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fifteen or sixteen - isn't unusual for a man who is indulging in the finer spirits. But in any event, he did get sick. But he remembered leaving the dance. He wasn't that drunk! My learned friend worked him into a drunk. If he was drunk, he wouldn't have remembered leaving the dance. He says he remembers meeting Sandy Seale and the accused up on George Street and he walked to Argyle Street with them and that's when he separated company with them. He remembers walking up Argyle Street. There's no question in his mind about that and there's been no doubt placed before this court as to that. He was not that drunk that he didn't know where he was walking. He went up Argyle Street, cut across Crescent. He walked to a position on Crescent Street that he marked with a "B" which is beside the figure "21". There he moved up, he says, to the railway track; walked down the railway track to the point behind the bush marked "X" and that is where he crouched. And that is where he observed what he related in court here today.

Now gentlemen, my learned friend is right. These two men, Chant and Pratico, did not know each other before the police action in this case. Then how is it they would come up with identical stories? At different times - one in Louisbourg and one in the city of Sydney and they had no communication between each other. There's no evidence whatsoever that these men got together and cooked up a story. They gave their evidence as they saw it. Pratico said that he saw the argument developing or heard the argument developing between these two men. He says that he saw the accused, Donald Marshall, whom he knew and who he says he saw earlier in the evening, take a long shiny thing from his pocket and plunge it into the stomach of Sandy Seale, and Seale went down on the street. He said with that, he got scared. As you know and I know, the number of cases in today's society where people say, we don't want to get involved. He had but one thought in mind. He was scared. He got out of there. And he went up Bentinck Street to his home. He didn't stop and talk it over with Chant. He didn't even see Chant! Chant saw him but

didn't know who he was at that time. Then gentlemen, through hard work, through long hours of labour, the police department, the City of Sydney Police Department, Detective Division, worked on this case day and night - day and night - until they finally came up with the evidence that they have here and presented in court here today.

Mr. Pratico, I agree, had been drinking. But he did not get in cahoots with Chant and make up a story! If they were both living in the same house, if they knew each other, if there was any evidence that they corroborated or got together and made up this story, then I would say it was an entirely different composition! But this statement on which they do not conflict with one another in any way, shape or form - those statements were given to the police at Louisbourg and at Sydney! There's no communication between the two men.

Now, Pratico - my learned friend tried to work him into a drunk. As he referred to him in his evidence, he was a drunk. I admit he was drinking! I admit that! While he was drinking, he was not drinking to the extent that he didn't know where he was! He said he was over behind the bush and Chant saw him there behind the bush. And where was Chant? Chant wasn't out drinking that night! Chant was in church that night! He came in from Louisbourg to go to a church service. Then after that he went down to visit a friend at the Pier or with a friend at the Pier. On getting down to the Pier, he waited for his friend and then went to the house to - my recollection of the evidence - to get his friend to come on, let's get going, get out of here and go home, get the bus to Louisbourg, and he went to the house and his friend had left. So he walked or ran from Whitney Pier over to the bus terminal which is, I presume all you gentlemen know, the Acadia Bus Line at Bentinck Street. There he found out that he was too late for his bus and that he missed it. He then walked down Bentinck Street, came down what he called over a bridge at Bentinck Street. If you look at the map you can see on Bentinck

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met Mr. Chant down in front of the house of Mr. Mattson and that corroborates the statement of this poorly educated man, Mr. Chant, according to my learned friend. But once again I repeat to you gentlemen that at quarter after twelve at night you won't find very many Ph.D.'s in Wentworth Park. But there is nothing wrong with a twelve year old with average intelligence or intelligence enough to be in grade seven to see and observe a man being stabbed in the stomach with a knife - there can be no question about that!

The identification is positive! You have two eye-witnesses to this murder! Two completely unrelated men! Two men that there has not been the slightest suggestion that there was any communication between the two of them at any time to make up a story and yet they give identical stories, corroborated stories in two areas, Louisbourg and in Sydney! Now gentlemen, how many more witnesses do you want the Crown to present to you? How many more witnesses? You've got two eye-witnesses! You've got their evidence corroborated! Mr. Rosenblum suggests to you, how would you feel tonight if you went home and found this man guilty on the evidence presented by the Crown? Well, I'll tell you gentlemen, that you've got the evidence of two eye-witnesses that were corroborated and I agree - I agree entirely that as Crown Prosecutor if I had my opportunity of putting witnesses on that stand, I would not pit a fourteen year old against Mr. Rosenblum or Mr. Khattar! In fact, if the truth were known, and I've been in the practice of law for twenty-three years, that my knees would be shaking if I had to go on the stand knowing the quality and capabilities of the defence lawyers, no matter what I was saying and supposing what I was saying was the absolute gospel truth! I would still be nervous! I don't think that any person has ever taken the stand in a court room and particularly a Supreme Court room that isn't nervous. But when you get witnesses of tender age, fourteen and sixteen years of age, you can imagine how nervous they are on the stand! And they in fact admit - they're not ashamed of the fact. They admit

D. LEWIS MATHESON, by Mr. Orsborn

1 | A. No. I wondered about the knife and I considered that it would  
2 | be an argument that would make the prosecution of the case  
3 | awkward but I can't say that I -- that I really thought that  
4 | he wasn't guilty because of the absence of the knife.

5 | Q. I take it then that you were of the opinion that Mr. Marshall  
6 | was guilty?

7 | A. I was of the opinion that the statements we had in the file,  
8 | that is, the statements that the -- the final statements given  
9 | to the police were the correct ones. I knew that the young  
10 | people would make poor witnesses but when we went into that  
11 | trial I believed that they were telling the truth and Chant  
12 | and Pratico and, of course, in a corollary way the witness,  
13 | Patricia Harriss. I couldn't conceive of the three of them not  
14 | telling the truth and having such a coincidence -- or I could  
15 | see no connection between the three people except for the fact  
16 | that they had met in the park, and I couldn't understand why  
17 | they -- they would all have the story unless there was truth  
18 | to it.

19 | Q. You've indicated earlier that you were -- concerned may be too  
20 | strong, but you were aware after you reviewed the file that  
21 | there were inconsistent statements from at least Chant and  
22 | Pratico. Did you raise this matter of the inconsistent  
23 | statements with Mr. MacNeil?

24 | A. Yes.

25 | Q. Do you recall what his response was?

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your verdict in this case is to be either guilty or not guilty of murder - guilty or not guilty of murder. The important question therefore for you is whether or not the Crown has established beyond a reasonable doubt that it was Donald Marshall Jr. who committed the murder of William Alexander (Sandy) Seale. ,

Now I have spoken for some considerable time and I'm going to pause to give you a chance to go in your room. But inasmuch as I am continuing with the charge, you will please, gentlemen, remain in your room. Do not go out in the corridor under any circumstances. 10 Remain there! I will stay in my room alone. In about ten minutes time, I will come back and I will continue with my charge after all of us have had a chance to refresh ourselves.

(11:10 A.M. COURT RECESSED TO 11:30 A.M.

11:30 A.M. JURY POLLED, ALL PRESENT)

Now Mr. Foreman, gentlemen of the jury, I told you that I would deal with the facts to a certain extent. I think it is clear that the Crown's case is based principally upon the evidence of two witnesses, Maynard Chant and John Pratico. There are of course a couple of other witnesses too to whose evidence I will refer. But 20 the case for the Crown, in my opinion, rests principally upon these two witnesses. So I have had the court reporter transcribe for me from the evidence of these witnesses. For the time being I am going to talk about the case for the Crown and I will turn, of course, to the case for the Defence. I may not have all that he said. I may not read you back all that he said but what I am reading is from the official record.

Maynard Chant - this is in direct examination - that is examination by the Crown -

30 "Q. Did you notice anything as you walked along the railway tracks?

A. I noticed a fellow hunched over into the bush.

Q. Good and loud now.

A. I noticed a fellow hunched over into a bush.

Q. Where would that be on this plan?

A. Right there.

Judge

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it at the hospital. He didn't say it at the police station. He didn't say it later. How much more credible would have been his story if indeed he had told that story at the time it happened. And he lied to the police for a while. He said they didn't coerce him into telling the story. He later told them the true story. Mr. Rosenblum says, "you can't believe a thing that this fellow says." Mr. Foreman, he says you can't believe - the Defence urges you to disregard the evidence of Maynard Chant, because of his inconsistencies and because of the fact that he lied and he didn't tell the story at the time.

10

Mr. MacNeil, on the other hand, urges you to accept his story completely as finally told. Well I told you before that it is up to you to assess the credibility of every witness. You don't have to believe everything a witness said. You can believe a part; you can believe some; you can reject - you can disregard the whole of that witness's testimony. It is up to you to determine the credibility of the witness and, of course, in this case you will have to be, in my opinion, I would instruct you, to be most careful of the evidence. You are looking at his evidence and you have to be most careful. But in assessing his evidence, Mr. Foreman and gentlemen, you will keep in mind the circumstances in which this boy came to be there that night. He had been to a church meeting in the Pier I think. He missed his ride. He came over town to try to get a bus to go to Louisbourg, his home, and he was too late for the bus. So he started to walk from the bus depot, down in this direction, presumably to hitch-hike a drive to his home in Louisbourg. Then he becomes involved, becomes a witness to a very serious matter - becomes a witness to a very serious matter. In discussing his testimony, you will ask yourselves, did Maynard Chant exhibit the tendency that as reasonable people you might feel many people would have of desperately not wishing to become involved in a very serious matter. You will keep in mind the age of this boy. You will ask yourselves what possible motive, what motive, would Maynard Chant have, in telling

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the story implicating the accused, Donald Marshall. It seems to me - now, that's my opinion and I caution you, you do not have to accept my opinion; you do not have to accept my opinion. In my opinion there is not the slightest suggestion in this case that Maynard Chant was in collusion with John Pratico, that they acted in cahoots, together, to concoct a story. There's not the slightest suggestion that these two people were anywhere near one another prior to the events of that night or around that time up to the time when Chant saw Pratico, and that afterwards they got together to

10 tell a story implicating the accused, Donald Marshall, Jr. He says that he saw Marshall and this other man arguing. Pratico said that they were arguing. He said, what he said here first, that he saw him haul out something; later he acknowledged it was a knife or as he put it, "he hauled out something which I thought was a knife, something shiny." Pratico said the same thing. Is he a liar? Or is there some consistency in his story which in spite of the events which were properly laid before you, he was declared adverse -

20 is there something there which can lead you to consider that he is a credible witness. It is up to you, gentlemen. I am just putting the picture before you.

Now we come to John L. Pratico. And again, I read from the official record. Again in the direct examination -

- "Q. Do you know Donald Marshall Jr.?
- A. Yes sir.
- Q. Do you see him here in court today?
- A. Yes.
- Q. Would you point him out to the court, please. Let the record indicate the witness points to the accused. Did you see him on the 28th day of May, 1971?
- 30 A. Yes.
- Q. Where?
- A. By Wentworth Park.
- Q. And where did you first see him that evening?
- A. Up by St. Joseph's Hall.
- Q. Up by St. Joseph's Hall?
- A. Around that area.
- Q. Who was with him?
- A. Sandy Seals.

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disgracefully. It certainly is a sad commentary on the authorities in this community that a young man of that age would be able to arrange to have liquor from the liquor store or wherever he got it. He drank wine and beer and whatever else he could get his hands on. In determining his credibility, however, you must ask yourselves - you will ask yourselves, and you are the judges, as you will in assessing the evidence of Maynard Chant, what motive - what possible motive could this young man, Pratico, have to put the finger of guilt on the accused, Marshall. What motive would he have? What motive would Maynard Chant have to say what he said here in court to you that Donald Marshall was the one who stabbed Sandy Seale? He was asked for example, "Where did you see Marshall first that evening?" He said, "Up at St. Joseph's Hall." The accused - and I will come to the accused's testimony later - read you his testimony too - the accused said he was not in the vicinity of St. Joseph's Hall. John L. Pratico said, "I saw him first that evening up by St. Joseph's Hall." Who was with him? Sandy Seale! The accused said Sandy Seale was with him. Later Pratico said that he noticed only the two and they were arguing. Chant said the same thing, the two, and they were

10  
20 arguing.

At one time, and this is my recollection and you need not take it; you will rely on your own - my impression is that Pratico said at one time that Seale had his fists up. They were arguing and Seale had his fists up. That's the impression I got. I think it's right but you will rely upon your own.

Now Mr. Foreman, the defence in this case is not self-defence. This is not a case of self-defence. This is a complete denial. The defence is, I didn't do it - complete denial! Not self-defence but even if it were self-defence, I would have to

30 instruct you that if that were the evidence, the late Mr. Seale put up his fists, then to strike him with an instrument and stab him was something that would go far, far beyond the right of self-defence. That sort of defence would not be commensurate with the

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other man's act. That issue does not arise here because as I said, the defence here is a complete denial. Pratico said that they were arguing. Chant said they were arguing. Pratico told of the shiny object in Marshall's right hand which he plunged into Seale's stomach. The other man said the same thing. What motive would lead this young man to concoct a story, a dreadful story if untrue, to place the blame of a heinous crime on the shoulders of an innocent man? What possible motive would Pratico have to say that Donald Marshall stabbed Sandy Seale? He had been drinking.

10 In assessing his evidence you will have to ask yourselves, is this a drunken recital or is it a recital of a drunken man, or is there a consistency which appears between the story of two eye-witnesses that night to this tragic event, eye-witnesses as to whom there is no evidence by the Crown that they got together, were in collusion to concoct the story.

I said to you before that that's the main case of the Crown. They also have Patricia Ann Harris. Patricia Ann Harris, a young girl; she said there was someone with the accused. Remember, she is the young lady who was with her companion, Terry Gushue and

20 coming from the dance. They stopped for a smoke in the bandshell. She says there was someone with him, with the accused. "I saw someone else there." One person! "I don't know who that person was." She says that Junior, the accused, held her hand that night. By the way, that's according to my notes. Again I caution you, you don't have to take my version. You will decide and again from my notes, and again I caution you, according to my notes, Terrence Gushue said that it was about ten to eleven when they were on Crescent Street going towards Kings Road where Miss Harris lives. They met

30 Junior Marshall and he borrowed a match; Junior spoke to Patricia for a moment. According to my notes, Gushue said in cross-examination that he saw him, the accused, by the Green apartment building. This was on Crescent Street. "I saw just one with him", he said. Then he was pressed in cross-examination, properly checked, and he said,

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"I thought there was only one" and he ends up, "I think there was only one." Patricia Harris says there were two people there. Gushue says there were two people. Maynard Chant says there were two and so does John Pratico.

That in essence is the case for the Crown, Mr. Foreman and gentlemen.

I come now to the evidence of the accused. I'm coming pretty close to the end. I'm not going to keep you all day, Mr. Foreman. I'm coming close to the end of my charge. Once again I have the direct examination, word for word, from the record as given here in court. He was questioned by defence counsel -

"Q. ...Had you been drinking on May 28 while you were at the home of Tobin's?

(I have left out a few preliminary questions.)

A. No.

Q. Where did you go after you left Tobin's home?

A. Down Wentworth Park.

Q. Were there people in the park?

A. Yeah.

Q. Did you meet anybody in the park?

A. Sandy Seale.

Q. Did you have any argument with him?

...

Q. What happened when you met Sandy Seale?

A. We were talking for a couple of minutes and Patterson came down-

Q. You met a fellow by name of Patterson?

A. Yes.

Q. What condition was he in?

A. Drunk.

Q. What happened then when you met Patterson?

A. Sat him on the ground. And went up to the bridge.

Q. Who went up to the bridge?

A. Me and Seale.

Q. You and Seale walked up to the bridge?

A. Two men called us up to Crescent Street.

Q. Two men what?

A. Called us up Crescent Street.

Q. What happened when you met these two men up there?

A. Bummed us for a cigarette.

Q. Pardon.

A. A Smoke.

Q. What about?

A. Asked for a cigarette and a light.

In my opinion there is not the slightest suggestion in this case that Maynard Chant was in collusion with John Pratico, that they acted in cahoots, together, to concoct a story. There's not the slightest suggestion that these two people were anywhere<sup>s</sup> near one another prior to the events of that night or around that time up to the time when Chant saw Pratico, and that afterwards they got together to tell a story implicating the accused, Donald Marshall, Jr. . . . Is there something there which can lead you to consider that he is a credible witness. It is up to you, gentlemen. I am just putting the picture before you."

and at p. 280:

"Pratico said that they were arguing. Chant said they were arguing. Pratico told of the shiny object in Marshall's right hand which he plunged into Seale's stomach. The other man said the same thing. What motive would lead this young man to concoct a story, a dreadful story if untrue, to place the blame of a heinous crime on the shoulders of an innocent man? What possible motive would Pratico have to say that Donald Marshall stabbed Sandy Seale? He had been drinking. In assessing his evidence you will have to ask yourselves, is this a drunken recital or is it a recital of a drunken man, or is there a consistency which appears between the story of two eye-witnesses that night to this tragic event, eye-witnesses as to whom there is no evidence by the Crown that they got together, were in collusion to concoct the story."

It was quite proper for the trial judge, in the circumstances, to address the above remarks to the jury. Two very important and independent eye-witnesses, with no apparent motive for collusion, and with no evidence to give the slightest support to any such suggestion,

had given to the Court mutually corroborative testimony that had a direct bearing on the very issue to be decided by the jury. It was the duty of the trial Judge to recite these facts to the jury in order to assist them in their deliberations, and as he repeatedly instructed them, the findings of fact, opinions based on facts and findings of credibility were theirs only to decide.

I am satisfied that exception cannot be taken successfully to the foregoing remarks of the learned trial Judge.

Regarding the objection that the trial Judge did not make mention to the jury the appellant was left handed, the only evidence indicating this was by the appellant himself. Whether or not he was left handed was irrelevant to the defence raised, which was a total denial of the act, and it may have confused the issue. Furthermore, under ordinary circumstances, man has effective use of both hands, whether he is right or left handed, except for such specialized tasks as writing, painting, et cetera.

As Halloran, J.A., said in the case of Rex v. Hughes et al., (1942), 78 C.C.C. 1, at pp. 15, 16:

"The jury have a right to expect from the Judge something more than a mere repetition of the evidence. They have a right to expect that his trained legal mind will employ itself in stripping the testimony of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decision, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits."

Pratico testified that he saw the deceased Seale and the appellant Marshall at the scene of the crime and he gave direct evidence that he saw Marshall stab Seale. He was acquainted with both men. Under a rigorous cross-examination, he admitted to drinking on the night of the stabbing. The learned trial Judge in his address to the jury reviewed this evidence and in clear language related Pratico's drinking to his credibility and left it for the jury to decide.

Regarding a conflict in his statements before and during trial, this is explained by the record which discloses that Pratico's life was threatened if he testified that the appellant stabbed Seale. The difficulty at trial was that this evidence involved conversations addressed to the witness by third parties not before the Court, and the trial Judge refused to allow such questions. However, the record on the voir dire indicates that such threats were made to the witness Pratico.

This issue of the conflicting statements by Pratico was also placed fully before the jury by the trial Judge and the determination of credibility in view of this evidence was expressly left to them.

Chant's evidence corroborated in every material particular that of the witness Pratico. He testified that he saw a person crouched in the bushes at the place where Pratico said he witnessed the stabbing. Chant, at first, declined to swear that the man who did the stabbing was the appellant Marshall, but this was inconsistent with a previous statement under oath made by him

325. A. I had nothing to do with anything like that, no. I didn't even know he was on probation sir. I never knew the boy until I, you know, interviewed him the first time, and he was a clean-cut young chap and he didn't know Pratico and Pratico didn't know him and they weren't together in the same place. They lived 31 miles apart, and what I'd like to ask is how they could pinpoint Marshall and this other chap on Crescent Street at that time of night on that particular date in the same spot along with Harriss and Gushue and not be there. I know I couldn't do it.
326. Q. Well had Pratico been interviewed before you interviewed Chant?
- A. Yes.
327. Q. So you had from Pratico the last statement he gave?
- A. That's right.
328. Q. Then you went to see Chant?
- A. Yes, in the afternoon.
329. Q. And did Pratico place Chant at the scene of this incident?
- A. Pratico didn't know Chant, and Pratico - and did you, were you over the area where this -
330. Q. M-hm.
- A. Do you recall the railroad track?
331. Q. Right.
- A. And do you recall the trestle that runs between one brook and the other, just for your own information?

468. Q. Right.

A. But that's all that was there. Then you have the Harriss girl saying there was three people there, you see? Then you have Pratico saying there was only two there, and where they were standing, which is very important, there was a driveway between the Green apartments and that grey haired man they're talking about in the grey house where the police - where the ambulance or police were called. They all point out that driveway there as to where they were standing. Now what I say is if they weren't there how could they have picked this location, you know, at that time.

469. Q. Okay, I'm with you on that. Incidentally, was Marshall ever polygraphed?

A. This I don't know. I did hear, and I didn't - I don't know - I did get it from somebody that one of the defense lawyers could have been approached on that and that he refused him. Now, you know, I have no direct evidence on that.

470. Q. Were you directly involved in that?

A. No, I had nothing to do with that.

471. Q. Okay, no, no, I thought you may have taken that step in the investigation?

A. What, about the polygraph?

472. Q. Yeah.

A. No, no. No, no, we didn't have a polygraph, you see, in - this was in the Ebsary case which I gave the Mounted Police. There's no polygraph here at all.

500. Q. But are you directly aware of his transportation and treatment?

A. Am I directly aware?

501. Q. Yeah.

A. No, I wouldn't have anything to do with that. I don't recall it. I was asked that question already.

502. Q. Now if I can go back to the script. This guy Pratico, he wasn't called at the Prehearing was he?

A. No.

503. Q. When was the last time you saw him?

A. When was his Affidavit taken? His Affidavit was taken on the 15th day of July, and what time was his statement taken - the date of the statement?

MR. PUGSLEY: His statement, I think, was the 25th of February.

MR. MacINTYRE: Of February?

MR. PUGSLEY: 1982.

A. (Cont'd) Right.

504. Q. Would you describe him as an unreliable witness then?

A. He was a nervous type and the way I looked at that when he - what he said in his second statement was corroborated by somebody else. You have to take notice of it, of what he said he'd seen and then what the story that Chant gave, and neither one of them are buddies, didn't know one another, were several hundred feet apart and lived 31 miles apart, and within a 10 - from quarter to 12 to 12 o'clock they have

504. A. (Cont'd) those two on Crescent Street, in the one spot, standing, and then the Harriss girl and Gushue, they come along at that time and they verify that, you know.
505. Q. But by himself he's not reliable I take it?
- A. Well that's the story I got from him, sir, and he went through the Courts with that. He went before a Preliminary Hearing, he went before a Grand Jury, he went before a judge and jury, two able defense counsel, which I think very highly of. Mr. Rosenbloom and Mr. Khattar had the chance of - privilege of cross-questioning there, and the judge and everybody else. He was there at their disposal, sir, and (inaudible) the evidence. So I -
506. Q. But you saw Mr. Pratico testify at the trial?
- A. I seen him testifying, yeah.
507. Q. And there was no reference there to the first statement he gave. Mr. Rosenbloom or Mr. Khattar didn't have that to put to him did they?
- A. No, no. I think, nor neither was I called, 'cause he told the same story as he gave me in the statement. So, you know, to keep that together and tell the same story in court, like a few months later, that he told me, his thinking ability can't be too bad.
508. Q. But in your experience in police work and in Court, I mean you expect the first thing to happen after Pratico's direct examination would be for defense counsel to get up with a

*Still believed in Sept 1984 that Chandy, P & H  
had told him the truth + Marshall Stabbed Seal.*



MR. EDWARDS, EXAM. BY MR. MacDONALD

1 A. Once with me and once in my presence.

2 Q. And in the times he has done it was in an anger, like an  
3 action done in anger?

4 A. Yes.

5 Q. Was...how would you describe the sight or the impact of him  
6 doing that?

7 A. I think intimidating would not be an unfair description  
8 given his size and demeanour.

9 Q. At that stage you now, as Crown Prosecutor for the County  
10 of Cape Breton, have indications that three people had  
11 committed perjury, is that correct? Or at least had lied at  
12 trial?

13 A. Yes, yes, because...

14 Q. Perjury requires intent.

15 A. Intent to mislead.

16 Q. Yes.

17 A. Yes.

18 Q. At least you had knowledge, at least indication, that three  
19 people at the trial of Junior Marshall had told...had made  
20 statements that were not true.

21 A. Yes.

22 Q. And you had the suspicion or the thought that that may  
23 have been caused because of pressure being applied by  
24 certain members of the Sydney Police?

25 A. That's fair, yes.

MR. EDWARDS, EXAM. BY MR. MacDONALD

1 Q. Would that not raise in your mind the possibility that some  
2 criminal act may have taken place here?

3 A. I thought that was a possibility, but I don't think I thought  
4 of it as any stronger than that.

5 Q. Would it at least require an investigation to be carried out to  
6 determine if there was some criminal act had taken place?

7 A. Yes.

8 Q. Did you ask or suggest that such an investigation be carried  
9 out?

10 A. Yes.

11 Q. And who did you ask that of?

12 A. Well, going back I had suggested that to Sergeant Wheaton  
13 back on February 23rd. Yeah, when I called Wheaton at  
14 home at 11:00 p.m. on February 23rd and told him then that  
15 part of the investigation he was doing, in my opinion, would  
16 encompass the questioning of Chief MacIntyre.

17 Q. Do you equate then, or did you mean when you say he  
18 should be questioned, that there should be an investigation  
19 to determine whether Chief MacIntyre, in particular, had  
20 committed any criminal act?

21 A. The best way I can answer that, I suppose, is that they  
22 should question him and my thinking would have been that  
23 if that questioning did disclose something criminal, well,  
24 take it from there. But certainly what I was envisaging at  
25 that time was the questioning of Chief MacIntyre in the

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

MR. EDWARDS, EXAM. BY MR. MACDONALD

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 hands 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           pressured on this. And I was...it's from those and it's hard  
2           to say that...exactly who I can attribute it to, but I know that  
3           I would have been discussing those matters with Mr.  
4           Edwards and with Superintendent Christen and I had the  
5           impression that, yes, there was very vigorous questioning of  
6           these people but there was nothing there that was more  
7           than that. There was not any suggestion made to me ever,  
8           and nothing to cause me to stop and think that this is a  
9           criminal activity. And we all...I also had in my mind that  
10          this should be the subject of an inquiry, and where you  
11          would inquire into the police actions and if possible the  
12          prosecutor's actions at the time, as to what occurred. I just  
13          did not have the feeling that there was a criminal offence  
14          being committed. It wasn't a matter of trying to cover the  
15          matter, it was my feeling that there should be an inquiry  
16          into that aspect of it so that that would come out as to what  
17          had happened then and how that sort of thing could be  
18          avoided in the future.

19          \*4:00 p.m.

20          Q. I'm just trying to get your understanding. We have two young  
21          people here, Chant and Pratico, who don't know each other.  
22          Twenty-two miles apart, they live. And they both testify that  
23          they saw Donald Marshall stab Sandy Seale and they both say,  
24          "I never saw that at all." And Frank Edwards says, "They  
25          were only telling the court what the police were convinced

1       was the correct version." And do you take from that the  
2       police somehow told them that Donald Marshall stabbed  
3       Sandy Seale?

4       A. Well, I took from that that there was a vigorous examination  
5       of them by the police and that every time they said  
6       something else, the police, for one reason or the other, had the  
7       view that this was the way it happened and would perhaps  
8       say, "I don't believe you." Keep saying that that couldn't have  
9       happened that way. I may be legally wrong. I didn't  
10      consider it counselling, and I still don't.

11     Q. How far can a policeman go? If he believes something, if he  
12     believes that a crime was committed a particular way. How  
13     far can he go without crossing that line into criminal activity?

14     A. Well, I'm not sure how far he can go. I'll tell you that there  
15     are very few cases on the point and it's not an easily defined  
16     point.

17     Q. But, in this case...

18     A. But I think he has to do something positive by saying, you  
19     know, you are to tell this story, no matter what. You don't  
20     think the mere fact that he says "I don't believe you" is  
21     counselling.

22     Q. Did you ever direct your mind to how two totally unconnected  
23     kids could come up with the same story that never  
24     happened?

25     A. Only to the extent that I assumed that the police kept saying

MR. GALE, EXAM, BY MR. MacDONALD

1 "I don't believe you on this." That such and such, "Donald  
2 must have stabbed Sandy," or something of this nature.

3 Q That's fine, that Donald must have stabbed Sandy. Let's stay  
4 with that. Is that proper? Is that legal police tactics to get a  
5 witness, a kid, under vigorous cross-examination, keep saying,  
6 "Donald must have stabbed Sandy," until they say it.

MR. PUGSLEY

7  
8 Excuse me. My Lords, I object to this form of questioning.  
9 There is absolutely no evidence at all that this occurred. If my  
10 friend wants to put theoretical positions to this witness, I really  
11 can't see how it's relevant or how it assists this Commission in  
12 coming to its conclusions. But there's certainly no evidence at all  
13 of what my friend suggested this witness as having...

MR. MACDONALD

14  
15 I haven't been giving any evidence, My Lord. The evidence  
16 has been coming out of the witness's mouth, not out of mine.

MR. CHAIRMAN

17  
18 I'm... And I think we're interested in hearing, and it is  
19 helpful, the opinion of Mr. Gale, as a senior Crown prosecutor, on  
20 what he considers to constitute, the evidence necessary to  
21 constitute grounds for laying a charge of counselling perjury.  
22 We can do that without accepting his evidence, the suggestion that  
23 there was, in fact, the statement now being put to this witness  
24 attributable to any of the investigating officers at that time. And  
25 that's as far as I see it going at this point in time. And with that

MR. GALE, EXAM, BY MR. MacDONALD

1 in mind, I see nothing wrong with the asking Mr. Gale to answer  
2 the question. As Mr. MacDonald says, he is the one who has  
3 suggested it.

MR. MACDONALD

5 Thank you, My Lord.

BY MR. MACDONALD

7 Q. If I can go back to the question, Mr. Gale. If the statement is  
8 made in the course of vigorous examination, the questioning  
9 of a youngster, "Donald must have stabbed Sandy," and  
10 eventually the witness says that, are you saying that that is  
11 legal activity by a policeman?

COMMISSIONER EVANS

13 It's improper, but it's not illegal.

MR. GALE

15 A. I'm not saying it's illegal activity. I'm saying it's improper  
16 activity by the policeman.

17 Q. But it would not be illegal.

18 A. It may or may not be. I have not given that portion of it a  
19 great deal of thought. You are leading me on to questions that  
20 are very hypothetical, Mr. MacDonald. You have asked me  
21 what sort of thing I might consider. I have indicated what  
22 sort of thing I might consider. I have told you that I have  
23 found very few cases that really deal with counselling of  
24 perjury and I find it very difficult to tell you exactly what  
25 counselling of perjury will consist of or what is needed to

1 constitute the charge. I have told you that I think it requires  
2 something active on the part of the officer or anyone to say,  
3 "You are to tell this and no other story. This is the story you  
4 are to tell." I think that's counselling. I think vigorous  
5 examination, there may be a possibility that it's counselling. I  
6 think it would be very difficult to convince a court that that,  
7 in fact, is counselling. I may be completely wet and off base,  
8 but that's my opinion and I really don't know how I can assist  
9 you further on that particular point, with all deference.

10 Q. Did you ever direct your attention to that? Have you ever  
11 had anyone look at the authority to determine whether the  
12 facts of this case, as you understand them or as your  
13 Department understood them, may have supported a charge  
14 of counselling perjury?

15 A. No, I have not had anybody else look at it. I have looked at  
16 perjury. I had looked a bit at counselling. But I was under  
17 the impression, mistaken as it might be, that the views that I  
18 was given is that the type of thing that went on there was not  
19 such that it would attract criminal liability. It was hard,  
20 heavy-handed police questioning and it was not of a type that  
21 was not unknown at that time.

22 Q. And just, this will be my last point on it, but that's with your  
23 understanding as you were told by Frank Edwards, that what  
24 the witnesses were telling the court is what the police were  
25 convinced was the correct version.

1 A. Yes, even with that, because the difficulty you have there is  
2 you have one person saying, "I told this because the police  
3 told me this." That person has already said that I recanted on  
4 the statement before. It does not give a great case to take  
5 before the court, quite frankly. But I also had in mind that  
6 we were hopefully going to go into some type of inquiry and,  
7 but a lot of these questions might be better answered in that  
8 forum.

9 Q I've already directed you to page 159 of Volume 32, in the  
10 third paragraph where Mr. How said to Mr. Coles: "We should  
11 be looking into the question of the performance of the police  
12 and the Crown in the prosecution of Donald Marshall  
13 originally." Now you asked the R.C.M.P., did you not, to  
14 review the files and comment on the procedures adopted by  
15 the, or followed by the police in this investigation.

16 A. Yes, I did.

17 Q And do you have Exhibit 20... Or Volume 20? I don't believe  
18 you do.

19 A. I don't think so.

20 COMMISSIONER EVANS

21 Before you leave the counselling for perjury, I would just  
22 like to ask the witness, in order to convict a person of counselling  
23 to commit perjury, do you not have to have a conviction for  
24 perjury first?  
25



1 he looked at it. I said, "Junior, it's tremendously important  
2 that you be honest and truthful. Now I'm going to give you a  
3 warning, I'm going to take a statement. You've had an  
4 opportunity since I was here last and I know what jails are  
5 like, to speak to a lot of legal eagles in the cell blocks, but  
6 you're the chap that wants to get out of here. Be honest and  
7 ~~be truthful with me."~~

8 Q. Did you give him any information on your investigation to  
9 date?

10 A. No, sir.

11 Q. The statement that you took, was that in, a narrative  
12 statement or was it question-answer?

13 A. This time, no, it was narrative.

14 Q. So he was not prompted. You just turned him on and he  
15 talked.

16 A. Yes, sir. Sentence-by-sentence.

17 Q. The opening of that statement talks a little bit about his  
18 history. It says he drank a lot and he was picked up by the  
19 Sydney Police, questioned a lot by John MacIntyre. Page 52.  
20 "MacIntyre didn't like me as I wouldn't talk or confess to  
21 these crimes." This history, this discussion of John MacIntyre,  
22 was this totally voluntarily on Mr. Marshall's part?

23 A. Yes.

24 Q. Do you have any idea why he would start off with that rather  
25 than starting with the night of the murder?

1 made to another day?

2 MR. CHAIRMAN

3 Right.

4 2:58 p.m.

5 EXAMINATION BY MR. RUBY

6 Q. Let me take you, if I may, Sergeant Wheaton, to the first time  
7 you actually met Mr. Marshall in Dorchester Penitentiary.

8 You told us what you said to him and you mentioned almost  
9 in passing as you recounted it before us that you told him to  
10 "be truthful with us." Can I get some more detail of what you  
11 meant by that and how you put it? Was it put casually, for  
12 example?

13 A. I told him that if he had any hope of getting out of Dorchester  
14 that it was extremely important for him to be absolutely  
15 truthful with me and give me honest facts which I, in turn,  
16 could go out and investigate and they would prove out that  
17 what he said was truthful. And I emphasized that very  
18 strongly to him right at the beginning of the conversation.

19 Q. Did you attempt to be hard with him on that issue?

20 A. Yes, sir, yes.

21 Q. You would appreciate that he was under the pressure of  
22 having spent 11 years in prison at that point, I think?

23 A. Yes, sir.

24 Q. With no prospects of release since he wouldn't admit his guilt.

25 A. That's correct, sir.

Feb 19

- 1 Q He was already under very heavy pressure when you stepped  
2 into the room?
- 3 A. Yes, sir, and had been for...
- 4 Q. And your comments would be intensifying that pressure on  
5 him?
- 6 A. Yes, he was relieved, though, to see that I was there. He was  
7 surprised to see that I was there, but it did put pressure on  
8 him, yes, sir.
- 9 Q. The second issue I want to take up with you if I may is the  
10 document Exhibit 88. Do you have that in front of you? It's  
11 the inventory given to you by Chief MacIntyre.
- 12 A. Yes, sir.
- 13 Q. Mr. Orsborn, in his questioning, asked you whether or not the  
14 Chief might have dropped, I take it accidentally, the Harriss  
15 statement in that office incident.
- 16 A. Yes, sir.
- 17 Q. And you said no you didn't think, given the circumstances,  
18 that he could. Am I correct in looking at Exhibit 88 that when  
19 the Chief prepared this document the Harriss statement is  
20 referred to on Page 1 but only the statement of June 18,  
21 1971?
- 22 A. That is correct, sir, yes.
- 23 Q. Not the one of June 17?
- 24 A. No, sir.
- 25 Q. That was slipped under the desk?

1 the prison population by talking to him so soon after the  
2 rumble. That they would figure he was finking on the rest of  
3 the inmates. So, we chose to terminate the thing.

4 Q. Okay. Well, let me go back to my question. Was the normal  
5 Wheaton technique followed in that there was a discussion  
6 first, nothing being written down at all, and then...

7 A. That's true.

8 Q. ..."we're now going to take the statement."

9 A. Yes.

10 Q. Now, in the discussion what would have been discussed?

11 A. I believe Wheaton asked him about the circumstances in  
12 which he and Seale were in the park that night. I don't think  
13 that he mentioned the robbery attempt at that time. He may  
14 have, but I don't believe he did. Marshall eventually came  
15 out with something that resembled that, that there had been  
16 something more than just a casual walk through the park.

17 Q. Is it possible that Wheaton had said that to him first, made  
18 some reference about a robbery attempt having been in  
19 place?

20 A. I don't think he did. I think that he...he got around it to the  
21 point where he was waiting for Marshall to admit to it.

22 Q. How did he get that stage? That's important to what's going  
23 on here. So, I'd like you to tell us in as much detail as you  
24 can what was said by Wheaton or you before you took pen to  
25 paper.

1 A. At this late date I certainly couldn't quote it word for word,  
2 but I would suggest that it was something to the effect that

3  
4 We are reviewing the circumstances  
5 surrounding your conviction, your trial,  
6 and having talked with some other  
7 witnesses prior to coming here to see you  
8 we feel that there was something else  
9 going on in the park other than just a  
10 casual walk through the park to catch a  
11 bus.

12 But I feel quite sure in my mind that the robbery or words  
13 outlining that incident came from Marshall originally.

14 Q. Okay. But the suggestion that there was something other than  
15 a casual walk through the park may well have come from the  
16 RCMP as a result of saying, "This is what we're told by people  
17 we've seen already."

18 A. Not, I don't think we're on the same wavelength. What I'm  
19 saying is that if Wheaton suggested anything other than that,  
20 it would be to the effect that... not what he had heard from  
21 Jimmy MacNeil or anything else. It would be "Let's hear the  
22 facts of what happened on the night in question when you  
23 were in the park with Seale coming home from the dance."

24 Q. Now, what you told me a moment ago though is, and I wrote  
25 it down, that "Wheaton said something to the effect as a result  
of what we've done to date we feel that something else was  
going on in the park other than a casual walk."

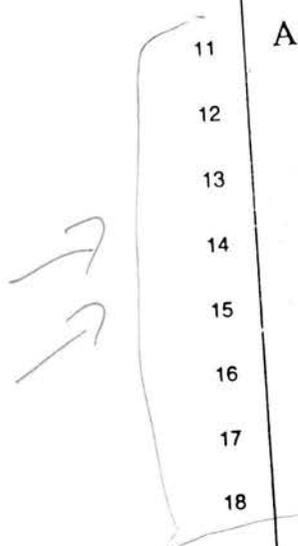
A. That's correct, but nothing more than that.

ARGUMENT

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MR. EDWARDS, EXAM. BY MR. MacDONALD

- 1 Q Did you have any discussions with Sergeant Wheaton
- 2 concerning the circumstances under which that statement
- 3 was taken?
- 4 A. Yes.
- 5 Q What were those?
- 6 A. The only specific recollection I can recall, and I believe this
- 7 is more referent to February 18th than...
- 8 Q That's the first statement.
- 9 A. Yes.
- 10 Q Yes.
- 11 A. But it may have been March the 9th. But I can recall
- 12 Sergeant Wheaton, Staff Sergeant Wheaton, telling me that
- 13 he and Carroll had met with Donald and, I may not have this
- 14 word for word, but this is pretty close. They said, "Look,
- 15 we're looking into this thing. Now you can tell us anything
- 16 you want and we'll sit here and listen politely and then we'll
- 17 leave and you'll never see us again or you can tell us what
- 18 really happened and we'll do our best from there."
- 19 Q Now, you knew at that time that Sarson had already told
- 20 Marshall about the Ebsary story about the robbery and so
- 21 on.
- 22 A. Yes.
- 23 Q We'll come to that statement later.
- 24 A. No doubt.
- 25 Q When did you learn that Donald Marshall had told Wheaton



1 and Carroll that a robbery attempt or a rolling or whatever  
2 had been underway at the time of the Seale killing?

3 A. I...the reason for my hesitation is that I don't know...I can't  
4 say with certainty whether they told me that after they  
5 came back from Dorchester, after February 18th or after the  
6 March 9th. It seems to me that it was after their first  
7 meeting, and, you know, if...there is so much material, I've  
8 read it, but I can't recall that partial statement of February  
9 18th, whether that mentions the robbery or not.

10 Q. I can show it to you. It's been introduced here.

11 A. Yes.

12 Q. We hadn't seen it until it was introduced ourselves I don't  
13 think, at least we didn't see the original. I'll get that turned  
14 up for you and we'll have a look at it.

15 A. Okay.

16 Q. It's the partial statement of Donald Marshall, February 18th,  
17 1982.

18 A. The only relevance of it, I suppose, is that if they were told  
19 on February 18th about the robbery then I think it's a  
20 pretty safe assumption that I was told.

21 Q. Okay. So at least then by the second interview on March the  
22 8th, shortly thereafter, you would have been aware of the  
23 fact that Marshall had given a statement indicating he had  
24 been involved in a robbery attempt.

25 A. That would be the latest, yes.

364.

0. MR. MARSHALL, JR., Redirect Examination  
statement. Allow him to explain that.

THE COURT: All right. I'll permit those questions.

All right, we'll bring the jury back.

5. JURY RETURNED (11:29 a.m.)

JURY POLLED. All present.

THE COURT: All right, Mr. Edwards?

MR. EDWARDS: Thank you, My Lord.

10. Q. Mr. Marshall, during your cross-examination on Friday in response to my learned friend, you said "I was not going to rob them, I was almost forced to say that. That's what it boiled down to." Mr. Marshall, what were you referring to when you said that?

A. Would you ask it again?

15. Q. Sure. The statement that you made: "I was not going to rob them. I was almost forced to say that. That's what it boiled down to." What were you referring to when you said that?

A. I was referring to - the reason I said that and other things, I was told one time . .

20. Q. Well, you can't tell us what you were told but you can tell us - put it this way. Let me ask you, what did you mean when you said that? "I was not going to rob them, I was almost forced to say that." What did you mean by that?

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

Q. That there was a robbery.

30. A. Yes. That's what he said. And that's why I said it.

365.

0.

MR. MARSHALL, JR., Redirect Examination

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

A. In - when I was visited by the R.C.M.P. in 1981. When I was released out of prison.

5.

Q. Pardon me?

A. When I gave the statement to the R.C.M.P. in '81.

Q. And what statement are you referring to? Where was that statement given?

A. In Dorchester Penitentiary.

10.

Q. That's be the March, 1982 statement?

A. Yes.

Q. No further questions.

THE COURT: All right. You're excused, Mr. Marshall.

WITNESS RETIRED. (11:34 a.m.)

15.

MR. EDWARDS: My Lord, I'm very sorry but there is a procedural matter that must be discussed in the absence of the jury before I call the next witness.

THE COURT: All right.

JURY RETIRED (11:35 a.m.)

20.

25.

30.



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DISCUSSION

impossibility of reconciling the story of Donald Marshall Jr. with that of James MacNeil and that's why . .

THE COURT: That's why we have a jury.

5.

MR. EDWARDS: That's right. But at the same time

it is incumbent upon the Crown to say what witnesses or to decide what witnesses we're going to call and when I saw - immediately when I saw that it was likely I would not be calling James MacNeil or Mary Ebsary or possibly Donna Ebsary, I immediately, Friday morning so that my learned friend would have the opportunity to bone up on their evidence and decide whether he was going to call them or not, I told him that Friday morning before court.

10.

THE COURT: Why would you not call James MacNeil?

He's an inherent party to all of the things that went on and he has given testimony. Surely it would be your duty to call him.

15.

MR. EDWARDS: I submit not. I submit that the

duty of the Crown is to present the evidence, I mean the Crown's role is ambiguous. On the one hand as you've told the jury yourself, we are engaged in the adversarial process.

20.

THE COURT: Yes, but the Crown . .

MR. EDWARDS: On the other hand, it's the duty of

the Crown to call all credible evidence. Now on Thursday night, without getting into the details, I had a discussion which told me that I preferred the evidence of Donald Marshall, Jr. to that of James MacNeil so I had to make a decision at that point about who was most credible in my view and at that point I decided I would go with the evidence of Donald Marshall, Jr. and that I would give the defence notice that I might not call

25.

James MacNeil so that he can make what decisions he had to make.

30.

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DISCUSSION

what MacNeil's - a summary of what MacNeil's essential testimony was, and it seemed to me that there'd be no question that you would be calling him. But I think that you should consider what I've said to you and you should consider that the unusual elements of this case would require you to put these witnesses forward. . . . stand or fall on whatever the jury decides is the credibility.

5.

MR. EDWARDS: My Lord, may I beg the indulgence of the court just about one additional matter on record. And since you know in a way my integrity is in question . . .

10.

THE COURT: Oh, I'm not questioning your integrity.

15.

MR. EDWARDS: Well, my role as Crown Counsel and what my duties are, let me say that the course that this case or the position that the Crown would take on this case depends upon the Crown's assessment of two witnesses, James MacNeil and Donald Marshall. Let me say that on Thursday evening, it was the first time that I could speak to Donald Marshall who is 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 and 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 do of what happened in the part in 1971. That's what it comes down to.

20.

25.

THE COURT: Yeah. The problem that I have, Mr. Edwards, and I don't want to prolong the discussion with you . . . .

30.

MR. EDWARDS: But it is important.

THE COURT: Yes. There was a trial in 1971, a man was sent to prison. People gave testimony. He spent 10

- not. Cause he didn't mention it. And my learned friend didn't..didn't cross examine him on that point, but..as my learned friend also said quite correctly and properly in his address that MacNeil was really, especially now 14 years later, would have no reason to recall what had happened prior to his arm being placed up behind his back as he says
- (10) it was by Marshall. See..so then when you consider MacNeil's drinking habits and the amount that he had had to consume that night, the combination that that fact was brought up by my learned friend - then, you have to then say, well as far as MacNeil is concerned, the conversation could have taken place. So then we have to look to Donald Marshall and his credibility on that point. Donald Marshall admitted on the stand and...read to him from the different transcripts, he admitted that he had lied, there's no..no question
- (20) about that. There may be reasons for that that we could get into, but for our purposes here...he admitted he lied and His Lordship will likely instruct you as is the custom of Judges when they have a situation like this, that he will correctly instruct you that when you have a witness such as Donald Marshall who has been proved to have lied on other occasions, then you must treat his evidence with great care and the Crown agrees, that's what you should do - treat it with great care. But, having said that, Donald
- (30) Marshall had to be telling the truth about something. We know now that Donald Marshall is telling the truth when he said he didn't stab (inaudible)...Ebsary did. He's truthful on that point. So, consider whether he's also truthful about this conversation and there's two very key factors there which bear directly on his truthfulness on that point. Number one - that conversation was not rebutted on cross examination, okay? See, if he had learned since 1971 of preacher and the sea captain..well my learned friend could have asked

- him on cross examination, well why didn't you mention the preacher or the sea captain in 1971, but that wasn't asked. So the point is, he's not rebutted on that part of his conversation. Remember, he said, "I said he looked like a priest." This is what Marshall says he said to Ebsary. "He said he was a priest of some kind and a sea captain." If the conversation..that conversation hadn't really taken place, how would Donald Marshall have known that? Remember Donna Ebsary said in 1971, her father was referred to as the captain or the reverend captain. He had this interest in religion - you see, that ties right in with Marshall's story. How could Marshall have possibly known that unless this prior conversation among the four of them had taken place? So the significance, if you accept that that conversation did take place, the conversation is significant because it rebuts
- (10) the suggestion that Marshall and Seale just jumped out of the bushes and pounced on these guys and..Ebsary as sort of a reflex stabbed Seale - no there had been this conversation beforehand. Now, if the conversation took place, if you find that, then doesn't it also establish that therefore after the four had this conversation, Ebsary and MacNeil walked away from Seale and Marshall? And if you accept that they did walk away and that is important because they've walked away - why did they come back when..when they were
- (20) called? Why did Ebsary come back if he was in fear of grievous bodily harm or death? Why did he come back and not run away, he was in good physical condition according to Greg, Mary and Donna at the time, but he didn't - he did come back. Now coming back like that, would that be the action of a man who was at the ready or a man who was ready to dispatch his antagonist with the knife he had in his pocket? So, having dealt with those three areas and I submit to you, you know, when you get into the jury room..of course it's up to you to establish your own procedure
- (30)



CONCLUSIONS(b) Submission re "Conclusiveness"

77. It is respectfully submitted that the evidence of each of the witnesses called before this Honourable Court is merely capable of belief and taken individually (with the exception of Gregory Ebsary), each could have affected the result at trial.
78. It is submitted however that, if the evidence is viewed as a whole, it is clear that it derives from a number of different and unconnected sources all of which are mutually complimentary. On that basis the cumulative effect of the evidence is conclusive of the fact that the Appellant did not stab Sanford Seale.
79. Perhaps the answers to a couple of admittedly hypothetical questions may clarify this "conclusiveness" proposition. First, if the evidence which is now before the Court had been known in 1971, would there exist reasonable and probable grounds to charge the Appellant with Seale's murder? Surely, where all the available evidence now points in another direction, the answer has to be no.
80. Similarly, on the basis of existing evidence, could a reasonable jury properly instructed convict the Appellant of Seale's murder? That question may be

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answered with another question: in the event of a new trial, what evidence could the Crown possibly call against the Appellant? When one considers the existing evidence together with the admission that John Pratico was not then and is not now a reliable witness, the answers are clear. There is no evidence the Crown could call and a reasonable jury certainly could not now convict.

CONCLUSIONS

(c) Submission re Disposition

81. It is respectfully submitted that the appeal should be allowed, that the conviction should be quashed, and a direction made that a verdict of acquittal be entered.

82. It is also submitted that the basis of the above disposition should be that, in light of the evidence now available, the conviction of the Appellant cannot be supported by the evidence.

83. The Respondent disagrees with Counsel for the Appellant who argues that the aforementioned order could issue on the basis that there has been a miscarriage of justice. It is submitted that the latter phrase connotes some fault in the criminal justice system or some wrongdoing on the part of some person or institution involved in that system. The Respondent contends that such was not the case and that care should be taken to dispel any such notion. Hopefully, the following submission will clarify the Respondent's position.

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of Vol 17/

CONCLUSIONS(d) Submission re Court's Role

84. Notwithstanding the fact that both Counsel agree upon what the ultimate disposition of this matter should be, it goes without saying that the Court retains the exclusive authority and responsibility to dispose of the case as it sees fit. The Court may reject the submissions of both Counsel and exercise any of the options open to it under Section 613 of the Criminal Code.

85. It is the Respondent's respectful submission that the role of the Court goes much further in this peculiar situation. Here, if the Court does ultimately decide to acquit the Appellant, it is no overstatement to say that the credibility of our criminal justice system may be called into question by a significant portion of the community. It seems reasonable to assume that the public will suspect that there is something wrong with the system if a man can be convicted of a murder he did not commit. A minimum level of public confidence in the criminal justice system must be maintained or it simply will not work.

86. For the above reasons, it is respectfully submitted that the Court should make it clear that what happened in this case was not the fault of the criminal

justice system or anyone in it including the police, the lawyers, the members of the jury, or the Court itself.

87. To function, our system depends on getting the truth and that is exactly what it did not get in 1971. The Appellant may argue that he told the truth but the fact remains that, not only did he put himself in a position which precipitated the stabbing, but he failed to disclose to anyone what he and Seale had actually been up to. Instead he told the police and his lawyers about an attack by two priests from Manitoba who did not like "niggers or Indians". It is not difficult to speculate upon how believable either the police or Defence Counsel found that story. (1)

88. It is submitted that had the Appellant been forthright, the odds are that both the police investigation and/or his defence would have taken different directions. The likelihood is that he would never have been charged let alone convicted.

89. When the stories told by Chant and Harriss were added to the Appellant's lack of candour, the flow of subsequent events was as inevitable as it is now understandable.

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90. Finally, it is important to note that this matter came before this Court by way of a Reference by the Minister of Justice under Section 617 of the Criminal Code. Presumably, the Minister had before him the same evidence which was heard by this Court and could have recommended a full pardon under Section 683 of the Criminal Code. His action begs the question of whether the Reference has any advantage not possessed by a pardon.

91.

The answer, it is submitted, harkens to the time-worn but valid cliché about justice being seen to be done. By requiring the new evidence to be called and tested in open Court, the Reference procedure does much to allay the inevitable suspicions this case will generate. It might be argued that had the Appellant been pardoned and another individual charged, the same result would have been achieved. The problem with that argument is that it is far from certain that such proceedings will ever get to trial. Furthermore, even if there were a trial, there is always the chance of an acquittal and juries, of course, do not give reasons. In short, there would be considerable risk that this case would remain forever clouded.

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2.

For those reasons, it is respectfully submitted that the Court should leave no doubt about its perception of the strength (or weakness) of the new evidence in this case.

93.

ALL OF WHICH is respectfully submitted this  
4th day of February, 1983, by:



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F.C. Edwards  
SOLICITOR FOR RESPONDENT



- 32 -

called to the scene. Further confirmation could be found in the fact that the doctor at the hospital thought it necessary to place ten or more stitches in the left arm of the appellant to close an actual wound that he had recently received.

Counsel for the defence attacked, very strongly, the evidence of the two witnesses, Maynard Chant and John L. Pratico, showing that neither of them had reported seeing Donald Marshall, Jr., commit the crime when they were first in contact with the police. Furthermore, Pratico had admitted to being drunk at the time and had told other civilians that Marshall did not commit the act. He even told the sheriff and counsel in the courthouse during the trial that Marshall had not stabbed Seale.

After full instructions by the trial judge, who related the principles of law to the evidence before the Court, the jury reached the conclusion that Donald Marshall, Jr., was guilty of the offence charged and had in fact murdered Sandy Seale. In order to reach this conclusion they had to disbelieve the evidence of the appellant and accept the eyewitness evidence of at least one of the two witnesses, Maynard Chant and John L. Pratico. They must have also, in our opinion, drawn an inference that the uncertainties of the accounts of the eyewitnesses and their failure to

immediately inform the police of what they had seen had been caused by some pressures brought to bear upon them on behalf of the accused.

The trial had lasted from November 2 to 5, 1971, and after the guilty verdict the Court pronounced the sentence of life imprisonment prescribed for the offence of non-capital murder by the Criminal Code of Canada.

On November 16, 1971 Donald Marshall, Jr., appealed his conviction to the Appeal Division of the Supreme Court alleging certain errors in the directions given to the jury by the trial judge and on the overall ground that the verdict was against the weight of evidence and perverse.

The Appeal Division found that there had been no error in the instructions given by the trial judge and that his charge had generally been very favourable to the accused.

The Appellate Court took the view that the jury had to decide which of two versions of the killing was to be believed and that the trial judge had properly pointed out the weaknesses inherent in the evidence relied upon by the Crown to support a finding of guilty against Donald Marshall, Jr. The Court was satisfied that the jury were left with this decision and that there was evidence which, if believed, could support the conviction. They therefore rendered a judgment on September 8, 1972 dismissing the appeal. (See R. v. Marshall (1973), 4 N.S.R. (2d) 517.)

Donald Marshall, Jr., commenced serving his life sentence in prison November 5, 1971 having been confined to jail since June 20, 1971. He was paroled from penitentiary on August 29, 1981, and the Minister of Justice referred this matter to this Court on June 16, 1982. The appellant contends that he never was guilty of the offence of murdering Sandy Seale, and that the fresh evidence taken before this Court on December 1 and 2, 1982, when considered along with the prior record of the case, is of sufficient force to require the Appeal Division at this time to set aside the original conviction of the appellant and enter a verdict of acquittal.

We turn now to a consideration of the fresh evidence.

As mentioned earlier, this Court in the interest of justice permitted a great deal of new evidence to be placed before it at the hearings held on December 1 and 2, 1982. Of all the evidence that given by James W. MacNeil was the most significant and met the test of fresh evidence that could be properly produced before an appellate court after the completion of a trial.

His evidence was unknown to the appellant's counsel, and in the light of their client's instructions could not have been discovered by them with reasonable diligence before the trial. It was evidence which, if believed, would establish that the appellant had not committed the crime, and

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even if it were not completely accepted would permit a court to say that no jury properly instructed with such evidence before it could have reached a verdict of guilty of the offence charged.

The fresh evidence of Mr. MacNeil must therefore be considered in the light of all of the other evidence to determine whether it is not only credible but of sufficient substance to merit a finding that the conviction of Donald Marshall, Jr., for the murder of Sandy Seale was unreasonable or could not be supported by the evidence.

James W. MacNeil is a thirty-seven-year-old labourer, who was born in Sydney and lived there all his life. He testified that on the evening of May 28, 1971 he was at the State Tavern on George Street, in the city of Sydney, where he met by accident an older man by the name of Roy Ebsary, whom he had known for a period of months. He had visited Mr. Ebsary's home on Argyle Street several times, and when they had finished drinking together for the evening, near eleven o'clock, they were returning there once again. The two of them cut through Wentworth Park, crossed the bridge and arrived on Crescent Street on their way home.

Mr. MacNeil describes Mr. Ebsary as about sixty

years of age, kind of stocky, not real tall, about 5'7", with a little hunch back. He was wearing a kind of black shawl and a sports coat. Mr. MacNeil's testimony then continues:

"A. Then we went up and we went up to like the top of the hill. Like I said we were crossing over the street and we were -- we were approached by this coloured youth and this Mr. Marshall. At that time I remember I recall that Mr. Marshall put my hand up behind my back like that, eh, and I remember I kinda like panicked because I -- in a situation like that, you get 'stensafied' or something like that but I remember the coloured fellow asking Roy Esabary for money. He said, like, 'Dig, man, dig.' and he said, 'I got something for you.' and then he -- I just heard the coloured fellow screaming and everything was so you know, like, 'tensafied' and every darn thing and I seen him running and flopping. I seen him running and flopping.

Q. Okay. As you're walking through the park -- let's go back a bit to after you'd entered the park and bring you up to the scene. Did you see anyone else in the park or speak with anyone else in the park prior to meeting this Indian fellow and black youth?

A. No, I never - never spoke to anybody.

Q. Can you say from what direction you were approached by these two individuals?

A. I think I was approached from behind like, you know, and everything like happened so fast, eh, you know. You just -- you get one of them there 'tensafied' like you know, you just -- a spear of the moment, like you know.

Q. Okay. How certain are you as to whether you were approached from behind as you said?

A. I can't answer you. How certain --

Q. Take your time.

A. Well when my arm was grabbed like this, so I mustta hadda been approached from behind, you know.

- Q. Now did you have any conversation with the Indian youth?
- A. No, I had no conversation with Mr. Marshall at all, whatsoever, like.
- Q. I see. How can you say that the individual you saw in the park that night was Mr. Marshall?
- A. Well I -- just by -- well, I seen his face. I seen his face. I know -- I know a person's face. I seen his face."

His testimony then continued:

- "Q. You were approached by two other people. Is that right?
- A. No, No, I was just approached by Mr. Marshall and the coloured person.
- Q. Where was Mr. Ebsary at this particular point in time?
- A. He was right next to me.
- Q. And was anyone standing with or near him?
- A. The -- Mr. -- the deceased, Mr. Seale.
- Q. Can you describe what -- you say the deceased, Mr. Seale. What did he look like?
- A. He's sort of like mulatte, like a light type face like. Like he was light, light-complected.
- Q. How tall would you say he was?
- A. I'd say he was about -- probably about five foot seven or eight, something like that.
- Q. And what happened again once you're -- what conversation did you hear between Ebsary and This other fellow?
- A. I just heard -- conversation I just heard is that the coloured fellow asked him for money, told him to 'Dig, man, dig.', and then Roy said: 'I got something for you.', and bang-o, that was it.
- Q. Now did you see this part where you say 'bang-o, that's it'?
- A. Yeh.
- Q. What happened?
- A. Well he took a knife and he just slit him up.

- Q. Slit who up?
- A. Slit up Seale.
- Q. And who had the knife?
- A. Esabary.
- Q. At the time you saw these two fellows or you were approached by these two fellows in the park you've described or indicated were Seale and Marshall, had you ever seen them before?
- A. I have never seen them before, no.
- Q. Have you ever seen them since that point in time?
- A. No, I've never seen them, no."

Mr. MacNeil was asked about the knife, and he said:

- "Q. Now you've indicated you saw a knife. Are you able to describe that knife in any way?
- A. In any way, kinda dark that there night there too. Like I -- I didn't -- like I couldn't describe it, you know, like I couldn't describe the knife but like I said everything happened so darn fast.
- Q. And after you say Seale was stabbed what did Seale do?
- A. Well he ran for a piece and then he fell on the road like. I heard him screaming and he ran and he fell on the road."

He was further asked about Marshall's actions after the stabbing, and his testimony was:

- "Q. . . . After the stabbing took place, what did you see Marshall do?
- A. I noticed that Marshall tried to come at Mr. Esabary, like he tried to at -- come at him there but he -- then he just -- he ran himself. I don't know where he went but he disappeared out of the picture but I believe he, tried to -- tried to help Mr. Seale at that there time."

Mr. MacNeil indicated that he had been drinking at

the tavern that evening but that he was not drunk, merely feeling good. He said that he "wasn't staggering or nothing," He said that after the stabbing Marshall disappeared and he and Roy Ebsary "automatically went to his home which is on the rear of Argyle Street", not far from the scene. He said they arrived there before midnight, and then continues his testimony as follows:

"A. I didn't stay too long, I think. His daughter was home. I remember that. I didn't stay too long. I seen him. He was wiping the blood off the knife underneath the sink and I went home and -- took off home and then I heard the next day that the fellow died, eh, that this Mr. Seale died.

Q. Okay, now you indicated that after you arrived at Roy Ebsary's home, you saw Roy Ebsary wash a knife off at a sink?

A. Yeh.

Q. Describe that knife. Are you able to describe that knife?

A. Well it's only -- it was only his pocket knife. I think it's only about six inches long. I think -- just -- it was only a pocket knife.

Q. Are you able to explain why we was washing the knife?

A. I guess he just wanted to clean the, get it clean and get the, you know -- I suppose he just wanted the --

Q. Now you've mentioned that you saw Ebsary's daughter?

A. Yeh.

Q. Do you know her name?

A. It's been so long since I seen her. I forget her first name, like."

His testimony continued:

"A. . . . The next day I went to Esabary's house and I told him that that fellow died, I said.

I said: 'You didn't have to kill him'. You know, 'You should have give him the money.' You know, and I told -- I told his son that so his son just said, well, he said: 'Well, if you say anything,' well, he said --"

Mr. MacNeil was then asked if he had ever communicated his story to the police, and in response he said:

"A. Yeh, I told the police in Sydney.

Q. Sir?

A. I told the police in Sydney after I -- after I heard that this fellow was in gaol, Mr. Marshall, for something he didn't do so I went and I told the police this and it bothered me because I wouldn't like to be in gaol for something I didn't do.

Q. And --

A. And so I went down and I made a statement to Sergeant MacIntyre and I just -- I don't know, is it Urquhart? There was another police -- what I remember was Sergeant MacIntyre. I made a statement to him and then I think a few days after that, --

Q. Okay, that's all.

THE COURT:

When was that?

MR. ARONSON:

I was just about to put that question.

BY MR. ARONSON:

Q. When can you recall having spoken to Sergeant MacIntyre concerning that event?

A. It was about a week after you were sentenced.

Q. Are you able to explain why you waited that length of time before going to the police?

A. Well because like, ah, Roy's son told me, he said: 'The whole family would be in trouble there.'"

On cross-examination Mr. MacNeil denied flatly that

there had been any conversation with Mr. Marshall or Mr. Seale and, in particular, there had been no mention of bootleggers. The only conversation was Mr. Seale saying, "Dig, man, dig" and then Mr. Ebsary replied, "I've got something for you" and then he saw a knife coming up and making contact with Mr. Seale. He said that neither Marshall nor Seale were carrying any weapons. He repeated, once again, that he saw Mr. Ebsary washing blood off his hands and the knife in the sink of his home shortly thereafter.

During cross-examination reference was made to an affidavit which Mr. MacNeil had sworn prior to giving testimony. In the affidavit Mr. MacNeil swore to facts substantially in agreement with his testimony before the Court, and then went on to say:

"10. That subsequent to the conviction of Donald Marshall, Jr., for the murder of Sandy Seale on November 5, 1971, and more particularly on or about November 15, 1971, I went to the Sydney City Police Department and was interviewed by then Det. Sgt. J.F. MacIntyre and gave to the said MacIntyre a free and voluntary written statement, a copy of which is produced herewith and marked Exhibit 'A' and that to the best of my knowledge and belief the facts contained therein are true.

11. That on or about November 23, 1971, I freely and voluntarily took a polygraph test administered by a member of the R.C.M.P., regarding my statement, Exhibit 'A', and it is my understanding that the results of the polygraph examination were inconclusive.

12. That I was interviewed by R.C.M.P. Cst. R.D. MacQueen and S/Sgt. H.F. Wheaton on February 8, 1982 and gave to the said MacQueen and Wheaton a

free and voluntary written statement, a copy of which is produced herewith and marked Exhibit 'B', concerning my knowledge of the circumstances relating to the murder of the said Sandy Seale, and that to the best of my knowledge and belief the facts contained therein are true."

The statement which Mr. MacNeil had given to the Sydney police on November 15, 1971, shortly after having heard of the conviction of Donald Marshall, Jr., for the murder of Sandy Seale, was as follows:

"Nov. 15th, 1971 - 7:25 P.M.

Statement of James William McNeil, age 25 yrs., residing at 1007 Rear George St., Sydney:

Myself and Roy Ebsary were at the State Tavern, George St., Sydney, late in the evening in May of this year. We were there about an hr. or so. We left. We walked down George St. and took the short cut through the Park (Wentworth). We came up to Crescent St. and while walking along Crescent St. we were approached by an Indian & a colored fellow from behind. The Indian put my right hand up behind my back. The colored fellow said dig man dig. Then Roy Ebsary said I got something for you. He put his hand in his right pocket and took out a knife and drove it into the colored fellow's side.

Q. What side

A. The left hand side of the colored fellow.  
I seen Roy's hand & knife full of blood

Q. Did you see the Indian being stabbed

A. No. I did not

Q. What happened then

A. Roy went home and I was with him. He washed the knife under the tap and washed his hands off. Then he told me not to say anything about it.

Q. Did you ask him why he done it

A. Yes, he said it was self defence

Q. What time did you get home that night

A. About 12 P.M.

Q. How long were you at Roy's house that night

A. About 1 hr. after that

- Q. When did you see Roy again  
A. The next day I went to his house. He was laying in bed. I told him that fellow died
- Q. What did he say  
A. He said it was self-defence. I told him he did not have to kill him. He told me he had 2 children - a girl and boy and not to say anything to the police. I left then.
- Q. Who seen you at the house besides Roy  
A. His wife, daughter & son.
- Q. Did they say anything to you then  
A. No. Not that day. About 2 days after that his son, about 18 or 19 yrs old came to my house with his car. He drove me out to the Wandlyn Motel - He went in the motel and his mother came out to the car. She got in the back seat. He got in and she said don't go to their house any more because of what Roy done. The young fellow told me if I mentioned what happened to the police all your family will be in trouble. They will have to go to Court
- Q. Was his mother present when he said that  
A. No
- Q. What were you wearing that night  
A. I was wearing a college coat - blue with 2 white marks on the sleeve
- Q. What was Roy wearing  
A. A black shawl over his shoulders - something like a priest wears over his shoulders
- Q. When did you tell somebody about this  
A. The first one I told was my mother. She noticed I was not sleeping; and walking around since the trial. She asked me and I told her about the stabbing and Indian man was in jail for something he did not do. It isn't fair. Then I told my brother Johnnie last night. He told me to go to the police
- Q. Did you know Marshall or Seale that night  
A. No.

Signed: James MacNeil

Witness: Cpl.G.A.Taylor

Nov. 14th - 8 P.M.

By: Sergt. Det. J.F.MacIntyre"

In support of the MacNeil story the appellant called Donna Elaine Ebsary, the daughter of Roy Ebsary; Gregory Allan Ebsary, his son, and A. J. Evers, the R.C.M.P. expert on hair and fibres, who had testified at the original trial. Donna E. Ebsary, who was thirteen years old at the time of the trial, had been living with her mother and father at 126 Rear Argyle Street, in Sydney. She testified as follows:

"Q. When did you hear of the murder?

A. I started hearing stories about it probably the day after it happened. Stories that I recognized.

Q. Okay. Are you able to recall any of the events which took place the night before you heard of the murder?

A. The night before I was at home. I was with my Mom and my father was out. He was out drinking with a friend which wasn't uncommon for him. We were sitting at home just kind of waiting for him to arrive. Late in the evening or I guess late in the night he arrived home with a friend. The two of them -- no, his friend was kind of excited and my father was trying to get his friend to quiet down. The two of them went into the kitchen where I followed them into the kitchen. My father had a knife in his hand. He put the knife in the sink and he washed it and that was -- that was the night prior to me hearing any stories about any murder taking place."

She then said that she had known Jimmy MacNeil for some time and that he had been associating with her father. She described her father as a violent person who had a propensity to carry knives and had a tendency to dress in an unusual way.

He would drape a coat over his shoulders rather than putting his arms in the sleeves and he usually wore dark clothes. He was a chef by trade and enjoyed playing with different kinds of knives.

Donna Ebsary's brother, Gregory Allan Ebsary, generally confirmed Roy Ebsary as being the type of person described by his sister. He testified that the many knives kept by his father were eventually transferred to their next residence at 46 Mechanic Street, in Sydney, and although they had been used generally throughout the years for various purposes they were turned over to the R.C.M.P. for scientific inspection in 1982. It was from this collection of knives that A. J. Evers, the R.C.M.P. expert in identification of fabrics, selected one knife that he found to contain material consistent with the material of the jacket worn by the deceased, Sandy Seale, and the yellow jacket worn by Donald Marshall, Jr. From this evidence the appellant argues that it was Roy Ebsary rather than Donald Marshall, Jr., who stabbed Sandy Seale.

In our opinion the evidence of Donna Ebsary, Gregory Allan Ebsary and A. J. Evers is highly speculative and by itself would not be of much force in determining the guilt or innocence of the appellant. It is only to the extent that it is consistent with the evidence of James W. MacNeil that it has any independent validity.

The next witness to testify was Maynard Chant.

Mr. Chant now says that he did not in fact see anyone stab Mr. Seale and did not really know what was happening until he met Donald Marshall, Jr., on Byng Street in the park. When the police noticed the blood on his shirt and asked him if he knew what had happened, he told them that he had seen everything. He then went to the police station and gave a written statement as follows:

"May 30, 1971 - 5:15 P.M.

Statement of Maynard Vincent Chant - age 15 yrs.,  
residing at Main St. Louisburg, C.B.

Friday night I was in town and I left the Bus Terminal on Bentinck St. about 11:40 P.M. I walked down Bentinck St. I came over Byng Ave. and started to cross the tracks. I got half way across the tracks - first I seen 2 fellows walking and 2 more were walking kind of slow talking. The 2 fellows who stabbed Donald Marshall and Sandy Seale - they talked for a few minutes over on Crescent St. One fellow hauled a knife from his pocket and he stabbed one of the fellow - so I took off back across the tracks to Byng Ave. and started to walk towards the bus terminal. Then I seen Donald Marshall coming down. I turned around and started to walk the other way. Donald caught up to me and said look what they did to me. He showed me a long cut on his left arm. Then he said help me - my Buddy is over on the other side of the park with a knife in his stomach. Then we started to look for more help. We met some boys and girls - one of the girls gave Donald a handkerchief - we got a car to take us over to where Seale was lying on the pavement. I took my shirt and put it around his waist and Donald went to a grey house and asked the man if he would call an ambulance.

About ten minutes later, I went up and asked the man in the house to call again and I knelt down beside Sandy Seale and he said it was hot. I unbuttoned his jacket. I then discovered his

stomach was cut. I took my shirt and put it where the cut was and made him comfortable. Then the police arrived. They called for the ambulance. He was taken to the hospital.

Q. Did you know those other 2 men

A. No

Q. Did you know Donald Marshall

A. I knew him to see him

Q. Did you know Sandy Seale

A. No

Q. Could you give me a description of these other men

A. One man about 6'2 - light brown hair; dark pants; suit coat - over 200 lbs. the other fellow 6' tall - dark pants; dark hair - 165 lbs.

Q. Did you see their faces

A. No

Q. Would they be young or old

A. I was not that handy

Q. Was there just 4 men there

A. Yes

Q. Did you see any knife

A. Yes it was a figure of a knife

Q. How far away would you be

A. 45 ft. or more down the tracks

Q. Could you tell if Marshall was drinking

A. I would not say he was

Signed: Maynard Chant

time 5:35 P.M.

Sergt. Det. J.F. MacIntyre"

No reference to this statement was made at the trial and counsel for Donald Marshall, Jr., did not know of its existence. A few days later, however, Mr. Chant made another statement in which he told the police that he had seen Marshall stab Seale, and his explanation for this change was that he was scared and being pressured; and when asked why he

had not subsequently revealed the true story he said in his sworn testimony:

- "Q. Subsequent to the trial in 1971 and Donald Marshall's conviction, did you ever have any occasion to tell anybody about the difference in your testimony?
- A. No.
- Q. Can you say when if ever you told someone about any discrepancy in your testimony?
- A. Four years ago.
- Q. Can you say who you said that to or who you indicated that to?
- A. My parents.
- Q. Anyone else?
- A. About a year and a half later I told it to my pastor. That was it.
- Q. Can you give any reason for having waited for such a length of time in indicating that you did not witness the Seale stabbing?
- A. All that was going on and the talk, even though I didn't witness the murder, I -- I figured he was guilty because of what was -- what had been told to me and what I had acquired through friends that were doing time in the Correctional Centre the same time Donald Marshall was doing time.
- Q. I see. Now can you give any reason to the Court today why you should be believed as to your testimony that you have given in Court today as opposed to the testimony you gave in Court in 1971?
- A. Roughly four and a half years ago, I became a Born-Again Christian. I accepted Jesus Christ as my Lord and personal Saviour. And this book that is being or used today to swear truth I hold very sacred in my life and I vow my life to it and I act the will that is in the Bible according to the commandments that Jesus Christ has given. That's why I speak the truth today.
- Q. Do you know an individual by the name of John Pratico?
- A. Yes.

- Q. When did you come to know him?  
A. At the trial.  
Q. Did you know him prior to the trial?  
A. No.  
Q. Had you ever seen him prior to the trial?  
A. No."

Mr. Chant has by now changed his story so many times that, in our opinion, no weight can be placed upon his evidence either at the trial or now. To the extent that his testimony cannot be relied upon to support the position taken by the appellant, however, it can no longer be of much assistance to the Crown should a new trial on the original charge ever take place.

John L. Pratico was not called before this Court to give evidence. Since he was the only other alleged eye-witness to the crime some explanation of his absence would be expected. With the consent of counsel for the Crown the appellant produced an affidavit in which Mr. Pratico indicated that he had not in fact been a witness to the actual killing even though he had said so at the trial, together with a second affidavit from a psychiatrist indicating that Mr. Pratico had been a patient prior to the time of the murder and continues under psychiatric treatment to the present day. This affidavit stated:

"4. THAT my medical diagnosis of the said John L. Pratico since August 1970, is that he suffers from a schizophreniform illness manifested in his case by

liability to fantasize and thereby distortion of reality and rather childish desire to be in the limelight or center of attraction.

5. THAT in order to function outside of a psychiatric institution, the said John L. Pratico has, since August 1970, to date, been on continual medication under my direction.

6. THAT on August 31, 1971, the said John L. Pratico was admitted to the Nova Scotia Hospital, in Dartmouth, Nova Scotia, for psychiatric treatment.

7. THAT it is my medical opinion that the said John L. Pratico was, in 1971, and has been continuously to date, a wholly unreliable informant and witness with regard to any subject or event, but more particularly in the Sandy Seale murder case in 1971."

Attached to the affidavit of Mr. Pratico was the following statement which he gave to the Sydney Police on May 30, 1971:

"May 30, 1971

Statement of John Pratico, age 16 yrs., residing at 201 Bentinck St., Sydney

Friday night I was at St. Joseph's Dance. I left there around 12 P.M. I seen Junior Marshall and Sandy Seale between the store and dance hall. I was talking to them. They wanted me to walk through with them. I said no. I went down Argyle St. and went over Crescent St. I was over by the Court house when I heard a scream. I looked. I seen 2 fellows running from the direction of the screaming. They jumped into a white volkswagon; blue lic. and white no. on it. One had a brown cordroy jacket - 5'5 dark complexion; heavy set. The other grey suit about 6 ft. tall; husky; red sweater - like a pullover. I started to run home.

Q. Did you see the Volkswagon since

A. No. I saw the 2 fellows twice last night walking near the park.

Q. Did you see them at the dance

A. Yes. I seen them walking around. Bobbie Robert Patterson said they are from Toronto Saints Choice Bike Gang.

Signed: John Pratico

May 30th - 6 P.M.  
Sergt. Det. J.F. MacIntyre"

Patricia Ann Harriss was the next witness, who had testified at the original trial, to testify before this Court that she had actually seen two people with Donald Marshall on Crescent Street rather than only one as she had said during cross-examination at the trial. Neither of the men whom she saw was Seale. Her original evidence was vague as to how many persons were about and was open to the inference that Seale was present. On June 17, 1971 Patricia Harriss gave the following statement to the Sydney Police:

"June 17 - 1 - 8.15 P.M.

Statement of Patricia Harriss, 5 Kings Rd. Born Nov. 15, 1957

On the night of the dance at St. Joseph's May 28/71 my boyfriend Terry Gushue, 2 Tulip Terrace left the dance at 11.45 P.M. We sat on a bench near the Grandstand. We sat on a bench. Robert Patterson was on the grass sick throwing up. We smoked a cigarette. Terry and I left. Walked back of the bandshell on to Crescent St. in front of the big green building. We saw and talked to Jr. Marshall. With Marshall was two other men.

Q. Describe the other men to me?

A. One man was short with a long coat. Gray or White hair. With a long coat. I was talking to Jr. Terry got a match from Jr. and Jr. said they are crazy. They were asking him Jr. for a cigarette.

Q. Did you see Sandy Seale in the Park?

A. No.

Q. Was there anyone else in the park?

A. Yes, boys and girls walking through the park. Gussie Dobbin and Kenny Barrow they left while we were still on the bench."

We turn finally to the evidence of Donald Marshall, Jr., the appellant herein. Mr. Marshall started off with the basic story that he had presented to the jury at his trial, but now includes many facts which if they had been known to Mr. Marshall at the time of his trial must have been wilfully held back from the Court at the time.

Donald Marshall, Jr., testified that he left some other associates at the Keltic Tavern and decided to head for the St. Joseph's dance. When passing through Wentworth Park he saw several people and then met Sandy Seale. He continued:

- "A. After I passed them four people, I met up with Sandy Seale in the centre part of the park and I asked him where he came from and he said from the dance hall, St. Joe's. And we had a little talk. I can't recall what we were talking about when we first met and I asked him if he would like to make some money with me one way or the other somehow.
- Q. Now when you say make some money with you, what did you mean by that?
- A. Nothing. Nothing in particular. I was looking for money from somewheres. I didn't have a plan how we were to make the money. I just asked him if he wanted to make some money with me.
- Q. Could you give any example of how you might have considered making money?
- A. Bumming it, breaking in a store probably, take it off somebody."

The appellant testified that he had known Sandy Seale for approximately three years, and that after they had talked for a few minutes they met Robert Patterson in the park, behind the bandshell. Patterson was drunk and they sat him down under a tree. He said at this time somebody called them up from Crescent Street asking for a cigarette and a light, and as they started up he was called by another party to give them a match. This second call came from Patricia Harriss and Terry Gushue. He gave them a light, talked a few minutes

and then he rejoined Seale and the two men who had called them first. He was asked to describe these men and he said:

"A. Yeh. The older guy, shorter guy, he was about five-eight. He had white hair, black rimmed glasses on, a top coat, a navy blue coat, I guess. It was dark. He had some kind of a sweater inside it or scarf or something under his coat.

Q. Could you place an age or estimated age for this particular person?

A. I'd say that he was about fifty-five anyway.

Q. Okay. And the other individual who you saw with this older man, can you describe him please.

A. He was younger. He was about I would say thirty, in his thirties and he was five-ten, about five-ten, five-nine and he had a brown corduroy coat on.

Q. Are you able to say how old you thought he might have been?

A. I would say he was about thirty years old.

Q. Had you ever seen these men before that particular occasion?

A. No.

He continued:

"A. Well when we first met them -- when I joined up with them, they -- I introduced myself to them. They introduced themselves to me and we shook hands and we just had a conversation. I was talking more to the older guy first when we first met. And I asked him where he was from and he -- what he did for a living and well, I asked him if he was a priest because he looked like a priest to me. He asked where the bootlegger's were and if there was any women in the park. I told him yes because I was familiar with the park and every time I'm there, there is females there. And at that time he invited us to his house. He pointed to his house where he lived and he invited us to his house for a drink. We told him no.

- Q. Did he give you a specific address as to where the house was located?
- A. He pointed to a house. He never give me an address only he pointed to a house. He told me he lived there.
- Q. Now are you able to say where this particular conversation between yourself, the two gentlemen you've described, and Seale took place?
- A. I'm not sure.
- Q. Was it in Wentworth Park?
- A. No, it wasn't in Wentworth Park.
- Q. Was it near Wentworth Park?
- A. Yeh, the street by Wentworth Park, Crescent Street.
- Q. Now did the conversation take place on the street itself or at some other location near the street?
- A. It was on the street.
- Q. I see. Now how long did you speak with these two men?
- A. Approximately I'd say about fifteen to twenty minutes.
- Q. Then what happened after that?
- A. After our conversation, we -- that's just before they were leaving, that's when they asked us to come to their house for a drink and we told them no and they walked away and they almost got to the end of the street. I wouldn't know the distance. Either Sandy Seale or I called them back. I don't know who called them back but one of us did.
- Q. Okay, now before you continue, Donald, in what direction were they walking?
- A. Walking in the direction of Bentinck Street.
- Q. And you've indicated that you believe you had this conversation on Crescent Street. Is that correct?
- A. Yes.
- Q. Can you explain why you or Sandy Seale as you say called the two -- these two men back?
- A. I don't know. I don't know why we called them back.

- Q. Can you say with any certainty which of you or Sandy Seale called them back?
- A. I'm not certain who called them back."

Donald Marshall, Jr., then described what took place when the men came back:

- "A. They were walking -- when we called them back, they -- they did come back and they joined up with us and the younger guy, the taller guy, walked on my right-hand side and then he was having -- I guess he had a few drinks that night because when they did come back, he had his head down, he had his hands in his pocket and to me he looked like he was ready to pass out or he was too drunk or something. And the curb of that road, the street, the sidewalk, he slipped off that and I grabbed him and at the same time -- at the same time, I heard the older guy, the shorter guy, telling Sandy Seale if he wanted everything he had. And at the same time, he had him hoist up with his arm and this is within five seconds of the whole thing.
- Q. Okay, now just to go back to when the two men -- you called them back, they returned to rejoin you. Where were you standing when they rejoined you?
- A. We were standing on the pavement.
- Q. And did -- how were you facing the man you've described you were with?
- A. I was facing not directly to him but almost directly to him at a forty-five degree angle to him.
- Q. Now were you able to observe Sandy Seale and this other gentleman you've described?
- A. Yes, I was looking directly at them two.
- Q. And what --
- BY MR. EDWARDS:
- Q. I'm sorry, I didn't catch that.
- A. I was looking directly at them two, Sandy Seale and the older guy.

BY MR. ARONSON:

- Q. And what did you see happen?
- A. The older guy had Sandy Seale hoist up with his -- I don't know if it was his right hand or left hand but he had him hoisted up and told him -- he -- the older guy told him did he want everything I want to Sandy Seale and he had him hoist up and he said, 'I got something here.' He called him a nigger, and at the same time -- this is within five seconds, the whole thing -- let's see now, I had the taller guy, the older guy hoisted up and when I turned around the older guy let go of Sandy Seale and he come after me and I let go of the other guy. I blocked his arm with my arm and --
- Q. Now when you say he came at you, what do you mean by that?
- A. He came at me with his arm coming towards me. I don't know what he had in his hand but he hit me and that's when I started running.
- Q. Now you mentioned that the older man had Sandy Seale hoisted up. I believe those were the words you used. What do you mean by hoisted up?
- A. He had his arm under his stomach in his mid-section and holding him up by the shoulder.
- Q. And in what position was Sandy Seale?
- A. He was hunched over.
- Q. During the time you observed this happening right after the two men rejoined you and Seale on Crescent Street, did you have any conversation with the younger fellow that you've described who was with you?
- A. Excuse me, I don't understand.
- Q. Okay. During this incident that you've described, did you have any conversation with the younger fellow?
- A. Before or after they came back?
- Q. After they came back.
- A. I don't recall.
- Q. Can you say what caused Sandy to hunch over?
- A. The older guy had him hoisted up with his arm. I don't know whether he was hitting him

or doing something to him and I didn't realize that he was stabbed until I started running.

- Q. What happened after the older fellow came at you?
- A. When he came at me, he took a swipe at me. He went to hit me in the stomach and I blocked him with my left hand and after I blocked him, I ran. I ran towards Bentinck Street.
- Q. Now can you say where or what happened to these two men?
- A. No, I don't know."

The appellant tells how he met Maynard Chant on Byng Avenue and just repeats what he told him, according to his testimony at the original trial, and how they then flagged down assistance and went to the aid of Mr. Seale.

Mr. Marshall was asked for an explanation of the difference between his testimony at the original trial and his recent testimony, and he said:

- "Q. Well in what way does your testimony differ in 1971 to today?
- A. In 1971 I did not mention anything about hitting somebody or robbing somebody or something like that. I did not mention that.
- Q. Why didn't you speak of that?
- A. The robbery didn't happen. It wasn't even an attempt of a robbery. I wasn't dealing with a robbery and I was afraid that one way or the other they would put the finger at me saying -- one way or the other they would have found a way -- in my opinion, they would have found a way to put it on me whether I told them or not.
- Q. To put what on you?
- A. Attempted robbery. Maybe the murder probably -- the robbery would have probably tried to cover up for the murder.

Q. Do you recall who the solicitors were who or the lawyers who acted for you at the 1971 trial?

A. C. M. Rosenblum and Simon Khattar.

Q. And were they aware of what -- at the time in 1971, were they aware of what you said in court today?

A. No."

During cross-examination the appellant identified the two men that they met in the park as Roy Ebsary and James MacNeil. He said that he did not know them at the time. He said that Mr. Ebsary invited them to his house for a drink and pointed in the direction where it was located. They just said "No." It was after they started to walk away that someone called them back, but he cannot remember whether it was Sandy Seale or himself. When they came back, however, the appellant grabbed Mr. MacNeil because he thought he was unsteady on his feet from drink. He said that he did not put MacNeil's arm up behind his back but merely tried to keep him from falling. Donald Marshall, Jr., then said he remembers Ebsary asking Sandy Seale if he wanted everything he had, and the cross-examination continued:

"Q. Is it possible that Sandy Seale could have said something to Ebsary at that point and you not heard it?

A. It's possible. I don't know.

Q. Isn't it true, Mr. Marshall, that when Ebsary and MacNeil were called back at least the intention in your mind -- you can't speak for Seale but in your mind, your intention was to roll those fellows?

A. Intentions of -- was to get money regardless how I got it. These men, after they left us,

they had a choice to keep going so -- they had the choice to leave when they left.

- Q. They had a choice to leave when they left the first time?
- A. Yes.
- Q. All right. But then when they were called back, they knew you meant business then, didn't they?
- A. Like I said, they had a choice to keep going. They were walking distance away from me. Nobody -- nobody cornered them, nobody pressured them. They had a choice to keep going. Nobody threatened their lives. I don't see why they came back. They lived a short distance where they said they lived.
- Q. They came back because either you or Sandy Seale ordered them to come back. Isn't that correct?
- A. They had a choice. Nobody's ordered to walk back.
- Q. If they had not come back, isn't it probable that you and Sandy Seale would have gone after them?
- A. I don't think I could say that. When they walked -- when they were walking away, we should have went after them then if that's the case but nobody went after them. They were close to their home and when we asked them back, they come back. The intentions I don't think it was to get robbed, you know, --
- Q. I'm sorry. I can't hear you, Mr. Marshall.
- A. The intentions of them coming back was not to get robbed so they had a choice to leave and they picked to come back and do us evil.
- Q. When they came back -- what you're saying is they didn't intend to get robbed but your earlier testimony was that you intended to get money from them no matter what you had to do at that point. Isn't that what you're saying?
- A. I didn't do anything to get the money off them. The intentions of getting money was there. The attempt -- any other thing else that will indicate that I tried to rob these people, I didn't. There was no indication from me or Sandy Seale. When they left, they should have kept going."

The cross-examination continued:

- "Q. Now you told my learned friend that while you had hold of MacNeil and you heard the words coming from Ebsary that -- I believe you said: 'The old guy had Sandy Seale hoisted up', and you couldn't remember whether it was with his right hand or his left hand. Right?
- A. I don't remember now.
- Q. That's what you said --
- A. Yes, I remember.
- Q. -- in testimony to my learned friend. Isn't that right?
- A. Yes.
- Q. Yes?
- A. Yes.
- Q. Could you see the knife at that point?
- A. No.
- Q. Because Seale was bent over?
- A. Yes. I had MacNeil - had MacNeil by the shoulders.
- Q. You had MacNeil by the shoulders?
- A. Yeh.
- Q. You let him go at that point?
- A. I threw him on the side when I was attacked by Roy Ebsary.
- Q. The old man took a swipe at you. Ebsary took a swipe at you.
- A. Yeh. His intentions was to stab me in the stomach.
- Q. You saw the knife at that point?
- A. Not really. Between -- within five seconds I guess I don't know whether I seen the knife or not. All I remember was I -- he threw a punch at me or took a swipe at me. I blocked it with my arm and I ran. And when I start running, I can feel blood coming down my arm.
- Q. Well, you're saying you didn't know there was a knife there until after you had run away?
- A. I don't know."

Later in the evidence Mr. Marshall was asked about a statement which he had made to the R.C.M.P. officer who was investigating his conviction while he was still in Dorchester on March 9, 1982. Part of this statement reads as follows:

"I asked Sandy if he wanted to make some money. He asked how and I explained to him we would roll someone. I had done this before myself a few times. I don't know if Sandy ever rolled anyone before. We agreed to roll someone and we started to look for someone to roll."

Later in the same statement the appellant said:

"I then walked down Crescent Street to Sandy and the two guys. We talked about everything, women, booze, about them being priests, and hinted around about money. The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them. I got in a shoving match with the tall guy. Sandy took the short old guy. I don't remember exactly what was said but I definitely remember Ebsary saying I got something for you and then stabbing Sandy."

There was also evidence before us to the effect that counsel for Marshall at the time of his trial had no knowledge of the prior inconsistent statements given to the police by Chant, Pratico and Harriss.

That then is the totality of the evidence before this Court from which it must be determined whether the conviction of Donald Marshall, Jr., is unreasonable or cannot be supported by the evidence, or whether an injustice has been done.

Although Mr. Marshall now puts forward Mr. MacNeil as his chief witness, their evidence in the main is in conflict. The only material particular on which they agree is that Ebsary stabbed Seale.

Mr. MacNeil's version of the incident has already been set out herein and we would but repeat the following extract from his evidence where he describes the meeting of Ebsary and himself with Marshall and Seale and the subsequent events:

"Then we went up and we went up to like the top of the hill. Like I said we were crossing over the street and we were -- we were approached by this coloured youth and this Mr. Marshall. At that time I remember I recall that Mr. Marshall put my hand up behind the back like that, eh, and I remember I kinda like panicked because I -- in a situation like that, you get 'stensa fied' or something like that but I remember the coloured fellow asking Roy Ebsary for money. He said, like, 'Dig, man, dig,' and he said 'I got something for you,' and then he -- I just heard the coloured fellow screaming and everything was so you know, like 'tensafied' and every darn thing and I seen him running and flopping...."

Mr. Marshall on the other hand testified before us that he passed four people in the park, two of whom he knows now were Ebsary and MacNeil; that later when Seale and himself were in the park someone called to them from Crescent Street asking for a cigarette and a light, that at about the same time Patricia Harriss and Terry Gushue asked for a light; that Seale responded to the first request and that he went to Miss Harriss and Gushue with whom he talked for approximately five minutes; that he then went to where Seale was talking to

two men whom he knows now were Ebsary and MacNeil; that they introduced themselves; that Ebsary and MacNeil inquired about bootleggers in the area; that Ebsary invited them to his house for a drink; that they declined; that Ebsary and MacNeil then left; that when Ebsary and MacNeil had nearly reached the intersection of Crescent and Bentinck Streets they were called back: that he doesn't know why they were called back; that MacNeil had his head down "looked like he was ready to pass out or he was too drunk or something...."; that MacNeil slipped off the curb and he grabbed him to keep him from falling; that at this time Ebsary stabbed Seale. Mr. Marshall categorically denies jumping Mr. MacNeil from behind and putting his arm behind his back. He is obviously not prepared to admit at this stage that he was engaged in a robbery.

How two people could describe the same incident in such a conflicting manner has caused us great concern and casts doubt on the credibility of both men. However, the fact remains that Marshall's new evidence, despite his evasions, prevarications and outright lies, supports the essence of James MacNeil's story - namely, that Seale was not killed by Marshall but died at the hands of Roy Ebsary in the course of a struggle during the attempted robbery of Ebsary and MacNeil by Marshall and Seale. In our opinion, Marshall's evidence, old and new, if it stood alone, would hardly be capable of belief.

MacNeil's evidence although unfortunately not

adequately tested by rigorous cross-examination by Crown counsel, is clearly evidence that is capable of being believed. Even though the various members of this Court may have varying degrees of belief as to some aspects of that evidence, we have no doubt that in the light of all the evidence now before this Court no reasonable jury could, on that evidence, find Donald Marshall, Jr., guilty of the murder of Sandy Seale. That evidence, even if much is not believed makes it impossible for a jury to avoid having a reasonable doubt as to whether the appellant had been proved to have killed Seale.

Putting it another way, the new evidence "causes us to doubt the correctness of the judgment at the trial." - Reference Re Regina v. Truscott (1967) 1 C.R.N.S. 1 (S.C.C.)

We must accordingly conclude that the verdict of guilt is not now supported by the evidence and is unreasonable and must order the conviction quashed. In such a case a new trial should ordinarily be required under s.613(2)(b) of the Criminal Code. Here, however, no purpose would be served in so doing. The evidence now available, with the denials by Pratico and Chant that they saw anything, could not support a conviction of Marshall. Accordingly we must take the alternative course directed by s.613(2)(a) and direct that a judgment of acquittal be entered in favour of the appellant.

This course accords with the following submission of counsel for the Crown as set forth in his factum:

"It is respectfully submitted that the appeal should be allowed, that the conviction should be quashed, and a direction made that a verdict of acquittal be entered.

"It is also submitted that the basis of the above disposition should be that, in light of the evidence now available, the conviction of the Appellant cannot be supported by the evidence."

Donald Marshall, Jr. was convicted of murder and served a lengthy period of incarceration. That conviction is now to be set aside. Any miscarriage of justice is, however, more apparent than real.

*no miscarriage of justice*

In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged.

By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief.

By planning a robbery with the aid of Mr. Seale he triggered a series of events which unfortunately ended in the death of Mr. Seale.

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

*MM*

information the truth of the matter might well have been uncovered by the police.

Even at the time of taking the fresh evidence, although he had little more to lose and much to gain if he could obtain his acquittal, Mr. Marshall was far from being straightforward on the stand. He continued to be evasive about the robbery and assault and even refused to answer questions until the Court ordered him to do so. There can be no doubt but that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction.

*Marshall could not appeal*

We accordingly allow the appeal, quash the conviction and direct that a verdict of acquittal be entered.

*Richardson* C.J.N.S.

*Edwin L. Harg* J.A.

*M. C. Jones* J.A.

*James L. Thompson* J.A.

*Samuel J. Hall* J.A.

IN THE SUPREME COURT OF NOVA SCOTIAAPPEAL DIVISION

IN THE MATTER OF A REFERENCE PURSUANT TO SECTION 617 OF THE CRIMINAL CODE BY THE HONOURABLE JEAN CHRETIEN, MINISTER OF JUSTICE, TO THE APPEAL DIVISION OF THE SUPREME COURT OF NOVA SCOTIA UPON AN APPLICATION FOR THE MERCY OF THE CROWN ON BEHALF OF DONALD MARSHALL, JR.

BETWEEN:

DONALD MARSHALL, JR.	)	
	)	REASONS
- and -	)	FOR
	)	JUDGMENT
HER MAJESTY THE QUEEN	)	



R. N. EBSARY, by Mr. Ruby

1 Q. You're not sure?

2 A. No.

3 Q. All right. Now if there was no other conversation, can you  
4 assist me in understanding how it is --

5 A. Oh, yes, I was. Yeh, I remember correctly.

6 Q. Oh, there was more conversation.

7 A. Yes.

8 Q. What was it about?

9 A. I invited the boys to come up to the house because I was going  
10 to have a barbecue.

11 Q. You invited them to come to the house because you were going  
12 to have a barbecue?

13 A. Right.

14 Q. How did that arise, that exchange?

15 A. Well, I don't know.

16 Q. You must have had some talk before that. You wouldn't meet  
17 strangers and say, "Come on over to the house and have a  
18 barbecue."?

19 A. Why not? I often did.

20 Q. No, but you would have had to have some kind of small talk  
21 before that.

22 A. Well if there was, I don't remember what it was.

23 Q. You agree with me, though, that it's likely you had some  
24 talk before the invitation.

25 A. Well, if there was, there was damn little.

R. N. EBSARY, by Mr. Ruby

- 1 Q. But you would have had to decide they were nice boys before  
2 you'd invite them into your home.
- 3 A. Right. I thought they were nice boys.
- 4 Q. So you would have to have talked to them somewhat.
- 5 A. Well, for a moment or two, maybe, I don't know.
- 6 Q. You're not sure how long that conversation went on, are you?
- 7 A. No.
- 8 Q. All right.
- 9 A. But not too bloody long, I can assure you.
- 10 Q. Because Marshall, (I think you'll agree from what you've  
11 read about this case and heard about it.) he knows in rough  
12 measure the direction of your home and tells that to the  
13 police that day.
- 14 A. Yes. My home is only a few steps from where this accident  
15 happened.
- 16 Q. That's right, and you told Marshall -- you pointed to the home  
17 and told him where it was.
- 18 A. Exactly.
- 19 Q. Of course you did.
- 20 A. Exactly.
- 21 Q. You also must have told him that you were a priest because  
22 he said, the two men -- one of the two men told him that  
23 they were priests and he told that to the police when they  
24 questioned him.
- 25 A. That's a -- Now that's a damn lie because I never told anyone

R. N. EBSARY, by Mr. Ross

- 1 Q. So you are on Crescent Street and the next thing, there are  
2 footsteps that you hear coming?
- 3 A. Right.
- 4 Q. Yes, and I take it that these people caught up with you?
- 5 A. That's right. They overtook us as a matter of fact.
- 6 Q. They overtook you and had they passed you?
- 7 A. Well, as soon as they rounded us, they confronted us.
- 8 Q. Yes. That's the point. You see, I want to find out about  
9 the invitation for the barbecue?
- 10 A. Well, I invited them up to the house because MacNeil and I  
11 were bound for the house.
- 12 Q. Okay.
- 13 A. And the barbecue. So we bumped into the other two and I said,  
14 "Why not come along"?
- 15 Q. I see. I see. But the problem I'm having is that if I was  
16 to tell somebody I bumped into you I would get the impression  
17 that I'm approaching you and we meet, but if somebody comes  
18 from behind and passes me I don't know that I can say I  
19 bumped into him.
- 20 A. Oh, yes.
- 21 Q. Do you understand the difficulty I'm having?
- 22 A. Oh, yes, quite.
- 23 Q. Well, perhaps you'd just assist me across that?
- 24 A. Now listen.
- 25 Q. Sure.

R. N. EBSARY, by Mr. Ross

- 1 | A. We're walking along and we hear -- or I hear footsteps behind  
2 | us.
- 3 | Q. Sure.
- 4 | A. And they're approaching us rapidly, so I figure they're going  
5 | to try to pass us, right? Well, they came right up behind us,  
6 | right? One goes this way and the other fellow goes that  
7 | way and they turn around and confront us. Now does that  
8 | clear your mind?
- 9 | Q. Well, that has cleared me up as far as the meeting and how  
10 | you became face to face.
- 11 | A. Right.
- 12 | Q. So now you're face to face. Then the invitation for the  
13 | barbecue, does that happen right then?
- 14 | A. Right then.
- 15 | Q. Just tell me if my understanding is correct. You come through  
16 | the park and you're walking along Crescent Street?
- 17 | A. Right.
- 18 | Q. You hear footsteps coming quickly?
- 19 | A. Right.
- 20 | Q. MacNeil is on your left side or right side, do you recall?
- 21 | A. On my left.
- 22 | Q. He is on your left and he is holding your hand?
- 23 | A. Right.
- 24 | Q. He is on your left and he is holding your arm?
- 25 | A. Yes.

R. N. EBSARY, by Mr. Ross

- 1 Q. And these people come around and they stop in front of you?
- 2 A. Right.
- 3 Q. So they stop in front of you and you indicate to them, "Look,
- 4 I'm heading for my home for a barbecue; would you guys want
- 5 to come"?
- 6 A. Yeh, that's the idea. That's what was said and that's what
- 7 was done.
- 8 Q. Well, I had to have it that way because I put the words --
- 9 I advanced the words. I would really like to know what you
- 10 recall as the specific words. Now they are around and in
- 11 front of you.
- 12 A. Right.
- 13 Q. Who speaks first, you or they?
- 14 A. I think I did. I invited them up to the house.
- 15 Q. And at that point I take it you did not have your glasses on
- 16 still?
- 17 A. I didn't.
- 18 Q. You didn't?
- 19 A. No.
- 20 Q. Okay, and as I understand it the night was quite dark?
- 21 A. Yeh, it was really.
- 22 Q. And it was misty?
- 23 A. Yes, there was a fine rain falling.
- 24 Q. A fine rain falling?
- 25 A. Yes.

R. N. EBSARY, by Mr. Ross

1 Q. And did you identify the forms; did you identify the figures,  
2 the people who were in front of you?

3 A. No, I didn't really.

4 Q. I see, but I think you could have identified the outline of  
5 the individuals?

6 A. Yes, that's right.

7 Q. And having identified the outline like a silhouette did you  
8 come to any conclusions as to who these people might possibly  
9 be?

10 A. No, I didn't.

11 Q. None whatsoever?

12 A. No.

13 Q. I see. And, for instance, at that point could you have  
14 identified that one person was black?

15 A. No.

16 Q. You did not?

17 A. Because it was so bloody dark you couldn't see anything really.

18 Q. I see, and I guess that's consistent with what you told the  
19 police some time later that you thought they were two white  
20 people?

21 A. That's right.

22 Q. So these people are now in front of you and you invite them for  
23 a barbecue?

24 A. Right.

25 Q. Was there a response? Did anybody say anything?

R. N. EBSARY, by Mr. Ross

- 1 A. The only thing that was said was, "Dig man, dig", so they  
2 refused to come to the house, right?
- 3 Q. I see.
- 4 A. And they wanted whatever we had in our pockets.
- 5 Q. I see. Were you offended by the fact that they had rejected  
6 the invitation to come to your barbecue?
- 7 A. No, but I was a bit startled when they said, "Dig man, dig".
- 8 Q. I see. You were stunned?
- 9 A. No, I wasn't stunned but I was a bit startled.
- 10 Q. Oh, startled?
- 11 A. Well, after all I was generous enough to invite them to the  
12 bloody house and they refused, so what --
- 13 Q. Oh, I understand. At that point you gave everything that was  
14 in your pockets. Am I correct?
- 15 A. They said, "Dig man, dig", and Marshall grabbed MacNeil by  
16 the throat, hey, and dragged him across the road, right?
- 17 Q. Yes.
- 18 A. And about sixty feet along the road this way.
- 19 Q. Along the road, was that toward Bentinck Street or towards--
- 20 A. Yes, toward Bentinck.
- 21 Q. Yes.
- 22 A. So he was much closer to Bentinck than I was.
- 23 Q. Now -- And I understand that you gave up the things -- Well,  
24 perhaps you'd tell me. One of my learned friends asked you  
25 about giving up your money --