

1
2 2:15 p.m.

3 MR. CHAIRMAN

4 Now you're finished your examination, Mr. MacDonald.

5 MR. MacDONALD

6 Yes, My Lord.

7 MR. CHAIRMAN

8 Before we start upon cross-examination.

9 COMMISSIONER EVANS

10 If any.

11 MR. CHAIRMAN

12 If any. May I once again renew my plea that I make about
13 once a month to counsel, we seem to be running further and
14 further behind schedule, to try and avoid repetition without in
15 any way constraining or constricting one's cross-examination but
16 repetition is...and I'm not suggesting that counsel are repetitious,
17 but I'm just reminding counsel so they won't fall into the trap of
18 becoming repetitious. With that rider and nebulous qualification,
19 Miss Derrick, are you ready?

20 MS. DERRICK

21 Thank you, My Lord. It's usually the rider that you give just
22 before I'm about to get on my feet. I don't take it personally
23 though.

24

25

MR. EDWARDS, EXAM. BY MS. DERRICK

1

2

MR. CHAIRMAN

3

That's only because you're the first.

4

MS. DERRICK

5

Oh, I know that, exactly.

6

MR. CHAIRMAN

7

If you want to change places with Mr. Wildsmith.

8

MS. DERRICK

9

I will do my best to abide...

10

MR. CHAIRMAN

11

I know, and you do.

12

MS. DERRICK

13

...by your admonitions.

14

MR. CHAIRMAN

15

And we'll help you, and you do.

16

MS. DERRICK

17

I'm grateful for any assistance.

18

EXAMINATION BY MS. DERRICK

19

Q. Mr. Edwards, I just want to pick up on some evidence that you were giving just before lunch and I want to ask you concerning the decision, let's say, that you made when it came to the Ebsary number 3 trial. As I understand it you said that with respect to Mr. MacNeil and Mr. Marshall's evidence on...with respect to the encounter in the Park, that

25

1 it came to the point of your not accepting Mr. MacNeil's
2 evidence, that there was no conversation prior to the fatal
3 attack on Mr. Seale. Is that...am I correct about that?

4 A. That it came to the point of my accepting...

5 Q. Of your not accepting Mr....

6 A. Of my not accepting.

7 Q. ... Mr. MacNeil's evidence that there was no conversation
8 prior to the attack.

9 A. Yeah, that's what it came down to, although I probably had
10 misgivings about that before because Donald Marshall had
11 been consistent right through on that prior conversation. I
12 guess what I was doing was changing tactics to try to get
13 that out as clear as I could.

14 Q. So it was the first time that you had adopted a strategy of
15 the case that took that clearly into account, is that correct?

16 A. Without having reviewed, and I purposely didn't review
17 Ebsary 1 and 2 in detail because I found I had enough other
18 material to try to keep straight, I don't believe that that
19 would be...that would be accurate. I tried to ride both sides
20 of the fence, I guess, in previous proceedings, but...

21 Q. Is it fair to say that the problem that you had with Mr.
22 MacNeil's evidence was that he related that there was no
23 conversation?

24 A. Yes.

25 Q. That...

1 A. Yes.

2 Q. Okay. So we're agreed on that.

3 A. Yes.

4 Q. And that you accepted Mr. Marshall's evidence that there
5 had been some conversation prior to the attack.

6 A. Yes, that's right.

7 Q. Is that right?

8 A. Yes.

9 Q. You said to the Court, now I'm just referring you to Volume
10 9 at page 231, which is page 481 in your transcript.

11 A. Yes.

12 Q. You say down about line 21, "And in the previous trials I
13 had accepted as gospel the 1982 statement."

14 A. Yes.

15 Q. The Court said, "Yes", and you say, "Which I don't now."

16 A. Yes.

17 Q. Now, I take it from that that you're expressing a doubt as to
18 Mr. Marshall's involvement in an attempted robbery,
19 because that's what the 1982 statement refers to.

20 A. Literally it seems to say that, although, you know, if you
21 look at the...at all our discussions together and my address
22 to the jury I believe I'm safe in saying that I never actually
23 rejected the robbery theory.

24 Q. But is it fair to say that you're expressing a doubt and that
25 that's what that reflects?

1 A. On the face of it that seems to be the case, yes.

2 Q. And your evidence is basically that Mr. Marshall deserves
3 some blame for not having related the attempted robbery in
4 1971, is that correct? And that there are basically three
5 groups or individuals that he ought to have made that
6 revelation to: the police, his lawyers and the Court.

7 A. Yes.

8 Q. Am I summarizing that correctly?

9 A. Yes, that's fair.

10 Q. Now, if we take the police, first of all; I want to ask you if
11 you're really suggesting that the police would have been
12 more likely to believe that Mr. Marshall didn't commit the
13 murder if he had admitted to being involved in a robbery.

14 A. Yes.

15 Q. Do you think if that had been the case that the police
16 wouldn't have disbelieved Chant, Pratico and Harriss and
17 that they, therefore, wouldn't have affected or pressured
18 any change in their stories?

19 A. That's hard for me to answer, Miss Derrick. My belief is
20 simply that had the police been given a plausible story and
21 that would include the details of the attempted robbery that
22 in my view they likely would have believed that such an
23 attack had taken place, or found it capable of belief, and
24 would then have focused their investigation or at least
25 spread the focus of their investigation to include an active

1 search for the other two. I think the problem was that they
2 believed that what were getting was a concocted story from
3 Donald Marshall and never believed for a minute that these
4 other two individuals existed.

5 Q. So if what you're saying is followed logically then if Mr.
6 Marshall had admitted to a robbery in 1971 the police
7 would have actually been happy to receive Patricia Harriss'
8 first statement about two men. Is that correct? And they
9 would have been glad to leave it at that.

10 A. Well, if they had been able to find the other two men. If
11 they...I guess what my problem is that if a serious search
12 had been made for Ebsary and MacNeil, given the size of the
13 community, given the fact that they had an incident with
14 Ebsary the year before and given the fact that he was a
15 fairly well-known individual in the community, I think they
16 would have turned him up. If they had turned up such a
17 character then Patricia Harriss' first statement, in light of
18 that finding, would have been credible.

19 Q. So in your view it's possible they would have left those
20 statements alone, those first statements that they got.

21 A. It's...yes.

22 Q. Now you know that the police knew in November of 1971,
23 ten days after Mr. Marshall's conviction, that there was an
24 alleged robbery because Jimmy MacNeil came to see them
25 with that story.

1 A. Yes.

2 Q. But that didn't change anything, did it? In fact, for
3 example...

4 A. Yes, okay.

5 Q. Mr. Marshall was still in the county jail at that point we
6 know. They could have gone and got him and brought him
7 in to see whether he could identify Mr. Ebsary and Mr.
8 MacNeil but they never did that.

9 A. No, that's right.

10 Q. So there's an example of where knowing about the alleged
11 robbery didn't cause any change.

12 A. Well, I'm not sure that that follows that simply and, you
13 know, I've been trying to keep my answers in sentences
14 rather than paragraphs, but you see I've taken some views
15 of what happened there too, and where the thing went off
16 the rails with the re-investigation in November, in my view,
17 was that polygraph was state of the art, and when Ebsary
18 passed the polygraph too many people thought that that was
19 the end of it. And, so I don't think you can ignore that
20 factor.

21 Q. So, what you're saying in November, 1971, the key was not
22 just this information about the alleged robbery.

23 A. No, what I'm saying is that in November '71 this other factor
24 intervened at that point and, you know, we had a different
25 situation there, I mean Mr. Marshall, Inspector Marshall has

1 'fessed up on the witness stand that it wasn't a proper
2 investigation and...but I think that there are different
3 reasons for that than perhaps pertain back in May.

4 Q. I suppose that might be a subject of argument as well.

5 A. Sure.

6 Q. With respect to the matter of Mr. Marshall's lawyers, taking
7 us back to May and June of 1971, I guess I don't understand
8 why Mr. Marshall is to be blamed for his lawyers not
9 believing him. I mean shouldn't they have done everything
10 in their power for him regardless of whether they believed
11 him or not? If we accept what you're saying that his story
12 was somewhat implausible, for the sake of argument, that
13 surely shouldn't have affected what...the type of job that
14 they did on his behalf.

15 A. Well, it shouldn't, no, but, I was going to say the fact of the
16 matter, but I think it's fair to infer that it did, perhaps.

17 Q. But that's not Mr. Marshall's fault.

18 A. Well, partially, I mean, it was he that threw them off track
19 by not giving them the full story.

20 Q. But it's not his fault that they didn't do as thorough a job as
21 they might have done simply on the basis of not believing a
22 client. That's not their responsibility.

23 A. Well, I can't agree with you, Miss Derrick, I'm sorry. I think
24 it's...he's partly to blame for that.

25 Q. Now it appears from Mr. Aronson's evidence, and I'm

1 looking in Volume 55 at page 10174, and I'm just going to
2 read it to you. That Mr. Aronson talked to Mr. Khattar and
3 Mr. Rosenblum in 1982 and that they did not take the view
4 that this alleged failure by Mr. Marshall to tell the whole
5 story in 1971 hampered their efforts to acquit him.

6 A. Yes.

7 Q. And this came out of Mr. Orsborn examining Mr. Aronson
8 with respect to your brief, I believe, on the reference.

9 2:29 p.m.

10 A. Yes.

11 Q. And where you state that it is... Basically, what I'm asking
12 about that your view that by Marshall failing to tell his
13 counsel the whole story in 1971, this hampered their efforts
14 to have him acquitted and Mr. Aronson says, in response, it
15 would not be an accurate reflection of my understanding of
16 the position that Messrs. Khattar and Rosenblum took. And,
17 in fact, earlier on in his evidence, he refers to their problem
18 having been not getting those first statements.

19 A. Yes. The trouble with that, you can't reconcile that, I suggest,
20 with the evidence of Simon Khattar or the evidence of Judge
21 Cacchione relating to his conversation with Mr. Rosenblum.

22 Q. The fact of their not believing him.

23 A. Yes. Didn't Mr. Rosenblum tell Mr. Cacchione, "If he had told
24 me the truth, I could have gotten him off"?

25 Q. So the problem seems to be that, if we accept again for the

1 sake of argument...

2 A. Yes.

3 Q. That there was an alleged robbery, that Mr. Marshall should
4 have told his lawyers to get them to believe him so that they
5 would then do a good job, or a better job. But, technically,
6 that didn't affect their ability to seek an acquittal.

7 A. Well, it left them under a misapprehension, I suggest, which I
8 think interfered with what they did next, or what they didn't
9 do next, which was seriously and actively try to check the
10 validity of the story their client gave them. I mean one...

11 Q. Which is...

12 A. Don't get me wrong. I'm not saying that they are completely
13 absolved, but I'm saying they're not totally to blame, either.

14 Q. Now you also took the position that Mr. Marshall should have
15 admitted to this alleged robbery before the jury. And I
16 understood your evidence was that you felt that there was a
17 burden on him to admit something he wasn't charged with
18 because he was obliged to tell the whole truth. Is that a fair
19 summary of your view?

20 A. Well, again, he was under no burden to say anything.

21 Q. But once he did.

22 A. But once he did, then I think that anything less than the full
23 truth was not appropriate.

24 Q. So once he elected to take the stand, he was then obliged to
25 tell all.

1 A. Yes.

2 Q. Is that a fair summary of what you're saying?

3 A. Yes.

4 Q. Now in your experience as a Crown, wouldn't Mr. Marshall
5 have been more likely to be convicted of murder if he had
6 confessed before the jury to being involved in a robbery
7 where a killing took place? Don't you think that would have
8 predisposed a jury against him?

9 A. No, I mean, obviously, the disclosure before a jury or any
10 trier of fact, for that matter, of a, well, a prior criminal record,
11 for example, or an involvement in prior offences, would tend
12 to predispose the jury or trier of fact against that person. But
13 in this circumstance, I suggest that that was outweighed by
14 the fact that that disclosure would have made his story
15 plausible. I mean what he was presenting was a story of a
16 motiveless attack.

17 Q. Is that so implausible?

18 A. It doesn't happen as often as an attack with some motive,
19 some understandable motive, but it's not impossible, no.

20 Q. You tried Mr. Ebsary three times.

21 A. Yes.

22 Q. Do you think now that it's so implausible that there could
23 have been a motiveless attack?

24 A. That's a fair suggestion.

25 Q. So it is possible...

1 A. It's... No, it's not totally implausible, given the nature of Mr.
2 Ebsary.

3 Q. So it's not impossible as a general proposition and it's not
4 impossible in these circumstances involving Mr. Ebsary?

5 A. Sorry, could you give me that again?

6 Q. The idea of a motiveless attack is not an impossible
7 proposition as a general proposition.

8 A. It's not impossible.

9 Q. And it's not in these circumstances involving Mr. Ebsary.

10 A. No, that's right.

11 Q. Now for Mr. Marshall's admission in front of the jury that he
12 was involved in a robbery to have done him any good, it
13 would have been impossible for there to have been the
14 eyewitnesses, is that correct? So he would have had to get to
15 a point where the police had not affected that evidence such
16 that it was present before the jury as well, is that fair to say?

17 A. Yes. I guess we're almost into hypothetical. But, as I
18 understand what you're saying, is that if Chant, Pratico, and
19 Harriss had testified exactly the way they did and then
20 Donald Marshall got on the witness stand said, "Well, here's
21 what was really going on."

22 Q. It wouldn't have done him much good.

23 A. No, that's a fair suggestion. It may not have.

24 Q. Isn't the effect of your evidence....

25 A. But it might.

1 Q. Sorry.

2 A. I mean I don't back away completely but that's a fair point.

3 Q. Isn't the effect of your evidence that Mr. Marshall should
4 have given the more plausible story, really, that Mr. Marshall
5 was more believable if he was up to no good?

6 A. Yeah, I'm uncomfortable with putting it that way. That's the
7 effect of what I'm saying, but what I'm, the focus of my point
8 there is plausibility and providing a motive for the attack.

9 Q. Do you have any personal view that to take this position is a
10 patently unfair position with respect to Mr. Marshall?

11 A. Yes, I don't think it is a patently unfair position. I think it's...

12 Q. An unfair position?

13 A. It's a reasonable position.

14 Q. You think it's a reasonable position?

15 A. Yes.

16 Q. So if there was an attempted robbery, in order to blame Mr.
17 Marshall, you have to accept that Mr. Marshall should have
18 disclosed this in 1971, even though he wasn't charged with it.
19 Is that correct?

20 A. He should have disclosed it once he opted to waive his right to
21 remain silent.

22 Q. And prior to that, to the police and to his lawyers, which
23 you've already said.

24 A. Yeah, well, that's what I mean. I mean when he decided to
25 talk to the police...

1 Q. At the very first instance.

2 A. Yes, he waived his right to remain silent at that point. And at
3 that point, he's required to not mislead, in any way, which, in
4 my view, was the effect of what he did.

5 Q. And if there was no attempted robbery under way, which
6 you've said you have some doubt about. I accept that you
7 haven't backed off that completely in any sense. But if there
8 was no attempted robbery under way, then no blame can be
9 attributed to Mr. Marshall, isn't that right?

10 A. Yes.

11 Q. Mr. Edwards, I want to ask you some general questions about
12 when you became Crown Prosecutor for Cape Breton County.
13 I believe in your evidence you said that you'd spent ten years
14 reviewing police investigations.

15 A. Well, that's... What I meant by that is conducting
16 prosecutions for the Crown, you...

17 Q. No, I understand that.

18 A. In the course of it, yes.

19 Q. That's what I'm saying, in your capacity as a Crown
20 Prosecutor.

21 A. Yes.

22 Q. What concerns did you have or do you have, if any, about the
23 way the Sydney Police conducted investigations?

24 A. Investigations or this investigation?

25 Q. Investigations, generally?

1 A. In ten words or less?

2 Q. Well, I'm in no rush, but...

3 A. It's hard, it's really difficult to answer a general question like
4 that.

5 Q. Well, were there other...

6 A. Do you want to make some suggestions to me? Maybe we can
7 focus it that way?

8 Q. I guess what I'm asking you is that you have been and are a
9 Crown Prosecutor.

10 A. Yes.

11 Q. You have a very intimate involvement or relationship with
12 the police.

13 A. Fair enough.

14 Q. Conducting investigations on cases that you then prosecute.

15 A. Yes.

16 Q. What observations or criticisms can you make about the way
17 those investigations have been handled? I mean are there
18 investigations that stick out in your mind where you can say
19 they failed to do this, they failed to get important statements.
20 They failed to collect essential evidence. And perhaps tell us
21 how those kinds of errors happen and what can be done to
22 avoid them?

23 A. And I'm going back to live in Sydney.

24 MR. PINK

25 My Lord, before Mr. Edwards answers that, perhaps the

MR. EDWARDS, EXAM. BY MS. DERRICK

1 witness might be given the warning that we've talked about in the
2 past where we're moving into areas where I don't think any of us
3 know where we're going.

MR. EDWARDS

5 I'm not going to mention any names.

MR. PINK

7 So that names aren't mentioned and the specifics.

MS. DERRICK

9 No.

MR. CHAIRMAN

11 This is a very general question and I appreciate the
12 difficulty in answering generalized questions, but if Mr. Edwards
13 is game to do it, we're game to listen.

MR. EDWARDS

15 A. Okay, I'll give it a try. My concerns. Well, I referred this
16 morning to an example of a case where the evidence came to
17 me, literally, at the 11:30 hour, just before the judge charged
18 the jury. That was a second degree murder case and, of
19 course, the fact that witnesses had seen the victim alive after
20 the time when the Crown theory and the evidence I
21 presented said she was dead, was obviously very important
22 information that I should have had long before that time.
23 And the defence should have had long before that time. So as
24 a result of that mistrial being called, of course, we did an
25 examination, a very careful one, to try to determine what had

1 gone wrong and a number of problems were identified. And I
2 guess the main one was that there was a lack of central
3 coordination of the investigation and, in particular, there was
4 a breakdown in communication among those involved in the
5 various aspects of the investigations. That is to say, the
6 detectives had given uniformed police officers certain matters
7 to check out. As a matter of fact, that rumours, as they had
8 them at that time and outright statement of these three ladies
9 who had seen the victim after the fact. And the uniformed
10 policeman, in fact, did not check that out. But the head
11 investigators never followed that up to find out whether their
12 directions had been followed. So there was no reporting
13 mechanism.

14 Similarly, the identification section, the investigators
15 were searching vigorously for the keys to the victim's car,
16 which, for our purposes is not important, but take it from me
17 that the whereabouts of her car and access to the keys was a
18 major concern. So the investigators were trying to find out
19 where the keys were.

20 Meanwhile, the exhibit man, the identification man,
21 had her purse and the car keys were in it. And that wasn't
22 disclosed until after the retrial. So that would be the central
23 concern there and, in fairness to the City Police, they have
24 taken steps to try to rectify that.

25 Q. As a result of that case?

MR. EDWARDS, EXAM. BY MS. DERRICK

1 A. As a result of that case, and I guess the acid test will come
2 when we get another major case to see how well that system
3 works. But, obviously, that is a matter of great concern and it
4 has a parallel to this situation.

5 Q. Indeed, it does.

MR. CHAIRMAN

7 Before you leave that, you'll have to satisfy our curiosity
8 and tell us what happened on the second trial?

MR. EDWARDS

10 Well, on the...

MR. CHAIRMAN

12 Not that it's relevant, but...

MR. EDWARDS

14 On the second trial, the matter had been reinvestigated by
15 the R.C.M.P. and all of those loose ends tied up and the Crown
16 presented all the evidence, including the evidence of the three
17 ladies, who gave evidence which was completely at odds with our
18 theory and the accused was convicted.

BY MS. DERRICK

20 Q. Mr. Edwards, did the problems that arose in that case, were
21 they part of a pattern of problems that you've experienced or
22 does that stand out as an isolated example of those types of
23 problems or other problems relating to a less than complete
24 investigation?

25 A. That is certainly the most dramatic example.

1 Q. In your experience?

2 A. In my experience. And I'd be less than fair to the City Police
3 if I didn't say that in that case, you know, that quite apart
4 from those obvious errors, there was some extremely, and I'm
5 not being gratuitous here, extremely adept detective work,
6 you know, involving wiretaps and it was almost the stuff
7 detective novels are made of. And it was unfortunate that
8 that good work was nullified by this, let's say organizational
9 problem. You know, there are very, very competent
10 investigators but it's a...

11 Q. Have you experienced those organizational problems in other
12 cases that you've prosecuted?

13 A. I have, to some extent, and I hesitate to say that because I
14 can't draw the specific examples.

15 Q. I see.

16 A. Again, I've tried to anticipate the questions. I wasn't ready
17 for that one. But, yes, I think it's fair for me to say that I
18 have experienced lesser degrees of that sort of problem in the
19 past. You see, there's, I guess one of the problems, and this
20 might have been relating to individuals rather than the set-
21 up there, was that there was an over-reliance on statements
22 and I think police generally have to guard against falling into
23 the trap of saying once I've got the statement, the confession,
24 game over. Because, of course, that statement may not be
25 admissible and then what have you got? So that was a

1 concern that I've had from time to time.

2 Q. A concern that an investigation might not be extensive
3 enough.

4 A. Yes.

5 Q. And would stop short, is that what you're identifying?

6 A. Yes. And, of course, that, in part, can be rectified or there's a
7 bit of a safety on that. If there is a well-established
8 consultation between the Crown and the police. But that's a
9 difficult area because, on the other side, Crown has to remind
10 himself that he is not part of the investigation and not get
11 caught up in the chase. It's important for a Crown to be able
12 to stand back and that's a difficulty that I think every Crown
13 appreciates.

14 Q. With respect to the preparation of the file that then goes to
15 you, do you have any comments or criticisms concerning that?
16 Is it your experience that the file you receive from the police
17 is sufficiently complete? I know you've identified...

18 A. Are you talking City Police now?

19 Q. Yes, I'm talking City Police.

20 A. Yes.

21 Q. I know you've identified that one case. I wondered if there
22 were any other examples that we haven't touched upon
23 where you've experienced receiving an incomplete file. Not
24 that the investigative work hasn't necessarily been done, but
25 that you haven't actually got the complete file.

1 A. I can't think of an example of that.

2 Q. Just related to this, and this is in Volume 31 at page 76, this is
3 when you're corresponding with the Attorney General's
4 Department concerning, I take it, another case that Mr. Ebsary
5 was involved with.

6 A. Volume 31, page...

7 Q. 76.

8 A. Yes.

9 Q. And you're enclosing copies of various statements and you
10 say, "Unfortunately," and this is in 1982, "The police did not
11 submit a Crown sheet or police report despite my persistent
12 efforts to encourage the practice of submitting same."

13 A. Yes.

14 Q. Was that a problem getting Crown sheets prepared or police
15 reports prepared subsequent to an investigation?

16 A. Generally speaking, it wasn't. And as I've indicated before,
17 Chief MacIntyre insured that as a matter of practice I was
18 provided with Crown sheets. But there were examples where
19 that would happen and did happen in this case, would be in
20 the situation where police would take all their statements
21 and come to the Crown and say, "Here are the statements.
22 What have we got?" And one of us would go through the
23 statements and suggest a charge. Once the charge is laid,
24 and I'm speaking generally, and I think it's a normal police
25 reaction, the heat is off them and the investigation loses ...

1 2:52 p.m.

2 Q Its momentum.

3 A. ...its momentum. And from time to time in that type of
4 situation it would be hard to pin down the investigator and
5 say, "I want that Crown sheet," the better...the solution to
6 that is that when they come in and throw a bunch of
7 file...statements on the desk the Crown should say, you
8 know, "Go away with them and come back with your file
9 complete and then we'll discuss it." There is...see there is a
10 danger that police will just automatic...sort of automatically
11 take statements and then leave all the thinking to the Crown
12 and let the decision be the Crown's, when of course it's their
13 duty to make the decision. Clay Powell, a prominent Toronto
14 lawyer who spent fifteen years in the Ontario Crown office,
15 Mr. Justice Evans may be familiar with him, but I attended a
16 lecture one time and he said, if he had it to do over again he
17 would not do the thinking for the police to that extent. That
18 we should be forcing them to grapple with the thing.

19 Q. So when I asked you if this was a problem I think you said
20 it wasn't, but you've obvious...

21 A. But from time to time it was, yes.

22 Q. And so from time to time it required your persistent efforts
23 to encourage this...

24 A. Yes, yes, that's right.

25 Q. ...this procedure. Mr. Edwards, do you have any

1 observations or have you received any criticisms concerning
2 the treatment by the Sydney police toward racial minorities
3 in Sydney?

4 A. I can only think of one which would have been just a couple
5 of months ago where an individual had been charged with
6 sexual assault and held in custody pending his trial and then
7 was acquitted at the trial. The individual was black. And
8 his lawyer wrote a letter of complaint to the Attorney
9 General with a copy to the Black United Front with the
10 assertion that had the individual been white he probably
11 never would have been charged. That is the only complaint
12 I'm aware of. I was involved in that case and I can tell you
13 that as far as I'm concerned there was no basis for making
14 that statement.

15 Q. And from your own observations are you able to say
16 anything concerning the Sydney Police treatment of racial
17 minorities? Have you ever heard the police discuss either
18 the black or native population or individuals in Sydney in
19 derogatory terms, for example?

20 A. Let me answer that in two ways. No case that has gone
21 through the Court while I was there to observe. I can't point
22 to any case and say, yeah, there was probably racial
23 discrimination there. From time to time I would hear
24 maybe a racial remark from an individual.

25 Q. Can you recall what kind of racial remark?

1 A. Well, you know, in reference to this case, and here again
2 these would be remarks that may have been made by
3 individual police officers, members of the public, but I did
4 hear remarks like, "Donald Marshall got what he deserved.
5 He probably would have been on welfare anyway, so, you
6 know, why compensate him." I wouldn't be...I don't have it.
7 Like I heard those remarks but I don't have specific
8 recollection so that I could in all honesty name the
9 individuals. I'm not trying to duck that. But I did hear that
10 kind of remark.

11 Q. And did you hear remarks about other native people or
12 black people, other native people other than my client? Not
13 necessarily with respect to cases, but just generally in your
14 day-to-day dealings with the police?

15 A. I couldn't say, no, I didn't. I probably did but they don't
16 come to mind. I mean I...

17 Q. So...

18 A. I don't minimize them but the past few weeks I've been so
19 focused on this that it's hard for me to focus on other...

20 Q. But what you're saying is you wouldn't dismiss it out of
21 hand, no, I've never heard anything.

22 A. No, no, I couldn't do that, no. Now, as a police force, as with
23 any other institution, I would make the general statement
24 that they...it is not racist but there may very well be
25 individuals who are in that. But I can't...I can't say that that

1 has ever influenced the laying of a charge, and certainly the
2 prosecution.

3 Q. Another general question, Mr. Edwards, you had, in your
4 earlier evidence, I think it was last week, answered a
5 question with respect to charging of prominent people and
6 you had said that there was no directive from the Attorney
7 General's Department whether or not charges were to be laid
8 or not laid in cases involving prominent people.

9 A. Yes.

10 Q. Can I ask you whether there would be a greater tendency to
11 consult with the Attorney General's Department on such
12 cases?

13 A. My difficulty answering that is that I can't recall a quote,
14 unquote prominent person being charged.

15 Q. That you've been...

16 A. That I've been involved in.

17 Q. ...involved in.

18 A. No.

19 Q. And based on your general knowledge of the relationship
20 between local Crown counsel and the Attorney General's
21 Department are you able to comment as to whether there
22 would be a ...there is a greater tendency to consult? Do you
23 have any knowledge that that's the case or has been the
24 case in other instances?

25 A. I couldn't answer that. I mean I've been involved in the

1 prosecution of prominent people but in after the fact.

2 Like...

3 Q. When you say "in after the fact" you mean after...

4 A. Well, it happened in another jurisdiction and while one was
5 the prosecution of a prominent lawyer, it happened in an
6 area outside my own jurisdiction. The lawyer was very well
7 known to prosecutors in his own jurisdiction and, therefore,
8 it was felt that it would be proper, appropriate, and I think
9 that's right, to bring in someone else, because of course if he
10 had been acquitted then the public would have said, "Well,
11 what do you expect? He was being prosecuted by his
12 buddy," sort of thing. You know, in my own jurisdiction I've
13 had...that sort of rings the bell a bit. I've had one lawyer
14 charged with fraud and I can tell you that that was handled
15 completely on the local level and, you know, he was
16 sentenced and went to Dorchester. There was no
17 consultation on that so, you know, if a lawyer fits into that
18 category of prominent person then maybe that's an example
19 you'd be interested in.

20 Q. Thank you. Now with respect to general disclosure policy, I
21 believe you've testified that the policy that's embodied in
22 Volume 28, starting on page 16, would...this is the
23 September 15th, 1986, policy directive from Mr. Giffin to
24 prosecuting officers.

25 A. Yes. Okay.

MR. EDWARDS, EXAM. BY MS. DERRICK

1 Q. I think you've testified that such a policy could possibly
2 prevent a future Frank Edwards from giving a future Steve
3 Aronson a report such as Staff Sergeant Wheaton's. Was
4 that not your evidence?

5 A. That's not the one I was referring to this morning. I think I
6 was referred to the December 3rd. Yes, I was referred to
7 the November 21st, '84 and the...

8 Q. Okay.

9 A. And the December 3rd, '84 memorandum. I don't think I
10 was referred to Mr. Giffin's.

11 Q. My apologies. If you're not familiar with Mr. Giffin's...

12 A. I am.

13 Q. And what would your answer be, then, with respect to the
14 effect of that directive on a future Frank Edwards dealing
15 with a future Steve Aronson and having in his possession a...

16 A. Perhaps I just better read it.

17 Q. Certainly.

18 A. I'd like to refresh my memory on it. Okay. That one seems
19 even broader than the...

20 Q. Yeah.

21 A. ...December 3rd.

22 Q. I believe that's his intention.

23 A. Yeah. So...

24 Q. I guess perhaps if I could point you to...

25 A. So that one may not cause a problem.

1 Q Perhaps I could point you to page 17 just before you give
2 your answer.

3 A. Yes.

4 Q Because page 17 says,

5
6 Prosecuting officers are reminded that in no case
7 should a file be turned over the defence for
8 perusal without the file having first been
9 checked to ensure that it does not contain any
10 confidential or extraneous material or police
11 reports containing expressions of personal views
12 or opinions of the police investigator which
13 ought not to be disclosed to the defence.

14 A. Well, that seems to leave the discretion in the prosecutor to
15 determine whether or not the personal views or opinions
16 ought or ought not to be disclosed. So if that interpretation
17 is correct it wouldn't cause a problem.

18 Q Wouldn't cause a problem for you.

19 A. No.

20 Q Is that correct?

21 A. Right.

22 Q And I take it, then, there would be some circumstances
23 when you would consider it acceptable to hand over a report
24 that would have some opinions of the investigating officer.
25 For...

A. Yes, I...I don't like speaking in absolutes and I would be
very uncomfortable with the blanket structure saying you
never do that if there is a personal view or opinion, because

1 there is always the possibility that, you know, it may have
2 some relevance.

3 Q. And would such an opinion that you might consider defence
4 counsel should have the benefit of be an opinion by a police
5 officer that the accused person is innocent?

6 A. I don't think I'd have particular difficulty with that. And I
7 know I've had cases where, in fact, reports weren't disclosed
8 but I invited defence counsel to talk to police officers who I
9 knew were less than convinced of the guilt of the accused
10 person.

11 Q. Now I want you to...I want to ask you about your evidence
12 with respect to Mr. MacIntyre's honest belief concerning Mr.
13 Marshall's guilt.

14 A. Okay.

15 Q. And would you agree with me that an honest belief is not a
16 false belief?

17 A. An honest belief is not a belief that the person knows to be
18 false. It can be a false belief, but if the person doesn't know
19 it's false.

20 Q. And how would you extend the definition of "know"? For
21 instance, what if the person is deliberately blind.

22 A. Willful blindness.

23 Q. Yes, to facts that would indicate that the belief was false. Is
24 that still an honest belief?

25 A. I've always had a problem with the abstract. If he

1 willfully...do you want to give me a for instance, please?

2 Q. Well, I'll give you a for instance.

3 A. I'm not trying to be evasive, I'm...

4 Q. No, no, and I'm not trying...

5 A. ...trying to answer your question the best I can.

6 Q. And I'm not trying to be obscure. In your evidence you said
7 that Mr. MacIntyre convinced himself that that's what
8 happened. I think those were your words, and I think the
9 "that's what happened" was meaning the stabbing of Mr.
10 Seale by Mr. Marshall.

11 A. Yes.

12 Q. And you said that the police have to start somewhere and
13 that I guess the somewhere where they started in this case
14 was with Mr. Marshall.

15 A. With, yes, that's right.

16 Q. Now, they had an exculpatory statement from Mr. Marshall
17 right off the bat.

18 A. Yes.

19 Q. And what...and I'm not going to point you to the references,
20 but it's in the evidence what we have had referred to us
21 some months past was that there is evidence before us.
22 There are notes from an RCMP corporal, I could be mistaken
23 about his position, Woods, taken on the Saturday morning
24 after the stabbing.

25 A. Yes.

- 1 Q In the presence of Mr. MacIntyre where he notes down that
2 Mr. Marshall is a possible suspect, words to that effect. And
3 there also is a telex that we have, although we don't know
4 who sent it, but we have a telex, I believe, from the Sydney
5 police again saying that Mr. Marshall is possibly the person
6 responsible.
- 7 A. Yes.
- 8 Q. Now that evidence seems to point to Mr. Marshall having
9 been immediately targeted as a suspect.
- 10 A. Yes.
- 11 Q. And that a case then being pursued to fit the theory of him
12 as the perpetrator.
- 13 A. Yes.
- 14 Q. So when you look at that and when you look at the fact that
15 there were three teenagers who in their initial statements
16 don't point a finger at Mr. Marshall at all...
- 17 A. Right, right.
- 18 Q. But later on, after the intervention of the police, change
19 their stories.
- 20 A. Yes.
- 21 Q. Can you still say that that amounts to an honest belief in the
22 face of all that?
- 23 A. Yes.
- 24 Q. You...your answer to me is, yes, you still...
- 25 A. Yes.

- 1 Q. ...maintain...
- 2 A. Yes, because John MacIntyre, by my assessment of it, it may
3 be faulty but it's my honest assessment, didn't believe the
4 first statements he got from Chant, Pratico and Harriss,
5 indeed, the first statement of Chant was a lie. And the first
6 statements of Chant and Harriss he chose not to believe
7 them. Now, it's probably easy for us to look back now and
8 say, "Well, he should have," armed with the knowledge we
9 have. And I don't think any of us is capable of divorcing
10 the knowledge we have now from what he had then. So
11 I've thought about that and I would maintain my original
12 evidence that in my view he had an honest belief in his
13 theory.
- 14 Q. And what do you say about it being a theory as a result of
15 being willfully blind?
- 16 A. Gee. Willfully...I'm having difficulty understanding...
- 17 Q. Of not accepting any other theory.
- 18 A. Uh-hum.
- 19 Q. Of not accepting the gray-haired man, the two men in the
20 Park.
- 21 A. Yes.
- 22 Q. Of determining right away that Mr. Marshall was the suspect
23 and pursuing that.
- 24 A. Uh-hum. Well, all I can say is that, you know, it was...it was
25 poor procedure and he should have kept an open mind and

1 he shouldn't have ignored the...those warning flags that
2 were up. But I can't go beyond that and say that that
3 amounts to willful blindness. It was mistaken, it was over-
4 zealous, but that's...that's as far as I can go.

5 Q. So he could be guilty of those faults but in your view still
6 have an honest belief as to...

7 A. Yes.

8 Q. ...Mr. Marshall's guilt. We have evidence, I believe, from Mr.
9 McGee who I think you've said that you know, when he
10 testified, and as I recollect his evidence he said that Mr.
11 MacIntyre suggested things to Mr. Chant at the taking of his
12 June 4th statement.

13 A. Yes.

14 Q. Is that...

15 MR. PUGSLEY

16 I'm sorry, who was that?

17 MS. DERRICK

18 Mr. McGee, Wayne McGee.

19 Q. Is that something which causes you concern?

20 A. It causes me concern given the circumstances in which those
21 suggestions were made and the individuals to whom the
22 suggestions were made. Yes, it causes me concern.

23 Q. Does it cause you to...

24 A. It's poor police procedure.

25 Q. Does it cause you to have any doubt about the honesty of

1 that approach?

2 A. It doesn't cause me to doubt the honesty of it. Again, I'm
3 repeating myself. It...

4 Q. No, that's fine, thank you, I have your answer.

5 A. Okay.

6 Q. I just want to ask you about some of the time leading up to
7 the reference, and I believe in your evidence you were
8 pointed to, this is in Volume 17 which are your notes.

9 A. Yes.

10 Q. And it's page 12. You don't really need to refer to it.

11 A. Okay.

12 Q. I'm just going to ask you about Mr. MacIntyre calling you on
13 March 5th, 1982, and he said to you on the telephone
14 "They're not going to put me in jail, are they? Have I been
15 talking with them?" And I assume that's you making the
16 notes.

17 A. Yes.

18 Q. Mr. MacIntyre said have...

19 A. Yes, he wants to know...

20 Q. ...you Mr. Edwards...

21 A. ...if I had been talking to Wheaton.

22 Q. ...have you been talking to them?

23 A. Right.

24 Q. Yes. Now that was one of my questions. I recognize that
25 you described that conversation on the phone with

1 Mr. MacIntyre as having been of a joking variety.

2 A. That's correct, yes.

3 Q. From him. I want to know from your understanding of the
4 context of that discussion who was the "them" he was
5 referring to?

6 3:15 p.m.

7 A. Wheaton and Carroll.

8 Q. I see. Do you have any view that there may have been a
9 serious worry underlying the joking exterior of his inquiry?

10 A. Oh, he was seriously concerned about where the investigation
11 was going but with John MacIntyre, I think it was more of a
12 concern about being proven wrong. I don't think there was
13 any real apprehension by him that he would, in fact, go to jail
14 as a result of this.

15 Q. I see.

16 A. That was my impression.

17 Q. But there may have been a real apprehension that he would
18 be shown to have been wrong in 1971?

19 A. There may have been that concern but, again, I mean that's
20 speculative. That's my personal impression.

21 Q. That was your impression from knowing him.

22 A. Yes. As I referred to in my evidence, my dealings with John
23 MacIntyre in relation to this matter and watching him on the
24 witness stand is that he felt there was only one right answer
25 here and that's that Donald Marshall was guilty.

1 Q. Now in April of 1982, and this is referred to at page 10 of
2 Volume 17.

3 A. Will I turn to that?

4 Q. You can, if you like. I'm not going to take you through it in
5 detail.

6 A. Okay.

7 Q. I just want to ask you a few questions. You refer to a
8 telephone conversation that you had with Mr. Gale and Mr.
9 Herschorn and I think your evidence was that by this point
10 you felt that the investigation should focus on the Sydney
11 Police.

12 A. That was the April 19th?

13 Q. That's right.

14 A. Yes, okay.

15 Q. Am I correct in understanding that you saw a need to get to
16 the bottom of why three people had lied...

17 A. Yes.

18 Q. During the original investigation?

19 A. That's fair

20 Q. And at the trial?

21 A. Yes.

22 Q. And it was your view then in April of 1982 that it was timely
23 to pursue such an investigation then?

24 A. Yes.

25 Q. In April of 1982?

1 A. Yes.

2 Q. Now this view of yours was not shared by Mr. Gale, is that not
3 correct?

4 A. No, he didn't feel it was necessary to proceed at that time.

5 Q. And you've said in your evidence, I believe, that the R.C.M.P.
6 accorded the Sydney Police special status in not pushing
7 harder at investigating them, is that correct?

8 A. That's fair.

9 Q. But is it not fair to say as well that this was acquiesced to by
10 the Attorney General's Department? Any special status
11 accorded by the R.C.M.P. wasn't resisted by the Attorney
12 General's Department. They weren't busy saying to the
13 R.C.M.P., "You shouldn't be being so reluctant," if we accept
14 that.

15 A. No, no one in the department ever said that.

16 Q. Can you see any reason why the investigation should not have
17 been pursued then or why it could not have been pursued at
18 some point, including the present?

19 A. Well, the answer to the first part of your question is, no, I
20 didn't see any reason why it couldn't proceed at that time,
21 although I understood Mr. Gale's rationale, but you know, I
22 had a different view. And why it couldn't proceed until the
23 present, I think that if the application had gone under 6.17(c),
24 barring the scope of 6.17(c) would still have been up to the
25 court in the final analysis. It would be the discretion of the

1 court what witnesses they were going to hear. But my
2 intention at that time, and I think it was concurred in by Mr.
3 Rutherford and Mr. Gale, was that everything be laid on the
4 table, police evidence included, and that, in effect, would have
5 constituted...

6 Q. But that didn't happen.

7 A. It didn't happen because of the last minute change from (c) to
8 (b).

9 Q. And that was in 1982, correct?

10 A. That's right.

11 Q. And I suggest to you there is no reason why there could not
12 have subsequently been an investigation into the Sydney
13 Police.

14 A. No, that's fair. It could have been done beforehand.

15 Q. And as an experienced Crown Prosecutor, would you not
16 agree with me that it's better to do investigations when a
17 matter is freshly uncovered rather than waiting until a "trail
18 gets cold," as it were?

19 A. Well, even when the matter was freshly uncovered, it was
20 eleven or twelve years old.

21 Q. That's true.

22 A. So another few months, like to wait until the end of the
23 anticipated Ebsary trial. I mean none of us knew it was going
24 to be three trials and two appeals, three appeals counting the
25 leave application to the Supreme Court of Canada. So, in that

1 sense, a few more months added on to eleven or twelve years
2 wasn't going to be a crucial difference.

3 Q. So from your dealings with the Attorney General's
4 Department, you accepted that there was going to be an
5 investigation initiated.

6 A. At some point.

7 Q. At some point. Now you've expressed having had concerns
8 that in April, 1982, the R.C.M.P. hadn't asked for the entire
9 file from Mr. MacIntyre.

10 A. As of what date? I'm sorry.

11 Q. In April of 1982?

12 A. Yes.

13 Q. Wouldn't it be fair to say, though, that any failure on their
14 part to do so wouldn't change your view that Mr. MacIntyre
15 was being manipulative?

16 A. No, it wouldn't change my view that he was being
17 manipulative, no.

18 Q. And any failure on the part of the R.C.M.P. doesn't excuse any
19 attempts Mr. MacIntyre may have made to manipulate the
20 investigation.

21 A. It doesn't excuse it, no.

22 Q. Your notes show and you've testified to the fact that in
23 January, 1983, you learned that Chief MacIntyre had paid a
24 visit to the Attorney General's Department and you said that
25 you had some concerns about this. And I just wanted to ask

1 you what concerns did... Did you have concerns that Mr.
2 MacIntyre would effectively fan the flames against your
3 position that an acquittal should be advocated for?

4 A. No, I don't think that was my concern. My concern was that,
5 on the face of it, that demonstrated that he had not been
6 completely forthcoming with the R.C.M.P. investigators. That
7 was my concern and, therefore, that there might still be
8 crucial evidence in his possession, which it would be
9 important for the R.C.M.P. to have. I think that sums up my
10 concerns.

11 Q. So you were concerned about what you learned he made
12 available to the, to Mr. Gale. Or Mr. Gale, I think, when he
13 met with...

14 A. Yes.

15 Q. You weren't concerned about him exerting an influence on Mr.
16 Gale with respect to your position on the matter?

17 A. No, I don't agree with that characterization. He may have
18 been attempting to exert an influence but...

19 Q. But that wasn't worrying you, is that what you're telling us?

20 A. No, that's right. I mean Gordon Gale, I was confident, would
21 not fall prey to any improper influence. My basic concern
22 was the fact that I was told by the R.C.M.P. that they pressed
23 him for anything that might be helpful to their investigation
24 and were told by him that he had nothing and then he turns
25 up in Halifax with, well, the Mary and Greg Ebsary

1 statements.

2 Q. Thank you. I'd like to ask you, Mr. Edwards, about the
3 preparation of the affidavits with respect to Mr. MacIntyre
4 and Mr. Urquhart.

5 A. Right.

6 Q. I believe you told us that when you questioned Mr.
7 MacIntyre on June... Sorry, July 12th, 1982 concerning the
8 taking of Patricia Harriss' statement, I take it from your
9 evidence that you offended him by questioning him with
10 respect to the propriety of his conduct, is that fair to say?

11 A. Yes, I believe that that was the point at which he became a
12 bit exercised.

13 Q. And am I correct that he told you that Patricia Harriss'
14 mother was there during the statement taking and that there
15 was no banging on the desk?

16 A. I believe that's right.

17 Q. That's what...

18 A. I'd have to cross-reference that. Is there any reference in my
19 note on that point, do you know?

20 Q. That's what I remember from your evidence. And your note
21 of July 12th, you have... This is on page 13 of Volume 17.
22 And I think your evidence just elaborated on that. You have
23 "J. F. MacIntyre doesn't recall who was with her but there was
24 someone. Doesn't recall other person being kept out of office."
25 Et cetera.

1 A. Right.

2 Q. So were you left with the impression after that meeting with
3 Mr. MacIntyre that Mrs. Harriss had been there throughout
4 the statement taking of her daughter?

5 A. That may have been my impression. I don't, I don't
6 specifically recall.

7 Q. You don't specifically recall what impression you were left
8 with, is that...

9 A. No. No, but I mean from the notes, "Doesn't recall who was
10 with her but there was someone." I think it's reasonable to
11 assume that I was left with the impression that somebody
12 had been there with her during the statement taking.

13 Q. And did you on this same occasion discuss with Mr.
14 MacIntyre the taking of the June 4th statement from
15 Maynard Chant?

16 A. Yes, I believe. Yes, you see on the first page of those notes.

17 Q. I see, I'm sorry.

18 A. Yes.

19 Q. Thank you. During this meeting, were Mr. MacIntyre or Mr.
20 Whalley up out of their chairs at all? Were they leaning over
21 you, pointing things out to you? Were they leaning forward
22 in their chairs?

23 A. No.

24 Q. Now...

25 A. I think John MacIntyre leaned forward in his chair a couple of

1 times, sure, yeah.

2 Q. Was the effect of that making it appear as though he was
3 starting to stand up?

4 A. No, no.

5 Q. Now on this same date, there's, about the middle of the page,
6 a section referring to John Pratico and the statement is
7 "Wouldn't say he was totally reliable." And then it goes on to
8 say, "But placed credence where his story was corroborated
9 by other witnesses, Chant and Harriss."

10 A. Yes.

11 Q. Did Mr. MacIntyre explain what he meant by that? That is,
12 the "wouldn't say he was totally reliable," with reference to
13 John Pratico?

14 A. I don't recall that being pursued, Ms. Derrick.

15 Q. And I believe we have your evidence that on July 22nd, Mr.
16 MacIntyre and Mr. Urquhart asked to have deleted from their
17 affidavits a paragraph to the effect that they had no
18 knowledge of John Pratico's mental problems.

19 A. Yes.

20 Q. I believe that was your evidence.

21 A. Yes, I'm just looking for my note on that, yeah.

22 Q. I take it that that must have meant to you that they had some
23 knowledge.

24

25

1 3:28 p.m.

2 A. Yes.

3 Q The fact that they would ask for it to be deleted.

4 A. That's when Chief MacIntyre made the remark "Pratico's
5 mother may have told him something about him being on
6 pills, so better leave that out," that being the original
7 paragraph.

8 Q And that being the case, I'm now going to refer you to your
9 brief, this is in Volume 39 at page 184, this relates to the
10 reference. You say, and this is in the second paragraph, "In
11 his brief, Counsel for the Appellant notes that in 1971
12 Pratico's disability was not known by the Appellant nor did
13 it appear obvious to the jury," and then you go on to say,
14 "The Crown submits that at the time it was no more
15 apparent to either the police or the Crown and, therefore,
16 neither should be criticized for having preferred Pratico as a
17 credible witness." That's somewhat at variance with the
18 information you had, isn't that fair to say?

19 A. I suppose it's arguable that it could be somewhat at
20 variance, but at the same time what John MacIntyre was
21 saying was that there may have been some suggestion, but I
22 took it to be that he didn't have a problem with Pratico.

23 Q Just by having some knowledge of some mental problem.

24 A. Yes, yes.

25 Q In your evidence before this Commission, I heard you to say

1 that you were uneasy about the bit about Pratico. And I
2 just wondered what you had meant by that.

3 A. Well, I...when John asked me to delete that paragraph, I
4 quite frankly was wondering if he was being completely
5 straight with me when he said all he knew was about the
6 pills, but I know no basis to pursue that further.

7 Q. You didn't pursue it further with him.

8 A. No.

9 Q. But you were left with an uneasy feeling that he might have
10 more information.

11 A. That that was...that that was possible but, you know, an
12 uneasy feeling by me doesn't amount to very much in
13 evidentiary terms.

14 Q. You've said that you would have been interested to have
15 been told, I believe, in response to Mr. MacDonald, that prior
16 to taking the second statement, Mr. MacIntyre took John
17 Pratico to the park and you don't recall having been told
18 this. Now, had you been told that in the course of preparing
19 these affidavits, is it not fair to say that you would have
20 included it?

21 A. I would have, I should have, but I can't discount that I may
22 have been inadvertent and just left it out.

23 Q. But if you had, Mr. Whalley or Mr. MacIntyre or Mr.
24 Urquhart could have picked up this omission when they
25 reviewed the affidavits.

1 A. Oh, they had lots of opportunity, I mean, they didn't just do
2 an on-the-spot review there in my office. They took them
3 with them and had them a day or so and presumably went
4 through them very carefully.

5 Q. Mr. Urquhart's affidavit, and I won't refer you to it, but
6 basically says with respect to these statements that there
7 were no threats, et cetera made.

8 A. Yes.

9 Q. And I think you said in your evidence here that perhaps Mr.
10 Urquhart said to you if there had been threats made, he
11 would have remembered them.

12 A. Yes. And I'm admittedly conjecturing there because there is
13 an inconsistency between my note of July 12th and the
14 affidavit on that point.

15 Q. But again, if he had said that to you then the affidavit would
16 likely have reflected that, is that not correct?

17 A. Well, it should have, yes.

18 Q. And I take it that you took some considerable care
19 preparing these affidavits.

20 A. Yes. I tried to be careful with them.

21 Q. Would you agree with me that the effect of saying "No
22 threats" is more powerful than saying "I don't recall threats,
23 but if there were any I'd remember them."?

24 A. That's fair.

25 Q. You relied on these affidavits being reviewed by Mr.

1 Whalley, is that correct?

2 A. And Mr. MacIntyre and Mr. Urquhart.

3 Q. And Mr. Urquhart.

4 A. Yes.

5 Q. Did you understand Mr. Whalley to be acting on behalf of
6 Mr. Urquhart and Mr. MacIntyre?

7 A. Yes.

8 Q. Was he like their legal counsel effectively?

9 A. Oh, yes, he was there as city solicitor and...

10 Q. And you understood...

11 A. And adviser to the police department.

12 Q. And you understood that Mr. Whalley believed Mr. Marshall
13 to be guilty.

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

15 Q. Just referring for a moment to Mr. MacIntyre's affidavit
16 which is found in Volume 39 at page 81, just one portion I
17 want to ask you about.

18 A. 39, 81.

19 Q. At 81.

20 A. Yes.

21 Q. I'm looking at paragraph 25 and Mr. MacIntyre is saying
22 he's aware of the George and Sandy McNeil statement which
23 is attached as an exhibit, "Wherein they describe two men
24 whom I now know could have been the above-named
25 Ebsary and the MacNeil referred to in the next paragraph,

1 but which statement appeared at the time to have been
2 superseded in importance by those subsequently taken from
3 the aforementioned Chant, Pratico and Harriss." I wondered
4 whether you ever had a discussion with Mr. MacIntyre as to
5 exactly what he meant by the George and Sandy McNeil
6 statements being superseded in importance.

7 A. Well, just the discussion of July the 12th and as I recall that
8 particular part superseded—that's my word, what John said
9 was something like, "Well, once I had Chant, Pratico and
10 Harriss statement that the others, George and Sandy McNeil,
11 didn't seem to matter." That was the gist of it. So, my
12 interpretation was he was saying that it was superseded in
13 importance.

14 Q. So, your sense of it was that once those three statements
15 came along they didn't fit the theory anymore. Did you take
16 that from that?

17 A. That's a possible interpretation from that. Another one is
18 that, well, I didn't need them anymore.

19 Q. And you're familiar with those statements they describe.

20 A. Yes, it's been some time before...since I've read them, but I
21 recall the gist of them I think, yes.

22 Q. In your experience with Mr. MacIntyre is it fair to describe
23 him as being stubborn and resolute in his opinions?

24 A. Yes, he is...he can be stubborn and he certainly has his
25 opinions.

MR. EDWARDS, EXAM. BY MS. DERRICK

1 Q. And would it be fair to say that it's hard, if not impossible,
2 to change his mind?

3 A. It would be difficult to get John to change his mind once he
4 had adopted an opinion. I'm trying to think of a specific.

5 Q. I just would like to refer you to Volume 29 for a moment. I
6 don't think you were asked about these and I just wondered
7 what they related to. I'm looking at page 50, Mr. Edwards,
8 in Volume 29.

9 A. Yes.

10 Q. It says at the top, "John MacIntyre-Cross".

11 A. I'm sorry, page 50.

12 Q. Of Volume 29. It's a thinner volume.

COMMISSIONER EVANS

14 What question were you going to ask him?

MS. DERRICK

16 Q. I was just going to ask Mr. Edwards with respect to Volume
17 29 at page 50, starting at the top of the page, "John
18 MacIntyre-Cross", which I assume means cross-examination,
19 what did these notes relate to? Where did they come from?
20 First of all, perhaps I should ask you, these are in your
21 handwriting, I assume.

22 A. Yes, they're in my handwriting. These are not in the sheaf I
23 was referring to. Can I just have a second to read them?

24 Q. Certainly.

25 A. And this page is isolated. It's not dated or anything, is it?

1 Q. No. I thought perhaps because of the reference to the CBC
2 libel action that it must be dated after 1984 and perhaps
3 relate to one of the Ebsary trials.

4 A. Yeah, without having read it...maybe I better read it
5 through. I'm not sure what that refers to. Is it...maybe
6 notes I made after listening to Parker Donham's
7 commentary on Sunday morning. I see down at the end
8 there I have "Parker: Police coercing witnesses into lying on
9 stand."

10 Q. I'm sorry.

11 A. Because I had to review...

12 Q. Oh, I see that on page 51.

13 A. Yeah. I had to review that tape at one point to decide
14 whether...what should happen to Mr. Donham.

15 Q. Do you have any degree of certainty as to whether that's
16 what these relate to or is that just a...

17 A. No, that's...

18 Q. ...guess.

19 A. Best guess at this point.

20 Q. The reference in the middle of the page "Bungled the
21 investigation and doesn't want to admit it," is that reflective
22 of your views with respect to Mr. MacIntyre?

23 A. There when that note is being made, if it is listening to the
24 tape and I think I'm reporting what was on the tape, if
25 you're asking me if that is my view, that may be part of the

MR. EDWARDS, EXAM. BY MS. DERRICK

1 problem, yes.

2 Q. That may be part of the problem.

3 A. That perhaps he feels he bungled the investigation and
4 doesn't want to admit it.

5 Q. And that may be part of the problem...

6 A. Being a very proud man, as I take him to be, it would be
7 hard for him to admit that he made some mistakes.

8 3:42 p.m.

9 Q. Following from that, do you feel Mr. MacIntyre should bear
10 some responsibility, considerable responsibility with respect
11 to Mr. Marshall's wrongful conviction?

12 A. Yes, but not in a criminal sense.

13 MS. DERRICK

14 My Lords, I'm going to be moving into a new area and I'll
15 still be a little bit of time so if this would be...

16 COMMISSIONER EVANS

17 How long are you going to be? Hours or minutes or...

18 MS. DERRICK

19 I would not think hours but I would think considerable
20 minutes.

21 BREAK - 3:42 p.m.

22 CHAIRMAN

23 Yes, Ms. Derrick.

24 MS. DERRICK

25 Thank you, My Lord.

MR. EDWARDS, EXAM. BY MS. DERRICK

- 1 Q. Mr. Edwards, I'm just going to refer you now to Volume 28,
2 this is concerning the exchanges you had with the Attorney
3 General's Department over disclosing Staff Sergeant
4 Wheaton's report to Mr. Aronson.
- 5 A. Yes, I don't think I have 28, do I? Yeah, here it is. Thank
6 you.
- 7 Q. Now you've told us that the Attorney General's Department,
8 particularly Mr. Coles, was upset with you for releasing that
9 report and in the very first page of that volume there is a
10 letter to you from Gordon Gale asking you to provide a report
11 with respect to the conditions under which you released the
12 report.
- 13 A. Yes.
- 14 Q. Is that a usual kind of request or directive? Have you ever
15 received one of those before?
- 16 A. No, I think that's the only time I was, I guess you could say
17 formally reprimanded.
- 18 Q. And was it the only time that you were formally requested to
19 make a report with respect to a disclosure matter to the
20 Attorney General's Department?
- 21 A. I believe it was, Ms. Derrick. I can never recall having a
22 problem like that before.
- 23 Q. And was it your understanding that the Attorney General's
24 Department was upset with you for having disclosed the
25 report at all, not merely having disclosed it in circumstances

MR. EDWARDS, EXAM. BY MS. DERRICK

1 where it became public?

2 A. Sorry, was it my feeling, could you give me that again?

3 Q. Certainly. Perhaps I can just phrase it another way.

4 A. Yes.

5 Q. Had the Attorney General's Department found out that you
6 had released the report to Mr. Aronson, but not in
7 circumstances where it became public, let's say it hadn't
8 become public, but you had simply given it to Mr. Aronson
9 and the Attorney General's Department had learned of that,
10 would they have been equally as upset with you? Or was the
11 fact of it becoming public what really exorcised them?

MR. PINK

12 I'm not sure how this witness can testify as to what would
13 have have exorcised somebody else.

MS. DERRICK

14 Well, I'm asking him for his impression.

CHAIRMAN

15 I was about to interject. The only person so far I could see
16 who would appear to be somewhat upset is Gordon F. Coles, Q.C.
17 and he...

MS. DERRICK

18 Well, he's the Deputy Attorney General, certainly, and on
19 that basis I would suggest represents the Department.

CHAIRMAN

20 You mean because Mr. Coles is upset then everybody else is
21

1 upset.

2 MS. DERRICK

3 Well, I would suggest that he represents the official position
4 of the Department and I guess unless he's called...

5 CHAIRMAN

6 Well, I don't know. But anyway reading, I have no doubt,
7 and I'm sure we all have no doubt, including from reading Mr.
8 Coles' letter, he was upset.

9 MS. DERRICK

10 Q. Well perhaps if that's not a question you can answer, Mr.
11 Edwards, I'll ask Mr. Coles that. I think the correspondence
12 does reveal, however, and I'm looking at page 7 now, that you
13 had concerns that Mr. Coles' displeasure with you at various
14 times in the case was motivated by partisan political
15 concerns. Is that not correct? And I'm looking at paragraph
16 5 on page 7 of Volume 28. You say,

17
18 "Was it not the fall-out in the election campaign
19 that caused you to be upset that I had given the
20 report to Aronson?" "Did the potential for
21 adverse reaction cause you to phone me
22 personally on July 21st after you'd been visited
23 by Michael Whalley?" "Did possible public
24 reaction have anything to do with your
25 threatening to take me off the case on January
25th, 1983?"

A. Right. Perhaps we should deal with each of those in turn
because they...

1 Q. Certainly.

2 A. So, the first sentence, "Was it not the fall-out in the election
3 campaign that caused you to be upset that I had given the
4 report to Aronson?" Well my feeling was that, I mean it was
5 a matter of public knowledge that the Liberal candidate in the
6 '84 election opposing the then Attorney General, Ron Giffin,
7 was the person who had used the report against Mr. Giffin in
8 the election campaign. And I felt that that magnified Mr.
9 Coles' concern. Does that answer your question?

10 Q. Yes, it does. Now with respect to the second part then, "Did
11 the potential for adverse reaction cause you to phone me
12 personally after you'd been visited by Michael Whalley?"
13 What were you referring to there, "the potential for adverse
14 reaction."

15 A. Well I guess what I was implying by that was that having
16 been confronted with a very hot potato, I suppose in some
17 senses, Mr. Coles had taken the position that the best thing to
18 do would be not to come down on one side of the issue or the
19 other.

20 Q. The hot potato being your taking a position.

21 A. Yes, I don't want to speculate in coming close to trying to say
22 what was in the mind of Mr. Coles, but at the same time to
23 explain what I wrote there...

24 Q. No, and that's all I'm asking about. I'm simply asking you to...

25 A. I'm having difficulty avoiding getting into that but that's what

1 I'm referring to. Like my feeling about Gordon Coles'
2 motivation was that he wanted to keep things calm and it was
3 hard to say which way the wind was blowing on this as I
4 described in my earlier evidence. The opinion was polarized
5 on it. So if you took a position one way or the other, you were
6 going to make a lot of people unhappy. So the best thing to
7 do was not to take any position. That's what I was implying.

8 Q. And that's what you were commenting on in his letter.

9 A. Now whether that's an accurate reflection or a fair reflection,
10 that's what I meant there. I've never discussed it with Mr.
11 Coles beyond what you see in the correspondence.

12 Q. In fact, Mr. Coles did at one point threaten to take you off the
13 case and he wanted to replace you with Reinhold Endres, isn't
14 that correct? I believe we heard that from Mr. Aronson in his
15 evidence. Was that mentioned to you?

16 A. That's, you're referring now, "Did to possible public reaction
17 have anything to do..."

18 Q. Yes.

19 A. "...with the threat..." Well, he did threaten to take me off the
20 case. Reinhold's name was never mentioned to me. The first
21 time I heard that was, I think I heard that bit of Steve
22 Aronson's evidence, but I can state definitely that during the
23 discussion we had, and January 25th was the only time we
24 ever discussed my being taken off the case, there was no
25 mention of Reinhold's name, or any other prosecutor's name

1 during that.

2 Q. So you heard that first when it was mentioned in Mr.
3 Aronson's evidence.

4 A. That's right.

5 Q. When Mr. Coles, at that January meeting when he said to you
6 at the end of it, don't create any more problems for me than
7 you have to. I'm paraphrasing. Sorry, page 18. He says,
8 "We're in your hands. Try not to create more problems for
9 me than I already have." Did you understand that to relate to
10 public opinion that Mr. Coles was concerned about? And did
11 he elaborate on that at all?

12 A. No, that was the parting comment and it was made in an
13 almost offhand manner. And what I was reading into that,
14 my reaction to that was, here is a guy who was saying, well,
15 I've tried to convince you otherwise, but you won't so, we're
16 in your hands.

17 Q. So you don't know, well you don't know when he was talking
18 about don't create more problems than I already have, you
19 don't know what those other problems that he had were.

20 A. No, I think he was just speaking in a general sense. That's my
21 impression. Now maybe he had concerns.

22 Q. Some specific problems.

23 A. I don't know. You'll have to ask him that.

24 Q. You express as well in this correspondence, I'm looking at
25 page 8 of Volume 28, a concern that the Crown didn't have a

1 sufficient degree of independence from the Attorney
2 General's Department and you talk on page 8 about Mr. Coles'
3 letter failing to address problems in our system that are far
4 more pressing than the need for confidentiality. And you say,
5 "Another would be the need to ensure a minimum level of
6 independence for the Crown in the conduct of a criminal
7 prosecution."

8 A. Yes.

9 Q. Now were you, was that comment that you were making
10 there relative to this case only? Were you expressing a
11 general frustration about any interference you'd experienced
12 in other cases?

13 A. Mr. Coles and I had had an incident the year before and so I
14 was referring to both that and this.
15 4:20 p.m.

16 Q. And the incident the year before, did that relate to decision
17 making that you had been involved in concerning a
18 prosecution? I'm not interested in names or...

19 A. Oh no, I'm not going to give you any names.

20 Q. Identifying details. I'm just interested in knowing the nature
21 of the problem.

22 A. It was a shoplifting case which was scheduled to go to trial
23 and I was ordered by Mr. Coles, not directly, he sent the
24 message through Gordon Gale to withdraw the charge or offer
25 no evidence.

MR. EDWARDS, EXAM. BY MS. DERRICK

1 Q. Did you understand the reason or that?

2 A. The stated reason was for humanitarian... humanitarian
3 reasons.

4 Q. Did it involve anybody who might be described as a friend of
5 the Department or a...

6 A. No.

7 Q. Did you have concerns about the basis on which that decision
8 was made?

9 A. Yes.

10 Q. So with respect to that case and with respect to this case and
11 perhaps particularly those three things that you refer to on
12 page seven of your November 26th letter, you had
13 experienced an unwelcome degree of interference, you felt, is
14 that correct?

15 A. Any interference like that is unwelcome. I mean in the, oh,
16 just about ten years that I've been prosecuting, those are the
17 only two incidents but they're two too many.

COMMISSIONER POITRAS

18
19 Were the charges effectively dropped, Mr. Edwards?

MR. EDWARDS

20
21 A. Yes. You recall when I was telling you about the meeting we
22 had on July 25th and I told him that in which case I would go
23 in and say, "Gordon Coles ordered me to..." Well, in the case
24 the year before, that's exactly what I did.

25 Q. So when you said that, he knew you meant it.

1 A. I would say.

2 Q. On page nine, this is the November 30th letter, this is Volume
3 28, November 30th letter, 1984, from Gordon Coles to
4 yourself. In the final paragraph...

5 A. What page?

6 Q. Sorry, page nine.

7 A. Yes.

8 Q. In the final paragraph, Mr. Coles says:

9
10 I expect you to understand that as a prosecuting
11 officer employed in this Department, you are an
12 Agent of the Attorney General and are to give
13 effect to the instructions and directions of the
14 Attorney General, the Deputy Attorney General,
15 and your other superiors in the Department.

16 Did you regard that comment, basically, as a veiled threat?
17 Telling you that you ought to toe the line?

18 A. Well, I regarded it as a direct order and I regarded it as being
19 the nub, perhaps, of the philosophical difference between
20 Gordon Coles and I on the role of the Crown.

21 Q. And ties directly in with your concerns about the Crown
22 having independence.

23 A. Yes.

24 Q. From the Department.

25 A. Yes.

Q. Mr. Edwards, I want to ask you some questions relating to the
position that you as the Crown adopted in Mr. Marshall's

1 reference. To begin with in Volume 31 at page 126 you...

2 A. Yes.

3 Q. This is a memo that you wrote to Mr. Herschorn on January
4 18th, 1983.

5 A. Yes.

6 Q. And I believe Mr. MacDonald has taken you through it but I
7 just want to ask you with respect to your statement in the
8 second paragraph there, (b):

9
10 They (meaning the police investigators,)
11 certainly were not motivated by malice toward
12 either the accused or, as has been suggested in
13 some press reports, prejudice towards his race.

14 A. Yes.

15 Q. You couldn't know that, certainly. You may have believed
16 that but you couldn't know that certainly, isn't that fair?

17 A. I guess the fairest way to put it is that I had no evidence, in
18 my view, of malice or prejudice.

19 Q. Which is somewhat different than saying "they certainly were
20 not motivated."

21 A. I suppose it is, but the absence of evidence, I presume, that
22 they weren't.

23 Q. I take it that nobody had made any efforts to see if there was
24 any evidence, though, is that fair to say?

25 That was not a line of inquiry that was pursued.

A. Not specifically, I suppose, although...

- 1 Q. Not when you were preparing this memo.
- 2 A. No, but I mean at that point I had had the discussion of July
3 12th with Chief MacIntyre. I was familiar with the entire file
4 and there had been no suggestion of prejudice, to take the
5 last one first; and the malice, I suppose if you read Harriss
6 and Chant and Pratico's statement, you might be able to
7 impute malice. But I didn't feel that that held up.
- 8 Q. In your personal view, Mr. Edwards, do you think it made any
9 difference in this case, with respect to the original
10 investigation, that Mr. Marshall is an Indian?
- 11 A. I don't think it did.
- 12 Q. For example, do you think it made it any less likely that the
13 police would believe him?
- 14 A. No.
- 15 Q. So you don't think that, given that he was an Indian, that it
16 was more necessary for him to provide a story about an
17 attempted robbery to be believed than if he had been a white
18 person?
- 19 A. I know of nothing on which I could base an affirmative
20 answer to that.
- 21 Q. I want to ask you with respect to the position that Mr. Coles
22 was encouraging you to take or the "no" position that Mr.
23 Coles was encouraging you to take.
- 24 A. Yes.
- 25 Q. Would you agree that especially given your reservations

1 about the Court of Appeal that the Department in
2 recommending to you a no position position, a neutral position
3 concerning Mr. Marshall's acquittal was, in fact,
4 recommending a course that was hazardous to Mr. Marshall's
5 interests?

6 A. If you agree with my premise that taking no position would
7 increase the likelihood of an order of a new trial, yes.

8 Q. And that's all they had to go on. They had, you were basically
9 advising them, telling them about your impressions and your
10 views and your opinion about how the case was shaping up.

11 A. Well, that would be their primary source of information, I
12 suppose, but they also had the evidence available to them and
13 are well capable of assessing it for themselves. They
14 certainly didn't need me to make a total assessment.

15 Q. You were never criticized by the Department for either
16 blaming Mr. Marshall or exonerating the police or the system,
17 isn't the correct?

18 A. That's correct.

19 Q. The only criticism you received was for advocating that he be
20 acquitted.

21 A. Well, that's the way I took it. As I said, after I sent in the
22 factum, I was speaking with Martin Herschorn after that and
23 he said that the Deputy wasn't too happy with the factum.
24 Now he didn't specify. What I took it to mean that he wasn't
25 too happy with me recommending an acquittal, because that's

1 what the debate had been about. You'll have to ask him, I
2 suppose...

3 Q. But when you wrote this memo on January 18th, '83...

4 A. Yes.

5 Q. Which resulted in a meeting at the Department, what the
6 meeting concerned was your position...

7 A. Oh, yes.

8 Q. Concerning the acquittal.

9 A. No question, yes, and that's why I inferred from Martin's
10 comments that that's why he was unhappy. But I was never
11 told he was unhappy because you recommended an acquittal
12 or, conversely, he was unhappy because you went too far and
13 exonerated the justice system.

14 Q. I realize you're being careful, but certainly...

15 A. Careful. I'm trying to be fair about it because, as I say, I
16 didn't discuss it with Mr. Coles and the most likely root of his
17 unhappiness was that I took the position of acquittal.

18 Q. Now when you assessed your position pragmatically, as I
19 think you've described it.

20 A. Yes.

21 Q. That you needed to argue that there was no miscarriage of
22 justice so you ran the risk that a new trial might be ordered.

23 A. Yes.

24 Q. Did you have concerns about the whole court's reaction to the
25 miscarriage of justice position or were you concerned just

1 about certain members of the panel?

2 A. I was concerned about the court's reaction.

3 Q. As a whole.

4 A. Yes, because there is nothing specific up to that time to single
5 out any one individual.

6 Q. I believe in your evidence you've said that the court had a
7 bona fide belief that there was no miscarriage of justice. Now
8 I...

9 A. No, I think I was premising an answer on that. I said
10 assuming and...

11 Q. Oh.

12 A. And I know of no basis for assuming otherwise, okay?

13 Q. Would that be your position? That having been involved in a
14 case that the court had a bona fide belief that there was no
15 miscarriage of justice?

16 A. I know of nothing to suggest otherwise.

17 4:33 p.m.

18 Q. In light of the fact that they didn't have the police evidence,
19 so they therefore didn't have a full picture, would you not
20 agree with me that they should have said at the very most
21 that they just couldn't comment on your submissions
22 concerning their being no miscarriage of justice without the
23 evidence. That that would have been the bona fide position
24 to take.

25 A. That would have been a more appropriate position.

1 Q. You were sufficiently concerned, I suggest to you, about
2 their predisposition against Mr. Marshall that you gave them
3 an out and they took it.

4 A. I can't adopt the word "predisposition". I mean in any trial
5 before any Judge they will often, not always, and some are
6 more inscrutable than others, but there will be a signal here
7 or there, a tone of voice in a question asked or a frown when
8 a particular answer is given, just an attitude that I think
9 most lawyers watch for. And you often get some sense, not
10 always, but you often get some sense whether the evidence
11 is being received favourably or otherwise, and that connotes
12 nothing improper. It certainly does not connote a
13 predisposition.

14 Q. I think you've told us that you told them what you believed
15 they wanted to hear.

16 A. Yes.

17 Q. Can you tell us why you think that's what they wanted to
18 hear and of any particular reasons why you felt that was the
19 more palatable position to take?

20 A. I really can't add anything to what I've already said, Miss
21 Derrick. Like I started this morning by talking about the
22 context and then in response to Mr. Justice Hickman I
23 summarized the process, as best I could, and I think I
24 acknowledged yesterday that, right up front, that I can't
25 point to specific bits of evidence and say, "There that proves

1 it." You know, it's...

2 Q. And just...

3 A. It's just...

4 Q. Sorry.

5 A. ...basically a judgement call I made.

6 Q. And just so that I understand you correctly, you did talk
7 this morning about there being a lot of public discussion
8 concerning the case.

9 A. Oh, yes.

10 Q. And you also talked about Judges being subject to the same
11 attitudes and, may I suggest, biases that other people in the
12 community are.

13 A. Yes.

14 Q. I believe I understood your evidence to be that your
15 concern was that the justices were likely to be subject to the
16 same attitudes and biases as was found in the community
17 and not so much a concern that they might be being
18 influenced by what was being discussed publicly, am I
19 correct about that?

20 A. Yes, yes.

21 Q. Did you have any concern about their being influenced by
22 the public discussion?

23 A. No. No, that wasn't a concern of mine, you know. Judges,
24 particularly Judges at that level, I don't think have too much
25 difficulty divorcing themselves from that. All I'm saying is

1 that, you know, these were common opinions and I didn't
2 feel it was unreasonable for me to infer that there was a
3 good possibility of same opinions maybe on the bench.

4 Q. So, in your view, they wouldn't have too much difficulty
5 divorcing themselves from what was being debated publicly,
6 but the concern was what they might be bringing with them
7 to the process that they already had as part of their
8 attitudes and outlook on life.

9 A. Yes. I suppose that's fair.

10 Q. Now, I must say that your position with respect to, first of
11 all, arguing in I believe it was April, 1982, that Mr. Marshall
12 should be acquitted on the basis of miscarriage of justice,
13 and then in January of '83 that having changed...

14 A. Yes.

15 Q. ... very considerably to saying no miscarriage of justice,
16 certainly looks like capitulation to the position of the
17 Attorney General's Department or Mr. Coles.

18 A. Uh-hum.

19 Q. But I believe you said that's not the case, what you were
20 doing was being sensitive to what you anticipated the Court
21 would be receptive to. Is that correct?

22 A. That's correct. I mean it would be convenient for me to take
23 that out and say, well, it's all Gordon Coles' fault. The fact of
24 the matter is that I, in effect, dug in on January 18th before
25 the big meeting, although I acknowledge that I had a pretty

1 good idea before then what Mr. Coles probable attitude was.

2 Q. Can I just ask you then why in all this correspondence,
3 discussion and documentation.

4 A. Yes.

5 Q. Was this change in view based on these concerns that you
6 had, this apprehension that you had, why is that not
7 expressed?

8 A. Well, the change took place after December 2nd. Now, that's
9 when...it was between December 2nd and January 18th
10 when I really wrestled with the problem of just what the
11 best course was. And, you know, there is not a lot of
12 correspondence or documentation I suggest between those
13 two dates.

14 Q. But on January 18th when you write your memo you don't
15 say to the...to Mr. Herschorn in that case "I am changing my
16 position with respect to their being a miscarriage of justice,
17 not because I've stopped believing in the fact that there is a
18 miscarriage of justice."

19 A. Right.

20 Q. "But rather because I no longer see that as being the
21 expedient route to ensure this man's acquittal." You don't
22 say that.

23 A. No, I don't.

24 Q. But that's what you believe.

25 A. Yes.

MR. EDWARDS, EXAM. BY MS. DERRICK

1 Q. That's...that was your...

2 A. That's right.

3 Q. That's the position you adopted.

4 A. Right.

5 Q. Can you tell us, in your opinion, what are the factors that
6 contributed to Mr. Marshall's wrongful conviction?

7 A. Well, I believe I've answered that, but...

8 MR. CHAIRMAN

9 You listed them all this morning...list them over again.

10 COMMISSIONER EVANS

11 I think you went through them this morning, did you not?

12 MR. EDWARDS

13 I thought I had, but...

14 MS. DERRICK

15 This is when you...

16 MR. EDWARDS

17 You know, I'm willing to go through them again if you want
18 me to.

19 MS. DERRICK

20 Q. No. I just wanted to be sure that what you had listed was,
21 in fact, your summary of what you felt contributed to Mr.
22 Marshall's wrongful conviction?

23 A. Yes. The non-disclosure of the statements and the non-
24 disclosure of the reinvestigation. That is not to completely
25 exonerate the investigation that was done because in my

MR. EDWARDS, EXAM. BY MS. DERRICK

1 view there were problems with that. But notwithstanding
2 those problems and notwithstanding the fact that Mr.
3 Marshall, in my view, didn't come clean, I think that those
4 two factors were the rock on which this foundered.

5 Q. And the problems with respect to the original investigation
6 relate to the gathering of the statements from the three
7 witnesses, is that...which I think you've referred to on
8 occasion.

9 A. Yes, and not broadening the scope of the investigation to at
10 least check the story of the other two men out. I think that
11 that was a mistake and I've explained, I think, already why
12 that may be an understandable mistake.

13 Q. Mr. Edwards, I believe you've said that in your evidence
14 that no blame should be attached to the people on the jury,
15 and I just want to draw your attention to an alleged comment
16 by a jury member, and this is reported in an article in the
17 Toronto Star, June 9th, 1986, which is found in Volume 38 at
18 page 129. I can just read you ...

19 A. Sure.

20 Q. ...the quote.

21 MR. PINK

22 Where is that?

23 MS. DERRICK

24 Sorry, Volume 38 at page 129.

25 Q. The...in this article it states,

1
2 Finally Rosenblum had to overcome the racial
3 prejudice of at least one juror interviewed by
4 the Star after Marshall's innocence was proved
5 the juror denied any discrimination was at work
6 in the case, but then he added 'With one redskin
7 and one Negro involved it was like two dogs in a
8 field, you knew one of them was going to kill the
9 other. I would expect more from a white
10 person,' he said, 'We're more civilized.'

11 A. A juror said that.

12 Q. Yes. Allegedly.

13 MR. CHAIRMAN

14 I will not rely on that, very accurate.

15 COMMISSIONER EVANS

16 Does it give the name of the juror?

17 MS. DERRICK

18 No, it doesn't, not in the article.

19 Q. I take it you're not aware of that.

20 A. I didn't hear that before.

21 Q. Now, assuming that this is accurate.

22 A. If true, that's the problem.

23 Q. If true. Yes, if true. But that's what I'm going to ask you to
24 accept for the moment in answering my question. Does this
25 give you concerns with respect to the position you've taken
that there should be no blame attributed to the jury?

A. Oh, if that is true, of course.

MR. EDWARDS, EXAM. BY MS. DERRICKMS. DERRICK

1
2 My Lords, I see that it's quarter to five. I will be a few
3 more minutes. I don't anticipate being very much longer
4 and if you'd like me to continue.

MR. CHAIRMAN

5
6 Oh, yes.

MS. DERRICK

7
8 I will.

9 Q. Mr. Edwards, I just want to ask you with respect to Volume
10 29, you've already been referred to this, but I don't believe
11 you were asked the question I want to ask you, and this is
12 on page 38. At the very bottom you have "Police evidence
13 respecting knowledge of Pratico's mental state." Now, before
14 you knew that the Court was not...sorry, do you have that?

15 A. Yes, I have it. I'm just trying to put a date on it. Yes, I
16 remember having some discussion with Mr. MacDonald, on it.
17 I believe the best we were able to do was say it might have
18 been drafts I was making before I did my brief on fresh
19 evidence, I believe.

20 Q. Had it been your intention to bring out evidence concerning
21 any knowledge Mr. MacIntyre and Mr. Urquhart may have
22 had with respect to Mr. Pratico's mental state?

23 4:45 p.m.

24 Is that why that note is there?

25 A. I have no recollection of making the note, honestly, Ms.

1 Derrick.

2 Q. So you have no recollection of what use you intended to make
3 of the note?

4 A. No, had the police been called, I'm sure I would have directed
5 them to Pratico and asked questions on that.

6 Q. You would have directed them to that point?

7 A. Yes.

8 Q. Now at the reference, you pushed quite hard with respect to
9 whether Mr. Marshall ever rolled anyone. That's fair?

10 A. That's right.

11 Q. And I just want to ask you concerning some correspondence
12 prior to that time that you had with Mr. Gale. This is in
13 Volume 31 at page 29. This commenced on April 22nd and
14 concluded on May 3rd, 1982.

15 A. Yes.

16 Q. Letter or memorandum. And I suggest to you that in that
17 letter at Paragraph 4, you make a reasonable and sympathetic
18 comment concerning Mr. Marshall, stating that he requires
19 more than just legal exoneration if he is to re-enter society.
20 He must be perceived as being innocent.

21 A. Yes.

22 Q. Now if you believed this, and it seems reasonable to do so,
23 and you believed that there had been a miscarriage of justice,
24 why did you insist upon pushing the alleged robbery, which
25 really was legally irrelevant to the murder charge? It seems

1 to run contrary to the view you take here.

2 A. Yes, yes. But my role had changed dramatically between May
3 3rd when this was completed and December 1st or 2nd when
4 I pushed Mr. Marshall on that. You know, I've already
5 expressed my regret at having done that. And, as I stated
6 yesterday, the rationale for it was laying the groundwork for
7 a statement that I was going to do a cross-examination on. I
8 mean at that point, at that time, I was being the adversary,
9 doing a cross-examination, a vigorous one, and, you know, I
10 know I, and probably other lawyers, sometimes go too far
11 with that.

12 Q. So part... Sorry.

13 A. And that's what happened.

14 Q. So part of making the acquittal position more palatable to the
15 court involved not just advocating no miscarriage of justice
16 but also pushing the attempted robbery.

17 A. Well, as I explained, I felt that the statement couldn't be
18 ignored. It had to be dealt with and I had to do that through
19 cross-examination in making the acquittal more palatable to
20 the court. I mean that was a mental exercise I went through
21 after that. Had I been, had I set out from the start to devise
22 all this, but I didn't. You know, it was fairly
23 compartmentalized, let me put it that way.

24 Q. And you may well have been right about the court, because is
25 it not a fair description of the reference that you pushed

1 harder and the court was more interested in evidence that
2 related to what Mr. Marshall was doing that night than they
3 were with respect to any evidence relating to the original
4 police investigation or why the witnesses had lied?

5 A. Well, I can agree that they were very interested in finding
6 out what was going on there that night as far as the witness
7 before them was concerned.

8 Q. Did you....

9 A. I have no reason to suggest that their not wanting to hear
10 from the police flowed from anything more than their
11 perception that this was an appeal with narrow confines.

12 Q. At the reference hearing in December, did you make any
13 observations of the panel's reaction to Mr. Marshall's evidence
14 while he was giving evidence?

15 A. Oh...

16 Q. You testified earlier...

17 A. Oh, yeah.

18 Q. Making observations about...

19 A. Yes.

20 Q. Courts and judges.

21 A. Yes.

22 Q. What observations did you make about their reception of his
23 evidence?

24 A. Well, again, there was nothing tangible but I just got the
25 impression that they were not impressed with Mr. Marshall.

MR. EDWARDS, EXAM. BY MS. DERRICK

1 Q. Is there anything that they did that you can describe?

2 A. No, not...

3 Q. Not in terms of body language?

4 A. Not specifically, no.

5 Q. Did you make any observations of any particular justices with
6 respect to that? For instance, was Mr. Justice Pace any more...

7 A. No, Mr. Justice Pace, the only recollection I have of him being
8 aggressive was during the argument in February. And part of
9 my reading of the court was probably influenced by my own
10 assessment of, for example, how Mr. Marshall came across.
11 And, you know, trying to put myself in the position of a judge
12 and how would I assess his evidence and say he wasn't a very
13 good witness.

14 Q. I think you've said that had you known that Mr. Pace, Justice
15 Pace was Attorney General in 1971, you would have taken
16 the position that his presence on the panel could give rise to
17 an argument of bias or apprehended bias, is that correct?

18 A. Yes.

19 Q. I take it you have been even more...

20 A. The last part, apprehended...

21 Q. Apprehended bias.

22 A. Bias.

23 Q. I take it you would have been even more concerned had you
24 known that he may have been contacted during the 1971
25 reinvestigation. Is that fair to say? That, in fact, not just...

MR. EDWARDS, EXAM. BY MS. DERRICK

1 A. Is there evidence to that effect?

2 Q. Yes, indeed, the evidence of Al Marshall, the R.C.M.P.
3 reinvestigator.

4 A. Oh, yeah. Oh, sorry.

5 Q. I believe he said "99% sure."

6 MR. CHAIRMAN

7 The evidence, as I recall it, was that Donald MacNeil
8 telephoned someone in the Attorney General's Department.
9 Inspector Marshall didn't know who it was, but he said it could
10 have been Mr. Pace or it could have been the Deputy Minister.
11 But he didn't know.

12 MS. DERRICK

13 I stand to be corrected, I believe he said "99% sure that it
14 was Mr. Pace."

15 MR. CHAIRMAN

16 Well, whatever.

17 BY MS. DERRICK

18 Q. In the event that there was such a contact made, I take it that
19 that would...

20 A. Oh, yes...

21 Q. Increase your concerns.

22 A. If there was any evidence that he had any direct participation
23 in the case, then that would make his presence on the bench
24 more serious. But assuming, and I thought I made that clear,
25 assuming, for the sake of the argument, that he had no

MR. EDWARDS, EXAM. BY MS. DERRICK

1 knowledge, it was my feeling he still shouldn't be there.

2 Q. By virtue of simply occupying the position of Attorney
3 General.

4 A. That's right. Because, in law, he was the one who was
5 ultimately responsible for that prosecution, legally speaking.

6 Q. You said that if it was a concern, I believe you said this in
7 your evidence, that if it was a concern of the Attorney
8 General's Department that the police come through in the
9 best possible light, this was not communicated to you, I
10 believe you said, other than indirectly.

11 A. You're referring now to what?

12 Q. I believe I'm referring to a conversation that you had with
13 Mr. Herschorn after the, I'm looking at page 15 of Volume...

14 A. After the reference.

15 Q. 17, after the reference.

16 A. December 6th, yes, okay.

17 Q. That's right.

18 A. Yes. Yes, I recall that now, Ms. Derrick.

19 Q. Page 16, I guess it is.

20 A. Right.

21 Q. And I wondered if you had received any indirect
22 communication, and indirect could take many forms, with
23 respect to the Attorney General's Department's concern about
24 how the police would come across at the reference?

25 A. Well, I mean my reading of the phone call on July 21st, was it,

1 from Mr. Coles was that there was evidence of a concern that
2 the police be given a fair shake. And so it was that
3 conception by me, which would have been the, would have
4 prompted that particular remark.

5 Q. And did you consider that to be an appropriate concern for
6 the Department?

7 A. It's an appropriate concern, I suppose, to insure that parties
8 involved in an action are treated fairly. My difficulty was
9 that there was no basis for that concern.

10 Q. I just want to ask you a few questions about your factum, Mr.
11 Edwards. On page 41, this is in Volume 4 of your factum, you
12 say in referring to the story Mr. Marshall told the police and
13 his lawyers about "an attack by two priests from Manitoba
14 who did not like niggers or Indians."

15 A. What page is that again, Ms. Derrick?

16 Q. Sorry, page 41 of Volume 4.

17 A. Okay.

18 Q. You then go on to say:

19
20 It is not difficult to speculate upon how
21 believable either the police or defence counsel
found that story.

22 Now I suggest to you that it's...

23 A. One shouldn't speculate in a...

24 Q. And one shouldn't invite the court to speculate, would that
25 not be fair?

MR. EDWARDS, EXAM. BY MS. DERRICK

1 A. I wonder, and of course, I forget what witness, but Mr. Ruby
2 put that same question. I think it was to Mr. Aronson.

3 Q. I wasn't here.

4 A. And I wondered at the time whether there would have been
5 any difficulty with that if I had reworded it something to the
6 effect that it is not difficult to infer that that story was
7 unbelievable.

8 Q. But these...

9 A. Maybe it's a semantic problem. The word "speculate," of
10 course...

11 Q. So you'd agree with me that that's not the appropriate choice
12 of language.

13 A. It's certainly not the appropriate choice of words. Maybe I'm
14 drawing too great an extension by saying you could substitute
15 "infer" there and thereby make it appropriate. I'm sure
16 there'll be some argument on that, but thankfully I'm here as
17 a witness and not an advocate.

18 Q. And you're nearly finished with me, I'm sure everybody will
19 be pleased to know. I just want to ask you a question with
20 respect to after the reference and the memo that you wrote.
21 It's found in Volume 32 at page 152, I believe. That's the, I
22 guess that is the request from Mr. Herschorn to you which
23 resulted in the May 16th memo on page 154. In fact, Volume
24 32...

25 A. Volume 32, page 152?

1 Q. At page 154.

2 A. 154.

3 Q. 154, which is where your memo starts.

4 A. Yes, I have it. What was the question?

5 Q. I haven't asked it yet. The question was that you refer to the
6 Farris case in this.

7 A. Yes.

8 Q. And use that as your basis for saying that, I guess on a
9 strictly technical basis, Mr. Marshall committed perjury in
10 1971.

11 A. Yes.

12 Q. Now I think you'll agree with me that in Farris, the accused
13 was well aware that the answer was literally true but, in fact,
14 misleading. And I suggest to you that the case here is
15 different because here, Mr. Marshall, in 1971, answered all
16 the questions fully that were put to him at his trial, is that not
17 correct?

18 You've reviewed the transcripts...
5:00 p.m.

19 A. Yeah, I'm at the disadvantage. I haven't read Farris in five
20 years. I don't remember it.

21 Q. Well, you...I have it here.

22 A. I just remember that one principle in the annotation which
23 Mr. MacDonald referred to this morning.

24 Q. You can take it from me, I can read to you from the head
25

1 note.

2 A. Yes.

3 Q. If you like. It just says,

4
5 When the accused was asked about the
6 disposition of the \$14,000 shares...14,000 shares
7 (sorry), he was well aware of the sense in which
8 the term was used and that it was the
9 disposition of the equities represented by the
10 14,000 shares that was in question and not the
11 disposition of the original share certificates
12 themselves. In the result the accused knew his
13 answer was false.

14 In other words, you know, knew that it would mislead.

15 A. I see.

16 Q. And I'm saying to you that there's a real distinction between
17 that case and Mr. Marshall's case where at his original trial
18 he, in fact, answered all questions fully that were put to him
19 and he was never asked anything about a robbery or
20 anything related to that. Is that not, in fact, correct?

21 A. I suppose that's...that may be arguably correct. I don't
22 know.

23 MR. CHAIRMAN

24 This opinion was given after the reference.

25 MR. EDWARDS

Yes.

MR. CHAIRMAN

And after the Court of Appeal had made certain findings.

MR. EDWARDS, EXAM. BY MS. DERRICK

1 MR. EDWARDS

2 Yes.

3 MS. DERRICK

4 But I'm referring, My Lord, to the comment in the memo
5 that says "In the Farris sense therefore," this is on page 155.

6 MR. CHAIRMAN

7 Oh, yeah, I have it in front of me.

8 MS. DERRICK

9 The answer to question 1 is "Yes, Marshall did commit
10 perjury in 1971."

11 A. Yes. That was my opinion at the time. I mean maybe I was
12 wrong.

13 Q. But I take it this wasn't a studied opinion. You had...

14 A. No, as I said this morning I didn't do extensive research
15 and...

16 MR. CHAIRMAN

17 You deal with that. You say "With respect to the latter
18 proposition, it is dubious because Marshall at no time admitted in
19 Court that he and Seale had been attempting a robbery." Now, so...

20 MR. EDWARDS

21 Uh-hum.

22 MR. CHAIRMAN

23 I don't think you and Miss Derrick are very much at odds.
24 You were, as I interpret it, asked to give an opinion based on
25 certain findings as had been made by the Court of Appeal on the

1 reference.

2 MR. EDWARDS

3 Well, that's what I felt had prompted the request, yes.

4 MR. CHAIRMAN

5 Yes.

6 MS. DERRICK

7 Q The only other thing I just want to ask you about, Mr.
8 Edwards, relates to Mr. Ebsary's preliminary, and in Judge
9 O'Connell's decision in committing Mr. Ebsary to trial on
10 manslaughter.

11 A. Yes.

12 Q May I ask you if it was your opinion that, in fact, he should
13 have committed Ebsary to trial on murder?

14 A. Oh, yes.

15 Q And that, in effect, what he was doing was weighing the
16 evidence.

17 A. Yes. Oh, yes. I don't agree with Judge O'Connell's decision
18 there at all.

19 Q So, he made an improper application of the test of...

20 A. Yes, my point was there was a good probability that it was
21 going to come down to manslaughter anyway so.

22 Q But, in fact, he was wrong in law in...

23 A. Yes.

24 Q ...in that committal.

25 A. Yes. I would have been more comfortable going with the

MR. EDWARDS, EXAM. BY MS. DERRICK

1 murder charge but at that time, well, my decision...my
2 feeling, I think, is reflected in the memo to Mr. Herschorn.

MS. DERRICK

4 Thank-you, Mr. Edwards, and thank-you for arguing for an
5 acquittal on behalf of Mr. Marshall. Those are my questions.

MR. PUGSLEY

7 My Lords, just before we adjourn for the day, if that was
8 your intention, I've prepared a short summary from Mr. Edward's
9 notebook of the meetings he had with Mr. Wheaton. I wonder if I
10 could leave those with him over the evening and if he can
11 comment on them tomorrow. I have a list of them prepared and
12 perhaps I can give a copy.

MR. CHAIRMAN

14 Anything that's designed to expedite the process.

MR. PUGSLEY

16 It's designed to expedite the process.

MR. CHAIRMAN

18 Gratefully received. We'll rise until 9:30.

19 INQUIRY ADJOURNED - 5:05 p.m.

20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, Margaret E. Graham, Court Reporter, certify that the foregoing is a true and accurate transcript of all the evidence taken by way of recording and reduced to typewritten copy.



Margaret E. Graham

DATED THIS 25 day of May, 1988 at Dartmouth, Nova Scotia