

I N D E X

VOLUME 5

EBSARY FIRST TRIAL-----PAGES 1 - 240
September, 1983

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IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROY NEWMAN EBSARY

Mr. Justice L. Clarke

F. Edwards, Esq., for the Crown

L. Wintermans, Esq., for the Defence

September 9, 1983

Mr. Wintermans' Argument regarding Charter or Rights

My Lord, I would submit that the Charter of Rights and Freedoms is a relevant consideration in this matter and I refer to -- first, to two sections, Section Seven which states, "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof accept in accordance with the principles of fundamental justice" -- that's at page eight seventy-nine of that book if you wish to look at it.

So, what I'm suggesting here is that the accused, Mr. Ebsary, has the right to liberty and the right not to be deprived of his liberty accept in accordance with the principles of fundamental justice.

Then, switching over to Section One of the same Charter, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". So, Section One seems to be somewhat of a limitation of the rights under Section Seven and other rights.

Another section that I would refer to is Section Eleven, sub-section (b) which says, "any person charged with an offense has the right to be tried within a reasonable time": Section Eleven (d) states, "any person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Those are the sections that I would rely on for argument.

Mr. Wintermans' Argument regarding Charter of Rights

Unfortunately there is little case law of a high court nature that really can help this court. There is very little as far as the Supreme Court of Nova Scotia or the Court of Appeal of Nova Scotia or the Supreme Court of Canada that I am aware of with respect to a situation such as ours. There are some foreign cases which could be of some assistance. The case of Grant versus D.P.P. which is a privy council decision at nineteen eighty-one Three W.L.R., three fifty-two and that case -- cases referred to in the Canadian Charter of Rights and Freedoms commentary by (inaudible) Palski, a Canadian writer, nineteen eighty-one Carswell or nineteen eighty-two, I'm sorry, and that refers to the British case the section actually, actually it's a Jamician constitutional case ruled on by the privy council and the section in the Jamician Constitution which states, "wherever a person is charged with a criminal offence he shall be afforded a fair hearing within a reasonable time". So, that is really a combination of a couple of these sections that I have referred to and in that situation the question was when the time starts to run. The judicial committee was of the opinion, under the circumstances, that it was appropriate to take into account the time elapsed between the offense and the trial and not only that between the charge and the trial. A lapse of three -- it's a quote, "A lapse of three and a half years between the events which gave rise to the charges and the trial would not in the ordinary way be a fair hearing within

Mr. Wintermans' Argument regarding Charter of Rights
a reasonable time". that's at.....

There's also American Law, which I would like to refer to. Barker versus Wingo which is four-o-seven, U.S. five one four, nineteen seventy-one, which I believe is the Supreme Court of the United States--refers to on the question of a speedy trial, a balancing test was adopted balancing the interest of the accused person and the state and the American policy considerations were referred to, "the factors to be considered in determining reasonableness included, (one) length of delay; (two) reason given by the Crown to justify delay; (three) responsibility of the accused to assert his rights; (four) prejudice to the accused. Furthermore, dismissal of the indictment was viewed as in the U.S. as the only appropriate redemy". So, those are some of the factors that are considered. Obviously this Charter of Rights is brand new in this country and new to the courts. There is other cases that have said that you can't really apply any definite rules, you just have to look at the sections and try and look at the circumstances of each case and decide on the basis of each case whether or not it contravenes the provisions of the Charter of Rights.

I would submit that in this case that just to tender the preliminary hearing transcript the following: (one) that the offense occurred approximately twelve years ago, that the probability of conviction, if that is a relevant consideration--is not strong in this case.

Mr. Wintermans' Argument regarding Charter of Rights

Relying only on the Crown's own witnesses the following becomes the uncontradicted facts: (one) that there was some evidence of intoxication of the accused. The evidence that the accused is an elder man of small stature. That there was a robbery. That the accused was a victim of a robbery along with another person. That the robbery had violence. That a single wound was inflicted with a pocket knife in self defense. This is from Crown's witnesses, not defense witnesses.

I would submit that when you consider that in conjunction with the very lengthy delay and when you consider that under the Charter of Rights there is a presumption of innocence until -- unless a person is proven guilty by a fair trial. When you consider what is the meaning of a fair trial, I think that you have to look at the principles of fundamental justice which have been compared to principles of natural justice in the administrative law and when you considered that an event occurred twelve years ago, that the person was not charged until eleven years, more than eleven years after the event, that it is not possible, under those circumstances, where me representing the accused to provide the accused with a fair trial because it is impossible at this stage for me on behalf of the accused to independently investigate what happened back in nineteen seventy-one.

I thank my learned friend, the Crown Prosecutor, Mr. Edwards, for having provided me with as much information

Mr. Wintermans' Argument regarding Charter of Rights
as he has provided me. However, it is still evidence
that has been supplied to me by the Crown which was
gathered by the police.....

By the Court: I interrupt you, ten minutes.

Mr. Wintermans: And that's about the extent of the
argument. I was just about to finish there.

By the Court: What are you looking for? You haven't
told me what you want.

Mr. Wintermans: Well the remedy that I am looking for
is dismissal of the indictment on the basis of Section
Twenty-two, sorry, Twenty-four of the Charter of Rights
that the accused rights and freedoms as guaranteed by the
charter have been infringed or denied and I am applying
to a court of competent jurisdiction to obtain the remedy
of dismissal of the indictment.

Mr. Edwards Argument

Mr. Edwards: My Lord, I would like to make two points
with respect to my learned friend's (inaudible) pursuant
to Section Eleven (b); that is, a trial within a reasonable
time. My learned friend has used the transcript of the
preliminary inquiry in his argument and I would submit that
unless he wishes to call evidence to the contrary that
transcript can be used to show that one of the major (inaudible)
has been a twelve year delay as he puts it is that Mr. Ebsary,
himself, did not come forward. If he had come forward years
ago, he could have had the matter disposed of one way or
the other at that time. So, if there is an argument that
there is no reasonable -- or that the timing lagged between

Mr. Edwards' Argument

the commission of the offense and the holding of a trial is unreasonable then a large measure of the blame for that has to go squarely on the shoulders of the accused.

By the Court: The accused is suppose to come forward in any (inaudible) situation, is that what you are saying?

Mr. Edwards: Yes My Lord. Well, I would say that

By the Court: (Inaudible).

Mr. Edwards: Well, I don't mean not at the trial. But, if at the time that he had gone to the police and said look here's what happened in the park then the matter could have been disposed of at that time. It was not the fault of the authorities that

By the Court: The background of the evidence which I know (inaudible) this is what you are saying (inaudible) in terms of evidence, I should know.

Mr. Edwards: Well, my learned friend referred to the transcript of the preliminary inquiry, Your Lordship has the fact sheet which was used for purposes of outlining the overview to the Grand Jury and I believe that fact sheet made reference to the fact that after the night in question Jimmy MacNeil went to the accused the next day and told him that fella had died and Mr. Ebsary told Mr. MacNeil that it was self defense and he had a family and that was the end of it as far as he was concerned and my submission is that the matter remained under wraps from that day forward because of the fact that Mr. Ebsary did not come forward and admit his participation in the alleged offense. So, looking at it conversely My Lord,

I submit that it would be an extraordinary situation if an accused could escape having to have his day in court merely by hiding for a few years and then coming forward and saying because the authorities haven't been able to find me I am now protected by the Charter because they didn't find me within a reasonable time. I submit that would be contrary to the spirit of the Charter and would bring the administration of justice into disrepute. But, my second point on this reasonable time argument, I submit, is the one which has most bearing on my learned friend's argument and the fact of the matter is that until, I forget the date of the Marshall decision by the Appeal Court but it was in the spring of this year, it was until that time another person stood convicted by the Supreme Court and jury of the offense which is now before the court. So, when Mr. Marshall was acquitted I submit that it was at that point that the crucial time began to run and I would submit strongly that the matter was held with most -- was handled most expeditiously from that point on because within days -- I would submit that within two weeks after Mr. Marshall was acquitted the charge was laid, the charge which was eventually reduced to manslaughter, but that charge was laid and the record will show on the twelfth of May, nineteen eighty-three, then the preliminary inquiry was held on the fourth of August nineteen eighty-three and I submit my learned friend would have to agree that the reason, the main reason for the lag between the twelfth of May and the fourth of August was the health of the accused and the court granted adjournments until then to enable the

Mr. Edwards' Argument

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accused to recover from health problems he was experiencing at the time. So, the fourth of August the preliminary inquiry was held and he was committed to stand trial. The sixth of September the matter went to the Grand Jury and now today, the ninth of September he is arraigned. So, I submit that it would have been impossible to do it very much faster than that. With respect to my learned friend's arguments on Eleven (d) that the accused is to be presumed innocent until proven guilty and to have the matter heard at a fair and public hearing, the crucial point there as far as a fair trial is concerned is that all witnesses to the nineteen seventy-one event are still available, no key witnesses have died or left the country thus making it impossible for Mr. Ebsary to have a fair trial and as far as the second point I wish to make on Eleven (d), as far as the presumption of innocence is concerned there is nothing that my learned friend has been able to identify or point out that could possibly impair the presumption of innocence as far as his client is concerned. That presumption still operates and I submit that it is fair to say at this point that he has an impartial tribunal. We have spent the entire making sure of that fact. So, he has the tribunal ~~which~~ is required now by the Charter. So, on those basis I would urge Your Lordship to reject my learned friend's motion.

Mr. Wintermans' Argument regarding Charter of Rights

Well, My Lord, with respect to a fair trial I would submit that fair means that the accused has the right to investigate thoroughly, which he hasn't had because of the delay. We have had to rely completely on what the Crown has given us as far as investigation. So, there is no independent investigation possible. Secondly, and very importantly, Mr. Ebsary, maybe he didn't come forward but there should never have been a duty recognized in this country under law that any person has to come forward, any witness or anybody and thirdly when you consider the facts, the bear facts, there is no question as to what they are and that is a little old man was walking through the park minding his own business and two young thugs came up and tried to rob him and one of them got killed unfortunately by a pocket knife. Under those circumstances I would submit that it's not fair to Mr. Ebsary to even suggest that he is guilty of anything and any judge can see that he is innocent and that it was self defense at worst and he shouldn't have to be put in jeopardy like this at such a late stage under the circumstances that are impossible for him to properly defend himself and the presumption of innocence is there to give Your Lordship the ground to just dismiss the charge on the basis that -- under those circumstances the presumption of innocence should hold, it should follow, that there is no offense there and the evidence is not in dispute and I leave that with Your Lordship.

By the Court: Thank you Mr. Wintermans

Court Adjourns.

C E R T I F I C A T E

I, Ruth McNeil, of Sydney, in the County of Cape Breton, Province of Nova Scotia, certify that the transcript of evidence hereto annexed is a true and accurate transcript of evidence given at Sydney, in the County of Cape Breton, Province of Nova Scotia in this matter of Her Majesty the Queen and Roy Newman Ebsary, recorded on tape, taken down in shorthand by Mrs. B. Munroe, transcribed and checked by me.

Ruth McNeil

Sydney, Nova Scotia

April 10, 1984

1983

CRIMINAL

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IN THE SUPREME COURT
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROY NEWMAN EBSARY

Mr. Justice L. Clarke
September 12 & 13, 1983

F. Edwards, Esq. for the Crown
L. Wintermans, Esq. for the Defence

September 12, 1983

1.

BY THE COURT:

The Defence has made a motion for the dismissal of the indictment under Section 7 and Section 1 of the Canadian Charter of Rights, which states that the Defendant is guaranteed his right to life, liberty and security of person, and that by these proceedings going forward, he is being denied that which the Defendant is otherwise guaranteed under this Section. The Defendant argues that he has not been tried under a reasonable time in a fair hearing by an independent and impartial tribunal.

As I understand the summary, Sandford Seale died on or about May twenty-eighth, nineteen seventy-one. A person other than this Defendant was charged with the unlawful death of Mr. Seale. That accused person, whose name is Marshall, was put on trial and found guilty. An investigation initiated by the Minister of Justice and the Attorney General for Canada in the latter part of nineteen eighty-two led to a determination and judgment of the Nova Scotia Court of Appeal in May, nineteen eighty-three, that Marshall should be acquitted of the crime for which he had been convicted. Within a few days thereafter, as I understand it, and meaning within less than a calendar week and more particularly on May twelve, nineteen eighty-three, an indictment under one of the murder sections of the Criminal Code was laid against this Defendant. Thereafter the

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BY THE COURT:

indictment was advanced expeditiously before a judge of the provincial court for a preliminary inquiry. Because the Defendant was suffering from ill health, adjournments were obtained from the Provincial Court until his health recovered to a sufficient degree to make it possible for him to be present at the inquiry.

A preliminary inquiry was held on August fourth, nineteen eighty-three. Upon the conclusion of the preliminary inquiry the Learned Judge caused the charge against the Defendant be reduced to manslaughter. The next following sitting of the Trial Division of the Supreme Court of Nova Scotia opened in Sydney on September sixth, nineteen eighty-three. On that day the indictment was referred to the grand jury, which upon the conclusion of its deliberations returned a true bill. Subject to the outcome of this preliminary motion the Defendant was arraigned before this court on September ninth, nineteen eighty-three. On its face a lapse of twelve years appears far too long and would seem to be struck down by the provisions of the Constitution Act falling within section 11(b). However, each of these cases must be considered on its facts. There is a clear and undisputed reason for the delay. It arises from the earlier conviction of Mr. Marshall and the subsequent and more recent investigation by the Court of Appeal of which I

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BY THE COURT:

have described. In my judgement there has been no unreasonable delay in the processing of this indictment from the time the final adjudication was made by the Court of Appeal of this province. The unusual and extraordinary circumstances under which this whole matter has developed do not, in my view, offend the provisions of the Constitution Act on the subject of time as such. One of my principal concerns is whether the Defendant has been prejudiced by the initiation of this indictment at this time. The circumstances by themselves would suggest inference of some prejudice to the Defendant. The issue becomes one of three and how one balances the somewhat competing interest between society, meaning a public interest and a person and rights of the Defendant. Among these submissions, the counsel of the Defendant argues that the possibility of conviction is not strong. I cannot comment on that, nor am I able to take that into consideration. Therein, counsel is expressing an opinion on the evidence which stands from his role as an advocate. I expect counsel to Crown holds an opposite view from that of counsel of the Defendant on that issue. The indictment suggests this is a serious offence and in no respect a title in this nature. The character or quality of the offence or its outcome upon the trial do not strike me as being terribly significant features as they relate to

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BY THE COURT:

this motion. The Constitution Act makes no distinction on these matters. However, I am very interested in the submission which has been advanced by counsel of the Defendant that the passage of time has not made it possible for the Defendant and his counsel to make a proper and thorough investigation in order to prepare his case to respond to the indictment. I consider this to be a fundamental and necessary right when viewed in the circumstances surrounding these events, if the Defendant is to have a fair and proper trial. The facts of this important issue which have been advanced to me are leads.

First, every material witness is still alive and available and competent to give evidence in this Court. Two, every material witness is still residing in this immediate local of Sydney and not one of them has even moved from the jurisdiction. Three, counsel of the Crown says that having regard to the somewhat unusual circumstances of this case, he has taken extra care to ensure that the defence has been provided with as much information and material that the Crown could make available, including that which goes back to its records and materials arising out of the prosecution of the earlier indictment. Counsel of the Defendant agrees that the Crown has been both generous and helpful in this regard.

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BY THE COURT:

While there is the possibility that with the passage of time, the memories of witnesses may be jaded, that is a proposition which cuts both ways and if it exists it will undoubtedly become evidence under the riggers of cross-examination. Fundamental adjustments was defined by the Supreme Court of Canada in Duke vs. The Queen, nineteen seventy-two, S.C.R. nine one seven in the following words by the then Chief Justice Cocco at page two hundred and ninety-three: "Without attempting to primalate any final definition of those words I would take them to mean generally that the tribunal which adjudicates upon his rights must act fairly in good faith without vise and in a judicial temper and must give to him the opportunity adequately to state his case."

If I were satisfied that material evidence necessary for the adequate preparation of the defence were unavailable I would agree that the motion should be granted. However, I am not persuaded that to be the case based upon what is before me now. Section seven of the Constitution Act is obviously one of its most important sections. No person is to be deprived of this right to life, liberty and security of person except in accordance with the principals of fundamental justice. In my judgement, the denial of the motion now before me will not cause the Defendant such a

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BY THE COURT:

degravation. Likewise and for the reasons given I find that the procedural rights and guarantees available to the Defendant under Section eleven (b) and Section eleven (d) have neither been offended, denied or violated. Accordingly the motion is dismissed and the relief sought is denied.

MR. FRANK EDWARDS:

My Lord, if I may. There is a substantial body of the press core here, some of whom may not be aware of the rule that the contents of your decision or the particulars of the motion made by defense counsel in the absence of the jury may not be published. I just want to make that mention now so that none of it is published by mistake and therefore causes a detriment to these proceedings.

BY THE COURT:

Sure. There is such a rule. It was not formally announced on Friday because of the manner in which this whole area of the motion is developed by agreement to be advanced after the jury was chosen. The jury, having been chosen, I would have to remind the media which is news, newspaper and television and radio and as well the persons in the court room that matters which are discussed in the court room in the absence of the jury are not to be broadcast and spread about, left to come to the attention of the jury because they are not

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BY THE COURT:

sequestered, that is they are not being kept together and will not be kept together until such time as the case is handed to them for their adjudication of the return, their verdict.

I expect that if the people wish to report that the motion was made under the Chartered Rights and the result of that motion, that that would be permissible, but it's the content of it and the reasons for which would violate the conditions of the Code because the jury was in effect chosen.

Shall we proceed with the return of the jury gentlemen?

Jury Returns.

Jury is called, Mr. Michael Raoul was selected as foreman.

Address to Jury.

Mr. foreman, ladies and gentlemen, you were sworn to look upon the prisoner harped in his cause. The prisoner says indictably the name of Roy Newman Ebsary on a charge that he at or near Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the twenty-eighth day of May, nineteen seventy-one, did unlawfully kill Sandord Sandy Seale by stabbing him and did thereby commit manslaughter contrary to Section seventeen of the Criminal Code of Canada.

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Upon this indictment he had been arraigned and following his arraignment has pleaded not guilty. Before his trial . . . upon his country, which country you are. Your charge, therefore, to declare whether he is guilty or not guilty.

BY THE COURT:

Now Mr. Foreman and members of the jury, I wish to make some preliminary remarks to you before the trial begins. You have been chosen, you have been sworn, and the twelve of you together with myself constitute the court which will try this case.

As jurors you are responsible for the determination of the facts. And to that extent you become judges of the Supreme Court of Nova Scotia to establish the facts and render a verdict based upon those facts. I am responsible for directing you and counsel with regard to the law. In that respect what I say concerning the relevant law is binding upon you as members of the jury as it is upon the counsel. So that within your field of responsibility and within mine, you as the jury and I as the presiding judge have exclusive jurisdiction.

You should understand that with respect to your responsibility that nothing becomes a fact in this trial until you find it to be so. Nothing becomes a fact in this trial until you find it to be a fact. So that means that it is of the utmost

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BY THE COURT:

importance that you follow the evidence carefully and in doing that you form your own impressions of each witness. Some witnesses will impress you as being impartial, fair and credible. Other witnesses may have an interest in the outcome of the case and that can be a factor to be borne in mind when assessing whether you believe all or part or none of what a witness may testify to. You may also find that there may be discrepancies in the evidence of the witness. If there are, and that is certainly not an infrequent occurrence, you can usually disregard that circumstance because witnesses have only their memories to rely upon and it is quite easy for an error to occur. A deliberate lie or falsehood is quite another matter. That will seriously affect the credibility or the believability of the evidence of the witness.

And so I ask you to listen carefully to observe the conduct and the demeanor of each of the witnesses as he or she is giving evidence and then form your own conclusions.

Now in addition to the oral evidence which you hear, there may be certain other evidence such as documents or photographs or objects introduced at the trial. If this occurs, these items are called exhibits. You will have an opportunity to examine, to read, touch, feel, whatever, with the exhibits when you go to the jury room because you will take all the

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BY THE COURT:

exhibits with you. You may or may not have an opportunity to examine an exhibit when it is actually entered and filed in the court. If, however, you wish to see or examine an exhibit which does not happen to passed to you at the time that it is entered in court or before you retire to consider your verdict after the evidence is in, you have every right to do so if you let us know.

It is your duty as members of the jury to carefully and calmly consider and weigh the evidence without any trace of sympathy or prejudice for or against any party to this trial. You are to take nothing into your consideration that is not presented to you as evidence at this trial. If you have read or heard anything about this case before coming to court you are duty bound to banish it from your minds. You must not discuss this case with anyone nor let anyone tell you anything about this case outside the court room. If anyone tries, politely refuse to listen. If he or she insists then let me know because the law imposes very severe penalties on anyone who attempts to communicate or does communicate with a juror respecting a matter of trial. I want to caution you as well with regard to your own families and your friends. They may very well, and naturally, be interested and curious to know about the case when you go home. If the subject is raised, as it may very well be, I suggest that you

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BY THE COURT:

simply tell them what kind of a case it is and tell them as well that the presiding judge has instructed you not to discuss its detail while you are sitting on this case.

I must also draw to your attention a provision in the Criminal Code which prohibits a juror at any time, either during or after the trial, from disclosing anything that took place or was said in the jury room with respect to the trial as the evidence. To make such a disclosure either during or after the trial is a very serious offence, and it's a very serious offence for the obvious reason that everyone of the twelve of you must have the freedom to communicate openly and frankly and confidentially among yourselves with respect to the evidence and the matters arising in this case, knowing that what you say is not going to be repeated outside the jury room. That is the reason why it is a serious offence for anyone to disclose, a juror to disclose outside what was said by any other juror in the jury room of matters having to do with this case.

I am going to suggest to you that you should not discuss the case among you, seriously at least, until all the evidence is in. The reason for this is to avoid the great danger that a person may come to some premature conclusion before hearing all the evidence. Your role during this trial is one of patient and careful listening to the evidence. The time to discuss the case is when you retire to the jury room

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12.

BY THE COURT:

to consider your verdict. At that time you will have heard all the evidence, you will have heard the addresses of counsel and you will have heard my direction to you on the law. At that point I think you will be in a much better position to exchange views with one another and to arrive at a fair verdict based upon the evidence and the law.

Now I want to take a couple of minutes to give you an outline of the procedure that is followed in a criminal trial. As you probably know, our system of justice is known as the adversary system, which means that the presentation and examination of the witnesses is substantially in control of the crown prosecutor and counsel for the defence. Subject to certain rules of law which I shall enforce, you and I as impartial judges will sit and listen to what the parties, their witnesses and counsel have to say. When I have concluded these opening instructions I will invite counsel for the crown, Mr. Edwards who is the lawyer sitting nearest your bench, to introduce the case to you. In so doing he will no doubt state what he expects that the evidence for the crown will be. Please bear in mind that such an address from Mr. Edwards as crown counsel is not evidence. It is merely a statement of what the crown hopes to prove in evidence and it is given to you only to assist you in following the evidence as it comes out to the witness.

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13.

BY THE COURT:

Now when crown counsel has completed his opening address, he will then call witnesses and examine them. This is called "examination-in-chief" or "direct examination". Those are legal-like labels which are given to that stage in the proceeding. When he has completed his questioning of a witness then Mr. Wintermans, who is counsel of the accused and the lawyer sitting to the right of Mr. Edwards and farther from you, will then have an opportunity to cross-examine the witness.

The purpose of cross examination is to test the evidence given by the witness and sometimes to bring out new facts which were not brought out during examination-in-chief.

When counsel for the defence has concluded his cross examination of a crown witness the crown counsel, Mr. Edwards, will then be entitled to ask a further - the same witness - further questions and explain fresh matters which may have been brought out during the cross examination by counsel for the defence. At that point in time crown counsel is limited only to new matters brought out by defence counsel and cannot use that time to introduce new evidence himself.

When counsel for the crown has called all the witnesses in support of the crown's case, then counsel for the accused will have the right to make an opening statement to you if he desires to do so, and then call such witnesses as he desires.

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14.

During the presentation of the evidence of the defence counsel for the accused will examine each witness in chief and crown counsel will then have an opportunity to cross examine that witness. Also, counsel for the defence will have the same opportunity to explain fresh matters raised during the cross examination as did the crown counsel with respect to the crown witnesses.

Now I indicated to you earlier on, I mentioned that one of the responsibilities which I have is to make determinations respecting the relevancy and application of the law. We have a well developed body of law which guides us with respect to the determination of how evidence is admissable and which evidence is not admissable. I may be called upon from time to time to make rules with respect to the admissability of evidence. These two counsel are experienced lawyers and they will know pretty well what evidence may be forthcoming to which an objection might be entered. When that point arises, if it does during the course of the trial, they may very well indicate to me that they require legal ruling with respect to the admissability of certain of the evidence. Now if that occurs, I want to tell you in advance why it occurs and what the procedure will be when it does occur.

At that point you, as the members of the jury, will be asked to retire to the jury room while I listen in your absence to what is proposed to be put before the court as

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15.

BY THE COURT:

evidence. If I come to the conclusion that it offends the law with respect to the admissability of evidence, you will never hear it and it will not be a part of what you have to consider in reaching your verdict. On the other hand, if I decide as a matter of law that the item is properly admissable then upon your return from the jury room this evidence will be repeated and it will form part of the evidence before you. I want you to be assured that anything that is proper for you to hear, that is to say, anything which the law permits admissable in this case, you will hear. Anything that the law does not permit to be admissable you will not hear as a result of the procedure which I have outlined.

When all of the evidence has been heard then counsel for the crown and counsel for the defence will present their arguments to you. What is said in their addresses to you from the conclusion of the evidence is not evidence any more than their opening statements were. What you will hear during their summation are their submissions and arguments based upon the evidence. Subject to my control, counsel may also make some modest records to comment on the relevant law. The purpose of argument by counsel at that point is to assist you in applying the evidence to the issues in the case.

When counsel have finished their addresses to you I will then deliver you my charge with respect to the apt of the law.

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15.

BY THE COURT:

I may very well comment on evidence during that time but as I have said to you already, if I do, you will have to treat any comment I make about the evidence at the close of the trial as simply my opinion and if your opinion on the evidence differs from any opinion expressed to you on the evidence by either of these lawyers or by myself then you are duty bound to follow your own interpretation and not any one of ours. But I will be speaking to you, as I said, about the law which is relevant about the case. And what I say to you then about the law it will be your responsibility to follow. Then when I have completed those instructions to you at the end of the case it is then that you will retire to the jury room and consider your verdict and return to the court when you have finished.

If at any time during this trial any one of you has any difficulties hearing any of the witnesses please let me or anyone of the court know. Just raise your hand, tell your foreman, whatever. You have to decide the facts, you have to hear the evidence and so we want to make every available opportunity for you to do that. If you have any difficulty in any respect whatsoever, please do not wait, let us know and we will do something about it.

I assume Mr. Edwards, Mr. Wintermans, that you have no objection to the jury separating until such time as they go into the jury room?

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16.

MR. EDWARDS:

That's correct my Lord.

MR. WINTERMANS:

Yes.

BY THE COURT:

I ask them because under the Code the court has the discretion to permit you to separate, that is to go your own ways, before you retire to consider your verdict, and that will be the case, and I so order.

Now I have already drawn attention to the spectators and in particular to all forms of the media, Section five hundred and seventy-six, decimal one, one of the Criminal Code which reads this way: "Where permission to separate is given to members of the jury under Section five hundred and seventy-six one, no information regarding any portion of the trial at which the jury is not present shall be published after the permission is granted in any newspaper or broadcast before the jury retires to consider its verdict". I've already said that the reason for that is so that the jury which is charged with the responsibility of rendering a verdict based upon that which is spoken, said and heard in the courtroom will only be exposed to what is in fact said in their presence.

I want to finally say to you Mr. Foreman and members of the jury, do not permit yourselves to be swayed by indignation, prejudice or sympathy during this trial. Weigh the evidence

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BY THE COURT:

you will hear calmly and dis-fashionably and in so doing you will enable yourselves to give fully objective considerations to this case.

Since you are being/^{given}the discretion, the right to separate, that is to go your own ways until you retire to consider your verdict, I'm going to suggest to you that you take the advice of the sheriff's officer which will undoubtedly be given to you if not already. He will show you the shortest way to get from the court, from the jury room to the outside of the court rooms. I suggest to you that so you will not be exposed unnecessarily to members of the public and person who may wish to detain you or speak to you, that you follow the shortest and most direct route from the jury room to the outside and that you return by that route and come directly to the jury room.

We will start at nine thirty, we will close at four thirty, as closely as possible to that time. We will have a break in the morning and a break in the afternoon, a midway break so that you can have a cup of coffee and the opportunity to stand up and move about.

If at any time during the course of this trial for any personal reason you find it uncomfortable sitting in the jury bench and wish a break, simply let us know. You have to give this your objective and total consideration as we certainly do not want you to feel uncomfortable, personally or

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BY THE COURT:

otherwise at any time during the proceedings. Likewise, if the weather becomes warm and difficult as it did last week when we were holding a trial here, whatever, I want you to feel the right to dress comfortably and so long as you meet the required community standards of decency you will be welcomed in the jury bench.

Mr. Edwards.

MR. WINTERMANS:

Excuse me My Lord. I wish at this time to make a motion for the exclusion of witnesses until they're called.

BY THE COURT:

Alright. Are you in agreement with that motion?

MR. EDWARDS:

Yes My Lord. I just ask that your Lordship include in that defence witnesses, if any, and excluding the informant in the matter who is Corporal James Carroll.

MR. WINTERMANS:

Fine Your Honour.

BY THE COURT:

Alright. That is to say that all persons who are subpoenaed here to give evidence in this trial will be required to remain outside of the court room until their evidence has been heard, with the exception, of course, of the accused and Constable Carroll.

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MR. EDWARDS:

Corporal My Lord.

BY THE COURT:

Corporal Carroll, the informant. Now gentlemen, this is still an open public trial. I'm only speaking to the motion which has been passed, which I have accepted with respect to the excluding of witnesses.

Before you go, gentlemen, what about -- there is always that area of concern with respect to rebuttal evidence. Let's deal with that now. So a witness is excluded, he or she gives his evidence and sits down at the back of the court and then if either one of you decide that you want to call that witness as rebuttal, and then we can have at that point sometimes legal argument. How is this motion to be applied with respect to that? I'm pretty open to receive your views with respect to that but I am suggesting it to you now so that we won't develop some sort of a hassle if that invention occurs, and I suppose you probably, you can't anticipate now whether any one of you is going to call a rebuttal, but it happens.

How do you feel about that?

MR. EDWARDS:

Yes, if Your Lordship pleases, the crown's position is that the exclusion of witnesses should be maintained until the conclusion of the trial so that even after a witness has given his testimony he is required to leave the courtroom after

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MR. EDWARDS:

that testimony is given, to avoid the very problem you just alluded sir.

MR. WINTERMANS:

I would agree that perhaps witnesses could come back into the courtroom at the time that the counsel are making their summations.

BY THE COURT:

Absolutely, oh yes.

MR. WINTERMANS:

But before that that they shouldn't, the situation be as suggested.

BY THE COURT:

Well then witnesses, those of you who are called here to give evidence, I have accepted and agreed with the motion which has been made by counsel of the defence that with the exception of the accused and Corporal Carroll, you will be asked to stay outside of the courtroom until all of the evidence is concluded. You don't have to leave the building. The sheriff's officer will perhaps be able to show you where there are some seats and things of that assort. You are

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BY THE COURT:

subpoenaed here for the trial and you must stay unless permission has been agreed by counsel to excuse you. After all of the evidence is in then you may come back to the courtroom to hear addresses by counsel and mine, things which follow, anything which follows the conclusion of all the evidence. I hope I'm clear on that.

Subpoenaed persons leave.

BY THE COURT:

Alright Mr. Edwards, please.

MR. EDWARDS:

Thank you very much My Lord.

Mr. Foreman, ladies and gentlemen of the jury, my name is Frank Edwards as His Lordship has already indicated. I have the privilege of representing the crown in this particular proceeding.

The facts in this tragic case are very brief. There are no exhibits, we do not have a weapon, we do not have any photographs because no photographs were taken apparently in nineteen seventy-one. There is no autopsy report so you will hear from Dr. Naqvi who attended the victim in question and he, as it is anticipated, will establish the cause of death.

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MR. EDWARDS:

Having said that, as I said the facts are brief but the application of those facts to the legal principals involved in this case will become flex. Therefore, as I am sure it is your mind to do, you will have to give very close attention to the facts as they are presented.

Briefly, the fact pertained to the events which occurred in Wentworth Park late at night, approximately 11:00 p.m., on May twenty-eighth, nineteen seventy-one. On that night Donald Marshall Junior, who was then aged approximately seventeen years, and Sandy Seale, the victim who was roughly the same age - maybe a year younger, were in Wentworth Park. At the suggestion of Mr. Marshall the two decided to get some money and it is apparent from what later transpired that they decided to roll someone in order to get the money.

Meanwhile, at the State Tavern which was then located on George Street in Sydney, the accused, Roy Newman Ebsary, who was approximately fifty-nine years of age at that time and James William MacNeil whom you will hear on the witness stand, then aged about twenty-seven years, they were at the State Tavern and they left shortly before 11:00 p.m. They made their way along George Street to Wentworth Park and then decided to cut through the park to Crescent Street on their way to Mr. Ebsary's home which at that time was on rear Argyle Street. For those of you not familiar with the

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MR. EDWARDS:

street patterns in the City of Sydney, rear Argyle Street is very close to Wentworth Park. Crescent Street runs along one of the perimeters of the park as does George Street. As such, the park constitutes a convenient short cut from George Street to Crescent Street and consequently to Argyle.

In any event, after Mr. Ebsary and Mr. MacNeil had made their way through the park and gotten up on Crescent Street they met Mr. Seale, the victim, and Mr. Marshall. At that time scuffled the two and Mr. Seale apparently said the words: "dig man dig" to the accused, Roy Ebsary. At that point in time you will hear Mr. Marshall and Mr. MacNeil testify that the accused said words to the effect "I have something for you" and made a lunging motion at Seale, apparently at that time stabbing him in the abdomen area. Now Mr. Marshall and Mr. MacNeil had been scuffling close by and Mr. Ebsary apparently at that time, made a lunging motion towards Mr. Marshall, grazing his left arm. Mr. Marshall will be able to show you the scar on his arm from the wound he suffered at that time.

Mr. Marshall then fled from the scene, down Byng Avenue and a short distance from where the stabbing took place he met Maynard Chant. Mr. Chant and Mr. Marshall then returned to the area where the stabbing had taken place and there they found Mr. Seale who is still alive, laying on the road.

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MR. EDWARDS:

Mr. Marshall then went to a nearby residence, summoned the police and an ambulance, both of which arrived a short time later. By a short time later I mean within minutes. Mr. Seale was then taken by ambulance to the City Hospital where he was treated by Dr. Naqvi. Unfortunately after several hours of very concerted attempts to save his life, those attempts failed and Mr. Seale expired. Mr. Marshall also went to the City Hospital and he received several stitches in the wound to his left arm.

In the meantime, after the stabbing and after Marshall had fled from the scene, Ebsary and MacNeil went directly to Ebsary's home which, as I stated, was on rear Argyle Street. Now you will notice when you hear James MacNeil's evidence and I should caution you on this point, that he is a person who we would have to say is of limited intelligence, and therefore, the evidence of the two witnesses who will be called later in the trial, that is Mary Ebsary who is the wife of the accused at the time and Donna Ebsary who was about thirteen years of age at the time, his daughter, becomes very important when you are weighing the testimony of James MacNeil because they state that they recall that night, clearly, they recall Ebsary and MacNeil coming into the house. They recall James MacNeil being in a very agitated condition and they will recall for you the words that Mr. MacNeil uttered

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MR. EDWARDS:

at that time, words to the effect: "you really saved us back there". There are point differences in what each lady remembers but that is the gist of what they remember.

The daughter, Donna Ebsary, despite her young age at the time, recalls that MacNeil and Ebsary then went to the kitchen area where she remembers seeing her father wash what appeared to be blood from a knife and then she recalls that he took the knife upstairs and she never saw it again.

Mr. MacNeil will tell you that he visited Mr. Ebsary the next day after he became aware that the Seale boy had died and was sent away by Ebsary who apparently was concerned about protecting his family at that time. Mr. MacNeil, and this is another matter you will have to consider when you are weighing his testimony, did not come forward to the police until some time in November. Remember, this happened in May and Mr. Marshall, as you've heard, went to trial in November of nineteen seventy-one and was convicted at that time. Within days after his conviction Mr. MacNeil went to the Sydney police and told them what had happened.

Unfortunately the result of that investigation remained inconclusive and you may get an idea after you see and hear Mr. MacNeil. In any event the matter did not become re-opened until early last year and thus we are here today.

I will now begin to call the evidence for the crown and the first witness you'll hear will be Donald Marshall, Junior.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

BY THE COURT:

Donald Marshall is duly sworn.

MR. EDWARDS:

1. Q. You are Donald Marshall Junior?
A. Yes.
2. Q. How old are you Mr. Marshall?
A. Twenty-nine.
3. Q. Twenty-nine?
A. Yes.
4. Q. Mr. Marshall, what is your address?
A. Fifty-One Fifty-Six Olandview Towers. I've got a cold,
excuse me.
Fifty-One Fifty-Six Olandview Towers, Halifax.
5. Q. In Halifax?
A. Yes.
6. Q. And what is your present occupation Mr. Marshall?
A. I'm a plumber. I'm working on the reserve in Shubenacadie.
7. Q. Working on the reserve in Shubenacadie?
A. Yes.
8. Q. Now Mr. Marshall, in nineteen seventy-one what was your
address?
A. Thirty-eight MicMac Crescent, Sydney.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

9. Q. That's on the Membertou Reservation in the City of Sydney, is that correct?
- A. Yes.
10. Q. So in nineteen seventy-one you would have been what age?
- A. Seventeen.
11. Q. Seventeen years of age. And what was your occupation at the time Mr. Marshall?
- A. I was working with my father, doing drywall.
12. Q. Working with your father doing drywall?
- A. Yes.
13. Q. Yes. Were you in school at the time also or had you left school?
- A. Left school.
14. Q. What education do you have?
- A. Right now I have grade ten.
15. Q. Grade ten. At that time what education did you have?
- A. Grade five.
16. Q. Grade five?
- A. Yes.
17. Q. So at that time did you know one Sandy Seale?
- A. Yes.
18. Q. How well did you know him?
- A. I use to meet him at the dances, see him around the dances and that.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

19. Q. Do you recall approximately what age he was at that time?
A. About the same age as me.
20. Q. Do you recall whether he was employed or in school at the time?
A. He was in school.
21. Q. Did you see Sandy Seale on the night of May twenty-eighth nineteen seventy-one?
A. Yes I did.
22. Q. Where did you see Mr. Seale?
A. I seen him in the park, Wentworth Park.
23. Q. And that's in the City of Sydney, County of Cape Breton, Province of Nova Scotia, correct?
A. Yes.
24. Q. Where had you been prior to going to the park that evening Mr. Marshall?
A. I went to Shubenacadie, came home and I went down Intercolonial Street after I came home.
25. Q. Yes, and what time did you leave Intercolonial Street?
A. About eleven thirty that evening.
26. Q. About eleven thirty?
A. Yes.
27. Q. Do you have any accurate recollection of the time or are you giving approximate time?
A. Approximate time.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

28. Q. So after you left Intercolonial Street, where did you go from there?
- A. I went to the Keltic Tavern with a couple of friends of mine.
29. Q. Yes, and how long did you remain there?
- A. About five minutes.
30. Q. Where did you go from the Keltic Tavern?
- A. I was heading for the dance hall on George Street.
31. -Q. Is that St. Joseph's dance hall?
- A. Yes.
32. Q. Yes?
- A. And I took a walk down the park to see if anybody was there.
33. Q. This is Wentworth Park you're referring to is it?
- A. Yes.
34. Q. And was it at that time that you met Sandy Seale?
- A. Yes.
35. Q. Okay. Prior to going to the park, do you have any idea of how much you had to drink that day?
- A. I didn't have too much, I had about one shot of rum.
36. Q. One shot of rum?
- A. Yes.
37. Q. What, if any, effect was that having on you?
- A. Not a -- it had effect but it wasn't, I wasn't drunk or anything.
38. Q. I'm sorry, Mr. Marshall?
- A. I said, I don't know if it had effect on me, I don't remember.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

39. Q. What was your height at the time Mr. Marshall?
- A. About five ten.
40. Q. About five ten?
- A. Yes.
41. Q. Do you recall what your weight would have been approximately at that time?
- A. Around one forty-five.
42. -Q. Around one forty-five?
- A. Yes.
43. Q. So some time after 11:00 p.m. then you met Sandy Seale in Wentworth Park?
- A. Yes.
44. Q. Now what happened, if anything, after you met Sandy Seale?
- A. What happened or who we met?
45. Q. I take it you had some discussion?
- A. Yes.
46. Q. Can you tell the jury what that discussion was about?
- A. When I met Sandy Seale I asked him if he wanted to make some money with me and he agreed with me. While we were talking, about it two fellows called us up from Crescent Street.
47. Q. Okay, before we get into that Mr. Marshall, if I may, could-- do you recall Mr. Seale's approximate height at that time?
- A. I believe he's shorter than me, a little shorter than me.
48. Q. Was he much shorter than you, or slightly or, can you?
- A. I don't remember.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

49. Q. Alright, after you two had decided to get some money you say somebody called you up to Crescent Street?
- A. Yes.
50. Q. Who was that?
- A. Two men, an older man and one younger man.
51. Q. Were they both the same height or was one short and one tall, just what was the situation?
- A. The younger one was taller and shorter one was short.
52. Q. Do you recall how both or either of those gentlemen were dressed?
- A. Yes. The shorter fellow had a navy coat on or a top coat or something.
53. Q. Yes?
- A. And the younger guy had a sports coat on.
54. Q. I see. Do you recall anything about the color of the hair of either of those gentlemen?
- A. The old fellow had gray hair combed back and the other fellow I don't remember.
55. Q. Had you known either of those gentlemen before that evening?
- A. No.
56. Q. Had you seen either of those gentlemen around before that evening?
- A. Earlier that evening, about a half hour before that.
57. Q. Half hour before that?
- A. Yes.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

58. Q. Where had you seen them then?
A. They were talking to a girl and a guy on a bench in the park.
59. Q. Okay. Did you have any discussion with them at that time?
A. No.
60. Q. Alright, who was with you, if anyone, at the time you saw these two fellows talking to a girl and guy at the bench?
-A. I was by myself.
61. Q. That was before you met Sandy Seale then?
A. Yes.
62. Q. Alright, so anyway they called you up to Crescent Street?
A. Yes.
63. Q. Do you recall enough about either of those gentlemen to be able to identify them if they were in this court room?
A. I don't know, I don't think, I don't know.
64. Q. Would you look around the court room and see if either of them are here?
A. I can't identify him right now.
65. Q. Alright, perhaps then you would tell the jury what was heard after they called you up to Crescent Street?
A. When they called us up I bumped into two other people. They asked me for a light.
66. Q. Do you know who they were?
A. Terry Gushue and Patricia Harris.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

67. Q. Terry Gushue and Patricia Harris?
A. Yes.
68. Q. Yes?
A. I went over to them and Sandy Seale went up to join up with the other two fellows.
69. Q. Yes?
A. And I asked these two, couple where they came from and they said that they. . .
70. Q. Alright, we can't get into what they told you but I take it you had discussion with Harris and Gushue?
A. Yes.
71. Q. And how long were you with Harris and Gushue?
A. Not too long, a couple of minutes.
72. Q. A couple of minutes?
A. Yes.
73. Q. And where did you go after you left Harris and Gushue?
A. I joined up with the two men and Sandy Seale.
74. Q. Now whereabouts were they at this time?
A. Not too far out. Twenty yards from us anyway, twenty-five yards.
75. Q. Were they still in the park or were they on the street, or where were they?
A. They were on the street.
76. Q. And what street was that?
A. Crescent Street.

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34.

Donald Marshall, Jr. Direct Exam. by Mr. Edwards

77. Q. Crescent Street. That runs along the perimeter of the park, is that correct?
- A. Yes.
78. Q. So after you joined up with Mr. Seale and these two men who had called you, what occurred then?
- A. When I got there I started talking to the older guy, just general discussion asking where he's from and other things like that. We were there for about twenty minutes talking and after twenty minutes he invited us up for a drink at his house. We told him no and they walked - they proceeded to go down home and I called them back and they came back. An argument started.
79. Q. Okay, let's stop there for a moment to clarify a couple of pieces. You say you had conversation with the two men then they left for home?
- A. Yes.
80. Q. Yes. Now how far from you and Seale did they proceed before you called them back?
- A. I'd say about a hundred yards from us.
81. Q. Yes. Do you recall what words you used to call them back?
- A. I told them, I said "come back here" I asked them to come back. Then they came back.
82. Q. So then I take it from your evidence that they did come back?
- A. Yes.

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Donald Marshall, Jr. Direct Exam. by Mr. Edwards

83. Q. You also said that "then an argument started" among the four of you, is that correct?
- A. Yes.
84. Q. Do you recall what words were used in the course of that argument or what the argument was about?
- A. No, the only words I heard was about -- the old fellow asked the young fellow, Sandy Seale, if he wanted everything he had.
85. Q. When you heard the old fellow ask Sandy Seale that, what were you doing?
- A. I was with Jim MacNeil.
86. Q. What do you mean you were with Jimmy MacNeil?
- A. I was standing by Jimmy MacNeil.
87. Q. What were you and Jimmy MacNeil doing?
- A. We had a hold of each other.
88. Q. You had a hold of each other, yes. So when the old fellow asked Sandy Seale whether he wanted everything he had, what, if anything, happened then?
- A. He had ah -- at the time I didn't know what was going on because he had him bent over and ah . . .
89. Q. Who had who bent over?
- A. The old fellow had Sandy Seale bent over, ah, just for a couple of seconds and he turned around and he came after me and I let the other fellow go.

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36.

Donald Marshall, Jr. Direct Exam. by Mr. Edwards

90. Q. You let MacNeil go?
- A. Yes.
91. Q. When he came after you what, if anything, happened?
- A. He swung something at me and he got me in the arm.
92. Q. Which arm?
- A. My left arm.
93. Q. When you say he got you in the arm, what happened to your left arm?
- A. I got slashed in the arm.
94. Q. You got slashed in the arm?
- A. Yes.
95. Q. Did you see what made the slash?
- A. No.
96. Q. Alright. So after you got the slash in the arm, where did you go from there?
- A. I ran down Crescent Street and down Bentick and I ran into Maynard Chant and I asked him to help me out, come back with me up there and he agreed with me and I headed towards Byng Avenue and I met some more people there. I asked them to come back with me and they said no. A car came driving by and I stopped it and I asked them to help me out and they told me to get in the car and we went back to Crescent Street.
97. Q. So you say we went back to Crescent Street. Who was with you at that point?
- A. Maynard Chant, the driver of the car and about two other fellows.

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37.

Donald Marshall, Jr. Direct Exam. by Mr. Edwards

98. Q. Did you know any of the other three before?
A. Yes.
99. Q. You did?
A. One, yeah.
100. Q. Do you recall who that was?
A. Mike Gentile I think.
101. Q. Pardon me?
-A. Mike Gentile.
102. Q. Just going back a little bit, you say that the old fellow had Seale bent over for a couple of seconds?
A. Yes.
103. Q. What, if any words did you hear between the two of them at that point?
A. I didn't hear nothing.
104. Q. Sorry -- are the jury hearing all this?
You didn't hear anything?
A. No.
105. Q. So when you got the slash in your left arm, can you recall where Seale was at that time?
A. No I don't recall.
106. Q. Did you see where Seale went after the old fellow had him bent over for that couple of seconds?
A. No I didn't see him.
107. Q. When did you next see Seale?
A. When I returned.

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38.

Donald Marshall, Jr. Direct Exam. by Mr. Edwards

108. Q. Pardon me?
- A. When I returned.
109. Q. When you returned?
- A. Yeah.
110. Q. That is you and Chant and the others in the car?
- A. Yes.
111. Q. And when you returned in the car at that point what did you observe?
- A. I seen Sandy Seale laying on the ground. My idea was to go and get an ambulance for him so I went to a house on Crescent Street.
112. Q. Yes?
- A. An older man came to the door and asked me what was going on and how my buddy got hurt and I asked him to call an ambulance for me.
113. Q. And where did you go after that?
- A. I went back outside and two police officers put me in a car and took me to City Hospital.
114. Q. When you, Chant and the others returned to Crescent Street -- returned to the area, you say Seale was on the ground?
- A. Yeah.
115. Q. Was he in the park or on the street at that time?
- A. He was on the street.
116. Q. And that's the same street, Crescent Street?
- A. Yes.

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39.

Donald Marshall, Jr. Direct Exam. by Mr. Edwards

117. Q. Was -- Could you tell the jury whether he was in the same location where you and Seale and the other two men had the argument or was he a distance from that?
- A. I believe he was at a distance.
118. Q. Approximately what distance?
- A. I wouldn't know, but it's not the same spot that I ran from.
119. Q. Well could you give the distances in this court room?
- A. About how far he was from where you fellows had the argument?
- A. No, I don't think so.
120. Q. So you say that you returned to Crescent Street after summoning the ambulance and then two city police officers took you to the City Hospital?
- A. Yes.
121. Q. What type of treatment did you get there?
- A. I got ten stitches in my arm.
122. Q. That's your left arm?
- A. Yes.
123. Q. Do you bear a scar from that injury, to this day?
- A. Yes.
124. Q. Could you show it to the jury?
- A. Mr. Marshall shows his scar to the jury.
125. Q. Now subsequent to that night I understand that you were in fact charged with the murder of Sandy Seale?
- A. Yes.

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40.

Donald Marshall, Jr. Direct Exam. by Mr. Edwards

126. Q. And you were convicted of that murder in November, nineteen seventy-one?

A. Yes.

127. Q. And sentenced to life imprisonment?

A. Yes.

128. Q. And you were released when?

A. March twenty-ninth, nineteen eighty-one.

129. Q. You were subsequently acquitted of that charge by the Appeals Division of the Nova Scotia Supreme Court in May of eighty-three, is that correct?

A. Yes.

130. Q. I have no further questions, thank you.

LUKE WINTERMANS:

1. Q. Mr. Marshall you say that you were about seventeen years old at the time?

A. Yes.

2. Q. That you were five feet, ten inches. How tall are you now?

A. I'm six one.

3. Q. Six foot, one inch.

Excuse me Mr. Marshall, you've given evidence so many times it's hard to keep all the different transcripts straight.

You indicated that you had had a drink of rum on that day?

A. Yes.

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Donald Marshall, Jr. Cross Exam. by Mr. Wintermans

4. Q. Earlier in that day. You also indicated that you were coming from, I think you said Shubenacadie?
- A. Yes.
5. Q. You were coming back into Sydney earlier that evening?
- A. Yes.
6. Q. I thought you were in Bedford, Nova Scotia.
- A. Well around Bedford and Shubenacadie.
7. Q. I see. That's near Halifax?
- A. Yes.
8. Q. You had gone up there in the company of some friends?
- A. Yes.
9. Q. For several days, is that correct? You were out of town for a few days?
- A. About three days.
10. Q. About three days. I understand that there was some drinking going on up there?
- A. Yes.
11. Q. And that you, yourself had been drinking up there?
- A. Yes.
12. Q. Of course you were not supposed to drink at that time if you were only seventeen, right?
- A. I wasn't supposed to, but.
13. Q. I understand that you described yourself at one time as being a heavy drinker at that time?
- A. Yeah, I was.

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42.

Donald Marshall, Jr. Cross Exam. by Mr. Wintermans

14. Q. You had started drinking when you were about sixteen?

A. Yes.

15. Q. You had been convicted of criminal offences at that time?

A. Yes.

16. Q. Yes, and you were a -- you described yourself as a bad young guy.

A. We were bad young guys.

17. Q. We were bad?

A. Yes.

18. Q. Bad young crowd?

A. We were considered bad, okay, you know.

19. Q. Okay. You say that that night that you hadn't had all that much to drink but that you just happened to run into Sandy Seale at the park, is that right?

A. Yes.

20. Q. Isn't it true that you were in the park for some time before this incident occurred?

A. No.

21. Q. I believe you testified today that you didn't even head for the park until eleven thirty?

A. My timing is real. . .

22. Q. Was it more like nine thirty perhaps?

A. I said approximate. I came home from Halifax nine thirty.

23. Q. You described Sandy Seale as being a little shorter than yourself?

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23. A. I don't -- yeah, a little shorter, yeah.
24. Q. He was a fairly athletic well built sort of guy, wasn't he?
A. I don't know.
25. Q. You say that when you -- just before this incident took place that night in the park, that you had a conversation with these two gentlemen that you refer to and didn't you grab on to Mr. MacNeil, grab a hold of him?
A. I don't recall.
26. Q. You don't recall?
A. I don't remember.
27. Q. At one point in your evidence today you indicated something to the effect that you and MacNeil had a hold of each other?
A. Yes.
28. Q. What do you mean by that?
A. We had a hold of each other.
29. Q. You were holding on to him, is that right?
A. We were both holding on to each other.
30. Q. I see. He didn't fall off the curb?
A. Yes he did.
31. Q. You tried to hold him up?
A. Yes he did.
32. Q. Do you agree then that ^{there are} a lot of different versions given as to what occurred on that night?
A. Yes.

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33. Q. You were seventeen years old at the time of your last trial, is that right?
- A. Yes.
34. Q. And you were up on a murder charge?
- A. Yes.
35. Q. You felt that you were innocent of, did you think that justice would pervale?
- A. What does pervale mean?
36. Q. That you would be found not guilty in that last trial, back in nineteen seventy-one?
- A. Yes.
37. Q. The evidence that you're giving today is not quite the same in some respects as the evidence you gave back then, wouldn't you agree with that?
- A. Ah-h. . .
38. Q. Let me just re -- let me withdraw that question.

MR. EDWARDS:

Yes, Your Honour, I want to object to that type of question. My Lord. The procedure as I understand it is that if he wishes to contradict the witness on previous testimony then he is to put the specific parts of that previous testimony to him and ask him whether he recalls giving it and whether he wishes to adopt it or say something different now.

39. Q. When you met Seale that night you said to him something to the effect of ah, "do you want to make some money with me?"

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39. A. Yes.

40. Q. ~~There was discussion between yourself and Seale as to how you would make that money?~~

A. Umm-mm.

41. Q. And that you suggested to him that you would roll somebody?

A. Yes.

42. Q. Is that right?

A. Yes.

43. Q. And roll someone, is it fair to say that roll someone that means rob someone?

A. No, robbing is a different subject altogether. Rolling somebody is different.

44. Q. I see. But the two people that you rolled or tried to roll, they would have known that you were trying to rob them at a certain point, right before this incident with the knife took place, wouldn't they?

A. They would know?

45. Q. They would know that you intended to rob them?

A. Yes, roll them.

46. Q. Roll them?

A. Yes.

47. Q. Do you recall having given a statement to the R.C.M.P. at Dorchester Penitentiary back in nineteen eighty-two, March the third, nineteen eighty-two, do you recall that?

A. Yes.

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48. Q. That statement is true, is it not?

A. Yes.

49. Q. It is. Do you recall having stated at that time and I'll read it to you and I'll ask you to comment on it: "I asked Sandy if he wanted to make some money, he asked how and I explained to him that we would roll someone. I had done this before myself a few times. I don't know if Sandy had ever rolled anyone before. We agreed to roll someone so we started to look for someone to roll. The first time I saw the two fellows we later decided to rob was on the George Street side of the park." You go on to say: "the short old guy I now know is Ebsary". Do you recall having stated that?

A. I recall stating it but not on George Street, I don't recall that. I might have made an error on George Street.

50. Q. I see. And you also recall having stated in that statement: "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". Do you deny that that's the way it happened?

A. To a certain extent I deny it. These two men were with us for twenty minutes, and ah. . .

51. Q. I see. Do you recall that?

MR. EDWARDS:

Objection. My Lord I ask that he be directed to allow the witness to finish his answer. He's starting another question before the witness finishes the answer he started.

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52. Q. Go ahead.

A. After talking to them for about twenty minutes they left us. If they knew our intentions of robbing them I don't see no reason why they came back.

53. Q. Okay. Do you recall having had that same phrase put to you for your comments at the preliminary inquiry into this matter, the latest preliminary inquiry in August of this year?

A. No answer.

54. Q. I'll read you the phrase, a couple of questions and answers and ask you to comment on it.

Do you recall in that statement, page two, stating that:

"They then knew that we meant business about robbing them.

I got in a shoving match with the tall guy, Sandy took the

short old guy." Answer: "You mentioned that a while ago I

think." The court: "Just answer the question." Question by

me: "Are you denying that?" Your answer: "I am not denying

nothing." Do you recall having stated that at the preliminary?

A. Yes.

55. Q. Now you spent ten or eleven years in the penitentiary. That's correct is it not?

A. Yes.

56. Q. And you had the transcript of the original trial did you not, or a portion at that time?

A. Some of it.

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57. Q. And you studied it, read it over and over and over again?
A. Yes.
58. Q. You were finally released from the penitentiary after speaking to the R.C.M.P. ultimately?
A. Yes.
59. Q. Isn't that the way it really happened?
A. Yes.
60. -Q. When you finally admitted that there was a robbery taking place. . .
A. A robbery is when you are armed, I wasn't armed.
61. Q. We'll leave that up to the jury to decide. I take it you're suggesting that you weren't armed that night?
A. I wasn't armed.
62. Q. But of course you testified yourself that you didn't see what Mr. Ebsary, assuming that's who it was, had in his hand. You testified that you didn't see any knife, didn't you?
A. It's obvious it was a knife. After I was stabbed I knew it was a knife then.
63. Q. So I'm suggesting to you that if you couldn't see what Mr. Ebsary had then it's not hard to suggest logically speaking that they wouldn't really be able to know whether or not you were armed or not. I'm not suggesting you were but in the minds of those two people there may have been

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a question as to whether or not you were armed.

A. I'm going to say it again. After talking to them for twenty minutes them two men walked away.

64. Q. Right.

A. When I called them back they came back, not to get robbed but to do us in.

65. Q. You ran away as soon as your arm was cut, isn't that right?

A. Yes.

66. Q. And so did Mr. Seale, isn't that right?

A. I don't know.

67. Q. Okay, you're not sure what happened to Mr. Seale then, I see. Isn't it true that there was you and Mr. Seale together and there was the older fellow and the younger taller fellow together?

A. Yes.

68. Q. And the way that it kind of worked out was that the four of you were fairly close together, that you and Mr. MacNeil were struggling and the old fellow and Sandy Seale were struggling?

A. No, it wasn't that way at all.

69. Q. Okay, pair it off then.

A. As far as struggling goes, nobody was struggling, nobody was physically hurt.

70. Q. No one was physically hurt?

A. No.

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71. Q. No one was physically hurt?
A. No.
72. Q. Sandy Seale was. . .
A. The other side I mean.
73. Q. Your arm was physically hurt?
A. But the other side, they weren't physically hurt.
74. Q. Alright, so what you're saying is that you didn't physically hurt Mr. MacNeil or anything?
A. No.
75. Q. You just grabbed on to him, that's all?
A. Yes.
76. Q. But what I'm suggesting is that Mr. Seale and Mr. Ebsary were together and you and Mr. MacNeil were together?
A. Yes.
77. Q. But you weren't that far away from each other?
A. No.
78. Q. But you were more concerned with Mr. MacNeil and Sandy was more concerned with Mr. Ebsary, isn't that the way it was?
A. No, not really.
79. Q. Now you testified that all you could hear was Mr. Ebsary saying something about "do you want what I have" or something like that. Is that right?
A. Yes, I heard him.
80. Q. Do you recall, let me rephrase that. I'm suggesting to you that it's possible, I think you'll agree with me, that there

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could have been some conversation between Seale and Ebsary that you didn't hear because you were either not quite there or concerned with Mr. MacNeil?

A. I wasn't concerned with Mr. MacNeil at all.

81. Q. I see. Are you suggesting -- just answer the question then with respect to the possibility of a conversation that you were not able to hear or didn't hear between Ebsary and Seale.

A. I didn't hear it.

82. Q. You didn't hear it.
And you're not denying that it's possible that it may have happened, you're just saying that you didn't hear it?

A. I didn't hear it.

83. Q. Whose idea was it to rob?

A. Roll them.

84. Q. Roll. Whose idea was it?

A. It was my idea.

85. Q. But you're saying that it wasn't to rob?

A. No.

86. Q. Just to roll.

A. Roll.

87. Q. Again, you already testified that you recall having giving a statement to the R.C.M.P. in nineteen eighty-two, you already stated that it was true and I will just refer you to one sentence, or part of as sentence: "it was my idea to rob these

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guys".

A. Roll, there's a roll there too, you know. There's a difference in rolling, you know, and robbing.

88. Q. Yeah. Now again, you testified that you recall having given evidence at the preliminary inquiry in August of nineteen eighty-three, and let me just refer you to an exchange that took place there. Based on what you earlier testified if seems to contradict it. Perhaps I will start here, this is questions by my Learned Friend, page eleven:

"Could you take it step by step and describe exactly what happened as they came towards you and Sandy Seale?" Answer:

"It is difficult for me to really tell you what happened, I think. There were too many stories already. I think I jeopardized my whole story." Question: "Well then would you tell it from your memory as best you can recall?" Answer:

"They came back, I don't know what happened between them, my memory just went after that. I got stabbed and I don't

remember too much." Question: "Well do you remember what, if anything, happened to Sandy Seale?" This is the important

part here. Answer: "The older fellow with the light hair with Sandy. They had a conversation and I never understood

what they were talking about. All I can remember is the old fellow told Sandy I got something for you right here and

he knifed him." Is that the way it happened, or? The way

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you told us a little earlier today is different.

A. I don't know.

89. Q. You don't know. It must be very confusing for you having gone through this so many times over such a long period of time. Is that right?

A. It is confusing, yeah.

90. Q. You must have gone through an awful lot of anxiety all of those years in the penitentiary. This must bring back bad memories for you. Is that right?

A. It doesn't bother me now.

91. Q. You know that today is probably the last time you'll have to testify about this incident, you must be happy about that, are you?

A. I don't know.

92. Q. Are you still concerned that in spite of what happened in the Appeal Court in Halifax, being acquitted on this charge, that you still may be in some jeopardy, that there still may be some dangerous consequences for you arising out of this incident?

A. For instance, like what?

93. Q. I don't know. Are you or aren't you still a little worried about this whole situation?

A. Yeah, I'm worried about it.

94. Q. You have your own lawyers, yourself, at this time. Isn't that right?

A. Yes.

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95. Q. In this very court room? Your lawyer from Halifax came with you?
- A. Yes.
96. Q. Isn't true that you have a law suit already started in relation to this incident?
- A. That's out of the question.
97. Q. Pardon me?
- A. That's out of the question, I can't talk about it.
98. Q. You don't want to talk about it, could you answer yes or no?
- A. I can't talk about it.
99. Q. Do you have a law suit against this City arising out of this incident?
- A. My lawyer is not here, that's his partner, so.
100. Q. His partner is here?
- A. Well it's between him and my lawyer, not his partner.
101. Q. Okay. What I'm suggesting, the only reason I'm bringing it up is that I'm suggesting to you that you may have -- that you do have a direct financial interest in the outcome of this situation still.
- A. As far as I'm concerned I just want to walk away from everything, okay. Money or no money, I don't care. I think I ah, for my mistake I think I paid for it so if you want to pay me you pay me, you don't, that's good. I can live my life, I don't need ah.

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Donald Marshall, Jr. Cross Exam. by Mr. Wintermans

102. Q.

Thank-you.

MR. EDWARDS:

Nothing on re-direct My Lord.

BY THE COURT:

That's all Mr. Marshall, thank-you.

FIFTEEN MINUTE BREAK

Upon return of break the jury is re-called.

Constable Leo Mroz is called.

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56.

Constable Leo Mroz, Direct Exam. by Mr. Edwards

BY THE COURT:

Constable Leo Mroz is duly sworn.

1. Q. Sir, you are Constable Leo Mroz and you are a peace officer employed with the City of Sydney Police Department, is that correct?
A. That's correct sir.
2. Q. How long have you been so employed Constable Mroz?
A. Twenty years.
3. Q. So you were on duty as a policeman on the night of May twenty-eighth, nineteen seventy-one?
A. That's correct sir, I was.
4. Q. And on that particular evening did you in company with Constable Richard Walsh as he then was, attend to a complaint at Wentworth Park, City of Sydney, County of Cape Breton, Province of Nova Scotia?
A. That's correct sir, we did.
5. Q. And what time did you police officers attend at that location?
A. It would be just minutes before midnight and we were on the twelve to eight shift. We arrived on location at approximately, I'd say two minutes to twelve.
6. Q. Yes?
A. Or just minutes before midnight.
7. Q. And upon your arrival at that location what, if anything, did you observe?

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Constable Leo Mroz, Direct Exam. by Mr. Edwards

A. We went by way of South Bentinck Street to Crescent and in the high beams or the lights of the police cruiser we observed a victim laying in the street, a subject laying in the street.

8. Q. That's on Crescent Street?

A. On Crescent Street.

9. Q. Yes?

A. Which is in the City of Sydney, County of Cape Breton and Province of Nova Scotia.

The subject was laying with his head extended towards the centre of the street and his feet extended inward towards the gutter of ah -- on the right shoulder of Crescent Street.

10. Q. Did you know the person who was laying in the street at that time?

A. On close examination I did.

11. Q. Who was it?

A. It was Sandy Seale.

12. Q. Yes?

A. He was attired in a t-shirt, it appeared directly underneath or beneath the t-shirt it appeared that he was concealing something.

13. Q. Was he conscious when you arrived?

A. Yes he was.

He was heard to utter three or four words, they were: "Oh God, no, oh God no" and repeated by "Oh Jesus, no, Oh Jesus, no"

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Constable Leo Mroz, Direct Exam. by Mr. Edwards

and then he slipped unconscious. That was the last conversation that we had with the victim.

14. Q. When you say he appeared to be concealing something under his shirt, what do you mean by that?
- A. There was a buldge, a noticeable buldge on the area of the high chest and lower - or high abdomen. Inspector Walsh had raised the shirt and beneath we discovered a large amount of intestines, they were surfaced and there was others coming out of a stab wound in a snake like fashion. There was more emerging at all times or oozing out of the chest area.
15. Q. You refer to Inspector Walsh, that's how he now is?
- A. That's correct sir.
16. Q. He was then a Constable?
- A. That's correct sir, he was.
17. Q. So as a result of observing those wounds, what did you and Constable Walsh do?
- A. There was a little bit of difficulty in lowering the garment. It was raised to a point where we had a fair look and assessment of the area affected and we had some difficulty bringing the garment back to the waist level. That was done however and I immediately responded to the cruiser and requested an ambulance. There was some delay in the arrival or response of the ambulance. As I later learned it was . . .
18. Q. Well without getting into that, how much longer was it before an ambulance did arrive?

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Constable Leo Mroz, Direct Exam. by Mr. Edwards

A. We were there approximately fifteen minutes awaiting the arrival.

19. Q. Yes?

A. While we were awaiting the arrival a second cruiser arrived at the scene. That was occupied by Constable Howard Dean and the late Corporal Martin MacDonald. In the high beams of that oncoming cruiser I had observed Donald Marshall, Jr., a person who I had known previously, he was approximately a hundred and fifty feet across Crescent Street and slouched against a rather large tree in the park area. His right hand was extended over his left wrist area, he appeared to be clasping in that fashion, sort of gripping his left arm with his right hand. The cruiser occupied by Dean and MacDonald had conveyed Marshall I believe to hospital. I'm not sure of that.

20. Q. Marshall went with Dean and MacDonald?

A. Exactly sir, yes.

21. Q. What did you do?

A. In the meantime the ambulance had arrived, or minutes later the ambulance had arrived and I had assisted -- we made several attempts first of all at conversing with the victim, that's Sandford Seale. All to no avail, there was no response at all. Facially there appeared to be a great hurt. You could almost see a writ on his forehead, he appeared to be in a great deal of pain. So I assisted the ambulance crew with the

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Constable Leo Mroz, Direct Exam. by Mr. Edwards

placement of the victim onto the stretcher, at which time he was placed into the ambulance and conveyed to City Hospital Outpatients.

22. Q. How do you know that?

A. I followed the ambulance there in the cruiser in company with Constable Walsh. We arrived at outpatients approximately the same time as Curry's -- as the ambulance at the door. He was wheeled into outpatients and Dr. Naqvi, he was attired in his operative wear or green type of outfit. Apparently he was performing surgery somewhere upstairs and he was summoned to the outpatients area.

23. Q. He was the physician you witnessed attend was he?

A. That correct, yes sir he was.

And Seale was transferred, the victim was transferred to a stretcher type bed in the outpatients area and at which time through the assistance of a nurse the t-shirt was cut. It was cut off by scissors or some cutting device.

24. Q. Well then the medical attendants took over?

A. Exactly.

25. Q. We won't get into that Constable Mroz, thank you very much.

LUKE WINTERMANS:

1. Q. So you say that Dr. Naqvi was right there when you and the ambulance arrived at outpatients?

A. Yes, he was on location when I entered into the

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Constable Leo Mroz, Cross Exam. by Mr. Wintermans

outpatients area, yes sir.

2. Q. You saw him there?

A. Yes I did.

3. Q. Yeah. So the ambulance took you say fifteen minutes to respond?

A. There was an unusual latitude, it was late, you know.

4. Q. Why wouldn't you have given the seriousness, apparent seriousness of the injury, why wouldn't you just put him in the car, the police car, and take him? It's only about three or four blocks, isn't it to the hospital?

A. The nature of the injury would not dictate that type of move with regards to risking more permanent or more or worse injury. In that light I didn't act in that manner sir.

5. Q. So you felt it was better to stay there at the scene and wait for the ambulance?

A. Exactly sir, right. I would rather have seen him move sort of prostrate.

6. Q. Thank you very much.

MR. EDWARDS:

Nothing further My Lord.

BY THE COURT:

Thank you Constable.

James William MacNeil is called.

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62.

James William MacNeil, Direct Exam. by Mr. Edwards

James William MacNeil is duly sworn.

1. Q. You are James William MacNeil?
A. Yes I am.
2. Q. What is your present address Mr. MacNeil?
A. Two two two Mount Pleasant Street.
3. Q. That's in Sydney?
A. Yeah.
4. Q. How old are you Mr. MacNeil?
A. I am thirty-nine.
5. Q. Thirty-nine?
A. Yeah.
6. Q. What is your present occupation?
A. I'm unemployed at this present time.
7. Q. You're a life long resident of Sydney?
A. Yes.
8. Q. And you lived in Sydney in May of nineteen seventy-one?
A. Yes.
9. Q. What was your address then?
A. Ten 0 0 Seven Rear George Street.
10. Q. Rear George Street?
A. Yes.
11. Q. What was your occupation at that time?
A. I was in landscaping then.
12. Q. Now Mr. MacNeil, do you know the accused, Roy Newman Ebsary?
A. Yes I do.

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James William MacNeil, Direct Exam. by Mr. Edwards

13. Q. Is he in court today?

A. Yes he is.

14. Q. Would you have a look around and find out please?

A. Right here.

15. Q. Where are you pointing Mr. MacNeil?

A. Right there, the fellow with the cast on him there. The cast on his neck.

16. -Q. What color jacket is he wearing?

A. He's wearing a light colored jacket and a yellow tie.

MR. EDWARDS:

For the record we'll say that he pointed to the accused My Lord.

17. Q. Mr. MacNeil, did you know Roy Newman Ebsary in nineteen seventy-one?

A. Nineteen seventy-one, yes I did, yeah.

18. Q. Prior to the night of May twenty-eighth, nineteen seventy-one, how long had you known Roy Ebsary?

A. I would say roughly around three months.

19. Q. Three months?

A. Yeah.

20. Q. And during that three months would you describe the relationship between the two of you?

A. Well we had a good relationship. I met him in the State Tavern and his son or daughter had a car there and I use to drive the car and I knew him pretty good at that there time.

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James William MacNeil, Direct Exam. by Mr. Edwards

- 21. Q. How would you describe your drinking habits around that time Mr. MacNeil?
- A. My drinking habits weren't too bad, you know. They weren't too heavy but after this they got heavy, after this incident they got heavy after this, you know, after what happened to the deceased.
- 22. Q. And what would you say about Roy Ebsary's drinking habits at the time?
- A. I would say fair, moderate. He wasn't heavy or you know, I wouldn't say he was a heavy drinker at that time anyway.
- 23. Q. Do you know if he was employed at the time?
- A. I don't believe, I don't think he was employed, no, I don't think.
- 24. Q. Do you recall the night of May twenty-eighth, nineteen seventy-one?
- A. I recall it when we left the tavern. We were in the tavern there.
- 25. Q. Now you say we, who was with you that night?
- A. I and Mr. Ebsary.
- 26. Q. That's Roy Ebsary, the accused?
- A. Yeah, right.
- 27. Q. Yes?
- A. We left there roughly, I think it was around - it was between eleven o'clock, ten thirty, eleven o'clock, something like that.

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65.

James William MacNeil, Direct Exam. by Mr. Edwards

28. Q. That's in the night, of course?
A. That was in the night, yeah.
29. Q. How long had you been at the tavern?
A. I think we were there since evening, since about seven o'clock or six o'clock, but I can't be sure. Six, seven, something like that.
30. Q. Right. How much had you had to drink that night?
A. I'd say I had about eight beer or something like that.
31. Q. And what effect, was the beer having on you, if any?
A. Well I wasn't drunk, you know, I was just, I was feeling good but I wasn't drunk like.
32. Q. How was it affecting your walk, if at all?
A. My walk was alright.
33. Q. What about Mr. Ebsary, how much had he had to drink that night?
A. I couldn't judge that night what he had to drink but I would say roughly around the same. You know, like, when you're in a tavern and a person is talking, I'm not sure, but I believe, whether somebody else came over to the table or something. When you're talking you're not really looking but I'd say roughly around that there much.
34. Q. And what effect did it appear to be having on him if any?
A. He seemed to be alright, he seemed to be walking straight.
35. Q. Now the State Tavern, that's no longer in business is it?
A. That is out of business.

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James William MacNeil, Direct Exam. by Mr. Edwards

36. Q. Where was it located at the time?
- A. Right at the corner of Falmouth and George Street.
37. Q. So you and Mr. Ebsary left the tavern, you say somewhere around ten thirty or eleven o'clock?
- A. Hmm-mm, yeah.
38. Q. Did anyone leave with you or was it just the two of you?
- A. Just the two of us.
39. Q. What route did you take?
- A. We came down George and we took a short cut up through the park.
40. Q. That's Wentworth Park?
- A. Wentworth Park, yeah.
41. Q. To what streets?
- A. To Crescent Street.
42. Q. Crescent Street. Where were you headed at the time?
- A. We were heading for his place.
43. Q. Which was where?
- A. On Argyle Street.
44. Q. So do you recall approximately what time it would have been or how long after you left the tavern was it before you crossed through the park?
- A. I would say it wouldn't be too long, about five or ten minutes, something like that. From the tavern to the spot there it's only about a ten minute walk, a fifteen minute walk.

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James William MacNeil, Direct Exam. by Mr. Edwards

45. Q. Perhaps you could tell the jury then what occurred from the time you reached the park?
- A. Well when we reached the park we crossed over to Crescent Street. When we crossed over to Crescent Street then we were approached by the deceased, Mr. Seale, and Marshall. My hand, Marshall put my hand up behind my back. . .
46. Q. That's Donald Marshall, Jr.?
- A. Donald Marshall, Jr. Then at that time like ah, I just froze. I just froze and the next question I heard, the deceased Seale asking Mr. Ebsary: "Dig man, dig".
47. Q. Seale said to Ebsary, "Dig man, dig."?
- A. Yeah.
48. Q. What was he doing when he said that Mr. MacNeil, if anything?
- A. I think the intentions were to rob him, I had no money.
49. Q. Yeah but, the question is what was Seale doing when he said "dig man, dig"? Was he doing anything?
- A. He was just standing right -- he was standing right in front of him like.
50. Q. How far from him?
- A. I would say roughly about three or four feet.
51. Q. Yes?
- A. Yeah, I would say roughly about three or four feet.
52. Q. So he said "dig man, dig"?
- A. Yeah.

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James William MacNeil, Direct Exam. by Mr. Edwards

53. Q. What happened then?
- A. And Mr. Ebsary said I got something for you and he just slid his hand in his pocket like that. I didn't, you know, I was just in a frozen state like that, and then SHWOO, I seen this big squirt of blood coming out of no where and I just went right into the state of shock. You know, it was terrible.
54. Q. Just before - or put it this way. While Seale was saying "dig man, dig," where was Marshall?
- A. Marshall still had my arm. But I can have it in a phrase like, I think Marshall let go of my arm like that because I can be sure that he tried to go for Ebsary. Like, you know, in a phrase, you know. But I know he let go of my arm like. He just dropped my arm.
55. Q. After you saw this squirt of blood, what did Seale do?
- A. Seale, he ran, I seen him, he ran -- he ran and then I seen him falling, he fell down, like he fell.
56. Q. About how far from where you were?
- A. Gee it's pretty hard now just . . .
57. Q. Well look at points in this court room.
- A. I would say from about, from to where I'm sitting probably a little bit farther than you. Around fifty yards or something like that.
58. Q. You're saying, you tell me to stop.
- A. Stop there.

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James William MacNeil, Direct Exam. by Mr. Edwards

59. Q. Stop here?
A. Yeah.
60. Q. So I would suggest to you that's about thirty-five, forty feet, okay?
A. Yeah.
61. Q. So Mr. Seale fell at that point?
A. Yeah, he fell at that there point, yeah.
62. Q. Just before you saw the blood again, would you describe what Mr. Ebsary did?
A. Mr. Ebsary, we went right up to his place.
63. Q. No, no. Just before you saw the blood squirt?
A. Yeah?
64. Q. What was Ebsary doing?
A. Well Mr. Ebsary just ah, headed for home like, he just said come and we just headed for home like, he wanted to get home.
65. Q. Yeah, that was after?
A. That was after, yeah.
66. Q. That was after, I'm talking about before. Just back up a bit, okay. When Seale said "dig man, dig", just describe exactly what Mr. Ebsary did at that point.
A. At that time he said "I got something for you" and he slid his hand into his pocket and he just cut him up like that.
67. Q. You're indicating an upward motion with your right hand?
A. I would say an upward motion, yeah.

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James William MacNeil, Direct Exam. by Mr. Edwards

68. Q. What, if anything, did he have in his hands?
A. A knife, a knife in his hand.
69. Q. How big was the knife, do you recall?
A. Well usually, I think it was a pocket knife. Usually that's what people carry, you know, but I can't be sure just exactly the size but a pocket knife would be a six inch blade. But I can't, you know, I can't be really sure.
70. Q. Did you see the blade?
A. No, I never seen the blade. This is just presay.
71. Q. Okay. So after Mr. Marshall let go of you, I believe you said that he went toward Ebsary?
A. Yeah.
72. Q. What happened between Ebsary and Marshall, if anything, at that point?
A. I just, I can't be sure. I think Ebsary waved like that at Marshall with his hand. It was like an upward motion. Then Marshall just vanished, right there he took off.
73. Q. He took off?
A. Yeah.
74. Q. Do you remember what way he took off?
A. I can't remember the directions, I can't remember the directions.
75. Q. Then where did you and Ebsary go?
A. We went up to his place on Argyle Street.
76. Q. And how long would it have taken you to get from Crescent Street to his place on Argyle Street?

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- A. I'd say roughly fifteen minutes.
77. Q. About fifteen minutes?
- A. Yeah.
78. Q. Yes. And when you got to his house what did you do?
- A. I sat in the front room and he went in and he was washing the knife off underneath the sink, the blood off the knife under the sink like.
79. Q. Did you see him do that?
- A. I seen him like from a distance there, and that was it. I just stayed for a little while longer and then I went home.
80. Q. Do you recall if there was anyone else in the house that night?
- A. I was to, I was to -- if there was I can't recall because I was to in a state of shock like.
81. Q. Now when did you next go back to Ebsary's house after that?
- A. I went back the next day.
82. Q. Yes?
- A. And I told him that the fellow died.
83. Q. You told who?
- A. Mr. Ebsary that the fellow died and Mr. Ebsary said it was self defence.
84. Q. How did you know that the fellow had died?
- A. I heard it on the radio and he he said it was self defence.
85. Q. So what did you say then when he said it was self defence?

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James William MacNeil, Direct Exam. by Mr. Edwards

- A. Well I said I don't really think. I don't think. To me it was -- like when he asked me that there question I was laying in bed there. I just ah, I couldn't accept it as being self defence in my own thinking, ah.
86. Q. Is that what you told Ebsary?
- A. No I didn't tell him that but in my own thinking I couldn't take it. . .
87. Q. What did you tell Ebsary, if anything, or what did you say to Ebsary after he said it was self defence?
- A. Ah-h, I told him he didn't have to kill him, I said. I said he should have like, meaning he should have handed over his billfold because the fellow never put a gun in his face or any darn thing so he should have handed over his billfold, but people act in different ways I guess.
88. Q. And what did he say to that, if anything?
- A. He never said nothing, nothing. He just said self defence so I never went back to the house again after ah -- wait now, a couple of days after that - where was I at - I was up at the house and his son came up and his wife up.
89. Q. That's Ebsary's son and wife?
- A. Yeah. They told me not to go down to the house on account of what . . .
90. Q. You can't tell what they told you. But you had some conversation with the wife and son?
- A. Yeah, right.

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James William MacNeil, Direct Exam. by Mr. Edwards

91. Q. As a result of that conversation you never went back to his house?
- A. Right.
92. Q. Mr. MacNeil when did you first tell anybody about this incident?
- A. Well when I went home I was pretty well ah - I couldn't sleep and then I never really told anybody except my like ah, when I went to the police after Mr. Marshall was tried.
93. Q. You went to the police after Mr. Marshall was tried?
- A. Yeah.
94. Q. Do you recall what month that would have been?
- A. That was just about ten days after that I think, or eleven days.
95. Q. Ten days after he was convicted?
- A. Yeah, right, yeah.
96. Q. Do you remember what month that was, what month of the year?
- A. I don't know, wait now, that was in November was it?
97. Q. November seventy-one?
- A. Yeah.
98. Q. Alright. So what police did you go to then?
- A. I went to Sydney Police. I think it was MacIntyre and ah.
99. Q. John MacIntyre, the one who is now chief?
- A. Yeah.
100. Q. Yes?
- A. And I gave him a statement and he wouldn't, him and there

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James William MacNeil, Direct Exam. by Mr. Edwards

100. A. was another cop there with him, I forget the cop's name. They wouldn't believe me so I said I'll take a voluntary lie detector test. So I took that and that came out negative too, so you know, I was really in a pickle there. Nobody believed me and Chripts, a fellow has to spend all that time in jail for something he didn't do and you've got to live with it.

MR. WINTERMANS:

Your Honour, My Lord, I want to object again, I question the relevancy of this testimony.

MR. EDWARDS:

No further questions, thank you Mr. MacNeil.

MR. WINTERMANS:

1. Q. Mr. MacNeil, how old were you at the time that this incident took place?
A. I was twenty-five.
2. Q. And Mr. Ebsary, do you know how old he was at that time, approximately?
A. He'd be around sixty I guess.
3. Q. About sixty?
A. Yeah.
4. Q. How would you describe Mr. Seale in terms of size?
A. I would say that he was a little bit taller than Marshall,

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James William MacNeil, Cross Exam. by Mr. Wintermans

I think he was taller than Marshall.

5. Q. You say that you first met Mr. Ebsary at the State Tavern which use to be on George Street. I understand it no longer exists there.

A. Yeah, right.

6. Q. It's on the corner of George and what?

A. George and Falmouth.

7. Q. Falmouth, okay. Mr. Ebsary was already at the tavern, wasn't he?

A. Yeah.

8. Q. And you just met him by coincidence there?

A. I believe so, yeah.

9. Q. So you're saying that you had about eight beers and that Ebsary probably had about eight beers. When you say that you're referring to the time that you were at the tavern with Mr. Ebsary, right?

A. Yeah.

10. Q. But you're not sure how long Mr. Ebsary was at the tavern before you got there?

A. No I'm not.

11. Q. Because you weren't there, right.

A. No I'm not, I can't.

12. Q. Okay, so you're not sure how much he had to drink before you even got there then?

A. No.

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James William MacNeil, Cross Exam. by Mr. Wintermans

13. Q. There's no way that you could know that?

A. No, there's no way I could.

14. Q. So you walked down George Street and of course that would be in the direction of Mr. Ebsary's residence at that time, which was on Argyle Street?

A. Yeah, right.

15. Q. And you cut through Wentworth Park which would have been directly on route to Mr. Ebsary's house at that time?

A. Yeah, right, yeah.

16. Q. Were you walking the whole time before you were approached by Marshall and Seale?

A. Yeah, we were walking.

17. Q. Did you stop in the park at all, lingering or anything like that?

A. No, we never stopped for nothing, no.

18. Q. You just kept walking through at a steady pace?

A. Yeah.

19. Q. And you were up on Crescent Street?

A. Yeah.

20. Q. You say that Marshall and Seale approached you?

A. Hmm-mm.

21. Q. You or Mr. Ebsary didn't approach them, did you?

A. No, no, no.

22. Q. So if someone was to testify that you or Mr. Ebsary called them over what would you say to that?

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James William MacNeil, Cross Exam. by Mr. Wintermans

22. A. I would have to say no, I would have to say no.
23. Q. From what direction did Mr. Marshall approach you?
- A. Well when we got up on the street from across the road I would say it would be around, just around, just as we.
24. Q. Okay. Let me rephrase that, I don't think you understand my question. Did he approach you from in front of you or from behind you or from beside you?
- A. I would say it would be sort of like in front of us.
25. Q. He approached you from the front?
- A. Yeah.
26. Q. Did you see him coming then?
- A. No, I never seen him coming.
27. Q. Do you recall having given evidence at the preliminary inquiry into this matter on August the fourth, nineteen eighty-three?
- A. Yeah.
28. Q. I'll just refer you to something at page forty-two, line five. Do you recall being asked the question by my Learned Friend, "Where did they approach you from, front or behind?" Your answer: "I would say it would be from like behind or like in a counter clockways, you know, like we were across the other side but I think it would be like from behind." Do you recall having said that then?
- A. Yeah, I think I recall saying that.

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James William MacNeil, Cross Exam. by Mr. Wintermans

29. Q. Let me ask you the question again. Did Marshall approach you from the front or from behind or from sideways or what?
- A. It was sort of like on a clock direction, like.
30. Q. What do you mean by that?
- A. Sort of like , I don't know in the heck; Marshall grabbed my arm and then all of a sudden I seen Mr. Seale in front of Mr. Ebsary.
31. Q. So let me just ask you this then. Did you see Mr. Seale at any time before Mr. Marshall grabbed your arm?
- A. Uh-h.
32. Q. Right at that - that night?
- A. No.
33. Q. Okay, so the first thing that you remember then as far as Marshall and Seale go is that Mr. Marshall grabbed your arm?
- A. Hmm-mm.
34. Q. And he pushed it up behind your back?
- A. Yeah.
35. Q. Like this?
- A. Yeah.
36. Q. And he put some pressure on it?
- A. Not too much pressure, I just froze when he grabbed it.
37. Q. He didn't hurt you or anything?
- A. No, he never hurt me, no.
38. Q. But he had you. . .
- A. He just had me like that.

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39. Q. So that you couldn't really move?
A. So I couldn't move like, right. Well I didn't plan or attend to move.
40. Q. You thought that you were being robbed, is that right?
A. Yeah, right.
41. Q. And you were afraid?
A. Darn rights I was.
42. Q. You thought that you might get hurt?
A. Darn rights.
43. Q. And Mr. Ebsary was standing right beside you?
A. Yeah.
44. Q. Just a couple of feet away from you?
A. Yeah, almost next, right, yeah.
45. Q. The two of you had been just walking along?
A. Yeah, right.
46. Q. Just minding your own business?
A. Yeah.
47. Q. Was there any conversation between either you and Ebsary with these two people, Seale and Marshall, before Mr. Marshall grabbed your arm?
A. No.
48. Q. Was there any conversation at all?
A. No.
49. Q. With either
With /Seale and Marshall?
A. No conversation whatsoever.

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James William MacNeil, Cross Exam. by Mr. Wintermans

50. Q. Was there any contact whatsoever?
A. No.
51. Q. Okay. So what you're saying is that you were walking through the park on your way to Mr. Ebsary's house?
A. Right.
52. Q. You were minding your own business?
A. Hmm-mm.
53. Q. You said that you had had a few beers but that you weren't staggering or anything, is the right?
A. No, I wasn't staggering.
54. Q. And two total strangers, were they total strangers?
A. Total strangers.
55. Q. Sandy Seale and Marshall?
A. Total strangers.
56. Q. Came up to you and attacked you. Is that a fair word to use?
A. Would be.
57. Q. At least Marshall attacked you?
A. Yeah, at least Marshall attacked me, yeah.
58. Q. I suppose you were more concerned about yourself and Mr. Marshall at that immediate moment than with Mr. Ebsary and Mr. Seale. Is that fair to say?
A. Yeah, that would be fair to say.
59. Q. Okay. And I suggest to you that between the time that Mr. Marshall grabbed your arm and put it up behind your back and the time that the knife came out and the two were cut

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with it, that that whole incident only took five or ten seconds, is that fair to say?

A. I would say, yeah.

60. Q. So it all happened very fast?

A. Very fast, yeah.

61. Q. And you say that right after Mr. Marshall put your hand up behind your back you heard some conversation between Mr. Seale and Mr. Ebsary?

A. Hmm-mm.

62. Q. Now you indicated that you heard Mr. Seale say: "dig man, dig".

A. I heard that, yeah.

63. Q. By that you understood, give me your money, dig into your pockets and give me your money?

A. Yeah, right, yeah.

64. Q. And that Mr. Ebsary said something to the effect, reaching into his pocket, "here, I've got something for you" or something like that?

A. Yeah, I heard that, yeah.

65. Q. Is that right?

A. I heard him saying that.

66. Q. Is it possible that there may have been some conversation between Seale and Ebsary before the comment "dig man, dig"?

A. I don't believe, no. I don't think, no.

67. Q. Are you sure that you may have just been so upset by being held by Mr. Marshall that you may not have noticed that

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it was all happening so fast?

A. No, no there was no conversation, no.

68. Q. I see. Isn't it true that Marshall never said one word to you before he put your arm up behind your back?

A. Marshall never said a word to me, no.

69. Q. Now you didn't actually see the knife at the scene, is that correct?

A. That's true.

70. Q. It wasn't until later at the house?

A. Yeah.

71. Q. And you say that Mr. Marshall, this is all happening of course in a five or ten second period but, after your arm was up behind your back and you heard "dig man, dig" and "I've got something for you" and you saw Mr. Ebsary move his arm towards Seale, isn't it right that you said that Mr. Marshall then made a move towards Mr. Ebsary?

A. Yeah, yeah, I seen that. I seen him making a move towards.

72. Q. And then Mr. Ebsary you say kind of swung his, put his arm up, his hand?

A. Yeah, and then Marshall.

73. Q. And then Marshall ran away?

A. Then he disappeared, yeah.

74. Q. Right. And Seale was already gone at that point?

A. Yeah.

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James William MacNeil, Cross Exam. by Mr. Wintermans

75. Q. He had already run and fell down or whatever?
A. Yeah.
76. Q. You and Mr. Ebsary then walked quickly to Mr. Ebsary's residence, is that correct?
A. Hmm-mm, yeah.
77. Q. And then when you got to Mr. Ebsary's residence you saw the knife at that time, did you not?
A. I saw the knife, I saw the knife.
78. Q. Isn't it true that this knife was a small knife with a brown handle on it?
A. There I can't -- I can't be really confident because I just had like a glimpse of it. There could have been a brown handle on it, but I can't be just, I'm not.
79. Q. Okay, what about the small aspect of it then?
A. I can't give you no size on the blade either. Just like if...
80. Q. But it was a pocket knife?
A. Yeah, this is what I figure it was.
81. Q. When you say a pocket knife to you mean like a jack knife, the blade folds into the handle?
A. Yeah, right, yeah.
82. Q. You said did you not too Mr. MacNeil, something to the effect "you did a good job back there"?
A. Yeah, I did when we got to the house. His daughter, I was telling her that.

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83.

James William MacNeil, Cross Exam. by Mr. Wintermans

83. Q. And that was because you were glad because you thought that you might have been hurt, or something like that?
- A. Yes, yes I was.
84. Q. So you went to the police after the trial was over, the Marshall trial was over?
- A. Hmm-mm.
85. Q. After Marshall had been sentenced, is that right?
- A. Yeah, right.
86. Q. But they didn't believe you?
- A. No.
87. Q. The City Police didn't believe your story, is that right?
- A. No, they didn't believe me.
88. Q. And that was some ten days after the sentence was passed?
- A. Yeah, yeah.
89. Q. Isn't it true that just before this stabbing incident took place that Mr. Seale could have had his hands on Mr. Ebsary but you're not sure?
- A. Yeah, that could be possible, it could be possible.
90. Q. And it's possible that you weren't looking in Mr. Ebsary's direction because you were more concerned with what was happening to you at the hands of Mr. Marshall, is that correct?
- A. Well I couldn't say that's correct because I noticed his hand going into motion like.
91. Q. I'm talking about before that, right before you saw the hand going.

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James William MacNeil, Cross Exam. by Mr. Wintermans

91. A. Oh-h, yeah, right, yeah, yeah, oh.
92. Q. You were pretty worried about your own safety at that point?
- A. Yeah, right.
93. Q. You were afraid that you were being robbed and that you'd be hurt?
- A. Yeah, right.
94. Q. If I was to suggest to you that the reason that Mr. Marshall grabbed a hold of your arm was because he thought that you were drunk and you were staggering and were about to fall down and that he was just trying to help you out, what would you say to that suggestion?
- A. I would say it's wrong. I'd say that's wrong.
95. Q. Now with respect to the description of the knife, today you're saying that you're not sure how small it was or whether it had a brown handle and that. You recall having given evidence at the preliminary inquiry that I referred to earlier, do you?
- A. No answer.
96. Q. In August of nineteen eighty-three?
- A. Hmm-mm.
97. Q. Are you sure that the knife was in fact a jack knife type knife, where the blade folds into the handle?
- A. Well I figure that's the kind of a knife people carry on them, a pocket knife, jack knife like.

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85.

James William MacNeil, Cross Exam. by Mr. Wintermans

98. Q. Do you recall having been asked as I refer to the preliminary inquiry in August of nineteen eighty-three: Question: "When you say pocket knife"

MR. EDWARDS:

Page and line please.

MR. WINTERMANS:

Page sixty-one, line seventeen.

99. Q. "When you say pocket knife do you mean the type of knife that folds up like a jack knife?". Your answer: "Yeah".
Question: "That the blade folds into the handle?" Answer: "Uh-hah". "Is that the kind of knife it was?" Answer: "Yeah." Question: "Are you certain about that?" Answer: "Yeah.". Do you recall having said that at the preliminary? That you were certain that it was a jack knife?

A. I believe I did.

100. Q. Isn't it true that you never saw any knife in Mr. Ebsary's possession earlier that evening?

A. No, I didn't even know.

101. Q. You were totally unaware of whether Mr. Ebsary had any kind of a knife on him?

A. I was totally unaware, totally unaware.

102. Q. Was it fairly dark at the tavern - not at the tavern, at the park that night?

A. The lighting was fair.

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James William MacNeil, Cross Exam. by Mr. Wintermans

103. Q. Was fair?

A. It wasn't really dark it was just fair.

104. Q. So this is back in nineteen seventy-one around midnight?

A. Hmm-mm.

105. Q. In a park?

A. Yeah, it was fair, it wasn't really dark out.

106. Q. But the lighting was such that you were unable to see exactly what Ebsary had in his hand at that time, wasn't it?

A. No answer.

107. Q. You said that you couldn't see the knife that well, isn't that right?

A. Well, no, that's right, yeah.

108. Q. Now, again, you're saying today that you're not sure about the size of the knife that you saw later at the house?

A. Yeah.

109. Q. Is that what you're saying?

A. Yeah.

110. Q. Do you recall having given evidence up in Halifax before the Nova Scotia Court of Appeal in nineteen eighty-two, do you remember that? Giving evidence in Halifax, do you remember testifying up in Halifax?

A. Yeah, right.

111. Q. Concerning this incident?

A. Yeah.

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87.

James William MacNeil, Cross Exam. by Mr. Wintermans.

112. Q. Page ninety-nine, that evidence. Do you remember the question, line twenty-seven or something like that,
Question: "But the point is you did see the knife before it went into Seale, did you?" Answer: "Not exactly because you know it was kind of dark like but I seen, I seen it. I had a glimpse of it after that, like you know, it was only a pocket knife, not a dagger or nothing, it was only small." Do you remember saying that?
- A. I remember saying that when I seen a glimpse of it after that. The only place I seen a glimpse of it was back home when he was washing it under the sink so I figured it was only a pocket knife.
113. Q. So what you're saying is that you assumed that the knife that you saw back at Ebsary's house, that he was washing in the sink, was the same knife that he had used back at the park, is that what you're saying?
- A. Hmm-mm.
114. Q. Yes?
- A. Pardon?
115. Q. Are you assuming that the knife that you saw Ebsary washing in the sink was the same knife that Mr. Ebsary had back in the park?
- A. Yeah, because there was blood on it and there was blood on his hands, blood on the handle.

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88.

MR. WINTERMANS:

That's all, thank you.

MR. EDWARDS:

No re-direct My Lord.

BY THE COURT:

That's all, thank you Mr. MacNeil.

MR. EDWARDS:

My Lord, I suggest we break for lunch at this point.

BY THE COURT:

Alright one forty-five, how would that be, I suggest we'll convene at one forty-five.

MR. EDWARDS:

That's fine My Lord.

LUNCH BREAK

Upon returning from lunch break the jury is re-called.

Mary Ebsary is called to the stand.

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89.

Mary Ebsary, Direct Exam. by Mr. Edwards

Mary Ebsary is duly sworn.

1. Q. Your name is Mary Ebsary?
A. Yes it is.
2. Q. You're the wife of the accused, Roy Newman Ebsary?
A. Yes I am.
3. Q. For how long have you been his wife?
A. Approximately thirty years.
4. Q. About thirty years?
A. Hmm-mm.
5. Q. Okay. So you and he would have been cohabiting in May of
nineteen seventy-one?
A. Yes.
6. Q. And where did you reside around that time?
A. Rear Argyle Street.
7. Q. And that's in the City of Sydney?
A. Yes it is.
8. Q. Yes. And who resided with you and Mr. Ebsary at that time?
A. Just my son and my daughter.
9. Q. Your daughter's name being Donna Ebsary?
A. Donna, hmm-mm.
10. Q. And your son's name?
A. Gregory.
11. Q. Gregory Ebsary?
A. Hmm-mm.

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90.

Mary Ebsary, Direct Exam. by Mr. Edwards

12. Q. Okay. Do you recall the time when Sandy Seale was alleged to have been stabbed in Wentworth Park?
- A. Yes I do.
13. Q. Do you recall that time as being in or about May twenty-eighth, nineteen seventy-one?
- A. Yes.
14. Q. And do you recall your husband, Roy Ebsary, coming home with another person on the night of the alleged stabbing?
- A. Yes I do.
15. Q. With whom, or who was with him on that night when he returned home?
- A. Mr. MacNeil.
16. Q. Do you recall his first name?
- A. James.
17. Q. It was James MacNeil?
- A. Hmm-mm.
18. Q. And do you recall what time Mr. MacNeil and your husband returned home that evening?
- A. Not accurately, some time between eleven and twelve.
19. Q. That's in the p.m.?
- A. Yeah.
20. Q. Alright. And do you recall what, if anything, occurred when they got home?
- A. Well Mr. MacNeil was quite aggitated, excited. So was my husband. He went in the kitchen and Mr. MacNeil stayed

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standing in the hallway. He -- am I allowed to say this?

21. Q. Yes. Was your husband able to hear what Mr. MacNeil said at that time?

A. Yes.

22. Q. Yes?

A. Mr. MacNeil stayed in the hallway and he kept repeating "Roy saved my life tonight" and Donna got up and she was in the living room with me and she went out in the hallway and she spoke some words with Mr. MacNeil.

23. Q. Was your husband still within earshot?

A. He was in the kitchen, I presumed, I don't know accurately whether he could hear but I presumed he could.

24. Q. Do you recall what Donna said to Mr. MacNeil at that point?

A. No I don't know what Donna said.

25. Q. Where did Donna go from there?

A. She went in the kitchen.

26. Q. How old would Donna have been at that time?

A. Thirteen, fourteen.

27. Q. Thirteen or fourteen years old?

A. Ahh-ha.

28. Q. Did your husband say anything during this period?

A. I didn't speak with my husband that night.

29. Q. Okay. Now, do you recall how long after it was before Mr. MacNeil left the residence?

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A. It could have been possibly fifteen minutes.

30. Q. Yes?

A. Fifteen, twenty minutes, no more than that.

31. Q. And when did you next see Mr. MacNeil?

A. The next afternoon he was at the house but they weren't there too long. Now this I'm not too accurate about, I don't remember too clearly.

32. Q. Yes, okay.

A. But he was there at the house again in the afternoon, some time during the afternoon.

33. Q. Was your husband present at that time?

A. Yes.

34. Q. Do you recall if they had any conversation at that time?

A. I don't know if the conversation took place, or if a conversation took place I wasn't there.

35. Q. You weren't?

A. No.

36. Q. Okay, thank you very much Mrs. Ebsary.

MR. WINTERMANS:

Just a couple of questions Mrs. Ebsary.

1. Q. Your the wife of the accused, Roy Newman Ebsary, correct?

A. No answer.

2. Q. Is it true that Mr. Ebsary was around sixty years old at that time?

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A. Hmm-mm.

3. Q. In nineteen seventy-one?

A. Yes.

4. Q. And that he is approximately five foot two?

A. Hmm-mm.

5. Q. Weighed at that time approximately a hundred and fifteen pounds?

A. Possibly, I wouldn't say yes or no to that, I don't know his weight.

6. Q. I see. Thank you, that's all the questions I have.

MR. EDWARDS:

Nothing further My Lord.

BY THE COURT:

Thank you Mrs. Ebsary.

Donna Ebsary is called.

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Donna Ebsary, Direct Exam. by Mr. Edwards

Donna Ebsary is duly sworn.

1. Q. Your name is Donna Ebsary?
A. Yes it is sir.
2. Q. Where do you reside Donna?
A. One eighty River Street, Waltham, Mass.
3. Q. That's Massachusetts, United States of America?
A. Yes it is sir.
4. Q. You are how old Donna?
A. Twenty-six years old.
5. Q. And you're the daughter of the accused, Roy Newman Ebsary?
A. Yes I am sir.
6. Q. And you resided with your mother and father and brother Greg at Rear Argyle Street in nineteen seventy-one, is that correct?
A. That is correct.
7. Q. Were you attending school at the time?
A. Yes I was.
8. Q. Do you recall what grade you would have been in at that time?
A. About grade seven.
9. Q. What's your employment now Donna?
A. What do I do?
10. Q. Yes.
A. I'm a manager of a furniture company.
11. Q. Manager of a furniture company?
A. Yes.

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Donna Ebsary, Direct Exam. by Mr. Edwards

12. Q. What education do you have?
- A. I've got a grade twelve diploma and I've got four years of University, three years at the College of Cape Breton and a year with a college in the States studying acupuncture.
13. Q. Do you recall in nineteen seventy-one the stabbing of Sandy Seale?
- A. Yes I do sir.
14. Q. Or news of that stabbing being in the media?
- A. Yes I do.
15. Q. When did you first learn of that?
- A. Ah-h, do you mean . . .
16. Q. Well do you recall the night of May twenty-eighth, nineteen seventy-one?
- A. Yes sir, I recall the night.
17. Q. How long was it after that before you learned that Sandy Seale had been stabbed in Wentworth Park?
- A. It might have been like the next day or -- I would say it was the next day.
18. Q. I see, okay. Now that night, where were you?
- A. I was at home with my mom.
19. Q. With your mother?
- A. Yes, sir.
20. Q. That was the previous witness, Mary Ebsary, is that correct?
- A. That is correct.

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Donna Ebsary, Direct Exam. by Mr. Edwards

21. Q. Yes, and what do you recall happening that night?
- A. I recall, ah - I was at home in the living room with my mom and my father and another gentleman, James MacNeil, came home.
22. Q. About what time did they come home?
- A. It was very late, I know the late news was on.
23. Q. Yes?
- A. So it would make it like eleven thirtyish or maybe a little later than that. Whatever time the late news comes on.
24. Q. Right?
- A. They came in and they stopped at the front room door where I was with my mother. Jimmy seemed to be kind of excited and he was telling my dad that he had done a good job and my father told him "oh be quiet, don't , you know just be quiet". Then they went into the kitchen and I followed them in there.
25. Q. Yes, and what, if anything, did you observe when you went into the kitchen?
- A. In the kitchen my father went to the kitchen sink and he was washing blood from a knife in the sink.
26. Q. Yes, and what happened then?
- A. I left the kitchen then, he left and I believe he went upstairs. I know that I went back with my mom.
27. Q. Did James MacNeil come to the house anymore after that night?
- A. I don't recall him being at the house after that.

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Donna Ebsary, Direct Exam. by Mr. Edwards

28. Q. I see. Did you ever make any efforts to report this matter to the police?
- A. I talked it with a friend of mine and my friend went to the police but I myself did not.
29. Q. Okay, I have no further questions Donna, thank you.

MR. WINTERMANS:

1. Q. You would have been thirteen or fourteen at the time?
- A. About that.
2. Q. Is it true that you didn't notice any blood on your father's clothes that night?
- A. I did not notice, no.
3. Q. Thank you.

MR. EDWARDS:

No re-direct My Lord.

BY THE COURT:

Thank you Miss Ebsary.

Dr. Naqvi is called.

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Dr. Naqvi, Direct Exam. by Mr. Edwards

Dr. Naqvi is duly sworn.

1. Q. Your full name sir?

A. (inaudible) Naqvi.

2. Q. And you are a surgeon and and as such qualified medical practitioner in the Province of Nova Scotia?

A. Yes I do.

3. Q. And you've been so qualified since when?

A. Nineteen sixty-eight.

4. Q. Since nineteen sixty-eight. And you practiced medicine and surgery in or about the City of Sydney continuously since that time?

A. That's right.

MR. EDWARDS:

My Lord, my Learned Friend has indicated that he is prepared to admit the qualifications of Dr. Naqvi to give opinion evidence in the field of surgery and the general practise of medicine.

MR. WINTERMANS:

That's correct My Lord.

BY THE COURT:

Opinion evidence in the field. . .

MR. EDWARDS:

General surgery.

BY THE COURT:

In the field of general surgery?

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Dr. Naqvi, Direct Exam. by Mr. Edwards

MR. EDWARDS:

Yes My Lord, and the general practice of medicine.

BY THE COURT:

Thank you.

MR. EDWARDS:

Thank you My Lord.

5. Q. Dr. Naqvi, I understand that you were on duty at the City Sydney Hospital on the night of May twenty-eighth, nineteen seventy-one, is that correct?
- A. Yeah.
6. Q. Yeah, and either late that night or early on the morning of the twenty-ninth you had occasion to treat one Sandy Seale, the apparent victim of a stab wound?
- A. That's correct.
7. Q. Yes, and what time did you first see Mr. Seale?
- A. Some time ah -- way early in the morning.
8. Q. Pardon me?
- A. Some time very early in the morning on the twenty-ninth day, fifth of the month, nineteen seventy-one.
9. Q. When you say very early, could you say about what hour?
- A. Approximately between, I'd say after midnight anyway.
10. Q. Yes?
- A. Sometime after midnight.

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Dr. Naqvi, Direct Exam. by Mr. Edwards

11. Q. Sometime after midnight, yes. The victim, Sandy Seale, do you recall his approximate height and weight?
- A. He was a young boy. I couldn't tell you the definite approximate height and weight but he was a colored boy. He was, I'd say about maybe five six or five seven, something like that.
12. Q. Five six or five seven?
- A. Could be in that range, I couldn't be sure.
13. Q. Could you give an approximate weight?
- A. No answer.
14. Q. Well how did he appear to you, thin, fat or?
- A. Average person, an average person.
15. Q. Average, an average build?
- A. Hmm-mm.
16. Q. Yes, okay. When you first saw him you were in the outpatient department of the City Hospital?
- A. That's correct.
17. Q. Would you tell the jury please what you observed about his condition at that time and place?
- A. At the time when they came to the outpatient department he was unconscious, unresponsive, he did not have any blood pressure and he had a wound into his abdomen and there was an intestine was lying over the abdomen at that time.
18. Q. Could you describe the approximate size of the wound?

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- A. Well approximately it would be at my finger's breath.
19. Q. Your finger's. . .
- A. Yeah, approximately about this much size. I couldn't be sure of the exact measurements.
20. Q. You're talking about three or four inches?
- A. Something in that vicinity.
21. Q. From where did the wound extend, to where?
- A. At the time in the emergency room this was not determined. He was taken to the operating room right away. At that time the wound extended right from the abdomen here on the front part, all the way to the back where the aorta lies.
22. Q. Yes. So how deep, could you give us an estimate how deep that wound would have been? If I understood you the wound went from the outside into the back/^{where}the aorta lies. What distance would that be approximately in a person of Mr. Seale's size?
- A. Well, it could be about ah -- you can imagine from here to there, I'd say a good six inches, maybe more.
23. Q. Six inches, maybe more?
- A. Yeah.
24. Q. Yes, okay. Would you describe what procedures would follow to try to save Mr. Seale?
- A. At the time of arrival to the emergency room we took Mr. Seale to the operating room. He was in a state of shock and he had a -- we did extend his old stab wound incision

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to enter into the abdominal cavity. At that time he had had the wound entering into the large bowel and there was a shetal matter present into the abdominal cavity. There was a large hemotomen into his back which was fairly extensive and his aorta was pulsata but the hemotoma was into the (inaudible) in his face. At that time we did not touch the aorta and there was a big opening into his vessels going to the, his bowel and these were repaired at that time and also his bowel is brought outside. Once the blood bowel is brought outside he had a, quite a bleed then and there was a blood also into the stomach at that time but because his condition was extremely poor it required over twenty-seven units of transfusion and he was on the respirator and after he received the first twelve points of blood to get some more blood pressure he was taken back to the operating room the same day. At this point the bowel was again packed on the side to open the large hemotoma which was into the aorta and once this was dissected there was a gush of bleeding and at that point we could not control the bleeding from the aorta. At this point his chest was opened on the left side and the aorta was cross clamped to control the bleeding. Although the bleeding was controlled the repair was done and once this was done his condition remained critical afterwards; and the blood supply to his bowel was very poor at that time and at this time we did repair his abdominal wound.

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and close the abdominal cavity and he was placed on all the life support majors but he died the same day.

25. Q. Do you recall approximately what time it was he died, Doctor?

A. The last note I have in my record here is eight o'clock.

26. Q. Eight o'clock, a.m.?

A. Eight o'clock, p.m.

27. Q. P.M.?

A. Yeah.

28. Q. So I take it he did not recover from the operation?

A. That's right, yeah.

29. Q. Now, in your opinion doctor, what was the cause of death?

A. The cause of death was his abdominal injuries as a result of an injury by a sharp object.

30. Q. Which caused a massive loss of blood?

A. Massive loss of blood, injury to his bowel, injury to his aorta and injury to the vessels going to his bowel and sort of a gangrene of the bowel as well. The cause of the loss of blood supply.

31. Q. Thank you doctor.

MR. WINTERMANS:

1. Q. First of all, I understand that there was just one injury, if it was caused by a knife, one stab wound to Mr. Seale.

Is that correct?

A. Yes.

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Dr. Naqvi, Cross Exam. by Mr. Wintermans

2. Q. Whereabouts on, whereabouts in relation to say my stomach area, would that approximately have been?
- A. Somewhere around the umbilicus, somewhere around there.
3. Q. That would be below where the rib cage area is?
- A. That's right.
4. Q. Right. So now what you're saying is that it went in there and it went about to where on his -- as far as his internal organs and things go?
- A. From here to all the way the - where the bone is in the back, in inner part of the bone.
5. Q. I see.
- A. Because the aorta lies right over the bone.
6. Q. So if he was a fairly thin person that's not all that far, is it?
- A. If it's a thin person still I would say -- just remember one thing that there was, beside the skin and the muscles there's a hollow cavity and the hollow cavity has to go through which is, I would say it would be a fair distance yet.
7. Q. Pardon me?
- A. It would be a fair length just the same.
8. Q. Okay, now if a person were to take a swing at another person, punch them in the stomach like this, isn't it a normal reaction for the person who is about to receive the blow to kind of suck in their stomach, so to speak, a bit?
- A. It's possible.

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Dr. Naqvi, Cross Exam. by Mr. Wintermans

9. Q. Can't you push a fair distance in, just with the pressure of your hand?
- A. If you're relaxed.
10. Q. If you're relaxed?
- A. Yes.
11. Q. I take it that there is no autopsy done on this boy?
- A. According to my notes there is no.
12. Q. According to your notes there is none. I understand also that you never actually measured the depth of the injury?
- A. That's right.
13. Q. So what are you relying on, your recollection, your memory?
- A. You mean the length of the injury?
14. Q. Hmm-mm?
- A. I would say yes.
15. Q. Do you remember this incident independent of your notes that you have?
- A. I couldn't describe to you without my notes.
16. Q. I see. One thing that bothers me doctor is that my understanding that -- let me put it to you this way. Do you recall giving evidence in the preliminary inquiry on August the fourth, nineteen eighty-three? That was the last time, last month?
- A. Yes.
17. Q. In the Magistrates' Court inquiry?
- A. Yes.

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Dr. Naqvi, Cross Exam. by Mr. Wintermans

18. Q. Page eighty-four, line eleven. Being asked a question by my Learned Friend: " And did you make a note of what time he did expire?" Your Answer: "Yeah, seven thirty a.m." Do you remember giving that answer?
- A. Well, if could recall, I've only gone through my notes and I do have two controversial notes here and no, I have a note here at seven thirty a.m. It says patient did regain some consciousness, there is free bleeding through the dressing was lavene tube, /saturated with blood which was again (inaudible) There has not been any urine output and the patient's condition remains critical. There is a large amount of bleeding through the lavene tube, last hemoglobin showed to be eleven grams. Now this was at seven thirty a.m., my note. Then I recall, I see here on the chart that I have permission from the hospital and here I have a note, the first note is at seven o'clock; this was seven thirty; then I have a note here seven o'clock. The seven o'clock note says patient has a very fluctual blood pressure, now his blood pressure dropped to sixty, again had taken cardio response, patient had a drop in the (inaudible) and I feel that he still continues to bleed into the rectal organ space by virtue of a sharp object.
19. Q. Without getting into all those details, what I'm asking you is the time of death. You've testified today that it was

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Dr. Naqvi, Cross Exam. by Mr. Wintermans

at 8:00 p.m. You recall having given evidence at the preliminary at 7:30 a.m. Let me ask you one more question, do you recall having given evidence in the original trial of Donald Marshall, Jr. back in nineteen seventy-one?

A. Well I don't have the dates but I was involved there.

20. Q. Do you recall having given evidence on July the fifth, nineteen seventy-one in the Supreme Court, here in Sydney?

A. I don't have the exact date but I was involved with the case.

21. Q. That was the preliminary. November the third, nineteen seventy-one, I'm sorry.

A. I couldn't tell you the time.

22. Q. But you do recall having given evidence in the Supreme Court in the trial of Donald Marshall, Jr?

A. It must be if I have that, my name is there.

23. Q. Page twenty, line twenty-two, twenty-three. You testified or at least it appears that there was a question: "How long did you administer to Mr. Seale?" Answer: "I was in attendance for over from twelve midnight until next day, approximately four or five o'clock." Question: "Four or five o'clock the next day?" Answer: "In the afternoon." Do you recall having said that?

A. Well I can't tell you the time but I was involved with that particular patient from the time he arrived until he died.

24. Q. I understand also that you operated on Mr. Seale on two

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Dr. Naqvi, Cross Exam. by Mr. Wintermans

different occasions during the course of that morning,
after midnight?

A. That's right.

25. Q. The first time you patched up some problems but didn't get to the aorta and it was only when he didn't respond that you went back in and the aorta appeared ruptured and he wasn't responding so you had to go back in for the second time?

A. Well he was, that's correct. He was such a bad shape that we couldn't really do it all so we had to go back within a short period. Even then we couldn't control it from the abdomen, we had to go through the chest in order to control it.

26. Q. Again with respect doctor, you indicated that you recalled giving evidence at the preliminary inquiry on August the fourth, nineteen eighty-three in Provincial Magistrates' Court in relation to this matter, and you indicated today that the death of the wound that's how deep it was - I think you said six inches, maybe more. Do you recall having, being questioned by the Judge at the very end of your testimony? Page ninety-three. And indicating, the whole page I guess. Question: "Dr., do you have any idea just approximately the length of the incision, you know the injury from when it entered the abdomen until it penetrated the aorta, just roughly?" Your answer: "Well he was an average boy and you

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Dr. Naqvi, Cross Exam. by Mr. Wintermans

can take any average boy and measure from one to the other." Another question: "I know you have to just answer in a general way, I want just a rough idea." Answer: "I couldn't put the size on it. I would say it would be fairly something like this." I think you raised up your hand. Question: "The length of the palm of your hand?" Answer: "The wound of entry I would say something like the length of the palm of your hand. It would be from here to here." I think you pointed from here to here. The question from the Judge: "I see, three or four inches?" Your answer: "Something like that." Do you recall that?

A. Yeah.

27. Q. Well I take it doctor that you're not really all that sure exactly how deep this injury was?

A. No.

28. Q. And that you're relying on some memory of something that happened a long time ago. Basically taking a guess, is that correct, is that fair to say?

A. At the time - at the time he came in he was such a bad state that really. . .

29. Q. You didn't care exactly how deep it was or anything like that, you were just trying to save him, is that right?

A. That's right, that's true.

30. Q. Okay, thank you doctor.

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Dr. Naqvi, Re-direct Exam. by Mr. Edwards

MR. EDWARDS:

Arising out of that My Lord.

1. Q. With respect to the depth of the wound, relying on your knowledge as a surgeon, what would the minimum length of a blade have to be to penetrate the outside of the abdomen and into the aorta, where the aorta is located?

A. Minimum length of the blade?

2. Q. Yes?

A. I couldn't tell you. I could say that it all depends if you look at the front part of the abdomen and the back part, and you have got some approximate length, I say that should be probably, should take as a length for the minimum length.

3. Q. I'm sorry doctor?

A. I say if you take the front part of the back, back part of the abdomen and you measure the length and that gives you some idea how long it could be in order to provide injuries that would penetrate deep.

4. Q. Well approximately with a person the size, you say five six or five seven, normally...

A. That's a rough estimate.

MR. WINTERMANS:

You Honour I think I'm going to object to this. I think that my Learned Friend went into this during his direct examination, that I didn't really go any further, I didn't raise anything

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Dr. Naqvi, Re-direct Exam. by Mr. Edwards

new in my cross examination and my Learned Friend is now trying to go over the same matters that he initiated himself in the direct examination here. That this is not proper for the re-direct.

BY THE COURT:

What do you say to that Mr. Edwards?

MR. EDWARDS:

With greatest respect My Lord, I say he did open it up on his cross examination. Three-quarters of his cross examination dealt with the depth of that wound. The issue has now been confused by the cross examination and this is an attempt to clarify it.

BY THE COURT:

Whether you discovered from the witness in your direct examination, you did not review the wound was approximately three or four inches.

MR. EDWARDS:

He said approximately six inches.

BY THE COURT:

The distance would be about six inches, maybe more to my notes.

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Dr. Naqvi, Re-direct Exam. by Mr. Edwards

MR. EDWARDS:

Okay, I'll leave the witness My Lord.

BY THE COURT:

Thank you Dr. Naqvi.

MR. EDWARDS:

My Lord, that is the evidence for the Crown.

My Lord, I'm aware that there are some exclamations from time to time from the gallery. I'm sure that it's distracting both to counsel and to members of the jury. I'd ask Your Lordship to make it clear to persons that they are not to making exclamations or comments upon the evidence and if they do so I'd ask Your Lordship to eject them from these proceedings.

BY THE COURT:

I haven't noted that happening Mr. Edwards but certainly I would caution the audience to save whispers and loud comments within the hearing for outside the court room.

MR. WINTERMANS:

My Lord, I would ask that the jury be excluded for a moment if I could before my next comment.

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Jury Leaves.

MR. WINTERMANS:

My Lord, I would make a motion at this time that Your Lordship make a directive verdict of acquittal in this case on the basis that there is just no question here for the jury properly instructed and that any jury properly instructed would, acting reasonably, would recognize that no offence known to law has been committed on the basis of the evidence as presented by the Crown. I would submit that although there may be some evidence that a jury might be able to consider that I would stress to Your Lordship that Your Lordship has a responsibility in extreme cases such as this to recognize the unreasonableness, if that's a correct word, of any guilty verdict that any jury properly instructed could ever come back with in this case and that in order to ensure that my client has the benefit of all protections of the law that at this stage I would move that Your Lordship rule that there is just no offence known to law made out here and that you ought to take this case out of the hands of the jury and enter an acquittal at this time.

MR. EDWARDS:

My Lord. The test as I understand it My Lord at this stage is whether or not a jury properly instructed could, not would,

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convict and whether there is sufficient evidence for that purpose. I would submit that the evidence is very clear, that there is at least that much evidence. There's a very clear issue to be tried here, submit the charge, of course, is unlawful killing which is manslaughter and the live issue that the jury must weigh is whether or not the accused conduct in the circumstances was excessive as that term is understood in the context of Section thirty-four or thirty-seven of the Criminal Code. There is very definitely that issue to be weighed and considered by a jury and I submit would most appropriately be considered by a jury rather than have a directed verdict at this stage.

Thank you.

MR. WINTERMANS:

If I could just respond to that. I would submit that the issue, if there is one, is not whether the force used was excessive but rather whether it was unlawful for the accused to do what he has apparently done. The question being unlawful versus excessive and that Your Lordship note that the law requires that the matter be examined from the point of view of the accused person, not from the point of view of the consequences that have unfortunately been suffered by Mr. Seale. But that is not really all that relevant.

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The important question is, looking at it from the accused's point of view, did he act unlawfully when he was being robbed with violence, one time with one stab, stopped the commission of an offence. I know that before at an earlier stage of the trial we discussed the applicability of Sections thirty-four and thirty-seven. I would also ask that Your Honour, that Your Lordship view Section twenty-seven of the Criminal Code. "Everyone is justified in using as much force as is reasonably necessary to prevent the commission of an offence for which if it were committed the person who committed it might be arrested without warrant" certainly robbery is that type of case, "that would be likely to cause immediate and serious injury to the person or property of any one". I would submit that ah -- it just goes to show that the action of the accused was not an unlawful act and there is no evidence to suggest that it was an unlawful act and within the meaning of culpable homicide, when you put that all together I would submit that the Crown has a burden to prove an unlawful act and that that is not the case here.

BY THE COURT:

Have you anything further to say Mr. Edwards?

MR. EDWARDS:

No My Lord.

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BY THE COURT:

You're not entitled to another turn but if Mr. Wintermans has introduced some new material there.

MR. EDWARDS:

No, simply My Lord that his argument is a circular one. He says that the question is not excessive but whether it was lawful. Well surely, that's the whole question, whether it's lawful turns upon whether or not it was excessive so his argument is circular and therefore ought to be rejected.

BY THE COURT:

Gentlemen, I will need time to consider this.

Returning to the Court:

BY THE COURT:

Counsel for defense has moved for a directive verdict of acquittal. I have taken time to consider the motion and the representations advanced by both counsel on the motion. To sustain the motion there must be no evidence on which a properly instructed jury acting reasonably might convict the accused. I refer to McWilliams of making criminal evidence, at page four hundred and seventy-eight. The decision is one of law for a Judge to make and should not depend on whether

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the accused (inaduable) would at that stage convict or acquit but whether the evidence he suffers is reasonable he might convict on the evidence so far before him.

Further, McWilliams also says at page four hundred and seventy-nine "When there is direct evidence or to some period circumstantial evidence of guilt, even though, the issue should not be withdrawn from the jury" referring to R. v. K. et al. 1973, 23 C.R.N.S. 116.

I have concluded after thoughtful consideration that there is evidence on which a properly instructed jury acting reasonably might convict the accused.

Accordingly, the motion is denied.

Jury is recalled.

MR. WINTERMANS

On behalf of Mr. Ebsary, the accused, we have elected that we will not be calling any evidence at this time, or at any time for that matter.

BY THE COURT:

Do you wish to become involved in addressing the jury today or do you prefer to wait until tomorrow?

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MR. EDWARDS:

I prefer to do it today, My Lord.

MR. WINTERMANS:

So would I My Lord.

BY THE COURT:

With the time as it is, I certainly, I wouldn't like to see your two addresses interrupted by a departure by the jury. If we start them then I would like you to be able to both finish your addresses while the jury is here, at the one sitting.

MR. EDWARDS:

Fine My Lord.

MR. WINTERMANS:

Are you suggesting not even a five minute recess between the two?

BY THE COURT:

Oh no, no. I'm saying . . .

MR. WINTERMANS:

Yes, I wouldn't want to have it split so mine is tomorrow, right.

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BY THE COURT:

I'm saying I don't think it's entirely fair for one of you to speak today and another. . .

MR. WINTERMANS:

Certainly My Lord, although I would like to have five minutes just to. . .

BY THE COURT:

No problem.

MR. WINTERMANS:

Thank-you.

BY THE COURT:

Is the noise of this fan going to be a disturbance?

MR. EDWARDS:

I believe it will turn down one notch and make a little less noise My Lord.

Thank you.

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MR. EDWARDS:

Mr Foreman, Ladies and Gentlemen of the Jury. I have concluded the evidence, as you are well aware. I want to thank each and every one of you for your attention to this matter and as I warned you at the outset of my opening remarks, the facts of the case seem very straight forward but some complicated principles of law are involved and it is at this point I am going to try to address the facts to those points of law although I must say it is not my function to give you a detailed address on the law. That will be done at the conclusion of the addresses by counsel by His Lordship and the way the time is running now, that will probably come tomorrow morning.

But, because there is such a close interconnection between the principles of law and the arguments that I wish to present to you, I do have to make some reference to the law and I will keep those a brief as I can because His Lorship will be repeating most of them again tomorrow.

Now the charge here is manslaughter. We briefly stated manslaughter is an unalwful killing and there is no question that there has been a killing and that the deceased, Sandy Seale, died on the day of question or as the doctor's evidence as of the day after, the twenty-eighth of May, nineteen seventy-one.

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MR. EDWARDS' ADDRESS:

When you retire to delibertate I submit to you that there are really three questions that you have to answer. The answers to the first two are fairly straight forward, the answer to the third is very complicated.

The first question you have to answer is:whether or not on the day in question the accused, Roy Ebsary, assaulted Sandy Seale. I submit to you on the evidence that you've heard there is virtually not room for doubt on that score. The assault, of course, is an intentional application of force and if you find on the evidence that Mr. Ebsary did in fact stab Sandy Seale you can infer from the facts the stabbing was with a knife, then of course that is, in law, an assault by Ebsary on Seale. That would be the extent of your consideration on that first question, which would bring you to the second question.

Did that assault cause Seale's death? Again, I submit to you that on the facts of this case it is all but obvious that that assault did cause Seale's death. We had the evidence of Dr. Naqvi and he related to you the fact that in his opinion, which you are not bound to take but you can take it, in his opinion the cause of death was due to loss of blood supply and the loss of the blood supply was the wound to the abdominal region of Mr. Seale's body which did the damage he described.

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MR. EDWARDS' ADDRESS:

So those are really the first two questions out of the way. The third question you have to answer is: whether or not the assault by Ebsary on Seale was lawful. Once you get into that question you have to consider what is known in law as the defence of self defence. His Lorship will instruct you in great detail tomorrow morning on several sections of the criminal code dealing with the defence of self defence. In the main those sections are three. They are Section 27 which has to do with using force to prevent the commission of an offence. If you find on the evidence that Marshall and Seale were in effect committing an offence of robbery then Section 27 comes into play and reasonable force is permitted to be used in order to prevent the commission of such an offence.

More pertinent I submit to you Section 34, having to do with self defence as such and Section 37 which has to do with preventing a non-provoked assault and I propose now to deal very briefly with those sections.

Essentially, Section 34, and I'm paraphrasing - not using word for word, Section 34 allows someone to repel an assault if it is not the intention by such repulsion to commit death or grieve as bodily harm. So that if somebody assaults you, as long as you don't intend to kill or wound or mane the attacker, then that's okay. But if you do cause such grieve as bodily harm or death to the attacker, then the law says that then you are only justified in causing that type of

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MR. EDWARDS' ADDRESS:

damage to your attacker if you were under apprehension yourself of either being killed or receiving grievous bodily harm, and, to use the words of the Section, "you cannot otherwise preserve yourself from death". So there are those two components and only if those two components present is the repulsion of your attacker justified.

Now just consider the facts of this case. Number one, I submit to you, that it is very clear on the evidence that when Ebsary stabbed Seale he intended to cause grievous bodily harm or death to Seale. No question about that, I submit to you that there really can't be. If you make a sweeping motion with a knife into somebody's abdominal region, and you have the benefit of hindsight, with the wound that was cut, there is no question that that human intended grievous bodily harm of death.

So, we go to the second stage, was that type of injury justified? Well it would only have been justified if Ebsary was one: under reasonable apprehension of receiving grievous bodily harm himself. Consider the facts of the case. James MacNeil, whose evidence you heard and I told you up front about the frailties of his evidence; but, the frailty if I can just digress for a moment, the frailty of his evidence is also extrajudicial. In other words, it should be obvious that Mr. MacNeil is of limited intelligence but his

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MR. EDWARDS' ADDRESS:

testimony, I suggest to you, had an innocence about it almost like a child who would relate what had happened and I submit to you that a person of his capacity, if he was making it up, that could very easily been exposed in cross-examination, and it was not.

To add to the credibility of MacNeil's testimony you have to consider that in November of nineteen seventy-one, and this is a non-contradictive fact from the mouth of Mr. MacNeil, he went and told the police the same story that he is telling you now. You also have, secondly, to support his credibility, the evidence of Donna and Mary Ebsary who place him with the accused on the night in question and behaving exactly as you would expect James MacNeil to behave and exactly as he said he did behave. He was very excited and aggitated about what had happened. I submit to you that that is exactly the way he came across on the witness stand.

To return to the point about whether or not Ebsary could possibly have been in reasonable apprehension of grievous bodily harm or death at the time he was confronted by Seale, you recall James MacNeil said that Seale was three or four feet away from Ebsary at that time. There is no evidence before you of any gesture being made by Seale toward Ebsary. On the contrary, the only evidence there is of any over-act by Mr. Seale were the words "Dig man, dig". Here I submit to

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MR. EDWARDS' ADDRESS:

you that it is absolutely crucial that you consider Mr. Ebsary's reply at that time, and consider if you will, if Mr. Ebsary's reply is constituted of the words of a terrified man who is in the immediate fear of creating its bodily harm. His words, according to Mr. Marshall, were : "You want what I got?" and then instantaneously he lunged at Seale with the knife and I submit to you that there is really no question, that's when the stabbing took place.

I just made a note Marshall said at that point "Ebsary had said 'do you want what I have?'" and I believe it was MacNeil who said that Ebsary said at the time in response to "Dig man dig", "I've got something for you". Really, those words, I submit to you, cannot be the words of a man who is terrified at that point. Rather I submit to you that they were the words of a man who was taking advantage of an opportunity to inflict very great harm on a person who admittedly was up to no good at that time. But I submit to you that the standards of our community don't permit the infliction of such harm to repel a threat of that nature.

The second aspect of that, as I suggested to you when I was outlining Section 34, remember in order to be justified in stabbing Seale as he did, Ebsary had to number one: be under reasonable apprehension of receiving grievous bodily harm himself; and two: he had to be in a situation where he

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MR. EDWARDS' ADDRESS:

could not otherwise preserve himself from death. I submit to you that that is definitely not the situation here. Nobody threatened to kill Ebsary at that time. There was this scuffle going on with MacNeil, no question about that, but keep in mind we had two teenage boys there at the time, age seventeen and sixteen. The situation may have been different if we had a couple of two hundred pound thugs but that is not the case. We had two teenage boys, one was wrestling with MacNeil and the other one said to Ebsary, "Dig, man dig" and on that basis Ebsary plunged into his abdomen causing his death. I submit to you that when you consider and break down Section 34 in that manner, apply it to this case, it has no application insofar as can come to the aid of Mr. Ebsary because this fact situation, I submit to you and it is entirely up to you, lies outside the purview of that section.

Now, Section 37, that is the other section which allows a person to repel a non-provoked assault. But, that section also says that it doesn't justify the wilful infliction of any hurt that is excessive having regard to the nature of the assault the force used was intended to prevent. So the key word, the operative word in that section is excessive. It is entirely up to you eleven and one lady to decide

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MR. EDWARDS' ADDRESS:

whether or not Mr. Ebsary stepped across the line in that particular instance. I submit to you that clearly he did. Clearly I submit to you he was not justified at that point in causing the wounds that you heard Constable Mroz describe.

Finally lady and gentlemen, I want you to consider the type of weapon that was used because no doubt my Learned Friend, who will be the last to have an opportunity to speak to you about, the last as between he and I in any event, will point the senerial thus: that here Mr. Ebsary who is five foot two, about sixty years old at the time was going through the park minding his own business and was accosted and had no choice but to act as he did. And even when he did, all he used was a little pocket knife and how was he to know that it would cause the harm it did.

You just consider that weapon. Unfortunately we don't have it, it will never be recovered. But for your purposes you have to take the evidence as it is in this court, we don't have a murder weapon. But when you're considering the amount of force that was used and whether or not it was a little pocket knife, consider the size of the wound that was inflicted. Consider if you will that if it was a folding knife and things happened in split seconds as they apparently did, would Mr. Ebsary have had the opportunity to get

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MR. EDWARDS' ADDRESS:

a knife that closes open. And if he did, then he must have been holding it upside down if the sweeping underhand motion is correct because it would appear from the way that motion was described on the witness stand the knife would have had to have penetrated in the lower abdomen and come up.

Now I submit to you that the facts of this case make it pretty unlikely that it was a pocket knife. Although Dr. Naqvi's evidence is not entirely clear on the point, I submit to you that the depth of that wound, and you can use your own common sense to determine this, if a body of five six, five seven, normal build, would have have to have been four to six inches deep. Not the wound caused by a small weapon.

There again, the size of the weapon has to do, of course, and the size of the injury that was inflicted, has to do with this whole question of whether the force used by Ebsary was excessive. I suggest to you that all those things suggest that it certainly was.

So those, Mr. Foreman and ladies and gentleman, are basically the facts that are before you and it will be your decision to make. As I stated at the outset there are no Exhibits so you will have to rely completely on your memory of the facts as presented to you although you would be

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MR. EDWARDS' ADDRESS:

permitted, if you requested, to hear the evidence of any witness played back.

I thank you for your attention.

MR. WINTERMANS' ADDRESS:

Mr. Foreman, ladies, gentlemen, I also want to thank you for the attention that you've directed towards the case. I don't know if I should apologize for Friday. It was a long day carefully choosing each of you. Of course that was because of the publicity and the danger of having a jury that may decide matters on the rumours and publicity that was going around for the last while. So that was unavoidable in this case.

Mr. Learned Friend has painted a picture of what may or may not have happened that night in the park. Of course he has painted a picture to try and make it look like Mr. Seale and Mr. Marshall who were the victims in the park that night. Now I suggest to you that the only reason why anyone could possibly suggest that Mr. Seale may have been a victim was because of the unfortunate consequences for him of what happened that night. No one is sorrier than I for the death that resulted because of what happened that night; but, I think it's very important and I think that the Judge when he

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MR. WINTERMANS' ADDRESS:

instructs you on what the law is, that the Judge will direct that you are not supposed to look at the case from the point of view of the consequences to any of the people involved. But rather, you are trying a person, Roy Newman Ebsary, for committing a criminal offence and you have to look at the whole situation as it unfolded through the eyes of the accused person. So you have to try and put yourself in the place of the old man going through the park that night. You'll recall the evidence of Mr. MacNeil who testified that the whole incident from the time that Marshall attacked him, put his arm up behind his back to stop him from being able to do anything, until the time that Marshall had his arm slashed, that that whole incident only took five or ten seconds. It all happened so fast that it's difficult to really imagine what it must have been like. The way we've been going through it in court here, we've been going through it bit by bit, each of the witnesses has been giving a very - trying to give a very detailed account of what took place. The fact remains that it all happened in just a matter of seconds and you have to try and put yourself in a position of Roy Ebsary under those circumstances. He didn't have a lot of time to decide on what to do. He didn't have time to go through all the different options that maybe he could have

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MR. WINTERMANS' ADDRESS:

done. When you consider his size and age at that time, it's almost absurd to suggest that he could have done anything short of what he did to avoid being injured.

My Learned Friend has referred twice to a section of the Criminal Code, Section 34(2) which states, and the reason I mention it to you in detail is because I believe that he hasn't quite stated it right. He said that "the person, Mr. Ebsary, would have to believe on reasonable and probable grounds that he cannot otherwise preserve himself from death". That's what he said twice. The section of the Criminal Code says, and I'll read it to you: "He believes on reasonable and probable grounds that he cannot otherwise preserve himself from death or grievous bodily harm". That's important obviously because it may be stretching things to think that Mr. Ebsary could have thought that he was going to be killed that night, although it is certainly possible. But, I would suggest that it is pretty reasonable for a person of his age and size, under those circumstances in the dark in a matter of seconds, to think that he is going to be hurt if he doesn't do something. I have no doubt that he would have been at least manhandled if not beaten up, knocked down and his money taken away from him if he had any. Now, that is grievous bodily harm in my book.

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MR. WINTERMANS' ADDRESS:

I would suggest that he doesn't have to, under the law, he doesn't have to believe that he is going to be killed. All he has to believe on reasonable grounds is that he is going to be hurt, maybe seriously hurt. I think that it's not stretching things at all to suggest that under the circumstances. You heard the evidence as to the age and size of the two attackers as I'll call them. Seale and Marshall, they were both young, big and probably a lot stronger than little Mr. Ebsary. Mr. MacNeil, he is not all that small, yet, he was very quickly disabled by Mr. Marshall without a word. There was no conversation, nothing we have to it. Two men walking through the park after having had maybe half a dozen or more beers at the tavern. They were walking home, minding their own business and going through a fairly dark park fairly late at night and they were simply, without warning, attacked by two total strangers who they didn't know. They never laid eyes on them before, they couldn't have known, under the circumstances because of the darkness, whether or not they were armed.

You will recall the evidence of both MacNeil and Marshall who testified that even while Mr. Ebsary was allegedly stabbing Seale and slashing Marshall that neither of those two witnesses actually saw the knife. They just assumed that it must have been a knife because people were getting cut but

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MR. WINTERMANS' ADDRESS:

they couldn't see the knife and I suggest to you that if those two witnesses couldn't see a knife in the hands of Mr. Ebsary, then how could you expect Mr. Ebsary or Mr. MacNeil to know whether or not Mr. Marshall or Mr. Seale were armed. They may very well have been armed. It's possible that they may have been armed. On the other hand, what's important here is not whether or not they were armed but rather, could Mr. Ebsary have reasonably suspected or thought that they might have been armed? I would suggest that that is not going very far to suggest that, surely. Two total strangers in a park and it all happens in a second or two, how can you know whether or not they are armed or not. I am not suggesting that they were armed because there is no evidence that they were. However, in this country the criminal law is set up in such a way, I'm sure you are all familiar with the basic principles of criminal law in our country, and that is, the number one principle is: that a person is presumed to be innocent until he is proven guilty beyond a reasonable doubt by the Crown. There is no burden, and the Judge will tell you this tomorrow morning, there is no burden upon a Defendant to prove his innocence. Thank God is all I can say because when something happens twelve years ago it is certainly pretty difficult to try and prove anything for

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MR. WINTERMANS' ADDRESS:

a person under those circumstances.

But my point is that there is a presumption of innocence here and so a person is presumed to be innocent until he is proven guilty beyond a reasonable doubt. That presumption of innocence applies all the way through the whole case and where a defence, such as self defence, is raised, then the burden is on the Crown to disprove, if I can use that word, the self defence. The burden is not on Roy Ebsary to prove that he had to do what he did in order to save himself, rather it's the other way around. The Prosecution has to prove that he was not justified in doing what he did, if he did it.

I assume on the basis of the evidence before you that you are satisfied that probably Roy Ebsary caused the injury to Seale. Of course, the real question here comes down to the question of whether or not it was an unlawful act on the part of Mr. Ebsary that caused that injury. Once again, I emphasize that you are not to really consider the actual result in the sense of the death. That's not all that relevant in a way. Of course it is in a sense because he is charged with causing death but the point is, it is not so much what happened to Seale but rather what did Ebsary do. I am sure that if Mr. Seale had survived that incident that night that I would have serious doubt as to whether or not Mr. Ebsary after all this time would ever have been placed

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MR. WINTERMANS' ADDRESS:

on trial at all. But because there is a death, because there is a lot of publicity, there is some political questions perhaps, we're here for this trial twelve years later.

Again, I emphasize to you that what happened here was that, contrary to what Mr. Marshall said about this conversation that took place before for a half an hour or all that, I suggest that you believe the testimony of Mr. MacNeil who indicated that they were simply walking home. They never stopped, they never lingered, they never hung around the park at all, they just walked through and these two complete strangers who they didn't know, who they had no idea may very well have, in the words of my Learned Friend, been "two hundred thugs". How did they know that they weren't, it was dark, they might have been armed, they didn't know.

Mr. Ebsary acted very quickly and when you consider the result in this sense that Mr. Ebsary, one blow to Mr. Seale, Mr. Seale ran away. One slash to Mr. Marshall who turned on to Mr. Ebsary, according to the testimony of Mr. MacNeil. One slash to Mr. Marshall, Mr. Marshall ran away.

So it worked, didn't it. What do you expect Mr. Ebsary to do? Do you expect him to punch Mr. Seale in the mouth? What do you think would happen to Mr. Ebsary if he tried something like that? He would probably get pounded right into the ground. What do you expect him to do? Take a stick

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MR. WINTERMANS' ADDRESS:

maybe and hit him over the head with a stick? There was no stick. He was asked to dig into his pocket for his money. He put his hand into his pocket, there was a pocket knife in there. He somehow in the darkness managed to get it out and flick it open and he was saying something to the effect "I've got something for you right here" or something to that effect, or "Here, I've got something for you" and in a split second he just lunged blindly, desperately. He may not have been beaten up before that incident happened but there is a real question as to what might have happened to Mr. Ebsary if he hadn't acted as quickly as he did.

Now the law does not require a person to wait until he gets a bullet between the eyes before he does something about it. If he has a reasonable apprehension of being in danger, the law permits a person to act first in the sense of before he is actually hurt. In other words, if someone takes a gun and starts to turn it towards you and you happen to be faster than him than you're entitled to do something about it. You don't have to wait until he fires a first shot at you and misses or something like that.

That's really what you're here for today, you are a representation, a cross section of society and the question that you have to decide as jurors, as members of the public,

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MR. WINTERMANS' ADDRESS:

is: Does a person under the circumstances that Mr. Ebsary found himself in, is he entitled to use a degree of force the only possible force that was available to him at the time to protect himself from an actual robbery with violence, because that's what it was and robbery with violence is a very serious, very serious offence under our law.

Mr. Marshall was ah, refer to a statement that he made to the R.C.M.P. which he said was the truth in which he, among other things, admitted to having rolled several people in the past. So we're dealing with someone who was a robber with a record who describes himself as a "bad kid" or something to that effect, in a "bad crowd", got into a lot of trouble. He was hanging around the park looking for some easy money. He unfortunately got Mr. Seale involved with him and they planned to roll or rob, whatever you want to call it - you heard Mr. Marshall trying to distinguish between rolling and robbing. He seemed to think that if you weren't armed that it wasn't robbery but certainly the law is if you use violence in attempt to steal, that's robbery.

So, there's no question that they attempted to rob Mr. Ebsary and Mr. MacNeil. I suggest that there was no other possible avenue of defence open to Mr. Ebsary. Now Mr. Seale may or may not have been three or four feet away from him. Three or four feet is not a very large distance.

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MR. WINTERMANS' ADDRESS:

I would say I'm about three or four feet away from my Learned Friend right now and that's within reach. When you're talking about a sixty year old man who's five foot two and weighs a hundred and fifteen pounds, he's not going to get very far if he tries to turn and run. He's not going to get anywhere if he tries to use his fists and he had nothing else available so what else was he supposed to do? Was he supposed to just stand there and be beaten to a pulp by two young thugs in a park or does society give him the power to defend himself under circumstances like that?

Now there is no suggestion really that Mr. Ebsary definitely tried to kill this boy. His intention was not to cause even serious bodily harm but his intention was to stop the commission of an offence, to protect himself, perhaps to protect Mr. MacNeil. His intention wasn't primarily to hurt anyone, that's just the unfortunate consequence of the whole situation. As I said before, you have to try to put yourself in the position of Mr. Ebsary that night. What would you have done? I see that a lot of you people on the jury look like you could probably handle yourselves with your bare hands but you take a look at Mr. Ebsary. He's not going to be able to handle a seventeen year old kid who's a medium size and a medium build.

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MR. WINTERMANS' ADDRESS:

There's a question of what Mr. Ebsary believed. There's a subjective test that you have to apply. Did he use more force than he, on reasonable grounds, believed to be necessary? It is not a question of whether he was actually in danger of being killed or seriously hurt, it's a question of whether he believed or he thought, mistakenly or otherwise, that he was in that kind of a situation.

There's a very famous quote from a case called the Baxter case where the Ontario Court of Appeal has stated a proposition that has been used quite a lot in this type of situation. That is: "A person defending himself against an attack reasonably apprehended cannot be expected to weigh to a nicety the exact measure of necessary defensive action." Let me read that one more time: "A person defending himself against an attack reasonably apprehended cannot be expected to weigh to a nicety the exact measure of necessary defensive action ". I think that that sums things up in a way, that when you're in the heat of the moment, when you're in an emergency situation, when you're in a state of shock perhaps, of fear, of desperation, the law doesn't require that you have to sort of sit back and coolly think: now what should I do here, maybe I'll - no if I take a swing that won't work; maybe I should try and run away; no, that won't work. There is no time for

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MR. WINTERMANS' ADDRESS:

that kind of thing. It all happened so fast that -- it's an unfortunate result that Mr. Seale is dead but, in a way I hate to say it, but - he's the author of his own misfortune to a very serious degree.

Now if Marshall and Seale had not gone after Ebsary and MacNeil, if they didn't try to rob those two then this never would have happened. That, I think, is a really critical point that you have to consider. I mean, who started it anyway? It certainly wasn't Ebsary and MacNeil.

Just to go through a bit of the evidence.

Dr. Naqvi. Dr. Naqvi has been a surgeon for a long time he testified. I think that given that he has given three totally different times of death over the various times that he's testified: 7:30 a.m.; 4:00 in the afternoon; and 8:00 at night, leads one to the reasonable conclusion that he doesn't exactly remember everything involved in this case. He had some notes up there that he was flipping through. He was asked questions like how big a cut was it and how deep was it, but on cross-examination he indicated that there was no autopsy done; that he had never actually measured it; and that he was just estimating really. Now I suggest to you that if you perhaps remember when you were seventeen, I don't know about you but when I was seventeen I was pretty - not skinny but it probably wasn't too far between my stomach, my

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MR. WINTERMANS' ADDRESS:

belly button to my backbone. What we are talking is not to the outside of the backbone, we're talking about the inside of the backbone. That's about almost how far the knife went in.

Now I suggest to you that if somebody takes a swing at you, an underhand swing with a fist, that your reaction is that you're going to kind of go back a bit like that, you're going to suck in your stomach a bit and when you consider that your stomach is kind of flexible anyway, I would suggest that it doesn't have to be all that long a knife to make it through that distance. The doctor said today, "six inches maybe more" but on cross-examination he remembered having said three to four inches before.

My point is not that the doctor is lying or anything like that, it's just that he doesn't really know how deep it was. He doesn't remember. He's had about, I don't know, how many thousand operations probably since then and he never made any measurements. So, I would submit that you have to use your own common sense on that type of situation.

Now going backwards again, the evidence of Donna Ebsary. She testified that when they came back that MacNeil said something to the effect "You did a good job back there" or something. She didn't notice any blood on her father's clothing, she didn't describe the knife.

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MR. WINTERMANS' ADDRESS:

Then Mrs. Ebsary. She testified that both of them were agitated and excited, reasonable I would submit. That MacNeil said over and over again, "Roy saved my life tonight." There was no response that she could remember. She testified that he would have been about sixty years old, five foot two and a hundred and fifteen pounds. "Roy saved my life tonight" over and over again.

The only description of the knife was from Mr. MacNeil. Given the proposition as I indicated earlier that a person is presumed innocent until proven guilty beyond a reasonable doubt, I think that it is only fair to accept that it must have been a small jackknife as he indicated as that's the only evidence of the description of the knife that we have.

There is another principle that comes into play in this case and that is that: if you have a doubt as to what happened that it is your duty, and the Judge I am sure will tell you this, it's your duty to resolve any doubt in favour of the innocence of the accused. It's kind of a companion principle with the presumption of innocence that a person is innocent until he is proven guilty. Similarly if there are two possible ways of looking at something, then you ought to take the most favourable position to the accused unless it's proven otherwise beyond a reasonable doubt. In other

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MR. WINTERMANS' ADDRESS:

words, if you have a doubt then you should find Mr. Ebsary not guilty. You should only find Mr. Ebsary guilty if you are satisfied by proof beyond a reasonable doubt that he intended to use this situation as -- take advantage of this situation by intentionally killing this boy. But I suggest to you, as I have earlier, that his primary intention obviously was not to hurt anybody but rather to defend himself. If you have a doubt then the doubt has to be resolved in favour of the accused.

The testimony of Mr. Marshall, I think, gave a very interesting picture of what kind of guy he was and what was in his mind that night. I referred him three times to a statement that he made to the R.C.M.P. which he said was true. First of all he said "I guess you could say I was a bad young guy". Secondly: "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 had ever rolled anyone before. We agreed to roll someone so we started to look for someone to roll. The first time I saw the two fellows we later decided to rob was on the George Street side of the park." Well he said that the George Street part was wrong. "The short old guy I now know as Ebsary."

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MR. WINTERMANS' ADDRESS:

I also referred him to ah -- he agreed with that, by the way, with the exception of the George Street. Of course, it was on Crescent Street.

The other point that he agreed with was: "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 mean that's -- if that doesn't paint a clear picture I don't know what does. It's obvious that these two guys went into that park, saw these two people who they thought they could knock over no problem. Maybe they didn't intend to hurt them or anything but maybe they did. Who knows? Who knows what would have happened if Mr. Ebsary hadn't pulled out a knife. We'll never know, it's impossible to know, you can't turn time back. All we know is that they were initially the victims and that unfortunately, as I said, they were, Seale and Marshall were authors of their own misfortune to a great degree.

Marshall, you may feel sorry for Marshall who spent all that time in jail but the fact is he admitted on cross-examination that he's told many different stories and that really the first time he told the truth was to the R.C.M.P. about the fact that there was a robbery being committed and it wasn't until around that stage that they finally started listening to him. It is not as if he was completely totally

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MR. WINTERMANS' ADDRESS:

railroaded and that he had stuck to the same story all along. He's an admitted robber who perhaps spent a little longer in jail than he would have if he had been caught for what he really intended to do that night.

And Mr. Seale, you might feel sorry for the Seale family because they lost their son under these bizarre circumstances. I ask you now to consider the position of Mr. Ebsary. Maybe he didn't come forward. The fact is that if it was just self defence there is no responsibility placed on any member of the public to come forward as a witness, we all have our right of privacy that we can mind our own business and not come forward. Just because he didn't come forward doesn't mean that he should be convicted of manslaughter.

He's obviously a person who would be afraid in retrospect, I mean when he thought back to what had happened he may have had some uncertainties as to exactly what his position might be. I mean, that's why we're here today. You have to decide whether or not he acted reasonably under the circumstances from his point of view. It's unfortunate but he has obviously suffered too. He's been going through this; he's had this on his mind for years and years and years. Now he's an old man, his life is almost over. Twelve years this has been eating away at him so you could feel sorry for everybody in this case.

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MR. WINTERMANS' ADDRESS:

But, ultimately, it comes back to the position that a person is presumed to be innocent until he is proven guilty and if you have a doubt that it should be resolved in favour of the accused person and if there are more than one way of looking at a situation it is your duty to look at it - to try and look at it from the point of view most favourable to the accused person and that is that Mr. Ebsary, in the five or ten seconds that this all happened, really honestly believed that he was in jeopardy of being beaten up and that his only - the only thing he could do under those circumstances, short of just allowing himself to be pounded, which I don't think that society requires that someone has to let himself be pounded into the ground so that some robber could get his money, but that the only avenue of defence that he had was this pocket knife and he used it. Unfortunately someone died. But Mr. Marshall didn't die, he just got a cut on his arm and he ran away. Too bad Mr. Seale didn't get a little cut on his arm and run away because if that had happened we wouldn't be here today and it would be Mr. Ebsary, who is the victim of a robbery and the two guys got away. Unfortunately, it didn't work out that way, for everyone involved.

I think that you're here today as members of society who

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MR. WINTERMANS' ADDRESS:

have to clearly state at this time with this verdict that if two people try and rob an old man and another person with violence then those people being robbed, that old man being robbed, has the right to defend himself and to use some force and that's all that happened here. It is just so unfortunate that Mr. Seale had to die as a result of this. But as I said so many times, that's not what Mr. Ebsary intended. All he intended was to stop the robbery. He just stabbed him once, it wasn't as if he stabbed him ten times or something. Then you've got a situation where it's obvious what your intentions are. He stabbed him once and Seale ran away. That was it for Seale. Marshall came at him, he cut him once, slashed him once and he ran away. That was it, over, he went home. That's all that really happened here.

I think as jurors you have to state categorically that Mr. Ebsary is not guilty of anything, that he was a victim that day and I ask you to find him not guilty.

Thank you very much.

BY THE COURT: _____

Alright, Mr. Foreman, members of the jury. You may go now and you will please return at half past nine tomorrow morning and I will have some comments to make to you and then the matter will be with you for decision. Thank you, you may go now.

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BY THE COURT:

Are there any matters, Counsel, that you want me to consider apart from those which you have spoken or discussed.

MR. EDWARDS:

My Lord, I want to register a couple of objections to my Learned Friend's address.

Number one, where he was giving his opinion about whether or not the charge would ever have been made. He made some comments which I submit are inappropriate and to which the jurors attention should be drawn in order that they can be told to disregard them altogether, that Counsel had no right to make them. That was the portion where he said "Because there is a death in this case all the publicity its had and perhaps there is some political considerations". I submit that that is an entirely inappropriate comment and one that the jury should be told has no bearing on the issued involved in this case.

Second objection which would probably be taken care of with the usual instruction about the use of prior statements. My Learned Friend, in one portion when he was referring to Mr. Marshall's statements said "I got in a shoving match with the tall guy, Sandy took the old guy". I don't recall Mr. Marshall adopting that statement but it was passed off

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MR. EDWARDS:

in my Learned Friend's address as though it were. If I'm correct in my recollection of that then I submit that the jury should be specifically instructed that that phrase definitely is not evidence in this case.

Thank you.

MR. WINTERMANS:

I have my own objection also and I'd have mentioned it to the jury but I think it might have a little more strength if it were to come from Your Lordship.

That is to my Learned Friend's deletion of "or grievous bodily harm" from Section 34 2(b). He twice stated that "the accused has to believe on reasonable probable grounds that he cannot otherwise preserve himself from death". Twice he said that without saying "or grievous bodily harm". I found that that was very misleading that it certainly -- not our suggestion that Mr. Ebsary thought he was going to die but it's pretty obvious that the theory of the defence would be that he believed and had reasonable grounds to believe that he was subject to grievous bodily harm. My Learned Friend just left that out.

BY THE COURT:

There is a problem, of course, to what extent either one of you should be referring to the Code and cases.

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MR. WINTERMANS

That's right and I guess that's why, but my Learned Friend went into it so I felt that I had also.

But with respect to my Learned Friend's objection about whether or not a death or if a death had resulted that it may not have been ah - we may not have been here today, I don't see anything wrong with that. There was some evidence brought out through Mr. Marshall that there was a law suit involved and that there was some politics involved. I don't think that I went too far in stating that.

I'm not sure what was the other?

BY THE COURT:

I'm not sure what was meant by political consideration.

MR. WINTERMANS:

I didn't mean anything too serious about it, just that ah-- I guess just what I said.

BY THE COURT:

His other point was with reference to the phrase "Sandy took the old guy".

MR. WINTERMANS:

I most certainly remember putting it to Mr. Marshall and

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MR. WINTERMANS:

I believe that he adopted it. He certainly adopted it in a general way when he indicated that the whole statement to the R.C.M.P. in nineteen eighty-two was the truth.

BY THE COURT:

Now Mr. Wintermans says you've got something to answer to.

MR. EDWARDS:

My Lord, if I did mistate Section 34(2) then, of course, that can be corrected and it would be corrected in the normal course when you went over 34(2) with them. If I did so it wasn't intentional and I apologize for that.

With reference to Your Lordship's comment about the right of Counsel to quote sections, it is my understanding My Lord that Counsel are permitted in the course of their address to make reference to the law on a given matter.

BY THE COURT:

The effect to which the analysis goes becomes a question in a given case. Certainly it is improper in my judgment to refer to cases.

MR. EDWARDS:

That is definitely across the line and of course it was my Learned Friend who started quoting cases.

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BY THE COURT:

I'm saying that he referred to a phrase that . . .

MR. WINTERMANS:

It's classic, it's a classic.

BY THE COURT:

I think that it's better not to refer to it as being the Baxter case. It tends to give it perhaps a little highlight or more than saying about the niceties in the face of an -- what is it an extended knife or something like that.

Anyway, do you feel strongly about this? We've heard from Mr. Wintermans, now Mr. Edwards in respect to -- Mr. Wintermans, you've heard Mr. Edwards on your objection.

I certainly (inaudible) we're talking more or less here in terms of the Section and I'll be telling about that, what the Section says and that grievous bodily harm is a part of it.

Now how do you feel Mr. Edwards, you've heard Mr. Wintermans, I gather it's the word political that we have to take into consideration.

MR. EDWARDS:

Yes, My Lord, I submit that that casts an unwarranted dispersion towards the Crown, there are no political

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MR. EDWARDS:

considerations as far as this trial are concerned and I submit that his comment in that regard was totally inappropriate.

BY THE COURT:

Now you've heard his response to your comment and I think that was concerning you was "Sandy hit the old guy", is that not the . . .

MR. EDWARDS:

That was the part. My Learned Friend made three or four references to the statement My Lord and if your custom I take it you will caution the jury on the use that can be made of a statement and that if there are some offending parts like that -- that's the one. My recollection is Mr. Marshall did not adopt that and it doesn't become evidence, of course, until if and when he does adopt it. So my Learned Friend, I thought, was weaving parts of the statement in as though they had been adopted and I'm not so sure that all the parts that he used were.

BY THE COURT:

I'm not able to answer your question unless we replay.

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MR. WINTERMANS:

My Lord, one thing I am absolutely positive of and that is that I asked Mr. Marshall if his statement to the R.C.M.P. in nineteen eighty-two was the truth and his answer was yes. I think that any part of the statement that I had referred to after that doesn't require his actual total of "yes" on it but he chose to make some comment on it. Of course, that's one of the problems when you're cross-examining someone, you can't write down what's going on.

BY THE COURT:

No, that's true. But I believe subject to ah -- the confrontation is, you know, "Mr. Jones did you say question so and so that you were asked the second day of June, it was a Thursday" and your answer was "Wednesday". You're saying here it was Tuesday. Now which is right, and it's a matter of going to credibility really, isn't it. I don't know whether to extend it so far as to say that (inaudible). I don't want to highlight things unnecessarily. I guess, as far as I'm concerned, if you gentlemen really wish to make an issue about that one we'll have to have it replayed so we can all hear it.

MR. WINTERMANS:

I don't see that it's a big problem, really.

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BY THE COURT:

I will certainly caution you -- for your concern Mr. Edwards I will say something to the jury.

MR. EDWARDS:

Perhaps My Lord, the way it could be done, after the general comment, of course the jury will have to rely on their own recollections, and they could be told that unless they recall Mr. Marshall specifically adopting the particular portions of the statement to which he was referred by Mr. Wintermans, then those portions should not be used as evidence.

BY THE COURT:

Well there were several instances with more than one witness where under cross-examination they were referred to various transcripts, or whatever. I'll have to look at them tonight and decide whether I want to highlight them in any particular except saying, you know, this occurred with Smith and Jones.

MR. WINTERMANS:

If I could be permitted to address the Court. Perhaps if Your Lordship just addresses or charges the jury with respect to the law and pretty well leave the facts, the evidence up

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MR. WINTERMANS:

to the jury to interpret who said what, they could make up their own minds and maybe that would solve the problem, finesse the problem so to speak.

BY THE COURT:

Well I shall say something along a general line.

We're gradually solving these issues, is that one still unresolved?

MR. EDWARDS:

Yes My Lord.

MR. WINTERMANS:

My Lord, if you want, if my Learned Friend would be satisfied with you specifically directing the jury to disregard that particular remark I would have no problem with that. However, I leave it with Your Lordship.

BY THE COURT:

Well how ~~be~~ it if I considered saying something to the effect of: any reference to political considerations involved in this case should be. . .

MR. EDWARDS:

That would be find My Lord.

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BY THE COURT:

Would that be alright with you?

MR. WINTERMANS:

Oh yes.

BY THE COURT:

Without, I prefer not to highlight either of your addresses by name.

Well then, I believe I started out to ask you if there were any other items that you wanted to bring to my attention? We talked about the section on self defence, Section 34 and 37, we already spoke of those. Do you want me to say something to them about the threat of alcohol? I guess I should say something about that.

MR. WINTERMANS:

Yes, certainly.

MR. EDWARDS:

Yes My Lord.

BY THE COURT:

I ordinarily refer them as well to that Section in the Code about pre -- 208?

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MR. WINTERMANS:

208 My Lord, a person dies because of the doctor not giving the right. . .

BY THE COURT:

That turns on the assault aspect of it.

MR. WINTERMANS:

I disagree with that My Lord. I think that the more appropriate word is "unlawful act", ^{rather} /than assault. The word assault I take issue with my Learned Friend in his three questions.

BY THE COURT:

I'm sorry, pardon me. Section . . .

MR. EDWARDS:

205, subsection 5 My Lord.

BY THE COURT:

By means of an unlawful act, 5(a).

MR. WINTERMANS:

Right, that's why I argue that it's not an unlawful act for someone to defend themselves. My Learned Friend thinks

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MR. WINTERMANS:

that that is a circular argument but an assault is a criminal offence and stabbing somebody under certain circumstances is not a criminal offence.

BY THE COURT:

But the case being made by the Crown, is it not based on the allegation of assault to which the Defence is self defence? Am I not right, the unlawful acts being alleged by the Crown is the assault, isn't it? I mean you have to tell the jury, don't you, what the Crown alleges to be the unlawful act.

MR. WINTERMANS:

It seems to me that it's a slightly different situation when a person is attacked by someone else. Then they are consenting, it's a constructed consent.

BY THE COURT:

Yeah, but isn't that where your argument about self defence enters because self defence is a blanket defence, isn't it? Self defence doesn't list as a to b. Gee, I thought - you kind of take me by surprise on that Mr. Wintermans. I would have thought that the jury would be told that the Crown's case is alleged, that the death of a human being was caused by

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BY THE COURT:

means of an unlawful act, namely mainly assault, and then tell them what's involved in that. But then, of course, (inaudible) doesn't need principle defence in an defence which is self defence, which the Crown has the burden of proving that there was no self defence and exactly why the jury then - self defence is a blanket answer to the entire thing.

MR. WINTERMANS:

I think this article by Mark Rosenberg from Substant of Criminal Law III, Vancouver B.C., 1979 conference, that he uses the words under manslaughter as a "causation, unlawful act, criminal negligence", he doesn't use the word assault, just causation and then unlawful act. Maybe I'm making something out of nothing, I don't know, just the word assault to me doesn't seem right.

BY THE COURT:

I see, well I'll briefly have a discussion with you.

Do you want to participate in this?

MR. EDWARDS:

If I may. Perhaps I could just offer this. If the unlawful act referred to is not assault then how do we ever get into Sections 34 and 37 which my Learned Friend agrees on the one

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MR. EDWARDS:

hand apply. Those Sections are labelled, 34 - Self defence against unprovoked assault. 37 - Preventing assault. So if the unlawful act is not an assault then he can't take advantage of those Sections, he can't have a. . .

MR. WINTERMANS:

Okay, maybe I'm misunderstanding. I thought you were referring to what Mr. Ebsary did as the assault. What you're suggesting is it's what Mr. Marshall and Seale did was the assault. If that's the case then I certainly stand corrected and misunderstood what was being discussed.

MR. EDWARDS:

Okay, there is that assault but there is also the fact that the intentional application -- I'm sorry, I mistated it. The intentional application of force by Ebsary against Seale is an assault by definition. The sole question here is whether or not that assault was justified. If that assault was justified then it must be justified under 34 or 37.

BY THE COURT:

That's what I thought the problem was Mr. Wintermans.

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MR. WINTERMANS:

You see, I thought that ah - for those self defence sections to come into play it's not Mr. Ebsary's action that's the assault, he is the one who is assaulted by Marshall and Seale so you instruct the jury that if you're satisfied that a robbery is an assault, then those sections come into play. I would submit the important parts of the manslaughter subsection are (1) causing death; (2) by means of an unlawful act. Or criminal negligence.

So there is really only two questions, causation and unlawful act which, of course, unlawful act breaks down into various questions.

MR. EDWARDS:

E.g. assault.

MR. WINTERMANS:

Well I don't know if it's assault. I mean an assault is an unlawful act, but ah.

BY THE COURT:

Well don't I have to tell them what the criminal subsection is. I interpret the Crown's evidence is that they seem to be suggesting that the unlawful act was the Defendant's assault on Seale.

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MR. EDWARDS:

That's right My Lord.

My Lord I stand by the brief of law that I submitted to you with a copy to Mr. Wintermans.

BY THE COURT:

And your defence is that the section or sections (inaudible) be provoked by self defending by words, gestures, actions and so on and that the actions, words, gestures, whatever, certainly had a provoking effect upon the Defendant to respond to the matter which he did which is my understanding of the basis of the Defence. You say that the effect of the provoking to do what he did, he was justified in doing it.

MR. WINTERMANS:

And that the burden is on the Crown to disprove the defence, not on the defence to even a stabbing blow, to establish it.

BY THE COURT:

That's true, yeah. The Defendant or accused, the burden is not on the accused to prove solvency.

Are you gentlemen in agreement on those. . .

MR. EDWARDS:

I believe so, My Lord.

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BY THE COURT:

Is there anything else then gentlemen that you would like to speak to me now rather than later?

Okay, nine thirty tomorrow morning.

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MR. EDWARDS:

My Lord, I ask the sheriff to leave the jury out. I just wanted to discuss one point that was raised at the very end of our discussion yesterday where Mr. Wintermans stated the proposition. If I recall correctly his words were that the: "The onus is upon the Crown to disprove the defence of self defence."

I did a little research on that last night and I submit that that, those precise words rather, overstate the proposition and I just wanted to say for the record that the Crown does not agree with that wording. I don't know if that was the wording Your Lordship was intending to use or not but I just wanted to register my objection to that type of wording before the fact.

If Your Lordship pleases I would indicate to you the wording which is preferred and which I discussed with Mr. Wintermans this morning and to which he has indicated he has no objection. But if Your Lordship has already made up his mind on just exactly how you are going to address I will leave it with you.

MR. WINTERMANS:

Why don't you read that?

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MR. EDWARDS:

Yes, I'll just read you this. This is not the whole instruction but this is on the crucial part as far as onus is concerned. I'm reading now from Kennedy Aids to Jury Charges. It states as follows:

"If when considering whether the accused was or was not acting self defence you come to the conclusion that the proponderence of credible evidence shows that he was acting in self defence it will be your duty to find him not guilty of the offence with which he is charged, or if you have a reasonable doubt whether he was acting in self defence it will be your duty to give the accused the benefit of the doubt and find him not guilty of the charge with which he is charged."

It may be semantic in a sense but that does not seem to go as far as Mr. Wintermans has suggested that there is an onus on the Crown to disprove the defence of self defence. I think that, as I say, is a little too blunt in its ascertainment.

MR. WINTERMANS:

I think it is a matter of semantics in a way because it is still the -- ultimately the rule is that if there is a reasonable doubt even on the question of self defence that it has to be resolved in favour of the accused person. The quote that I made was from a book that it stated it perhaps in

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MR. WINTERMANS:

a corollary manner; therefore, of course, the burden being on the Crown to prove the onus of the offence, I would submit that in a situation such as ours the defence of self defence would have to be disproved -- maybe that's not a word that my Learned Friend likes to use, but -- beyond a reasonable doubt. As I said, if there is a reasonable doubt upon self defence then the accused gets the benefit of it.

BY THE COURT:

The burden is not on the accused to defend himself, the burden continues on the Crown.

MR. EDWARDS:

Yes, My Lord. I'm agreeing with that but as I stated, I submit that that wording that I read best describes it. It still leaves the burden on the Crown in the sense that it cautions them that if at the end they still have a reasonable doubt they must acquit.

MR. WINTERMANS:

I don't see that there's a real difference, but.

MR. EDWARDS:

It doesn't state distinctly either that the Crown must disprove self defence.

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BY THE COURT:

Anything else?

MR. EDWARDS:

No My Lord.

BY THE COURT:

Before the jury comes in I just want to say to the people in the audience that this has been brought to my attention by the sheriff's office that the jury found it a little disconcerting yesterday by the amount of - the flow of traffic going in and out the main door. So I ask you in the name of the jury, on their behalf, that unless you're confronted with an emergency, personal or otherwise, to exercise some fairness in the order of traffic.

MR. WINTERMANS:

My Lord, I wonder if I could address the Court on another problem. That is the media coverage of what took place yesterday in the court room. I heard a number of different accounts, one of which I found to be very negative and I thought slanted heavily against the accused and on this statement of what the evidence was. I would ask that Your Lordship caution the jury that they shouldn't pay attention to any news reports they may have heard of what transpired

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MR. WINTERMANS:

here yesterday, but rather should rely on their own interpretation of the evidence. The one point that. . .

BY THE COURT:

I told them at the beginning Mr. Wintermans. . .

MR. WINTERMANS:

Right. There was one particular point that I found very distressing in a CBC report where it was simply stated that Mr. MacNeil testified that self defence, that it wasn't self defence. I think that that is a conclusion of a matter of law that Your Lordship should direct the jury to disregard. The thing that bothered me was that it was pulled out of the whole testimony and highlighted to such a degree that -- without any mention of the fact that the day, the night before Mrs. Ebsary testified that he was reported to say "Roy saved my life back there" over and over again. It was, I found, a very twisted, slanted and inappropriate report of what happened and if the jury heard it it could have the effect that, you know, they might have been sitting there themselves listening and then after hearing the report they may have had second thoughts on the accuracy of their own recollection or something like that. It might not have an effect but, anyway, I would ask that Your Lordship perhaps

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MR. WINTERMANS:

mention something along those lines.

MR. EDWARDS:

I have no comment on that My Lord.

The Jury returns and is recalled.

BY THE COURT:

Mr. Foreman and Members of the Jury.

You have now heard all of the evidence and the addresses of counsel for the Crown and the accused. In their addresses, as you will recall from yesterday afternoon, both counsels set out their respective positions based upon the evidence of the witnesses which you have heard during the course of this trial.

The summations of counsel are not evidence. I indicated that to you at the commencing of the trial. Your opinion with respect to the facts and conclusions to be drawn from the facts may differ from those of counsel. You are not bound to accept their opinion on facts, you are not bound to accept my opinion on facts. You are under no obligation to accept interpretations placed upon the facts by either

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BY THE COURT:

counsel or myself. It is your responsibility to determine what the facts are, based upon the evidence that you've heard in this court room and not based upon anything that you may have heard outside the court room in any respect whatsoever. Your decisions are to be based solely upon the evidence which you have heard in the court room since this case started.

And so it is now my duty to instruct you on the law and how it applies to the facts as you determine those facts to be. I have said several times, I keep repeating it I suppose, you are sole judges of the facts and I am the sole judge of the law and it is my duty to talk to you about the law and that's what I propose to do this morning.

You as members of the jury, you have to weigh the evidence you've heard, the submissions made by counsel and then the comments I make on the evidence. After you go through that process then you come to your individual determinations on the relevant facts. Nothing becomes a fact in this case until you find it to be a fact. Once you as a jury have decided a fact is a fact then it is difficult to correct even a mistake.

I mentioned to you when we opened this case that your attitude at the outset of the case was considerably important and I urged you not to form any early conclusions but to approach the case with a vast open mind. I repeat that as a

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BY THE COURT:

general comment for whatever worth you may want to place in for it as you begin your deliberations after I have given you my remarks.

It seems to me that it may not always be a wise thing to take an early stand to form an opinion right off the bat and to make a determination to hold out for a certain verdict. The reason being that when one takes such a positive stand early in the deposition and you consider your verdict, it sometimes becomes difficult to shake that opinion or that position in the face of very good and persuasive arguments which may be defenced by or views of defence by your fellow jurors. So I ask you to approach the deliberations that you undertake as jurors with an open mind and engage in a discussion which I am sure in the meantime will lead you to a verdict.

As members of the jury, please remember that you are neither parsons nor are you advocates. You are judges as I told you yesterday and your contribution to the administration of justice is to render a just verdict. And so I ask you to approach your duties objectively with neither pity nor sympathy for the accused nor with any prejudice or animosity against him.

In determining the guilt or innocence of the accused you are to be governed solely by the evidence introduced in this

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BY THE COURT:

trial and by the law. Absolutely nothing else, absolutely nothing else should enter into your deliberations.

Let me mention to you one situation where you have - after I've concluded my remarks to you and you've gone into the jury room, I will be asking counsel if they have any comments which they want to make which they feel may improve the charge which I have given you this morning. If they do and if there are any of them which I have set then I may very well call you back and give you an added instruction. If that happens I don't want you to think that what I called you back to say to you is to be highlighted more than what I am saying to you now. Rather, it will be a matter of saying something to you, if it does happen at all, it will be a matter of saying something to you which you should treat as though I overlooked it or forgotten it when I was making the general comments to you this morning and you should treat this as being a part of the comments which I am making to you now..

Under our law I am entitled to make some comments with respect to the evidence. As I have already indicated to you, if I do, and I shall make a few comments I think, you are not to give my comments on the evidence any greater weight because I happen to disagree with them. As I have already indicated to you, it is your opinion which prevails. You then, again, must consider all of the evidence and you must make your own

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BY THE COURT:

decisions with respect to what you feel is important and persuasive in the evidence which you have heard during the course of this trial.

Another preliminary remark I want to mention in passing is that in determining the guilt or innocence of the accused, you should not speculate in any way upon the question of penalty or punishment. Penalty is a subject that concerns me alone in the event that you find the accused guilty.

Another preliminary comment is that all twelve of you must be in agreement in your decision in order to plea a verdict. A verdict is the unanimous expression of opinion of the entire jury. You must be unanimous in your verdict. Occasionally a unanimous verdict becomes impossible because one or more jurors have an honest and sincere difference of opinion which prevents them from joining in the majority. However, I urge you, as I do in all cases in which I am involved, to try your best to reach an unanimous verdict. I think that you will be able to do that.

Now I want to say a word to you about the presumption of innocence and the doctrine of reasonable doubt. You've heard those words, innocence and reasonable doubt, you've heard them in this court room during the course of this trial yesterday, on many occasions. In a criminal trial an accused person, the accused person, is presumed to be innocent

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BY THE COURT:

until the trial has proved his guilt to you, beyond a reasonable doubt. It is not the responsibility of the accused to establish or demonstrate or prove that he is innocent. If the crown fails to prove guilt beyond a reasonable doubt, then you must acquit the accused.

I suggest to you, members of the jury, that proof beyond a reasonable doubt has been achieved when you, as a juror, feel sure of the guilt of the accused. It is that degree of proof which convinces the mind and satisfies the conscience so that you feel bound or compelled to act upon. It may happen that the evidence which you have heard leaves you with some lingering or nagging doubt with respect to the proof of some essential element of the offence. If that happens and you are unable to say to yourself that you are confident that the crown has proven guilty beyond a reasonable doubt, then your duty is to acquit the accused. When I'm talking about doubt, reasonable doubt, I am not talking about it in terms of a fancy or whimsical doubt, I'm talking about a real doubt.

Now I'm sure that you know, without me saying it to you, that people see and hear things differently. Discrepancies do not necessarily mean that such testimony or evidence should be discredited or ignored. Discrepancies on trivial matters may be and usually are quite unimportant. You are not

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BY THE COURT:

obliged to accept everything a witness says. On the other hand, if you cannot accept a part of the evidence of a witness, you are not obliged to eject the whole of it. You are free to form your own conclusions, whether or not you will accept all or a part or none of that evidence which is given by a witness.

When I talk to you about discrepancies, I am talking to you about mere discrepancies which can easily and quite innocently occur to any one of us as human beings and likewise to any witness. But, a deliberate falsehood or lie is quite a different matter. This is always serious and may very well taint the entire evidence of a witness.

Now when you are weighing the impact of evidence which you have heard during this trial it is quite proper, I believe, for you to consider the human factors which may effect the giving of perfectly on this evidence. Questions which suggest these factors to you are alleged. But to give you an idea of the point which I am trying to make let me put these kinds of general questions to you as questions which you may want to take into account - as examples only of questions which you may want to take into account - when you are examining the evidence of any particular witness: Did the witness have any particular reason to assist him or her in recalling the precise event? Could the witness, because of the relevant

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BY THE COURT:

unimportance of the event, be understandably in error with respect to its detail? What real opportunity did the witness have to observe the events? Has the witness any interest in the outcome of the trial or any motive for either favouring or injuring the accused? What is the apparent memory capacity of the witness? What was the appearance, the demeanor and the conduct of the witness while he or she was testifying? Was the witness forthright and responsive to questions or on the other hand do you have a witness who was evasive or hesitant or argumentative with counsel? Is the testimony of the witness reasonable and consistent with uncontradicted facts? Those are, as I have indicated to you, examples of questions which you may put to your minds when you are trying to assess the evidence of a particular witness on any particular point.

I suppose there may be other questions similarly which may come to your mind. You really are saying I suppose, in another way, does the evidence of this witness really stack up and the bottom line of your duty, I suggest to you, in weighing evidence given by a witness is perhaps as simple as saying that you are being asked to use your everyday experience and your good common sense in judging people in what they have to say.

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BY THE COURT:

Now the evidence which comes before a jury may be either direct or circumstantial. The facts of the case may be established by direct evidence and by circumstantial evidence. In this case the crown is relying on both some direct evidence and some circumstantial evidence. I won't take a minute to try to explain the difference between direct evidence and circumstantial evidence.

The somewhat dictionary type meaning, I suppose, of the two within the framework of the law, is to say that direct evidence is evidence which accepted as the truth proves a fact and issue in a case, without the necessity of drawing an inference. Circumstantial evidence, on the other hand, is evidence which does not directly prove a fact in issue but which may give rise to an inference of the existence of a certain fact which is in issue. An inference from the circumstantial evidence must be based on the fact or facts which have been proven by the evidence and not on the near suspicion or speculation.

Having said that, let me try to give you an example which may help to clarify the point which I am going to make. Let us suppose, for example, that a question arises in a trial as to whether a car went off the paved portion of the highway onto the unpaved shoulder and then back again on the highway. Suppose, for example, somebody is trying to prove that type

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BY THE COURT:

of motion of a motor vehicle. Now if you have a witness who can give evidence that he saw the car do exactly that, that is to say steer off the road onto the shoulder and back on the road, then if the evidence of that witness is accepted we have a situation of direct evidence as to the way the car behaved. On the other hand, suppose there were no eye witnesses but evidence is given to the effect: Skid marks were shown on the paved portion of the highway and these skid marks matched the tire tread of the car in question. Also, that there were ruts in the unpaved portion and there was dirt from these ruts on the tires of the car. There we have a case of circumstantial evidence. In other words, given the facts of the skid marks and the matching tire treads and the mud on the tires, you as a jury would draw an inference that the car behaved in that fashion. There are situations in this evidence, in this case, where reliance is being placed by the crown on the circumstantial evidence.

For example, take the proposition that the crown, I think is relying upon, that the accused stabbed Seale with a knife or a weapon of some kind. There is no actual direct evidence of that. To do this the crown relies on the evidence of what witnesses say they heard, what witnesses say they heard the accused say, like: "I've got something for you."; "Blood spurting from Seale."; Donna Ebsary saying that her father

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BY THE COURT:

washed blood from the knife in the kitchen in the home of the accused; James MacNeil saying "You did a good job back there."; Marshall's evidence about the cut in his arm; all that is an example of the kind of situation from which out of these circumstances and these pieces of evidence the crown is saying that you should draw an inference that such and such took place.

Can you, from evidence such as I have described, draw the inference then that the accused stabbed Seale with a knife or some instrument or weapon? This is the kind of thing that circumstantial evidence is about. It is important that you bear in mind that a fact can be proved just as effectively by using either direct or circumstantial evidence.

I have already explained that the burden is on the crown to prove that the accused was in defence and to prove it beyond a reasonable doubt. Where the crown relies on circumstantial evidence to discharge that burden of proof then you must be satisfied beyond a reasonable doubt that the guilt of the accused is the only real interest which may be drawn from the proven facts. Put another way, the guilt of the accused must be consistent with the facts and inconsistent with any other reasonable conclusion.

The fact that a witness has on a prior occasion made a

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BY THE COURT:

statement or statements or given evidence that is contradictory of the evidence given by that witness at this trial goes to the credibility or truthfulness of a witness. The evidence of a witness may discredit in whole or part by showing that he or she previously made statements which are inconsistent with his or her present testimony. I mention this point to you because during the course of this trial you heard counsel for the defence ask several questions of some of the witnesses about evidence and or statements, or both, which they gave in earlier proceedings and which they made on other occasions. Questions of that nature, according to my notes, were directed to Donald Marshall Jr; James William MacNeil; and Dr. Naqvi. For example with Naqvi you will recall there were questions directed to him about evidence or statements he had earlier given as to the time of death of Sandy Seale in an effort to establish when did Sandy Seale die. The similar process and procedures were followed in the questioning and cross examination of MacNeil and Marshall on other subjects. It's to those instances in the evidence that I am speaking now, in giving you a general instruction concerning how they are to be considered by you. I want to make it quite clear that such statements cannot be used to prove the truth of the facts to which they relate unless, in your opinion, the witness has adopted that part of the statement as being

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BY THE COURT:

true. It is up to you to decide if any of the statements have been adopted by the witness as true and the weight to be given to those parts. Any parts of the statements or evidence which were not adopted by the witness as being true cannot be relied upon you as proof of the facts stated. You can only use parts of the earlier evidence in statements in deciding the truthfulness of the witness. You are the sole judges if there has been a contradiction of an earlier statement or evidence by the witness and the effect, if any, of such contradiction on the witness' credibility which is another word for saying believability.

Ordinarily witnesses are permitted to give evidence of facts that they themselves have seen, heard or otherwise perceived with their senses. They are not allowed to give their opinions when testifying in court. However, duly qualified experts are permitted to give opinions on matters in controversy at trial. We have one such witness in this case and I refer to the evidence of Dr. Naqvi. He was qualified, as you will remember, by the consent of both counsel to give opinion evidence in the field of general surgery and the general practice of medicine. When he talks about what he did and what he saw, that is one thing, but here I am referring to that portion of his evidence which one would have to describe as his opinion. According to my notes,

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BY THE COURT:

the doctor expressed the opinion that Seale died from abdominal injuries as a result of a blow from a sharp object. At least that's the note which I have made as best I could follow his evidence. He also said that the cause of death was loss of blood supply. To assist you in deciding the issues in this trial, you may consider the opinions given by such experts with the reasons for them. But just because they are given by an expert such as Dr. Naqvi happens to be, you are not bound to accept his opinion if, in your judgement, it is unsound.

Now I want to deal with the offence with which the accused is charged. The indictment of charge is the accused with manslaughter. The indictment says: "The jurors for Her Majesty The Queen present that Roy Newman Ebsary at or near Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the twenty-eighth day of May, nineteen seventy-one, did unlawfully kill Sandford Sandy Seale by stabbing him and did thereby commit manslaughter contrary to Section 217 of the Criminal Code of Canada." This indictment you will be taking with you Mr. Foreman when you and the jurors go in the jury room, you'll have the document with you.

Now the reference there is to Section 217 of the Criminal Code of Canada. 217 says that: "Culpable homicide that is not murder or infanticide is manslaughter." Now the crown

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BY THE COURT:

is not suggesting that this was murder or infanticide, the charge is manslaughter. In Section 217 it says "Culpable homicide that is not murder or infanticide is manslaughter".

As I shall tell you in a minute, the word culpable means blame worthy. So one can say about 217 that blame worthy homicide is manslaughter.

Under the Criminal Code a person commits homicide when directly or indirectly by any means he causes the death of a human being, and so it says, Section 205 of the Criminal Code, subsection (1): "A person commits homicide when directly or indirectly by any means causes the death of a human being". Let me pause on the word causes so far as this case is concerned and mention to you Section 208 of the Criminal Code which says this: "That where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is the proper or improper treatment that is applied in good faith". So far as cause is concerned then, by Section 208, it does not matter whether the treatment at the City Hospital was proper or improper so long as it was applied in good faith on the subject of cause.

I come back to 205: "A person commits homicide when directly or indirectly by any means he causes the death of a human

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BY THE COURT:

being". And then it goes on, Subsection (2), "homicide is culpable or not culpable" which is to say that homicide can be blame worthy or not blame worthy. Homicide that is not culpable, homicide that is not blame worthy, is not an offence. Culpable homicide, blame worthy homicide, is murder or manslaughter or infanticide.

I have already said to you as the Code reads, that homicide is culpable or non-culpable and the word culpable means blame worthy. Culpable homicide is the blame worthy killing of a human being. If homicide is not culpable it is not an offence. Let me give you an example of non-culpable homicide. An example would be a case where a motorist driving slowly and carefully strikes and hits a child who has darted out from behind a parked truck. The motorist in that situation, caused the death of a human being and so he committed homicide. But in that case the killing is not culpable or blame worthy and, therefore, it is not an offence. In this case the defence submits that the homicide was not culpable because the death resulted from self defence. I will be dealing with self defence in greater detail in a moment but first I want to continue speaking with you about culpable homicide.

I go on to the next Subsection of 205: "A person commits culpable homicide when he causes the death of a human being

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BY THE COURT:

by means of an unlawful act.

In this case the crown contends that the accused caused the death of the deceased, Seale, by the unlawful act of assaulting. Assault is committed when a person directly or indirectly applies force to the person of another without his consent or attempts or threatens by an act or gesture to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose. Thus, an assault may consist of the intentional application of force such as a blow or a punch without consent or threats of the application of force by acts or gestures under certain circumstances. A person is presumed to intend the natural and probable consequences of his actions. An assault, in the terms in which I have described, is an unlawful act. If you are satisfied beyond a reasonable doubt that the accused caused the death of Seale by stabbing him and that the deceased, Seale, did not consent to the stabbing by challenging the accused to do it, then the stabbing of the accused constituted an assault which was an unlawful act causing the death of the deceased, Seale. The accused would thus have committed culpable homicide because he caused the death of the deceased by an unlawful act. I will be speaking to you about self

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BY THE COURT:

defence in a moment but I am talking to you about culpable homicide. The accused would thus have committed culpable homicide because he caused the death of the deceased by an unlawful act unless the crown, in these circumstances, failed to negatively argue self defence.

Culpable homicide that is not murder is manslaughter. The accused has not been charged with murder because it has not been suggested that the intent to kill Seale or to cause him bodily harm which he knew was likely to cause death and was reckless whether death ensued or not. Such intent is a necessary part of murder. Murder is intentional killing. But a person commits manslaughter when he causes the death of another person by an unlawful act even though he did not intend to cause death or bodily harm that he knew was likely to cause death.

Did Mr. Ebsary, the accused, assault Seale? On that question you will have to consider the evidence of Donald Marshall, Jr. and James MacNeil. If you find that he did then you will have to consider the circumstantial evidence to decide if Ebsary wounded Seale and caused the wound in the abdomen. This is suggested by the circumstantial evidence. You will have to consider the evidence of Marshall and of MacNeil, Mrs. Ebsary, Donna Ebsary. You will have to

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BY THE COURT:

determine from their evidence whether the accused assaulted Sandy Seale by stabbing him with a knife or some such weapon. Those are facts which you will have to determine from the evidence you heard yesterday. If you find them to be facts which have been proved to you beyond a reasonable doubt then you will ask yourselves whether the assault or contributed to Seale's death. Here the evidence of Dr. Naqvi is relevant.

Dr. Naqvi described the conditions he found and he gave that in considerable detail as evidence. He described the wound in the abdomen, the size, its nature. In spite of surgery, blood transfusions and the like, Seale ultimately died from the loss of blood supply, said Dr. Naqvi. Was his death caused or contributed to by the assault? If it was, then you must be satisfied that that has been proved to you beyond a reasonable doubt.

If you find that the accused committed the assault which caused the death of Sandy Seale, let me turn to discuss with you whether it was lawful. To this point I have been discussing with you the assault or an assault which is unlawful as an abbreviate of manslaughter.

I want to mention one Section which one counsel has mentioned to you. That is Section 27 of the Criminal Code. Section 27 says that "Everyone is justified in using as much force as is reasonably necessary to prevent the commission of

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BY THE COURT:

an offence for which if it were committed the person who committed it might be arrested without warrant and that would be likely to cause immediate and serious injury to the person or property of anyone or" and that takes us back to the heading again "Everyone is justified in using as much force as is reasonably necessary to prevent anything of being done that on reasonable and probable grounds he believes would if it were done, to be an offense mentioned in paragraph (a)" which is the one I've just read to you.

Marshall says that he and Seale had the intention to roll one or more persons that night. I am not quite sure what the word roll means but I assume that it meant in effect, to steal, to deprive others of their money. Well, theft or robbery would be such an offence as Section 27 anticipates. For the purposes of Section 27 "as much force as is reasonably necessary" those words call for an objective test depending upon your findings of fact in the evidence before you for Section 27. You weigh the facts to determine what force under the circumstances was reasonably necessary. That is the extent of the justification to prevent the commission of an offence.

The issue which the defence has clearly raised in this case is self defence. I want to spend a few minutes now talking to you about that issue.

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BY THE COURT:

Even if it has been shown that the accused would otherwise be guilty, before he can be convicted you must be satisfied to the exclusion of any reasonable doubt that he was not acting in self defence according to law. If you conclude that he did kill or harm in self defence as I shall define and explain it, or if there be any reasonable doubt in your minds as to whether he did or not, then in either case you must acquit him.

The term self defence is often commonly understood as any measure employed to preserve one's self from threatening or actual physical attack regardless of the consequences of such employment or the extent of such means. However, this is not the legal meaning of the term and it is, of course, only with the legal significance that you are concerned in this case. In law self defence is not a loose term. It is defined by the Criminal Code of Canada at the conditions under which it may prevail are there rigidly laid down. Any defence which rests on the theory of self defence must come strictly within the provisions of the Code. There are a number of different definitions in the Code which apply in different factual situations.

I have discussed this matter with counsel and they have agreed that I will discuss with you the provisions of

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BY THE COURT:

Section 34 of the Criminal Code, which is divided in two parts. I am going to talk to you first about the first part.

Section 34, Subsection (1), and it reads this way:

"Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself". I'll read that again and then we'll talk: "Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself".

Now let us consider the evidence in this case in relation to each of the elements mentioned in the Section I have just read. First, was the accused unlawfully assaulted by Seale without having provoked the assault? Generally speaking, a person commits an assault when he applies force intentionally to the person of another, directly or indirectly without the consent of that other person. There does not seem to be any evidence of any physical assault by Seale on the accused. We do not know exactly, but you can not engage in speculation on this point. You will have to rely upon the evidence before you and make your own determination. However, even when no

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BY THE COURT:

force is applied it is an assault to attempt or threaten by act or gesture to apply force to the person of the other if he has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose. We are told that Seale said to Ebsary "Dig man, dig". The defence that you can infer from this that Seale was threatening by act or gesture meaning something like give me your money or else; that sort of situation. Out of that, even though Seale applied no force, the defence is saying that the evidence is there of the assault on Ebsary. The crown is saying it's insufficient to be an assault. You have to decide.

Secondly, was the assault provoked by the accused? Everyone who is unlawfully assaulted without having provoked the assault. Second point, was the assault provoked by the accused?

Section 36 in the Code says that provocation includes, for the purpose of Section 34 and 35 - we're here dealing with 34 - provocation includes for the purposes of Section 34, provocation by blows, words or gestures. So provocation includes for this purpose, provocation by blows, words or gestures.

If you find that Seale's actions and gestures constitute an assault on the accused, it does not seem to me that there is any evidence that the accused provoked the assault. He and MacNeil appeared from the evidence to have been peaceable walking alone towards Ebsary's home.

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BY THE COURT:

Next point. Was the force used by the accused not intended to cause death or grievous bodily harm? "Everyone who is unlawfully assaulted without having provoked the assault is justified in the repelling force by force if the force he uses is not intended to cause death or grievous bodily harm." Was the force used by the accused not intended to cause death or grievous bodily harm? On this point you will consider the evidence as to whether the death or grievous bodily harm sustained by Seale was caused by the accused and whether it was caused intentionally. If you find it was caused by the accused, then was it caused intentionally? The crown says it was. The defence says that when Ebsary was confronted with the situation presented by Seale he had to respond for his own protection in the emergency of the situation which was before him. You will have to decide.

Finally in 34(1), was the force used by the accused no more than was necessary to enable to defend himself? "Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself".

In considering, I am now focusing on those last words: "and is no more than is necessary to enable him to defend himself".

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BY THE COURT:

In considering this question you will look at the nature of the assault by Seale and the risk to the accused that was involved. You will then consider whether the force used by the accused was no more than that which a reasonable man would regard as necessary to protect himself.

Now the test to be applied is not purely and entirely an objective one in the light of what you know the fact to have been. If the conduct of the accused in the light of the actual facts was no more than that which a reasonable man would regard as necessary for his protection then, of course, this requirement of self defence in the law will have been met. It will also have been met if the accused was genuinely mistaken as to the facts and did no more than a reasonable man would have regarded as necessary to detain himself on the facts as he genuinely believed them to be.

There is no definition of a reasonable man, it's safe to say "I suppose in these circumstances". How should an average ordinary man of the age and sex of the accused respond? In deciding whether the force used by the accused was more than necessary in self defence you must bear in mind that a person defending himself against an attack reasonably apprehended had ought to have expected to weigh to a nicety the exact measures of necessary defensive action. The evidence discloses the amount of force used by the accused. The crown

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BY THE COURT:

has said to you that to respond with a knife to the abdomen when confronted with Seale saying "Dig man, dig" was more than necessary for his self defence, the accused's self defence.

The defence says that it was reasonable for Ebsary to be afraid; that it was reasonable to feel that he might be hurt seriously. Could he have expected Seale might be armed is asked by the defence. The defence says that the force used on the spur of the moment was no more than necessary faced with the gravity of the situation. You have those two opposite views, you will have to decide from the evidence.

I emphasize again that there is no burden on the accused to establish self defence. It means that you must acquit the accused unless you are satisfied beyond a reasonable doubt that there was not an unlawful, an unprovoked assault on the accused or that the accused intended to cause death or grievous bodily harm or that the accused used more force than was necessary to enable him to defend himself unless it was no more than a reasonable man would have considered necessary on the facts which the accused genuinely believed to exist. If the crown has proved any one or more of these circumstances than self defence under this subsection is not available to the accused as a defence.

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BY THE COURT:

If you have any reasonable doubt as to whether the accused acted in self defence you will find the accused not guilty of manslaughter because then the crown would have failed to prove that the homicide was culpable.

Now, I must take some more of your time to talk to you about the second part of Section 34. I've been speaking to you about the first part of Section 34.

Even if the accused intended to cause death or grievous bodily harm, his actions may have been justified as self defence under Section 34, subsection (2) of the Criminal Code of Canada. I've been talking to you up to now about subsection (1) where the force used is not intended to cause death or grievous bodily harm. Now subsection (2).

Everyone who is unlawfully assaulted and causes death or grievous bodily harm in the kind the assault is justified if he causes it under reasonable apprehension of death or grievous bodily harm. Let me read this again. "Everyone who is unlawfully assaulted and it causes death or grievous bodily harm in repelling the assault is justified if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes and he believes on reasonable and probable grounds that he cannot otherwise reserve himself from death or

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BY THE COURT:

grievous bodily harm". "Everyone who is unlawfully assaulted and causes death or grievous bodily harm in repelling the assault is justified if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally laid or with which the assailant pursues his purposes and he believes on reasonable and probable grounds that he cannot otherwise reserve himself from death or grievous bodily harm."

Now, here again subsection (2) you must first consider whether the accused was unlawfully assaulted by Seale. Generally speaking, as I have indicated, a person commits an assault when he applies force intentionally to the person of another, directly or indirectly, without the consent of that other person. Even when no force is applied it is an assault to attempt or threaten by act or gesture to apply force to the person of the other if he has or causes the other to believe on reasonable grounds that he has the present ability to effect this purpose.

The evidence of the alleged assault of Seale on the accused is the same as I have already discussed with you when talking about this same form minutes ago in relation to subsection (1) of Section 34.

You next must consider under this subsection whether the accused caused that of Seale or grievous bodily harm to

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BY THE COURT:

Seale under reasonable apprehension of death or grievous bodily harm and believe on reasonable and probable grounds that he could not otherwise protect himself from death or grievous bodily harm. Here the question, ladies and gentlemen, is not whether the accused was actually in danger of death or grievous bodily harm and whether the causing of death or grievous bodily harm by him was in fact necessary to preserve himself from death or grievous bodily harm; but whether he caused death or grievous bodily harm under a reasonable apprehension of death or grievous bodily harm and whether he believed on reasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm.

The accused may have been mistaken as to the imminence of death or grievous bodily harm or as to the amount of force necessary to preserve himself from death or grievous bodily harm. But if this apprehension of death or grievous bodily harm was reasonable and there was reasonable and probable grounds for his belief that he could not otherwise persue himself from death or grievous bodily harm, then his use of force was justified as self defence.

I have reviewed most of the relevant evidence in considering under Section 34(1) whether the accused more force than was necessary to enable him to defend himself. Under Section 34(2),

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BY THE COURT:

however, the question is not whether the accused used no more force than was necessary for his defence but whether he caused death or grievous bodily harm under a reasonable apprehension of death or grievous bodily harm and believe on reasonable and probable grounds that he could not otherwise reserve himself from death or grievous bodily harm. You will have to decide who and what you believe on this issue as to whether there were reasonable and probable grounds for the accused's belief that he could not otherwise preserve himself from death or grievous bodily harm.

The crown says there were no such grounds and the accused took the opportunity to inflict hard on Seale. The defence says otherwise. Not knowing what to expect and fearing the worst, the defence says it was a reasonable response for his own preservation.

In deciding whether the accused believed on reasonable and probable grounds that he would not otherwise preserve himself from death or grievous bodily harm, you must bear in mind that a person defending himself against an attack reasonably apprehended cannot be expected to weigh to a nicety the exact measure of necessary defensive action.

If you are satisfied beyond a reasonable doubt that the accused was not unlawfully assaulted or was not acting under reasonable apprehension of death or grievous bodily harm

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BY THE COURT:

from the violence with which Seale's assault was originally measured or with which he pursued his purposes, the defence of self defence under Section 34(2) fails. Likewise it fails if you are satisfied beyond a reasonable doubt that the accused did not believe on real and probable grounds that he could not preserve himself from death or grievous bodily harm except by stabbing Seale.

The law of self defence proceeds from necessity, the instinctive and intuitive necessity for self preservation. Under no circumstances may it be used as a quote before retaliation or revenge. Reference has been made during the course of summations to Section 37 of the Criminal Code and I am going to read it to you but I am not going to touch much on it. "Everyone is justified in using force to defend himself or anyone under his protection from assault if he uses not more force than is necessary to prevent the assault or the repetition of it. Nothing in this Section shall be deemed to justify the wilfull infliction of any part of mischief that is excessive having regard to the nature of the assault that the force was intended to prevent."

Now I don't want to give you the impression, I mention it to you because it has been mentioned, but I don't want to give you the impression that this is something to be considered separately from that which I said to you when I

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BY THE COURT:

was talking about the effect of Section 34(2). I want you to understand that any reference to Section 37 are not to be considered as qualified defence as to Section 34.

So far as self defence is concerned, in my opinion, the essential sections for you to consider on the application of self defence are those in Section 34, meaning 34(1) and 34(2) which I have already discussed with you in some detail.

Let me also say a word to you about the evidence concerning the consumption of liquor. While it is a part of the evidence it is not such as to cause it to be a defence in this case.

One other point. You need not be concerned by any suggestion which may have been made that there are any political considerations involved in this case.

Now the evidence is fresh in your minds and it would be repetitious for me to spend a great deal of time reviewing it. Both counsels have spoken to you and analyzed the synical detail in the addresses that they gave to you. You heard the evidence of Donald Marshall, Jr. and he told you about meeting Seale and discussing whether he wanted to make some money, he agreed. He says that they were called up to Crescent Street by an older man and a younger man and the older man had grey hair combed back; he doesn't remember the other fellow. He says he can't identify them. He joined up

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BY THE COURT:

with the two men and Seale. Says that he started talking with older man and had some general discussion with him, there about ten minutes. He invited Seale and Marshall to his house for a drink and they said no. Then they started to walk away and Marshall says he called the two men back and then "an argument started among the four of us". "The only words I heard, the old fellow asked Seale if he wanted everything he had". He says that he was standing by Jimmy MacNeil and they had hold of each other; "the old fellow had Seale bent over for a couple of seconds, he turned around and came after me and I let MacNeil go; he swung something at me and he got me in the left arm, slashed in the left arm; I couldn't see what made the slash; when the old fellow bent over I didn't hear any other words. When I got slashed I don't recall where Seale was then; I saw Seale laying on the ground" In his cross examination he noted that "we were considered as bad young guys; I suggested to Seale that we make some money by rolling somebody; and rolling is different from robbing". You will recall that then he was asked by defence counsel questions having to do with a statement he had made to the R.C.M.P. on March 3, 1982 at Dorchester. He was also asked questions about evidence which he gave at a preliminary hearing and some other matters which were raised in terms of whether he had made a contradictory previous

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BY THE COURT:

statement -- contradicted previous evidence.

Constable Leo Mroz talks about the discovery of Seale and how he was dressed, observing the noticeable buldge on the high abdomen or lower chest and he told you what he saw and did. In cross examination he indicated the nature of the injury did not vindicate putting him in the car for permissable further injury and about fifteen minutes for the ambulance to get there.

You heard the evidence of MacNeil in some detail. He talks about reaching the park and walking over the Crescent and they were approached by Seale and Marshall. He says that: "Marshall put my hand up behind my back and I froze; next I heard Seale say to Ebsary 'dig man,dig' I think the intentions were to rob".He was standing three to four feet in front of Ebsary. Ebsary said "I've got something for you". "He reached and then I saw a squirt of blood coming out of nowhere, I was in a state of shock. I think Marshall let go of my arm and it dropped. Seale ran and then he fell down. I never saw the blade." "I've got something for you", I guess he's referring to what he thinks he heard him say. "The accused slipped his hand in his pocket, he had a knife in his hand; he brought it up in an awkward motion, I never saw the blade; I think Ebsary waived at Marshall with his hand; Marshall took off; Ebsary and I went up to his place on

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BY THE COURT:

Argyle Street, it took us about fifteen minutes to get there; I sat in the front room and I saw in the distance washing the blood off the knife; it was too much of a state of shock to remember if anybody else was there". He went back the next day and had conversation with Ebsary. In his cross examination he said that he was twenty-five when the incident took place and Ebsary was sixty; that they had not stopped in the park, they kept walking through at a steady pace and that "we didn't approach them" meaning Seale and Marshall, "we didn't call them over". Then he was asked about evidence which he had given at the preliminary inquiry, whether he accepted it or rejected it in terms of where Seale and Ebsary were standing. MacNeil said also in the cross examination that "I thought I was being robbed and I thought I might get hurt". "There was no conversation with Seale and Marshall before Marshall grabbed my arm. Seale and Marshall were (inaudible) it all happened very fast. I understood 'dig man, dig' meaning to reach in your pocket for your money. I don't think there was any conversation between Ebsary and Seale before Seale said 'dig man, dig'. I didn't see the knife until at Ebsary's house; I can't describe the knife, it was probably a pocket knife. When we got to the house I said 'you did a good job back there', I was glad because I thought I might get hurt". Then he was asked some questions about the

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BY THE COURT:

evidence given now and the evidence given at the preliminary hearing; about the knife and blade and whether it was a folding knife blade and that sort of thing. "I was totally unaware Ebsary had any kind of knife on him. The lighting in the park was fair; I couldn't see the knife that well. I'm not sure of the size of the knife that I saw in the house that night". Then he was asked some further questions about evidence which he had given in Halifax in nineteen eighty-two.

Mary Ebsary, she said that MacNeil was with Mr. Ebsary and that they came home sometime between eleven and twelve p.m.; MacNeil was agitated and excited, so was Ebsary; Ebsary went into the kitchen and MacNeil stayed in the hallway and he kept repeating "Roy saved my life tonight".

Donna went out to the hallway; she saw MacNeil and she doesn't know what was said to MacNeil; MacNeil left fifteen or twenty minutes later. In her cross examination she agreed that then Mr. Ebsary was around sixty years old and he was about five feet and two inches in height. She was unable to say what was his weight. Donna Ebsary says she was home with the mother in the living room, her father and James MacNeil came home she thinks during the late news, 11:30 or 12:00 p.m. "Jimmy was excited, telling my father he had done a good job. I followed them into the kitchen." Her father

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BY THE COURT:

was at the kitchen sink and was washing blood from the knife. In cross examination she said she didn't notice any blood on her father's clothes at that time.

Dr. Naqvi reported about the wound, what he found. In Seale the wound approximated three to four inches, extended from the front of the abdomen all the way to the back where the aorta is. This he estimated to be six inches, maybe more. He described the condition of Mr. Seale and what he did and gave his opinion, as I mentioned to you, with respect to the cause of death. In his cross examination he says that it was one stab wound that was caused by injury and that the injury was somewhere around the umbilicus area. He was asked questions then, as I already mentioned to you, about earlier evidence which he gave in terms of when the hour of death occurred. He told us that he operated on Seale giving the hours.

That is just a recaption on some of the evidence. That is not to say that my recaption on that covers all of the evidence at all nor is it to say that that's the important evidence in the case. The evidence in the case is what you find to be important, you decide what is important.

Yesterday afternoon you recall that the first lawyer to speak to you was Mr. Edwards on behalf of the crown. He, as he saw it, answers the question of whether or not Mr. Ebsary

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BY THE COURT:

assaulted Seale. He suggested to you that there is no room for doubt on that, that Mr. Ebsary stabbed Seale.

The second question, did that assault cause Seale's death? He said that that is obvious, suggested to you. Dr. Naqvi's opinion is important, that the cause of death was due to loss of blood supply which followed the wound.

His third question which he put to you was whether the assault by Ebsary on Seale was lawful. He told you that Marshall and Seale were committing an offence of robbery and evidence persuaded him to believe that reasonable force hadn't been used to prevent the commission of crime. Sorry, that reasonable force cannot be used to prevent the commission of crime and he proceeded to talk to you about the implications of self defence and the evidence which has been induced as he saw it from the crown's point of view.

He told you that Ebsary stabbed Seale, in his view and the view of the crown he intended to cause death or grievous bodily harm to Seale and there was no question about that so far as his interpretation of the evidence was concerned. It was justified said Mr. Edwards, only if Ebsary was under real apprehension of receiving grievous bodily harm himself. He discussed the efforts of MacNeil and he talked about MacNeil having said that Ebsary was three to four feet away from Seale and the evidence of the words "behind me". He asked you

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BY THE COURT:

to consider the reply and whether it constituted the words of a terrified man "do you want what I've got" and then said Mr. Edwards, the accused lunged for Seale and that's when the stabbing took place. MacNeil used the words "I've got something for you." Mr. Edwards said to you that these are the words of a man taking advantage, par of a person who is up to no good at that particular time.

He talked to you about justification. Ebsary had to be under the apprehension of death or grievous bodily harm or he had to be in circumstances where he could not have otherwise preserve himself. Mr. Edwards said that these were two teenage boys, one wrestling with MacNeil the other with Ebsary, and the response to the words "dig man, dig" was to punish Seale.

Mr. Edwards said it was up to you to decide whether Ebsary stepped across the line of justifiable force and Mr. Edwards is suggesting that he did.

He also talked to you about the type of weapon; you should consider the size of the wound; would he have had an opportunity to get a closed knife open. The knife would have to penetrate the lower abdomen and he suggested that it was a pocket knife.

Mr. Edwards concluded by saying the crown proves this case beyond a reasonable doubt.

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BY THE COURT:

Then Mr. Wintermans spoke to you on behalf of the defence and told you that you are not to look at the case in the point of consequences to any people who are involved, you are to look at the whole situation as it folded through the eyes of the accused.

He said that here was an old man that was going through the park that night. Marshall said the whole incident took five to ten minutes, it all happened in a matter of seconds, the accused didn't have time to consider options considering his size and age.

He told you to - asked you to consider that it was reasonable for a person like Ebsary to think he was going to be hurt, to be manhandled or beaten, that he had a prospect before him suffering grievous bodily harm and all he has to believe is that he may be hurt seriously. Mr. Wintermans urged you to accept that proposition in the evidence. He told you that Seale and Marshall were strong, that MacNeil was quickly disabled by Marshall. Without warning they were attacked by two total strangers said Mr. Wintermans and neither MacNeil nor Marshall saw the knife. Neither of those two could see a knife, but Ebsary could reasonably expect that they might be armed.

He pointed out that the real questions was whether this was an unlawful act which caused the injury and the death is not

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BY THE COURT:

all that relevant, the point is not so much what happened to Seale; What do you expect Ebsary to do, punch Seale in the mouth, hit him over the head with a stick? Seale reached into his pocket for his money, in a split second he lunged blindly and desperately. The law permits a person to act personally before he is actually hurt, you don't have to wait for him to fire the first shot, said Mr. Wintermans. What degree of force is he entitled to use, the only force available to Ebsary was to protect himself from robbery with violence says Mr. Wintermans, and he's told you that in his view there is no question they attempted to rob MacNeil and Ebsary. That Ebsary's intention was not to hurt anyone, it was an unfortunate consequence (inaudible) which the court does not require one to sit back and consider. Seale is the author of his own misfortune to a very serious degree; Ebsary and MacNeil didn't start it and he urged the doubt to be resolved in favour of the accused and that it is impossible to know what would have happened if Ebsary had not pulled the knife.

The crown has not proved its case, says Mr. Wintermans, beyond a reasonable doubt.

Now the section 205(5) of the Code provides that person commits a culpable homicide when causes the death of a human being by means of an unlawful act. If you are satisfied beyond

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BY THE COURT:

a reasonable doubt that the accused caused the death of Seale and that the accused was not acting in self defence in law as I have explained it, then the accused committed culpable homicide and is guilty of manslaughter.

The reason he would be guilty of manslaughter in these circumstances is that he would have caused the death of Seale by an unlawful act, being the assault which wounded and ultimately caused his death.

If you find that the accused acted in self defence as I have explained it to you, then that is a complete defence. But as I have said to you, the burden of proof is on the crown, it does not shift to the accused. The crown must prove its case beyond a reasonable doubt, any real doubt is to be resolved in the favour of the accused.

I told you that you would take the indictment into the jury room with you and you will note Mr. Foreman, inside the indictment there is a place which is marked verdict and which you will have circled the verdict. There also is a printed line down here which is marked foreman beside it. When you have arrived at a verdict which you write in on the left side, then you will sign it, your own signature as foreman. That is the only signature required.

There are no exhibits so you have this to take with you. There is only one of two possible verdicts. One is guilty as

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BY THE COURT:

charged. The other is not guilty as charged. I have told you that you must be unanimous in your verdict. If you aren't, if you can't arrive at unity, then I will have to discharge you and set the matter down for a new trial, so please do try to arrive at an unanimous verdict. If you wish to hear any of the evidence you can let me know by a note to the sheriff's officer and we can arrange to have a replay.

I have come to the conclusion of my charge unless for some reason I call you back with some other comment, so at this point I then order that you will no longer separate, you must stay together until your determination is made. Only the sheriff's officers will have access to you, they will look after you with respect to your food and your comfort. No other person is permitted to speak to you and certainly not in reference to this case. They are not able to speak to you with regard to any of the details in this case. They will be sworn in a moment and they honour their oath.

Clarence B. Landry is duly sworn for jury.

Jury is discharged.

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MR. EDWARDS:

The crown has no objection to the charge My Lord.

MR. WINTERMANS:

The only problem that I have My Lord with all respect is on your very brief comment with respect to drunkenness. I realize that perhaps the defence of drunkenness -- well, the defence of drunkenness is not available in a strick sense. However, perhaps I should have guilty myself of not having said it in my own summation, but on reflection it seems that when one considers the subjective elements involved in assessing the situation, on behalf of Mr. Ebsary that is, that when he found himself under those circumstances I would submit that his degree of intoxication is a factor which the jury could take into account to consider how it may effect the way he thinks or reacts. That's about all, really.

BY THE COURT:

What do you say to that point Mr. Edwards?

MR. EDWARDS:

I respectively disagree with my Learned Friend and I would oppose to having the jury reinstructed on that point.

Just on that point, I see in the latest edition of Crankshaw's, volume one, the annotated cases, it says:

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BY THE COURT:

"Section 34(2) requires a reasonable apprehension which must be taken to mean the apprehension of reasonable man. There is, therefore, no justification for taking into consideration the fact that the accused was drunk in determining the degree of apprehension under which he acted." In support of that proposition they quote a case of the Saskatchewan Court of Appeal which is a 1936 case. It's in 66 Canadian Criminal Cases, 134.

Although the case is old it apparently has never been overturned so that would seem to answer my Learned Friend's concern. As I say. . .

BY THE COURT:

Do you want to take a look at that case? We'll take five minutes and then reconvene?

MR. WINTERMANS:

Perhaps. . . that would be . . .

BY THE COURT:

I didn't think that drunkenness was a defence here. Of course that's what I said, that's what prompted you to make your comment which is fair game. In thinking about it last night

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BY THE COURT:

and looking at my notes on the evidence of consumption of liquor, I didn't think - at least my notes which may not be terribly reliable - were all that convincing about the effect, if any, that liquor had on either pair, if I can put it that way, MacNeil and -- I'm not making a speech or engaging you in argument, I'm just telling you how it struck me.

It appeared to me from the evidence that MacNeil and Mr. Ebsary were certainly walking a - o.k. and didn't have any - the evidence didn't strike me as though there was a couple of drunks heading home. Marshall and Seale, the evidence of Marshall, they all had some beer, there is no doubt about that. Maybe more than may have had its effect. I'm just explaining to you why I sort of came to the conclusion that it's not a serious matter. But I'm glad to hear you on it.

MR. WINTERMANS:

The way I see it My Lord is that the evidence of MacNeil was that both he and Ebsary had around seven or eight beers at the tavern, that Ebsary had been there before MacNeil arrived so he wasn't sure how much Ebsary may have had before he got there so Ebsary had at least seven or eight beers. Of course he was asked whether or not he was drunk or feeling good and as a typical Cape Breton, of course, he said that he was feeling pretty good but wasn't drunk.

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MR. WINTERMANS:

I would submit that anybody who has eight beers or more is obviously going to be under some effect. But be that as it may, perhaps if I could take a few minutes and . . .

BY THE COURT:

Take five minutes and you and Mr. Edwards can also discuss it and then we'll reconvene. It's not that major a point that we're going to disturb the jury too much by taking a five minute break.

FIVE MINUTE BREAK

BY THE COURT:

Mr. Wintermans?

MR. WINTERMANS:

Yes, My Lord. I'm satisfied that it's not important enough to bring the jury back to recharge them.

MR. EDWARDS:

And I concur with my Learned Friend.

BY THE COURT:

Alright, thank you. We'll await the return of the jury.

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The jury returns and is recalled.

BY THE COURT:

Mr. Foreman, I have a message from you and it says MacNeil testimony, Section 34 of the Criminal Code and you would like to hear that?

MR. FOREMAN:

We would like to hear that.

BY THE COURT:

Sure. Alright, I've shown this note to the counsel, they know what it is and we have arranged to set up the machinery so that we will first play to you the evidence of Mr. MacNeil.

The jury is recalled.

BY THE COURT:

Mr. Foreman, I have your request which reads as follows: Is it possible that the jury could have a written copy of a section 34 or a photocopy of the Criminal Code page containing this section?

That is the message, isn't it?

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MR. FOREMAN:

Yes it is.

BY THE COURT:

The answer is yes, I will of course give you that. First of all I should ask counsel if they have anything to say, that's the decision I intend to make.

MR. WINTERMANS:

No My Lord.

MR. EDWARDS:

Yes that's agreeable My Lord.

The jury receives a copy of Section 34 and retires to deliberate.

The jury returns and is recalled.

BY THE COURT:

Mr. Foreman, have you agreed upon your verdict?

MR. FOREMAN:

We have not.

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BY THE COURT:

The message here from Mr. Foreman says:

"We, the jury, after extremely careful consideration have determined that we cannot reach a unanimous decision".

Now we thank you for the message. I want to just speak to you a bit about that Mr. Foreman and members of the jury.

As I indicated to you earlier on and certainly I am sure we are all aware of the desire to have a verdict in a case, any case before the court. I certainly realize that it has been a long day, I realize that you have been in a room with rather close quarters and I realize full well that you have all given this your conscientious dedication. I am sure you tried to reach a verdict.

Now if you are unable to reach a verdict then, as I indicated to you earlier today, the whole matter is set over to be tried again at the next sitting of the Supreme Court in Sydney. That means a delay in an already rather protracted proceeding in a sense, and it means worry, inconvenience and so on to all concerned. So that to know that you went out about quarter past eleven or something like that this morning and there has been a couple of meal times, some time spent in here listening to tapes and so on, I'm wondering Mr. Foreman if before you make this a final thing, if you and the members of the jury would be interested in considering whether you would like to break for tonight and have the sheriff arrange

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BY THE COURT:

accomodation and return tomorrow morning after the sun rises to take another look at this situation, see if that is the final position that you are taking. Don't misunderstand, I hope you appreciate why I am saying these things to you because of the desire of the process to render a verdict but I don't want you to think that I'm attempting to bring any pressure. I hope you understand that Mr. Foreman. The last thing that I would try to do and I have no right in any respect to try and pressure you in any way whatsoever. Having said those things to you, Mr. Foreman, would you be prepared to go back once more to the jury room and consider what I have said and then let me know how you feel about that proposition.

I am not trying to make deals with you, I am not trying to bring any pressure on you, I am just asking you if you would consider, in the event that you have not considered that possibility in the face of what would have to be done if you are unable to reach a unanimous verdict.

Would you mind giving that a little consideration and then you can let me know.

Jury deliberates.

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Jury returns and is recalled.

MR. FOREMAN:

Your Honour, we have discussed what you have mentioned to us as we have unanimously decided that we cannot agree. I feel quite competent that all those concerned have given very sincere thought and that in all conscience that's the best we can do. We also feel that more time would not really assist us unless there are other things to consider. Based on what we have seen, that's what we have come up with.

BY THE COURT:

Thank you Mr. Foreman.

Well Mr. Foreman and members of the Jury, it goes without saying that I want to thank you for what I know has been a diligent and conscientious effort which you have made during these last two or three days that you've been here. I can tell you have worked hard and that you have given these matters your serious consideration and I certainly accept what you say Mr. Foreman on behalf of all members of the jury.

As I indicated, naturally the court is sorry that a verdict has not been achieved and I expect that you, Mr. Foreman, and members of the jury are as well. Even though, I want you to know that you have engaged in very important and a significant part of the democratic process and the court is equally

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BY THE COURT:

grateful for your effort and understands the position that you have expressed.

It will be a -- there is another case to begin tomorrow but I am not going to ask you to come tomorrow for that. I will, however, ask you to return on Tuesday of next week, the twentieth of September at half past nine, unless there are any of you to whom I have granted an exemption while we're in that period. So so far as your duties are concerned, I want to officially thank and I want to ask you to please return on Tuesday, September twenty at half past nine in the morning.

Now then, so far as the indictment of Her Majesty the Queen against Roy Newman Ebsary is concerned, I order that it be set over to the November, nineteen eighty-three sitting, of the Supreme Court of Nova Scotia Trial Division in Sydney, in the County of Cape Breton, for the reason that the jury has been unable to reach a verdict.

There is no other matters. . .

MR. WINTERMANS:

My Lord, with respect to Mr. Ebsary's liberty I would ask that he continue to be released on his own recognizance or his own undertaking to reappear at the next trial date in November of nineteen eighty-three.

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MR. EDWARDS:

The crown has no objection to that My Lord.

BY THE COURT:

Alright. What is the specific date in November?

MR. EDWARDS:

November first.

BY THE COURT:

Then with respect to the application which has been made on behalf of Roy Newman Ebsary, I grant your application that Mr. Ebsary shall continue to be on his own recognizance with the direction that he return to this court on Tuesday, November one, nineteen eighty-three at nine thirty o'clock in the morning.

MR. EDWARDS:

My Lord, he was subject to certain conditions about staying away from certain properties so rather than reiterate those, I don't have the precise wording of them, I think we can agree on the saying he is released on his own recognizance. . .

BY THE COURT:

As an addendum to the Order which I have just read, I will add that the conditions which have existed on the recognizance

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BY THE COURT:

and bail provision prior to the hearing of this case with respect to Roy Newman Ebsary shall also continue until he next returns to Supreme Court on November one, nineteen eighty-three, as though each and every said restriction were now repeated by me specifically in this court.

MR. WINTERMANS:

Thank you.

MR. EDWARDS:

Thank you My Lord.

BY THE COURT:

The court will adjourn until nine thirty in the morning.