

MR. GIOVANNETTI, EXAM. BY MR. ORSBORNINQUIRY RESUMES - 11:54 a.m.

1 MR. CHAIRMAN

2 Mr. Orsborn.

3 MR. ORSBORN

4 The next witness will be Mr. Dana Giovannetti. Mr.
5 Giovannetti's name does not appear on the witness list, however,
6 counsel have been advised that he will be called. I do not
7 anticipate that his testimony will be lengthy. However, I'm
8 advised that Mr. Giovannetti is in the process of preparing a
9 number of arguments for Court. I think he has a couple of appeals
10 scheduled with the next couple of days and it would be requested,
11 if at all possible, to have his testimony completed by lunch time.
12 If it may mean sitting beyond 12:30, I would ask Your Lordships
13 to...

14 MR. CHAIRMAN

15 Do our best.

16 MR. DANA WILLIAM GIOVANNETTI, duly called and sworn,
17 testified as follows:

18 EXAMINATION BY MR. ORSBORN

19 Q. Mr. Giovannetti, could we have your full name for the
20 record, please, and be so kind as to spell it for us?

21 A. Dana William Giovannetti, G-I-O-V-A-N-N-E-T-T-I.

22 MR. CHAIRMAN

23 E-T-T-I.

24 MR. ORSBORN

25

1 Q. And do I understand that you're presently employed with
the Department of the Attorney General?

2 A. Yes.

3 Q. In the capacity of solicitor.

4 A. Yes.

5 Q. How long have you been in that capacity, sir?

6 A. Since 1978.

7 Q. When were you admitted to the bar?

8 A. '77.

9 Q. So your entire working career has been with the
10 Department?

11 A. No, I was in private practise from June of '77 until December
12 of '78.

13 Q. I see. And, do I understand that in your capacity as solicitor
14 with the Department you assume responsibility
15 predominantly for appellate work?

16 A. That's right.

17 Q. And, do I understand that in the course of your work you
18 were responsible for carriage of the appeals arising out of
19 the various Ebsary trials?

20 A. Yes. And do I understand in particular that you were
21 responsible for the carriage of the appeal arising out of the
22 third Ebsary trial?

23 A. Yes.

24 Q. And my understanding is that that third trial was conducted
25

MR. GIOVANNETTI, EXAM. BY MR. ORSBORN

in January of 1985 and that the appeal itself was argued in
1 early 1986, would that be correct?

2 A. The latter is correct. I don't...

MR. CHAIRMAN

3
4 Sorry, I missed the dates. Would you try the dates on me
5 again?

MR. ORSBORN

6
7 The trial, My Lord, according to our records was, I believe,
8 in January, 1985.

MR. CHAIRMAN

9
10 Yes.

MR. ORSBORN

11
12 And the reasons for judgement in the...in the subsequent
13 appeal indicates that it was argued, I believe, on January 13th,
14 1986. So, we're looking in '85-86 time span.

15 A. The appeal was argued in January '86. I don't recall the
16 trial.

17 Q. Yes. That, as I understand it, that particular appeal from the
18 third trial was an appeal taken by Mr. Ebsary against
19 conviction and sentence.

20 A. Yes.

21 Q. And...

MR. CHAIRMAN

22
23 What was he convicted of?
24
25

MR. ORSBORN

1 Manslaughter, I believe.

2 MR. CHAIRMAN

3 All right.

4 MR. ORSBORN

5 Q. And do I also understand that the appeal as to conviction
6 was eventually dismissed but that the sentence was reduced
7 from three years to one year?

8 A. Yes, the, ah...there was also a leave application to the
9 Supreme Court of Canada.

10 Q. Yes, following that.

11 A. Yes.

12 Q. That was denied, I believe, was it?

13 A. That was denied, yes.

14 Q. Do I understand that prior to the time that this third or that
15 this particular Ebsary appeal was to be argued that you
16 became aware of the constitution of the panel of judges that
17 were scheduled to hear the appeal?

18 A. Yes, yes.

19 Q. How did you become aware of that?

20 A. The appeal was originally set down to be heard on Monday,
21 I think, December 2nd. I was in court on the previous
22 Friday, on an unrelated matter, and at the conclusion of that
23 case I mentioned to the...or I asked the Court Clerk who was
24 on the panel for Monday and he told me.

25

Q. What were you told?

1 A. I don't remember the list he gave me, but it included the
2 name of Mr. Justice Pace.

3 Q. And what was your reaction to that?

4 A. I was...I was immediately concerned about that.

5 Q. Why?

6 A. Well, I knew that Justice Pace had been Attorney General in
7 the early seventies and that his sitting on the reference had
8 been a matter of concern to a number of people and so this
9 was the climate in which I received that information. I
10 think I shared what I thought was the concern of many, that
11 there may be the appearance of possible bias or
12 apprehension of bias.

13 Q. What, if anything, did you do about that concern?

14 A. Well, I thought about it for, I think, a few hours and my
15 concern just kept growing. I phoned Frank Edwards, the
16 previous witness here. He had been the prosecutor in the
17 case, so that's one reason to phone him, and also I knew that
18 he had argued the reference case and that it was my
19 understanding there was no objection at that...in that case to
20 Justice Pace sitting on it and I wanted to discuss that with
21 him and to get his views about the appeal that was coming
22 up on Monday.

23 Q. And did he give you his views?

24 A. Yes. I thought I knew the answer and it turned out I did.
25

1 That he told me he did not object at the reference simply
2 because it hadn't occurred to him, in fact, he didn't know
3 that Justice Pace had been Attorney General at the time of
4 the original Marshall trial, and his view with regard to what,
5 if anything, I should do or what my position ought to be was
6 that if, indeed, Justice Pace was on the panel when the
7 judges came out on Monday morning that I should object on
8 the basis that...not of actual bias, and I think it's important
9 to make that clear, but on the basis of an apprehension of
possible bias.

10 Q. Yes. And, did you yourself reach the conclusion that this
11 application should be made on the Monday?

12 A. Eventually, eventually. I didn't reach it quickly. I kept
13 considering it.

14 Q. Yes.

15 A. And turning it over in my head, but eventually I did reach
16 that conclusion, yes.

17 Q. I believe that Mr. Al Nicholson was acting for Mr. Ebsary at
18 the time. Did you discuss the matter with him?

19 A. I'm pretty sure I called him. I can't remember that vividly,
20 but I think I did call him at some point. I don't remember
21 exactly when, simply to tell him what I had learned, what
22 my concern was and what my position would be.

23 Q. Who was your superior in the Department of Attorney
24 General? Who was your superior at the time?

25

A. Gordon Gale.

1 Q. I see. Did you discuss the matter with him or seek his
2 instructions?

3 A. No, I didn't.

4 Q. Why not?

5 A. I ultimately phoned the Attorney General himself. I thought
6 that this was an unusual position that I was going to have to
7 take and an important one, I guess I can use that word. So,
8 in one sense I wanted to get my instructions from the
9 highest source. I also, I think, and it's hard to reconstruct
10 this, but I think I thought that if I talked to Gordon Gale
11 about it, I'd simply end up talking to the Attorney General
12 anyway or at least someone higher up.

13 Q. Did you discuss the matter with Mr. Coles?

14 A. No, not then and I haven't discussed it at any time with him.

15 Q. Why not?

16 A. It's difficult to say. I...in the case of Gordon Gale I probably
17 didn't even think of getting my instructions from him. In
18 the case of Mr. Coles I actually did give it serious thought
19 and decided that I wouldn't, that it was my view, whether
20 it's right or not I don't know, that there was a prior
21 association between him and Justice Pace and I felt that at
22 the very least, given the nature of the submission I was
23 making, and given that prior association, that it might be
24 uncomfortable for him or might present some kind of

25

MR. GIOVANNETTI, EXAM. BY MR. ORSBORN

problem. And, so I did think about it and decided not to.

1 Q. Was this a new venture for you having to consider an
2 application in respect of perceived bias?

3 A. I had never done that before, I mean.

4 Q. I'm sorry.

5 A. I had never done it before.

6 MR. CHAIRMAN

7 Who was the Attorney General at the time, Mr. Giovannetti?

8 MR. GIOVANNETTI

9 Ron Giffin.

10 MR. ORSBORN

11 Q. And did you subsequently, prior to speaking to the Attorney
12 General, did you subsequently form in your own mind an
13 opinion on what you should do?

14 A. Yes. I think it eventually became clear to me that the right
15 thing to do was to make that submission on Monday
16 morning if, in fact, Justice Pace was on the panel.

17 Q. But was this all on the Friday that you found out that he was
18 sitting?

19 A. Yes, I'm a little unclear as to times throughout. I don't
20 recall exactly when I talked to the Attorney General. It
21 might have been on that Friday later in the evening or it
22 might have been on the Saturday morning. But it was in
23 that time frame.

24 Q. You did, in fact, communicate with Mr. Giffin?
25

1 A. Yes, I did, yes. I telephoned him. I think I got him at his
2 residence and reviewed what had occurred and what I
3 knew, what submission I'd like to make and the reasons for
it and he instructed me to do that.

4 Q. Did you seek his advice or simply his instructions?

5 A. I think it would be fair to say that I simply told him this is
6 what I thought should be done and I don't remember any
7 long discussion about it. In fact, I think it was rather brief
8 that, well, I agree, those are your instructions. He also
9 suggested though that I call the Chief Justice of the Province,
10 Chief Justice Clarke, to advise him in advance that this
11 would be the Crown's position on Monday morning.

12 Q. This would be as a matter of courtesy, I take it.

13 A. I took it as a matter of courtesy, yes.

14 Q. And did you, in fact, phone Chief Justice Clarke?

15 A. Yes, I reached him on Saturday afternoon at his residence
16 and went through what had occurred. He said very little, I
17 think he might have thanked me for the call and asked me
18 where I'd be over the weekend. I gave him my home phone
19 number and the work phone number and that was it. He
20 didn't indicate he'd call or anything. He just asked where I'd
21 be.

22 Q. And what happened next as far as the matter was
23 concerned?

24 A. Well, again I...and I'm not sure if it was Saturday or Sunday
25

1 morning but I seem to recall Sunday morning that I was at
2 the office and Chief Justice Clarke called and advised me
3 that the case would not be heard on the Monday. That there
4 would be a new panel. That Justice Pace would not be
5 sitting on the case. He didn't identify who would be. And,
6 that a new date would have to be set, and that's all.

7 Q. I see. So, on Monday you went to work and didn't have to go
8 to Court.

9 A. That's right.

10 Q. Did you advise Mr. Gale of what had happened?

11 A. Mr. Gale?

12 Q. Yes.

13 A. At that point I don't think I had any conversation with him.

14 Q. And I take it from your earlier testimony you didn't advise
15 Mr. Coles either.

16 A. No.

17 Q. Was it a subject of discussion with your colleagues?

18 A. On the Monday?

19 Q. Yes.

20 A. It probably was. I don't recall any specific discussion, but I
21 imagine people wondered why I wasn't in Court and what
22 had happened. This was a important case and people would
23 probably observe that I wasn't there. I don't recall any
24 specific discussion but I'm sure it was the subject of
25 discussions at coffee break or whatever.

1 Q. Did anything then transpire to your recollection about the
2 matter on the Monday?

3 A. No.

4 Q. Anything happen on the Tuesday?

5 A. Yes. Tuesday morning at...shortly after nine o'clock I
6 received a call and the lady on the other end asked me if I'd
7 hold for Justice Pace and I did and he came on the line
8 shortly and asked me if I was free sometime that day to
9 meet with him. I said I was and he said...I said I was free at
10 any time, and he said, "Would you come over now?" and I
11 said, "Yes," and I did.

12 Q. Do you have any idea what he wanted?

13 A. He didn't say what he wanted. I had an idea what he
14 wanted. I had a gut feeling that he would call me. I don't
15 think I can explain it. It was...I was surprised on the
16 Monday when I didn't hear from him and to have heard
17 from him on the Tuesday morning surprised me because I
18 thought I'm not going to hear from him, having not heard
19 from him right away. I can't really explain this. I expected
20 that I would hear something from him that he would react
21 to what had occurred.

22 Q. I see. And did you, in fact, go to see Mr. Justice Pace on the
23 Tuesday?

24 A. Yes, I went over

25 Q. Do you know have a recollection of meeting with him?

A. Yes, yes.

1 Q. Can you give us your recollection, please, as best you can?

2 A. I had about a half hour meeting with him. As I say, it was
3 about 9:30 to 10:00 in the morning.

4 Q. Anybody else present?

5 A. Nobody was present except the two of us.

6 Q. And it was in his chambers?

7 A. It was in his office, yes.

8 Q. His office, yes. Okay.

9 A. When I first went in he, I have a good recollection of this,
10 the first question that he asked me is, "Tell, Mr. Giovannetti,
11 doesn't the accused still have the presumption of
12 innocence?" I don't say that this or anything I attribute to
13 him is an exact quote, but it's pretty close, that statement.
14 He might have said, "Enjoy the presumption of innocence,"
15 for example. I responded to that, I thought that was still
16 pretty good law and I should say that I think he asked the
17 question a couple of times. When I first sat down, I was
18 shown to the chair, and he remained standing and not right
19 over me, a number of feet away, but I clearly felt
20 uncomfortable. I think the distance was perhaps the same
21 distance between us and the same arrangement. And, with
22 that question and with him standing and the expression on
23 his face and tone of voice, I felt pretty uncomfortable by
24 this, and I...

25

1 Q I'm sorry. How would you describe his expression and tone
2 of voice?

3 A. His tone of voice was loud. His expression looked to me to
4 be angry. It was set. He was...it was more than eye contact.
5 I felt I was being stared at. He was motionless and I
6 thought I was about to be cross-examined.

7 Q Yes.

8 A. So, what happened is I stood up and said that I was
9 uncomfortable with somebody standing like that and looking
10 down at me and whatnot, and he took a seat behind his desk
11 and I sat back down and he asked the question again about
12 the accused having the presumption of innocence and I had
13 given my answer. Then the conversation, it was clear that
14 what he was getting at is, and I don't remember the exact
15 words he used, but he began to...he began to question me in
16 a way and it was clear that to me that he was under the
17 impression that I was of the view that he was actually bias
18 with respect to hearing this Ebsary case. And so I launched
19 into an explanation of, in fact, what had occurred and much
20 as we've done it today.

21 Q Your explanation was that you were concerned simply about
22 the perception?

23 A. Yes. And, that that's the reason I phoned the Chief Justice to
24 advise him out of courtesy that we intended to make that
25 submission on the Monday morning. To continue, it was

1 clear that he wasn't accepting this. As the conversation
2 continued we seemed to simply go over and over the same
3 ground. He would listen to what I was saying but then right
4 away he would be telling me he wasn't biased or, you know,
5 trying to assure me of that and how could I think that, and
6 mixed in with this were other statements, such as that I had
7 gone behind his back in phoning the Chief Justice and that
8 he disapproved of that. I responded to that that I felt that
9 was entirely proper for me to have communicated with the
10 Chief Justice. And this just continued, I would say, for ten or
11 fifteen minutes. I know it seems like a short amount of
12 conversation for a long period of time but that conversation
13 kept going...we kept going over it and over it.

13 12:13 p.m.

14 Q. How would you describe the mood in this ten or fifteen
15 minutes?

16 A. It was, I was certainly uncomfortable. There's no question
17 about that. The description of the outset pretty well
18 continued through that part of the conversation. You know, I
19 thought his mood was aggressive and that he wasn't prepared
20 to accept what I had said, or my view of what had happened.
21 And I certainly felt that I was being accused of something
22 improper.

23 Q. Did that mood continue?

24 A. The mood never became friendly but I would think after
25

1 about ten or fifteen minutes the mood changed a bit and I
2 recall him making the statement at this time that he really
3 shouldn't be angry with me because he knew I was carrying
4 out the will or the whim, I don't recall which, of my political
5 masters. This was delivered, perhaps, in a somewhat quieter
6 tone and I reacted to that by telling him that it was insulting
7 to me and untrue. I did that because I interpreted the
8 remark to somehow imply that there was a political
9 motivation for what I did as opposed to simply acting as
10 counsel in the case.

11 Q. Had you discussed the matter with any politician other than
12 the Mr. Giffin?

13 A. No.

14 Q. In your conversation with Mr. Giffin was there anything that
15 would suggest to you that there was anything political about
16 the instructions that you received?

17 A. No.

18 Q. Had you ever previously been summoned by a judge for a
19 like conversation?

20 A. I have been in the judge's chambers but not for a like
21 conversation.

22 Q. Did you consider it appropriate that you should be so
23 summoned?

24 A. Excuse me?

25 Q. Did you consider it appropriate that you should be summoned

1 for a conversation of this nature?

2 A. I certainly don't now and at the time perhaps I shouldn't
3 have attended. I didn't, I don't think I really turned my mind
4 to it. When a Court of Appeal judge says, "Get over," I got
5 over.

6 Q. Could you have left? You say you got personally insulted
7 about this political comment. Could you have left at that
8 point?

9 A. Yes, I wish I had left. I, throughout the half hour, I don't
10 recall how many times, but I think two or three, possibly four
11 times I had attempted to wind up the conversation by making
12 comments like, "Well, we've been through this, I guess you
13 understand me and I understand you." Something that would
14 bring it to an end. At one point in time I actually stood up as
15 I was making a comment like that, but His Lordship paid no
16 attention to that, those cues, and I ended up sitting down
17 again. I guess today I would be a little more vigorous on
18 whether I should be walking out of the room or not. At that
19 time I didn't.

20 Q. You continue then your recollection that you have following
21 this comment about your political masters.

22 A. Well it was around this time that he made a comment that
23 struck me. He told me that he knew from the time that poor,
24 old Mr. Ebsary was charged that he could not be guilty.

25 Q. Do you have a present recollection of that statement?

1 A. I have a clear recollection of it. I'm not saying it's an exact
2 quote. It may have been that poor, old man couldn't have
3 been guilty. It may have been could not have been guilty or
4 couldn't have, but I am clear that it was from the time he was
5 charged and that he couldn't or could not have been guilty.
6 And I recall that well.

7 Q. Did you take from that that Mr. Justice Pace then had a view
8 as to Mr. Ebsary's guilt or innocence?

9 A. Well that was my interpretation. I responded to him that
10 that, in fact, sounded to me like actual bias, the very thing he
11 had been vigorously denying in his conversation with me.
12 And I think I said something like, "How could Your Lordship
13 allow yourself to be placed on the panel to hear this case
14 when you have that view, or you've known all along that he
15 could not be guilty?" That was really the substance of the
16 conversation on that topic. It was my impression at this time
17 that His Lordship thought that over. The conversation had
18 been moving back and forth fairly rapidly and at that point
19 he paused, he didn't say anything for perhaps 20 seconds,
20 perhaps half a minute, and I thought to myself, well, he's
21 thinking it over. However, when the conversation resumed it
22 wasn't responsive to that issue. And I didn't quiz him on it.

23 Q. Did you take from that comment about Mr. Ebsary, did you
24 take from that that Mr. Justice Pace had any view about Mr.
25 Marshall's guilt or innocence?

1 A. I don't believe Marshall's name was mentioned during the
2 whole conversation, at least I don't recall it and I didn't draw
3 any inference with respect to Marshall.

4 Q. Anything other about the conversation that you can recall?

5 A. There was more conversation and out of my view not very
6 important. The topics were, I think, that His Lordship was
7 quite upset with his colleagues on the Bench and His Lordship
8 also made, and this is in the concluding maybe five or ten
9 minutes, comments about the difficulties of being a judge, of
10 judicial life.

11 Q. And the meeting lasted about a half an hour I think you,
12 believe you said.

13 A. That's right.

14 Q. And I take it you then went back to your office.

15 A. I did.

16 Q. Did you discuss the meeting with any of your colleagues at
17 the Department?

18 A. Well, this was an event and I'm sure I discussed it with a
19 number of my colleagues, most likely those in the criminal
20 appeals division. I don't have a clear recollection of that but
21 I'm sure I did.

22 Q. Did you treat the matter seriously?

23 A. I thought it was serious. I wanted, I was anxious to get in
24 touch with the Attorney General to report back to him as soon
25 as possible and I eventually reached him. I don't recall

1 exactly when but that was very much in my mind that I
2 should advise him of what occurred.

3 Q. And you did so advise him?

4 A. Yes, as I say, I don't recall exactly when but I reached him
5 fairly soon, perhaps that day, perhaps the next, and...

6 Q. Do you recall if it was in person or by phone.

7 A. No, I recall it was by phone. I think he was at his residence.

8 Q. And what reaction, if any, did he have?

9 A. He simply listened to what I had to say. A number of times
10 he laughed. At one point, and I don't recall exactly what this
11 was in response to, he made the comment that, "Well, Len's
12 like that." And that was pretty well it.

13 Q. Did you discuss the matter subsequently with Mr. Gale?

14 A. I probably discussed it with Gale but not, I don't recall
15 discussing it with Gale. And if I did discuss it with him it
16 wasn't in the sense of, to a report, that I felt I had to report. I
17 probably discussed it with him like I probably discussed it
18 with a number of my colleagues.

19 Q. Was Mr. Coles present for any of those discussions to your
20 knowledge?

21 A. I've never had a discussion with him about these events.

22 Q. Did you consider making any kind of a response or comment
23 or complaint to any person or body?

24 A. I didn't, no.

25 Q. Did you make any note for your file?

1 A. When I couldn't reach Mr. Giffin right away I took out a piece
2 of paper and wrote down a series of quotes as exact as I could
3 remember of things that Justice Pace had said to me. And it
4 amounted to perhaps 12 or 15 statements and when I spoke
5 with Mr. Giffin I was working my way down that list. I don't
6 know if I read every one to him or not. I'm sure I got far
7 enough for him to get the gist of what had occurred. And
8 after that conversation, I'm sorry to say, I threw that piece of
9 paper away.

10 Q. If you took the matter seriously why did you not consider
11 complaining about it or reporting it more formally?

12 A. It never entered my mind. I certainly had no instructions to
13 do it and I never thought of a formal complaint.

14 Q. Did you have any occasion to discuss the matter since with
15 Chief Justice Clarke?

16 A. Yes, I met Justice Clarke, quite by accident, early in the new
17 year. I don't recall when. It was a business day. I was, in
18 fact, returning from the court, met him near the courthouse
19 and we had a discussion at that time.

20 Q. And do I take it that you, following this meeting with Mr.
21 Justice Pace, that, in fact, a new date was set for the appeal
22 and you, in fact, argued the appeal before a panel which, I
23 think, consisted of three judges?

24 A. Yes.
25

MR. GIOVANNETTI, EXAM. BY MR. ORSBORN

1 MR. ORSBORN

2 Those are my questions, thank you, My Lord.

3 CHAIRMAN

4 Any counsel have any questions relevant to their client?

5 EXAMINATION BY MS. DERRICK

6 Q. Mr. Giovannetti, my name is Anne Derrick and I represent
7 Donald Marshall, Jr. and I just have a few questions
8 concerning this. In this discussion that you had with Mr.
9 Justice Pace was there any discussion about the reference
10 appeal at all?

11 A. I don't recall the reference being brought up. I'm not
12 comfortable saying no because there was a lot of conversation
13 I don't remember the details of but I don't recall it.

14 Q. Is your recollection that the discussion you had with him was
15 focussed solely on his concern about the application you had
16 intended to make? Or do you have a recollection that it may
17 have covered other issues relating to the Marshall and Ebsary
18 matter.

19 A. No, I don't recall it relating in that broad way. I certainly
20 thought, the initial part of the conversation clearly appeared
21 to be with regard to the application that I had intended to
22 make and my conversations with the Chief Justice and the
23 latter part of the conversation dealt with other matters, but
24 not with Marshall, as I said, with his views of being a judge
25 and his views of his colleagues.

1 Q. Why did you have an expectation that Mr. Justice Pace would
2 react once you had contacted Justice Lorne Clarke?

3 A. I don't know if I can give you an answer that is very
4 satisfying. It was a gut reaction, an intuitive. I've argued
5 many cases in front of Justice Pace and I guess I've formed
6 the view that he's a fellow who shoots from the hip and I
7 expected a shot to be fired.

8 Q. So you had an expectation that this would upset him.

9 A. Yeah, I was surprised when he didn't call on the Monday.

10 Q. When you explained that you were concerned there might be
11 a perception of bias and that was the foundation for your
12 wanting him not to be on the panel, is it fair to say that he
13 wasn't at all sympathetic to that position?

14 A. He just wasn't accepting that that was, in fact, the view that I
15 would have put forward on Monday. It didn't seem to make
16 any difference that I was explaining it and ultimately ended
17 up explaining it several times. He wasn't appreciating any
18 distinction between an apprehension of bias, an actual bias
19 and I had the feeling when I explained it for the second or
20 third time that it's a waste of time explaining it again.

21 Q. And is it fair to say that he wasn't persuaded that an
22 apprehension of bias should have been a concern.

23 A. No, I'm not comfortable with saying yes or no to that. I don't,
24 I just don't think, he was quiet while I was giving the
25 explanation but I don't think he was listening to it or

1 evaluating it. It was just a pause while I talked and then he
2 continued.

3 Q. You got no sense, is it fair to say, that he would have
4 voluntarily removed himself from the panel.

5 A. No, certainly not.

6 Q. Did you get any impression that he actually wanted to sit on
7 the appeal and that's one of the reasons he was angry?

8 A. That's a very difficult question to answer as to whether he
9 actually wanted to or not. I guess it's fair to say I had that
10 feeling but he didn't say that.

11 Q. He gave you an opinion at some point that, I believe the way
12 you recollected it is that he knew from the time of poor, old
13 Ebsary being charged that he couldn't have been guilty. Some
14 words to that effect.

15 A. Yes.

16 Q. Is that correct? Did you have any sense that this opinion may
17 have predated the charging of Mr. Ebsary?

18 A. Well he said that he knew from the time Ebsary was charged
19 and so his actual words didn't convey the impression that he
20 was talking about in earlier time.

21 Q. Did any of the discussion that surrounded that issue leave you
22 with the impression that he may have formed this opinion
23 prior to the charging of Mr. Ebsary?

24 A. No.

25 Q. You subsequently discussed the matter with Attorney General

1 Giffin. Is it fair to say that you got the impression that Mr.
2 Giffin wasn't taking it seriously?

3 A. No, I'm glad you asked that. He laughed a number of times
4 but it's my impression that, with Mr. Giffin that's no
5 indication of how seriously he's taking it. In fact, he may well
6 be taking it very seriously and nonetheless laughing.
7 However, he did say that, "Well, Len's like that," which I
8 thought to be a casual observation.

9 Q. That's somewhat of a dismissive comment, is it not?

10 A. A bit, yeah.

11 12:29 a.m.

12 Q. And you were given no indication from Attorney General
13 Giffin that he was going to do anything about this?

14 A. There was no discussion about doing anything about it. It
15 hadn't occurred to me. I was...from my point of view Justice
16 Pace was not going to be on the Ebsary case. I wasn't
17 thinking in terms of inquiries and I had reported to the
18 Attorney General what occurred and that was it.

19 Q. But there was no indication from Mr. Giffin that he was
20 going to take the matter over and look into it further or do
21 something about it or make a complaint or...

22 A. None.

23 Q. Or anything of that nature. And, in fact, as far as you know
24 nothing further was ever done.

25 A. Now, I'm not aware of any complaint being made to anyone.

1 Q I'd like to just ask you one other question which is related to
2 this, although not referred to you by Commission counsel.
3 You wrote an opinion, and I'm not going...I don't think you
4 need to refer to it. In Volume 33 at page 570 of our
5 materials you wrote an opinion to Gordon Gale in October of
6 1985 concerning the issue of whether or not to lay perjury
7 charges against Mr. Marshall. Do you recollect...

8 A. Very vaguely.

9 Q And I'm not interested in asking you about that, but you do
10 at the end of your opinion talk about the Ebsary appeal from
11 the third trial and you are saying in your opinion, one final
12 factor,

13
14 A possible or possibly likely outcome of the
15 current appeal is an order for a new trial. My
16 research is at a preliminary stage, but I am not
17 optimistic because of Mr. Justice Nunn's poor
18 directions and the apparent attitude of the Court
19 of Appeal.

18 A. When was that written?

19 Q. This was written October 3rd, 1985.

20 A. That would be...was that between the two appeals?

21 Q. I believe that this must have been after the second...

22 A. After the second.

23 Q. ...trial. And I guess what I want to ask you about that is is it
24 fair to say from that comment that you thought these
25 factors, that is the trial judge's directions, and the Court of

1 Appeal's attitude at the reference, made it likely that Mr.
2 Ebsary would get a new trial from the Court of Appeal?

3 A. I certainly, on both of those factors thought that they would
4 be important, yes.

5 Q. So, in effect, is it fair to say that you felt that in October of
6 1985 that the Court of Appeal was predisposed in favour of
7 Mr. Ebsary?

8 A. I had formed the view during oral argument of the second
9 appeal that the Court had, at the outset of the oral argument,
10 some strong and set views about the case. To try to
11 recapture why I thought that exactly or exactly what those
12 views were would be very difficult. But I recall questions
13 that I felt uncomfortable with because I did not know where
14 in the case that was on the appeal, where the Judges...what
15 part of that case the Judges would be using to form their
16 view. And I think at one point in oral argument I said, and
17 this is not characteristic of me, "Well, show me in the
18 transcript where that evidence is?" And I had the feeling
19 that with the reference having occurred just a little while
20 before that that the reference evidence was in their mind
21 and I was thinking to myself, well, perhaps I should have
22 read...read everything I could about the reference. So I
23 think that's what I'm alluding to in that opinion although I
24 don't remember that opinion.

25

MR. GIOVANNETTI, EXAM. BY MS. DERRICK

1 MR. CHAIRMAN

2 This your opinion prior to the final appeal...

3 MR. GIOVANNETTI

4 Yes. This was...

5 MR. CHAIRMAN

6 On the manslaughter charge which, and the conviction was
7 upheld by the Court of Appeal of Nova Scotia.

8 MR. GIOVANNETTI

9 It was after the, yes, the second appeal.

10 MS. DERRICK

11 This, in fact, predated the third Ebsary trial, so I think what
12 Mr...

13 MR. CHAIRMAN

14 No, no, it was after.

15 MS. DERRICK

16 I'm sorry. It was after, yes. That's right. So it was after the
17 third trial and before the Court of Appeal decision.

18 MR. CHAIRMAN

19 Right.

20 MS. DERRICK

21 Q So you had some concerns, Mr. Giovannetti, about the basis
22 on which the Court of Appeal were deliberating or
23 considering.

24 A. No, I wouldn't...I think that's putting that a little strongly.

25 In fact, in fact, the decision after the first appeal was one

1 that I, in fact, agreed with. I thought they had reached the
2 right conclusion. I'm just saying that in oral argument I had
3 a feeling that from the outset that this was going to be tough
4 and that they knew a lot about the case and that perhaps
5 not everything, not every nuance of what happened in
6 Wentworth Park that night was being drawn from the
7 transcript that I had read.

8 MS. DERRICK

9 Thank you. Those are my questions.

10 MR. MURRAY

11 No questions on behalf of William Urquhart or John
12 MacIntyre.

13 MR. PRINGLE

14 No questions, My Lord.

15 MR. CHAIRMAN

16 Mr. Saunders?

17 MR. SAUNDERS

18 I believe we go second, My Lord.

19 MR. CHAIRMAN

20 Mr. Wildsmith.

21 MR. WILDSMITH

22 No questions.

23 MR. CHAIRMAN

24 Mr. Ross.

25

1 MR. ROSS

2 One question.

3 EXAMINATION BY MR. ROSS

4 Q. Mr. Giovannetti, my name is Tony Ross. Miss Derrick
5 referred you to your letter, to your opinion of October 3,
6 1985, to Gordon Gale. And at page 572 there still seems to
7 be some question as you saw it as to whether or not there
8 was any evidence of a robbery.

9 MR. SAUNDERS

10 My Lords, if my friend is going to get into detail with the
11 witness I wonder if he could be shown the exhibit volume.

12 MR. CHAIRMAN

13 Yes.

14 MR. ROSS

15 Volume 33.

16 COMMISSIONER POITRAS

17 33, did he say?

18 MR. CHAIRMAN

19 Page?

20 MR. ROSS

21 572.

22 MR. CHAIRMAN

23 572.

24 MR. GIOVANNETTI

25 A. Do you want me to read through this?

1 Q. Yes. No...

2 A. I have no recollection of it.

3 Q. Pardon me?

4 A. I say I have almost no recollection. Do you want me to read
5 through it or...

6 MR. CHAIRMAN

7 Mr Ross, if you could direct Mr. Giovannetti's attention to the
8 particular paragraph you..

9 MR. ROSS

10 I am looking at the first paragraph on page 572.

11 MR. CHAIRMAN

12 572, okay.

13 MR. GIOVANNETTI

14 A. At the very top of the page or the first full paragraph or...

15 Q. Yeah, the top of the page. And I will suggest that on page
16 571 what you are doing is reviewing the evidence given by
17 Marshall from time to time with respect to the robbery and
18 at the end you made...your submission would suggest that at
19 that point you still had some concerns as to whether or not
20 there would have been sufficient evidence on which one
21 could positively conclude that a robbery had taken place.

22 A. Well, I'm just trying to recapture what I was thinking, but I
23 think the concern on appeal, the principal concern, dealt
24 with the self-defence issue, and I think from my point of
25 view whether or not there was a robbery was important

1 because if there was no robbery there was no assault, there
2 was nothing to act in self defence against. And so it was in
3 that context that I was focusing on the robbery issue. It's
4 certainly not necessary for me to know as appellate counsel
5 whether, in fact, there was a robbery or not.

6 Q. I see. And I think if...is it fair to say that in your discussions
7 with Mr. Justice Pace the word "robbery" never came up as
8 you recall?

9 A. No.

10 Q. I see. And, finally, could you tell us what, if any, effect did
11 your making this application or your intention to make this
12 application have on your appearances before the Appeal
13 panel when Mr. Justice Pace was sitting?

14 A. Well, I was concerned, curious to see what would happen.
15 As far as I know, no effect.

16 MR. ROSS

17 Thank you kindly, sir.

18 MR. CHAIRMAN

19 Mr. Saunders?

20 MR. SAUNDERS

21 No questions for Mr. Giovannetti.

22 MR. CHAIRMAN

23 That's all, thank you, Mr. Giovannetti. 2:15.

24 LUNCH BREAK - 12:38 p.m.