RS44
GOD 258
T+

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

Volume 68

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

MEDIA POOL COPY

May 25, 1988

INDEX - VOLUME 68

Mr. Frank Edwards

Examination by Mr. MacDonald (Cont'd)		12014
	9:52	12023
	10:13	12036
	11:26	12060
	11:37	12064
	11:49	12072
	12:10	12082
	12:30	12093
Examination by Ms. Derrick	2:15	12104
	2:29	12112
	2:52	12125
	3:15	12138
	3:28	12147
	3:42	12154
	4:20	12161
	4:33	12168
	4:45	12176
	5:00	12185

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

MR. CHAIRMAN

Mr. MacDonald.

MR. MacDONALD

Thank-you, My Lords.

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

EXAMINATION BY MR. MacDONALD [Cont'd.]

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

A. Before we proceed with that, could I?

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

MR. CHAIRMAN

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

MR. EDWARDS

The lights went out, had to do something.

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

1 arose. And, what I mean by that is that just going back to the
2 beginning of the investigation, February, March and April, and
3 April in particular, it was my view during that period, and talking
4 especially now in April, that this was all quite straightforward.
5 That the evidence was so overwhelming that anybody who heard
6 it would be as convinced as I was that there had been a
7 miscarriage and that the wrong man was in jail.
8 Well, I mean, at that time and maybe I had solidified my
9 views on it prematurely, but I don't think so. But at that time it
10 was just not conceivable to me that anyone could really look at all
11 this evidence and have another view.
12 Well, then after it became public, the case, the facts
13 generated a lot of discussion in the community at large. And, I
14 soon realized that my impression of it wasn't universally shared,
15 and that there were a lot of...a lot of people who took the opposite
16 view, that it wasn't a straightforward miscarriage. In fact, that
17 there was no miscarriage at all. And, now, I'm talking about a
18 cross-section of opinion in the community.
19 Indeed, from my experience with the case and that's
20 stretched over six years now, it's...if you went looking for
21 somebody who was neutral on this case you would have to look
22 hard. And, you know, we found that out when we starting
23 selecting Ebsary juries. I think each time we went through some
24 eighty people on the panel, challenging for cause.
25 And, my perception through this period, so we're talking

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

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

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

1 MR. MacDONALD

2 Thank-you.

3 MR. CHAIRMAN

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

6 MR. EDWARDS

7 Yes, My Lord.

8 MR. CHAIRMAN

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

11 MR. EDWARDS

12 Yes.

13 MR. CHAIRMAN

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

18 MR. EDWARDS

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

1 was aware, as a result of the investigation, that the Court was not
2 aware of through the affidavits that were filed. For example, they
3 had the affidavits of the police, and they had the affidavits of
4 most of the other major players, e.g., the defence lawyers. And so
5 technically speaking those items did not become evidence but to
6 me it's a bit artificial perhaps to suggest that, well, because they
7 actually weren't tendered as evidence that as far as the Judges
8 were concerned, they didn't exist. I mean, there was...there was an
9 awareness both through the affidavits and living in the
10 community, my goodness, all of this was publicized every day on
11 TV and radio and everything else.
12 MR. CHAIRMAN
13 So, there are two or three factors that we can assume caused
14 you concern that a new trial would be ordered rather than an
15 acquittal of Donald Marshall, one being the change from 617 (c), to
16 617(b) for the inquiry.
17 MR. EDWARDS
18 Yes. As I say, I was perplexed...
19 MR. CHAIRMAN
20 Yes.
21 MR. EDWARDS
22 ...by that...it being narrowed...
23 MR. CHAIRMAN
24 Another, that some of the evidence, including the police
25 evidence, was not either admitted or called before the Court of

1 Appeal, and thirdly, comments or rulings that had been made
2 during the hearing of the evidence. Is that a summary of what
3 you've been saying?
4 MR. EDWARDS
5 Perhaps I could...it's a summary but I...
6 MR. CHAIRMAN
7 There may be others.
8 MR. EDWARDS
9 ...don't agree with part of it, My Lord, with respect. Number
10 one, I mean, and I think it's very important because you, for
11 example, My Lord, you're coming in and hearing it fresh. You're
12 not in the community, so you wouldn't be aware of the extreme
13 positions that were in the community. That's why I think it's
14 important that I give you some sense of the context of this, that
15 the apprehension. So, that would be the first point. That, I think,
16 the context, the community feeling about it.
17 Then number two would be the development of the thing
18 starting with the change from 617(c) to (b).
19 Then getting into the July and October applications, the
20 Court making it abundantly clear that this was going to be an
21 ordinary appeal, pretty well, except I mean they loosened up on
22 the fresh evidence rules to allow Marshall to testify. But other
23 than that it was pretty well an ordinary appeal, and was deemed
24 to be treated as such.
25 Then the next would be the...my assessment that the

1 evidence which was heard by the Court on December 1st and 2nd
2 did not play well, if I can put it that way, and didn't come out
3 near as well as I thought it would. And I gave the illustration of
4 Adolph Evers' evidence yesterday.
5 And then the next would be just my gut reaction trying to
6 assess how the judges felt about it. And, all of those factors
7 combined made me feel that the order for a new trial was in the
8 cards.
9 MR. CHAIRMAN
10 Thank-you.
11 COMMISSIONER EVANS
12 Mr. Edwards, do I understand from your evidence this
13 morning that you were of the opinion that the evidence that was
14 offered by way of affidavits and which was rejected by the Court,
15 still played a part in the decision?
16 MR. EDWARDS
17 I think I haven't myself done a close analysis of the decision
18 to determine that. I believe there are a couple of references to
19 affidavits in it that that...
20 COMMISSIONER EVANS
21 That were rejected?
22 MR. EDWARDS
23 That were rejected. Now, a closer scrutiny may prove that
24 wrong. But that's...that's my feeling now. But I guess the point I
25 was making about the affidavits was that, you know, they were

1 seen and they were read, certainly prior to the October application
2 because they were the meat on which the October application was
3 argued. I mean, we're talking about the same judges except for
4 one, I mean, the only difference is that Mr.Justice Morrison had
5 been replaced in December. So, although technically you would
6 call it a different panel, it was four out of the five were the same.
7 So, I don't know, I appreciate that a judge has to separate
8 out what is evidence and what is not evidence, but to say that
9 they could then write the decision and pretend that they didn't
10 know anything about the reinvestigation or the police point of
11 view, as I say, I think lay people and even I, as lawyer, have
12 some difficulty with that.
13 COMMISSIONER EVANS
14 And you also stated that the public perception and the
15 polarization that took place...
16 MR. EDWARDS
17 Yes.
18 COMMISSIONER EVANS
19 ...would have an effect upon the judiciary. Or is that more...
20 MR. EDWARDS
21 No.
22 COMMISSIONER EVANS
23 ...applicable to a jury panel than to Court?
24 MR. EDWARDS
25 No, no, I'm glad you brought that back because that's not

1 what I meant to imply.

2 COMMISSIONER EVANS

3 It had an effect upon you.

4 MR. EDWARDS

5 It had an effect upon me.

6 COMMISSIONER EVANS

7 That's right.

8 MR. EDWARDS

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

19 COMMISSIONER EVANS

20 Thank-you.

21 MR. MacDONALD

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

25 A. Yes.

1 Q. It was your assessment that the Court of Appeal of Nova
2 Scotia was not going to acquit Junior Marshall unless they
3 could blame him.
4 A. Yes.
5 Q. The affidavits, I just want to clean up one point on those,
6 other than what's contained in the transcript of the
7 reference, and concessions that you made or statements of
8 agreement you made in your factum.
9 A. Yes.
10 Q. There was no agreement by you to have affidavits filed. Is
11 that correct? Have affidavits become part...
12 A. Of the evidence.
13 Q. ...of the record. Of the record.
14 A. I think that's correct.
15 9:52 a.m.
16 Q. Thank you.
17 A. Except insofar as they were, portions were adopted by
18 witnesses.
19 Q. Thank you. And, in particular, do you know if you agreed,
20 can you recall whether you agreed to the introduction of the
21 affidavit of Dr. Mian as forming part of the record of the
22 reference?
23 A. I think the transcript is a little ambiguous on that. My recall
24 is yes, my recollection is that the trade-off not calling Pratico
25 is that we make Dr. Mian's affidavit part of the evidence...

1 Q. And that was your...
2 A. And possibly John Pratico's affidavit for that matter, but I
3 think Dr. Mian's for sure.
4 Q. Certainly your intention was to have Dr. Mian's affidavit form
5 part of the record.
6 A. Yes.
7 Q. Thank you. Let me take you to the reference decision. Now
8 it's in Volume 4, it starts at page 80 but I want you to go to
9 page 143. Page 143.
10 A. Yes. This is the decision, is it?
11 Q. Yes.
12 A. Yes, okay.
13 Q. At the bottom of page 143 and continuing to page 144 it is
14 stated, "MacNeil's evidence, although unfortunately not
15 adequately tested by rigorous cross-examination by Crown
16 counsel, is clearly evidence that it's capable of being
17 believed."
18 A. Yes.
19 Q. I read that as being a criticism of the way you conducted the
20 examination of Mr. MacNeil in any event.
21 A. That's how I read it, too.
22 Q. Did you consider that, is that perhaps other evidence of your
23 belief that you were being criticized for not being
24 adversarial?
25 A. Well, when I took that, when I read that rightly or wrongly,

1 what rang to me was Mr. Justice Pace saying, "Tell me one
2 witness that we can believe," and I said, "Jimmy MacNeil."
3 And what I read into that was, when they got to the evidence
4 of Jimmy MacNeil they couldn't get around it, or that's
5 unfortunate wording. They had to deal with the fact that his
6 evidence hadn't been shaken and so I was criticized for not
7 cross-examining him rigorously enough. And I have to
8 concede, to be perfectly honest about it, that I didn't do, I
9 didn't try to devastate to Jimmy MacNeil, and the main reason
10 was because I believed him. I don't know if that answers
11 your question.
12 Q. Your explanation, either yesterday or the day before, of your
13 role as you saw it in the Court of Appeal was to test the
14 evidence.
15 A. Yes.
16 Q. And you consider that you did test the evidence of MacNeil?
17 A. I do. I do. And as, when I was preparing to give my
18 evidence, of course, that comment, quite frankly, has always
19 rankled me. And so I thought, well, what I'll do is read a
20 thorough cross-examination of Jimmy MacNeil. So I read Miss
21 Edwardh's cross-examination and it was a very, very capable
22 cross-examination. But at the end of the day Jimmy MacNeil
23 was still on his feet even after that searching cross-
24 examination. So I guess what I'm saying is what was the
25 point of cross-examining Jimmy MacNeil there. Now, of

1 course by the time of Ebsary three I wanted to cross-examine
2 Jimmy MacNeil to really give him a test on the conversation
3 prior to the stabbing.
4 Q. But you never doubted his story that Seale...
5 A. I never...
6 Q. Was stabbed by Ebsary.
7 A. Never doubted, exactly.
8 Q. And you don't today.
9 A. No.
10 Q. I assume from what you've told us in the last day or so that
11 you certainly weren't surprised by the decision of the Court of
12 Appeal on this reference.
13 A. No, I wasn't surprised. I suppose I was, if anything, a little
14 bit relieved that he had been acquitted.
15 Q. And would you agree with me that the Court of Appeal is
16 saying there was no miscarriage of justice in this case.
17 A. That's what they're saying, yes.
18 Q. And that Donald Marshall is to blame, he's the author of his
19 own misfortune.
20 A. I don't know if they actually come out and say that but that
21 is...
22 Q. That's what you understand them to be saying.
23 A. Yes. But I don't think those words actually appear in the
24 decision, do they?
25 Q. Not those actual words.

A. No.

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

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

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

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

Q. Okay, perhaps not in the technical sense.

A. No.

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

A. Yes.

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

A. Yes.

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

COMMISSIONER POITRAS

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

MR. MacDONALD

Thank you, My Lord.

1 MR. EDWARDS

2 By planning a robbery?

3 COMMISSIONER POITRAS

4 Yes.

5 MR. EDWARDS

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

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

11 A. Yes.

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

15 A. Fair enough.

16 CHAIRMAN

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

21 MR. EDWARDS

22 Not guilty of the murder.

23 CHAIRMAN

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

1 MR. EDWARDS

2 Which part specifically, My Lord?

3 COMMISSIONER EVANS

4 First paragraph.

5 CHAIRMAN

6 It says, the first paragraph.

7

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

13 MR. EDWARDS

14 Yes.

15 CHAIRMAN

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

18 MR. EDWARDS

19 Yes.

20 CHAIRMAN

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

24 MR. EDWARDS

25 Yes.

1 CHAIRMAN

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

3 MR. EDWARDS

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

5 CHAIRMAN

6 Yes.

7 MR. EDWARDS

8 And saying specifically that Donald...

9 CHAIRMAN

10 Yes.

11 MR. EDWARDS

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

14 COMMISSIONER EVANS

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

17 MR. EDWARDS

18 No question about that.

19 COMMISSIONER EVANS

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

22 MR. EDWARDS

23 Yes.

24 COMMISSIONER EVANS

25 And they allow the appeal where,

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

MR. EDWARDS

Yes.

COMMISSIONER EVANS

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

MR. EDWARDS

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

COMMISSIONER EVANS

And it was open to them.

MR. EDWARDS

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

1 although perhaps he was just taking it chronologically. I don't
2 know it that reflected that he had the same appreciation I did or
3 not...
4 COMMISSIONER EVANS
5 Maybe he read the court in the same fashion as you did.
6 MR. EDWARDS
7 That's possible. I don't know, was that ever put to him?
8 MR. MacDONALD
9 I don't know either, My Lord. I didn't examine Mr. Aronson.
10 Q. Let me take you back to page 144, if I can just follow along
11 the line that Mr. Justice Evans was just dealing with. The
12 Court says, "We must accordingly conclude that the verdict of
13 guilt is not now supported by the evidence..."
14 A. Yes.
15 Q. "...and is unreasonable and must order the conviction
16 quashed. In such a case a new trial should ordinarily be
17 required."
18 A. Yes.
19 Q. I, perhaps mis-, don't understand the criminal law that well
20 but I would expect if there's no evidence or if the evidence
21 now available cannot support a conviction why would you
22 ever order a new trial?
23 A. I can't answer that.
24 COMMISSIONER EVANS
25 Many a defence lawyer has wondered about many Courts of

1 Appeal.

2 MR. MacDONALD

3 Perhaps you can answer, My Lord.

4 COMMISSIONER EVANS

5 At one time I could have.

6 CHAIRMAN

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

11 MR. EDWARDS

12 Yes.

13 CHAIRMAN

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

17 MR. EDWARDS

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

1 at that time, there was no doubt in my mind then that there had
2 been a miscarriage.
3 CHAIRMAN
4 What would you have done if you had been the prosecutor
5 at the original trial when John Pratico, if John Pratico had come to
6 you in the corridor before he went into the witness box and told
7 you that he had not seen Donald Marshall murder Sandy Seale?
8 That he wasn't there that night. How would you have brought
9 that to the attention of the Court and the jury?
10 MR. EDWARDS
11 Perhaps the best way I can answer that it's hard to say what
12 I would have done but surprisingly I had a parallel situation
13 two years ago in a murder trial where after the addresses of
14 counsel, I was leaving the courthouse and a lady approached
15 me very flustered and was directed to me by a CBC reporter,
16 as a matter of fact, George Garland, and she was on the verge
17 of tears and shaking and she said, "Mr. Edwards, what you
18 just said in there was all wrong." And I had just finished
19 arguing to the jury that the victim had died on Saturday night
20 and that was the whole theory of the Crown. She said,
21 "Because I spoke with the victim the next day and I told that
22 to the police and," she said, "not only that there are two
23 others that I know of who also spoke with her the next day."
24 So what I did was advise defence counsel of the information,
25 then we went in and saw Mr. Justice Hallett, told him. He

1 heard her evidence that evening at 7 o'clock. We convened a
2 special session and I led the evidence out of her and after
3 hearing that he asked for motions. I moved for a mistrial.
4 And the defence concurred and that's what he did. I think
5 that's a parallel and I think that may have been an option
6 open at that time.
7 MR. MacDONALD
8 Q. I have a little difficulty, and perhaps I didn't understand your
9 answer to the question just before. But are you saying that,
10 in your view, given the evidence at trial of Junior Marshall...
11 A. Yes.
12 Q. With the two eyewitnesses and the evidence given by Mr.
13 Marshall and the whole thing, that there was a miscarriage of
14 justice when he was convicted? Did I understand you to say
15 that?
16 A. Yes. Because that evidence was so tainted that it shouldn't
17 have been put before a court.
18 Q. Okay, but I didn't understand that. I thought that question
19 was the evidence that was before the Court, that was before
20 the jury, that you did say could certainly support a conviction.
21 A. Yes. What I'm saying is...
22 Q. But what you're saying is the evidence, perhaps, shouldn't
23 have been put before the Court or more or additional
24 evidence should have been put or something to that effect. I
25 don't understand your...

1 A. Yeah, I know...
2 Q. What you're saying to us.
3 A. And it's difficult. I have a tough enough time answering
4 some of the questions I've anticipated. But what I'm saying
5 is that the, in my view, the root of the miscarriage lies in the
6 fact that that evidence was placed before a jury.
7 10:13 a.m.
8 Q. And now does that answer the question I believe the Chief
9 Justice asked, if at any time there was evidence that would
10 support a conviction. I believe that's, that was your
11 question.
12 A. Yes.
13 Q. And I put that to you. I think your answer was, yes, the
14 evidence that actually was presented to the jury could and
15 did support a conviction.
16 A. Yes. But on the other hand, what I'm saying is that had that
17 evidence been properly assessed prior to going to Court that
18 it wouldn't have been placed.
19 Q. I understand that.
20 A. Yeah.
21 Q. Okay, thank-you. And we've been through that, I think,
22 earlier in your evidence. But I want to go back now to page
23 144. Just following the sequence here. The Court of Appeal
24 says, "Accordingly we must take the alternate course
25 directed by 613(2)(a) and direct that a judgement of

1 acquittal be entered in favour of the appellant." Isn't that
2 the end of it? Why does the Court have to go beyond that
3 at all? In first year law term isn't that what is known as
4 from then on obiter dicta, or gratuitous remarks?
5 A. Yes. I think you're correct in saying that, but at the same
6 time let's assume for a moment that there had been no
7 miscarriage for the sake of argument.
8 Q. Yes.
9 A. Then I would think, and let's assume that the Court had that
10 view which they obviously did, then I would think that that
11 would invite some comment from the Court in the public
12 interest and, so I don't think one should be critical of that
13 being tacked on as gratuitous because to my mind that flows
14 from a bona fide, not to overwork that term, belief that
15 there had been no miscarriage. But again, you know,
16 maybe I'm interpreting the rationale of the Court, but that's
17 my own feeling on it.
18 Q. But you did tell us earlier that you really couldn't assess
19 whether there has been a miscarriage unless you had a
20 broad ranging inquiry into all of the facts.
21 A. Well, that's my opinion, yes.
22 Q. And that didn't happen.
23 A. No.
24 Q. Well, I'm suggesting to you that the comments of the Court
25 after they have directed that an acquittal be entered are

1 strictly gratuitous and shouldn't have been made at all.
2 A. They could have stopped there, but I can't go that far and
3 say that they were strictly gratuitous, because I think that a
4 Court hearing this and if they were convinced that there was
5 no miscarriage, even if, you know, you can argue whether
6 they were mistakenly convinced or they didn't have enough
7 evidence before them to be convinced, but if they were
8 genuinely convinced that there had been no miscarriage,
9 then I don't think they remarks that follow would be
10 unreasonable. Now, of course, that's prefaced by the "if." In
11 fact, I believed there was a miscarriage and on that basis,
12 you know, believing there had been a miscarriage, then
13 those remarks are gratuitous.
14 Q. To come back to what you told us yesterday and confirmed
15 this morning though.
16 A. Yes.
17 Q. Your assessment was that the Court would not have reached
18 that first decision directing that a judgement of acquittal be
19 entered unless they could go on with the balance of the
20 decision and place the blame on Marshall.
21 A. Yes.
22 Q. Thank-you. Let's go to Volume 32, please. You were asked
23 to review the decision of the Appeal Division and to
24 determine the evidence that might exist to support charges
25 of perjury, is that correct?

1 A. Yes.
2 Q. And on page 152 of that volume there is a memorandum
3 from Mr. Herschorn to the file where he indicates that that
4 instruction was given to you.
5 A. Yes.
6 Q. Your...the request of you was restricted to that extent, was
7 it, you were only to review the decision of the Court to
8 determine what evidence exists to support charges of
9 perjury and a charge of attempted robbery against Donald
10 Marshall, Junior.
11 A. My memo in response, the May 16th memo.
12 Q. Yes, that's on page 154.
13 A. Now, my difficulty here, I'm just checking the memo to see
14 what I did give opinions on because I...yeah, I think that
15 was the request. Charges of perjury and attempted robbery.
16 Q. Prior to giving your opinion, did you have any discussions
17 with any of the people involved, Marshall, Chant, Harriss,
18 Pratico?
19 A. No.
20 Q. Yesterday we talked about, a little bit about perjury. My
21 understanding of the offence is that someone tells a lie, tells
22 an untruth to a trier of fact, under oath, with intent to
23 mislead, is that a fair definition?
24 A. Yes.
25 Q. Now, you concluded that Junior Marshall...what did you

1 conclude? Did he commit perjury in 1971 or did he not?
2 A. I think the bottom line was that, yes, he did in a very
3 technical sense but there shouldn't be a charge.
4 Q. Now, you go on, on page 155, you talk about the comments
5 of the Court, and then you quote from a comment of the
6 Court and then you say, "The Court seems to treat Marshall's
7 omission of facts pertaining to the attempted robbery as
8 lies."
9 A. Yes.
10 Q. Is that what you understand Marshall didn't do at trial is he
11 didn't tell the story about the robbery?
12 A. Yes.
13 Q. That's what his "crime" was.
14 A. Yes.
15 Q. He didn't tell about the robbery.
16 A. You have the Code there open, I'm sure, at 120.
17 Q. Yes.
18 A. And you see there's a succinct quote there from the Farris
19 case, and there's a ...
20 Q. "There is no defence if the accused's statement is literally
21 true, if he well knew and intended that the statement
22 should be taken in another sense."
23 A. Right. That's the sense I'm talking about there.
24 Q. So, is it, and was it your conclusion then that Marshall's
25 crime, well, at trial, was not telling enough, not telling about

1 an attempted robbery?
2 A. I can't improve upon the words of Farris. Giving a
3 statement that was literally true, but intending for it to be
4 taken in another sense. In other words, saying we met
5 these two individuals, and they were dressed like such and
6 such, and the implication being that they then without
7 provocation attacked us. That would be the literal sense of
8 his testimony. By omitting to say that he was in the process
9 of committing a robbery, the literal correctness of his
10 testimony was misleading. That's why I say it's a very
11 technical and I think I used the word "extension" of the
12 word perjury. Again, when I was asked to give these
13 opinions on perjury, I'm sure what went through my mind is
14 you can't be serious, you know, but I will. And, so I
15 satisfied the request but admittedly with a minimum of
16 research.
17 Q. On page 156 you are advising Mr. Herschorn, and this is the
18 first full paragraph, that Donald Marshall under cross-
19 examination refused to adopt those portions of the
20 statement given to the RCMP at Dorchester dealing with the
21 robbery.
22 A. Right.
23 Q. And that's been his position throughout, hasn't it?
24 A. No question.
25 Q. He has never adopted what he told the RCMP in Dorchester.

1 A. Right.
2 Q. Thank-you.
3 A. The only...the only qualification you can put on that, he has
4 never adopted the statement, but if you read closely his
5 direct evidence at...on the reference it could be construed as
6 an admission of a robbery. I think I wrote down the page
7 references if you want to get into that. But suffice to say
8 perhaps that I think any fair reading of his direct evidence
9 on the reference is arguably an admission of the robbery. It
10 was to me an attempt to avoid being confronted with the
11 statement perhaps. Now, to admit but not admit, I don't
12 know, that's speculative.
13 Q. Okay. Now, let's go to the other witnesses. Let's take the
14 two eyewitnesses, Chant and Pratico.
15 A. Yes.
16 Q. Chant told the jury at the trial that he saw Donald Marshall
17 stab Sandy Seale, yes?
18 A. Yes.
19 Q. And Chant intended, I would expect, that the jury would
20 believe that.
21 A. Yes.
22 Q. How could that not be perjury, having him now say that he
23 never saw that? He was lying when he said it.
24 A. Well, again, technically speaking it is perjury.
25 Q. And the same with Pratico.

1 A. And the same with Pratico.
2 Q. And the same with Patricia Harriss, she told something on
3 the witness stand that she knew was not the truth.
4 A. That's right.
5 Q. Intending the jury to believe.
6 A. Technically, yeah.
7 Q. Now, but their's is not an act of omission.
8 A. That's right.
9 Q. Where Marshall's may have been not going far enough or
10 not telling them. Their's is a direct lie.
11 A. Yes.
12 Q. So, if it's perjury in the technical sense, it satisfies the
13 requirements of perjury, why is it that you concluded that
14 no charge should be laid? Can you just explain, just
15 generally if you want to, or explain at whatever length you
16 want why you would say there should not be perjury
17 charges laid against those three individuals?
18 A. Well, I think I recognized that it could be a technical
19 perjury, but I try not to be too technical and perhaps I let
20 quote unquote "common sense" prevail sometimes and I
21 think that's what happened here. That taking them one by
22 one, Pratico, given the mental background and background
23 and mental problems he had, the fact that he tried to recant
24 during the trial, looking at the fact that he had been
25 interrogated twice, had given two written statements, was

1 obviously open to suggestion, and again that related, I
2 suppose, to his mental condition. Really how could one
3 seriously recommend a prosecution for perjury there,
4 recommend that a perjury charge be laid?
5 Patricia Harriss, a fourteen-year-old girl, kept from,
6 was it eight or eight-twenty until 1:20 a.m., who gave a...the
7 first written statement and then, after what I judged to
8 have been very intensive interrogation, changes it. I have
9 great difficulty in impugning criminal intent to her.
10 Q. That's not the time that she committed perjury, is it? The
11 perjury...
12 A. No.
13 Q. ...is committed when she takes the witness stand.
14 A. Yes, but surely...surely you just don't look at the lie in a
15 vacuum. I mean, I can't divorce from my mind what had
16 gone on before. So, maybe I'm wrong on that, and there are
17 lots who argue I am. But my ...that was my belief and my
18 opinion.
19 And Chant, again the same sort of situation, in the
20 sense that he had given two statements. Well, the first one
21 was a lie, of course, as was the second, but again looking at
22 his age and the manner in which his second statement was
23 elicited, and no doubt we will get into that again about those
24 circumstances, but just the fact that he had a prior record,
25 that his probation officer was present, his mother was

1 present, and the Sheriff was present and two policemen.
2 And, as came out in the reference he believed Marshall was
3 guilty anyway and I'd have difficulty impugning the
4 necessary intent to him.
5 Q. Let me read you from your opinion and it' s on page 157,
6 about Chant. This is the end of the first paragraph about
7 Chant, "No doubt he was acquainted with the fact that
8 earlier that morning Pratico had given a statement in which
9 he said he saw Marshall stab Seale." Now, first of all your
10 notes of July 12th, 1982, when you were interviewing...
11 A. Right.
12 Q. ...the police, contained a statement that Chant was not told
13 anything about the Pratico statement.
14 A. Yes.
15 Q. Did you subsequently get evidence or were you told
16 anything which would lead you to change or to make the
17 statement that I've just read to you that you made in 1983
18 in May?
19 A. No. No. I...July 12th I had difficulty believing that but I
20 didn't have then, nor do I have now, a basis for saying "John
21 MacIntyre, you're a liar on that point."
22 Q. But you believed it enough to tell Martin Herschorn that no
23 doubt.
24 A. Yes.
25 Q. Pratico or Chant was told about Pratico's statement given

1 earlier that morning.
2 A. That's right.
3 Q. And can you...you had no doubt of that.
4 A. No.
5 Q. Okay. In these circumstances...
6 A. Now, it may have been a situation where the opinion should
7 have been asked by someone else. Perhaps I was too close
8 to it.
9 Q. Okay.
10 A. And I acknowledge that.
11 Q. Let me continue the quote. "In these circumstances, he
12 likely saw no alternative to telling the police what he
13 believed they wanted to hear."
14 A. Right.
15 Q. And that, I'd suggest to you, is your reasoning for saying
16 "Chant didn't have any criminal intent, he was only telling
17 the police what he thought they wanted to hear him say."
18 A. Yes.
19 Q. And then when we go on to Harriss, it's on page 158, just at
20 the bottom of that first full paragraph, "It is probable that
21 after such extensive questioning, she, like Chant, told police
22 what she believed they wanted to hear."
23 A. Yes.
24 Q. And you then conclude that, in your conclusion:
25

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

10:36 a.m.

A. Right.

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

A. No.

Q. You were never asked to do that?

A. No.

Q. And you never have.

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

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

A. Yes.

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

A. Yes.

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

A. Yes, I suppose you could say that.

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

1 A. Yes.
2 Q. Isn't, aren't they committing perjury on the advice of
3 somebody else or on the coercion of somebody else?
4 A. Yes.
5 Q. Thank you. And you said yesterday, and I can turn up the
6 document for you if you want, but I'm sure you don't need it.
7 It's the January letter...
8 A. Yes.
9 Q. That you wrote to Martin Herschorn where you said, "The
10 police acted bona fide throughout..."
11 A. Yes.
12 Q. "...because they honestly believed that Junior Marshall had
13 committed this crime."
14 A. Yes.
15 Q. Are we then, in this situation, where the police believe that
16 Marshall commits the crime...
17 A. Yes.
18 Q. And they convince a couple of witnesses to tell the Court what
19 the police believe?
20 A. See, when you were taking me through it there a couple of
21 minutes ago, and just now, I think you're stopping one step
22 short...
23 Q. And don't let me do that. Please take me the last step.
24 A. Oh no, I was waiting for it.
25 Q. That seems to me to be a real sort of a "Catch-22" situation.

1 Somebody starts off with the belief...
2 A. Yes.
3 Q. That something happened.
4 A. Yes.
5 Q. That, is it then they can do whatever they like?
6 A. No.
7 Q. Is it free game from them on?
8 A. No.
9 Q. What are the limits?
10 A. There's a whole bunch of issues that you've probably raised.
11 Let's deal with the counselling perjury issue...
12 Q. Okay.
13 A. Head on. Okay? And I guess really what we're leading up to
14 is whether or not there's a case to be made that John
15 MacIntyre is guilty of counselling perjury. Is that fair?
16 Q. Yes.
17 A. Okay. Well, if he is counselling perjury then he is not only
18 urging Patricia Harriss, for example, to give a false story. But
19 in my view to be guilty of counselling perjury he would have
20 to be urging her to give a false story, and this is the crucial
21 part, which he knows to be false, and with intent to mislead.
22 Now if you accept, as I do, that John MacIntyre honestly
23 believed that the true story was that Marshall had committed
24 the stabbing, then it seems to me that that rubs out the
25 necessary ingredient to say that there's a case to be made

1 that he's guilty of counselling perjury.
2 Q. Even if, if...
3 A. Yes.
4 Q. He convinced Harriss and Chant to tell the Court what the
5 police were convinced was the correct version. They didn't
6 know, they didn't have this, remember they lied. They never
7 saw this...
8 A. That's right. And Chant and Pratico or Chant and Harriss,
9 right.
10 Q. They never saw it.
11 A. Um-hmm.
12 Q. Even in those circumstances if John MacIntyre convinced
13 them to tell a story that was a lie...
14 A. Yes.
15 Q. There's no criminal act by him...
16 A. Where...
17 Q. Because he believed, he believed...
18 A. He has ...
19 Q. That Marshall stabbed Seale.
20 A. Yeah. Criminal law, and I don't mean to be didactic but
21 criminal law hinges on the word "intention." And you have to
22 have evidence of intent to mislead on the part of John
23 MacIntyre in order to saddle him with counselling perjury.
24 Now if he bona fide believes that he's getting the truth out of
25 these witnesses, that he's cracked the case, then I can't

1 understand how you could make any inference of intent to
2 mislead in that circumstance.
3 Q. You have a circumstance here...
4 A. Yes.
5 Q. Of two witnesses who are unconnected, live 22 miles from
6 each other...
7 A. No question.
8 Q. Don't know each other.
9 A. Right.
10 Q. Haven't spoken to each other...
11 A. Yes.
12 Q. Who both say they saw Donald Marshall stab Seale, which is a
13 lie...
14 A. Yes.
15 Q. That they were involved in an altercation. That there were,
16 there is a thread running throughout their evidence of
17 common things that they both saw, none of which they did.
18 A. Um-hmm.
19 Q. Now isn't the only possibility, the only set of possibilities,
20 either that they did, in fact, see that occur, or that they
21 conspired, one with the other to concoct a story, or that
22 someone put the words in their mouth. Is there any other
23 possibility?
24 A. No.
25 Q. And if we accept, just for the basis of our discussion, that

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

1 my view. You have to assess at least a possibility. Now
2 unfortunately, John MacIntyre assessed the possibility that
3 Marshall was the guilty party. And he convinced himself that
4 that's, in fact, what happened. So it wasn't just somebody
5 pulling an answer out of the air and say, "Well, I'm going to
6 hang it on this guy", in my view. And what did he have? I
7 mean he had Chant who he knew had lied to him. That's an
8 undisputed fact.
9 Q. Yes.
10 A. So he got overzealous. His tactics should be censored but I, in
11 that context what happened I don't think you would get past
12 preliminary inquiry if you charged him with counselling
13 perjury.
14 Q. Isn't it a bit ironic, though, that a man can go to jail for 11
15 years...
16 A. Yes.
17 Q. Based on the evidence of two people who lied...
18 A. Yes.
19 Q. Who, according to your belief, merely told the Court the story
20 the police wanted them to tell...
21 A. Yes.
22 Q. And after he gets out and finds out about all this, all we can
23 tell him is, "You can't do anything. The system can't do
24 anything to these people who put you away for 11 years."
25 A. No, I can't adopt that proposition.

1 Q. Well the system, you're telling us the system can't.
2 A. No, I'm not. I'm not.
3 Q. The criminal system now.
4 A. No, I think you have to dissect it. What I'm telling you is that,
5 in my opinion, and my logic may be all wet, but you have it
6 such as it is, in my opinion, John MacIntyre can't be held
7 criminally responsible.
8 Q. Neither should Harriss.
9 A. He is deserving of criticism for the way in which he conducted
10 the investigation but not a criminal charge. The system, you
11 know, the next logical progression is to say, well, if it's not
12 John MacIntyre where do we go from there. And I am of the
13 view, and I know that a contrary theory has been proffered
14 through questioning here but I am of the view that the first
15 statements of Chant, Pratico and Harriss were never disclosed
16 to the defence.
17 Q. And that's...
18 A. And if fault is to be assessed anywhere, then it is on that non-
19 disclosure.
20 Q. Okay.
21 A. Okay?
22 Q. All right.
23 A. Because my view, and again, that's all it is, is that the
24 disclosure of those statements would have prevented the
25 conviction. And then to carry it right through, that after the

1 conviction the 11-year incarceration could have been
2 prevented had the re-investigation been disclosed.
3 Q. Or had it been carried out in the same manner as the 1982
4 re-investigation.
5 A. Or had it been carried out in the same manner as the 1982
6 re-investigation.
7 Q. With all of these...
8 A. So, you know, to get back to your point, in view of what I've
9 just said, I don't think I'm throwing up my heads to Donald
10 Marshall and saying, "Too bad, pal. You know, you spent 11
11 years in jail."
12 Q. But the system has, the Court told him. "In spite of all that,
13 it's your own fault. You're the guy who is to blame."
14 A. And the Appeal Court said that, yes.
15 Q. Okay.
16 COMMISSIONER EVANS
17 May I just ask one question dealing with MacIntyre and the
18 witnesses. The witnesses didn't tell him the truth to start with
19 and as you say he was a little aggressive. But leaving aside...
20 MR. EDWARDS
21 Well Chant didn't...
22 COMMISSIONER EVANS
23 Well leaving aside the aggressiveness...
24 MR. EDWARDS
25 Or, and Pratico.

1 COMMISSIONER EVANS

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

4 MR. EDWARDS

5 Yes.

6 COMMISSIONER EVANS

7 As to how their story was impossible.

8 MR. EDWARDS

9 Yes.

10 COMMISSIONER EVANS

11 And they adopted his suggestions.

12 MR. EDWARDS

13 They adopted, yes.

14 COMMISSIONER EVANS

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

16 MR. EDWARDS

17 No.

18 COMMISSIONER EVANS

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

24 MR. EDWARDS

25 Yes.

1 COMMISSIONER EVANS

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

5 MR. EDWARDS

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

16 MR. MacDONALD

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

21 A. Mr. How. Okay.

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

A. Never.

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

A. Oh, yes.

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

A. Okay.

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

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

Now, would you like to comment on that?

A. Here are the receipts.

Q. The receipts for what?

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

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

A. On every occasion.

COMMISSIONER EVANS

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

1 MR. EDWARDS

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

4 MR. MacDONALD

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

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

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

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

17 Q. Was his...

18 A. He was coming to Court.

19 Q. Was his attendance secured at subpoena?

20 A. Yes.

21 COMMISSIONER POITRAS

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

23 MR. MacDONALD

24 I'm sorry, My Lord.

25

EXHIBIT 151 - PHOTOCOPIES OF EXPENSE VOUCHERS PAID BY CROWN ON BEHALF OF DONALD MARSHALL

BREAK

11:26 a.m.

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

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

Q. You have it open in front of you.

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

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

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

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

1 here. That Donald was cross-examined on his statement and
2 all I can say to that is that that statement was in the
3 possession of the defence so you would take it as a given that
4 that statement was going to be used to confront Mr. Marshall,
5 if not by the Crown, then certainly by the defence. And it has
6 been, I mean Mr. Marshall is not the first time I've had a
7 witness that I've presented, that I've done a Section 9(2)
8 application on and the strategy and, in particular, before a
9 jury is that it is better, makes a more credible case if the
10 Crown contradicts the witness rather than leave it for the
11 defence. The jury then, I think gets the impression that the
12 Crown is being forthright with them and is presenting the
13 evidence, warts and all. So I can understand Mr. Cacchione's
14 sympathy for Mr. Marshall being confronted with the
15 statement, but I make no apology for having confronted him
16 with it. And, as a matter of fact, I used different strategies at
17 different times.
18 The first trial I didn't confront Marshall with his
19 statement but left it to the defence and they did it with fairly
20 devastating effect. So having seen that, and in the second
21 trial, I decided I'd take the sting out of it as much as I could
22 by doing the 9(2) myself. So that's the reasoning there.
23 He is critical on page 2, which would be page 211, of
24 the fact that I called only the minimum of evidence at the
25 first trial and seems to be imputing almost that I was trying

1 to lose the case or assist Ebsary to get an acquittal. Well the
2 fact of the matter is that, well there's two points that have to
3 raised. Number one, prior to the first trial, the charge of
4 murder had been reduced to manslaughter at the preliminary
5 inquiry. And it was my view that that was the very least that
6 could be proven or, to put it another way, that manslaughter
7 would be easy to prove. Added to that the comments of the
8 Appeal Court in the reference decision with respect to the
9 other witnesses.
10 Like he's critical of the fact that A.J. Evers wasn't
11 called on that first occasion and, in fact, wasn't called on the
12 second trial either. Well A.J. Evers had evidence which the
13 Appeal Court, in its decision, had said was, at best,
14 speculative. So if Ebsary had been convicted with that
15 evidence in, I feared at the time that that might present a
16 ground of appeal. That there was a danger that that evidence
17 would be viewed as being prejudicial but not probative by
18 the Appeal Court. And the same is true with several other
19 witnesses. They made very critical remarks of the evidence
20 of Chant and Harriss at the reference decision. So that was
21 the reason.
22 I didn't use the tape-recorded conversation of Ebsary
23 for the simple reason that, and he refers to that, that there
24 was, in my view, a vulnerability of that statement because
25 Ebsary had been drinking at the time and also because there

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

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

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

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

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

1 preliminary, and I couldn't find in there any finding of fact
2 that a robbery was being attempted by Seale and Marshall.
3 Is that something...
4 COMMISSIONER EVANS
5 Line 6 and 7?
6 MR. MacDONALD
7 Line 6 and 7. Yeah, I understand, My Lord, he's making a
8 statement what the evidence said.
9 COMMISSIONER EVANS
10 Yeah, okay.
11 MR. MacDONALD
12 The statement in Mr. Edwards' letter is that His Honour did,
13 in fact, find that there was a robbery in effect.
14 MR. EDWARDS
15 A. I think that's the unmistakeable conclusion one would draw
16 from his decision.
17 Q. Okay.
18 A. "The evidence against the accused is that when a robbery
19 was in progress he stabbed Sanford Seale with his death
20 ensuing. " And then he said, page 232, line 24, I just noticed
21 this sentence so it might be out of context. But there's a
22 sentence there, "The accused has become responsible for a
23 killing, that's what we have here." So...
24 Q. There are no...
25 A. That was my impression anyway.

1 Q. There are no written decisions of Judge O'Connell other than
2 this one we have here, other....
3 A. No.
4 Q. On the preliminary.
5 A. No.
6 Q. Okay. That was the main point I wanted to find out. You, in
7 your letter... Okay. Let's just leave that alone.
8 A. Yeah, well, I mean, all I'm saying there is that I recognize
9 the possibility or even a probability that murder would be
10 reduced to manslaughter by a jury and there was...there was
11 not much point in preferring an indictment there, but...
12 Q. At any time, Mr. Edwards, have you had discussions with
13 any members of the media concerning this, your role in the
14 Marshall case so-called? Let's say Michael Harris. Have
15 you...did you sit down and meet with Michael Harris?
16 A. I sat down and I spoke with Michael Harris. I know I didn't
17 discuss with him any of the internal Department discussions
18 that we had, otherwise I'm sure, for example, the January
19 25th meeting would have showed up in his book. But I
20 remember showing him the knives at one stage. I think it
21 was after the second Ebsary trial. But I've got no
22 recollection and I don't believe I told him anything that
23 wasn't on the public record at that point.
24 Q. Staff Wheaton testified before the Commission that he was
25 of the view that charges should be laid against Detectives

1 MacIntyre and Urquhart.
2 A. Right.
3 Q. For their role in this...in the investigation.
4 A. Yes.
5 Q. Did he ever tell you that?
6 A. No.
7 Q. At no time has he...
8 A. No.
9 Q. ...said that to you?
10 A. Well, not until December 10th of 1987.
11 Q. And that was after the evidence.
12 A. That's when John MacIntyre was on the stand.
13 Q. And that related to a concern that...of Wheaton's or a
14 statement of Wheaton that during his evidence Chief
15 MacIntyre had not been...
16 A. Committed perjury.
17 Q. Yes. But I'm talking about...
18 A. Counseling perjury.
19 Q. Yeah. I'm talking about the activities of the investigators
20 during the initial investigation.
21 A. Yes.
22 Q. At any time did Staff Wheaton say to you that he believed
23 that charges should be laid against John MacIntyre or
24 William Urquhart?
25 A. No.

1 Q. Thank you. And just to clean up on one point, just that we
2 talked earlier this morning. You were saying that if a
3 policeman honestly believes something occurred that
4 he...there is nothing wrong with him putting it to other
5 witnesses or potential witnesses, isn't this what you thought
6 happened and this, so...
7 A. He's got to do so with great caution. He's got to consider the
8 subject he's dealing with.
9 Q. How far can he go though? He believes that something
10 happened. What are...how far can he go?
11 A. I don't think he can do more than suggest it. I don't think
12 he should...should press it or, in effect , cross-examine the
13 witness, particularly at any length. But if he does that
14 doesn't necessarily make it criminal. It makes it
15 inappropriate and perhaps subject to discipline under the
16 Police Act but that would be it.
17 Q. You had no involvement in the...
18 A. Probably kill the admissibility of any statement he got
19 thereby.
20 Q. You had no involvement in the Donald Marshall matter at
21 the compensation level, did you?
22 A. None. Never discussed with me directly or indirectly.
23 Q. After the reference decision was down and after you gave
24 your opinion on the perjury matter...
25 A. Yes.

1 Q. You've had no involvement in the Donald Marshall case as
2 such.
3 A. No.
4 Q. Prosecution...
5 A. Just in the prosecution of Ebsary.
6 Q. Yeah.
7 A. You know, I don't...I didn't separate the two. It was all part
8 of the same...
9 Q. Okay. That's fair.
10 A. The same file.
11 Q. In particular, though, you had nothing to do with the
12 compensation.
13 A. Right.
14 Q. And your advices were not asked at any time during that...
15 A. I think it would have been inappropriate to ask me for
16 advice on compensation, compensation to my mind was a
17 political issue and the last thing that I wanted any...any
18 contact with was any political matter.
19 Q. Do you have Volume 28?
20 A. Yes. And there I guess I did step into the arena, not on
21 compensation, but my May of '83 letter, I believe it is, I did
22 suggest that there should be an inquiry because only by that
23 means would the evidence of Chant and Pratico and the
24 others ever be resolved. But other than that I gave no
25 opinion on any political matters.

1 Q. In October of '84, and for...I guess a month or so thereafter,
2 you and Mr. Gale got into another difference of opinion.
3 A. Coles.
4 Q. Coles. Coles, sorry.
5 A. Gordon Gale and I never had any argument about this. We
6 had a difference of opinion on whether or not the
7 investigation should proceed into the city police, but that
8 was it.
9 Q. In October of 1984 you were being asked why you had
10 given the police reports prepared by Staff Wheaton to
11 Stephen Aronson.
12 A. Right.
13 Q. Now you told us yesterday you gave those documents to
14 Aronson so he could carry the reference hearing.
15 A. So he could carry the reference hearing and so that he
16 would be assured that he had had it all.
17 Q. You're being asked in 1984 to explain why you gave the
18 documents, because the documents had become public...
19 A. Right.
20 Q. ...during the course of an election campaign. That was the
21 context, wasn't it?
22 A. That was the context.
23 Q. And your letter of October 29, 1984, which is found on page
24 2 of Volume 28 explains why you were giving those
25 documents to Mr. Aronson or why you did give them.

A. Yes.

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

A. Yes.

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

A. Right.

Q.

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

A. Right.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

Q.

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

A. Yes.

Q. The investigator being Wheaton.

11:49 a.m.

A. That's right.

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

A. That's right.

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

A. Yes.

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

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

1 inference, the message is, well, look, the Crown told us not to
2 do it, eh. So then the complainant ends up on my door
3 wanting to know why I stopped the police when, of course,
4 what I've done is give the police advice. But they were free
5 to lay the charge. That's an illustration of what I'm getting at
6 there. See, in this circumstance, what... If I had it to do over
7 again, when I advised Wheaton that the investigation should
8 now go to John MacIntyre, and when he came back and said,
9 "Well, we want a direction from the Attorney General," I
10 should have said, "You don't need any direction from the
11 Attorney General. You have my advice. Now you can accept
12 it or reject it. That's it." That's what I should have done. But
13 I was being pragmatic about it and I took the position, well,
14 nothing is going to happen unless I try to move them along.
15 Q. And it would be your recommendation, I take it today, that a
16 police force, or the R.C.M.P., in particular, should not have to
17 have to the approval of the Attorney General before they
18 conduct an investigation of events they suspect are criminal.
19 A. I think that goes without saying. I mean that's...
20 Q. No matter who's involved.
21 A. That's clear, right. There's no special status under the law for
22 investigating police departments. It's the same as if they
23 were investigating Company X, as far as I'm concerned.
24 Q. That's what there should be.
25 A. Right.

1 Q. But today, and I think you've told us before that, in fact, there
2 is special status for other police forces.
3 A. Yes, not under the law, but as a matter of attitude, I suppose.
4 Mr... Staff Wheaton referred to it. I think he acknowledged
5 that there is sort of a fraternal feeling among police and they
6 don't like investigating one another.
7 Q. Let's go to Mr. Coles' reply to you. That's found on page four
8 of Volume 40... 28.
9 A. Right.
10 Q. And he didn't seem to be convinced with your position, and
11 let me take you to page five.
12
13 > Lest there be any doubt, you are to understand
14 > that police reports prepared and delivered for
15 > the use of the Attorney General, his Deputy and
16 > agents, are not to be copied to other persons
17 > without the expressed authorization of the
18 > Attorney General or your superiors in the
19 > Department.
20 Is that the position that you understand you are under today?
21 A. No, my position is outlined in the, in my reply.
22 Q. You replied to...
23 A. November 26th.
24 Q. Mr. Coles on November 26th.
25 A. Yes.
Q. What is your position then?
A. Well, Number one, confidential memos for the Attorney

1 General don't normally come into my possession and this one
2 was not a confidential report for the Attorney General,
3 technically speaking. But aside from that, and that's the
4 technical point, but aside from that, I take the position that,
5 as the prosecuting officer for Cape Breton County, that I'm the
6 one who's responsible for the proper carriage conduct of
7 criminal matters arising in that jurisdiction. And any
8 documents that come into my possession, subject to the
9 safeguards, like witnesses being harassed, with that type of
10 exception omitted, are going to be disclosed to the defence.
11 Q. If you had it all to do over again...
12 A. Yes.
13 Q. And we're talking about the R.C.M.P. reports here.
14 A. Yes.
15 Q. And Aronson has the carry of the ball, carriage of the case in
16 the reference, would you give him the reports?
17 A. Yes.
18 Q. And in doing so, do you understand you would be violating
19 the instructions from Mr. Coles?
20 A. I'd take the chance.
21 Q. In fact, you've told Mr. Coles on page seven... Or page two of
22 your letter, but it's in page seven of the volume, the third
23 paragraph, that, in fact, you consider you have a duty to
24 disclose that report to Mr. Aronson.
25 A. Yes. You know, that letter, it basically sums up my thoughts.

1 It's, the tone of it is angry. I wasn't in a very good mood after
2 I got his letter of November 20th. But taking out the vitriol, it
3 still discloses my feeling on it.
4 Q. Mr. Coles replied to your letter again on November 30th.
5 A. Right.
6 Q. In the final paragraph of that letter... The second final
7 paragraph, he explains why he would have taken you off the
8 reference case if he had had time to brief other counsel.
9 A. Yes.
10 Q. In the final paragraph, he's directing you, is he not, to follow
11 the instructions of the Attorney General's office?
12 A. Yes.
13 Q. And, subsequently, there was a directive issued over the
14 signature of Mr. Herschorn. That's found on page 11.
15 A. Yes. Before we pass on to that. I mean I don't want to leave
16 the impression that I think I can do whatever I want in Cape
17 Breton County. And I feel that it is legitimate for the
18 Attorney General's office in Halifax to have general
19 supervisory power, such as saying, look, this is what we think
20 you should do in the case of a drunk driver who is caught for
21 a second conviction. We look for jail. Or this is how we think
22 spousal assaults should be handled. That's all perfectly
23 legitimate. What I'm saying is that in the conduct of
24 individual cases, the intervention from Halifax can only be on
25 very restricted grounds and if I'm acting improperly, well,

1 then they should take me off it and put somebody else there.
2 Q. On page 11 of Volume 28 and on page 13.
3 A. Yes.
4 Q. Which is explaining or adding to the document on page 11,
5 the procedure to be followed by a prosecuting officer, and I
6 take it that includes you.
7 A. Yes.
8 Q. With respect to release of police reports is set out. And you
9 would have received copies of those two documents?
10 A. Yes, the one of November 21st, I haven't read them lately, but
11 as I recall, it's clarified by the December 3rd.
12 Q. That's correct.
13 A. And broadened. It was recognized that the interpretation or
14 possible interpretations on the November 21st document
15 would make the practices very restrictive.
16 Q. Do you consider that the procedures which are set out in
17 those two documents would prohibit you from giving Steve
18 Aronson copies of the R.C.M.P. reports today, if the same facts
19 were in existence?
20 A. That, again, perhaps should be asked of somebody else. In my
21 mind, if the report to Aronson issue arose again, there may be
22 disagreement and possibly a standoff. Because
23 notwithstanding those instructions, I would still feel under a
24 duty to give that report to Steve Aronson.
25 Q. I understand that.

1 A. Yeah.
2 Q. What I'm asking you is something different.
3 A. Okay, I'm sorry.
4 Q. I'm asking is the policy of the department, as reflected in
5 these two statements, in your understanding, would the
6 policy prohibit you from giving those documents to Aronson?
7 A. It might. Yes, it probably would.
8 Q. Okay. There's one final topic I'd like to...
9 A. And further to that. I had a case recently where the police
10 report contained investigator's opinions and this was told to
11 me by the investigator. And I said, "Well, I'm not interested
12 in your opinions. So take those paragraphs out dealing with
13 your opinions and send it on to me."
14 Q. The last topic I want to deal with arises out of some
15 comments you've made and others have made. And,
16 specifically, that if Junior Marshall had told the truth at the
17 time he was, in May of 1981, none of this ever would have
18 happened.
19 A. 1971.
20 Q. 1971.
21 A. Right.
22 Q. First of all, I want to refer you to some evidence that was
23 given by Mr. Marshall the last time he gave evidence. The
24 third Ebsary trial was the last time Marshall gave evidence,
25 wasn't it?

1 A. Yes.
2 Q. And that evidence is found, My Lords, in Volume 9 of the
3 transcript. Perhaps Your Lordships should have that.
4 MR. PINK
5 What page?
6 MR. MACDONALD
7 Q. Volume 9. I'm going to refer Mr. Edwards to various pages.
8 Do you have a copy of that transcript with you?
9 A. Yes.
10 Q. Okay. I want to refer you, first of all, to pages... For people
11 who have Volume 10, My Lords, it's page 121 and 126. Why
12 don't you give the witness that, so we'll all have the same
13 volume that we're looking at?
14 A. What was the page again?
15 Q. 121. You were involved at that stage in a discussion with Mr.
16 Justice Nunn, and counsel for the defence, because of the
17 position you were adopting that you did not intend to call
18 Jimmy MacNeil as a Crown witness.
19 A. Right.
20 Q. And the court was asking why and so on. I want to direct you
21 to your remarks at the bottom of page 121. You say:
22
23 On the other hand, it is the duty of the Crown to call all credible evidence. Now on Thursday
24 night, without getting into the details, I had a discussion which told me that I preferred the
25 evidence of Donald Marshall, Jr. to that of James

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

A. Right.

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

A. Right.

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

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

That's what it comes down to.

A. Right.

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

1 A. Right.
2 Q. And this was after having spent a couple of hours with Donald
3 Marshall, which is the first time you've ever had the
4 opportunity to meet and discuss it with him, is that fair?
5 A. That's what I'm saying. I mean, of course, I had the
6 opportunity before...
7 Q. Yes, but I'm...
8 A. To speak with him, but...
9 Q. But this is the first time...
10 A. But that was the first time I took the opportunity, I suppose.
11 Q. And having done so.
12 A. Yes.
13 Q. You were telling the court that you had to decide which
14 evidence you preferred—MacNeil's or Marshall's.
15 A. Yes.
16 Q. And you made the assessment that you were going to prefer
17 Marshall's.
18 A. Yes.
19 Q. And not call MacNeil.
20 A. Right.
21 Q. Do you want to elaborate on that for the benefit of Your
22 Lordships, why you would...
23 A. Okay.
24 Q. Take that position?
25 A. Firstly, I think it's important to realize that here we are at the

1 third trial, and this is really going to be the last opportunity
2 to try to get to the truth, or as near to the truth as one could
3 get as to what actually happened that night. The first trial,
4 of course, had been a hung jury. The second trial
5 overturned on the question of self-defence.
6 The self-defence, of course, was the pivotal issue in
7 every trial but it was magnified here because the second
8 trial had been overturned on that issue. I think anyone
9 looking at this would recognize the inherent problem of
10 presenting a case where your two primary witnesses,
11 Marshall and MacNeil are at odds over the very nub of
12 evidence which is crucial to self-defence. That was my
13 thinking at the time. And what I'm referring to, of course, is
14 Jimmy MacNeil saying, in effect, that he and Ebsary had just
15 been pounced upon and Eb...and Marshall saying that there
16 had been a conversation and then they walked away and
17 then walked back again. That sequence and which sequence
18 you accept or you convince a jury to accept is crucial in
19 determining whether or not self-defence is a viable issue.
20 Now, I had...I had tried in two previous trials to
21 present the two of them, their evidence together. And, who
22 knows, I mean, what goes on in the jury room. But the
23 probability was real to me that this conflict in the evidence
24 may be really what would cause this jury most trouble.
25 12:10 p.m.

1 Q. You told...
2 A. So...
3 Q. I'm sorry.
4 A. So I made the decision, after talking with Donald, I suppose
5 a better way for me to have expressed it to Mr. Justice Nunn
6 would have been that I'm going to put all my eggs in this
7 basket and go for it and demonstrate to the jury, at least
8 through cross-examination, if I wasn't able to budge Jimmy
9 MacNeil and in view of Miss Edwardh's cross-examination I
10 probably wouldn't have been able to budge him on that, that
11 I was going to demonstrate that the Crown wasn't accepting
12 that there was no prior conversation prior to the stabbing.
13 That was the rationale, now he ordered me to call MacNeil
14 and I presented them as I had before pretty well and there
15 was a conviction. And it probably, you know, that was a
16 good thing.
17 Q. The evidence that you called from Donald Marshall was
18 being presented by you as evidence that you believed to be
19 the truth.
20 A. Yes.
21 Q. Thank you. Let me take you the evidence then, if I can, at
22 least in part. At page 37 of Volume 10, would you turn that
23 up. Volume 9, sorry, Volume 9, page 37.
24 A. Volume 9.
25 Q. Page 37.

1 A. Okay.
2 Q. This is the evidence of Mr. Marshall on direct. I'm just going
3 to highlight certain parts of the evidence.
4 A. Yes.
5 Q. Around page...line 10 you're asking him if he had known or
6 how he met Sandy Seale in the Park and if he had known
7 him before. And he said he met Sandy Seale around the
8 middle of the Park on that night of the occurrence.
9 A. Yes.
10 Q. And then down at the bottom of this page, you were asking
11 him "What, if anything, did the two of you decide to do?"
12 And this is what Mr. Marshall said, "We didn't go our
13 separate ways. I was down there to see if I could find my
14 Indian friends down there, and I told him I was going to try
15 to scrape up some money for later on." And you asked,
16 "What did you want the money for?" "Probably head out to
17 the bootleggers or something." Then you said, "How did you
18 intend to get the money?"
19 A. Yes.
20 Q. "Like I usually do. I bum it down there. Like I bum it off
21 people. " "You're saying you usually bum the money off
22 someone in the Park?" "Yes." Then he goes on to talk about
23 meeting or being called up to Crescent Street by two people
24 and asked to give a cigarette. Do you see that? That
25 continues on at page 38.

1 A. Yes
2 Q. And over to 39 he's asked who these two people were and
3 he says, "Terry Gushue and Patricia Harriss."
4 A. Yes.
5 Q. And on page 40 he says, around line 17 and continuing, that
6 he was with Gushue and Harriss for a couple of minutes,
7 meantime he has said that Sandy Seale had gone up and met
8 these other two people.
9 A. Yes.
10 Q. Now on page 43. He's now joined up with Seale and these
11 other two people.
12 A. Yes.
13 Q. He says he started to talk to the older person and he
14 describes, starting on page 15, that older person. "At the
15 time he was about 50 years old or whatever, he had white
16 hair, glasses on and he had some kind of a navy coat on,
17 some kind of a cape he had on at that time." And then over
18 on page 44, on line 7, "Can you tell us what the conversation
19 was?" Answer,
20
21 I asked him about his coat he had on. I told
22 him, 'You look like a priest with that coat
23 on,' and he told me he was a preacher or
24 something. I don't know. And he said that
25 he was a sea captain and he was a priest, of
some sort of a priest. I don't know what
kind of a priest he was, and we were
talking.

A. Yes.

Q.

> Q. What were you talking about? What type of things were you talking about?
>
> A. I asked him where he was from and he told me he was from Manitoba. Right. And he asked me if there were any woman, women around the Park area, and at that point I hung around the Park for about three years at that time and I told him there were all kinds of women.

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

> When Mr. Ebsary asked him if he wanted everything he had I guess he didn't say anything.
>
> Okay. What happened then?
>
> He put his hand on his shoulder. Mr. Ebsary put his hand on Seale's shoulder and at the first time when that happened I thought he

1 punched him in the stomach, but
apparently he stabbed him in the stomach.
2 And he goes on again to explain that everything happened
3 very quickly.
4 A. Yes.
5 Q. And he says that two or three times. That was the evidence
6 that was given. You didn't apply to cross-examine him at
7 that stage on the statement he had given to the RCMP in
8 Dorchester.
9 A. That's why I was just thumbing ahead. See, I've done this
10 five times and I can't recall whether at Ebsary 3 whether I
11 cross-examined him on the statement on that occasion or
12 didn't.
13 Q. You didn't.
14 A. If you say I didn't.
15 Q. You didn't.
16 A. Fine.
17 Q. Now again...
18 A. And I explained before why sometimes I did and sometimes
19 I didn't.
20 Q. But I just want to get out the fact that this evidence was
21 presented through Mr. Marshall or by Mr. Marshall through
22 you and it was being presented as a plausible and a credible
23 story.
24 A. Yes, but it's being presented with the knowledge, you know,
25

1 I think it's stronger than an expectation that he's going to be
2 confronted with that statement, you know, for strategic
3 purposes in the trial I left it to Winterman to do at that
4 time.
5 Q. Yeah. I understand that. But my question to you is that you
6 presented the evidence.
7 A. Yes.
8 Q. And you told the Judge and subsequently told the jury that
9 you considered it credible evidence and plausible, his story
10 as a plausible story.
11 A. The gist of what I told the Judge and the jury was that I
12 believed him on those parts of his evidence which bore on
13 the defence of self-defence. Now, unfortunately we don't
14 have the same number system, but a subsequent discussion
15 on page 481 of the transcript, line 14.
16 Q. Okay. Well, you can find that in Volume 9 because the
17 numbers are here as well.
18 A. Okay. Sorry, I didn't notice that.
19 COMMISSIONER EVANS
20 231 or 481.
21 MR. EDWARDS
22 481. Yes, and it will be 231 on the exhibit.
23 A. And that's just an example I've been able to find here. You
24 see line 14 where we're discussing, you know, what I'm
25 believing and what I'm disbelieving and I make it clear on

1 the parts of his evidence which bear directly on the defence
2 of self-defence I believe Marshall over James MacNeil. I, at
3 no time, in that trial indicated that I was abandoning the
4 robbery theory, although Mr. Wintermans apparently took it
5 that I was, but I wasn't. And, you know, that's my position
6 on it.
7 Q. Well, did you believe Marshall when he testified that, "I
8 was...Seale and I talked about getting some money, we were
9 going to bum it."?
10 A. No. I believed there was more to it than that, and I believed
11 that that was going to come out in cross. And I believed
12 that I was going to be putting the robbery theory to the
13 jury.
14 Q. Did you think it was believable when he said, "We come up
15 to these fellows and I said, 'You look like a priest.'"?
16 A. Yes.
17 Q. And that these fellows told him they're from Manitoba.
18 A. Ebsary is capable of saying something like that. I didn't
19 have any difficulty with that. I believed the prior
20 conversation.
21 Q. Yeah. Okay. And that they asked about...
22 A. He was capable of saying something...
23 Q. ...are there women down in the Park and this sort of thing?
24 A. Pardon me?
25 Q. Talked about whether there were women down in the Park,

1 Ebsary...

2 A. I believe that.

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

5 A. Okay.

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

9 A. Yes.

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

11

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

18 And he asked you to repeat it.

19 A. Right.

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

23

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

Q. That there was a robbery.

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

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

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

A. Right.

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

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

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

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

Q. Did you believe that?

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

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

A. Not recently.

1 Q. Recently. Have you ever looked closely at the statements
2 that he gave to the police?
3 A. I think what...maybe we can save time, you're asking me
4 whether his evidence has been consistent through the piece,
5 is...
6 Q. Yes.
7 A. Yeah.
8 Q. I'm suggest...I'll suggest to you that what, the evidence that
9 you presented to the Supreme Court in Ebsary 3.
10 A. Yes.
11 Q. Of meeting two people on Crescent Street.
12 A. Yes.
13 Q. Talking about them looking like priests, being told they're
14 from Manitoba.
15 A. Was totally consistent with what he had said on other
16 occasions, yes.
17 Q. Totally consistent. And totally consistent, also, I can show
18 you if you like...
19 A. Yes.
20 Q. With what he told the police immediately after the event.
21 A. Yes. And, of course, that led to the big to-do about my
22 wanting to re-direct him on the 1971 transcript when
23 defence counsel was, in effect, arguing recent fabrication by
24 Mr. Marshall.
25 Q. But in your factum that you filed with the Appeal Court, and

1 I'd liked to show you, I'd like you to quote from it. It's in
2 Volume 4 at page...I just...on page 41.
3 A. Right.
4 Q. The first full paragraph, you say this. "Instead he told the
5 police and his lawyers about an attack by two priests from
6 Manitoba who did not like niggers or Indians."
7 A. Yes.
8 Q. "It is not difficult to speculate upon how believable either
9 the police or defence counsel found that story."
10 A. Yes.
11 Q. But that's the same story told in, you know, in essence about
12 two people from...looked like priests from Manitoba that
13 asked him about women, they had a talk...
14 A. Uh-hum.
15 Q. They walked away and they come back and stabbed Seale.
16 A. Yes.
17 Q. Is that any more plausible than what he told in the first
18 instance?
19 12:30 p.m.
20 A. I mean...
21 Q. That's the evidence he gave at Ebsary 3.
22 A. Maybe I had lost you, but what I was arguing was that
23 evidence, which is on the prior conversation, should be
24 accepted and that was consistent. My point of departure was
25 on the robbery. When I say that "he wasn't being forthright",

1 I'm saying by giving a story of a motiveless attack, the
2 robbery provides the motive for the attack.
3 Q. But the... What part of Marshall's evidence given at Ebsary 3
4 do you say is not believable?
5 A. Well, see, I haven't read that through but the absence of the
6 admission that there was a robbery in progress.
7 Q. Well, do you accept that they met and they just had a
8 conversation?
9 A. Yes.
10 Q. And do you accept that Ebsary and MacNeil then walked
11 away?
12 A. Yes, and I argued that forcefully, I think, yeah.
13 Q. And that they were called back?
14 A. Yes.
15 Q. And that they came back.
16 A. Yes.
17 Q. And that.. What do you say happened after that?
18 A. What I say happened after that was that Marshall grabbed
19 hold of Jimmy MacNeil, put his arm up behind his back. I
20 don't accept his story when he says that he merely supported
21 Jimmy MacNeil when Jimmy stumbled on the curb. I find
22 that impossible. That at the same time he was doing that, Mr.
23 Seale was saying, "Dig, man, dig," to Roy Ebsary and got the
24 tragic response.
25 Q. And if that had been told to the police...

1 A. Right.
2 Q. Are you saying initially that if he had said, in addition to
3 what he told the police, "We called, before they stabbed us,
4 these fellows walked away and we called them back and said,
5 'Dig, man, dig,' and they stabbed Seale."
6 A. Uh-huh.
7 Q. That that would have made all the difference? People
8 would...
9 A. Well, that's not all he said. He said, in his statement, they
10 knew then that we meant business. You know, again, we're
11 getting...
12 Q. But you yourself...
13 A. Yes.
14 Q. And before the Supreme Court of Nova Scotia introduced the
15 evidence through Marshall, that he gave that statement for
16 one reason and one reason only, and that was to get out of
17 jail. He was telling them what Ebsary had said.
18 A. You're talking about when I re-directed him...
19 Q. Yes.
20 A. On Ebsary 3.
21 Q. Yeah.
22 A. I asked him those questions. I let him explain, yes.
23 Q. He doesn't talk...
24 A. If I may. In view of that re-direction and having the benefit
25 of analyzing it now, it would have been more appropriate for

1 me in that circumstance to do the Section 9(2) myself and I
2 take the criticism for not doing that. But, you know, that was
3 not an easy trial and we all have them and that was a
4 decision that I made during the course of the trial. It was not
5 a perfect game.
6 Q. In the trial in Ebsary 3, Mr. Marshall relates a story that
7 when they called back what happened is that Ebsary placed
8 his hand on Seale's shoulder, gave a motion that could be
9 consistent with punching him in the stomach...
10 A. Yes.
11 Q. Or stabbing him.
12 A. Yes.
13 Q. And, at that time, he and MacNeil got into a, he grabbed
14 MacNeil. There's nothing about stumbling off the curb.
15 A. Uh-huh.
16 Q. Is that not a plausible story?
17 A. It may be. I don't accept it and perhaps I've fallen into the
18 trap of others who have been associated with this case for
19 many years. I have an opinion now on what happened and I
20 just can't stand back from it. I gave you my view of what I
21 thought happened.
22 Q. Are you saying, and is it your belief, that Junior Marshall
23 should be blamed in some measure for what happened here
24 because he did not tell the police when he gave his
25 statements immediately after the event and on May 30th,

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

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

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

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

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

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

1 A. But see, what you're doing, with respect, is isolating that bit of
2 evidence in Ebsary 3 and saying it's the same story. So if it's
3 plausible then, it was plausible in '71. The difference is that
4 it was being presented in a trial where I knew that the
5 robbery evidence was going to come out. And, therefore, I
6 don't accept that it is fair to say you've got the two stories,
7 unless you look at the circumstances surrounding each. In '71
8 there was no hint of a robbery. In Ebsary 3, his statement
9 was put to him as it was on every occasion in the past.
10 Q. That same statement, the one that you introduced evidence
11 through him to show it was, he was only telling the police
12 what he understood Ebsary had already told them.
13 A. Yes.
14 Q. And he was giving it to get out of prison.
15 A. Yes.
16 Q. That statement has been used to convict Marshall of robbery,
17 hasn't it? In the sense that we've used that phrase this
18 morning. That's hung around his neck like a millstone, that
19 statement.
20 A. There's no question that that statement has haunted him.
21 And I don't argue that.
22 Q. And no one has ever. Yet there's never ever been, subject to
23 what we've been doing here...
24 A. Yes.
25 Q. There's never ever been a voir dire to determine, first of all,

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

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

Q. Okay.

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

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

1 A. Yes.
2 Q. He was telling something that he understood Ebsary had
3 already said.
4 A. Yes.
5 Q. And it was to get out of jail. When you used that statement in
6 the previous trials to impeach him...
7 A. Yes.
8 Q. Did you bring that out?
9 A. I don't know. I'd have to check the transcript. I don't think I
10 did.
11 Q. And who would be there to protect him then?
12 A. No one. No one. And that's a valid criticism. Perhaps I
13 should have brought it out. But in Ebsary 3, it was brought
14 out and I think if anybody looked at it, whether you agree
15 with the robbery theory or not, that was a proper item to put
16 before the jury so they could consider what weight they were
17 going to give to Marshall's evidence.
18 MR. MACDONALD
19 Thank you, Mr. Edwards.
20 COMMISSIONER POITRAS
21 Just a question, Mr. MacDonald. Assuming for a moment
22 that it is still possible today to query whether Marshall was
23 involved or not in an attempted robbery.
24 MR. EDWARDS
25 Yes.

COMMISSIONER POITRAS

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

MR. EDWARDS

That would destroy that theory.

COMMISSIONER POITRAS

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

MR. MACDONALD

Those are all the questions I have, My Lords.

MR. CHAIRMAN

We'll adjourn until 2:15.

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

2:15 p.m.

MR. CHAIRMAN

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

MR. MacDONALD

Yes, My Lord.

MR. CHAIRMAN

Before we start upon cross-examination.

COMMISSIONER EVANS

If any.

MR. CHAIRMAN

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

MS. DERRICK

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

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

20 you were giving just before lunch and I want to ask you

21 concerning the decision, let's say, that you made when it

22 came to the Ebsary number 3 trial. As I understand it you

23 said that with respect to Mr. MacNeil and Mr. Marshall's

24 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.

A. Yes.

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

A. Yes, okay.

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

A. No, that's right.

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

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

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

A. No, what I'm saying is that in November '71 this other factor intervened at that point and, you know, we had a different 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 got 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

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.
4 MR. EDWARDS
5 I'm not going to mention any names.
6 MR. PINK
7 So that names aren't mentioned and the specifics.
8 MS. DERRICK
9 No.
10 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.
14 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?

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.
6 MR. CHAIRMAN
7 Before you leave that, you'll have to satisfy our curiosity
8 and tell us what happened on the second trial?
9 MR. EDWARDS
10 Well, on the...
11 MR. CHAIRMAN
12 Not that it's relevant, but...
13 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.
19 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 completly 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.

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 should a file be turned over the defence for
7 perusal without the file having first been checked to ensure that it does not contain any
8 confidential or extraneous material or police
9 reports containing expressions of personal views or opinions of the police investigator which
10 ought not to be disclosed to the defence.
11 A. Well, that seems to leave the discretion in the prosecutor to
12 determine whether or not the personal views or opinions
13 ought or ought not to be disclosed. So if that interpretation
14 is correct it wouldn't cause a problem.
15 Q. Wouldn't cause a problem for you.
16 A. No.
17 Q. Is that correct?
18 A. Right.
19 Q. And I take it, then, there would be some circumstances
20 when you would consider it acceptable to hand over a report
21 that would have some opinions of the investigating officer.
22 For...
23 A. Yes, I...I don't like speaking in absolutes and I would be
24 very uncomfortable with the blanket structure saying you
25 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

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

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

A. Yes.

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

A. Yes.

Q. Is that...

MR. PUGSLEY

I'm sorry, who was that?

MS. DERRICK

Mr. McGee, Wayne McGee.

Q. Is that something which causes you concern?

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

Q. Does it cause you to...

A. It's poor police procedure.

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?
3:15 p.m.
6 A. Wheaton and Carroll.
7 Q. I see. Do you have any view that there may have been a
8 serious worry underlying the joking exterior of his inquiry?
9 A. Oh, he was seriously concerned about where the investigation
10 was going but with John MacIntyre, I think it was more of a
11 concern about being proven wrong. I don't think there was
12 any real apprehension by him that he would, in fact, go to jail
13 as a result of this.
14 Q. I see.
15 A. That was my impression.
16 Q. But there may have been a real apprehension that he would
17 be shown to have been wrong in 1971?
18 A. There may have been that concern but, again, I mean that's
19 speculative. That's my personal impression.
20 Q. That was your impression from knowing him.
21 A. Yes. As I referred to in my evidence, my dealings with John
22 MacIntyre in relation to this matter and watching him on the
23 witness stand is that he felt there was only one right answer
24 here and that's that Donald Marshall was guilty.
25

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 an 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

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

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

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

A. No.

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

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

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

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

Q. But if you had, Mr. Whalley or Mr. MacIntyre or Mr. Urquhart could have picked up this omission when they 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.

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.
13 COMMISSIONER EVANS
14 What question were you going to ask him?
15 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

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.

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

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?
12 MR. PINK
13 I'm not sure how this witness can testify as to what would
14 have have exorcised somebody else.
15 MS. DERRICK
16 Well, I'm asking him for his impression.
17 CHAIRMAN
18 I was about to interject. The only person so far I could see
19 who would appear to be somewhat upset is Gordon F. Coles, Q.C.
20 and he...
21 MS. DERRICK
22 Well, he's the Deputy Attorney General, certainly, and on
23 that basis I would suggest represents the Department.
24 CHAIRMAN
25 You mean because Mr. Coles is upset then everybody else is

upset.

MS. DERRICK

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

CHAIRMAN

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

MS. DERRICK

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

> "Was it not the fall-out in the election campaign that caused you to be upset that I had given the report to Aronson?" "Did the potential for adverse reaction cause you to phone me personally on July 21st after you'd been visited by Michael Whalley?" "Did possible public reaction have anything to do with your 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.

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.
18 COMMISSIONER POITRAS
19 Were the charges effectively dropped, Mr. Edwards?
20 MR. EDWARDS
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.

A. I would say.

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

A. What page?

Q. Sorry, page nine.

A. Yes.

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

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

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

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

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

A. Yes.

Q. From the Department.

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

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

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

A. Yes. I suppose that's fair.

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

A. Yes.

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

A. Uh-hum.

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

A. That's correct. I mean it would be convenient for me to take that out and say, well, it's all Gordon Coles' fault. The fact of the matter is that I, in effect, dug in on January 18th before 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.

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

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 you 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,

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

A. A juror said that.

Q. Yes. Allegedly.

MR. CHAIRMAN

I will not rely on that, very accurate.

COMMISSIONER EVANS

Does it give the name of the juror?

MS. DERRICK

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

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

A. I didn't hear that before.

Q. Now, assuming that this is accurate.

A. If true, that's the problem.

Q. If true. Yes, if true. But that's what I'm going to ask you to accept for the moment in answering my question. Does this 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.

1 MS. DERRICK

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.

5 MR. CHAIRMAN

6 Oh, yes.

7 MS. DERRICK

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.

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...

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

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
> believable either the police or defence counsel
21 > 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?

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?
You've reviewed the transcripts...
18 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

note.

A. Yes.

Q. If you like. It just says,

> When the accused was asked about the disposition of the $14,000 shares...14,000 shares (sorry), he was well aware of the sense in which the term was used and that it was the disposition of the equities represented by the 14,000 shares that was in question and not the disposition of the original share certificates themselves. In the result the accused knew his answer was false.

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

A. I see.

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

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

MR. CHAIRMAN

This opinion was given after the reference.

MR. EDWARDS

Yes.

MR. CHAIRMAN

And after the Court of Appeal had made certain findings.

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

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

MS. DERRICK

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

MR. PUGSLEY

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

MR. CHAIRMAN

Anything that's designed to expedite the process.

MR. PUGSLEY

It's designed to expedite the process.

MR. CHAIRMAN

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

INQUIRY ADJOURNED - 5:05 p.m.

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