responsibility. I do not believe that because he
10 wasn't forthright that he was, therefore, the author of his own
11 misfortune. In my view, as I said here today, had those three
12 first statements been disclosed, he wouldn't have been
13 convicted. Had the reinvestigation been disclosed, he
14 wouldn't have spent eleven years in jail.

15 Q. Can he be blamed in any way, in any way, because three
16 independent and unconnected teenagers lied at trial?

17 A. He can't be blamed for them lying.

18 Q. And given the fact that those three people lied at trial, do you
19 think there's any reasonable probability that he was going to
20 be acquitted, given that evidence? No matter what he told
21 the police.

22 A. Yes, and I guess we're getting repetitive now because my
23 view is that, at that time, there was a reasonable probability
24 that the police direction, or the police investigation would
25 have taken a different direction. If not, his lawyers certainly

1 A. But see, what you're doing, with respect, is isolating that bit of
2 evidence in Ebsary 3 and saying it's the same story. So if it's
3 plausible then, it was plausible in '71. The difference is that
4 it was being presented in a trial where I knew that the
5 robbery evidence was going to come out. And, therefore, I
6 don't accept that it is fair to say you've got the two stories,
7 unless you look at the circumstances surrounding each. In '71
8 there was no hint of a robbery. In Ebsary 3, his statement
9 was put to him as it was on every occasion in the past.

10 Q. That same statement, the one that you introduced evidence
11 through him to show it was, he was only telling the police
12 what he understood Ebsary had already told them.

13 A. Yes.

14 Q. And he was giving it to get out of prison.

15 A. Yes.

16 Q. That statement has been used to convict Marshall of robbery,
17 hasn't it? In the sense that we've used that phrase this
18 morning. That's hung around his neck like a millstone, that
19 statement.

20 A. There's no question that that statement has haunted him.
21 And I don't argue that.

22 Q. And no one has ever. Yet there's never ever been, subject to
23 what we've been doing here...

24 A. Yes.

25 Q. There's never ever been a voir dire to determine, first of all,

1 that that statement was voluntarily given or was one that was
2 induced and never ever should have been used in a court of
3 law.

4 A. You're making a giant leap there. In Ebsary... or in the
5 reference, there is an argument that a voir dire should have
6 been held, and probably that's the correct argument and I
7 acknowledge that because at the reference, Donald Marshall's
8 status was as the appellant; ie. the accused. And I know that
9 I didn't accept that at the time because I argued that he
10 wasn't in jeopardy. But that is, looking at it now, that's a fair
11 argument. However, his status in Ebsary 1, 2 and 3 and the
12 preliminary inquiry was not as accused person.

13 Q. Okay.

14 A. He was a witness and the same constraints that govern the
15 admissibility of an accused statement proceeding against him
16 don't, in my view, and I may be wrong in this, but in my
17 view, don't apply to a statement of a witness. It is a relevant
18 circumstance to bring out and I think that, in that sense, the
19 jury were entitled to hear that so that they could weigh, if
20 they wanted to weigh that factor against what they've heard
21 in the statement in cross-examination. But I can't recall ever
22 having a voir dire on a witness statement at a trial.

23 Q. Okay, and I accept that. You brought it out, though, in the
24 third Ebsary trial in re-direct, that when he gave that
25 statement...

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. Yes.

2 Q. He was telling something that he understood Ebsary had
3 already said.

4 A. Yes.

5 Q. And it was to get out of jail. When you used that statement in
6 the previous trials to impeach him...

7 A. Yes.

8 Q. Did you bring that out?

9 A. I don't know. I'd have to check the transcript. I don't think I
10 did.

11 Q. And who would be there to protect him then?

12 A. No one. No one. And that's a valid criticism. Perhaps I
13 should have brought it out. But in Ebsary 3, it was brought
14 out and I think if anybody looked at it, whether you agree
15 with the robbery theory or not, that was a proper item to put
16 before the jury so they could consider what weight they were
17 going to give to Marshall's evidence.

18 MR. MACDONALD

19 Thank you, Mr. Edwards.

20 COMMISSIONER POITRAS

21 Just a question, Mr. MacDonald. Assuming for a moment
22 that it is still possible today to query whether Marshall was
23 involved or not in an attempted robbery.

24 MR. EDWARDS

25 Yes.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 COMMISSIONER POITRAS

2 If, in fact, Marshall was not involved in an attempted
3 robbery, what would that do to the theory that at not disclosing
4 the intended robbery, he contributed to his conviction?

5 MR. EDWARDS

6 That would destroy that theory.

7 COMMISSIONER POITRAS

8 I think so. So there still is something to be proved. I leave
9 that open.

10 MR. MACDONALD

11 Those are all the questions I have, My Lords.

12 MR. CHAIRMAN

13 We'll adjourn until 2:15.

14 12:48 p.m. INQUIRY RECESSED UNTIL 2:15 p.m.

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