

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK  
TRIAL DIVISION  
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ALLAN JOSEPH LEGERE

TRIAL held before Honourable Mr. Justice  
David M. Dickson and a Petit Jury at Burton, New  
Brunswick, commencing on the 26th day of August,  
A. D. 1991, at 10:00 in the forenoon.

APPEARANCES:

Graham J. Sleeth, Esq.,        )  
Anthony Allman, Esq., and    ) for the Crown.  
John J. Walsh, Esq.,         )

Weldon J. Furlotte, Esq., for the Accused.  
.....

Proceedings of September 5 & 6, 1991

Dolores Brewer,  
Court Reporter.

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COURT RECONVENES - 9:30 A.M., SEPTEMBER 5, 1991.

(Accused present in prisoner's dock.)

5

THE COURT: Now, normally we would bring the jury in but I understand counsel may have some representations they want to make Mr. Walsh.

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MR. WALSH: Yes, My Lord, thank you. My Lord it is the Crown's motion at this time that we would ask for an order pursuant to Section 486(1) of the Criminal Code, and for the purpose of the record I will read it My Lord. It says:

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"Any proceeding made against an accused shall be held in open court but where the presiding judge is of the opinion that it is in the interests of public morals, the maintenance of order, or the proper administration of justice to exclude all or any members of the public from the courtroom for all or part of the proceedings he may so order."

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1           The Crown asks for an order excluding the  
public from the courtroom during the direct and  
cross-examination of the witness to be called this  
morning, Nina Flam.

5           The decision was made, My Lord, last evening.  
It was made under circumstances in which Miss Flam  
was made aware of this particular section and not  
made aware of this section until last evening. She  
was asked as to what her feelings were with respect  
10          to this question of the public. Her answer was to  
the effect she does not know, in all honesty, how  
she is going to react in the courtroom. That is  
understandable. She feels that not having the  
public here will help her to be less inhibitive in  
15          terms of her testimony. It is her belief she doesn't  
know how she's going to react but it's her belief  
that not having the public present will help her to  
relate all the details that is necessary to relate.

20          Miss Flam is a woman in her sixties. She is a  
woman of fine standing in the community. She's a  
proud woman. It takes an enormous amount of courage  
for her to even come here and it's the crown's  
opinion that for the proper administration of justice  
25          we want to ensure that this woman is able to testify  
and that anything, particularly under these circum-  
stances, anything that we can do to aid in that  
testimony is important in the proper administration  
of justice.

30          The key element or one of the reasons, My Lord,  
is that some of the occurrences that she will be re-  
quired to relate to the Court as to what occurred  
that night are of a very horrible nature. They have

1 sexual aspects to it. They are of such a nature  
that it adds to the difficulty in a woman to relate  
this evidence in any event. To come here is hard  
enough; to testify is hard enough; but to testify  
5 about certain acts and things that were done and  
said to her makes it that much more difficult, and  
the witness herself has said that she believes that  
not having the public present will aid in relating  
her testimony. She cannot guarantee it. She doesn't  
10 know, but she believes that the public not being  
present will be of an assistance in the sense that  
she would be able to relate the testimony, and the  
crown's position is that for the due administration  
of justice, and this is a very rare motion, but for  
15 the due administration of justice it is necessary  
that this woman be allowed to testify without the  
public being present My Lord.

THE COURT: Did you have -- You were --

20 MR. WALSH: There are some points, My Lord. I would refer  
you particularly to the annotation in Martin's Annual  
Criminal Code. A number of the decisions there,  
perhaps to - I know Your Lordship is familiar but  
for the record perhaps just to touch on them, there  
is one decision of the Alberta Supreme Court Appeal  
25 Division, R. V. Warawuk, Alberta Supreme Court Appeal  
Division, 1978, 42 Canadian Criminal Cases (2d) at  
121, and the annotation states:

30 "The mere fact that the charges are of  
sexual offences is not sufficient to  
justify an order excluding the public.  
Exclusion of the public in the interest  
of public morals relates not to the  
category of the offence charged but to

1 the evidence proposed to be tendered  
of acts or circumstances which might  
reasonably be expected to offend, or  
to have an adverse or corrupting  
effect on, public morals by publicity  
of obscenities, perversions or the  
like. Alternatively, a witness might  
5 need the reassurance of exclusion of  
the public in testifying to certain  
matters which would justify the order  
of exclusion on the grounds of the  
proper administration of justice. The  
discretion to exclude the public must be  
exercised cautiously and only as cir-  
cumstances demand."

10 And there is the decision of the Ontario Court  
of Appeal in Quesnel (1979) 51 Canadian Criminal  
Cases (2d) at 270.

"The fact that witnesses having to  
testify as to sexual behaviour may  
be embarrassed is not alone sufficient  
to warrant exclusion of the public."

15 That is not a ground. The ground is that we  
believe it would tend to aid the witness. I refer  
you to the LeFebvre decision of the Quebec Court of  
Appeal (1984) 17 Canadian Criminal Cases (3d) at  
277.

20 "An order excluding the public may  
properly be made where the complainant  
in a sexual offence would otherwise  
be too nervous to give evidence. In  
such circumstances the order is  
necessary for the proper administra-  
tion of justice."

25 What I am suggesting here, My Lord, is that  
not so much to give the evidence as to give all the  
evidence. That is an important factor.

THE COURT: Are there relevant sections in the Charter of  
Rights and Liberties?

30 MR. WALSH: Before that particular reference, My Lord, I  
would refer you to Tremear's Criminal Code, 1991,  
by Watt & Fuerst, the annotated provision, and under  
section 486 it says that:

1 "Such discretion may only be exercised  
where the presiding judge or justice is  
satisfied that the exclusion is necessary  
to obtain a full and candid account of  
the acts complained."

And I think that summarizes the crown's view here,  
5 in that we want a full and candid account and this  
would tend to help it.

My learned colleague, Mr. Sleeth, will address  
any aspects associated with how this order would  
impact on perhaps others.

10 THE COURT: Others meaning third parties?

MR. WALSH: That's correct, My Lord.

THE COURT: Well perhaps before we come to Mr. Sleeth we  
could - might have an indication of what is the  
feeling of the defence in this matter. Mr. Furlotte,  
15 do you take a position at all?

MR. FURLOTTE: My Lord we would object to the motion for  
the exclusion of the public as it would violate Mr.  
Legere's right to what I would believe to be not  
necessarily you can say a fair public trial, but  
20 at least it would exclude - take away his right to  
a public trial.

I can't help but think back at the beginning of  
this case and I received a letter from Mr. Allman  
that he expected from me notice in writing upon any  
25 motions that were to be made before the court and to be  
given, not necessarily to be held to the rules of  
court as to the time-wise for motions to be made and  
the order of motions to be made, but at least to be  
notified in writing as to what the motion was, the  
30 contents of the motions and to be given reasonable  
amount of time to answer those motions. He felt

1           that that was only fair and that we should be  
          following the law in relation to which motions are  
          presented before the courts under the Rules of Court.  
          I received notice of this motion 5 after 9 this  
5           morning. The Crown has had ample time to consider  
          this motion as to whether or not it would be  
          necessary. They just advised the witness, Nina  
          Flam, from what I understand from Mr. Walsh to say,  
          they just advised her yesterday of the section of  
10           the Code where they could apply to the Court for an  
          exclusion of the public.

          THE COURT: Well how has that prejudiced you though? I  
          mean suppose they told you just now and suppose this  
          was the first you heard about it in court. How are  
15           you prejudiced? Do you mean you haven't had a chance  
          to look up the law on it or --

          MR. FURLOTTE: I haven't had any chance to look up the law;  
          I haven't had any chance to form an argument, but an  
          argument I can think right offhand is Mr. Legere is  
20           entitled to a public trial.

          THE COURT: That's under the Charter of Rights.

          MR. FURLOTTE: I believe it's under the Charter of Rights  
          and I --

          THE COURT: What section?

25           MR. FURLOTTE: I don't even remember the section, that's  
          how little time I have had.

          THE COURT: Mr. Sleeth what section is it here?

          MR. SLEETH: I believe that would be under section 11 My  
30           Lord. I should indicate that if it becomes necessary  
          my argument will be in relation to section 2(b) of  
          the Charter. If it please the court, My Lord, I was  
          referring specifically to section 11(d).

1 MR. FURLOTTE: "To be presumed innocent until proven guilty  
according to law in a fair and public hearing by an  
independent and impartial tribunal."

My Lord as you will recall in the selection of the  
5 jury there is, I believe, 7 people on the jury who  
have already formed the opinion and I would --

THE COURT: Look, I don't want to hear reference to that  
again Mr. Furlotte. I have made it clear in the jury  
selection process and in discussions earlier that  
10 the importance of non-bias or indifference, or lack  
of indifference, isn't based on whether one has  
formed an opinion or entertained suspicions or any-  
thing. The criterion is if the jurors are able to  
put any opinion they had beforehand out of their  
15 mind. Now Mr. Legere has referred to that again  
yesterday and it's a totally wrong concept. You know.  
You read about murders like this; you see somebody  
has been arrested, you read in the paper. Everybody  
forms an opinion on the thing, or a suspicion.  
20 There's no difference between a suspicion perhaps  
and an opinion. Suspicion is a part opinion. And,  
you know, this is a fair jury, prepared to look at  
this thing objectively and to say that six said they  
had formed an opinion and one had read "Terror on the  
25 Miramichi" is just irrelevant.

MR. FURLOTTE: Well, My Lord, that's - you are entitled to  
your opinion and we intend to appeal on those grounds.

THE COURT: All right.

30 MR. FURLOTTE: And I'm sure you have no doubt about that.

THE COURT: No, I haven't, and the Supreme Court of Canada  
may in due course say I'm wrong but that is my view.

MR. FURLOTTE: Yes, My Lord, that is quite possible.



1 THE COURT: I wouldn't be giving that view and expressing  
that view unless I felt I'm right because I'm not  
out to create grounds of appeal for either the crown  
or the defence.

5 MR. FURLOTTE: My Lord the position of the defence,  
basically, is that Mr. Legere is entitled to a fair  
and public hearing by an independent and impartial  
tribunal. The evidence, I believe, of Nina Flam is  
to describe an attacker, somebody other than Mr.  
10 Legere both size-wise, voice-wise and every other  
which way that she could possibly have described her  
attacker, it describes somebody other than Mr. Legere.  
And while a jury might be convinced - or may not be  
convinced at this time that Mr. Legere is guilty or  
15 not guilty I believe Mr. Legere is entitled to,  
regardless of what the jury's verdict is, Mr. Legere  
is entitled to be tried by the public also. And as  
I told you in court before, it's not just Mr. Legere  
that's entitled to a fair and public trial but the  
20 people of New Brunswick are entitled to a fair and  
public trial, and to deny Mr. Legere the publicity  
is to deny him a fair trial; to deny the people of  
New Brunswick the publicity is to deny the people  
of New Brunswick a fair trial; and under the circum-  
25 stances I'm sure there's going to be lots of contro-  
versy at the end of this trial both how the trial was  
conducted and the verdict of the jury. I believe the  
people of New Brunswick, and especially Mr. Legere,  
deserves a fair and public hearing.  
30

Again, I have not been prepared to argue this  
motion. The Crown has taken me by surprise. And I  
would submit that the motion be denied because I have

1 not been given reasonable time to prepare full answer  
in defence to this motion, as the rest of the trial,  
and I for once ask the Court to rule in favour of  
Mr. Legere.

5 THE COURT: What was your last comment? For once?

MR. FURLOTTE: I said for once I would ask --

THE COURT: For once. The Court hasn't done before?

MR. FURLOTTE: Not that I am aware of.

THE COURT: The first application made in this thing was  
10 made by you Mr. Furlotte, on behalf of the Accused.  
It was for a change of venue. The Court granted  
your application.

MR. FURLOTTE: My Lord as I recollect December 5th it was  
the Court itself who pressed for me to make the  
15 motion for a change of venue and --

THE COURT: I said if you were going to make one now is the  
time to make it.

MR. FURLOTTE: Mr. Legere - because of the circumstances  
of that Mr. Legere feels that everything was cut and  
20 dried before he even appeared in court on December  
5th as to where the trial was going to be held.

THE COURT: Well, that's pleasant.

MR. FURLOTTE: But, again, that's only speculation on his  
part like everybody else in this case is speculating.  
25

THE COURT: Mr. Walsh.

MR. WALSH: My Lord if I may reply to those aspects of Mr.  
Furlotte's argument. A number of points I think we  
should make clear to the court. One is that the  
30 reason we wish the order is so we will not inhibit  
the witness in giving all the evidence. Number two,  
as a result, the crown chose not to inform Ms. Flam

1 in preparing for this trial of the provision of the  
Criminal Code because we did not want her to become  
aware of it and then perhaps rely on it as a crutch  
to aid her to come here and then have the crutch  
5 pulled out from under her. We waited until the very  
last minute before we advised her of that particular  
provision of the Criminal Code and that, as I said,  
was last evening to make her aware of that provision.  
And I have never at any point told her that I would  
10 make this particular order at any time in preparing  
for this trial. That was to aid the public -- to aid  
her in actually coming forward.

Mr. Furlotte has mentioned the fact that he was  
not aware of this motion or anticipated this motion.  
15 Well I don't know how this happened but yesterday I  
heard that there were press actually making inquiries,  
in fact my superiors received a call from the press  
indicating that they had heard - or they anticipated -  
I'm not sure of the - anticipated a motion under the  
20 Criminal Code to exclude, and it certainly didn't  
come from me and I'm the only one who has the contact  
with Ms. Flam in terms of that particular aspect.  
So what that simply points out is that this is not  
some obscure provision of the Criminal Code, some  
25 Latin aspect that only a particular aspect of the  
legal profession would be aware of. This is some-  
thing that when you are dealing with a woman and  
under circumstances of this particular nature which  
Mr. Furlotte is certainly aware of, this is something  
30 that anyone should have anticipated that this could  
perhaps be a motion that could be made. But I can't

1 give notice of motion of something that I hadn't made  
up my mind to do until last night, and the reason we  
didn't do it until last night was because we didn't  
want to have Ms. Flam relying on it during the  
5 period of time that she was preparing to come here.

I wish to make those particular points clear My  
Lord. And with respect to informing the public, the  
order is to exclude the public. The public still  
have access to the transcripts of this particular  
10 trial and they can be informed. The media can be  
informed through the transcripts. What we are asking  
is that the public be excluded so the lady can  
testify fully. That we at least do everything we  
possibly can so she can testify fully. Anything  
15 that's said in here is certainly going to get out to  
the public in probably a very accurate form in the  
sense that it's in a transcript.

I believe, My Lord, that's the points I wish to  
make. Thank you.

20 THE COURT: May I ask you this Mr. Walsh just before you  
finish. Section 11 - Mr. Furlotte has referred to  
section 11(d) of the Charter which says an accused  
is entitled to a fair and public trial before an  
impartial tribunal and so on. You are relying on  
25 section 2(b) is it, of the Charter. Reference was  
made to 2(b) to the notwithstanding --

MR. SLEETH: Excuse me, no My Lord. The reference made to  
2(b) was in anticipation there might be an application  
made by media organizations pursuant to that dealing  
30 with freedom of the press and that I would argue that,

1 THE COURT: What I am asking you, Mr. Walsh, now, is how  
do you get over the provision that everyone is  
entitled to a public trial. What justification  
would there be for a Court to make an order other-  
5 wise in the face of that section?

MR. WALSH: Well, My Lord, the particular provisions of  
the Charter of Rights would not, we were suggesting,  
inhibit this particular provision of the Criminal  
Code. Under certain circumstances a provision of  
10 the Criminal Code generally would not comply with  
the Charter of Rights, however, there are times that  
the provisions of the Criminal Code are still  
operative in particular circumstances where it would  
work an unfairness or work against the administration  
15 of justice to actually have the provision struck down.  
The provision normally would certainly operate but  
in these particular unique circumstances and when  
it's very limited that particular provision of the  
Charter would not inhibit. Mr. Sleeth, as I indicated,  
20 and this particular argument has great application,  
My Lord, to third party standing, and I would much  
prefer that Mr. Sleeth argue the Charter aspects of  
this particular matter. It's a complex topic and  
it's a subject that Mr. Sleeth has certainly been  
25 aware of for some time having done cases in relation  
to media and aspects of that nature.

THE COURT: Thank you very much.

MR. CHRISTIE: If it please the Court, my name is Tom  
30 Christie and I represent the Daily Gleaner and ask  
that I have status to speak on behalf of our client  
on this motion.

1 THE COURT: You're speaking, the Daily Gleaner being a  
media.

MR. CHRISTIE: Being a third party who wishes --

THE COURT: A medium, or whatever. Press.

5 MR. COREY: My Lord Peter Corey and I am appearing on  
behalf of the Canadian Broadcasting Corporation and  
I would request status to be heard with respect to  
the motion as well.

THE COURT: You forgot your gown Mr. Corey.

10 MR. COREY: I didn't forget my gown, My Lord, it's out-  
side. I just didn't have time. When I got here the  
motion had -- I just got the call at 20 to 10 to  
appear on their behalf.

15 THE COURT: Well, it's not serious. Well now do counsel  
have any -- I think it's proper perhaps in a  
thing like that to hear the media. Do you have any  
objection Mr. Furlotte?

20 MR. FURLOTTE: My Lord the one thing that Mr. Legere has  
brought to my attention that there was supposed to  
be in the Glendenning incident where Mr. Legere was  
charged and convicted of murder, that the public was  
not excluded in that trial and her situation would  
be no more devastating than Nina Flam's. Also, one  
25 last thought on such short notice. If the crown was  
so concerned about Nina Flam, and they have every  
right to be concerned about Nina Flam, and I am too,  
because I believe Nina Flam has more evidence to help  
Mr. Legere than she does have to hurt him, but there  
30 is provisions in the Code also where a witness can  
testify behind a screen so she doesn't have to face  
her attacker in sexual assault cases, and that's

1           mostly used for young children because they find it  
          intimidating to testify before their alleged  
          attacker.

THE COURT: That's been found unconstitutional, I think,  
5           hasn't it, just recently by the Supreme Court of  
          Canada?

MR. FURLOTTE: I believe it has just recently, yes.

THE COURT: Am I right?

MR. SLEETH: In Manitoba I believe.

10          THE COURT: So there was case law that it shows that a  
          witness cannot be protected that much from giving  
          evidence in an open and public trial. It's possible  
          if she may be intimidated or shy or embarrassed  
          somewhat that she is not going to be able to give  
15           her testimony. She doesn't even know yet because she  
          doesn't know how she is going to react. The crown,  
          had they given this enough thought, they could have  
          provided a screen similar to the type to shield from  
          the victim in the past could have been put up for the  
20           public to allow her to more easily give her testimony.

          We want the testimony of Nina Flam and we want  
          it as in her statements to the police after the  
          event and, as I said, we are not trying to inhibit  
          the testimony of Nina Flam. Heck, I want to encourage  
25           it and get it out as right as possible but, neverthe-  
          less, Mr. Legere is entitled to a fair and public  
          trial as is the people of New Brunswick.

MR. SLEETH: My Lord I just want to mention very quickly at  
30           the outset that references by my learned friend to  
          the question of screen provisions which have been  
          ruled on, as I understand it, by a recent Manitoba  
          judgment, I believe that is also on appeal to the

1 Supreme Court of Canada at the moment. What they  
will rule I have no idea. They involve situations  
of sex offences. They involve young children, a  
clear distinction of what's taken place here. There  
5 is no authority contained within the Criminal Code  
to permit us doing any such thing in the case of  
Nina Flam.

Before making further argument, My Lord, I would  
just want to find the thought of the Court with re-  
10 spect to standing for the two gentlemen who made  
application a moment ago, one gentleman I believe  
representing Radio Canada, or CBC, and another  
gentleman representing another news organization,  
namely the Gleaner. And I would leave it to them,  
15 My Lord, to make their -- First of all, where  
there appears to be a violation, an infringement of  
any charter right, I believe that the party, either  
in this case the party immediately involved with  
litigation, or the party to whom standing might be  
20 granted, should indicate to the Court the basis on  
which they believe a violation of the Charter exists,  
and then the argument can be made in answer to their  
arguments, (a) whether or not it is in fact a  
violation, and secondly, whether or not it is over-  
25 riden by the provisions of section 1 of the Charter  
of Canadian Rights and Freedoms.

THE COURT: Now, you gentlemen have no objection if we  
invite Mr. Christie perhaps first, and Mr. Corey  
subsequently, forward to the bar - or to the --

30 MR. SLEETH: Since, My Lord, the objection of the crown  
here is not in any way to impede ultimate publication  
of any testimony we have no objection whatsoever to  
their being granted standing.



1 THE COURT: No objection to what?

MR. SLEETH: To ultimate publication of anything that is  
said by Nina Flam. So we have no objection to their  
being given standing.

5 THE COURT: Mr. Christie, would you like to speak, please.

MR. CHRISTIE: Thank you My Lord.

THE COURT: I don't want to hear -- I'll put it this  
way. Take all the time you want to as long as you  
don't take more than five minutes.

10 MR. FURLOTTE: My Lord one last comment from the defence.  
I feel somewhat kind of offended and taken back that  
somehow the press had more notice of this motion than  
I did.

MR. SLEETH: My Lord just to make one thing absolutely  
15 clear since that remark was put on the record, how  
the press got ahold of anything here I have no idea.  
It did not come from myself, Mr. Allman or Mr. Walsh.

THE COURT: Well, that's by the way at this point. Mr.  
Christie what do you --

20 MR. CHRISTIE: Thank you My Lord. There is no doubt that  
the impact of granting this application will be  
significant to our client. In effect it will be a  
ban on immediate publication of the proceedings of  
this court, and what is clear from the fact that this  
25 courtroom is again filled today is that there are  
many people who have a great interest in following  
these proceedings and they have a variety of reasons  
for being here, and in particular they all share the  
interest in observing how our justice system deals  
30 with matters as significant as those before this  
court. In fact the integrity of our justice system

1 has always rested on its openness, on its  
accessibility to all members of the public. As was  
noted by Lord Blanesburgh in McPherson V. McPherson,  
1936 Appeal Cases, 177 at page 200, and quoted with  
5 approval by Mr. Justice Dickson of the Supreme Court  
of Canada as he then was in Attorney-General of Nova  
Scotia V. McIntyre, the cite being (1982) 1 Supreme  
Court Reports, 175 at page 185, is the note that  
10 "Publicity is the authentic hall-mark of judicial  
as distinct from administrative procedure."

What makes openness and publicity critical to  
an effective and trusted judiciary is that we live  
in a democracy which permits, and for its own health,  
should foster public input into its various branches.  
15 Furthermore, the role of the media is essential to  
the development of the public's trust in our system  
of judgment and democracy, so essential that the  
freedom is guaranteed by our Charter of Rights as  
found in section 2 which reads in part: "Every  
20 person has the following fundamental freedoms:  
freedom of expression and freedom of the press and  
other media of communication.". This is fundamental  
and is the pillar of our social system. The freedom  
of the press is fundamental because it provides a  
25 vehicle by which the general public can participate  
in our judicial process without having to actually  
be present.

Now this philosophy of respecting the freedom  
30 of expression and freedom of the press was recently  
described by Mr. Justice Cory of the Supreme Court  
of Canada in the case Edmonton Journal V. Attorney-  
General of Alberta, and the citation for that is

1 1990, 102 National Reporter, 321. And I actually  
have a copy of that case. Now, at page 322 Mr.  
Justice Cory makes the following observations.

5 "There is another aspect to freedom  
of expression which was recognized  
by this court in Ford v. Quebec" --

and that cite is set out in the case. There Mr.  
Justice Cory notes at page --

THE COURT: I'm sorry, what page are you on now?

MR. CHRISTIE: Page 322 and it will be paragraph 10.

10 I apologize, My Lord, if there are some margin notes  
there. I haven't had an opportunity to clean up our  
copy of the cases before appearing this morning.

THE COURT: 332 you mean.

15 MR. CHRISTIE: Yes, I'm sorry, paragraph 10. And partway  
down it's noted --

THE COURT: Do you have an extra copy of this?

MR. CHRISTIE: I'm afraid I don't. I have only had a  
chance to get a copy for the Court.

20 Now, partway through it notes:

"There at p. 767 it was observed  
that freedom of expression "protects  
listeners as well as speakers".  
That is to say as listeners and readers,  
members of the public have a right to  
information pertaining to public  
institutions and particularly the  
courts. Here the press plays a  
fundamentally important role."

25 And further on down - I won't take up much of the  
court's time, Mr. Justice Cory notes:

30 "Those who cannot attend rely in  
large measure upon the press to inform  
them about court proceedings -- the  
nature of the evidence that was called,  
the arguments presented, the comments  
made by the trial judge -- in order to  
know not only what rights they may have,  
but how their problems might be dealt  
with in court. It is only through the

1 press that most individuals can really  
learn of what is transpiring in the courts."

And he also notes of particular interest:

"They, as 'listeners' or readers have  
a right to receive this information."

5 Now, again in the same case, the role of the  
media and the judicial process was discussed by  
Madam Justice Wilson who commenting on the words of  
Chief Justice Burger states - and I'm afraid I don't  
have the citation for where you will find that there  
10 My Lord --

"This is an important point and serves  
to remind us that any harm that may  
flow from limiting the press's ability  
to recount what takes place in court  
cannot readily be rationalized or  
minimized by saying that, although the  
press is constrained, the public is  
15 still free to attend. The media are,  
as Chief Justice Burger so truly  
observed, surrogates for the public."

Now, unfortunately many of the details involving  
this witness have already been made public and pre-  
venting the publication of her evidence which is in  
20 effect what would take place by granting this ban is  
preventing the publication of evidence which may be  
crucial to this trial. And, undoubtedly, we have some  
sympathy with the intention behind the motion but the  
significant point I think was made by, again, Mr.  
25 Justice Dickson as he then was in the case of  
Attorney-General of Nova Scotia V. McIntyre, and I  
see I don't have the citation with me present, but he  
does note:

30 "As a general rule the sensibilities  
of the individuals involved are no  
basis for the exclusion of the public  
from judicial proceedings."

1 And by restricting the press Your Lordship would  
be in effect excluding the public. Mr. Justice  
Dickson further quotes, with approval, the words  
of Mr. Justice Lawrence in, again, a case which I  
5 haven't had opportunity to cite properly, R. V. Wright:

"Though the application of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in  
10 having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings."

And, finally, My Lord, I wish to draw to your attention the recent Ontario Court of Appeal decision  
15 R. V. Dalzell, and apologizing to my friends I do only have one copy for the Court. Now in this case Mr. Justice Findlayson discusses at some length the freedom of the press and the right to report court proceedings. Now the Court also discusses the inherent  
20 jurisdiction of the Court to grant bans on publication and they note:

"Even the statutory exceptions to the public nature of the trial or the open justice system have themselves come under close charter scrutiny as infringement of the public's right to know  
25 implicit in the media's constitutional rights under section 2(b), freedom of the press. The court also notes that the public has as much interest in the conduct of this trial as does the accused."

And furthermore the court notes:

"The concept of the justice system which is open to the public is itself a hallmark of fundamental justice. In other  
30 words fundamental justice requires that this criminal trial process be fully open to the public."

1           The conclusion, My Lord, I think it's essential  
to note that the rights of the press to freely report  
the proceedings of this court are fundamental rights.  
These rights should not be restricted since by doing  
5           so the public would be deprived of their ancient  
right to be part of the criminal justice system.

          This in many ways is a very unique case; a case  
in which a great many people wish to be kept abreast  
of what is going on. I respectfully request that  
10           Your Lordship not hinder my client from fulfilling  
its historic and fundamental right to be part of this  
process.

          Thank you My Lord.

15           THE COURT: Thank you very much. I think we will go on, Mr.  
Sleeth, with Mr. Corey, hear him, and then give you an  
opportunity to respond to both of them.

MR. SLEETH: Thank you My Lord.

20           THE COURT: Mr. Corey, if Mr. Christie's presentation was  
5 minutes I'm going to cut you down to 2.

MR. COREY: I will be very brief, My Lord, and thank you  
for the opportunity of being heard here today.

          My Lord the application that has been made before  
the Court, it is the position of my client, the  
Canadian Broadcasting Corporation, that that  
25           particular application does contravene section 2(b)  
of the Canadian Charter of Rights and Freedoms in that  
everyone has the following fundamental freedoms:  
freedom of thought, belief, opinion and expression,  
including freedom of the press, and other media  
30           communication.

1           Now, the position, as I understand it, and what  
I have been able to hear from the presentation by the  
Crown in this particular matter, is that they are  
alleging in this particular situation that they are  
5           not really restricting freedom of the press in the  
sense that their position is and their argument has  
been that we are not restricting freedom of the press  
because at some time later the transcripts will be  
available and people will be able to order the  
10           transcripts and will be able to publish the transcripts  
and that type of thing, but what they are ignoring,  
it is my submission, is that not only is freedom of  
the press an essential thing as much as access of the  
public to judicial proceedings, and that particular  
15           matter was dealt with in the Ontario Court of Appeal  
decision of Southam Inc. and the Queen (No. 1), which  
is a 1983 decision of the Ontario Court of Appeal.  
Now that decision in itself went on to the Supreme  
Court of Canada on another issue on the legality of  
20           search and seizure but in that particular Court of  
Appeal decision the Court said that:

25           "While public accessibility to the courts  
is not explicitly guaranteed by the  
Charter, (although that is true) such  
access, having regard to its historical  
origin and necessary purpose, it is an  
integral and implicit part of the  
30           guarantee to everyone of freedom of  
opinion and expression including  
freedom of the press. The rule of  
openness in court fosters the necessary  
public confidence in the integrity of  
the court system and an understanding of  
the administration of justice."

30

1           What the Court is indicating in that particular  
decision, it is my submission, is that public  
accessibility goes hand in hand with freedom of the  
press. It is not necessarily the difficulty in this  
5           particular situation that the evidence may not at  
some time specifically be available but it is the  
issue of the public accessibility to the judicial  
system that is in question. And my position in this  
particular matter is that this case has received  
10           exorbitant - tremendous amount of press coverage, and  
the community at large is relying specifically on  
the media to present current and up to date reports  
with respect to the proceedings of this particular  
trial. The position of my client in this particular  
15           matter is that it is a media. It is a communications  
media in the sense that it is relied upon to bring  
up to date reports, up to date news broadcasts, up to  
date responses to the judicial proceedings so that  
the public itself is accessing this particular court.  
20           The public accessibility is not in my position the  
number of people who appear in this particular court  
and are able to hear the testimony. Public access-  
ibility is also the accessibility that the public  
receives via the media.

25           My position in this particular matter is that the  
court would be taking a dangerous precedent in allowing  
the crown's motion in this particular matter because  
it would prevent the public accessibility that is so  
essential as outlined in the Southam Inc. case and that  
30           it is one of historic and necessary purpose, and that  
the rule of openness fosters the necessary public



1 confidence and an understanding of the administration  
of justice, and our position is that the crown's  
motion in this particular matter should be denied.

Thank you My Lord.

5 THE COURT: Thank you very much Mr. Corey. Mr. Sleeth.

MR. SLEETH: Yes, My Lord. I would reiterate at the outset  
my earlier remarks that the public's right to know in  
this particular case will not be infringed by the  
request that is being made by the crown. There is no  
10 effort being made here to ban publication forever.  
I would also note, in passing, that reference was  
made to Section 2(b) by both my learned friends and  
it may be important and worthwhile to note that as  
we look at Section 2(b) of the Canadian Charter of  
15 Rights and Freedoms the fundamental freedom that is  
referred to there is freedom of thought, belief,  
opinion and expression, including freedom of the  
press and other media of communications.

20 The press do not enjoy a special position higher  
than that of other members of the public My Lord.  
They are basically in the same position as other  
members of the public as was set out by a Federal  
Court decision, My Lord, and the case I would refer  
25 you to, My Lord, is a case MacLeod, McLaughlin and  
Southam Inc. V. De Chastelain, Foster and the Attorney  
General of Canada. It involved the presence of re-  
porters, My Lord, at an Indian blockade area. The case  
is reported in 38 Federal Trial Reports starting at  
30 page 129, a decision by Mr. Justice Joyal. Mr. Justice  
Joyal pointed out in that particular case that among  
other things "The Constitution does not require the

1 government" - and I'm referring to page 134 - "to  
accord the press special access to information not  
shared by the members of the public generally. It  
is one thing to say that a journalist is free to seek  
5 out sources of information not available to members  
of the public, that he is entitled to some  
constitutional protection", but continued on to say:  
"It is quite another thing to suggest that the  
Constitution imposes upon government" - or upon the  
10 courts I would add here My Lord - "the affirmative  
duty to make available to journalists sources of  
information not available to members of the public  
generally."

15 The provision of the Code that's involved here,  
My Lord, allows the Court, if it feels that under  
the circumstances it is essential to obtain testimony  
it allows the court to not ban publication but to  
briefly exclude the public from the courtroom while  
the testimony is given.

20 I would submit, My Lord, that is very important  
as we consider the background to our Charter that we  
start at a fundamental starting point by the Supreme  
Court of Canada and I would refer you, My Lord, to  
the decision of that court in 1984, the judgment of  
25 R. V. Big M Drug Mart Limited contained in 1985 1  
Supreme Court Reports starting at page 295, and in  
that decision, My Lord, at page 344 then Mr. Justice  
Dickson, not yet at the time Chief Justice of the  
30 Supreme Court of Canada but he would subsequently be,  
indicated that in interpreting the Charter "a generous"  
- and I'm quoting from page 344 - "a generous rather

1 than a legalistic one," should be applied "aimed at  
fulfilling the purpose of the guarantee and securing  
for individuals the full benefit of the Charter's  
protection." He went on, however, to say: "At the  
5 same time it is important not to overshoot the actual  
purpose of the right or freedom in question, but to  
recall that the Charter was not enacted in a vacuum,  
and must, therefore, as this Court's decision in  
Law Society of Upper Canada V. Skapinker illustrates,  
10 be placed in its proper linguistic, philosophic and  
historical contexts."

My Lord the Courts have always been permitted a  
measure of control of their own operations and in  
this particular case, My Lord, the factors related  
15 earlier by my learned friend, Mr. Walsh, would, I  
submit, indicate a necessity in this particular case  
to follow the provisions that is permitted by the  
Criminal Code, allowed and envisaged by the Criminal  
Code, in order that this court may hear the testimony  
20 of this witness.

My Lord I go back to the argument about access-  
ibility and publication. I repeat it as I have  
throughout, there is no proposal here to ban publication.  
However, My Lord, even a ban on publication in some  
25 circumstances has been held by the Supreme Court of  
Canada to be appropriate which is why I referred  
earlier to Big M, things must be viewed within their  
historical context and within the development establishe  
by the courts, and the courts have indicated extravagant  
30 interpretations are not to be accepted. I would note,  
for instance, My Lord, that in Blackwoods Beverages  
Ltd. et al V. R., 1985 2 Western Weekly Reporter, 159

1 and 43 Criminal Reports (3d), page 254, the Manitoba  
Court of Appeal noted:

5 "The Charter was not intended to disturb  
what is and was a well-organized legal  
system, nor to cause its paralysis. The  
Charter is the supreme law of the country;  
it must be applied and given the most  
liberal and free interpretation but it  
must do so within the existing trial  
system."

In examining the situation of bans on publication,  
My Lord, the Supreme Court of Canada in a case called  
10 Canadian Newspapers Co. V. Canada, A.G. contained in  
1988 2 Supreme Court Reports commencing at page 122  
Mr. Justice Lamer, as he then was, he would also  
subsequently become a Chief Justice of the Supreme  
Court of Canada, stated at page 130, and he was re-  
15 ferring again to bans on publication and he examined  
such cases as the issue of freedom of the press, and  
he noted, if I may go back for a moment to page 129:  
"Freedom of the press is indeed" - and we do not  
deny this My Lord - "is indeed an important and  
20 essential attribute of a free and democratic society  
and measures which prohibit the media from publishing  
information deemed of interest obviously restrict that  
freedom." I underline, again, My Lord, we are not  
even proposing here a ban on publication. There may  
25 be a temporary delay but no more than that. The  
public interest will be served. Immediacy is not  
guaranteed in the Charter My Lord. It is not said  
anywhere in the Charter you must have information now  
this very minute. If that were the case there would  
30 be possibly an application made for rights for  
television cameras in this very room.

1 My Lord in Canadian Newspapers V. Canada,  
2 Attorney General, Mr. Justice Lamer referred to the  
3 test which is to be applied in Oakes and he noted  
4 the first thing to be examined is the importance of  
5 a legislative objective which the limitation is  
6 designed to achieve. He was again dealing with a  
7 ban on publication, not a mere temporary removal of  
8 persons with no ban on publication. And he went on:  
9 "In the present case the impugned provision purports  
10 to foster complaints by victims of sexual assault by  
11 protecting them from the trauma of wide-spread  
12 publication resulting in embarrassment and humiliation.  
13 And he goes on. "Encouraging victims to come forward  
14 and complain facilitates the prosecution on the  
15 conviction of those guilty of" - and he was indeed  
16 referring to sexual offences but I submit it applies  
17 to all offences. "Ultimately, the overall objective  
18 of the publication ban imposed by Section 442(3)" as  
19 it then was "is to favour the suppression of crime  
20 and improve the administration of justice." There  
21 has been much made of the administration of justice  
22 by my two learned friends in their argument. His  
23 Lordship went on: "This objective undoubtedly bears"  
24 on what he described as "a pressing and substantial  
25 concern.", and noted in that case "The respondent  
26 conceded it is of sufficient importance to warrant  
27 overriding a constitutional right."

28 He noted further in the following paragraph  
29 again on page 139 the proportionality requirement.  
30 You will recall, My Lord, that under Oakes one must  
31 examine first of all what was the legislative

1 objective. Is it a worthwhile objective. Here I  
submit, My Lord, the need to enable a witness to  
testify where there has been indication to the court  
that the witness would be held back from testifying  
5 because of the possibility - because of the presence  
of the public would be a matter of pressing concern  
because the administration of justice does call for  
the facilitation of the prosecution of offences.  
Then we must ask, My Lord, as then Justice Lamer did,  
10 is the proportionality requirement in existence here,  
and he went on to note this has three aspects: the  
existence of a rational link between the means and  
the objective; secondly, a minimal impairment on the  
right or freedom asserted; and finally, a proper  
15 balancing between the effects of the limiting measures  
and the legislative objective. And in this particular  
case, My Lord, what occurs is a temporary - it's not  
a long-term - a temporary restraint.

My Lord the freedom of the press has been pointed  
20 out in cases such as Edmonton Journal V. Alberta, and  
I would refer, My Lord, to the 1989 2 Supreme Court  
Reports version which starts at page 1326. Mr. Justice  
La Forest, My Lord, at pages 1373 and 1374 indicated  
very clearly that the liberty of the press and the  
25 media is not an absolute one. As with all other  
rights guaranteed by the Charter it is submitted to  
the provisions of Section 1 of the Charter within  
limits that are seen as appropriate and reasonable  
in a free and true democracy, a free and libertarian  
30 society. In this particular case again, My Lord, I  
refer you back to the position taken by the Supreme

1 Court of Canada in Canadian Newspapers earlier  
referred to. There a limitation necessary for the  
effective presentation of evidence was held to be  
a reasonable limitation and that resulted in a ban  
5 entirely on publication. We, again, do not seek a  
ban on publication in this particular case.

My Lord recently the Supreme Court of Canada  
in a case, and I should note there are some clear  
distinctions on this one, I want to say that fairly  
10 at the outset, the judgment is a case called Kahn,  
R. V. Kahn. The case is reported, My Lord, at 113  
National Reporter commencing at page 53. This case  
dealt with the testimony and the introduction of so  
called hearsay evidence, relation of a complaint by a  
15 child, and Madam Justice McLachlin at page 70 of that  
decision noted at the foot of the page in paragraph  
29:

"The first question should be whether  
reception of the hearsay statement is  
necessary."

20 Necessity was seen to her as very, very important.

"Necessity for these purposes must be  
interpreted as reasonably necessary.  
The inadmissibility of the child's  
evidence might be one basis for a  
finding of necessity. But sound  
evidence based on psychological assess-  
25 ments that testimony in court might be  
traumatic for the child or harm the  
child might also serve. There may be  
other examples which could establish  
the requirement of necessity."

The legislators, My Lord, envisaged situations  
when they created this particular provision of the  
Criminal Code where it might be impossible for  
30 witnesses, although they are dealing with a situation  
where the suppression of crime is at stake and the

1 prosecution of persons charged with offences, both  
pressing concerns referred to by the Supreme Court of  
Canada in Canadian Newspapers, would be an issue.  
There could be a temporary pause, no more, in reporting

5 My Lord the first of my learned friends who was  
speaking, and I regret, I don't want to be rude, I  
have forgotten his name, he referred to I believe  
the --

THE COURT: Mr. Christie.

10 MR. SLEETH: Thank you My Lord. Referred to the Edmonton  
Journal case and in the citation he gave from the  
Edmonton Journal case reference was made there - the  
Supreme Court of Canada was referring to its own  
prior decision in Ford V. Quebec. Ford V. Quebec  
15 also known as Chaussure Brown. That particular case,  
My Lord, dealt with a right of commercial expression,  
the placing of English language terms in advertise-  
ments My Lord, and I submit that here we are not  
really dealing with quite what was involved in  
20 Chaussure Brown. I would note further, My Lord, that  
the question of public accessibility as offered by  
the second of my two learned friends, Mr. Corey, he  
equated public accessibility at that stage with the  
right of publication. Well if there is such an  
25 equation then that equation has been disposed of,  
My Lord, and if it were valid, if the argument is  
correct, the question of publication was eliminated  
by Canadian Newspapers when the authority and the  
power of the legislature of the Federal Parliament  
30 to pass legislation which would ban publication was  
upheld in light of section 1 of the Charter in the



1 interests of, as they put it, the improving of the  
administration of justice and facilitating the  
prosecution of offences and the suppression of crime.

THE COURT: Are you going to be very much longer?

5 MR. SLEETH: I am done My Lord.

THE COURT: Oh, you're done. Thank you very much.

MR. SLEETH: I stop by saying only, My Lord, that the  
equation that is offered by my learned friend - both  
my learned friends has, I submit, with the greatest  
10 of respect, absolutely no validity. We are not  
talking about a ban on publication. The interests  
of the public will be served. Their only concern  
seems to be one of immediacy. That is not contained  
within the Charter. Thank you.

15 THE COURT: I am not going to hear Mr. Furlotte again. I  
don't find it necessary nor do I find it necessary  
to go back to Mr. Christie and Mr. Corey.

Before giving my decision, just to make a couple  
of inquiries, who is examining Miss--

20 MR. WALSH: I will be My Lord.

THE COURT: You are Mr. Walsh. Miss Flam is in her mid  
sixties do I understand?

MR. WALSH: Yes, My Lord.

25 THE COURT: She's a spinster?

MR. WALSH: A widower My Lord.

THE COURT: She was injured, of course, or suffered burns  
according to the evidence here.

MR. WALSH: Yes, My Lord.

30 THE COURT: And has she recovered from her injuries?

MR. WALSH: Oh yes, she has recovered, My Lord. She has no  
problem physically in coming in.

1 THE COURT: Where has she been living since? I mean I  
don't mean what house but where? In what area? Is  
she in Chatham?

MR. WALSH: Yes, My Lord.

5 THE COURT: She's in Chatham. And is she accompanied today  
by friends?

MR. WALSH: She was out of the province visiting daughters.  
She has a number of daughters. She was accompanied  
here by a police officer and I believe, I'm not sure,  
10 I understood that some of her daughters, if not all  
of them, were coming here today in support of her.

THE COURT: And the other thing is Miss Flam now is in  
one of the --

MR. WALSH: She's in one of the rooms, My Lord. That is a  
15 concern of mine, obviously, as the longer --

THE COURT: Oh yes, yes. The other thing is when she is  
brought in she would be coming in that door there and  
brought around here and be sworn in there and then  
take the stand.

20 MR. WALSH: Yes.

THE COURT: Is there anything that -- She should have a  
glass of water there.

MR. WALSH: Yes, I will arrange for that My Lord. I was  
going to do that.

25 THE COURT: My decision is this. I am not going to pro-  
hibit the public at this point. If developments are  
such during Mrs. Flam's testimony that I should re-  
view that decision I will have to reconsider it at  
that time. I accept that the Court has the authority  
30 to put the public out during the giving of testimony  
by any witness but I have been most reluctant in my

1 career on the bench to ever do it. As a matter of  
fact I have never done it. I have never excluded  
the public from anything, even rape trials or sexual  
offence trials where witnesses have found it most  
5 embarrassing. I have had the representation made  
that the public should be excluded. My experience  
has always been that the witness, the victim, goes  
on the stand and forgets that there's anybody else  
present. I think sometimes witnesses build this up  
10 a little in their own mind and sometimes there are  
ways to put them a little at ease and I have never  
really found any great difficulty about this.

I remember a case, a murder trial I had in  
Dorchester in 1970 - '69, 23 years ago I think it  
15 was, 22 years ago, R. versus Cormier, and there  
was a young man 17 or 18 being tried there and the  
Criminal Code at that time provided that where any  
minor were being tried there could be no publicity  
given to it whatever, and I, in the face of that  
20 provision of the Criminal Code, I said that's  
nonsense. The public are entitled to know what is  
going on. And the other big factor, of course, is  
that people when they have to testify and testify in  
front of others they are more likely to tell the  
25 truth.

We have a barrier here in the court. I don't  
think any witness up here is really going to be very  
much aware that there are people looking on. I see  
30 a lot of faces out there but, you know, you get on  
the witness stand it becomes a blur. And that there  
is a jury over there - Mrs. Flam will be aware there

1 is a jury there. She will see a red shirt on the  
court reporter here in front of her. There will be  
counsel on one side or the other asking her questions,  
I will be interrupting now and again and those will  
5 be the people that she will be aware of in the court-  
room, and I don't think it is going to be the  
traumatic experience for Miss Flam that perhaps  
counsel may fear.

10 Mr. Walsh you have said yourself that she is not  
sure what her reaction will be. It may not be much  
at all.

MR. WALSH: No, My Lord.

15 THE COURT: There is one restriction I am going to put on  
the public in the thing. We should perhaps have a  
recess here. We need a recess for a few minutes -  
10 minutes, and then we will come back and have the  
jury brought in and then Miss Flam will be brought  
in. You bring your witness in. But I am going to put  
20 this restriction on the public that when she comes in,  
and she will be brought in by one of the officers of  
the court, when she comes in I don't want people  
sitting in the public gallery to turn around and  
stare at her. Please, if you are sitting in the  
25 public gallery, look this way so that she is not  
embarrassed by faces all turned toward her. She  
will be brought up here, she will be sworn. I will  
say a few words to her before we start in the hope  
that I might put her better at ease or I might even  
30 let the thing get started and then perhaps say some-  
thing. If I do interrupt I want counsel to appreciate  
why I am interrupting and it's -- I have found in

1 the past that that sometimes works. I may bring  
extraneous matters into the thing that you people  
will wonder what the devil I'm talking about but  
we will see how it works. Now, if you know, Mrs.  
5 Flam breaks down - I don't see this happening  
really - I can't see it happening. I must say that  
it must be most embarrassing for an innocent victim  
of a criminal act, I'm not talking about who committed  
it or who the assailant was, but she is the victim  
10 quite obviously of a criminal assault - criminal  
assaults, and she has been subjected to her sister (sic  
dying as a result of this fire and so on, or the same  
type of thing, and you know for her to have to account  
for sexual activities it must be a most embarrassing  
15 thing and I can't imagine - I'm pleased that today  
she will be able to testify and get this over with  
and hopefully that will be the end of testimony for  
her. You know when we talked earlier at voir dire  
and so on about adjournments of the case there's one  
20 thing that has run totally through my mind or runs  
through my mind at all times and that is this has an  
- you know, a trial of this nature has an impact on  
more than counsel, an accused, or juries or anybody  
else. It has an impact on victims and on members of  
25 the public who are concerned in the thing. They want  
to get something like this behind them and I would  
say that Mrs. Flam must certainly be a person who  
wants to get this behind them. I am sure she will  
cooperate. Very possibly, Mr. Walsh, you might  
30 encourage if there are family members here perhaps  
they would like to speak with her before this happens

1 and perhaps they can give her reassurance that will --

MR. WALSH: As I indicated, My Lord, she was prepared for  
trial with the idea that the public would be present.

THE COURT: There is not going to be any trouble. I'm an  
5 eternal optimist, as I have made the point before.

My optimism has always proven to be well-founded.

Mr. Allman am I not right?

MR. ALLMAN: Well, I can think of at least one instance  
where you were certainly right and I was pessimistic  
10 and I was wrong.

THE COURT: We will recess now for what - we'll take 15  
minutes.

(RECESS - 11 - 11:20 A.M.)

15 COURT RECONVENES.

(Accused present.)

THE COURT: Just before the jury comes in, a question was  
raised by or on behalf of various media members  
as to whether or not the application that was made  
20 by the crown and the disposition of it, and the  
discussion on it could be reported even though it was  
at a voir dire thing, and I do lift the restriction  
on publication as far as that application is con-  
cerned. The media may deal with it if they wish.  
25 The media should not, of course, get into any aspect  
of it that would affect the evidence that may have  
been mentioned. I don't think there was much mention  
of evidence, really, but I'm sure the media --  
30 May I say too, perhaps, to the television camera  
people that when Miss Flam leaves the building when

1 she is through today, probably, please don't jam  
television cameras in her face and subject her to  
that sort of treatment. That's unfair. Totally  
unfair.

5 Counsel had nothing else? I might have asked  
counsel if they had any objection or could see any  
objection to that being publicized. I am sure counsel  
have no objection.

All right, we will have the jury in, please.

10 (Jury called. All present.)

THE COURT: Just before we call the next witness I want to  
apologize to the jury, it's not a matter within my  
control, for keeping you waiting around so long this  
morning but certain points were raised that we will  
15 be alluding to a little later. We have been working  
here. Time hasn't been wasted so thank you very  
much for bearing with the delay.

Now, you have a witness Mr. Walsh.

MR. WALSH: Thank you My Lord. Good morning members of  
20 the jury. My first witness is Nina Flam.

25

30

1            NINA FLAM, called as a witness, having been duly  
sworn, testified as follows:

THE COURT: May I say before you start Mr. Walsh, just a  
little. Mrs. Flam, I have never met you but I feel  
5            I have something in common with you. You moved out  
of a hospital room up at the Chalmers Hospital here.  
You were in the burn unit?

A.        Yes.

THE COURT: I took over your room. Not for the same reason.  
10           I got thrown off a camel crossing the Great Thar  
Desert in India and had to have some plastic surgery  
done. You had that type of thing done there, did  
you, in the hospital?

A.        Yes.

15        THE COURT: I just wanted to explain this to you: that an  
application was made, as probably you know, this  
morning, to exclude the public from the court here.  
That's a most exceptional step to take in a criminal  
trial. The Charter of Rights says every trial must  
20           be public and so on. I know it's embarrassing to  
you - it will be embarrassing to you to perhaps have  
to testify about some of the things you may be asked  
about but I know that you will cooperate and pull  
yourself together. If you need a recess or a rest  
25           at any point please speak up and we will accommodate  
you as well as we can. If when you speak though -  
well, the microphone will carry your voice so I don't  
think you'll have to speak too loud but speak  
30           distinctly and if there are any other requests you  
have that I can help you with well then you make it  
during your testimony.



1 Have you testified before in court?

A. No.

THE COURT: Well, this is a new experience then. Okay Mr. Walsh, you go ahead.

5 MR. WALSH: Okay, My Lord, thank you.

DIRECT EXAMINATION BY MR. WALSH:

Q. You are Nina Flam?

A. Yes.

10 Q. You are the sister-in-law of Annie Flam, is that correct?

A. Yes.

Q. You were married to a person by the name of Bernard Flam?

15 A. Yes.

Q. And what did people call him?

A. Bernie.

Q. And you have been widowed since 1973?

A. Yes.

20 Q. And you have 5 daughters?

A. Yes.

Q. You lived in Chatham in a building next to Annie Flam?

A. Yes. The same building.

25 Q. The same building. Would you just tell the jury, please, your living arrangements in that building?

A. It was a double house and we had our own entrances, and there was a door between her hallway, my hallway and her store.

Q. Is that on the ground floor?

30 A. Bottom - ground floor, yes.

Q. Was there anything to connect on the top floor?

A. No.

- 1 Q. And how long did you live in that particular dwelling?
- A. 34 years.
- Q. And do you know how long Annie had lived in her aspect? Approximately.
- 5 A. Oh, 50 years.
- Q. And the evidence is she ran a grocery store of some sort?
- A. Yes.
- 10 Q. And how long had she run that grocery store in that location? Again, approximately.
- A. Around 50 years.
- Q. And could you tell the jury something about Annie Flam? Could you tell us, please, roughly how old she was?
- 15 A. 75.
- Q. And could you tell us something about her size? Would she be a big woman or a small woman?
- A. Small.
- 20 Q. About how tall?
- A. About five feet.
- Q. And when you say small are you referring to just her height or to her weight as well?
- A. Both.
- 25 Q. Mrs. Flam if you look to your right you'll see a diagram. You are familiar with that diagram?
- A. Yes.
- Q. Would you just quickly point to the jury, please, where Annie Flam's bedroom was on her side of the premises?
- 30 A. Right there.

1 Q. You are referring, for the record, to a place where there's a figure of a person?

A. Yes.

5 Q. Would you please show the jury, please, where your bedroom was. You are referring to the upper left-hand corner of diagram P-3. Thank you. Can you tell the jury something, Mrs. Flam, about the routine of Annie in relation to the store, when she opened, when she closed?

10 A. She opened every morning at 8 and closed at 11.

Q. Is that 7 days a week?

A. 7 days a week.

15 Q. Could you tell us something about her routine in terms of what, if any, kind of bed clothes she would wear? What routine would she have to retire for the night for bed?

A. She wore tailored pyjamas.

20 Q. Tailored pyjamas. What are you referring to? Of ladies pyjamas or mens pyjamas?

A. Ladies.

Q. Ladies. And is that a one piece or two piece?

A. Two.

25 Q. Yourself, were you employed anywhere in the Chatham area at any time?

A. Yes, I worked at the liquor store.

Q. And that was in the Town of Chatham?

A. Yes.

Q. And when did you finish your employment there?

30 A. '88.

Q. And when you were working there, Mrs. Flam, would you be accessible to the public?

A. Yes.

- 1 Q. What part in the store did you work?  
A. Cashier.
- Q. The cashier. I am going to ask you if you would take  
us, please, to May the 28th, 1989. Would you tell us  
5 please, what day of the - do you remember what day of  
the week that was?  
A. Sunday.
- Q. And would you, please, perhaps begin in the evening  
of that particular day and explain to the jury what  
10 happened.  
A. I came in around 9:30 to my own house through the  
front door and I had a cup of coffee and a snack and  
I went in to watch television and oh, probably 10:30  
or so, Ann come in, spoke to me, just talked, and she  
15 went back to the store. Normally I would go in while  
she closed the store but that night I didn't. I went  
upstairs to my room and I did a little bit of work,  
you know, and I got into bed just around 11.
- Q. How would you be dressed Mrs. Flam?  
20 A. Nightgown.
- Q. And what happened?  
A. I was reading and I fell asleep.
- Q. Did you have any lights on in your room?  
A. Both bed lights were on.  
25 Q. And where were those lights?  
A. On the night table by my bed.
- Q. I would refer you to --  
A. Yes.
- 30 Q. -- your bedroom. Is this the two places that the  
lights were?  
A. Yes.

- 1 Q. Did you have both of them on to read?  
A. Yes.
- Q. Continue, please. You said you fell asleep?  
A. Yes.
- 5 Q. Then what, if anything, happened?  
A. Natalie phoned.  
Q. Who is Natalie?  
A. My daughter. And I --
- Q. Do you know what time that call was, approximately?  
10 A. After 11. And I spoke with her for a couple of  
minutes. I went back to my reading and I fell  
asleep again and then I heard somebody coming up the  
stairs, and this person came through the door and  
over to the bed. My back was to the door. And he  
15 put his hand over my mouth and held a knife to my  
throat and said "Don't make a noise and I won't hurt  
you."
- Q. Did he do anything else?  
A. And then he asked me where my pantyhose were. I  
20 told him which drawer, in the dresser close to the  
bed, and he opened the drawer, got out the pantyhose  
and he tied my hands behind my back. My right wrist  
had a cast because I had broken it a few weeks before.  
And then he tied my feet and he put a pillow over my  
25 face.
- Q. Was he able to reach your pantyhose from where he was  
holding on to you?  
A. Yes.
- 30 Q. What about the lights in the room?  
A. The lights were still on.

- 1 Q. What about your telephone?
- A. The telephone was on the left side of the bed. And he pushed the receiver - knocked the receiver off.
- Q. Did you - were you able to tell - when he spoke could  
5 you tell whether it was a male or a female voice?
- A. It was a male's voice.
- Q. And were you able to see this individual? Get a good look at him?
- A. No.
- 10 Q. Could you tell anything about the person? What, if anything, he was wearing at this time.
- A. He was wearing a mask - a ski mask or a knitted thing that pulled over the head.
- Q. Did he speak other than that, other than he told you--
- 15 A. Yes. He asked me if I knew who he was and I said no, and he said "My name is Gerald and I live down by Kerrs, and I need money. I need \$3000.00. My girl-friend is pregnant and she needs an abortion and I need \$3000.00." And I told him I didn't have \$3000.00.  
20 And he wanted to know where my bank book was and I told him, and where my purse was and he said "How much money do you have in your purse?" and I said "\$60.00." And he said "Yes, you do have \$60.00. No you don't have \$3000.00 in your bank book." And then he asked  
25 me where Annie kept her money and I told him in the bank and he said "She must have money in the house." I said "No, she doesn't keep her money in the house." "Well she has properties. She must have money." And  
30 I said "Well, she gets paid by cheque and she deposits the cheques." And "When does she make the deposits?" and I said "Well she does on Wednesdays." "Well this is Sunday, there must be some money because you don't

1 make deposits on Sunday" and I said "Well she makes  
deposits on Wednesday, sometimes I do, and sometimes  
she does night deposits." So "Well who makes the  
night deposits?" and I said "Well sometimes I do;  
5 sometimes the police do."

Q. Did he appear to know about night deposits - this  
person?

A. I don't know. I'm not sure. Then he asked me where  
the safe was and I said we don't have a safe.  
10 "Business people have a safe." I said "We don't have  
a safe." Then he said "What's that big blue thing  
downstairs down in the store?", and I said "That's  
a six forty-nine machine." "Is there any money in  
it?" "No, it's for tickets." And he said "How do  
15 you open it?", and I said "Well, it's shut off now  
for the night but there's a spot on the front - a  
button on the front that says 'push' - 'push to open'."  
I said that's what you do.

20 So he went downstairs and came back and he said  
that it didn't open or it wasn't - didn't open, and  
I said "Well are you pushing the right button?", you  
know, or something like that, and he said - asked how  
it worked and I told him. I said it's also hooked  
25 up to Moncton - Lotto in Moncton, and I told him how  
to do it. I gave the agent number plus the secret  
number, how to push that, how to work it, and who  
would answer in Moncton. So then he went downstairs  
and when he came back again I asked if he got the  
30 machine opened and he said no.

Q. Did he ask you anything else other than about a safe  
or about the six forty-nine machine? Did he ask you  
about anything else?

1 A. He wanted to know about the alarm on the door - the  
bell on the door, and I said yes, but it's turned off  
at night, you know, like. And "How do you -- "Where's  
the key for the front door?" and I said well -- "The  
5 store door." And I said "Well, Ann locks the door.  
She locked the door tonight and it would either be in  
her smock pocket or her sweater pocket. Whatever she  
was wearing. And it would be upstairs."

I asked him what he did with Ann, if he did any-  
10 thing to her, about Ann, and he said -- Once he  
said "Ann's all right.". And --

Q. Did he make any more inquiries, Mrs. Flam, about the  
- about Ann's money?

A. Yes.

15 Q. Would you describe, please, to the jury what the  
inquiries were? What, if anything, he was doing?

A. "Well where does she keep her money?" and I said in  
the bank. "Well she must have money in the house."  
And I said "If so it's in the dresser drawer. The  
20 bottom dresser drawer in the bedroom."

Q. In whose bedroom?

A. In the other bedroom. There was two bedrooms up-  
stairs at Ann's. I said "In the other bedroom."

25 Q. Did he ever leave your room?

A. Several times. And go downstairs and go in through  
the store and to Ann's and then come back and ask  
again.

Q. Ask what?

30 A. Ask where the money was, and --

Q. How long would he stay away?



- 1 A. Oh, minutes at a time. I don't really know.
- Q. And when he was gone what kind of condition were you in?
- A. I was still lying on the bed. Once I was tied to the  
5 bed frame and I was told not to move and I said "How can I if I'm tied?". Well, I really couldn't see because the pillow was over my head all the time.
- Q. What -- I see you are wearing glasses. Were you wearing glasses back then?
- 10 A. At the beginning of the night yes I was.
- Q. What happened to those?
- A. I said one time "Don't break my glasses." and he took my glasses off and put them on the night table.
- Q. Without your glasses what kind of vision do you have  
15 Mrs. Flam?
- A. Well, I don't see too well without my glasses.
- THE COURT: About like mine.
- MR. WALSH: And you said that you saw a mask at the beginning; did you have your glasses on at that time?
- 20 A. Yes.
- Q. Perhaps if we could just for the jury just so we can demonstrate your eyesight without your glasses if you would. Without your glasses, Mrs. Flam, would you be able to distinguish my features from this particular  
25 position?
- A. No.
- Q. Would you remove your glasses, please, and I'm going to walk forward and would you tell me when you can distinguish my face? (Mr. Walsh moves forward.)
- 30 A. Yes.

- 1 Q. Mrs. Flam you have indicated that he asked you questions with respect to Annie's money and he would leave the room and come back again.
- A. Um-hmm.
- 5 Q. What kind of things were you telling him? You explained that you told him about money in another bedroom in Annie's side. Did you tell him anything else about where money would be?
- A. I said I didn't know where she kept her money and that would be the only place that I knew where it might be. And he did at one time ask about under the stairs where the magazines were and what was there and I said that in that spot if you moved some cases you would go down to a cellar which we didn't use.
- 10
- 15 Q. What, if anything -- What was his response when he couldn't find money in - Annie's money? What, if anything, was he doing?
- A. Well, he became angry with me when I wouldn't tell him and I said I couldn't tell because I didn't know, and each time -- Well, when I wouldn't tell him - or couldn't tell him he would either slap me or punch me to make me tell him.
- 20
- Q. What parts of your body?
- A. Well, one time he punched me like this.
- 25 Q. Where are you pointing to? For the record would you just describe what part of your body you are pointing to?
- A. My chin.
- 30 Q. How often through the evening would you have been slapped or punched?
- A. Several times.

- 1 Q. And continue, please. Could you tell the jury,  
please, whether he did anything in your room in terms  
of your belongings?
- A. He looked on the -- He went through my jewelry,  
5 through my dresser, looked at things on top of the  
dresser.
- Q. How did you know that? How did you know that he --
- A. Well, I could just sort of know that he was doing it.  
I couldn't see but -- And then he asked me where  
10 my jewelry was and I said it was in that top drawer,  
and he said -- He looked - I think he looked in  
and he said -- I said "I don't have jewelry of any  
value.", and then when he went through the drawer he  
said "You're right, it's not valuable." And then he  
15 asked me where my diamond ring was and I said "I don't  
have a diamond ring." He didn't believe me that I  
wouldn't have a diamond ring - didn't have a diamond  
ring. And when he was looking through things in my  
husband's - late husband's jewelry case and he said  
20 it was junk.
- Q. He said what was junk?
- A. The jewelry. The cufflinks and things. And there was,  
There was a few old cufflinks and I think an old  
25 watch. A pocket watch that belonged to his father.
- Q. Did he make any particular comment about any particular  
piece of jewelry?
- A. Oh. There was a lady's ring but the stones had been  
taken out.
- 30 Q. Did he ask you anything about that?
- A. It was mentioned, yes.

- 1 Q. What did he say?
- A. "What happened to the stones?"
- Q. Were you able to see him doing these things at any time?
- 5 A. No, not really, no.
- Q. Did he do anything in the room in terms of collecting any of these items, or any items?
- A. Yes.
- Q. Would you tell the jury what he did?
- 10 A. Well, I think he took something from the dresser but I don't -- I couldn't see. I don't really know.
- Q. And why do you say you think that? What, if anything, could you --
- A. Well, I thought at one time there was something being  
15 taken and put in a bag but I don't know. I had a gray leather purse on the chair by that dresser and I thought something was being put in that but I couldn't see and -- Well, several times he left the room and went downstairs and into the store and came  
20 back and then he - one time he came back he said that if I wouldn't tell him where the money was -- He said "If you don't tell me where the money is I'm going to rape you." And I couldn't tell him where the money was and he did rape me. And when I wouldn't  
25 do what he wanted me to do he used to hit me.
- Q. When you say he raped you you are referring to your vagina?
- A. Yes.
- 30 Q. With his penis?
- A. Yes. And then he went away. I don't know whether he went into the other rooms - the other bedrooms

1 in my house or downstairs, or both, but he was away  
and came back and he did it again. Or he said --  
Yes, he did it again, and he said - he said - he  
said "I'm going to -- He said "I'm going to suck  
5 you off" and he asked me if my husband ever did that  
and I said no.

Q. Could you tell me, Mrs. Flam, when you say your  
husband did he mention any particular name?

A. He said Bernie. And I said no. And he also asked me  
10 if I had ever had sex with anybody else and I said  
no. He said "Do you mean to tell me in all these  
years you haven't?" and I said "No, I didn't."  
And he - he - he was on top of me and he put his  
penis in my mouth and tried to make me suck it and  
15 when I wouldn't he hit me. And then he did say that  
- and this was his words - he had to get hard because  
he said 'you know what it's like when you've been  
away for a while'. And then he said he was going to  
set fire to the place. Oh, before that he used a --  
20 He had a chain and --

Q. Okay, I am just going to stop you there Mrs. Flam.  
Would you describe for the jury this chain, where it  
was.

A. He had a chain around his waist. And I did get a  
25 glimpse of the chain and he used the chain on me  
too and --

MR. FURLLOTTE: Sorry, My Lord, I'm having a difficult time  
to hear.

30 THE COURT: I believe the witness said he used the chain on  
me too. Is that what you said?

A. Yes. Yes.

1 THE COURT: He used the chain on me too.

A. And I said "Stop, you're killing me!" and he said  
"And you're killing me."

MR. WALSH: Mrs. Flam how did he use the chain on you,  
5 please?

A. Well, I think -- I felt the chain but I don't know --  
I don't know whether -- I don't know whether --  
I don't know whether he put the chain in me or he  
had it wrapped around himself, I don't know.

10 Q. When you say in me you are referring to your vagina?

A. Yes.

Q. When you saw the chain, Mrs. Flam, did he have any  
clothes on?

A. Not pants. I didn't see the -- I don't know.

15 Q. What about underwear?

A. No. No. No. I couldn't see the rest of him.

Q. Did you make any observations -- First of all,  
would you tell the jury about the chain? Just  
describe what it was like?

20 A. It was loosely around his waist. You know. Not real  
tight. It was -- And it was on the right side.  
There was something on the right side but - like a  
little square of something and there was a piece of  
the chain - seemed to be a little piece of the chain  
25 hanging down.

Q. Could you put your hands up and give us some idea of  
the approximate length?

A. Well, about (indicating).

30 Q. You are referring to?

A. The piece that was on the side.

Q. Did you notice anything else about his anatomy or any  
part of his body?

- 1 A. No, not really.
- Q. Could you tell us anything about the size of the person in terms of what you saw?
- A. You mean the man's waist or the size of him?
- 5 Q. Did you happen to see his hips or his waist?
- A. He wasn't - he was thin.
- Q. What part of his body did you see to say he was thin?
- A. Just the waist.
- Q. And did you notice anything about his pubic hair?
- 10 A. Light brown. Light.
- Q. Mrs. Flam what, if anything, did he do after he raped you the second time?
- A. He said he was going to set a fire to the house so that it would look like an accident and that it would seem
- 15 as though I - we or I perished in the fire. Smoke. And he started the fire and then -- Started the fire in the closets and on the floor at the foot of the bed which would be in front of the clothes closets, and then he -- The lights were out by
- 20 this time and -- or he put them out. And he untied - or cut my hands. My hands were behind my back the whole time and my feet were tied. And he cut the pantyhose from my hands, my wrists, and pulled down my nightgown and tucked me in so that it would look
- 25 like a fire had started in the house.
- Q. Tucked you in in what fashion?
- A. Pulled the blankets around me, you know, like you would tuck in a child. And he - one time he tried
- 30 to choke me.
- Q. Would you describe that for the jury, please?

- 1 Q. Well, he had his hands on my throat and pressing hard  
on my neck and --
- Q. How many hands were on your throat Mrs. Flam?
- A. One and then two, and then both.
- 5 Q. Okay, one, and how long would he have the one on your  
neck?
- A. I don't know. I don't know. But I -- He did choke  
me so hard that I did lose my breath. And then he  
choked me again and put his hands -- Choked me  
10 again, yes, and I thought one time that - well, I  
thought that I was dead, and I just -- Well, I was  
quiet and I kept real quiet.
- Q. What were you trying to do?
- A. Well, I thought perhaps if he thought I was dead he  
15 might go away. And I -- Just before that I got  
my feet moved around this way in the bed and I was  
across the head of the bed and that's when he choked  
me, and my feet were still tied. My hands were loose.  
The feet were not tied tightly and I knew I could get  
20 loose so I had my feet sort of over the head - the  
foot - the side of the bed, and I got the tie off my  
feet and I went around the bed and out the door, my  
bedroom door, it was closed, and as I opened the door  
and went out there was somebody standing in the hall,  
25 and I know I screamed, and I got pushed back in the  
bedroom and I landed in the fire.
- Q. Okay, perhaps if you would just explain to the jury,  
please, before you left the bedroom you said this  
30 person set fire where? Where were the fires set be-  
fore you left the bedroom?



- 1 A. The clothes closets, and something on the floor. It was dark by this time and at the foot of the bed there was a fire started I think on the - at the foot of my bed. And then on --
- 5 Q. Would you point to --
- A. -- the side of my bed.
- Q. Would you point to, please, where you noticed fires were set?
- A. Here. Here. And here. And over here. And when I  
10 got my feet around this way I came out here.
- Q. Where was the person at this time?
- A. Had gone out and closed the door. And I got my feet  
15 down here on the floor and I came out this way and out the hall. There was somebody standing about - standing out in the hall, and I screamed, and I got pushed back in. The door was closed again. And I got up off the floor and I started out again to the  
20 hall - or I mean I got out into the hall again and he was still standing there, and I ran down the hall and into the girls' bedroom down the hall. I ran down into the girls' bedroom. It was smoke-filled and I stayed there a very, very short time and I knew that I couldn't stay there, I couldn't get out, and  
25 I knew I had to come back out into the hall and try to get downstairs. And when I come back out into the hall I did go downstairs, holding on to the railing, and I got to the bottom of the step and I sat down. And then I was sitting there when I could hear some-  
30 body breaking the glass in the back door and somebody called out "Anybody there?", and I said "Yes, I'm here at the foot of the stairs.". And two men

1           came in and I asked for a coat. I saw his coat and  
I said I wanted to put around myself which he gave me  
his coat, I wrapped it around myself, and he helped  
me out the front door and into the car. Police car.  
5           And they took me to the hospital.

Q.       Mrs. Flam could you tell the jury something, please,  
when you were trying to get out of your room could  
you tell us something about how far along the fires  
were? Could you feel or sense or see how far along  
10       these fires were?

A.       There was a lot of smoke and it was hard to breathe  
in my bedroom.

Q.       When you got pushed back in the bedroom what happened  
when you got pushed back in?

15       A.       Well, it was on fire and when I was pushed in I landed  
on the fire and I got up - up and out again for the  
second time, and this person was standing in --  
like it was just a short hall. There's the hall and  
then going right downstairs and there was a landing.  
20       And I ran down into the other bedrooms - other bed-  
room, and I couldn't stay there and that's when I  
decided I had to go downstairs, which I did.

Q.       How many people were you aware of there that night?

25       A.       One.

Q.       You went to the hospital Mrs. Flam?

A.       Yes.

Q.       Chatham and then the Fredericton Hospital?

A.       Yes.

30       Q.       How long were you in hospital?

A.       From the 29th of May until the 12th of September.

Q.       Of 1989?

A.       Yes.

- 1 Q. You had skin grafts done Mrs. Flam?  
A. Yes.
- Q. What parts of your body were burnt?  
A. My back. My hips. 40% of my body, third degree  
5 burns.
- Q. Did you have any other injuries or pain in addition  
to the fire?  
A. Well, it was all caused from the fire. And that  
night.
- 10 Q. And that night?  
A. Yes.
- Q. What do you mean by and that night?  
A. The rape.
- 15 Q. What, if anything, did this person say to you during  
this night about you yourself or your family? What,  
if anything, personal did he say?  
A. Oh. He seemed to know a little bit about my family.  
He asked - he said "You have a daughter, Nancy?" and  
I said "Yes.". And he said "She goes out with John  
20 Smith." And I said "Yes, she did." And he said  
"She's 23 years old." And I said "I have a daughter  
23" but at that time Nancy was 31. And yes, I had  
5 daughters. And at one time he did mention, I don't  
25 know why, something about "You rich people. You  
think you have everything your way.", or something  
like that. And --
- Q. If I could stop you there, please. You say about  
Nancy and who? Whose relationship was he talking  
30 about?  
A. John Smith.

- 1 Q. Who is John Smith?
- A. A school friend of Nancy's.
- Q. And was he actually going out with Nancy at that time?
- A. Well, she was in Halifax and he was in Chatham but
- 5 they were still very good friends.
- Q. Did they ever have a boyfriend/girlfriend relationship?
- A. Earlier, yes.
- Q. Okay, earlier, for how long?
- A. From grade 10 on. When they were both in grade 10.
- 10 Q. When would it have ended, the boyfriend/girlfriend relationship? Approximately.
- A. Maybe -- I'm not sure. A couple of years before.
- Q. A couple of years before this incident?
- A. Yes.
- 15 Q. And had John Smith and Nancy seen each other any time prior to this incident? Immediately prior to this incident.
- A. Yes, Nancy was home for the weekend.
- Q. That particular weekend?
- 20 A. That weekend, and she had gone back on the Sunday morning. Yes, Nancy and John were together on Saturday night.
- Q. But they were really no longer boyfriend and girlfriend?
- A. No. And they're still good friends.
- 25 Q. Did he ask you anything about yourself in terms of what you were now doing, whether you were working, or anything of that nature?
- A. He did ask me why I stayed around here, and he did
- 30 say, and these were the exact words, "Were you satisfied staying and getting pickings from Annie?".

- 1 Q. Stay around here after what Mrs. Flam?
- A. Well, I was all alone at the time. The kids were all in school, and I was home alone in my part of the house and I was helping Annie out in the store.
- 5 And this is what he said: you're content to have pickings from Annie.
- Q. You indicated earlier that you used to work at the liquor store in Chatham. What, if anything, was mentioned that night about that?
- 10 A. He asked me if I still worked at the liquor store, or if I still worked.
- Q. Mrs. Flam how long was that person there that night? This incident from the time it started until the time the two people come in and took you out? Do you have
- 15 any idea how long this occurred over?
- A. Well, yes, because it was after 11 and at one time he said "It's 5 o'clock and I'm not fooling around any longer."
- Q. And was it 5 o'clock?
- 20 A. Well, when I arrived at the hospital I did hear somebody say it was 4 o'clock, but 5 o'clock in May it might have been bright but it was still dark when they took me to the hospital.
- Q. This person spoke to you, you have indicated, while
- 25 he was there that night. Did the voice sound like anyone you knew?
- A. Well, I didn't know who it was.
- Q. You did or didn't?
- 30 A. Did not. And he did tell me his name was Gerald and the only Gerald that I ever heard of was a Gerald Dutcher but I didn't know him. I thought perhaps it might have been somebody that knew us because when he

- 1 knew the questions. He seemed to know the family.
- Q. Did the voice sound like anybody that you knew?
- A. Well, it sounded familiar but --
- Q. Was there anybody in particular perhaps that you told
- 5 the police that it sounded like?
- A. Well, there was a neighbor of ours and I thought perhaps it was the neighbor because he had been at the house and installed some lights - a light for me.
- 10 Q. And what was his name?
- A. John Marsh.
- Q. Did you ever see this person's face uncovered that night?
- A. No.
- 15 Q. Did you get any impression from that particular evening as to this person's approximate age range?
- A. Well, probably -- No, I would say about around forties or -- Well, to me that's a young man. I don't know --
- 20 Q. Do you know Allan Legere Mrs. Flam?
- A. No.
- Q. Have you ever had a conversation with him?
- A. No.
- Q. Have you ever seen him in person anywhere?
- 25 A. Twice.
- Q. Where?
- A. In the grocery store?
- Q. Whose grocery store?
- A. Ann's.
- 30 Q. And what was he doing? Was there anybody there at the time?

- 1 A. Ann was behind the counter.
- Q. Okay. What, if anything, unusual happened in relation to your premises before this particular night? Do you know of anything?
- 5 A. We -- Well, there's just the two women in the building and we always kept the doors locked, at the back especially, day and night, and one night I walked over to the door, my back door, and it was unlocked.
- 10 Q. How long before this night?
- A. A few weeks - couple of weeks. And I never left the door unlocked so I just locked it and went -- That was before I went up to bed so I locked the door and went upstairs.
- 15 Q. Mrs. Flam can you tell the jury who your attacker was?
- A. No.
- Q. What, if anything, was said that night by you or the person with respect to how he was treating you?
- 20 Q. Does the word 'torture' mean anything to you in relation to that night?
- MR. FURLOTTE: I think that's a little bit leading My Lord.
- MR. WALSH: Certainly it is My Lord.
- THE COURT: All right, go ahead Mrs. Flam.
- 25 MR. WALSH: Does that word mean -- did that word come up that night?
- A. Yes.
- Q. Would you tell the jury, please under what context?
- 30 A. He was standing by the dresser at the foot of the bed and he had just walked from the bed and over to the dresser and I said "You like to torture" and he said "Yes, I do."

1 Q. Did this person say anything else about anybody else  
that night that you can remember at this point?

A. At the beginning when he told me his name was Gerald  
and what he was looking for, and when he did mention  
5 looking for the money, wanting the money, he said  
that the bad guy would be blamed for it.

Q. Mrs. Flam I wanted to clear up some things just for  
the record, and certainly not for the jury but for  
the record. You have given some distances when I  
10 was questioning you earlier, and one of the distances  
that you gave was how far - you stopped me when I was  
at a particular distance. I would make that for the  
record My Lord, and I correct to be wrong, I make the  
distance that she stopped me from where she was to be  
15 approximately 4 feet.

THE COURT: 7 feet.

MR. WALSH: 7 feet. Excuse me My Lord.

MR. FURLOTTE: I had marked 6 to 8 My Lord.

THE COURT: You had 6 to 8. No, it was 8 feet. I have 7  
20 feet - 8 feet. No, I think that's --

MR. WALSH: I'm sorry My Lord. And it's difficult when  
you are assessing these. The other thing is the  
chain - the piece of chain that was coming off the  
other piece of chain. I made that at somewhere  
25 between 8 and 10 inches My Lord. I'll be corrected  
on that particular aspect.

MR. FURLOTTE: I observed about the same thing.

THE COURT: I couldn't see from here. That was the loose  
30 end of the chain hanging down?

A. Yes.



1 THE COURT: As I understood it there was a chain around  
the waist with a left-over piece sort of hanging  
down on the right.

A. Yes.

5 MR. WALSH: Mrs. Flam just some other matters just to  
clarify certain points. With respect to how you were  
addressed that night could you tell the jury what names  
he would use to address you?

A. He called me Nina and at one time he called me Mrs.  
10 Bernie.

Q. Mrs. Bernie?

A. Yes.

Q. Is that something that you have heard before, Mrs.  
Bernie, being addressed in that fashion?

15 A. Well, yes.

Q. There was a baseball cap found in your - back of your  
premises. Do you know whether or not there were any  
baseball caps or anything of that nature in your  
house?

20 A. Well not baseball but there were -- Well, peak caps.

Q. Peak caps.

A. Yes.

Q. Where did these come from?

A. Well, at the back closet there were caps. The girls  
25 collected them.

Q. You indicated that he was setting fires in your room.  
Could you tell the jury, please, how you could tell -  
how you knew that he was setting fires and where they  
were being set.

30 A. Well, he told me he was going to start a fire and my  
clothes closets had sliding doors and I could hear  
the sliding doors.

- 1 Q. And in relation to the bed and bed area what, if  
anything, could you tell about that?
- A. Well, I couldn't see but I could feel that he was  
setting the fire and there was smoke at the foot of  
5 the bed.
- Q. Could you smell anything when the fires were being  
set?
- A. Only smoke.
- Q. One final point, Mrs. Flam, you testified that he  
10 slapped you that night and you also testified he  
punched you, am I correct?
- A. Yes.
- Q. And when you refer to punch I take it you mean with  
a clenched fist?
- 15 A. Um-hmm.
- Q. What, if anything, did he ever do with the clenched  
fist other than punch you? Did he ever put the  
clenched fist anywhere other than actually striking  
you with it?
- 20 A. When he was raping me he hit me - where would it be?  
Well he was lying the opposite way and when I wouldn't  
do as he wanted me to, he would hit me with his fist  
which would be on this side of my body.
- Q. Other than actually hitting you, striking you with  
25 the fist, did he ever take the fist and put it on any  
part of your body without actually striking you?
- A. No.
- MR. WALSH: I have no further questions My Lord, thank you.
- 30 THE COURT: Thank you very much. The next step would be  
cross-examination by defence counsel but I think that  
we'll adjourn now for --

1 MR. WALSH: My Lord if I may impose on the court. I have  
asked Mrs. Flam this question before coming in here.  
She would prefer, and I stand to be corrected here,  
obviously it's in the discretion of the Court, her  
5 personal wishes would be to conclude the matter, if  
we could start into the cross-examination now.  
Obviously the discretion is in the Court.

THE COURT: Well, I prefer that myself but I felt perhaps  
she might want a break or something. How do you feel  
10 Mrs. Flam? Would you like to --

A. Continue.

THE COURT: Continue now and --

A. Yes.

THE COURT: -- get it all over with.

15 A. Yes.

THE COURT: And you will be through totally, utterly.

A. Yes.

THE COURT: This is satisfactory to the jury? You would  
prefer it that way.

20 MR. FURLOTTE: My Lord I don't wish to inconvenience this  
witness for sure but I feel this is a crucial witness  
I suppose to the defence, or for the defence, and  
personally I would prefer the noon recess to confer  
with my client and co-counsel before I begin cross-  
25 examination.

THE COURT: Well, I am not going to grant that Mr. Furlotte,  
I am directing you to proceed with your cross-  
examination now, if you wish to cross-examine.

30 May I ask this Mr. Walsh, I take it that what  
the witness has said was substantially covered in  
abstracts of her evidence.

1 MR. FURLOTTE: My Lord I have a special request for that  
and it's something I guess you probably don't want me  
to say in front of the jury as to why I would prefer  
to have this witness - have a short recess before I  
5 am able to cross-examine this witness. In order to  
finish my argument as to why it is necessary I think  
the jury would have to be excused.

THE COURT: Well let's have a very short recess now. We  
will have a very short recess now and then we will  
10 continue in about 10 minutes time. Mr. Sears would  
you escort Mrs. Flam out, please. And would the  
jury please retire for now. You will be called back  
in about 10 minutes.

(Jury excluded - 12:25 P.M.)

15 THE COURT: You didn't envisage a voir dire now or any  
discussion?

MR. FURLOTTE: Well, just one final point I would like to  
make, My Lord, is that as you are well aware I had  
requested an adjournment because Mr. Ryan was no  
20 longer representing Mr. Legere and part of his  
position was to handle the civilian witnesses and  
he was to prepare for the cross-examination of this  
witness, and since I have just taken on that chore  
in the past month along with all my other things, I  
25 feel it is necessary for me to consult with Mr.  
Legere, as I had him staying up all night last night  
to prepare for cross-examination of this witness,  
along with myself working last evening to prepare for  
cross-examination of the witness, and I think because  
30 of the short period of time that I had to prepare for  
this witness that I ought to be able to consult with  
Mr. Legere before we -- I'm not asking anything  
extraordinary.

1 THE COURT: No, no, we'll take 15 minutes now and do that.  
I make this observation that surely, Mr. Furlotte,  
you don't intend to harass, if I may use that word,  
this witness --

5 MR. FURLOTTE: Oh, My Lord, I'm going to be as --

THE COURT: -- because it would make it most -- Surely I  
don't have to tell you that it would make a most un-  
favorable impression on any jury to go after this  
innocent woman who has been a victim of a dreadful  
10 assault.

MR. FURLOTTE: My Lord the last thing I have intention is  
to harass or -- I want to be as accommodating to  
this witness as possible without prejudicing my  
client's rights to full answer and defence.

15 THE COURT: All right then, thank you.

{RECESS - 12:25 - 12:45 P.M.}

(Accused present.)

THE COURT: Just before Mrs. Flam returns I want to give  
the same admonition to those, please, in the public  
20 gallery. Please don't turn around and stare. Keep  
looking this way until she comes up.

MR. FURLOTTE: My Lord before the witness comes back and  
the jury comes in I would like some directions from  
the Court. I would like to advise the Court and the  
25 crown at this time that sometime during the cross-  
examination of Mrs. Flam I would like her to view  
pubic hair of Mr. Legere. Now that can be done one  
of two ways, at least; there might be three more  
that maybe you can think of. Either we could ask  
30 the witness to come over and Mr. Legere could either  
just pull his pants down, not to show his privates

1 but just to show the pubic hair, or we could have  
police officers cut some pubic hair off Mr. Legere  
this morning, bring it over to the witness to view  
in that respect, in a container and we could enter  
5 that as an exhibit.

THE COURT: Well, that's one of the most fantastic  
suggestions I've ever heard made during a trial.

MR. FURLOTTE: Well, My Lord, I believe --

THE COURT: She has described - she has said in her evidence  
10 so far that she saw light brown pubic hair.

MR. FURLOTTE: She says light brown -- In her evidence  
today she says light brown pubic hair. I have in  
her statements where at one time she describes it as  
maybe blond, even gray, but definitely very light in  
15 color. Not black or not dark brown. And she even  
described it as comparing it to Police Officer Kevin  
Mole's. Definitely not as dark as your hair, which  
is the hair on Kevin Mole's head mind you. So I  
want - I believe that the jury should be able to have  
20 the privilege of her comparing Mr. Legere's actual  
pubic hair to the pubic hair that she saw so that we  
feel that she can definitely distinguish and eliminate  
Mr. Legere.

THE COURT: Well, without hearing the crown on this  
25 matter -- Do the crown have any representations?

MR. WALSH: Oh we object strenuously to this My Lord.

THE COURT: Well, without hearing from you I am not going  
to do that actually. You can ask her, Mr. Furlotte,  
30 about the color - this matter of the color and if  
she has on some earlier occasion said it was a  
different color with some gray in it or something,

1 you can remind her of what she - or ask her if on  
some earlier occasion she said so and so and you can  
ask her about it.

5 Here is a woman who - or a witness who says that  
she was lying in a bed, her hands tied behind her  
back, her feet tied, tied to the bed, raped under  
these circumstances, a pillow over her head, her  
glasses off, you know, it might not be too difficult  
10 to establish well she didn't really have very much  
opportunity to notice what color pubic hair was.  
But as far as getting down to a fine distinction in  
color, whether it was yellowish-brown, or purplish-  
brown, or whatever the range of colors is in the  
rainbow for brown, but I am not going to get into  
15 a sordid business of exposing one's private parts in  
a courtroom. That's utter nonsense.

MR. FURLOTTE: Well, I don't think pubic hair is that  
private a part. At least it's not - got nothing to  
do with the testicles. It's just hair in that  
20 general area. And my concern is that from the --

THE COURT: How could you go out and cut 10 pubic hair out  
and bring it in an envelope and show it to the witness  
and say is that the hair that you saw or the same  
hair. How can you --  
25

MR. FURLOTTE: Is this color or could you definitely say it  
is not this color.

THE COURT: Well, you have got to see the whole thing to  
form any opinion as to color.

30 MR. FURLOTTE: You got to see the whole thing. Well I'm  
sure, My Lord, that the crown is going to be arguing  
again well maybe she could be a little mistaken in

1 the color because, you know, under the circumstances  
pillow over her head, but evidence from her is that  
she distinctly saw the pubic hair because there was  
oral sex involved and --

5 THE COURT: Well, you ask her about it and you cross-examine  
her about the color if you wish to do and, you know,  
it's open to you to establish or try to establish,  
and it's very possible you can, that she didn't really  
have the opportunity to form a very firm opinion as  
10 to what color. Here was a room that was in semi-  
darkness I gather, or it wasn't a well lit room.

MR. FURLOTTE: My Lord the position of the defence is that  
I want to establish that she had a good opportunity  
to view the pubic hair of her assailant, that the  
15 lights were on, that she was extremely close enough  
to the pubic hair to view it, even with take her  
glasses off to view the hair. I want to eliminate  
all the crown's possible arguments. And this is  
evidence that would exclude Mr. Legere as her  
20 attacker and I think I somehow or other with - at the  
least bit of embarrassment to the witness - that we  
ought to be able to provide this type of evidence on  
cross-examination and full answer in defence.

25 THE COURT: Does the crown have any representation to make?

MR. WALSH: Yes, My Lord. My colleagues, My Lord, and I  
don't wish to delay this any more, particularly with  
Mrs. Flam, but before we provide a response to you I  
was wondering if you would grant us a couple of  
30 minutes, at least no more than two minutes, just to  
formulate our thoughts on the request. This is the  
first we have heard of it and we would like to  
address it. Our reaction is that we strenuously



1 object. We would like to formulate our ideas in  
terms of our position.

THE COURT: Put your heads together there for two minutes  
and we will sit here. (Pause.)

5 MR. WALSH: Thank you My Lord. My Lord our position is  
this. We object, obviously, to exposing the pubic  
hair in the courtroom as that is just a suggestion  
that it doesn't require comment on, particularly the  
effect on Mrs. Flam I think is the inference to be  
10 drawn by everyone. With respect to showing her bits  
of hair, I mean that doesn't give a picture of any-  
thing in terms of trying to assess what's done. The  
third suggestion would be to photograph that particula  
area of Mr. Legere and show it to her but, again, we  
15 come back to the question, My Lord, that we cannot  
mimic the circumstances and the situation that she  
was facing on that particular night. That's for Mr.  
Furlotte in cross-examination but not in any kind of  
stuff - demonstrations that they think that they have  
20 a right to rely on. We cannot mimic those particular  
types of circumstances so this kind of experiment is  
something that is just completely not relevant. It  
just has no firm foundation. He can actually cross-  
examine Mrs. Flam with respect to those particular  
25 aspects but we cannot mimic the circumstances she  
was under that particular night. So we take strong  
objection to any kind of a hair line-up as Mr.  
Furlotte would like to provide.

30 THE COURT: Well, I am going to direct that the cross-  
examination in that regard must be limited to oral,  
verbal cross-examination. I am sure that can clear

1           it up. One has to have regard here for all the  
circumstances, the darkness. You know. Even if  
she says it was light brown hair that - she may be  
right. Defence counsel may very well undermine her  
5           statement in that regard and she may readily admit,  
you know, that well she didn't have all that  
opportunity, or she may be positive about it. If  
you want to say what do you mean by light brown ask  
her if it's the color of Mrs. Brewer here in front,  
10           the court reporter.

          There was the other question we talked about in  
voir dire yesterday about the questioning in another  
field here. I take it there is not really much need  
for that, is there, or what is your position there  
15           Mr. Furlotte? You were talking about the hypnosis  
examination and so on. Has her evidence so far --

MR. FURLOTTE: No, it does not.

THE COURT: Her evidence hasn't been --

20           MR. FURLOTTE: I don't think we will have a problem with  
the hypnosis.

THE COURT: No. Well I thought that that problem would  
probably disappear. Okay, Mr. Sears, and please in  
the back look this way.

25           MR. WALSH: Perhaps the motion Mr. Furlotte made and the  
arguments we have just made, My Lord, perhaps we  
should remind the people present that that was in  
the absence of the jury.

THE COURT: Of course. That was at a voir dire session  
and shouldn't be reported.

30           (Jury called. All present.)

1 THE COURT: Now, cross-examination by Mr. Furlotte.

CROSS-EXAMINATION BY MR. FURLOTTE:

Q. Well, Mrs. Flam, I would like to advise you that I  
5 am not going to be too hard on you and just ask you  
to just try and remember things the best you can and  
to maybe sometimes as to what you may have told the  
police officers at first when you first gave your  
statements so just try to relax.

10 Mrs. Flam it appears from your testimony today  
that whoever attacked you did a lot of talking to  
you. Would that be safe to say?

A. Yes.

Q. He did talk a lot, did he not?

15 A. Yes.

Q. And during the police investigation they provided,  
I believe, four tapes of four different men for you  
to listen to?

A. Yes.

20 Q. Is that right?

A. Yes.

Q. And on those tapes I believe you were not able to  
positively identify anybody as being the - the voice  
being similar to the one that you had heard that  
25 evening.

A. No.

Q. But one of the tapes did sound similar?

A. Yes.

Q. And were you told who that tape belonged to?

30 A. No.

Q. Were you told that the tape with Allan Legere was not  
the one that you identified?

A. No.

- 1 Q. So the police didn't tell you anything?
- A. No.
- Q. Okay. That's fair. Now, to stay at that voice for  
a while Mrs. Flam, when you are attempting to identify  
5 I guess the age of the individual you are simply  
going by the sound of the individual's voice, is that  
not right?
- A. Yes.
- Q. You didn't see his face that you could give any  
10 distinguishing characteristics?
- A. The only time that I saw the face he was wearing a  
mask.
- Q. He was wearing a mask.
- A. Yes.
- 15 Q. And I believe that was a ski mask with the full face  
cut out?
- A. Yes.
- Q. But even though the full face was cut out you could  
not make any distinguishing characteristics?  
20
- A. I couldn't see that well.
- Q. As to the nose or the color of the eyes?
- A. No.
- Q. Or as to --
- A. My face was covered.  
25
- Q. Pardon?
- A. My face was covered with a pillow.
- Q. But at one time the pillow slipped off --
- A. Yes.
- 30 Q. -- and you were able to see that the face mask was  
cut out?
- A. Yes.

1 Q. So when you say that the individual may have been in  
his forties that's just a wild guess.

A. Yes.

5 Q. Again, when you say and told people that the man was  
slight build he would have been narrow shoulders  
also?

A. I didn't see his shoulders.

Q. You saw his face but you didn't see his shoulders.

10 A. With his clothes on. I just caught a glimpse of his  
shoulders and --

Q. So it would have been difficult to tell --

A. Yes.

Q. -- from just a glimpse?

A. Yes.

15 Q. Okay, that's fine.

THE COURT: Just in that regard, are you talking about  
bare shoulders? Do you understand the question to  
be --

20 A. Yes.

THE COURT: Did you see the bare shoulders?

A. No, I didn't.

MR. FURLOTTE: You didn't see the bare shoulders?

A. No.

25 Q. But you did see his shoulders with his clothes on?

A. Just a glimpse, yes.

Q. Yes. And he still appeared slight to you?

A. Yes.

Q. Not a big man?

30 A. No.

Q. Now, I believe people - when people talked to you,  
be they police officers, some people tried to maybe  
convince you that it may have been Allan Legere?

A. No.

- 1 Q. No. You have told the police officer that the individual was not as big as Allan Legere.
- A. I didn't know Allan Legere. I don't know Allan Legere.
- 5 Q. Do you recall telling the police officer that the man was not as big as Allan Legere?
- A. No, I haven't. Was that when I was in the hospital?
- Q. That would have been the first interview at the Chatham Hospital, Mrs. Flam, with the first police officer who interviewed you at the Chatham Hospital.
- 10 THE COURT: I'm sorry, just what was the question? What was the question?
- MR. FURLOTTE: Do you recall telling the police officer that the individual wasn't as big as Allan Legere?
- 15 THE COURT: This was at the Chatham Hospital on the night this incident occurred.
- MR. WALSH: It wasn't at the Chatham Hospital My Lord. If he's referring to an incident with Constable Houde that would have been at the Fredericton Hospital and that would have taken place on May 29th.
- 20 MR. FURLOTTE: I'm sorry.
- THE COURT: I didn't think it was possible that night at the Chatham Hospital. So we're talking about May 29th at the Fredericton Hospital.
- 25 MR. FURLOTTE: May 29th, Fredericton Hospital.
- THE COURT: And your question is?
- MR. FURLOTTE: I asked her if you recall telling the police officer that the individual --
- 30 A. No, I don't.
- Q. You don't recall.
- A. I don't recall.

1 MR. WALSH: I would like, My Lord, if I could to clarify  
it so we don't misread it, I would ask that perhaps  
Mr. Furlotte read the particular provision to the  
witness, the whole part of what she apparently said.

5 MR. FURLOTTE: I could read the question and answer maybe  
to the witness.

THE COURT: Yes. Was this in question and answer form?  
Was this a statement taken?

MR. WALSH: This was a transcript of a tape.

10 THE COURT: Well why don't you read that slowly to Mrs.  
Flam and then you can ask her, Mr. Furlotte, if she  
recalls having said that. This is a transcript made  
from the tape recording of the interview?

MR. WALSH: Yes.

15 THE COURT: And then if there are discrepancies between  
what she says now and what she said then you can  
ask her to explain it.

MR. FURLOTTE: This is on page 6 of the transcript. The  
question the officer asked you, Mrs. Flam, was --

20 THE COURT: Do you know who the officer was?

MR. WALSH: Constable Houde. H-o-u-d-e.

THE COURT: Do you know what the incident was Mrs. Flam?  
Do you remember Constable Houde interviewing you  
there?

25 A. No.

MR. FURLOTTE: Okay, maybe if I put the question to you or  
something it might jog your memory. The question  
says: "So can you tell us anything about his voice  
or --" And your answer was: "Well, not really.  
30 Somebody I told a while ago - boys in Chatham said  
was it Allan Legere, and I said I don't think so

1           because he didn't seem big enough for I haven't seen  
Allan Legere for years so I don't know."

          Do you recall that conversation?

A.       No, I don't.

5       THE COURT: Can you get that ventilator turned off? Would  
          you like to go through it again?

MR. FURLOTTE: I will just go on with the next question the  
          police officer put to you: "Did you know Allan?"  
          And your answer: "Not really. Just to see him in  
10       pictures." Is that correct?

A.       Yes. That's right.

Q.       I understand your testimony earlier today was that  
          you saw him in the store on what - 2 occasions?

A.       Yes.

15       MR. WALSH: Mr. Furlotte is not reading the whole part.

MR. FURLOTTE: I will finish it My Lord. And the question:  
          "See him in pictures.", and your answer was: "And  
          seeing him on the street." So you saw --

20       THE COURT: Yes, but go through the whole thing and then  
          come back.

MR. FURLOTTE: Question: "But the fellow that" - and it's  
          just marked e-n-t here, entered I suppose, "entered  
          your house last night?" Your answer was: "I felt  
25       he was smaller."

A.       I don't --

Q.       So you can see Mr. Legere in court today, and would  
          you please stand up Mr. Legere. Now, do you still  
          feel that the individual who attacked you was smaller  
30       than Mr. Legere? Can you see him?

A.       I don't know.

Q.       You don't know?

A.       No.



1 Q. I believe also in your references to the police you  
may have said that the individual was smaller than  
Junior Marsh. Do you recall that?

A. I don't know a Junior Marsh.

5 Q. You don't know a Junior Marsh. Or was it just a  
Junior?

A. Junior?

Q. Do you know anybody named Junior? Maybe I have the  
last name wrong.

10 MR. WALSH: My Lord perhaps we could clarify this problem  
one of two ways. First of all perhaps she could be  
asked of the circumstances under which she apparently  
made this statement so that she can bring her mind  
to it, and then if he is intending to ask her about  
15 something that she actually said perhaps she should  
be asked the exact thing that she apparently said.

THE COURT: Well, if there has been - if she has given  
evidence here that might be in conflict in some  
regard with something said earlier, the proper way  
20 to do it, of course, is to remind the witness of the  
place, the time, the circumstances, who was present  
and so on when the earlier interview took place or  
the statement was made and then, of course, to read  
what was said at that time to the witness, in full,  
25 and in its proper context, and then ask the witness  
do you agree with that or if there is a discrepancy  
how do you account for the discrepancy.

MR. WALSH: That's it. You put it in better words than  
30 myself, My Lord, but that's what I would like to see  
happen.

THE COURT: Well that's the proper procedure that I'm  
describing.



1 MR. FURLOTTE: Yes, My Lord, and then --

THE COURT: For referring back to it.

MR. FURLOTTE: Of course I don't want Mrs. Flam to feel  
that I am badgering her and I'm trying to be as  
5 gentle with her as possible, and sometimes the old  
method might be a little too rough. It's almost as  
if -- The old method it's almost as if I'm accusing  
her of lying rather than -- I mean she went through  
a traumatic experience and it's reasonable that she's  
10 going to forget some things - some things that she  
said.

THE COURT: Well just follow that procedure that I  
recommended. You know Mrs. Flam is - she's --  
Us old geezers are a little thick-skinned you know  
15 sometimes. We can handle these situations. I'm  
sorry to have said that Mrs. Flam, I didn't mean to  
include you.

MR. FURLOTTE: Mrs. Flam I understand he asked you if you  
20 knew who he was.

A. Yes.

Q. And you said no, that he - then he told you that he  
was Gerald and he lived down by Kerrs.

A. Right.

Q. And do you know anybody by the name of Kerr?  
25

A. By Kerr?

Q. Yes.

A. I know the Kerr construction people, yes.

Q. Where do they live?

30 A. Well the construction place is down on Wellington  
Street and the family of Kerrs also live on  
Wellington Street. Fraser Kerr. He just died last

- 1 year. I know where they live and I know where the construction is. And I do know of the Kerr family.
- Q. Now, the voice I believe you said sounded familiar to you?
- 5 A. Well, yes, sounded like a Miramichier.
- Q. And it sounded like one of your neighbors, John Marsh, I believe you testified to.
- A. Well, that was what I thought of at the --
- Q. That was at the time?
- 10 A. At the time, yes.
- Q. You thought it was John Marsh.
- A. Yes.
- Q. And up until you gave all the police statements you continued - say up until the end of 1989, November of
- 15 1989, you continued to think it sounded like John Marsh?
- A. No. At the moment, that evening one time I thought it sounded like John Marsh but not the whole evening, no.
- 20 Q. Do the Marshs all have a - well maybe it sounds like a Chatham voice the way you put it, but kind of an accent? They talk a little differently. Kind of a twang to their voice. Sometimes like you can tell maybe a Newfoundlander. They have a distinct accent
- 25 or twang to their voice or like --
- A. Well, yes.
- Q. People from England, like Mr. Allman here.
- MR. ALLMAN: She has never heard my voice.
- 30 Q. People from the Jacket River area. You can almost tell the area that they are from because of the distinct - I won't say vocabulary but --

- 1 A. Well he sounded local.
- Q. He sounded local.
- A. Yes. And when he --
- Q. He sounded like the Marshs. What particular reason  
5 did you feel that it sounded like John Marsh?
- A. Well he had been in my house a few days - a week or  
so or a few days before that putting in a light  
fixture.
- Q. Putting in a light fixture?
- 10 A. Yes.
- Q. And does he have any brothers?
- A. Yes. I don't know them. I know to see.
- Q. Does John Marsh abuse or use alcohol? Do you know  
whether or not he drinks?
- 15 A. Well, I really don't know. I don't know what you  
mean by abusing it.
- Q. Now, Mrs. Flam, is it not true that you really don't  
want to say that it sounded like John Marsh because  
you don't want to accuse - point a finger at some-  
20 body who may be innocent, is that right? If you're  
not certain that that's who it is.
- A. I'm not certain. No, I'm not certain.
- Q. No, and that's fair. And because you are not certain  
you don't like to imply that it may be John Marsh,  
25 is that right, or maybe even sounds like John Marsh?
- A. I don't want to accuse anyone.
- Q. This person told you he needed \$3000.00 to get an  
abortion for his girlfriend?
- A. Right.
- 30 Q. Could you tell if that person was drinking?
- A. Pardon?

- 1 Q. Could you tell if that person was drinking? The man who attacked you.
- A. Shortly after he come up the stairs he said "I just had a drink of whiskey."
- 5 Q. And could you smell liquor off him?
- A. Yes.
- Q. And did you tell him that you had any money?
- A. I told him what I had. I said "No, I don't have money."
- 10 Q. You told him what - you had \$60.00 in your purse?
- A. Right. Yes.
- Q. Did he even take the \$60.00?
- A. I don't know.
- Q. Where was your purse that night?
- 15 A. My purse ws on the chair and my bank book was on the corner of the dresser.
- Q. And what color was your purse?
- A. Gray. Gray leather.
- Q. Basically, you had the impression that this man was after money?
- 20 A. Yes.
- Q. And I believe you told the Court that there was no money in the house but if there was any money there would be some in a dresser in a bedroom.
- 25 A. Yes.
- Q. And where was that bedroom supposed to be?
- A. Second bedroom upstairs in Annie's house.
- Q. In Annie's house?
- 30 A. Yes.
- Q. Now, Mrs. Flam, I believe maybe you could point out the bedroom that you mean.

- 1 A. This one right here.
- Q. That would be in that bedroom there. Okay.
- A. If that's the window it was right under the window,  
and then there was one dresser here.
- 5 Q. One dresser here.
- A. Two. Two --
- Q. I take it you explained that to him the best you  
could?
- A. Yes.
- 10 Q. And what I get from your evidence is that at least it  
appears as if he went looking for it.
- A. Yes.
- Q. And he come back and he told you he couldn't find  
it.
- 15 A. Yes.
- Q. And he thought that you were lying to him.
- A. Yes.
- Q. And, again, for some reason or another he thought  
the Lotto six forty-nine machine was a safe.
- 20 A. Yes.
- Q. Did this individual seem very bright?
- A. Yes.
- Q. But yet he couldn't find any money in the house.
- A. Well, there wasn't money in the house. There was  
25 not a lot of money in the house.
- Q. I believe the police officer testified earlier that  
there was - they found somewheres between 3 and \$5000.  
in the house after the fire. Were you aware of that  
amount of money being in the house?
- 30 A. No.

- 1 Q. Now, you mentioned that he hit you a couple of times.  
A. Yes.  
Q. With his fist?  
A. Yes.
- 5 Q. And I believe on the chin you said that he hit you on.  
A. Yes.  
Q. Which chin was it?  
A. Oh, I don't remember. I know I was hit.  
Q. You were hit.
- 10 A. Yes.  
Q. Do you remember in direct examination you brought your hand up to the right side of your chin.  
A. Yes. Well, at one time, yes, because that's the side he was on, the side of the bed he was on.
- 15 Q. And you said he hit you also, was beating on you while he was raping you?  
A. Yes.  
Q. And that would have been while he was on top of you?  
A. Yes.
- 20 Q. And do you recall where he was hitting you then?  
A. Well, he had his hand back and was hitting me so it would be somewhere around here. The right-side of my body.  
Q. That side of you.  
A. The right side of my body, yes.
- 25 Q. The right side of you he was hitting you?  
A. Yes. My right side.  
Q. Your right side?  
A. Yes.
- 30 THE COURT: You are indicating your buttocks area - hip area - or higher up?



- 1 A. Anywhere. Higher up and anywhere.
- Q. So he would have been hitting you with his left hand if he was on top of you?
- A. No. It would be his right hand.
- 5 Q. He was on top.
- A. He was the other way.
- Q. He was the other way.
- A. Yes.
- Q. You mentioned once in your testimony that you
- 10 thought you saw him put something in a bag.
- A. Yes.
- Q. Did you see the bag?
- A. The bag that I thought that it was was my gray leather purse and it was a soft leather and the
- 15 purse came from Spain, and it had a strap. It was a shoulder bag. But I just felt that what he was doing was putting something in that bag.
- Q. Putting something in that bag.
- A. As I said before, I had a pillow over my head. I
- 20 couldn't see everything.
- Q. And at one time you mentioned that he came back and because he couldn't find the money he was getting upset, was he not?
- A. Yes.
- 25 Q. And because he couldn't find any money he was beating on you, am I right?
- A. Yes.
- Q. And from what I understand of your testimony that
- 30 this individual told you that if you don't tell me where the money is I'll rape you.
- A. Yes.

- 1 Q. And of course you weren't able to tell him where  
money was because you didn't know.
- A. That's right.
- Q. Now, you mentioned this individual had a chain around  
5 his waist.
- A. Yes.
- Q. And you were able to get a good look at the chain.  
He had his pants what - down at that time?
- A. Yes.
- 10 Q. And the chain had been underneath the pants?
- A. Yes. Well, it was around his waist.
- Q. Around his waist and there was a portion about 8 - 10  
inches hanging down. Did the chain go all around  
the waist and then another portion of 8 to 10 inch  
15 hanging down?
- A. Yes. Well, I don't know if it was 10 inches. It  
was a piece of chain.
- Q. A piece of chain hanging down, and you say you saw  
something kind of square --
- 20 A. Yes.
- Q. -- on this?
- A. Yes.
- Q. And where would that square piece have been on the  
chain, do you recall?
- 25 A. Around the waist.
- Q. Do you recall when you were talking to Kevin Mole  
you said that your attacker was definitely not as  
big as Mr. Mole?
- 30 A. When did I say that?
- MR. WALSH: Again, My Lord, I would like that particular  
provision -- she is inquiring -- I would like it put  
to her.

1 THE COURT: Yes, is there some basis for that in one of the  
abstracts?

MR. FURLOTTE: Well, My Lord, maybe I could save the court'  
time if I leave that for a minute because I have this  
5 thickness of statements to go through later and I'll  
find it in there later on, but maybe if I just go  
through the notes that I took on her direct examina-  
tion I can get back to that later. I thought maybe  
this witness would have known right offhand that she  
10 did remember.

THE COURT: All right.

MR. FURLOTTE: It's just that I don't want to waste the  
court's time that everytime she can't remember some-  
thing that I have to run through a hundred pages of  
15 typed transcript to find it. I'm not as sharp as some  
of my crown prosecutor friends.

THE COURT: Perhaps can the crown help Mr. Furlotte with  
the statement?

MR. WALSH: Well, My Lord, all I am trying to do is be  
20 assured that what Mr. Furlotte in fact says she said  
is correct. That he hasn't misunderstood it or mis-  
quoted it. That's the only thing.

THE COURT: I mean as far as finding the page that Mr.  
Furlotte finds it difficult to find. Do you know  
25 where it is? I mean perhaps you can help.

MR. WALSH: Well, the problem is I don't know if what he  
gave her was a direct quote from anything. That's  
what I'm trying to find out.

30 THE COURT: Are you quoting from --

MR. FURLOTTE: Well it's probably paraphrased somewhat. I  
wouldn't call it a direct quote but it is to the  
point.

1 Mrs. Flam I believe on direct examination you  
told Mr. Walsh that you were only aware of one person  
there that night?

A. Yes.

5 Q. Could another person have been in Annie Flam's  
apartment without you hearing anything?

A. Yes.

Q. And you said when there was fires lit in your bedroom  
this person told you he was going to light the fires?

10 A. Yes.

Q. And that person is the person with the chain around  
his waist?

A. Yes.

15 Q. And I believe you described his pubic hair as being  
what - light brown?

A. Light, yes.

Q. Pardon?

A. Yes.

20 Q. Light brown. Could that light brown also have been  
blond or even gray?

A. Yes.

25 Q. Now, when you say light brown do you mean something  
the color of my hair? Light blond, brown-gray, some-  
thing the color of my hair?

THE COURT: We may have to put you in as an exhibit.

MR. FURLOTTE: Well sometimes I think I would be better  
off there My Lord.

30 Would it be similar to the hair on my head or  
maybe yours, or --

A. It's hard to say. Your hair looks more gray.

1 Q. Everybody tells me that. But did you mention that it  
could have been gray?

A. Not gray, no.

Q. Not gray. Blond?

5 A. Just light. That's all I know.

Q. Just light?

A. Light.

Q. Definitely not black?

A. Not black, no.

10 Q. And not dark brown?

A. Well, I don't know. I don't have a color chart, I  
don't know.

Q. Do you remember the color of Kevin Mole's hair?

A. Now? Yes.

15 Q. Is he back there? Not the color of his hair, is it?  
Kevin Mole's.

A. No.

MR. WALSH: Perhaps, My Lord, I don't know if the jury  
20 knows who Kevin Mole is.

THE COURT: Yes, I just missed that for a minute but I  
gather that the witness recognized Kevin Mole, did  
you Mrs. Flam?

A. Yes.

25 THE COURT: Which gentleman is he?

MR. FURLOTTE: The only one standing, besides myself.

THE COURT: For the record he's got dark brown hair.

MR. FURLOTTE: Kevin Mole, Mrs. Flam, is a police officer  
who took a statement from you?

30 A. Yes.

Q. On one or two occasions?

A. Yes.

- 1 Q. Now this individual that you were talking to that attacked you that night, Mrs. Flam, he appeared to know a little bit about your family but not a whole lot, is that correct?
- 5 A. Well, he -- What he said about my family was right. The only thing was he said Nancy was 30 - and Nancy was 23, and my answer was yes I have a daughter 23.
- Q. But it wasn't Nancy?
- 10 A. No.
- Q. No. So he thought it was your 23 year old daughter that was going out with John Smith. Or did he think Nancy was 23?
- A. Nancy is a very young looking girl. Very young looking
- 15 girl. And at the time she was 31.
- Q. At the time she was 31.
- A. She's 33 now.
- Q. This individual thought Nancy was 23?
- A. Well he just said she's 23.
- 20 Q. And he thought maybe she was still going out with John Smith.
- A. Yes. He asked if she was still going out with John Smith.
- Q. Because John Smith and Nancy I believe went out that
- 25 weekend.
- A. Yes.
- Q. Did he appear that he might be interested in Nancy?
- A. No.
- 30 Q. That was just the questions that he asked?
- A. Yes.

- 1 Q. Now, you mentioned you saw Mr. Legere I believe you  
said twice before in the grocery store?
- A. Yes.
- Q. And do you recall how long ago that was?
- 5 A. Oh --
- Q. In the '70's or '60's? '80's?
- A. It would be the early '70's.
- Q. Early '70's.
- A. My husband was still alive so it would have to be  
10 the early '70's.
- Q. Early '70's?
- A. Yes.
- Q. I assume a lot of people went into Annie's store?
- A. Yes.
- 15 Q. Chatham is a small town?
- A. Yes.
- Q. You mentioned something about maybe a couple of weeks  
before this incident that your back door was unlocked,  
20 You noticed your back door unlocked one night.
- A. Yes.
- Q. Was that before you were going to bed?
- A. Yes.
- Q. And you don't know how that door got unlocked or was  
left unlocked?
- 25 A. No.
- Q. Could it have been a couple of months before?
- A. No.
- Q. There was nothing missing at that time?
- 30 A. No.
- Q. So you just could have forgot to lock the door?
- A. My door was always locked, day and night.

- 1 Q. Did anybody else use your --
- A. There was nobody home at the time, no.
- Q. So are you suggesting somebody had a key to your apartment?
- 5 A. No.
- Q. Now, this individual who attacked you told you his name was Gerald and he lived around Kerrs?
- A. Yes.
- Q. And that he needed money for his girlfriend's
- 10 abortion.
- A. Yes.
- Q. And that he told you he was going to kill you, burn the house down, make it look like an accident?
- A. Yes.
- 15 Q. And he also told you that he wasn't worried about it because they were going to blame it on the bad guy.
- A. Yes.
- Q. And when he said they were going to blame it on the bad guy he meant Allan Legere?
- 20 A. He didn't say. He just said the bad guy.
- Q. But you assumed at the time that he meant Allan Legere, is that right? Didn't you assume at the time that he meant Allan Legere?
- A. Yes. Yes.
- 25 Q. But yet at the last minute after he lit the fire and before he left the residence he decided to untie you so you could - or at least for whatever reason it was he decided to untie you?
- A. Yes.
- 30 Q. And you ran out right behind him?
- A. Not right behind him, no.



1 Q. Not right behind him. But when you run out he didn't have time to get out of the apartment yet and you run face on into him.

A. I think he was standing there waiting to see - until  
5 the smoke got - until the fire was really going. He was at --

Q. Okay, you think, but you are not sure why he was there but he was out in the hallway --

A. Yes, he was in the hall.

10 Q. Maybe we could have the pointer again. I believe this is your bedroom over here.

A. Yes. Okay, there's my bed. I got out on this side and came around this way. There was a fire going here. There was a fire on that side of my bed; and  
15 a fire in the clothes closets. And I came out into the hall, and he was standing there.

Q. He was standing there. And when he saw you come out he pushed you back in?

A. Yes.

20 Q. And then when he pushed you back in you fell into the fire?

A. Yes.

Q. And then you got up again and come out again?

A. Umm.

25 Q. And when you come out the second time he was gone?

A. No.

Q. He was there again the second time?

A. Still there. Not again but still.

30 Q. And what did you do then?

A. I went down - ran down the hall to the - one of the--

Q. You ran down the hall into - down this hall? Which hall did you run down?

- 1 A. Yes, down here and down this hall and into this  
bedroom.
- Q. Into that bedroom.
- A. Yes.
- 5 Q. And he didn't come after you?
- A. No. I didn't see him, no. So then I came back this  
way and went down the stairs.
- Q. I believe in your direct testimony you said once you  
got down to the girls' bedroom you stayed there for  
10 a very, very short period of time and then --
- A. Yes.
- Q. You knew you had to get out so you went back.
- A. Yes. I went down the stairs.
- Q. And when you went down the stairs the second time --
- 15 A. Yes.
- Q. Or when you went down the stairs whoever attacked  
you was gone at that point?
- A. Yes.
- Q. So he got out, I would imagine, before you did.
- 20 A. I didn't see him.
- Q. There was no reason for you to believe he was still  
upstairs?
- A. No. He was on the - at the head of the stairs so --
- Q. Yes.
- 25 A. And the place was filled with smoke. And there was  
too much smoke for me to stay in the bedroom so I  
came out of the bedroom, back through the hall, and  
then down the stairs, and I did not see anyone.
- 30 Q. Now, Mrs. Flam, I believe you stated Annie usually  
closed the store at 11 o'clock at night?
- A. Yes.

1 Q. 7 days a week?

A. Yes.

Q. And is it possible that somebody could have snuck  
5 into the store earlier and hid until Annie would have  
locked up?

A. It's possible, yes.

Q. So whoever attacked you possibly could have been in  
the store before 11 o'clock?

A. Well, yes, if they snuck in, yes, but I didn't see  
10 anyone.

Q. Now, I suppose when we're looking at all kinds of  
possibilities it's possible that there was more than  
one individual in the store and there could have been  
somebody over in Annie's apartment while this person  
15 was attacking you.

A. I don't know.

Q. But that's possible. As far as you know it's  
possible?

A. As far as I know it's possible, yes.

20 Q. Now, when I read -- If you recall I read from the  
statement that you gave to Constable Houde from the  
Chatham - I believe it was the Chatham Police  
Department, or R.C.M.P.?

25 MR. WALSH: R.C.M.P.

MR. FURLOTTE: R.C.M.P. in the hospital in Fredericton.  
When I said -- The question was on page 6: "Can  
you tell us anything about his voice or--", and your  
answer was: "Well, not really. Somebody I told a  
30 while ago - boys in Chatham said was it Allan Legere."  
Who do you mean by the boys in Chatham? Is that the  
Chatham Police asked you was it Allan Legere?

1 A. I don't -- That was in the hospital in Fredericton?  
Q. In the hospital in Fredericton.  
THE COURT: What would the date be?  
MR. FURLOTTE: That would have been May 29th.

5 A. I don't know.  
Q. You don't recall that?  
A. Not on May 29th, no.  
Q. Okay. If you were referring to the boys of Chatham  
asked was it Allan Legere can you think of who you  
10 would have been referring to as the boys?  
A. No. But on May 29th I didn't know what I was saying.  
Q. Now, when you said that the individual sounded like  
a Chatham boy, when you listened to the tapes, the  
four tapes the police officers played to you for  
15 identification, how many of those tapes sounded like  
Chatham boys?  
A. I don't remember the sound.  
Q. You don't remember listening to those tapes?  
A. I remember listening but -- Was that while I was  
20 in the hospital?  
Q. Yes, while you were in the hospital on May 29th.  
A. Oh.  
Q. Oh no, when the tapes were played you mean?  
A. Yes.  
25 Q. I'm not sure of the date. Hang on a second. That  
would have been at the Chalmers Hospital on June  
29th.  
A. June 29th?  
Q. With yourself and Constable Mole - Kevin Mole.  
30 A. I don't remember the tapes. I don't remember the  
voices.

1 Q. Do you recall --

THE COURT: Excuse me, were you finished that answer?

A. (Nods affirmatively.)

MR. FURLOTTE: Do you recall telling Kevin Mole in a state-  
5 ment at the Chalmers Hospital taken on Wednesday, May  
31st, that to you he was probably in his thirties?

A. On when?

Q. That you thought maybe the individual was in his  
thirties.

10 A. May 31st? No, I don't.

MR. WALSH: Could I have the page Mr. Furlotte, please?

MR. FURLOTTE: Page 12, would be the second statement.

THE COURT: Was this a tape recording of an interview or  
what was it from?

15 MR. FURLOTTE: This was a statement. I'll read the question

THE COURT: Read the -- Well first of all, did the witness  
recall the interview with Corporal Mole at that time?

MR. FURLOTTE: Do you recall having an interview with  
Corporal Mole?

20 A. Yes.

Q. I am reading from page 12 of the transcript. Did you  
know that the interview was being taped? Put on a  
tape recorder?

A. Yes.

25 Q. And this is when the tape is all typed up so I am  
reading off the typewritten transcript. Okay? On  
page 12 Kevin says: "Nina, you're doing real good.  
You're being a big help." And your answer is "So,  
and he asked me - he said you have one daughter."  
30 And Kevin said "Um-hmm." And you said: "And I said  
no I have 5 daughters. Then I was sorry I said 5

1 daughters." Kevin says: "Did he seem like a young  
lad or an older lad to you?" Your answer: "Well to  
me he seemed - he just seemed like a young lad."

A. Yes.

5 Q. Kevin said "How young would a young lad be? Do you  
know?" Your answer: "To me probably in his thirties.  
Do you recall whether or not this person who attacked  
you was a strong individual?

A. Yes.

10 Q. Was he strong or not strong?

A. Well, he was stronger than me.

Q. He was stronger than you?

A. Yes.

Q. But for a man he wouldn't have been all that strong?

15 A. Well, I was tied and at times I was tied to the bed  
so he wouldn't have to be that strong if I was tied.

Q. Do you remember Corporal Mole asking you about the  
strength of this individual?

A. No, I don't remember.

20 Q. Okay, still on page 12 of that same interview that  
he had with you Corporal Mole says - continued on:  
"In his thirties. Okay. Can you remember much about  
him? Was he a big strong guy or --" And your answer  
was: "No, he didn't seem to be."

25 MR. WALSH: He has to complete that paragraph.

MR. FURLOTTE: Kevin says "No.", and your answer was  
"Because I only saw his mask once." I don't know  
what relevance that has but --

30 MR. WALSH: It has related to what she assumed I would  
assume -- It's not for me to say. I just think  
that the whole thing has to be read in its context.

1 THE COURT: This is May the 31st?

MR. FURLOTTE: This was May 31st. I understand this individual tried to choke you a couple of times.

A. Yes.

5 Q. And this individual was not able to choke you.

A. No, I'm --

Q. Evidently. You're still here today.

A. I'm here, yes.

Q. So this individual - is that one of the reasons why  
10 you felt the individual was not strong because he wasn't strong enough to choke you?

A. Well, when he was choking me and I sort of lost my breath, and then I just let him think that I was - that I couldn't breathe.

15 Q. How many times did he try to choke you?

A. Twice.

Q. Twice?

A. Yes.

Q. Now, you said there was nobody home at your place to  
20 leave the door unlocked a couple of weeks prior to?

A. No.

Q. So you were living in your apartment alone for how long before this event happened? And when I say alone, that your daughters weren't home to visit  
25 you.

A. Well, I'm not sure. Nancy was home that weekend. It would be a few weeks before but I'm not positive of the time because I have the five girls and they came on different weekends. Or four at home and  
30 they came different weekends.

1 Q. Do you remember Mr. Mole asking you about - on that  
same interview about a brown paper bag with some  
chips in it and a bottle of pop that they found in  
between the store and your living room? Do you  
5 remember him asking you about that?

A. Yes.

Q. And could you explain how that had got there? Were  
you able to?

A. I don't remember if I was then but I think I put it  
10 there. I was taking a treat to my niece.

Q. Now you think you put it there?

A. Yes.

THE COURT: May I just ask here, the crown have other  
witnesses available readily when this witness is  
15 finished?

MR. WALSH: Yes, My Lord.

MR. FURLOTTE: Would Annie open the door for anybody after  
11 o'clock?

A. No.  
20

Q. Not for anybody?

A. Nobody. Not even me.

Q. Was the store ever robbed before?

A. Yes.

Q. How many times?  
25

A. Twice.

Q. Twice before. And was there anybody in the area that  
Annie was particularly scared of? Concerned about  
somebody burning her out?

A. Well, yes.  
30

Q. Who was that?



1 THE COURT: Well, let me just think about this for a  
minute. Here is a woman who is dead. Do we want  
to be talking, really, about what suspicions she had.  
Well, I suppose it's all right. Sort of a shame to  
5 have to involve a dead person in suspicions against  
somebody. Well, you go ahead.

MR. FURLOTTE: And who would that have been?

A. Well there were two young boys but I don't remember  
their names.

10 Q. Do you remember the last names?

MR. WALSH: My Lord I would point out to Mr. Furlotte that  
he's playing a very dangerous game. I have the right  
to redirect.

MR. FURLOTTE: Two young boys?

15 A. Yes.

Q. Let me put it this way then. Without revealing their  
names had one of those young boys also escaped from  
a prison at the time?

20 A. I don't know.

Q. Do you recall the last name?

A. I never could pronounce it.

Q. Tanasichuk.

A. Yes.

25 Q. What was your answer?

A. Yes.

Q. Do you know of anybody else that Annie was scared of?

A. No.

30 Q. Now, this individual who attacked you, he didn't have  
any gloves on?

A. No.

- 1 Q. And did you notice any jewelry on his hands?  
A. No.
- Q. Did you notice any gold chains around his neck?  
A. No. I couldn't see.
- 5 Q. Now, this individual I understand he checked your  
bank book.  
A. Yes.  
Q. To see if you had any amount of money in it.  
A. Yes.
- 10 Q. What was he hoping you would do? Write him a cheque?  
A. I don't know. He just wanted to know how much money  
I had.
- Q. And then he checked -- I believe there was a  
cheque from the Navy or a pension cheque or something  
15 on one of your dressers.  
A. It would be a Canada Pension, yes.  
Q. Canada Pension.  
A. Yes.
- Q. And that was for \$55.00?  
20 A. Oh no. No, a Canada pension cheque wouldn't be  
\$55.00.
- Q. Did you have a cheque for \$55.00, do you recall? I'm  
just concerned about the statement you give --  
A. Was it a personal cheque?  
25 Q. When you give this statement I'm going through here,  
it would be again at the Chalmers Hospital with Kevin  
Mole and your daughter, Susan, was there also on  
June the 8th. On page 7 I believe Mr. Mole was  
questioning you and you stated -- Kevin says:  
30 "Good girl" as you were going on, "and a - so I did  
just stay there. A - he'd get up there and, oh yeah,  
he asked me how much money I had. He said I suppose

- 1           so much you don't know, and I said I know exactly.  
I said I have \$60.00 in my wallet. I said \$200.00  
in the bank and a - I did have a couple of government  
cheques on the dresser but I didn't say anything."
- 5           And then you state: "Then he said fifty-five dollare.  
A cheque from Navy. That's not much."
- A.       Navy?
- Q.       Do you know what he was talking about?
- A.       Not Navy, no.
- 10       Q.       Not Navy?
- A.       No.
- Q.       The expression "fifty-five dollare", is that --
- A.       I never heard that before.
- Q.       You never heard that before?
- 15       A.       No.
- Q.       Maybe it's just a typographical error.
- MR. WALSH: Perhaps Mr. Furlotte would spell it and then --
- MR. FURLOTTE: D-o-l-l-a-r-e.
- A.       I don't know.
- 20       THE COURT: Somebody pressed the 'e' instead of an 's'.
- MR. WALSH: That's why I asked to have it spelled My Lord.
- MR. FURLOTTE: That's what I mentioned first. It might  
be a typographical error. I just wanted to check  
with this witness.
- 25       THE COURT: Sure. Sure. But my gosh, do we have to examine  
this witness about typographical errors. This poor  
lady must be tired and --
- MR. FURLOTTE: My Lord when the only identification we have  
30       is a voice and possible size-wise, then we have to  
investigate every possibility.

1 THE COURT: I know, and I suppose it's important whether  
the typist has put dollare or dollars.

MR. FURLOTTE: Mrs. Flam if you are going to make an  
expression 'down river' what do you mean by that  
5 in relation to --

A. Below Chatham.

Q. Below Chatham. Is that towards Loggieville or towards  
Chatham Head? Which way?

A. No, down is down towards Loggieville, Bay du Vin,  
10 in that area.

Q. Towards Bay Comeau and Bay du Vin?

A. No, not Bay Comeau. Bay du Vin.

Q. Bay du Vin?

A. Yes.

15 Q. Which on the map behind you - would you turn around  
and have a look at that map behind you on the wall?  
That would be in the opposite direction of Chatham  
or Chatham Head?

A. Yes.

20 Q. Now, I understand people in Chatham area they don't  
- they don't use the expression like Mrs. Bernie or  
Mrs. Bobby or Mrs. John too much but the people down-  
river do.

A. It all depends on where they -- If they are  
25 living in Chatham now and came from down there yes  
they would.

Q. They would.

A. I think, but I don't --

30 Q. But they would --

A. It's possible, yes.

1 Q. So the people from Chatham area who use that  
expression are the ones who used to live down river  
and they are still accustomed to it? That's what  
you are saying.

5 A. Well, it used to be like that. I don't know lately.

Q. And this person called you Mrs. Bernie at times?

A. Yes.

Q. Mrs. Flam, again, I will ask you do you know anybody  
by the name of Junior? Do you recall any Junior  
10 around?

A. No. Chatham?

Q. Around Chatham or --

A. No.

Q. Do you remember Mr. Mole showing you photo pictures,  
15 line-ups? That would be on page 20 of the transcript  
Mr. Mole asked you about somebody familiar, number  
8, and Mr. Mole says "Number 8" --

MR. WALSH: Excuse me, My Lord, she hasn't answered the  
20 question whether she remembers the particular  
occasion. I don't think she did.

THE COURT: No. Do you recall Corporal Mole showing you  
a number of pictures - or persons, and where? When  
was this Mr. --

25 A. Was that in the hospital?

MR. FURLOTTE: This would be in the hospital, I believe,  
with Mr. Mole and your daughter, Susan, but I'll  
double check.

THE COURT: June 8th?

30 MR. FURLOTTE: Yes, your daughter Susan was there along  
with Kevin Mole on June the 8th at the Doctor  
Chalmers Hospital in Fredericton. So I take it,  
Mrs. Flam, you don't recall the conversation anyway  
about some person named Junior.

- 1 A. No, I don't. No.
- Q. So maybe if I just read it for a second. Kevin says "Number 8.", and your answer is "It can't be." And you said "Is that Junior?". Kevin says "Number 8.
- 5 I don't know who it is. Do you want me to look and find out?" Your answer was "No, because it wasn't him." - meaning that it wasn't Junior. Kevin says "It wasn't him, eh?" and you say "No." And then Kevin says "But you know him I guess, eh?", and your
- 10 answer "Yeah." Kevin says "Okay." Your answer: "He's not as big the boy (inaudible) that night was not as big as Junior." And I would like to know if you can remember who you were referring to as Junior.
- 15 A. Junior?
- Q. Do you know a Junior McLenaghan?
- A. Yes, I just remembered.
- Q. You just remembered, okay.
- A. Um-hmm.
- 20 Q. And how big is Junior McLenaghan?
- A. Oh, I haven't seen --
- Q. Is he as big as I am?
- A. Bigger.
- Q. He's bigger than me?
- 25 A. Yes. I haven't seen him for a while.
- Q. I'm not trying to trick you or anything, Mrs. Flam; I'm just trying to help the jury out here to get the facts straight so that they can have something to
- 30 deal with, okay.
- THE COURT: You'd be helping them a lot more if you let them get away to lunch.

1 MR. FURLOTTE: My Lord I wanted them to go to lunch. It's  
you yourself who denied them that opportunity.

THE COURT: Well I assumed you might have 25 or 30 concise  
questions you would put to the witness and that would  
5 be it, and this has gone on for two hours. Or an  
hour and a half. And no end in sight.

MR. FURLOTTE: My Lord for the record I would like the  
Court to appreciate my ability and my necessity to  
defend Mr. Legere as best possible and until I'm  
10 doing something illegal then --

THE COURT: Well, you have the privilege of doing this so  
I am not going to stop you. I fail to see how some  
of the line of questioning really is helping the  
thing very much one way or another.

15 MR. FURLOTTE: My Lord since you don't know my final  
arguments, since you don't know the other evidence  
that's coming in, then you don't know how the answers  
I'm getting out of this witness are going to fit in.  
I don't think it's proper for you to stand there and  
20 criticize me in front of my client. A client should  
have confidence in his solicitor and if you are going  
to keep down-grading my competence. I'm sure the  
jury can assess that for themselves, they don't need  
your assistance.

25 THE COURT: Thank you.

MR. FURLOTTE: Do you know a Fraser Kerr?

A. Yes, I did know him.

Q. You did know him. Is he the one who died a couple of  
30 months ago?

A. Yes.

- 1 Q. And does he have a daughter who is a friend of one  
of your daughters?
- A. Yes.
- Q. That daughter Natalie?
- 5 A. Yes.
- Q. And how old is Natalie?
- A. My daughter Natalie?
- Q. Yes.
- A. 37.
- 10 Q. 37. Now, Mrs. Flam, I mentioned here about the  
Tanasichuks. I believe Constable Mole also  
questioned you about the Tanasichuks. Do you  
recall that?
- A. Yes.
- 15 Q. Mr. Mole also --
- A. Was that in the hospital as well?
- Q. That would be on the same day that he showed you the  
pictures. So you recall Kevin Mole questioning you  
about David Tanasichuk also?
- 20 A. Yes.
- Q. And it's Kevin Mole that you told that Annie was  
scared to death of living there?
- A. Of what?
- 25 Q. Annie was scared to death of living there because  
of the Tanasichuks.
- A. Yes, because of fires.
- Q. Could you tell me how big John Marsh is? Bigger than  
me or smaller?
- 30 A. I don't know. Smaller.
- Q. Smaller than me?
- A. Smaller, yes.



1 MR. WALSH: My Lord before we end that aspect of the  
Tanasichuks that Mr. Furlotte just referred to in  
his transcript, I would ask that perhaps to clarify  
the matter that the whole aspect that he is referring  
5 to be read to her.

MR. FURLOTTE: I didn't read anything out of this statement  
about the Tanasichuks. I just asked --

MR. WALSH: Well apparently you're paraphrasing out of it.

MR. FURLOTTE: I never paraphrased out of it; I just asked  
10 Mrs. Flam --

THE COURT: I think the witness has said that she told  
Corporal Mole that her sister-in-law was scared of  
Anasichuk, or whatever the name is, because of the  
possibility of fires. That's right?

15 MR. FURLOTTE: Yes, something to that effect, that's what  
she said.

THE COURT: That's right Mrs. Flam?

A. Yes.

20 THE COURT: Okay, well I don't think we have to bother to  
go into that.

MR. WALSH: Thank you My Lord.

MR. FURLOTTE: Do you recall whether or not you told  
Constable Mole that you thought maybe and not - no  
25 certainties here - you thought maybe that it was  
John Marsh because of the voice and because of his  
size?

A. Of his size?

Q. Do you recall whether or not --

30 A. Well John is thin, or was. I haven't seen him for  
two years.

- 1 Q. But at least as far as you remember him he was thin?  
A. Slight, yes.
- Q. Slight. Do you recall whether or not you made that  
statement in the past that you thought it was John  
5 Marsh because of the sound of the voice and the size?  
A. Just --
- Q. Nobody is going to go out and blame John Marsh for  
this.  
A. I know.
- 10 Q. We're just trying to establish size-wise here.  
A. Yes. Just for the size at a moment, yes.  
Q. So you felt he was somewhere around the size of  
John Marsh?  
A. Slight.
- 15 Q. Yes.  
A. Slight.  
Q. Did you at any time, Mrs. Flam, feel that Corporal  
Kevin Mole was trying to convince you or lead you  
into saying that you thought it was Allan Legere?  
20 A. No.  
Q. Do you recall just after Kevin Mole issued the  
tapes - the voice tapes - the four tapes to see if  
you could recognize the voices as the person who  
25 assaulted you, do you recall Kevin Mole asking you  
after that time as to whether or not you thought it  
was Allan Legere or if there was any reason why you  
might think it was Allan Legere?  
A. No.
- 30 Q. Again, at that same conversation with Kevin Mole,  
that would have been in Fredericton on June 29th at  
the hospital, do you recall whether or not in that

1 conversation you told Mr. Mole that the pubic hair  
would have been not black - blond or light gray?

THE COURT: Well, Mr. Furlotte, would you read what she did  
say to Mole in that --

5 MR. FURLOTTE: Well, I thought I was supposed to ask her  
if she recalled it first and then read it to her.

THE COURT: Well no, does she recall the interview and  
talking about pubic hair and then you read what she  
did say about pubic hair and if her answer is differen  
10 then ask her if she --

MR. FURLOTTE: Kevin says to you on page 2: "Nina, you  
have already told me all this." And your answer is  
"No, I didn't." Kevin says "Okay." And then you  
say: "And then he was kind of on my chest and that's  
15 the reason I could see the chain and then that's the  
time when I had - the hair was not black. It was  
kind of - I don't know - blond or light gray. Not  
dark anyway."

20 Do you recall making that statement to Corporal  
Mole?

A. No.

Q. Would you admit today that it could have - the pubic  
hair could have been blond or light gray?

25 A. Light brown.

Q. Light brown.

A. Yes.

Q. Do you recall whether or not you told Mr. Mole or  
whether or not you could see his face at all at any  
30 time through the night?

A. The full face or with the mask?

Q. With the mask, at least, with a portion cut out, the  
face.

- 1 A. I saw at the beginning of the evening, yes.
- Q. Yes.
- A. Just briefly.
- Q. And the lights were on?
- 5 A. Yes.
- Q. And, Mrs. Flam, I would submit that while you cannot identify that individual with any certainty you can with certainty say that it is not Mr. Legere, isn't that right?
- 10 A. I couldn't say who he is. I didn't --
- Q. No, I know you can't say who he is but can you say that it is not Mr. Legere?
- A. I don't know.
- Q. You seen him well enough for that, did you not?
- 15 A. No.
- Q. Mrs. Flam do you recall thinking that it may have been Allan Legere and then discounting it? Do you recall thinking -- Let me put it this way: do you recall thinking that it may have been Allan
- 20 Legere because of the Glendenning incident?
- A. Yes.
- Q. And then -- All right. Okay. At one point in time you did that, okay.
- 25 A. I just -- I remembered the Glendennings; I remembered the incident and how it all happened.
- Q. I don't want to get into the incident, just the fact that this come to your mind because of --
- A. Yes.
- 30 Q. -- Glendenning, and you thought that maybe that's Legere's tricks?
- A. Yes.

1 Q. That was the expression?

A. Well --

Q. And then you discounted it right away and your mind went back to John Marsh?

5 A. No.

Q. Is that right?

A. No. Only for a minute - or a very, very short time I thought of John Marsh because of the voice.

10 Q. On page 26 of your statement of June the 8th, that's with Corporal Mole and your daughter was there, Susan, Kevin says on page 26 - just make sure I'm going up high enough for the crown's benefit, Kevin says: "Well do you have anybody that you -- Is there anybody that you can think of at all who you might suspect of doing this? Just somewhere we can start." Your answer was "Well, I don't know if I should say it or not." Kevin says "Oh, I think it would be just great if you did. It would give us something to work on." Your answer: "Well, the only person --" Kevin says "Okay." and you continue: "that I thought it is possible and then when all the actions started I thought no it's not him." Kevin says "Okay." And then you say: "That's Legere's tricks. The only person I could think of was John Marsh."  
15  
20  
25

MR. WALSH: Continue, please, My Lord, if I could.

30 MR. FURLOTTE: The question, Kevin says "Who?", and you answer "John Marsh." Kevin says "John Marsh. Why would you think his name?" Your answer: "Just because it kind of sounded like his voice."

And I guess you also admit that it was about the same size as John Marsh.

A. Yes.

1 Q. Who is smaller than I am.

A. What was the same size as John Marsh?

Q. Pardon?

A. You mean the person? The --

5 Q. The size -- Yeah, that the only one you could think of at the time was John Marsh because of the voice here and because of his size.

A. Of the voice. Just for a short time.

MR. FURLOTTE: I have no further questions of this witness.

10 THE COURT: Thank you very much. Now, the only remaining part of the examination of Mrs. Flam would be the redirect examination, and I take it that --

MR. WALSH: The crown will be very brief My Lord.

THE COURT: I think we should try to complete that.

15 MR. WALSH: Yes, I think we can. I would like to just finish it. I just want to clarify some things particularly for jurors who are not from the Miramichi area. Names get bantered around here.

20 REDIRECT EXAMINATION BY MR. WALSH:

Q. Would you tell the jury, please, who Fraser Kerr is and how old he was when he died? Approximately how old a man he was.

A. He died a few months ago and he would be somewhere  
25 in his eighties.

Q. Thank you. You mentioned the Tanasichuks. Did Annie ever have a problem with the Tanasichuks?

A. No.

Q. Mr. - and I don't want any names, Mr. Furlotte asked  
30 a question was Annie scared of anyone else and you said no. Did you ever see Annie speaking to someone and then ask her why she was speaking to that person?

- 1 A. Yes.
- Q. Without mentioning any names what would her answer be?
- A. 'I'm afraid not to.'
- 5 Q. And would that be someone other than the Tanasichuks?
- A. Yes.
- THE COURT: Sorry, I didn't catch that. You said I'm afraid not to?
- A. Yes.
- 10 MR. WALSH: That's correct.
- THE COURT: You mean --
- A. Afraid not to speak to that person.
- THE COURT: To the person?
- A. Yes.
- 15 MR. WALSH: You have five daughters?
- A. Yes.
- Q. They visited your home you say on successive weekends up to this incident?
- A. Yes.
- 20 Q. Your daughters - I take it your daughters and Annie got along quite well?
- A. Yes.
- Q. They would be over in Annie's store and in Annie's side of her residence?
- 25 A. Yes.
- Q. They would actually have access to the whole building?
- A. Yes.
- Q. They would have no gloves on when they were inside the house, would they?
- 30 A. No. Gloves? No.
- Q. Yes, they would be bare-handed?
- A. Yes.

1 Q. Your daughters. Do your daughters have children?

A. Yes, two of them.

Q. And these children have access to the house as well?

A. Well, one lives out in Saskatchewan and the other  
5 daughter lives in Dartmouth.

Q. When Mr. Furlotte asked you about the - again, about  
Kerrs, about him telling you that I'm Gerald from  
down at Kerrs, and then saying that they would blame  
it on the bad guy, at what point in the evening did  
10 he actually say that?

MR. FURLOTTE: My Lord the Crown Prosecutor hit that in  
direct examination and I just went further into it  
in cross-examination and now he's trying to open --  
It's already been covered.

15 THE COURT: Yes, that did come up, didn't it, out in --

MR. WALSH: Yes, it did, My Lord, but I was trying to on  
the redirect clarify the fact that apparently Mr.  
Furlotte was getting into the sequence in which that  
particular incident occurred, and I was trying to  
20 clarify for the jury as to when those things were  
said. What part of the evening those words were  
used.

MR. FURLOTTE: My Lord anything that's taken up in direct  
examination, the Crown is supposed to get all the  
25 clarification he can possibly get at that time. It's  
not open for reexamination.

THE COURT: Yes. I'll have to rule against you Mr. Walsh.

MR. WALSH: Thank you My Lord. Fine. What part of the  
person's body were you using to judge that he was  
30 slight?

A. His waist.



1 MR. WALSH: Thank you. I have no further questions My  
Lord.

THE COURT: Well that -- This witness, of course, is not  
subject to recall. That's the end. So Mrs. Flam you  
5 are free to go. I hope this puts an end to your  
involvement in this matter, except for other things  
that will never be changed.

I think at that point we will have the jury --  
It's quarter to three. It's early enough in the day  
10 I think probably it would be a good thing if you went  
down and had your noon lunch and came back in about an  
hour or so, say 4 o'clock, and we went on for say  
half an hour or perhaps three-quarters of an hour  
after that and we could cover a little more territory.

15

(NOON RECESS - 2:45 - 4 P.M.)

COURT RECONVENES. (Accused present. Jury called. All  
present.)

THE COURT: Another witness Mr. Walsh.

20 MR. WALSH: Yes, My Lord, I would call Professor MacLaughlin,

PROFESSOR MOIRA MacLAUGHLIN, called as a witness,  
having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

25 Q. Would you give the court your name, please, and your  
present occupation.

A. My name is Moira MacLaughlin. I teach at the  
University of New Brunswick and St. Thomas University  
in the Anthropology Department.

30 MR. WALSH: My Lord at this time I wish to seek your  
permission to lead Professor MacLaughlin through her  
curriculum vitae. Her background.

1 THE COURT: You are seeking to have her qualified as an expert in anthropology?

MR. WALSH: Forensic anthropology.

THE COURT: Forensic.

5 MR. WALSH: With your permission My Lord.

THE COURT: Yes.

MR. WALSH: Miss MacLaughlin you received a Bachelors degree in 1969 from the University of Toronto with a major in anthropology, is that correct?

10 A. Yes.

MR. WALSH: Would you define for the jury, please, briefly, what anthropology is?

A. Anthropology is simply the study of humans from both a biological and a social and cultural perspective.

15 Q. You also have received a Masters degree in 1974 from the University of Tennessee in physical anthropology?

A. That's right.

Q. Would you explain, please, briefly, what physical anthropology is?

20 A. Physical anthropology is that area of anthropology that focuses mainly on the human body and the relationship of the human body with the environment. My particular interest in physical anthropology is the skeleton which is called osteology.

25 Q. The study of the skeleton?

A. The study of the skeleton.

Q. I take it that you are referring to bones?

30 A. Yes, to bones. One area of physical anthropology is the study of the skeleton which is called osteology and that's what my major in the Masters program was.

- 1 Q. Did you take any course of study after you got your  
Masters degree at the University of Tennessee?
- A. I studied - went to the University of Toronto to  
study with a bone expert at the University of  
5 Toronto, Doctor Gerry Melby, and I studied for three  
years with him.
- Q. And that would be towards what degree?
- A. Working towards a Ph.D.
- Q. That is a doctorate.
- 10 A. That's right.
- Q. And did you actually complete that particular course?
- A. Not at the moment. I have done all the course work  
and the oral exams and the written exams and have to  
finish up my dissertation.
- 15 Q. I take it - did you stop your dissertation for any  
particular reason?
- A. To raise my daughter.
- Q. And this particular time that you were at the  
University of Toronto studying under this man do you  
20 know what years that was?
- A. 1977 to the fall of 1980 I guess. About 2½ years.
- Q. And when you finished that particular aspect you went  
to the University of New Brunswick, is that correct?
- A. That's right.
- 25 Q. And that would have been in 1980?
- A. Yes.
- Q. I understand, Professor, at the University of New  
Brunswick some of the courses that you teach, and  
correct me if I'm wrong, one of the courses is an  
30 introduction to physical anthropology?
- A. That's right.

- 1 Q. You also teach in areas of paleontology?
- A. Yes.
- Q. Would you explain to the jury what paleontology is?
- A. Paleontology is the study of prehistoric humans and  
5 in order to study in that field obviously one needs to have a knowledge of bones because that's mostly the kinds of remains that you find so that would be one of my interests in the skeleton, prehistoric humans.
- 10 Q. You also teach forensic anthropology?
- A. That's right.
- Q. Would you explain, please, to the jury, briefly, what forensic anthropology is and how it relates to what we have been talking about so far?
- 15 A. Forensic anthropology is simply the application of the knowledge of bone experts to the forensic situation, that is working with law enforcement agencies. So I would be called in by the R.C.M.P.,  
20 for example, to look at some bones that had been found, and my expertise in osteology or in the study of bones is used in a forensic situation then with law enforcement agencies.
- Q. And you also teach paleopathology?
- A. That's right.
- 25 Q. And what is paleopathology, briefly, please?
- A. Paleopathology is the pathology of the skeleton. By pathology I mean illnesses, disease, trauma, any kind of abnormality found in a skeleton falls in the area  
30 of paleopathology.
- Q. You mentioned the word 'trauma' and I think that was mentioned earlier in this trial. Would you, again,

- 1 just remind the jury, please, what trauma is when you refer to trauma?
- A. Trauma itself means any kind of stress to the skeleton. It usually includes fractures, dislocations, etc.
- 5 Q. In the area of forensic anthropology, Professor MacLaughlin, you have already indicated that your undergraduate and graduate studies focused on osteology, that's the study of the skeleton, is that correct?
- 10 A. Um-hmm.
- Q. Your specific training in forensic anthropology began at the University of Tennessee in the early 1970s.
- A. Yes.
- 15 Q. That you trained under and worked with Doctor William Bass. Would you tell the jury, please, who Doctor William Bass is?
- A. Doctor William Bass is one of the top forensic anthropologists in North America. I was very
- 20 fortunate to be at the University when he was there. I trained under him and I worked on some cases with him. Some of the cases were FBI cases from as far afield as New Jersey to Kansas. So I did a lot of my training in forensic with Doctor Bass. He's still at
- 25 the university.
- Q. He is still at the University of Tennessee?
- A. Yes, he is. He's the Chairman.
- Q. You continue ongoing training in this particular
- 30 field Professor MacLaughlin?
- A. That's right.

- 1 Q. By attending seminars and meetings of physical and forensic anthropology associations, is that correct?
- A. Yes.
- 5 Q. I understand, Professor, MacLaughlin, you have been nominated for membership in the Academy of Forensic Sciences. Would you explain to the jury what the Academy of Forensic Sciences is and what being nominated means?
- 10 A. The Academy of Forensic Science is an international organization. It is for professional working forensic anthropologists. In order to be nominated to the Academy one has to have been an active working forensic anthropologist, have worked on a number of cases and have worked successfully on those cases.
- 15 Q. I understand that in fact, Professor MacLaughlin, you have recently presented a seminar at a National Meeting of Identification Sections of Canadian Police Forces which was held in the spring of this year in Saint John?
- 20 A. Yes, I did.
- Q. And that in relation to your teaching you are designing an introductory course in fact in forensic anthropology to be taught this fall at the St. Thomas University?
- 25 A. Yes.
- Q. And that one of the courses at U.N.B., the Introduction to Physical Anthropology, is an osteology course?
- 30 A. That's right.
- Q. And in fact that you have actually had police officers take that course?

1 A. Yes, I have.

Q. I understand, Doctor, that in the field of Forensic Anthropology that you have consulted in forensic cases for the Sheriffs' Departments and the City Police in Tennessee?

5 A. Yes.

Q. While you were there.

A. Yes.

Q. That you have consulted in forensic cases for City Police in Fredericton and Moncton and that you presently consult for the R.C.M.P. out of the Fredericton Identification Section?

10 A. That's right.

Q. Would you tell the jury, please, any of the cases in this province that you have worked on that would be of any note?

15 A. I worked on the Noel Winters case in Saint John that was commonly called the garbage bag murders. In that situation I was called in to -- There were a number of different body parts and some of the parts had been burnt just right down to bone, others were partially burnt, and I was called in to sort them out and to determine how many people were there and what sex and age, etc., of these people would have been.

20 Q. Have you or are you working on any other cases of note in this province in relation to osteology?

25 A. I worked on the Musquash case, Brenda Cosgrove case, where she was found in the woods near Musquash and we had to retrieve as many of the body parts as we could. That case is - my part in terms of the analysis is finished. The case is not solved yet.

30

1 Q. Would you, Doctor, I understand, Doctor, that you are  
a member of the American Association of Physical  
Anthropologists?

A. Yes.

5 Q. And that you are a member of the Canadian Association  
for Physical Anthropologists?

A. Yes.

Q. That you are, among other things, a member of the  
Northeastern Forensic Anthropology Association?

10 A. Yes.

Q. I also understand Doctor - I said Doctor, excuse me,  
I mean Professor, you have presented papers at the  
Northeastern Forensic Anthropology Association held  
at Cornell University in October of 1988.

15 A. Yes.

Q. And that's related to forensic anthropology?

A. Yes, it is.

Q. You have presented a paper at the University of  
Maine at Orono in the fall of 1989.

20 A. Yes.

Q. Again related to forensic anthropology.

A. That's correct.

Q. And you have presented a paper on forensic anthro-  
pology at York College in York, Pennsylvania in the  
25 fall of 1990?

A. Yes.

Q. And these papers were presented to who?

30 A. They are presented to my colleagues and also to  
pathologists and State medical examiners.

THE COURT: Well, I think you have done a rather thorough  
job, surely, haven't you?



1 MR. WALSH: Well, My Lord, I was just making sure I had  
covered everything. I was just looking through my  
papers. I would at this time, My Lord, make a motion  
to the Court. I would ask that Professor MacLaughlin  
5 be declared an expert in the field of forensic  
anthropology.

THE COURT: Mr. Furlotte do you have any questions to put  
to the Professor on her qualifications?

MR. FURLOTTE: Mrs. MacLaughlin, in the field of forensic  
10 anthropology, if you were declared an expert as such,  
just what would that entail?

A. In my area of forensic anthropology it would entail  
always the study of bones. The examination of skeletal  
material.

15 MR. FURLOTTE: Skeleton material.

A. Yes.

MR. FURLOTTE: That would not have to do with tissue I assume

A. No, that would be the expertise of the pathologist.

MR. FURLOTTE: And it doesn't have anything to do with  
20 blood?

A. With blood? No, except in an extraneous way. You  
can't really separate the skeleton from the rest of  
the body so I mean I have to be aware of blood and  
tissues but that's not my area of expertise.

25 MR. FURLOTTE: Usually anthropologists are just interested  
in skeletons.

A. Well, some anthropologists are interested in genetics,  
others are interested in blood. I mean there's a  
variety of different kinds of physical anthropology.  
30 My interest and training has been in the skeleton.

1 MR. FURLOTTE: Now, you stated that you worked with local  
police forces and different police forces in New  
Brunswick to help them I suppose gather evidence or  
give them your opinion as to certain information that  
5 they want?

A. It involves a variety of things. Sometimes I am just  
asked to look at a bone to determine whether it's  
human or whether it's animal, and I have training in  
animal bones as well so I can usually tell them what  
10 kind of animal it is. Sometimes it is to give an  
identification to a human. It might be somebody who  
has drowned and the R.C.M.P. are not able to lift any  
fingerprints for example. There was a case I worked  
on in Hartland where they were able to get the finger-  
15 prints but they weren't listed in the fingerprint  
bank and they asked me to look at the individual and  
I did and I gave a description and the person was  
identified on the basis of the description that I  
gave looking at certain parts of the skeleton.

20 MR. FURLOTTE: You mentioned the different police forces  
you worked with to assist them. Have you testified  
in a criminal court before as an expert witness?

A. I have never had to -- On any of the cases I have  
worked on, which have been hundreds, I have never  
25 had to come to court to testify before.

MR. FURLOTTE: Have you ever been asked to give the kind of  
opinion evidence before that you are going to be  
asked to give today?

30 A. Many times.

MR. FURLOTTE: In court?

A. Not in court, no.

1 MR. FURLOTTE: And what particular portions of your studies  
would have been concentrated on that area of the  
opinion that you are going to be asked to give today?

A. I'm sorry, I --

5 MR. FURLOTTE: What specific courses or who did you study  
under to entitle you to become an expert in this  
particular area that you are going to give an opinion  
on?

A. Well, I have been studying bones since 1966. At the  
10 University of Toronto all together 6 years. At the  
University of Tennessee for two years. I have worked  
on many, many archaeological sites from Mexico up to  
Newfoundland. That entailed excavating cemeteries  
and analyzing the bones. I have, as I mentioned to  
15 counsel, I have worked under Doctor Bass and Doctor  
Melby.

MR. FURLOTTE: Would you believe yourself to be more  
qualified or less qualified to give an opinion say  
20 in comparison to a pathologist with the evidence that  
you are about to give today?

A. I don't believe that I should answer that - that  
question in that way, but what I will say is that I  
feel very confident in my expertise and in looking  
25 at the bone. That's what I'm used to looking at - the  
bone. Pathologists are usually used to looking at the  
soft tissue and bone through x-rays. I am just  
familiar with looking at the bone, feeling it,  
microscopically examining it even. That's just the  
30 way I have been trained.

MR. FURLOTTE: And you mentioned you began studying for  
your doctorate degree in 1977?

A. Yes.

1 MR. FURLOTTE: To 1980.

A. Yes. It was two years and a bit. About 2½ years  
that I completed. So I did everything except my  
dissertation. I completed all the course training  
5 under Doctor Melby and all of the written exams and  
it's just a matter of writing my dissertation and  
when my daughter graduates from high school I will  
be planning to go back and finish that.

MR. FURLOTTE: So that is some ten years ago since you  
10 studied for your doctorate degree?

A. Yes, but I have been working on cases since the early  
seventies every year. I do training every year when-  
ever programs become available. For example I went -  
I worked for a week at the Smithsonian with two of  
15 the top osteologists in North America, Doctor Doug  
Hubalocker, -- Well, the other one wasn't there  
at the time but with Doctor Doug Hubalocker who was  
there at the Smithsonian. I worked there for a  
week. Worked with him. That was a chance to work  
20 further in microscopic techniques for bone.

MR. FURLOTTE: How readily available are expert witnesses  
supposedly as yourself in New Brunswick?

A. I am the only one in the Maritimes.

MR. FURLOTTE: I have no further questions.  
25

THE COURT: Have you any representations to make here?

MR. WALSH: No, My Lord, I have made my motion.

THE COURT: I feel the witness has qualified herself as an  
expert. May I just ask this, Mr. Walsh, though, before  
30 I do qualify her. What information or what opinions  
are you seeking here in a general way, without getting  
into --

1 MR. WALSH: The opinions that I will be seeking from  
Professor MacLaughlin relate to the jaw bone of  
Annie Flam. It will be related in particular to a  
fracture. She will be asked to give an opinion as  
5 to how that fracture would have been caused and what  
that fracture is consistent with.

THE COURT: May I ask, Professor MacLaughlin, do you feel  
your expertise extends to giving that type of  
opinion?

10 A. Oh, absolutely. I have been doing it for years. It  
just has never come to court before but the kind of  
thing that I am talking about now is something that I  
do routinely for the R.C.M.P. and for any other  
agency.

15 THE COURT: Now you will be able to say you have been  
declared an expert in court, so welcome.

Well, the witness, I am satisfied, is an expert  
in the field of forensic anthropology.

20 MR. WALSH: Forensic anthropology. My Lord with your  
permission, Professor MacLaughlin would you begin,  
please, by just telling the jury how you became involved  
in this particular case and what, if any, initial  
steps you took.

25 A. On the evening of May 31st, 1989 Corporal Ron Godin  
called me and --

Q. We won't get into the conversation. What, if any-  
thing, did you do as a result of his call?

A. You don't want me to say why he called me?

30 Q. Yes. Just tell me what you did as a result of the  
telephone call.

1 THE COURT: You haven't been in court before and we must  
tell you that you can't -- It's a rule of court  
that no conversation between a witness and any other  
person can be related in court unless it took place  
5 in the presence of the accused in the case. There  
are certain limited exceptions to that type of thing  
but that's the general rule. So if you had a con-  
versation with Corporal Godin you say you had a con-  
versation and as a result I did so and so.

10 A. Thank you very much.

THE COURT: This will help you in the future.

A. Thank you. As a result of the conversation on June  
1st - morning of June 1st, 1989 I drove down to Saint  
John to examine the body of Annie Flam.

15 MR. WALSH: And where did you go?

A. I went to the funeral home. Sorry, I have forgotten  
what the name of it was. I think it was the --

Q. But it was a funeral home?

A. It was a funeral home.

20 Q. And did you have an opportunity to actually view the  
body of Annie Flam?

A. Yes, I did.

Q. Were you interested in any particular part of Annie  
Flam's body?

25 A. I was asked to examine the right jaw.

MR. WALSH; Members of the jury, if you could refer to the  
large booklet of 93 photographs first and then we will  
move to the smaller one. I show you a booklet marked  
30 exhibit P-6. I will just refer you - there's photo-  
graphs 39, 40, 41, 42, 43 and 44, and tell me  
whether or not you have ever seen this body.

A. Yes, I have.

- 1 Q. This is the body of Annie Flam that you examined?
- A. Yes.
- Q. Would you tell the jury, please, how you went about your examination?
- 5 A. I had to clean off - had to clean the tissue from the right jaw in order to get down to the bone and make the bone absolutely clean so that I could examine the area in question.
- Q. And how did you exactly - how would you examine the area in question?
- 10 A. I had a magnifying glass and a hand-held microscope, plus just microscopic observation, just by the eye.
- Q. And did you determine whether or not there was any trauma to this particular aspect of the jaw?
- 15 A. Yes, there was trauma.
- Q. What was the trauma?
- A. It was an impact fracture.
- Q. Did you have occasion, Doctor, to assist the jury and to assist you in explaining to the jury, did you have occasion to prepare anything in relation to your testimony?
- 20 A. Yes, I have.
- Q. First of all, Doctor, I am going to show you, Members of the Jury if you would refer to your small booklet of photographs, P-9, it's two photographs. Would you look at those for me, please, and tell me whether or not you have ever seen those photographs before?
- 25 A. Yes, I have.
- 30 Q. Who took those photographs?
- A. Corporal Godin.

- 1 Q. At whose direction?
- A. Mine.
- Q. Did you have occasion in order to assist you again in  
5 giving your testimony to do anything with these  
photographs or arrange to have anything done with  
these photographs?
- A. Yes. Those two I had enlarged so I could demonstrate  
some points.
- Q. And have you got the enlargements here?
- 10 A. Yes, I do.
- MR. WALSH: My Lord, unless there is any objection, I would  
like to introduce these particular enlargements.
- THE COURT: These are just enlargements of this --
- MR. WALSH: These photographs, My Lord. I'll show them to  
15 you first. Any objection to me having these marked  
as an exhibit?
- MR. FURLOTTE: No.
- MR. WALSH: My Lord, if I may.
- THE COURT: Yes, we can call them P-12-1 and 2.
- 20 MR. WALSH: Perhaps if I could coordinate them with that  
booklet. I would ask that P-12-1 be the top photo-  
graph in the booklet. Professor MacLaughlin would it  
be all right if we affix the sticker to the bottom  
left-hand corner of this photograph?
- 25 A. That's fine.
- THE COURT: Don't ask her, ask me. It's all right.
- MR. WALSH: I just wanted to make sure we didn't cover over  
anything she wanted to use as a reference, My Lord,  
30 I'm sorry. And the second photograph which would be  
the bottom photograph in your booklet I would ask be  
marked P-12-2. Again, My Lord, I am going to ask



- 1 Professor MacLaughlin if we could affix that sticker  
any place that wouldn't interfere with your --
- A. Yes, as long as it's not on the scale, just in the  
white part of the scale.
- 5 MR. WALSH: Would you show me, please, where you would like  
the sticker.
- A. Maybe down here. I just didn't want this part  
covered up here, that's all. I don't know how big a  
sticker it is.
- 10 THE COURT: You could put it on the back if there's any  
problem.
- MR. WALSH: Perhaps it would be easier, My Lord, that way.
- THE COURT: Put it on the back but put the number in pen  
on the front. On the front, Mr. Pugh, just write  
15 down in the left-hand corner, bottom, put "P-12-2".  
Exhibit P-12-2.
- (Clerk marks large jaw photos exhibit P-12-1 and  
P-12-2.)
- MR. WALSH: Now, Doctor, in addition to the blow-ups of the  
20 two photographs that have been entered into evidence  
did you arrange for anything or did you prepare any-  
thing else to assist you in giving your testimony?
- A. I prepared some diagrams - some schematic diagrams  
just to begin the description, and then the photo-  
25 graphs then would follow up behind the diagrams.
- Q. I have here what appears to be cardboard mounted,  
two diagrams, and what are they views of?
- A. A frontal view of the skull or cranium and a lateral  
view or side view.
- 30 Q. Are they accurate depictions of the --
- A. Of the skull?
- Q. Yes.
- A. Yes.

1 Q. And it's a human skull?

A. Yes.

Q. All writing on this - all markings are yours?

A. Mine.

5 MR. WALSH: Do you have any objection?

MR. FURLOTTE: I have no objection.

THE COURT: This is a skull, not any particular --

A. Oh no, it's just a drawing. I could use it in teaching or something.

10 THE COURT: A typical skull.

A. A typical skull, that's right.

THE COURT: We will call that P-13, 1 and 2.

(Clerk marks drawing of skull exhibit P-13-1 and 2.)

15 MR. WALSH: Do you wish me to put this on the easel Professor?

A. Yes, please.

20 Q. Now, Professor, if you would, would you please explain to the jury using the items that we have entered into evidence, explain to the jury your findings, your conclusions, and if you wish to stand up, if it would be more comfortable, please do so.

25 A. I'll try it from here first. After I had an opportunity to examine both with the microscope and microscopically with my eyes the fracture, I could see very clearly that it was an impact fracture, and by an impact fracture I mean a fracture that is due to a blow, and how I determined that is why I am using the schematic diagram first. This line here, 30 the sort of curved line, would be the main fracture. You could see - I could see that there was a point of

1 impact, a point at where the blow had - whatever  
caused the blow - a point at where this blow had hit  
the jaw, and that point was defined by the fact that  
the bone had bent inwards. We call it inbending of  
5 the bone at the point of impact. The other thing  
or characteristic that defines this as an impact  
fracture is this straight radiating fracture that  
comes out as a result of that impact. So you have  
got the two characteristics: the point of impact  
10 where the bone has bent in; the radiating fracture  
that comes out as a result of that impact. The force  
of the blow caused the main break and there was still  
enough force left over for this radiating fracture to  
come out of the impact point. I should maybe at this  
15 point mention and apologize because this is a left  
side view and typically in anthropology we always  
look at the left side of the body because it's less  
variable and when I went to prepare for this I  
realized, unfortunately, that there was no right  
20 side views, but if I had a right side view the  
drawing would be exactly the same. And this is  
simply a front view. If you were to look at the  
individual from the front it would look the same.  
You have got the main fracture going in a curve down  
25 here; the radiating fracture going out to the rear;  
and the point of impact where the circle is.

Q. Thank you Doctor. At this time, since we don't have  
smaller copies for the jury, and the distance is  
30 great, I am just going to, with Your Lordship's  
permission, take it a little closer and let them  
familiarize themselves with it.

1 THE COURT: All right.

MR. WALSH: If you would like to continue, Doctor.

A. Maybe I could use the photographs now. This is an  
enlargement of one of the photographs that you have  
5 here. I have got an even larger one but I won't talk  
too much about this one. But this shows the right  
jaw in correct anatomical position, the way it  
should be without it being separated, and here you  
can see very clearly the curved fracture coming out,  
10 the radiating fracture going there, and that's where  
the point of impact would be. Right there. This  
will demonstrate it more clearly. Here, of course,  
it's been separated.

Q. Who separated it?

15 A. It was pulled apart by the muscles and the tightening  
of the muscles in the fire and in order to get it in  
correct anatomical position I had to hold it for the  
photograph.

Q. This fracture, did it extend right through the bone?

20 A. Oh yes.

Q. When you first observed it?

A. Oh yes. the mandible or lower jaw was broken right  
in two. This radiating fracture is just on the  
25 surface. If you were able to take a closer look  
than you can, here's the point of impact right here  
and you can see right here where the bone has bent  
in. The force of the blow travels along the break  
and sort of comes out at the top and the bottom so the  
bone bends out, and so you get that outbending at the  
30 top of the fractures. The rest of the force goes out  
through this radiating fracture and that is very,  
very characteristic of an impact fracture.

1 Q. In your study, Doctor, have you ever seen fractures  
of that particular type?

A. Yes, I have.

5 Q. And in those studies fractures of this particular  
type are caused by impact?

A. Caused by impact. This kind of fracture would be  
caused by a blow directed at that point in the jaw.

10 Q. And in your experience, Doctor, a blow consistent  
with what kind of blow would cause a fracture of that  
particular type?

A. Well, I mean it could be -- it would have to be an  
object that was small enough and directed enough to  
just make the impact in that small area.

15 Q. What kind of things do you envision in that  
description?

A. Well, --

MR. FURLOTTE: I object to that, My Lord. There's probably  
a thousand items that could be described and that's  
calling for pure conjecture.

20 THE COURT: Well, that point is well taken although I think  
the witness could give an indication of --

MR. WALSH: Doctor, maybe if I could phrase it and you  
could stop me, My Lord, stop the answer if you think  
it's improper. Doctor, in your experience you have  
indicated that you have seen fractures of that type.  
In the fractures that you have seen of that type in  
your experience, what kinds of things caused those  
fractures?

30 A. I have seen fractures like this caused by a blow to  
the jaw by a fist; I have seen fractures of this type  
caused by a blow with an object held in somebody's  
hand.

- 1 Q. Have you ever heard of a heat fracture?  
A. Yes.
- Q. There is such a thing as a heat fracture?  
A. Oh yes.
- 5 Q. Would you please tell the jury, please, how that would relate to this kind of examination you have here?  
A. Well, heat fractures occur in bone only when the bone has dried out enough in order to start cracking and that would take a tremendous amount of heat and/or  
10 a long period of burning. In this particular case there had been no drying out of the bone at all and it most definitely is not a heat fracture.
- Q. Apart from the drying, would there be other things -- If that was a heat fracture what kinds of things would  
15 you expect to see?  
A. If it were a heat fracture -- Well, let me start again. The jaw, the way the mandible grows is in horizontal lines like this and those are the natural growth lines of everybody's jaw. If it were -- If  
20 the jaw were to fracture due to heat it would fracture along those natural growth lines as the bone dries out and sort of just simply come apart at those lines. This fracture with the accompanying radiating fracture cuts right across those natural growth lines so that  
25 would be another indication that it's not a heat fracture.
- Q. In your opinion, Doctor, is there any possibility that that fracture could have been caused by heat?  
A. None whatsoever.  
30

1 Q. Is there anything else you would like to add, Doctor?

A. On that particular question? On that particular point?

5 Q. Yes, or on any aspect to explain your -- I have no further questions unless you --

A. I can't think of anything at the moment.

MR. WALSH: Thank you My Lord.

THE COURT: Cross-examination?

10 CROSS-EXAMINATION BY MR. FURLOTTE:

Q. Miss MacLaughlin, I notice you said that there was two main characteristics as to why you say that was an impact fracture.

A. Yes.

15 Q. Would there be other characteristics to consider for impact fractures, or are those the only two?

A. Those would be the two major diagnostic characteristics. The radiating fracture and the inbending at the point are the two major.

20 Q. Are there other characteristics that could be present with an impact fracture which we do not see here?

A. No. The other evidence of impact fracture is the fact that it's broken across the natural growth lines. It's got all the classic characteristics of an impact fracture.

25 Q. Now, Miss MacLaughlin, you say there's no possible way that this could be caused by a heat fracture.

A. Yes, I said that.

Q. And you are absolutely certain about that?

30 A. Absolutely.

Q. If you're so absolutely certain about that why did you find it necessary to consult the Chief Medical Examiner of Maine to get his opinion?

1 A. I didn't find it necessary. I was -- We were  
meeting as part of the Northeastern Forensic  
Anthropological Association and the case that I was  
presenting was this case, and as colleagues we all  
5 discuss our cases together and he was present at the  
paper that I delivered, and everybody there, including  
him, gave their opinion that indeed it was an impact  
fracture.

Q. Did you present this there at that meeting, or any-  
10 thing, or do your colleagues?

A. I discussed it. Not the names or anything like that.  
I discussed the situation. What we were doing is we  
were having a seminar - an afternoon seminar on  
fracturing on trauma and we were talking about heat  
15 fractures and impact fractures and different kinds  
of trauma to the skeleton.

Q. So in a sense you could say that you run to other  
experts for their opinion?

A. Well, as far as I know in any field it's very common  
20 to consult with your colleagues. I have no problem  
with that and I don't believe it undermines my  
expertise in any way whatsoever.

Q. And the opinion you got from the Chief Medical  
25 Examiner of Maine was that an impact fracture was  
the best possible explanation but not the only one,  
is that not right?

A. He said it was the best possible and probably the only  
one.

Q. Probably the only one. But you come to court and you  
30 say there's no possible way it could be any other?

A. That's what I am saying, yes.



- 1 Q. But the Chief Medical Examiner who you thought enough  
of to ask his opinion thinks differently. That this  
is the best probable explanation, this impact --
- A. Well, he did say that he couldn't see how it could  
5 be any other - there could be any other possibility.
- Q. But in your report you state that he said it was his  
opinion an impact fracture was the best possible one?
- A. Those were the words he used so I repeated them in the  
report.
- 10 Q. But you come to court using much stronger words,  
don't you?
- A. Yes, because the Chief Medical Examiner is a  
pathologist and he doesn't have experience with bones  
that I do, and he said that himself.
- 15 Q. So he doesn't have your experience is that what you  
are saying?
- A. With bones only.
- Q. With bones?
- A. Yes.
- 20 Q. Now, I notice also in your report that you state that  
a person of Annie Flam's age, 75 years of age, almost  
any application of force could break her jaw because  
of her age?
- 25 A. There's a greater likelihood of the jaw being broken  
of somebody that age than say somebody who is 25 or  
30.
- Q. But in your report I believe you say almost any  
application of force. So it wouldn't take a very  
heavy degree of force to break the jaw?
- 30 A. This is all relative of course. You're quite right.  
At her age it wouldn't matter what the force was that

1 was applied to her jaw it would be more likely to  
break than somebody who was 25 or 30.

Q. Definitely. Okay. Now, I notice in your - when Mr.  
Walsh asked you to speculate as to what kind of  
5 force --

MR. WALSH: I didn't ask her to speculate My Lord.

MR. FURLOTTE: Well, Mr. Walsh --

MR. WALSH: I asked her, My Lord, I asked her to give an  
opinion. I didn't ask her to speculate.

10 MR. FURLOTTE: I'm sorry. When Mr. Walsh asked you to give  
your opinion as to and in your experience as to what  
types of force caused these impact fractures in the  
past you stated oh a blow to the jaw by a fist and a  
blow with an object held by somebody's hand, which  
15 goes to show that the only thing you're thinking of  
is somebody deliberately fracturing Annie Flam's jaw.

A. I didn't use the word 'deliberate' as far as I can  
remember.

Q. Well, a blow to the jaw by a fist. Okay, you didn't  
20 express it but one could imply you meant deliberate.  
A blow with an object held in somebody's hand. Again,  
you could imply that somebody deliberately attempted  
to do that. Do you have any more of an imagination  
than that?

25 MR. WALSH: Objection, My Lord. That's --

MR. FURLOTTE: Or can you think of anything else?

MR. WALSH: That's not a proper question.

MR. FURLOTTE: Can you think of anything else?

30 MR. WALSH: All he's attempting to do here -- He's not  
questioning. He's attempting to --

THE COURT: Well, I don't think you should approach the  
matter in that way Mr. Furlotte.

- 1 MR. FURLOTTE: Can you think of anything else Mrs.  
MacLaughlin?
- A. Some other cause of the fracture?
- Q. Yes.
- 5 A. It could be caused by any kind of -- Okay, I'll  
rephrase it. Some kind of blow had to be directed  
at that point. When I responded before I was saying  
that it is consistent with or typical of the kind of  
jaw fracture that you see when a blow has been  
10 wielded by a human, either a fist or holding an  
object, but the main point is that some kind of force  
had to be directed at that particular point on the  
mandible.
- Q. Have you ever heard of old people falling?
- 15 A. Oh yes.
- Q. They break hips; they break arms. Is it possible  
they can break a jaw by falling?
- A. Yes, it is.
- Q. Is there any reason why you did not give that as a  
20 possible cause when Mr. Walsh asked you for some  
explanations?
- A. It is not an explanation that readily jumps to mind.  
It was not one that I would have thought of probably,  
25 the reason being that it is halfway along the right  
side of the lower jaw, the other reason being that  
there is this very specific point of impact. The  
only way that could have been caused by falling would  
be if she were to fall on something that hit her in  
30 that particular spot.
- Q. That's highly possible, isn't it?
- A. I'm not sure.

- 1 Q. What about even falling and tripping and hitting your chin on the door frame?
- A. No. This kind of fracture cannot be caused in any way by hitting your chin.
- 5 Q. Why not?
- A. Because the stress doesn't go up that way. It goes back through the jaw and you get breaks back here.
- Q. It would all depend on which way your chin hit the object.
- 10 A. No. That's not correct.
- Q. What difference would it make if somebody fell face first, jaw-wise, say on my fist or my fist come up and hit them in the jaw? What difference would it make?
- 15 A. It would - the fist coming up would cause breaks up here. I think the point is this kind of break cannot occur with any kind of force to the front.
- Q. Well when I talk about the jaw I don't just talk about the chin here, I'm talking about the whole thing.
- 20 A. Yes.
- Q. You are saying the force was hit right in this area?
- A. Yes.
- Q. From --
- A. But the force was --
- 25 Q. From the side.
- A. That's right.
- Q. And if I come up -- That's the right side. If I give you a left hook that would cause this kind of a fracture?
- 30 A. Yes, that could cause that kind of fracture.
- Q. And if you fell sideways and you hit your face on something why could it not fracture the same way?

- 1 A. I can't rule out that possibility.
- Q. So it is possible that Annie Flam could fall and come up with this kind of a fracture?
- A. If she were to have fallen on her right side and
- 5 there had been some kind of object that would have directed a blow to that particular point, yes.
- Q. When you investigated the jaw at the funeral home you say you had to cut away some of the material and clean it up.
- 10 A. That's right.
- Q. Had that been done before you got there?
- A. No.
- Q. Doctor MacKay himself didn't clean away any from the bone so he could check it?
- 15 A. There had been some cutting but the area was not cleaned off and exposed.
- Q. Right. So Doctor MacKay did do some cutting away?
- A. Yes.
- Q. Before you did.
- 20 A. Yes.
- Q. And were you made aware by Ron Godin that Doctor MacKay thought it may have been a possible heat fracture?
- A. Did Corporal Godin say that to me?
- 25 Q. Yes.
- A. He suggested that it might be a heat fracture, yes.
- Q. So you knew that Corporal Godin was looking for some other explanation?
- A. No, I don't know that.
- 30 Q. So when I asked you -- The medical examiner in Maine, is he also a pathologist?
- A. Yes.

- 1 Q. So when I asked you if you were any better qualified  
to give an expert opinion than a pathologist and you  
said you couldn't answer that but after I understand  
you to be saying that yes you are better qualified  
5 than a pathologist.
- A. You asked me about blood and soft tissue and I said  
no, in blood and soft tissue that's not my area of  
expertise. Of course I'm not going to comment on  
that.
- 10 Q. I believe I asked you if you were in a better position  
than a pathologist to give the type of evidence that  
you were about to give today. I didn't even mention  
at that time the type of evidence.
- A. And I said in bone I am. A forensic anthropologist  
15 is in bone only.
- Q. If a person was lying on their back or on their  
side on the floor or anywhere is it possible that  
something could fall on them, the jaw, and cause this  
fracture?
- 20 A. If the person was lying on his or her back with the  
face directly up towards the ceiling this fracture  
could not occur.
- Q. Because it would hit right in the face.
- A. That's right.
- 25 Q. But if the face was turned to the side?
- A. And if whatever fell on the jaw when the face was  
turned to the side had some kind of point. Not a  
sharp point but some kind of a --
- 30 Q. Edge.
- A. Yes, some kind of an edge. It couldn't be a big flat  
board.

1 Q. Something maybe like a two by four with an edge on  
it?

A. Yes, I couldn't discount that possibility.

MR. FURLOTTE: I have no further questions.

5 THE COURT: Reexamination Mr. Walsh?

MR. WALSH: No, My Lord, thank you.

THE COURT: Thank you very much then, Professor MacLaughlin  
and you are excused.

10 It's now three minutes to five, I think we'll  
call it a day.

MR. WALSH: My Lord, if I could impose on yourself and the  
jury, we have Doctor Hayward who is a dentist from  
the Chatham area. His evidence was initially  
15 tendered to show that he attended at the autopsy of  
Annie Flam and identified her through dental work,  
him being her dentist. Mr. Furlotte previously this  
week, and Mr. Kearney, have accepted the fact that the  
body was Annie Flam but I am offering Doctor Hayward  
20 for cross-examination by Mr. Furlotte and Mr. Furlotte  
indicates that he should be very brief and we could -  
if I could impose.

THE COURT: Doctor Hayward is from Newcastle?

MR. WALSH: From Chatham. And I would like to get him away  
25 if I could.

MR. FURLOTTE: I will probably only be about two minutes.

THE COURT: All right, the jury don't mind staying for a  
couple of minutes? All right.

MR. WALSH: Call Doctor Hayward.

30 THE COURT: Maybe you would ask a couple of questions first  
just to very briefly and generally establish the points  
you wanted to make originally.

MR. WALSH: Yes, My Lord, if I could.

1           DOCTOR CLINTON HAYWARD, called as a witness, having  
been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

Q.     Give the court your name, please.

5     A.     Clinton A. Hayward.

Q.     And your occupation?

A.     I am a dentist.

Q.     And how long have you been a dentist?

A.     39 years.

10    Q.     And you live in the Town of Chatham?

A.     Yes, I do.

Q.     Was Annie Flam a patient of yours?

A.     Yes, she was.

Q.     And how well did you know Annie Flam?

15    A.     I knew her extremely well. She was my landlady in  
the office where I practice.

Q.     And your office would be how close to her former  
store?

A.     Oh, about 60 feet I suppose in back of her store.

20    Q.     And did you have occasion to attend Annie Flam just  
prior to her death?

A.     Yes, I did.

Q.     And under what circumstances?

25    A.     She had a lower left central tooth that had to be  
removed.

Q.     How many days prior to the fire?

A.     It was on May the 26th at 3 o'clock in the afternoon.

Q.     And, Doctor, you attended - you went with the R.C.M.P.  
to an autopsy in Saint John?

30    A.     Yes, I did.





1           REDIRECT EXAMINATION BY MR. WALSH:

Q.    If you fractured a patient's jaw extracting a tooth  
      would you know it?

A.    Oh, I certainly would.

5    Q.    Did you fracture Annie Flam's?

A.    Annie Flam's tooth had what you call advanced  
      periodontia and it was practically - you could  
      practically take it out with your fingers.

MR. WALSH: I have no further questions, thank you.

10   THE COURT: Thank you very much Doctor, and you are free  
      to go.

          Now, we will recess until 9:30 tomorrow  
      morning and we will stop at 12:30 sharp. No lunch  
      tomorrow, a short break mid morning.

15                           (COURT RECESSES - 5:05 P.M.)

COURT RECONVENES - SEPTEMBER 6, 1991, 9:30 A.M.

(Accused present in prisoner's dock.)

MR. ALLMAN: My Lord there is one very minor matter we  
20        would want to raise before the jury comes in.

THE COURT: All right.

MR. ALLMAN: Yes, My Lord, it's basically a housekeeping  
      matter. Counsel for the Crown have been keeping in  
      touch with the reports in the media and we have  
25        observed from time to time a number of inaccuracies  
      in them. I make this comment in no critical sense.  
      The media have to try and encapsulate in a few  
      paragraphs or a few words a whole day's proceedings  
      and in doing so inevitably they shorten, they move  
30        things around a little bit in the sequence of events,  
      they use one word where a witness used ten. So, as  
      I say, it is not a criticism but we have observed a  
      number of inaccuracies and we would appreciate it if

1           you could just perhaps remind the jury that they  
          probably shouldn't read or watch the news on this.  
          If as they do, and they certainly will do, they  
          should remember that the evidence is the evidence  
5           on oath and not what they read in the newspapers.

THE COURT: I will be saying something more to them,  
          perhaps, later in the morning.

          Now, the jury.

          (Jury in. Jury called; all present.)

10          THE COURT: You have another witness Mr. Allman or Mr.  
          Sleeth?

MR. SLEETH: Yes, My Lord. Members of the jury, good  
          morning. The next witness will be Doctor John MacKay  
          My Lord.

15                   DOCTOR JOHN MacKAY, called as a witness, having been  
          duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SLEETH:

Q.       Doctor MacKay would you please state your full name  
20           and your occupation for the jurors?

A.       My name is John Sinclair MacKay. I live at 2788  
          Rothsay Road, Kings County, Province of New Brunswick  
          in the village of Kingshurst-East Riverside. I am  
          a pathologist and employed with the Saint John  
25           Regional Hospital and have worked there since 1971.

MR. SLEETH: My Lord I would ask permission to lead this  
          witness, establishing the credentials for making a  
          motion for expert qualification.

30          THE COURT: All right. You are seeking a declaration of  
          expertise in pathology?

- 1 MR. SLEETH: Forensic pathology, My Lord, yes. Doctor  
MacKay you stated a moment ago that you are employed  
by the Saint John Regional Hospital in what capacity  
again, please?
- 5 A. I am a pathologist. I serve as Chief of Laboratory  
Medicine Service.
- Q. Doctor, in order to become a pathologist you have to  
undergo certain training and I would just like to  
briefly take you through that. It is my understanding  
10 that you graduated from Dalhousie University, Faculty  
of Medicine, in 1960, is that correct?
- A. '61.
- Q. '61. Doctor, while you were at Dalhousie University  
you had the Leonard Foundation Award and the John  
15 Black prize in surgery?
- A. Yes.
- Q. You were admitted to Licentiate to the Medical Council  
of Canada by examination in 1961?
- A. Yes.
- 20 Q. You then proceeded, as I understand, to the University  
of Toronto and did graduate work there?
- A. Yes.
- Q. You studied in clinical psychology in 1963 and '64 in  
the Department of Pathological Chemistry?
- 25 A. Clinical pathology, not psychology. I often think  
that was a mistake but --
- Q. You were later elected a Fellow of the Royal  
Microscopical Society of London, England in 1964?
- 30 A. Yes.
- Q. What is that society, sir?

- 1 A. It is a society devoted to the study of the microscope and the various sciences that employ the microscope which includes, of course, anatomical and forensic pathology.
- 5 Q. And it would have a direct relationship to pathology?  
A. Yes.  
Q. You were elected a fellow in 1964 of that society. You also graduated with a Master of Arts in Pathology in 1965 from the University of Toronto.
- 10 A. Yes.  
Q. That was subsequent to your already having received your medical degree?  
A. Yes.  
Q. In 1964 to 1970 you were a graduate student as well  
15 in the Department of Microbiology at the School of Hygiene of the University of Toronto?  
A. Yes.  
Q. In 1965 you were awarded by examination the Specialist  
20 Certification in Pathology of the Royal College of Physicians and Surgeons of Canada?  
A. Yes.  
Q. In 1966 you were elected a fellow of the American  
Society of Clinical Pathologists?  
A. Yes.  
25 Q. In 1967 you completed courses at the Department of Pathology at Johns Hopkins University in Baltimore, Maryland in the United States.  
A. Yes.  
30 Q. You also graduated in 1969 from a laboratory course on blood coagulation put forth by Warner-Chilcott Laboratories in Toronto, Ontario.  
A. Yes.

- 1 Q. You received your Doctor of Philosophy in micro-  
biology in 1970 from the University of Toronto.
- A. Yes.
- 5 Q. I also understand, Doctor, that over the years you  
have participated in and been a member of a number  
of seminars such as in 1973, a Cancer Immunology  
Seminar in New York City?
- A. Yes.
- 10 Q. 1974, a symposium on radioimmunoassay - perhaps you  
could pronounce it for me - in Washington, D.C. put  
on by Searle Laboratories.
- A. Yes. We call it RIA. It's simpler.
- Q. Which is?
- 15 A. Radioimmunoassay. It's a technique for diagnosis of  
small oddities of chemical elements.
- Q. In 1977 you were a graduate of a course in medical  
jurisprudence given by the London Hospital Medical  
School at the University of London, England.
- A. Yes.
- 20 Q. You also attended a symposium that same year, the  
symposium of Canadian Tuberculosis and Respiratory  
Disease Association in Moncton, New Brunswick.
- A. Yes.
- 25 Q. In 1978 you attended an Advance Pathology Course and  
graduated from it at the Ministry of the Solicitor  
General in Toronto, Ontario.
- A. Yes.
- Q. Perhaps while I note that, are you familiar with an  
individual by the name of Hillsden Smith?
- 30 A. I am.
- Q. And what do you know of this particular person?
- A. He is a senior forensic pathologist, I think arguably

1 the best - certainly the best know and possibly the  
best forensic pathologist in Canada.

Q. In 1978 as well you were awarded by examination a  
diploma in medical jurisprudence at the Society of  
5 Apothecaries of London?

A. Yes.

Q. What is that, sir?

A. It is a very ancient body in England which has been  
involved with examining medical candidates for many,  
10 many years. In recent years it has involved itself  
with a number of specialist diplomas, gynecology and  
obstetrics is one, and forensic medicine and pathology  
is another. It has been making an effort over the  
last 20 years to upgrade its standards to match those  
15 of the other licensing authorities in various  
medical specialties. I went there, I may say, be-  
cause Canada does not offer a subspecialty examina-  
tion in forensic pathology so you have to go to the  
United States or Britain and I chose to do the one  
20 in England.

Q. I also understand further, Doctor, that in 1983, '84  
and '85 you participated in seminars in forensic  
science at Colby College in Waterville, Maine?

A. Yes.

Q. So then in summary, Doctor, you received your  
Bachelor of Science at Mount -- You also received  
a Bachelor of Science from Mount Allison University  
before your medical degree?

A. Yes.

Q. And a Bachelor of Science from Mount Allison  
University, your medical degree from Dalhousie  
University, Master of Arts and Pathology from the

1 University of Toronto, a member of the Royal Society  
of Physicians and Surgeons, 1965, your Ph.D. from  
the University of Toronto, and your license from the  
Society of Apothecaries of London, England.

5 A. Yes.

Q. Are you a member of medical societies since 1961,  
sir?

A. Yes.

Q. Which ones?

10 A. New Brunswick Medical Association, Canadian Medical  
Association, Canadian Association of Pathologists,  
New Brunswick Association of Pathologists, American  
Society of Clinical Pathologists.

15 Q. I also understand you were licensed to practice in  
the Province of Ontario.

A. Was. I resigned that license. I am now licensed  
to practice in New Brunswick.

20 Q. And I also understand you are of the Overseas List  
of the General Medical Council of the United Kingdom,  
or were in 1965?

A. Yes.

25 Q. In terms of specific experience, Doctor, I understand  
that, well, in 1961 through '62 you were a senior  
intern at the Department of Pathology of New Mount  
Sinai Hospital in Toronto, Ontario?

A. Yes.

30 Q. You were later Assistant Resident of St. Michael's  
Hospital in 1962/63 in the Autopsy Service Department  
of Pathology?

A. Yes.

Q. In Toronto.

A. Correct.



- 1 Q. In 1964 to '67 you were a lecturer in microscopy at  
the Toronto Institute of Medical Technology.
- A. Yes.
- Q. 1964 you were also a pathologist at the South Peel  
5 Hospital in Cooksville, Ontario.
- A. Yes.
- Q. Attending physician in 1965 at Scarborough Glaucoma  
Survey in Scarborough, Ontario.
- A. Yes.
- 10 Q. 1965 you became Locum Tenens pathologist of North  
York Branson Hospital of Willowdale, Ontario.
- A. Yes.
- Q. What would that be, sir?
- A. 15 When the regular pathologist is on vacation they  
require somebody to come in and look after his duties  
for him and I did that while on my own vacation.
- Q. You do that for other hospitals as well in Cooksville,  
Ontario and in Etobicoke as I understand it.
- A. Yes.
- 20 Q. Same time period.
- A. Yes.
- Q. You are a lecturer in pathogenic microbiology for  
the Department of Microbiology of the University of  
Ontario?
- 25 A. Yes. University of Toronto.
- Q. You were in 1970-71 Assistant Professor of Department  
of Epidemiology and Biometrics at the School of Hygiene  
of the University of Toronto.
- 30 A. Yes.

- 1 Q. In 1971 you were appointed Associate Professor,  
Department of Pathology, at the Faculty of Medicine,  
Dalhousie University?
- A. Yes.
- 5 Q. 1982 you were appointed Provincial Forensic Pathologist  
by the Chief Coroner for the Province of New Brunswick.
- A. Yes.
- Q. In 1983 and '85 you were an examiner in anatomical  
pathology for the Royal College of Physicians of  
10 Canada.
- A. Yes.
- Q. I understand you became a member of the Ontario  
Medical Association and were a member of that  
association from 1961 until 1971?
- 15 A. Yes.
- Q. Also the Canadian Medical Association from 1961 to  
date.
- A. Yes.
- Q. The Toronto Academy of Medicine from 1961 to 1973?
- 20 A. Yes.
- Q. Ontario Association of Pathologists from 1963 till  
now?
- A. Yes.
- 25 Q. A Fellow of the Royal Microscopical Society in 1964  
and you became a life fellow in 1975.
- A. Yes.
- Q. You became a Fellow of the American Society of Clinical  
Pathologists in 1966?
- 30 A. Yes.
- Q. Became a member of the American Association for the  
Advancement of Science in 1967?
- A. Yes.

- 1 Q. Canadian Association of Pathologists from 1967 to  
1971?
- A. Yes.
- Q. I also understand you have contributed articles and  
5 written articles for various journals, is that  
correct, Doctor?
- A. Yes.
- Q. This would include the Dalhousie Medical Journal?
- A. Yes.
- 10 Q. The Canadian Medical Association's Journal?
- A. Yes.
- Q. The Lancet.
- A. Yes.
- Q. What is the Lancet?
- 15 A. Lancet is a very well known general medical journal  
published in England and widely distributed throughout  
the English-speaking world.
- Q. You have also published in the New England Journal  
of Medicine?
- 20 A. Yes.
- Q. You have also published in the Journal of Applied  
Therapeutics?
- A. Yes.
- Q. Do you do any instructional work, Doctor? Any  
25 teaching work as well?
- A. Yes. We have a residency program at the Saint John  
Regional whereby graduate physicians pursuing different  
specialties come for part of their practical training  
30 in Saint John. We have a rotation there in which  
those people studying pathology come and work for  
3 months in my department in order to have some

- 1 exposure to forensic pathology as it is done in  
New Brunswick as well as in surgical pathology.
- Q. The service that you have in Saint John, how many  
cases, autopsies and the like, would you do in that  
5 service in the course of a year?
- A. I would personally do I suppose 50 or 60. The  
service itself for which I am responsible would do  
350 to 400 cases a year. I personally do those which  
are likely to be of forensic interest from all over  
10 the province and that amounts to between 20 and 30  
cases a year are sent to us, what we call a type two  
case. Those are cases which there's reason to suspect  
are likely to be of forensic interest.
- Q. Doctor, about how many autopsies would you have per-  
15 formed?
- A. I don't know. I have certainly personally performed  
over a thousand and I have supervised 8 or 9000.
- Q. And have you ever testified as an expert witness in  
courts before, Doctor, and if so, about how many times?  
20
- A. Yes. I have appeared in the New Brunswick courts  
perhaps 8 or 9 times a year.
- Q. And you would be looking about how many times in  
which you would have testified as an expert?
- A. All of those times.  
25
- Q. A total of how many occasions, about?
- A. Well, as I say, 150 times.
- Q. Classified as an expert in?
- A. Forensic pathology.
- 30 MR. SLEETH: My Lord I would move that this witness be  
qualified as an expert in forensic pathology entitled  
to give opinion evidence in that.



1 Q. Would you then be concerned about causes, as well, of injuries and causes of death and the like?

A. Causes and effects of injuries and causes of death, yes.

5 MR. SLEETH: Thank you.

THE COURT: Mr. Furlotte, do you have any questions?

MR. FURLOTTE: I have no questions My Lord.

THE COURT: Well I, without hesitation, declare Doctor MacKay an expert in the field of forensic pathology.

10 That makes a 151.

MR. SLEETH: Doctor, it is my understanding that you performed autopsies on an Annie Flam, Linda Lou Daughney, Donna Daughney, and one Father James Smith.

A. Yes, sir.

15 Q. I would like to refer you to the case of one Annie Flam and I will leave you to tell us, first of all, what date did you perform your examination of this person and what discoveries you made at that time.

A. On the 31st of May, 1989 in response to a Coroner's Warrant I attended the morgue at the Regional Hospital and beginning at about 10:30 in the morning I conducted a postmortem examination on the body which was identified to me by the R.C.M.P. and by a Doctor Hayward, a previous witness, as that of Annie Flam.

25 The body was that of an elderly white female person weighing an estimated hundred pounds. We do not have a morgue scale so that weight is based on the estimate of myself and the others who were attending. The others, I may say for the record, were my resident, Doctor Roscoe, who is with me  
30 studying, two members of the R.C.M.P., Corporal Godin

1 from the Identification Section in Bathurst,  
Constable LeFebvre from the Newcastle Detachment  
who was the investigating officer, and my assistant,  
Romeo Tolentino. It's not the best way to measure  
5 body weights but it is the only way we have and each  
of us makes an estimate and I have the casting vote.  
The body was that of a very small female.

The length of the body was approximately four  
foot eight inches. Now, this body had been burned  
10 and was not completely straight so that is an  
approximation but we are dealing with a person who  
is less than five foot tall and weighing not more  
than a hundred pounds.

The body had been subjected to a fire and showed  
15 severe effects from that. There was extensive soot  
staining. The body was in a contracted pose. That  
means that the arms and legs were flexed. This is  
commonly seen in victims of burning due to contraction  
of the muscles and tendons so that instead of lying  
20 perfectly flat it tends to be ~ the joints are bent.  
Hands and feet were severely damaged to the point of  
being charred. Much of the hair had been burned  
off. There was charring of the face and of the right  
side of the trunk. The rest of the body was less  
25 severely damaged but there was heat coagulation,  
cooking if you like, and there were splits and tears  
in the skin as a result of this.

Of course one's opportunity to draw conclusions  
30 from an autopsy is limited when the body has been  
damaged by a fire but in spite of that the internal  
organs were fairly well preserved. We were able to

1           make a number of observations that I think are of  
          some relevance.

          The body was unclothed save for some remnants  
          around the legs of a fabric. I couldn't identify it  
5           more than that. It was charred. And panties which  
          were also soot stained and partially burned but  
          still identifiable. The panties had been pulled  
          down over the hips. There was an amount of coagulated  
          blood in the crotch. There was also a tear along the  
10           seam. This blood appeared to have come from a heat  
          laceration over the abdomen. There was no evidence  
          of direct injury to either rectum or vagina. If I  
          may -- Forgive me, I try to avoid technical words,  
          but heat laceration simply means that when a body is  
15           exposed to heat the skin will sometimes split. There  
          is nothing mysterious about pathology. If you have  
          ever -- I don't mean to be vulgar, but if you have  
          ever cooked a roast of pork you understand many of  
          the changes found in a burnt body. The tissue  
20           coagulates, the fat is liquified, the blood may boil,  
          the skin may split or crack. So otherwise the body  
          was undressed.

          We should then deal with disease processes and  
          so nearly as I could tell, granted some changes from  
25           the effects of the heat, the only disease processes  
          were some curvature of the spine which contributed  
          to the short stature. There had been two surgical  
          operations in the remote past, an appendectomy and  
          hysterectomy which have no relevance to the death at  
30           all, and there was a chronic heart condition called  
          mitral stenosis. One of the heart valves was scarred  
          and rigid and the space through it was diminished.



1 One can only speculate on the effect this would have  
had on the patient in life but I would think the  
cardiac function, the heart function, would have been  
adequate for an old lady. Her stated age was 75 and  
5 that was consistent with my observations. This lady  
would not have been champion runner or swimmer or  
tennis player but I expect following her occupation  
as a store keeper her heart function would have been  
adequate for that. She probably would have got a  
10 little short of breath going upstairs but other than  
that this was a disease she had had for a long time  
and has no direct bearing I think on her death.

There were no other disease processes present  
which I could identify.

15 The most significant finding -- Oh, perhaps I  
should mention identification. I said that the body  
was identified to me by the R.C.M.P. Actually, it  
was identified both to the R.C.M.P. members and my-  
self simultaneously by Doctor Hayward, a previous  
20 witness, based on the examination of her teeth. She  
had in fact only three lower central incisor teeth  
left and there was a socket from a recent extraction,  
and you have already heard that witness and it was on  
the basis of his evidence that the body was identified.  
25

The principal injury present, apart from  
injuries which I attribute to the fire, that is  
burning, charring, soot staining, splitting of the  
skin and a fracture of the right leg which was, I  
30 think, clearly the result of the fire, there was  
also a fracture of the right jaw where I point on

1 myself on the right-hand side of the body of the  
mandible just a little bit in front of the mid point  
between the point of the chin and the angle of the  
jaw. This fracture was in relatively intact bone  
5 and the tissue over it was not in fact charred. It  
was also relatively well preserved so that it appears  
that this fracture was the result of mechanical force  
rather than heat. That, of course, is very  
significant.

10 The other finding which is very important is  
that the trachea, the windpipe, and the main stem  
bronchi were filled with stomach content. The  
stomach contained a quantity of partly digested  
15 food, semi liquid, couldn't identify what the food  
was, but this same content was present in the  
trachea and brochial tree and in such quantity that  
it blocked the passage of air. It is not uncommon  
for traces of gastric content to be present in the  
pharynx or in the trachea at death without having a  
20 great deal of significance, but this amount in my  
opinion was in fact significant.

25 The other point of importance was that although  
the body was soot stained extensively and there was  
soot about the nose and mouth, this did not extend  
into the windpipe. There was no soot staining in  
the trachea or in the bronchi. We sent specimens of  
blood to the R.C.M.P. forensic laboratory for analysis  
specifically for carbon monoxide and this was reported  
30 as negative. Therefore, we have no evidence that the  
victim was exposed to a fire while she was alive.  
There was no evidence she inhaled smoke. There was

1 no evidence that she inhaled carbon monoxide.  
From this we can conclude that she was dead before  
the fire started. We are left then with the question  
of why was she dead.

5 I would like to take a minute and explain to  
you three terms which are very often confused by  
doctors as well as juries: cause, manner and  
mechanism of death. The cause is the first thing  
that happened to a person otherwise going about  
10 their business as all of us are today. Something  
happens which leads in an unbroken sequence of events  
to that person's death. That first thing is the  
cause. The mechanism of death is what goes wrong  
internally that causes them to die. Sometimes the  
15 cause and the mechanism are very directly related.  
If you are shot between the eyes the cause is a gun-  
shot wound and the mechanism is a gun and that's  
pretty easy. But you can visualize a great long  
complex train of events in which one accident leads  
20 to an injury which leads to a complication and so  
on and so forth. Those things are the mechanism.  
Mechanisms are of great interest to doctors more than  
to anyone else. And, finally, there is the manner  
of death, and the manner of death is what is of  
25 interest to the courts. Manner of death can be  
natural. That means disease or old age that flesh is  
heir to, or it can be the result of an intervention.  
That may be by the individual themselves or by some-  
30 one else. If it's by the individual themselves that  
causes death this is suicide. It may be an accident.

1 The accident can be the result of somebody else or  
the individual. Or it may be the deliberate action  
of someone else, and that is homicide. So those are  
manners.

5 To conclude then, based on my observations, I  
believe the cause of death was a blow to the jaw.  
The blow to the jaw resulted in a fracture of the  
jaw. That, given that the victim was a frail elderly  
lady, would have caused pain; it would have caused,  
10 certainly, fear; it would have caused probably either  
loss of consciousness or diminished consciousness and  
confusion. As a result of some combination of these  
things, fear, pain, impaired consciousness, the  
victim vomited. Because of the impairment of  
15 consciousness her reflexes were not as they should  
have been, she inhaled the vomitus and she basically  
choked to death. At some point after that a fire  
occurred which resulted in the other changes which  
we see. So the cause, the first thing that happened  
20 was that she was struck in the face and this, as a  
result of that, caused a fracture, caused pain,  
caused reduced consciousness, caused aspiration -  
vomiting, aspiration and then death from asphyxia.

25 The manner of death in my opinion is homicide  
and homicide in my terminology simply means that the  
death was caused by some other person. I am not  
implying any amount of guilt or any individual. I  
am merely saying that somebody did this.

30 What are the alternatives? The alternatives  
are that she did it to herself. I think that is so  
ridiculous we needn't consider it further. Little

1 old ladies do not break their own jaws deliberately.  
Could it have been an accident? Yes, it could have  
been an accident as far as the fracture itself is  
concerned. If this lady fell down and struck her  
5 jaw on a hard object such as the corner of the jury  
box that could have resulted in a jaw fracture,  
certainly. We then have to account for the fact that  
having done that she got up, laid down quietly in  
bed and stayed there until the house burned down.

10 It is very important to interpret a forensic  
autopsy in the light of all of the available evidence.  
So often I am asked can you say from the autopsy  
alone, excluding everything else you know about the  
case, and the answer is I wouldn't dream of reaching  
15 a conclusion on the autopsy alone because you make  
terrible mistakes that way. So I think that we have  
to consider, as you heard from previous --

MR. FURLOTTE: My Lord, I wonder if this witness has been  
declared an expert to draw an opinion that maybe  
20 ought to be left to the jury.

MR. SLEETH: Excuse me, My Lord, but the witness has  
already been declared an expert entitled to give  
opinion evidence. That was done by this court in  
the presence of the jurors.

25 MR. FURLOTTE: Opinion evidence as to pathology and to the  
cause of death, and not as to mechanisms.

THE COURT: Well, I'm following carefully what the witness  
has said and I don't think he has transcended the  
bounds. He will be subject to cross-examination.

30 MR. FURLOTTE: Yes, but I believe the manner of death is a  
question for the jury, not for any witness be he  
expert or otherwise.

1 THE COURT: Well now he can give his opinions based on his  
deductions and observations. I don't think he has  
exceeded that yet. His opinions may be shown to be  
invalid on cross-examination or otherwise.

5 MR. SLEETH: Exactly, My Lord, but he has been qualified  
by the court entitled to give them. Please continue  
Doctor.

A. Well, quite correct. What I am offering is my  
opinion of how this person came to her death and I  
10 believe that given all of the circumstances of the  
crime which admittedly are not part of the autopsy,  
that the only reasonable interpretation is that she  
was struck on the jaw by some other person. I think  
the likelihood of her having fallen, then managing  
15 in some way to transport herself to the bed, and then  
a fire occurring, if you put these all together it  
becomes so improbable that I would personally dismiss  
it.

In conclusion, therefore, it is my opinion that  
20 this lady died as a result of a blow to the face.  
The mechanism of death was aspiration of vomitus,  
and that the blow was caused by some other party.

MR. SLEETH: Thank you Doctor.

25 THE COURT: Now, cross-examination.

CROSS-EXAMINATION BY MR. FURLOTTE:

Q. Doctor MacKay, I believe you said the only reasonable  
assumption was homicide?

A. That is my opinion.

30 Q. And you were led to believe that before you even per-  
formed your autopsy, were you not?

1 A. No, on the contrary. I was told that the lady had  
been found in a burned building and my original  
impression was that this was probably accidental.  
Indeed I was startled to find this fracture of the  
5 jaw and was very concerned that this was not in fact  
a heat fracture because clearly that determination  
is vital.

Q. Were you also advised when the body was brought in  
for an autopsy that the victim's sister-in-law was  
10 living in the next apartment and she escaped the fire  
but described being assaulted by a lone male?

A. Yes.

Q. And you were told that before you performed your  
autopsy?

15 A. Yes.

Q. Did that statement to you have any effect on your  
reasonable assumption of homicide?

A. That statement is critical to my assumption of  
20 homicide because we're dealing with probabilities.  
You start with the probability that an old lady falls  
down and breaks her jaw. That's unlikely because of  
the nature of the fracture. Usually if you fall down  
you hit your chin and you break your jaw back here.  
25 This person broke her jaw there. So the fall is very  
improbable to start with. Then that she should get  
up after the fall and quietly go to bed makes it even  
more improbable. But when I learned from the police  
that simultaneously someone next door is being  
30 assaulted and then I say a previous witness yesterday  
described being struck on the right side of her jaw  
by the assailant who is in the same house at the same  
time, when I put that altogether I say with absolute  
confidence this is a homicide.

1 Q. Now, when you say it was a reasonable assumption of  
homicide that it was caused by somebody else, the  
mannerism, that it was deliberately caused, you are  
not saying that someone else deliberately intended to  
5 kill Annie Flam. Just maybe deliberately intended to  
strike Annie Flam?

A. Well, it certainly exceeds my expertise to say what's  
in the mind of an assailant. I can only say that I  
believe she was struck by some person. What was in  
10 his mind I have no idea.

Q. But death was caused by her choking to death on her  
own vomit?

A. Death was caused by being struck; the mechanism was  
the aspiration of vomitus. If she had not been  
15 struck she would not have vomited, she would not have  
aspirated, she would not have died.

Q. That depends on how far back you want to go to cause  
and effect.

A. Yes, and I want to go back to the first incident that  
20 night. I believe that if she had not been struck that  
she would be alive today.

Q. Okay. What was the -- The cause of death was  
what?

A. The cause of death was one or more blows to the face.  
25

Q. What was the mechanism?

A. The mechanism of death was aspiration of vomitus.

Q. And in all your fields of - you have testified in  
many homicide cases?

A. Yes.  
30

Q. Is a normally planned or commonly planned and  
deliberate cause of death to cause somebody to choke  
on their own vomit?



- 1 A. Oh, I see what you are saying. No, of course not.
- Q. If you were going to plan this -- As a pathologist  
you would --
- A. No.
- 5 Q. You would not plan --
- A. This is not a way that one would plan to kill someone.
- Q. No. Right.
- A. Absolutely.
- Q. You are not going to go out and plan to have somebody  
10 choke on their own vomit, are you?
- A. No. I am sure that no one had that intent.
- Q. Now, you mentioned that Annie Flam had a bad heart  
condition.
- A. She had a heart condition. As to bad, I think she  
15 had lived with it for many years and as far as I know  
went about her business.
- Q. And I believe you said that it's possible that as a  
result of pain from the strike, or fear --
- A. Yes.
- 20 Q. -- it may have caused her to get stomach sick and  
throw up.
- A. Yes.
- Q. And cause her death. Did you check with Annie Flam's  
family doctor to see what kind of medication she was  
25 taking for her heart?
- A. No, I did not.
- Q. If a person is about to take say a heart attack is it  
possible that they throw up?
- 30 A. Yes.
- Q. If Annie Flam was taking a heart attack it's possible  
that could cause her to vomit?

1 A. Except there's no evidence of heart attack whatsoever.  
Chronic disease of the heart has nothing whatsoever  
to do with what is commonly called a heart attack.

Q. What about certain medications that if she was  
5 taking - what's that medication that people about to  
take a heart attack may put a little pill under their  
tongue?

A. Nitroglycerin.

Q. If a person is in that kind of a condition could that  
10 cause them to throw up?

A. I suppose it could. It's not a common side effect  
of nitroglycerin. It's a speculation.

Q. Every time a person has to take nitroglycerin is  
that person actually having a heart attack?

15 A. No.

Q. No. But yet when a person gets in that kind of a  
condition where she needs the nitroglycerin she could  
be sick enough that she would throw up also. Vomit.

20 A. Yes.

Q. So let's say, for instance, Annie Flam with her heart  
condition if she heard an intruder in the house she  
could become in such a condition that even that type  
of fear could cause her to vomit?

25 A. Yes.

Q. So it's not necessarily from the strike in the jaw  
which would cause this woman to vomit? It could be  
some other --

A. It could certainly be fear.

30 Q. Some other mechanism.

A. I would think fear is very relevant here.

Q. So as far as the only evidence that you could provide  
the court with here is your report that as a result

1 of pain, maybe from the broken jaw, or fear, she vomited and aspirated causing death by asphyxia before exposure to the fire.

A. Correct.

5 Q. That's your basic conclusion?

A. Yes.

Q. Do you ever make mistakes in court before about the causes of death or the assumptions that you drew?

10 MR. SLEETH: My Lord I am going to object to the way that question was phrased. There is no indication whatsoever, no evidence whatsoever there has been a mistake made here today. The question was has there even been a mistake made before. An implication there was a mistake made here today.

15 MR. FURLOTTE: This is an expert witness, My Lord, entitled to give an opinion.

THE COURT: How do you measure mistakes? How would the witness measure mistakes he has made? How does he know? What do you mean by mistakes?

20 MR. FURLOTTE: In the courts.

THE COURT: What is a mistake in court?

25 MR. FURLOTTE: Let me put it this way. Have you ever testified in court before that the likely cause of death, once you give the cause of death and the likely manner was homicide, which you later retracted?

30 A. No, I don't recall ever retracting it. I often wondered if I am right. Unfortunately, one never knows. What can I say? The jury have not always convicted people when I have testified on behalf of the crown. If that means I am mistaken so be it.

1 Q. Last year was there not a case in Moncton where you testified at a preliminary hearing --

THE COURT: I think, you know, this should have been gone into on the question of whether the witness is an  
5 expert in pathology. That's the time these questions - but I'll permit you to go ahead anyway.

MR. FURLOTTE: I have no doubt that this witness is an expert in pathology, My Lord, but I think the jury is entitled to know that even experts make mistakes and  
10 it goes to the weight of the evidence that they would like to put on this witness or any expert witness.

THE COURT: All right, go ahead. Go ahead.

MR. FURLOTTE: Do you recall testifying in a preliminary hearing in a murder charge of a woman in Moncton  
15 last year, sometime last year, where your evidence at the preliminary hearing bound her over for trial?

A. Yes.

Q. And later because the defence was able to get another expert witness to counter the evidence you gave the  
20 crown withdrew that case?

A. Yes.

Q. And is it true that -- are you being sued for negligence in that case?

A. That is not true.  
25

Q. That is not true.

A. No. The crown is being sued.

Q. You were not named as a defendant?

A. No. I was named in the crown's response that they had proceeded on the basis of my opinion.  
30

Q. Were you included as a third party?

1 A. No. My name was mentioned. I was not -- If you  
want to go through what happened, this individual  
when the charge was withdrawn sued the City of  
Moncton and the Police Department who said it was  
5 not their business to lay charges, it was the  
crown's business, so the action then came against  
the crown and the crown said well they only did it  
because I recommended that they do it which was not  
strictly true. I don't recommend that they lay  
10 charges or not. I offered the opinion that that  
woman was murdered and I may say, members of the jury,  
it is still my opinion that that woman was murdered.  
I have not changed my opinion in the slightest.

Q. You have not changed your opinion.

15 THE COURT: Are there charges still pending in that case?

MR. FURLOTTE: No, the charges have been withdrawn. In  
the murder trial the charges have been withdrawn.

A. I may say I have suggested to crown they should be  
20 reinstated but the crown have not accepted my  
recommendation.

THE COURT: I only asked that question because if there had  
been proceedings in some other court I would have  
instructed the media not to be referring to that.

25 A. No, those charges have been dropped.

MR. FURLOTTE: And basically the crown was blaming you for  
giving them bad advice? That's the basis of it?

A. I can't tell you what the crown's -- Well, I can  
tell you what the crown's motivations were because  
30 we discussed it. The feeling was that since an  
element of doubt could be raised it would not be in  
the best interests of society to go through the

1 expense of a trial when there was a high probability  
of acquittal on grounds of reasonable doubt. I also  
discussed this with my old friend and colleague who  
was retained by the defence and he said to me 'I am  
5 going to go after reasonable doubt. Will you agree  
to that?' And I would say there is doubt in that  
case, whether it's reasonable one can argue. Had we  
gone I would have suggested we have further experts  
to appear for the crown. But that is a different  
10 case. In that case it was a question - the crown's  
decision that there was sufficient possibility of  
acquittal that it was not worth proceeding. In this  
case the crown has not made that decision and in this  
case I believe there is not reasonable doubt.

15 Q. That case was withdrawn because basically --

THE COURT: Well haven't we gone far enough with this other  
case? We're not trying a Moncton murder, or alleged  
murder, now. You are trying to establish in this  
line of questioning that this witness is incompetent  
20 and gives poor advice on occasion.

MR. FURLOTTE: I am trying to establish that in this case that  
this witness is able to make mistakes like any other  
human being and draw wrong conclusions from the  
evidence.

25 THE COURT: Would you put that to him in the form of a  
question and let him answer it, and his answer will  
be yes.

MR. FURLOTTE: Would you admit, Doctor, that you are capable  
of making mistakes, drawing wrong conclusions from  
30 evidence?

A. Absolutely.

1 Q. And you admit, Doctor, that in this case that Annie Flam could have died from -- or she could have vomited from fear or fright and not necessarily from a fractured jaw?

5 A. Well she had a fractured jaw and she did vomit and I am certain that she was afraid.

Q. I am asking you for possibilities or doubts. It's possible that Annie Flam - what caused her to vomit was fear or fright and not a fractured jaw?

10 A. Yes.

MR. FURLOTTE: I have no further questions.

THE COURT: Reexamination?

REDIRECT EXAMINATION BY MR. SLEETH:

15 Q. Doctor, at the end of the day and after all the cross-examination by my learned friend of the possibilities and the like, has there been any change in your conclusion?

A. No, because all of these alternatives have been  
20 considered and obviously I do not know what happened because I wasn't there. All that you can do with a forensic autopsy is look at the findings and come to the most reasonable conclusion of what caused those findings, and that is what I have done. And  
25 I believe the most reasonable conclusion, and in fact the only one that I can accept, is that Annie Flam was assaulted As a result of that assault - and I don't think it greatly matters if it was pain or  
30 fear in the course of the assault, that produced the vomiting that caused her death.

1 MR. SLEETH: Thank you Doctor. I would ask this witness  
be stood aside My Lord. We will require him three  
more times.

THE COURT: Yes. Well, you are stood aside for now Doctor.

5 I warn you, as I have done the others, and as you have  
been warned on numerous occasions before, you shouldn't  
discuss this aspect of your testimony with anyone  
until all your evidence is completed.

A. Yes, My Lord.

10 MR. WALSH: My Lord another witness, Doctor John Hillsden  
Smith.

DOCTOR JOHN SMITH, called as a witness, having been  
duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MR. WALSH:

Q. Would you give the Court your name, please, and  
your present occupation?

A. John Hillsden Smith, forensic pathologist, address:  
R.R. 1, Orton, Ontario.

20 Q. And your present position, Doctor?

A. Present position is provincial forensic pathologist  
for the province of Ontario employed by the mercy of  
the Solicitor General, and Professor of Forensic  
Pathology, University of Toronto, and Consultant  
25 Staff Pathologist for the Hospital for Sick Children  
in Toronto.

MR. WALSH: My Lord at this time I would like your permission  
to lead Doctor Hillsden Smith through his curriculum  
vitae.

30 THE COURT: Yes, you may. I was just assessing from his  
age how long this curriculum might be.



- 1 A. Nothing special My Lord.
- MR. WALSH: No, My Lord, in fact we have made an effort to  
reduce it and put the high points, so to speak --
- THE COURT: I think if you touched on the high points  
5 perhaps it would suffice.
- MR. WALSH: Yes, My Lord, but it's important that the jury  
understand the depth of his training.
- THE COURT: All right.
- MR. WALSH: You have, Doctor, a Bachelor's degree in  
10 honours from the University of Birmingham in 1949,  
Bachelor of Science?
- A. Yes.
- Q. You received a degree from the University of  
Birmingham in 1952. Would you tell us what degree  
15 that was?
- A. That's the M.B.C.H.B. which is the equivalent of the  
M.D. on this continent.
- Q. And you were registered with the College of Physicians  
and Surgeons of Ontario in 1973?  
20
- A. Yes.
- Q. As what, Doctor?
- A. As a registered medical practitioner.
- Q. And you were registered with the Royal College of  
Physicians and Surgeons of Canada in 1973 as well?  
25
- A. Yes.
- Q. In what area?
- A. As a fellow of the Royal College of Physicians of  
Canada in general pathology.
- 30 Q. You were present in court when Doctor MacKay  
testified?
- A. Yes, I was.

- 1 Q. And he explained pathology and forensic pathology.  
Do you accept that definition?
- A. I do indeed, yes.
- Q. Doctor, you were at one time a major in the British  
5 Royal Army, Medical Corps and specializing in  
pathology?
- A. Yes, I was.
- Q. You were a Shepherd Research Fellow in Pathology  
at the University of London in England?
- 10 A. Yes.
- Q. You were a government pathologist and consultant  
forensic pathologist to the Northern Rhodesian  
government?
- A. Yes.
- 15 Q. You were a senior registrar in pathology at Newcastle,  
England?
- A. Yes.
- Q. What is a registrar?
- A. It's simply a position in the hospital setting. It's  
20 a sort of dogsbody/gopher type of situation.
- Q. You were a lecturer in forensic medicine at the  
University of Edinburgh and Police Surgeon to the  
southeast of Scotland?
- A. Yes.
- 25 Q. You are an examiner in forensic medicine to the  
Royal Colleges of Physicians and Surgeons in Edinburgh  
and Glasgow?
- A. Yes.
- 30 Q. You are a member of the British Association of  
Forensic Medicine?
- A. Yes.

- 1 Q. The Association of Clinical Pathologists of England?  
A. Yes.
- Q. The Medical/Legal Society of Toronto?  
A. Yes.
- 5 Q. A member of the Ontario Association of Pathologists?  
A. Yes.
- Q. A member of the American Academy of Forensic  
Scientists?  
A. Yes.
- 10 Q. A member of the Royal Society of Medicine?  
A. Yes.
- Q. A member of the International Academy of Pathology?  
A. Yes.
- 15 Q. Doctor, I understand that you have conducted approx-  
imately 7000 medical/legal autopsies?  
A. Yes.
- Q. And could you give the jury some indication of how  
many of those autopsies would be fire death autopsies?  
A. I would say maybe 5 to 600.
- 20 Q. Do you participate in any teaching duties associated  
with fire death autopsies?  
A. Yes, I do. I teach at the Ontario Fire College, the  
Ontario Police College at Aylmer, at the Canadian  
25 Fire College in Aylmer. I have lectured in Halifax,  
Nova Scotia, and I lecture on the seminars that we  
host on an annual basis on the pathology of fire  
deaths.
- Q. In fact, Doctor, you are the Chief Pathologist for  
30 the Province of Ontario, is that correct?  
A. Yes, I am, yes.

1 Q. Doctor, you have given expert testimony in courts  
before as a forensic pathologist?

A. I have.

Q. On approximately how many occasions?

5 A. On a career basis about twelve hundred times.

Q. And that is in this country and other countries?

A. Yes, that's in this country, mainly of course in  
Ontario, but British Columbia, Nova Scotia, Manitoba,  
New York State, Scotland, England, Rhodesia.

10 MR. WALSH: My Lord at this time I am going to ask that  
Doctor Hillsden Smith be declared an expert in  
forensic pathology.

THE COURT: Any questions?

MR. FURLOTTE: I have no questions or objections My Lord.

15 THE COURT: I would declare the witness an expert in the  
field of forensic pathology for the purpose of this  
trial.

MR. WALSH: Doctor, would you tell the jury, please, how  
20 you became involved in this particular matter? Under  
what circumstances?

A. Firstly, I received a phone call from Doctor MacKay  
in regard to the interpretation of the fracture of the  
right lower jaw. As a result of that the R.C.M.P.  
25 sent me a number of photographs showing the right  
lower jaw injury together with some photographs of  
the body of the deceased.

Q. I will refer you to exhibit P-9 Doctor. It purports  
to be two photographs of the jaw of Annie Flam. Do  
30 you recognize those as being among the photos that  
you received?

A. Yes, I do.

- 1 Q. I show you, as well, Doctor, what has been marked on  
this particular hearing as exhibit P-12-1 and 2  
which are blow-ups of those particular photographs.  
Have you seen those blow-ups?
- 5 A. Yes, I have.
- Q. I show you, as well, Doctor, exhibit P-13 which  
purports to be a schematic of a human skull.
- A. Yes.
- Q. And I understand, Doctor, you are aware that  
10 Professor MacLaughlin has the opposite view of the  
skull due to the fact that she didn't have a right  
side schematic.
- A. Yes, I am aware of that, yes.
- Q. Doctor, what, if anything, did you do as a result of  
15 your conversation and as a result of receiving those  
particular photographs?
- A. The question posed really was was this fracture of  
the lower jaw a before death injury or was it a heat  
fracture as Doctor MacKay has already explained what  
20 happens when the body is subjected to intense heat.  
Firstly, in my opinion it is clearly a before death  
injury. We have a fracture line there with  
hemorrhage between the two pieces of bone which in-  
25 dicates that at the time of the injury the heart was  
beating. It shows none of the attributes of a fire  
fracture. Fire fracture occurs as a result of water  
in the bone. Contrary to popular belief the bone  
contains a fairly considerable amount of water.  
30 Under intense heat the water boils, produces steam,  
and we have steam under pressure and, of course, this  
is very destructive. In the case of a heat fracture

1           instead of having a relatively straight or in this  
          case slightly curved fracture, it would be a  
          splintering of the bone with very irregular bone  
          ends and there would be evidence of blackening,  
5           charring and incineration of the bone itself which  
          of course is absent here, and is even absent in the  
          muscle overlying that fracture. So I have no doubt  
          in my mind this is a before death fracture. It had  
          nothing to do with the postmortem burning of the body  
10           at all.

Q.       Do you have anything else to add on that particular  
          point?

A.       It's the type of fracture which would result from a  
          forceful blunt instrument impact on that particular  
15           part of the jaw, and by that I am talking about a  
          baseball bat, a two by four, a fist, or anything  
          that exerts considerable energy over a small area  
          will result in that type of fracture.

MR. WALSH: Thank you Doctor. Do you have anything further  
20           on that?

A.       No. No.

MR. FURLOTTE: I have no questions My Lord.

THE COURT: This witness isn't being stood aside Mr. Walsh?

MR. WALSH: No, My Lord, Doctor Smith will be going back  
25           to Ontario.

THE COURT: Thank you very much Doctor, you are excused.

MR. WALSH: My Lord my next witness would be Mr. Mel  
          Vincent.

30

1        MR. MELVIN VINCENT, called as a witness, having been  
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

Q.        Would you give the Court your name, please, and your  
5        present occupation?

A.        My name is Melvin Arthur Vincent. I reside at 36  
Wildwood Street, City of Saint John, Province of New  
Brunswick. I am the acting Fire Marshal for the  
Province of New Brunswick and I have been so con-  
10        tinuously employed with the Office of the Fire  
Marshal for 27 years.

MR. WALSH: My Lord at this time I would ask for your  
permission to lead Mr. Vincent through his qualifica-  
tions.

15        THE COURT: Fine. You are seeking to have him qualified  
as an expert in what field?

MR. WALSH: Moving to have him qualified as an expert in  
the fields of the chemistry of combustion, fire  
technology and fire investigation procedures.

20        THE COURT: Okay.

MR. WALSH: Mr. Vincent you are a principal of the New  
Brunswick Fire and Arson Investigation School?

A.        Yes.

25        Q.        You are a Senior Fire Prevention Officer?

A.        Yes.

Q.        With the Provincial Fire Marshal's Office as well as  
now you are the acting Fire Marshal?

A.        That's correct.

30        Q.        You were a former volunteer and a professional fire-  
fighter?

A.        Yes.

- 1 Q. You have been a member - you have pointed out, you have been a member of the Fire Marshal's Office for the Province of New Brunswick for approximately 25 years?
- 5 A. Yes.
- Q. You are a former Director of the Firemens Training in Fire Prevention Education for the New Brunswick Provincial Fire Marshal's Office?
- A. Yes.
- 10 Q. You have attended courses of advanced training on matters of Fire Prevention Education, Advanced Fire Investigation, and Fire Fighter Training at McMaster University in Hamilton, Ontario, at the University of Maine, at the University of New Brunswick and at the
- 15 Canadian Forces Base at Rockcliffe, Ontario?
- A. Yes.
- Q. And you have also attended a number of other programs of an advanced nature throughout this country?
- A. Yes.
- 20 Q. You have written, Mr. Vincent, and presented papers, manuals and documents in use by the fire service in the fields of Fire Investigation, Firemens Training, and Fire Prevention Education?
- A. Yes.
- 25 Q. You have lectured widely throughout the Atlantic Provinces in these related fields?
- A. Yes.
- Q. You have attended recognized national schools at the
- 30 National Research Centre, the Canadian Standards Association, and three levels of National Training offered through the Fire Investigations School, the



- 1 levels including Fire Cause Determination, Fire Investigation and Advanced - an Advanced National Course?
- A. Yes.
- 5 Q. You are a member of the Association of the Canadian Fire Marshals and Fire Commissioners?
- A. Yes.
- Q. You are member of the New Brunswick Fire Chiefs Association, the New Brunswick Association of Fire and Arson Investigators, in fact you're the president?
- 10 A. Yes.
- Q. You are a member of the Canadian Association of Fire Investigators?
- A. Yes.
- 15 Q. And a member of the International Association of Fire Investigators?
- A. Yes.
- Q. You have been involved in the investigation of the more serious types of fires which have occurred within the Province of New Brunswick in the last how many years?
- 20 A. 27 years.
- Q. You are presently serving as a member of the Canadian Ad Hoc Committee, the Association of Canadian Fire Marshals and Fire Commissioners, addressing the updating of the course content, lesson planning and examination preparation for use in future by nationally recognized fire and arson investigation courses?
- 25 A. Yes.
- 30 Q. Is that correct? You have been declared an expert in the fields of Chemistry of Combustion and Fire

1 Technology and Fire Investigation Procedures in the  
Provincial Court, Court of Queen's Bench, Trial  
Division, Coroners Inquests on well over a hundred  
occasions in New Brunswick during the years you have  
5 been employed with the Office of the Fire Marshal?

A. Yes.

Q. And those courts are in the Province of New Brunswick?

A. Yes.

Q. Would you for the jury, please, and the court, would  
10 you please define the chemistry of combustion?

A. Chemistry of combustion in the Fire Investigative  
Services relates to a knowledge and understanding of  
the elements that are required for a fire to occur  
and what takes place in the fire process if each of  
15 those elements are removed. The elements are heat,  
fuel and air or oxygen and are referred to as the  
fire triangle. The chemistry of fire and combustion  
also relates to temperatures of fire, gas exchange,  
stratification or layering of fire and smoke, and  
20 touches briefly on the area of fire spread and "V"  
patterns.

Q. Thank you. Would you define for the jury and the  
court, please, fire technology?

A. Yes. Fire technology is the thorough knowledge and  
25 understanding of the behavioral patterns of fire once  
it occurs. The extension of fire, the colors of  
smoke and the colors of flame, temperature of the  
seat of the fire, and the normal flow that can be  
30 expected in a natural fire versus the differences of  
fire spread in an unnatural fire.

1 Q. And would you also, please, define for the jury fire investigation procedures?

A. Yes. Internationally or universally there is an adopted process to allow an investigator to make a  
5 determination on point of origin and possible cause. That takes effect on the principle of addressing the known or natural causes of fires. Fires can occur and can be affected by electrical installations, electrical apparatus. Fires can be affected by  
10 heating appliances and apparatus. Another area where fires can occur as to cause and origin is identified or recognized as an act of God such as lightning strikes, wind storms, those types of things. They are generally perceived to be a natural or act of  
15 God fire causes. The process to result in a successful examination is to eliminate the natural causes. Once the natural causes have been eliminated and can be disregarded you then have a fire of an unnatural cause and that is to say it was an incendiary or set  
20 fire and that's the fire investigative process that is recognized by those people who have the expertise to carry out that act.

MR. WALSH: Thank you. My Lord at this time I am going to  
25 ask that Mr. Vincent be declared an expert in the field of chemistry of combustion, fire technology, and fire investigation procedures.

THE COURT: Any questions?

MR. FURLOTTE: I have no questions, no objections.

30 THE COURT: I would declare the witness an expert for the purpose of this trial in those combined fields, those three fields that you have described.

1 MR. WALSH: Mr. Vincent I understand that you have conducted an investigation with respect to the fire associated with Annie and Nina Flam, is that correct?

A. Yes.

5 Q. You have also conducted an examination with respect to the premises of Linda and Donna Daughney, is that correct?

A. Yes.

10 Q. For your testimony this morning I would ask you to restrict yourself, please, to the fire associated with Annie and Nina Flam. Would you tell the jury, please, in your own words how you became involved in that particular aspect and what, if anything, you did?

15 A. As a result of a call I received on Monday, May 29th of 1989 I proceeded to the Chatham/Newcastle area and on that day spent considerable time in meetings with fire and police authorities. It was agreed that a meeting would take place on a joint forces basis at  
20 10 A.M. on Tuesday morning, May 30th, 1989 and at the conclusion of that meeting I left the R.C.M.P. Detachment in the Town of Newcastle, Province of New Brunswick and proceeded to the Chatham Fire Department in the Town of Chatham, Province of New Brunswick  
25 where I had discussion with the Fire Chief and Deputy Fire Chief. Following that discussion I proceeded to a building located at 244 Water Street in the Town of Chatham, Province of New Brunswick where I met with  
30 fire and police officials whom I was previous acquainted with, I met others that I was not. I identified myself to them and I commenced a fire

1 scene examination of a two storey wood frame dwelling  
which also housed a store identified as 244 Water  
Street, Chatham, New Brunswick. I examined the entire  
structure as well as the surrounding areas outside  
5 of the building and identified two main areas of  
fire in that structure. Both of those areas were  
located on the second floor of the building and were  
identified to me, with the first instance, as Annie  
Flam's bedroom area on the 2nd floor of this dwelling  
10 is located. For the purpose of trying to explain to  
you where I was, if I was standing on Water Street  
and facing the residence at 244 Water Street the  
Annie Flam bedroom would be on my left-hand side,  
second floor. The Nina Flam bedroom facing the  
15 building from Water Street would be on the second  
floor right-hand side of the building.

Q. Perhaps, Mr. Vincent, I'll ask you to stop there for  
a second. This is the P-3 is over here. I'll switch  
20 them to make them easier to reach. Are you familiar  
with the plan drawing that has been marked exhibit  
P-3?

A. Yes, I am.

Q. Would you, please, refer to that plan drawing and  
25 show the jury what you are referring to as the bed-  
room of Annie Flam and the bedroom of Nina Flam?

A. This would be the bedroom of Annie Flam.

Q. You are referring to the room which has the outline  
of a body?

30 A. Yes. This would be the bedroom of Nina Flam.

Q. And you are referring to the room - for the record  
you are referring to the room on the top left-hand  
side of that particular plan drawing?

1 A. That's correct. I proceeded to the bedroom that was  
identified to me as Annie Flam's bedroom. In my  
preliminary tour of the building I recognized and  
identified that this bedroom was the most severely  
5 damaged area in the home. A simple straightforward  
fire occurred and by that I mean we found no evidence  
of incendiary devices, of accelerant use, of delayed  
or timed ignition devices.

Q. For the jury would you explain incendiary and  
10 accelerant?

A. Incendiary means something that would be set by - a  
fire that would occur by other than a natural cause,  
that is to say it would be a set fire, incendiary.  
An accelerant is a product that can be added to a  
15 normal fire scene that will cause a number of different  
reactions but is usually intended to cause the fire  
to burn more severely and more rapidly.

Q. Such as?

A. Such as gasoline. Any of the petroleum products, and  
20 a long list of other products that would be of non-  
petroleum-based nature.

Q. Continue, please.

A. When I examined the Annie Flam bedroom there was  
25 evidence of a fire that had basically destroyed that  
living unit. The fire had extended from the floors  
to the ceilings, to the roof of the room, the floors,  
and consumed most of the content of that particular  
bedroom area. One of the principals in determining  
30 points of origin is to try to locate the area where  
the fire has burned the deepest and stayed in that  
location the longest and would get into conditions

1 called alligatoring which is the blistering or  
bubbling of the surface of wood so that it becomes  
ribbed and porous and that indicates that the product  
has been ignited, in this case wood, and has burned  
5 in-depth. Generally speaking, a half inch of wood  
that has burned in its depth will indicate about an  
hour's time of actual burning. Once the product is  
surface burned and charred, ignition and combustion  
can stop because there's no more raw wood for the fire  
10 to consume and if you bear in mind the fire triangle  
that I offered to you during the declaration process,  
I mentioned air, oxygen, fuel and a source of  
ignition. That's the fire triangle. Fire will  
continue to burn as long as there is sufficient air  
15 or oxygen present in the atmosphere to allow com-  
bustion to continue, fire will burn as long as  
there's a source of heat or ignition, but primarily  
fire will only burn as long as there is fuel or  
something to burn. In this instance the fire engulfed  
20 almost all of the fuel that was in that bedroom.

I examined a closet in the Annie Flam bedroom  
that was located on the wall separating the bedroom  
from the bathroom. In that closet there was establishe  
25 a definite point of origin of a fire. The closet it-  
self had been stratified, it had alligatoring on it,  
and was one area where there was more severe burn  
than perhaps any other area in the bedroom. I deter-  
mined that that was one point of origin of the fires  
30 in that particular bedroom. I also examined the bed  
itself, and I don't know what was on the bed, whether  
there were blankets, whether it was made or what have  
you, but the mattress had been completely burned

1 leaving a frame of coil rings that are the springs of  
the mattress. When metal is exposed to heat of high  
temperature and for a long enough period of time the  
temper, the rigidity in the steel, can be removed  
5 from it by having the metal reheated. I found that  
there was no temper in the part of the springs that  
would be the top of the mattress. That would apply  
to about 70% of the surface of that mattress area  
that I examined. When I checked the temper on the  
10 springs on the bottom or under side of the mattress  
there was temper in the steel and the springs would  
go back to their normal position to a much greater  
degree than they would on top. It was my opinion  
that could only happen if there was a fire on the  
15 mattress of sufficient heat and long enough to re-  
move the tempering from the steel. I was satisfied  
that occurred and I established the bed unit, the  
mattress, as being the second point of origin in that  
particular bedroom, second point of origin of the  
20 fire.

Q. When you say point of origin what do you mean?

A. That's a place where a fire would have started or  
been set.

25 Q. Would you take this grease pencil, please, and would  
you just circle in Annie Flam's bedroom where the two  
points of origin of the fire you have determined?  
First of all do you see a closet drawn in that  
particular --

30 A. Not really, no. The closet area that I was referring  
to in my testimony would have been along this wall.



1 Q. If you could turn to the other side, Mr. Vincent, so  
the Judge could see.

THE COURT: No, I can -- Yes, I can follow that. All  
right, that's better perhaps. As long as the jury  
5 can.

A. There was a closet area along here and it was that  
location that I determined the point of origin of  
that fire. If this is recognized in the drawing as  
to be the closet it would be along this area but I  
10 don't see a closet clearly marked as such. And the  
second point of origin was this mattress so I'll put  
the marks on it.

MR. WALSH: You are drawing a circle to designate two  
points of origin, is that correct?

15 A. Yes. The fire extended in that bedroom in a normal  
means - there was nothing that was surprising in  
the spread pattern, out through the door, along this  
hallway, and we had a set of stairs here and over  
these set of stairs the fire had burned through the  
20 super structure of the building and you could see  
the outside by looking inside the building up through  
the roof. That was quite normal and quite natural.  
Smoke, fire, gases, rise when they are heated and  
as the pressure built up in this room it would vent  
25 itself out. Fire always travels the path of least  
resistance and there was no resistance out here. It  
just rose to the ceiling and burnt the ceiling and  
the roof of that particular building.

30 There is one other area that I had some concern  
over and that was the stairwell leading from the  
second floor to the ground floor and the landing

1 just outside the entrance to the store. There is a possibility that that location might have been the site of a third separate unconnected point of origin of a third fire.

5 Q. Where are you referring to? Can you pick it out on the schematic? That's the top floor and the second one over there is the bottom floor.

A. It would be in this area here.

10 Q. What are you saying about that particular area Mr. Vincent?

A. I am saying there is a possibility this could have been the site of a third separate unconnected point of origin, however, in fairness I want to say that the possibility of debris coming down the stairs from the second floor to the first floor and landing there could very well have been a cause as well. I didn't pursue that to any great detail because I was satisfied that I had two separate unconnected points of origin in this bedroom and it is not considered usual or normal to have two separate fires unconnected occurring at the same time, and I will come to that perhaps later.

15  
20  
25 Q. Now, did you determine whether or not there were any other points of origin that --

THE COURT: I wonder, I couldn't see where you were pointing to. I wonder if you would just point again.

A. To the points of origin?

THE COURT: No, to the third one, this one you have just mentioned, the possible one.

30 A. Yes.

1 MR. WALSH: Perhaps, My Lord, if you wish I could ask Mr. Vincent to draw a circle in that area and put a question mark inside it.

THE COURT: All right.

5 MR. WALSH: If that would be all right.

A. It would be in this area, generally, at the foot of the stairs and in this landing leading into the store.

Q. Would you turn around so the jury can see that.

A. The stairs and landing, at the foot of the stairs  
10 from which you could go through here and into the store.

Q. Mr. Vincent I believe the question was what if any other points of origin did you determine in that structure, in the building?

15 A. Yes. I then left the Annie Flam portion of the building and proceeded to the other side of the second floor and, again, I had previously toured that on my initial walk through, and I revisited that because  
20 there were signs on my preliminary observation of a fire occurring in what was identified to me as Nina Flam's bedroom. The Nina Flam area was damaged to a much lesser degree than was the fires in the Annie Flam side of the second floor. It was very easy when  
25 examining the fire scene to determine what took place there. It was not damaged, as I repeat, very badly at all, and I identified a point of origin of a fire in a closet in the Nina Flam bedroom that extended quite extensively on a horizontal plane along the  
30 wall in the closets, and in the center closet the fire actually burned through the floor of the closet itself. I also examined a bed unit, mattress and frame

1 in Nina Flam's bedroom, and I noted a fire occurring  
on the side of the mattress - I'll mark them for you  
in a moment - that was separate and unconnected to  
the fire that occurred in the closet. No connection  
5 between the two fires. No sign of the fires spreading  
from one area to the other. Two separate and  
distinct fire scenes. I concluded there were two  
points of origin in that room and established the  
third and fourth separate unconnected fire, or if you  
10 include the stairwell, the fifth separate unconnected  
fire. I'll mark them now.

Q. Please, thank you.

A. I have marked the side of the mattress in Nina Flam's  
bedroom where I determined the fire had started, and  
15 the area of the closets along the wall in the center  
where a separate fire occurred and where a great  
amount of damage was done to the internal part of  
that closet.

Q. Okay. Just perhaps in case there were some jurors  
20 back there that might not have seen that, I'm not  
sure.

A. I marked the mattress and bed unit in the Nina Flam  
bedroom in the area generally where the greatest  
amount of fire and damage occurred to a mattress  
25 that was separate and unconnected with a fire in the  
closet area of the Nina Flam bedroom, and I have  
marked that fire in the area where the greatest burn  
occurred to the point of burning the floor in that  
particular closet.  
30

Q. Are you able to provide the jury with any opinion as  
to the type of material that would have been used to

1           begin the point of origin, to start the fire?

A.       In the absence of any observations or any information  
to the contrary, I would suspect that some type of  
open flame would be required to ignite the fuel which  
5           in this instance would be a type "A" fuel, ordinary  
combustibles, clothing materials, wood fiber products  
similar to a cigarette lighter, a card of matches,  
along those lines. There was no evidence of  
spontaneous combustion. I could find nothing in  
10           there that was really out of the norm. I believe we  
had a straightforward situation where a source of  
ignition was applied to ordinary combustibles, class  
"A" fuel, and the fire would have continued and would  
have destroyed the entire property or until the fuel  
15           was used up had it not been extinguished. In this  
instance the responding fire department extinguished  
the fire before it burned up all the fuel and destroyed  
the property. I did determine, however, that due to  
20           the two fires being on the second floor in the same  
house, that the fire in the Annie Flam bedroom would  
have been the first fire or set of fires burning and  
that the fire in the Nina Flam bedroom would have  
happened after the fire in the Annie Flam bedroom as  
evidenced by the amount of damage done in the bedrooms  
25           and the comparison between the two bedrooms as to the  
extent of damage each suffered.

Q.       Could you give us any time frame in your opinion?

A.       Time frame between --

30       Q.       You say that in your opinion the fire in the Annie  
Flam bedroom would have begun prior to Nina Flam's.  
I was wondering if you could assist the jury in  
knowing how -- Are you able to give an opinion as

1 to how much prior or how long prior?  
A. Quite easily it could be an hour, and I say that be-  
cause the fire that started in the Nina Flam bedroom  
it would be relatively easy to determine how long that  
5 fire burned because of the amount of damage done. And  
if that was corresponded to the time that the fire  
department arrived you could work that backwards and  
come out fairly accurately with the time difference.  
But I would offer an hour now just for a guideline.  
10 That's subject to flexibility.

As a result of my investigation of the fire  
scene I have come to the following conclusions: that  
the four or five, at least, points of origin were  
separate and non-connected and that the approved  
15 process of removing the possible natural causes was  
carried out, and I believe further witnesses will  
deal with two areas to verify that; that we had fires  
here occurring as a result of unnatural causes, that  
is to say they were incendiary in nature, or set  
20 fires.

Q. Do you have anything else you wish to add Mr. Vincent?

A. No.

MR. WALSH: Thank you, My Lord, I have no further questions.

25 THE COURT: Thank you very much. Cross-examination?

MR. FURLOTTE: No questions My Lord.

THE COURT: This witness is being stood aside I believe.

MR. WALSH: Yes, My Lord, he's being stood aside, yes.

30 THE COURT: Yes. You shouldn't discuss this aspect of your  
testimony with anyone until your evidence is all com-  
pleted. Thank you very much for now.

Well now we will have a recess for 15 minutes.

(RECESS - 11:15 - 11:30 A.M.)

1 COURT RESUMES: (Accused present. Jury called, all present.)

THE COURT: Now, Mr. Walsh you have a --

MR. WALSH: Yes, I have another witness My Lord.

THE COURT: Just on timing here, you are aware that we must  
5 finish today at 12:30?

MR. WALSH: Oh yes, very aware My Lord.

THE COURT: This may require a little bit of fine tuning.  
Are you thinking in terms now of one witness or two  
witnesses before lunch or what?

10 MR. WALSH: I'm thinking at least two, My Lord, and --  
Well, at least two, and again there are some variables  
that we're not sure of, but I would expect to get  
through a minimum of two.

MR. ALLMAN: I have one civilian witness I would like to  
15 get on today too and I don't know how long she will  
be. The reason why, she's a single mother and she's  
got a small child and she's been here two days and  
she wants to get back there.

THE COURT: Yes, but I want to make it clear now we can't  
20 extend it beyond 12:30.

MR. WALSH: Yes, My Lord, I would like to call Lawrence  
Clark.

LAWRENCE CLARK, called as a witness, having been duly  
25 sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

Q. Would you give the Court your name, please?

A. Yes, my name is Lawrence Wade Clark.

Q. And your occupation?

30 A. I am the Heating Manager for Irving Oil for Newcastle  
New Brunswick and the Miramichi Valley.

1 MR. WALSH: My Lord at this time I understand from Mr.  
Furlotte that he would - correct me if I'm wrong Mr.  
Furlotte - that he would have no objection to Mr.  
Clark being declared an expert in the field of  
5 residential oil burner mechanic, as a residential  
oil burner mechanic and as a heating technician.

MR. FURLOTTE: That is correct My Lord.

MR. WALSH: Would that cover your qualifications Mr. Clark?

A. Basically, yes.

10 THE COURT: I have never heard that one before, but would  
you just repeat that again?

MR. WALSH: I'm sorry. It's an expert in the field as a  
residential oil burner mechanic, and as a heating  
technician.

15 THE COURT: Okay, we will declare you an expert in those  
fields.

MR. WALSH: Perhaps if you would then, Mr. Clark, would you  
tell the jury and His Lordship what a residential  
oil burner mechanic is?

20 A. Basically my job deals with the supervision of the  
sales, the installation, the care and maintenance of  
both hot air heating systems and hot water heating  
systems as well as the supply of domestic hot water  
within homes and commercial establishments within my  
25 area.

Q. Does that include a heating technician as well or is  
that a separate category?

A. A heating technician, basically I've dealt in the  
30 past with all different types of heating such as  
propane, natural gas, electric heating both in the  
heat pumps or baseboard heating or forced air heating.



1 and in other - basically in a wide range of heating  
equipment which would, I think, describe a heating  
technician as such.

Q. Did you have any - you have had involvement I under-  
5 stand, Mr. Clark, in both the matter involving a fire  
associated with Annie and Nina Flam and a fire  
associated with Linda and Donna Daughney's premises,  
is that correct?

A. Yes, sir.

10 Q. For your testimony this morning I would ask you to  
restrict your testimony to the circumstances in-  
volving the Flams. Could you tell the jury, please,  
in your own words how you became involved in this  
particular matter?

15 A. I was contacted May 30th, '89 by the Deputy Chief  
of the Chatham Fire Department which would be Mr.  
Edward Duplessie to investigate the heating equip-  
ment itself, only the heating equipment, as to  
20 whether or not it may have caused or in any way aided  
in the fire that partially destroyed the building.  
I proceeded to the location --

Q. Which was where?

A. 244 Water Street in Chatham, and there went through  
the process of the inspection.

25 Q. And what, if any, findings - what kind of inspection  
did you make and what were your findings?

A. Well, first of all, as common in most of these  
30 situations I think you do a visual inspection as you  
approach the equipment itself because that should  
determine whether or not there has been foul play or  
anything obvious, externally, that would cause  
problems with the furnace.

- 1 Q. What kind of a heating system was in the location?
- A. This was a forced air, oil fired furnace.
- Q. And did you make any determination of what kind of a hot water system was it?
- 5 A. Yes, it was an oil-fired hot water system.
- Q. And where was this heating system located?
- A. Basically in that type of building, an older building, the heating equipment is normally located close to the center of the building in the basement.
- 10 Q. I see. And did any part of the basement have any fire damage?
- A. Not that I could -- There was water damage and I think there was smoke damage but fire damage, no.
- Q. What did you observe?
- 15 A. Well, initially, as I mentioned, I checked the exterior of the heating unit itself, first the forced air furnace itself, and not detecting anything unusual I went to check the air filters to determine if in fact the furnace was in the operating condition
- 20 during the fire. I found nothing to indicate on the filters that this was so and at this point I proceeded to check both the return air ducts and the supply air ducts to the furnace itself. I could detect no sign of soot or anything in the return and supply ducts.
- 25 At this point then that would indicate to me that the blower - now what I mean by that is the portion of the furnace that circulates the air within the house, the blower at this time had not been operating otherwise it would have brought soot and debris down
- 30 through the system, caught in the filters and, of course, through the heating system itself.

1 I proceeded then to the burner, the portion of the  
furnace that supplies the heat within the combustion  
chamber and the heat exchanger. There was no exterior  
evidence of a problem. Now, I pulled out the burner  
5 and took it apart to see if there was anything inside,  
any tampering, anything that would indicate perhaps  
there was a malfunction. I could detect nothing on  
that burner that would indicate this. I checked the  
inside of the furnace itself to determine if, for  
10 instance, something had gone wrong with the burner and  
it may have been the result of a bad chamber or some-  
thing of this nature. I could detect nothing inside  
the furnace or with the burner itself. So at that  
point I checked the electrical components of the  
15 furnace itself.

Now, electrical components, if we could deal  
basically here, that would cause a problem could be  
the transformer, basically, and this transformer is  
a device whereby -- It's the ignition source for  
20 the oil. The oil is sprayed into the furnace at a  
high pressure, is atomized, and the ignition source  
of course then is provided by electrodes connected to  
the transformer. But there was no indication that  
the transformer in any way had malfunctioned.  
25

Now, what happens normally in this case, if there  
is externally heat or a lot of heat provided to the  
transformer, the insulating material itself which is  
a tar-like substance will then flow out of the  
transformer and over the burner. This just simply  
30 did not happen. So there was no sign of excess heat  
at that point.

1           The next thing I checked was the cad cell relay  
or a safety relay which is on all oil-fired heating  
equipment. Now, the safety relay in a sense tells  
us that if anything - if there's a malfunction in the  
5           furnace, for instance, if we lose ignition or if we  
lose fuel, then within a short period of time, and  
this can be depending on the type of equipment, can  
be any place from 8 seconds to about 90 seconds de-  
10          pending on the type of furnace and on the type of  
relay it is, in this case the relay itself was the  
type that will, if there's a malfunction, will shut  
the furnace off on safety within 30 seconds. Okay.  
Now that means that in order to get that furnace  
15          going again, or to try it, it must be physically  
reactivated. Okay. Via a button on it. I found that  
in this case the relay was in fact in the safety  
position. Now, two possible explanations for this:  
first, it would appear that, for instance the wires  
20          running to the thermostat which really is a device we  
all have in our home, they are to determine the heat  
level. If the wires had melted, had in actual fact  
shorted together, they would start the burner of the  
furnace. Not the fan but just the furnace. If at  
25          this time there was a serious lack of oxygen in the  
room that would cause a very smokey fire. Now,  
there's a device there hooked into the relay called  
a cad cell, cad cell, cadmium sulfide cell, and its  
job is to determine the light conditions in the  
30          fire chamber itself. In other words is the burner  
going or isn't it going. If it isn't going the cad  
cell will shut the safety off. It's hooked into the

1 safety device. It will shut that furnace off  
within that 30 second period. Okay. Now, the  
oxygen content in the air could possibly have  
caused this device to shut off on safety, or lack  
5 of it I should say.

The other possibility is that if the fire at  
any point in the building was acting on the  
electrical service in such a way as to cause  
fluctuations in the electrical system then this  
10 in fact could also cause the unit to shut down on  
safety. So that's two possible reasons for that  
to be on safety.

Q. Continue, please. Did you check any other aspects?

A. Yes. The only other electrical piece of equipment  
15 on the furnace itself would have been the fan  
limit controls and of course the fan limit control  
does two things. It operates the fan of the furnace  
that circulates the air in the home and it also  
monitors the temperature of the furnace. In other  
20 words if something happened that the fan didn't  
start and the unit would then go -- And normally  
the temperature on the high limit aspect of this is  
about 200°, so if the fan didn't start, the burner  
kept going, at about 200° the furnace would - the  
25 burner itself now, would shut down again. Okay.  
I could find nothing there to indicate that there was  
any damage or any malfunction in that part of the  
furnace at all.

30 The external electrical, that is to say the  
power supply from the fuse disconnect to the furnace  
itself, but only from the fuse disconnect, and not  
to have that confused with the main building

1 supply, but the wiring to that point there was no  
problem with it. I didn't find anything wrong with  
it. It was operated by a 20 amp fuse. The 20 amp  
fuse was in fact intact and which would indicate that  
5 the other findings are correct.

I then basically went through the same thing with  
the hot water heater. Okay. Oil fired hot water  
heater.

Q. What conclusions did you draw after you went through  
10 that?

A. Oh, I'm sorry.

Q. No, with the hot water heater you went through  
basically the same kind of inspection.

A. Basically the same.

15 Q. What, if any, conclusions did you draw about the hot  
water heater?

A. I found nothing. No problems with it.

Q. Was there anything else you checked?

20 A. Basically that was my --

Q. What about fuel lines or the fuel tanks?

A. The fuel lines and the fuel tank, yes, I'm sorry, I  
did check that and I found them intact. I found no  
reason to believe that they had any - played any part  
25 in the fire.

Q. And the general condition, again, of the furnace and  
the hot water heater?

A. The general condition there, I found no excess soot,  
no deep charring, nothing to indicate that the fire  
30 had originated in or around either the furnace or the  
hot water heater.

1 Q. Mr. Clark what was your final conclusion with respect  
to the heating equipment in relation to the fire?

A. My conclusion is that the furnace and the hot water  
heater neither started nor did they aid in any way in  
5 the fire which occurred at that point.

MR. WALSH: Thank you Mr. Clark. My Lord, that's all my  
questions.

MR. FURLOTTE: I have no questions of this witness My Lord.

THE COURT: Thank you very much Mr. Clark, you are excused.

10 MR. WALSH: He is stood aside My Lord.

THE COURT: Oh, stood aside, and then you shouldn't discuss  
then this aspect of your evidence until all of your  
evidence is completed.

MR. WALSH; I'll call Blair Carroll.

15

BLAIR CARROLL, called as a witness, having been duly  
sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

Q. Would you give the Court your name, please, and your  
20 occupation?

A. My name is Blair Carroll.

Q. And what is your present occupation Mr. Carroll?

A. Electrical Inspector.

Q. Where?

25 A. In Chatham, Northumberland County.

Q. Employed by whom?

A. Employed by Department of Labour.

Q. For the province of New Brunswick?

A. Province of New Brunswick.

30 Q. My Lord at this time Mr. Furlotte, I understand, and  
correct me if I'm wrong, I am going to ask that Mr.  
Carroll be declared an expert in the field of the

1           electrical aspects of building inspection.

MR. FURLOTTE: That is correct, My Lord. I have no  
          objections.

THE COURT: Are you an expert in that field?

5    A.     Well, I guess I'm just waiting for your answer. This  
          my first time I have testified so, you know, I --

THE COURT: Well, you know more than I do about electrical  
          aspects of what is it - house wiring?

MR. WALSH: The electrical aspects of building inspection  
10           My Lord.

THE COURT: What sort of -- Are you going to get him to  
          establish --

MR. WALSH: He inspected the electrical system at the  
          Flams' premises and what --

15   THE COURT: You want to establish, presumably, that the fire  
          didn't originate with the electrical?

MR. WALSH: That's correct, My Lord. It's in conjunction  
          with Mr. Vincent's testimony that they eliminate all  
          other --

20   THE COURT: Mr. Carroll, do you feel your experience in that  
          field in your opinion enables you to determine whether  
          or not that's correct?

   A.     Yes, sir, I do.

25   THE COURT: Well, on that basis I will declare you an  
          expert. I can't declare a witness an expert just on  
          the basis of agreement between the parties because the  
          Court has to be satisfied the expertise does exist  
          before it -- I explained to the jury earlier the  
          purpose of declaring an expert. You are an expert.  
30           First time.

MR. WALSH: Thank you My Lord. I apologize. You are quite  
          correct. I should have got a little bit of background  
          even with the consent.



1 THE COURT: Well, you have to even where there's agreement.

MR. WALSH: Just quickly, you began your career in  
electricity as an electrician in 1965 with the  
Department of National Defence, is that right?

5 A. That's correct.

Q. You have worked in various aspects of electrical, both  
residential and construction, over that period of  
time?

A. That's correct.

10 Q. And you in fact were hired by the Province of New  
Brunswick, Department of Labour, November 30th, 1981?

A. That's correct.

Q. And one of your particular jobs has been to inspect  
both residential and commercial premises, the electric  
15 systems in those premises, both new and old?

A. That's correct.

MR. WALSH: I should have done that before, My Lord, I  
apologize. Mr. Carroll you, again, like Mr. Clark,  
are involved both in the Flam premises and in the  
20 Daughney premises, is that correct?

A. That's correct.

Q. Would you please restrict your testimony just to the  
Flam premises.

A. I will.

25 Q. And would you tell the jury, please, in your own  
words how you became involved?

A. May 31st, 1989 I received a call to do an inspection  
of the Flam residence on Water Street in regards --  
30 Deputy Fire Chief Edward Duplessie was there on the  
scene and he gave me clearances with R.C.M.P. to  
carry out the investigation. So after receiving  
clearances I went ahead and proceeded with the  
electrical installation.

1 Q. Did you know from your previous knowledge of Chatham  
did you know who used to live in those premises?

A. Yes, I did.

Q. Who?

5 A. Annie Flam and Nina Flam both.

Q. What, if anything, did you do when you went there?

A. Okay. The first thing I done when I went in, I went  
in --

10 Q. I am going to have to ask you to speak up. I know you  
have a low voice but just speak up.

A. Nina Flam, I entered her premises from the front  
entry and on her entry she had a 100 amp service and  
it fed to a 100 amp switch which was controlled with  
two 100 amp fuses which fed a six circuit panel with  
15 a range block, and to the other side of that was a  
nipple installed for a 60 amp switch which was also  
connected off of the 100 amp on the load side, and  
also to that was a 30 amp switch which was connected  
to single pole 30 amp switch. I proceeded by starting  
20 at the main entrance which was located on point of  
entry to the right, I guess it was kind of a closet  
at the time there, and on opening the switch I checked  
all the connections, checked the main fuses. Every-  
thing was intact. There was nothing to show any  
25 heating or discoloration to show a heating effect.  
The fuses were all intact. I took the fuses out just  
to make sure there was no bridging or jumping out of  
fuses whether it be a penny or tinfoil or whatever.  
30 All the overcurrent branch circuit protection was  
there. From there then I proceeded upstairs to where  
mostly the fire was contained - or I found from the  
stairwell up.

1           After examining like light switches, plugs, I  
couldn't find any evidence of any arcing or loose  
connections on anything that may have been relevant  
to the starting of the fire.

5 Q.   Did you check both sides of the building?

A.   Yes. Then from that side I went over to Annie Flam's.  
On her side of the building she had her own service  
entrance which was a 60 amp service and it also fed  
in through. It was located on the right wall on point  
10 of entry and it fed into a 60 amp switch, and on that  
60 amp switch there was a 10-3 cable that fed a four  
circuit panel. I also proceeded there by checking  
all connections, fuses, and there was no indication  
of any bridging or bypassing of the fuses. Just in  
15 case the jury is not aware of what I mean by bridging  
or bypassing is that the power has to go through the  
fuse before it goes through its branch circuits  
throughout the house. So there was no indication of  
any malfunction or anything of that nature.

20 Q.   Continue.

A.   From there then I proceeded to check -- Like I say  
I found no - or not much damage other than smoke and  
water damage to the downstairs in both residences.  
I proceeded from the stairwell up where it appeared  
25 the damage was done and the upstairs was extensively  
burned and, like I say, the insulation was burned off  
a lot of the wires but, you know, to the best of my  
knowledge and my findings the only thing I checked  
30 was the remains of what was in contact on the switch  
terminals and receptacles and that and there was no  
sign of any arcing or anything to indicate that may  
have contributed.

1 Q. Mr. Carroll what was your final conclusions with  
respect to the electrical system in relation to the  
fire?

A. Well, just my personal opinion, I feel that the  
5 electrical - the fire wasn't of electrical origin and  
I think I stated that in --

MR. WALSH: Thank you. I have no further questions.

THE COURT: Cross-examination?

MR. FURLOTTE: I have no questions of this witness.

10 THE COURT: This witness is being stood aside Mr. Walsh?

MR. WALSH: That's correct My Lord.

THE COURT: So you shouldn't discuss this aspect of your  
testimony until you are finished.

MR. ALLMAN: Cathy Mecure.

15

CATHY MECURE, called as a witness, having been duly  
sworn, testified as follows:

DIRECT EXAMINATION BY MR. ALLMAN:

Q. What's your name, please?

20 A. Catherine Ann Mecure.

Q. Mrs. Mecure, like a number of witnesses you have got  
a low voice and you speak quietly. You have got to  
very consciously try to speak loud. Your name is  
Cathy Mecure?

25 A. Yes.

Q. What town - and I don't mean your exact address, what  
town do you live in present?

A. Chatham.

Q. That's here in New Brunswick?

30 A. Yes.

- 1 Q. In May, 1989 were you living in Chatham?  
A. Yes.
- Q. The same address as now or a different address then?  
A. Different address.
- 5 Q. What was the address back in 1989, May?  
A. 42 Kelly Road.
- Q. I am going to ask you - I'm not sure if you are tall enough to do it, if you are we won't get it down and otherwise we'll get it down, I am going to ask you to  
10 take this little white pin. Have you seen a photograph like that photograph - the big aerial photograph that's up on the wall?  
A. Yes.
- Q. You have had the opportunity to view it?  
15 A. Yes.
- Q. I am going to ask you to take a little white pin and if you can reach it, and if not I'll get the photograph down -- I guess you can't. I'll get it down. Can you put a pin where you were living in May, 1989?  
20 Perhaps, My Lord, because we are going to be putting in a number of white pins I'm going to put a number by it. I will put a number 1 by the white pin that Mrs. Mecure indicated. I think we are going to make  
25 a minor change My Lord. Mr. Walsh, whose eyesight is better than mine, says he thinks yellow would be clearer. We will try a yellow one instead.
- THE COURT: So you are substituting a yellow pin for the white.
- 30 MR. ALLMAN: Substituting a yellow pin for a white pin.
- MR. WALSH: I think I can reach that. I have put it in the same hole My Lord.

- 1 MR. ALLMAN: In May, 1989, or in the times prior to May,  
1989 had you ever had occasion to meet Allan Legere,  
the accused in this case?
- A. Yes.
- 5 Q. Where and when and how would you have had occasion  
to meet with him?
- A. It was about 4 to 5 years ago he came to my place  
where I was living then to see my husband.
- Q. What was the relationship between him and your  
10 husband?
- A. They were friends.
- Q. This would be in your home do I understand?
- A. Yes.
- Q. The home that we're actually --
- 15 A. No.
- Q. A different home.
- A. A different one.
- Q. How many times would he have visited at your home?
- A. About 3 times.
- 20 Q. Is that an exact figure or just an approximation?
- A. Just --
- Q. And on those occasions how long would he have stayed  
and, again, I realize that's no doubt an approxi-  
25 mation.
- A. Half hour - an hour.
- Q. And what was your -- I guess he had come to see  
your husband. He was your husband's friend.
- A. Yes.
- 30 Q. What would your activities have been while Mr. Legere  
was in your home?
- A. Oh, I was just going on with my housework and every-

- 1 thing. Wasn't in the room hardly at all.
- Q. Do you remember in May, 1989 reading anything in the newspaper about Mr. Legere?
- A. Yes, that's when he escaped.
- 5 MR. ALLMAN: My Lord I am going to ask the witness what it was she read in the newspaper about Mr. Legere, not for the purpose of establishing the truth of it but to focus on a date.
- THE COURT: I think she actually included that in her reply.
- 10 You may not have caught it.
- MR. ALLMAN: I was checking with Mr. Furlotte to make sure I could ask it.
- THE COURT: What the witness said, unless I misheard, was that you had read in the newspaper that he had
- 15 escaped.
- A. Yes.
- MR. ALLMAN: I want you to -- do you remember the date that you read that?
- A. I don't exactly remember the date, no.
- 20 Q. Sometime after that did something happen that has a connection to this matter?
- A. Yes. About two weeks later after that.
- Q. Two weeks after what?
- A. That I read in the paper that when he escaped I seen
- 25 him up around my place.
- Q. Let's just go into a little bit more detail for the jury. What time of day was it that this occurred?
- A. Between 2 and 3 o'clock in the afternoon.
- Q. What sort of day was it?
- 30 A. A sunny day.

- 1 Q. What did you do? What led up to it?
- A. I was just sitting in my trailer where I was living and I was just looking out my window and I spotted Mr. Legere in the ditch, and I just screamed.
- 5 Q. Why did you scream?
- A. Well, it got me nervous.
- Q. How long did it take from the time you looked out and said to yourself that's Allan Legere to the time you screamed?
- 10 A. Well, as soon as I seen him that's when I screamed.
- Q. I gather you were inside the house at the time looking out the window?
- A. Yes.
- Q. About how far would it be from where you were at the window to where you saw this individual in the ditch?
- 15 A. About a hundred feet.
- Q. Was there anything of any kind between you and the individual that obstructed your view?
- A. No.
- 20 Q. After you had seen this person what did you do?
- A. I yelled to my husband. I told him 'There's Allan Legere.', and by the time he got to the window he was scrouched down in the ditch.
- Q. Who was scrouched down in the ditch?
- 25 A. Mr. Legere. And then he was looking to see if there was any cars coming and when there was no cars coming he ran across the road.
- Q. Can you turn around and use this pointer a moment, please? See the yellow that indicates where your view was. You said he was a hundred feet up the ditch. In which direction?
- 30



- 1 A. This way here.  
Q. You are pointing from the yellow --  
A. Yes.  
Q. -- down towards the bottom right-hand corner.
- 5 A. Yes.  
Q. And on which side of the road was your house? The left-hand --  
A. The left.  
Q. -- as you are looking, or the right-hand?
- 10 A. The left.  
Q. Which side of the road was he on?  
A. The left.  
Q. The side of your house or the other?  
A. Side of our house.
- 15 Q. And you said he scrunched down in the ditch, looked across the road and then what did he do?  
A. He once there was no cars coming he ran across the road.  
Q. In which direction did he run?
- 20 A. I believe he started to cross right there.  
Q. You are indicating in a direction that if he kept on a straight path would take him across the right-hand side of the picture somewhere between the middle and the top?
- 25 A. Yes.  
Q. Tell me, how long do you think you would have had him in your view from the moment you looked out and screamed to the moment he disappeared?
- 30 A. Maybe 5 minutes. Approximately.  
Q. And what was he doing during that time?  
A. When? When -- I don't understand.

- 1 Q. What was his appearance? We will break it down into how he looked and then how his clothing looked. How did he look facially?
- A. Well, he like wasn't clean-shaven. He had black wavy hair.
- 5 Q. What do you mean by he wasn't clean-shaven?
- A. He was like scruffy like. Didn't shave.
- Q. As you said that you were running your hand around your chin.
- 10 A. Right.
- Q. So the person you saw was scruffy, not clean-shaven around the chin.
- A. No.
- Q. And what about his hair?
- 15 A. Black and curly.
- Q. What about his clothing?
- A. He had white sneakers and blue jeans.
- Q. Sorry, I didn't get that.
- A. White sneakers, blue jeans, and a brown winter coat.
- 20 Q. Do you happen to remember if he was wearing glasses?
- A. No, I don't remember.
- Q. You don't know one way or the other?
- A. No.
- 25 Q. This incident occurred in May, 1989. Can you remember how long it was, approximately, since the last time when Mr. Legere had been visiting with you?
- A. Be about three years before that.
- Q. So we would be talking '86? Thereabouts. Is that right or wrong?
- 30 A. No. All together like since right now it would have been about five years ago.

- 1 Q. Five years. It's now --  
A. From now.  
Q. -- August, September, 1991, so roughly five years.  
A. Yes.
- 5 Q. How did he look on the morning when you saw him on -  
the afternoon in May, '89 compared with how he had  
looked when you had seen him at your house?  
A. Well he had a big beard then and he had glasses then  
too.
- 10 Q. When did he have the big beard and glasses?  
A. When he visited me a few years ago there.  
Q. Are you able to say whether the individual you saw --  
You have already told us the individual you saw on  
your road that morning was the Allan Legere who had  
15 visited you in previous years. Can you say whether  
that person is in court today or not?  
A. Yes.  
Q. Which person is he?  
A. Over there in the --
- 20 Q. You are pointing to the individual in the prisoner's  
dock.  
A. Right.  
Q. Is he dressed in plain clothes or police uniform?  
A. Plain clothes.
- 25 Q. Just one last question. The place where he was  
standing in the ditch or near the road was there any  
object nearby as a point of reference?  
A. There was just a fire hydrant.
- 30 Q. As a result of your observation that morning what  
did you do? Did you speak to anybody?  
A. I phoned the police.

- 1 Q. And did anybody attend - police officer attend as a  
result of that?
- A. They showed up later, yes.
- Q. Do you remember who the police officer was who showed  
5 up later?
- A. No, I don't.
- Q. Do you remember what police force he was with?
- A. It was Chatham.
- MR. ALLMAN: Thank you.
- 10 THE COURT: Cross-examination Mr. Furlotte.

CROSS-EXAMINATION BY MR. FURLOTTE:

- Q. Ms. Mecure you mentioned you called the police?
- A. Yes.
- 15 Q. And you called the police on May 22nd, 1989, would  
that be right?
- A. I don't know the date.
- Q. You don't know the date. You said it was a couple  
of weeks after you read it in the newspaper that  
20 Allan Legere escaped.
- A. Yes.
- Q. And in relation to time then, again, it would be  
approximately be one week before the Flam residence  
burnt down?
- 25 A. Yes.
- Q. Is that right? And when you called the police you  
didn't ask the police if Allan had -- you didn't tell  
the police you saw Allan Legere. You asked the police  
if Allan Legere was in the Chatham area, did you not?
- 30 A. No, I didn't ask that.
- Q. You didn't ask that. You are sure.
- A. I told them that I had spotted him.

- 1 Q. You told them you thought you spotted him --  
A. Not --  
Q. -- or you did spot him.  
A. I did.
- 5 Q. And you didn't ask if he was seen in the Chatham area?  
Now, you said Allan Legere had - this person you saw  
had black curly hair and you know it was Allan Legere  
because you saw Allan Legere a couple of years prior  
to that when Mr. Legere had been to your home a couple  
10 of times.  
A. Yes.  
THE COURT: Not a couple. She said three.  
A. Three.  
MR. FURLOTTE: Three.
- 15 THE COURT: That may or may not be right but I'm just re-  
counting what she said.  
MR. FURLOTTE: Maybe even four times.  
A. No.  
Q. You don't know. Just three times. That's it?  
20 A. Wouldn't be any more than three.  
Q. Wouldn't be any more than three. And that would have  
been in 1986?  
A. Around there, yes.
- 25 Q. Around '86. So that would have been about three  
years prior to this?  
A. Yes.  
Q. Do you recall when you gave a statement to the  
police?  
A. A -- No.  
30 Q. I have your statement. November 15th, 1990. That  
would be one week before -- That would be about  
what - a year and a half after? You only gave a

1 statement to the police about a year and a half after  
the sighting?

A. I don't know when it was.

Q. Would that be right?

5 A. I can't remember when it was.

Q. The police - when you called the police in May of  
1989 the police didn't treat it as a positive  
sighting, did they?

MR. ALLMAN: Well, with respect, we will be calling the  
10 police. Perhaps they could speak for themselves.

THE COURT: This lady wouldn't --

MR. FURLOTTE: Do you know whether or not the police treated  
your call to the police as a positive sighting in May,  
1989?

15 A. Well, they showed up and tried to check it out and  
that.

Q. Tried to check it out. I understand your husband was  
going to come also as a witness in this case.

MR. ALLMAN: I am going to object to this line of  
20 questioning. If Mr. Furlotte wants to enter into it  
we will do it in the absence of the jury. I should  
say it's personal and it may be a private --

MR. FURLOTTE: You noticed that Mr. Legere had a brown coat  
I believe.

25

A. Yes.

Q. Jeans on?

A. Yes.

Q. And sneakers?

30 A. Yes.

Q. And the color?

A. The sneakers? White.

- 1 Q. White sneakers. And the person had black curly hair?
- A. Yes.
- Q. How long was it?
- 5 A. I can't recall now.
- Q. You can't recall. Do you recall how tall he was?
- A. No.
- Q. Do you recall how much he weighed? How big?
- A. No.
- 10 Q. Did he weigh 200 pounds? Did he weigh 120 pounds?
- A. I don't know. I can't judge that.
- Q. You can't judge that. Did he have anything on his head?
- A. No.
- 15 Q. You don't know whether he was wearing glasses or not?
- A. I can't --
- Q. Did he have a mustache?
- A. I didn't really notice.
- Q. Did he have a beard?
- 20 A. No. He was just scruffy. Like he wasn't shaved. He was just scruffy.
- Q. You don't know if he had a hat; you don't know if he was wearing glasses; you don't know if he had a mustache because you didn't notice; you are not sure about a beard; but yet you can identify it as being Allan Legere? Is that what you are saying?
- 25
- MR. ALLMAN: I don't think she said she -- She did not say she didn't know about his beard. She said - she
- 30 described him as unshaven and scruffy around the chin. That's not the same thing.

1 MR. FURLOTTE: But you don't know whether he had a mustache  
or not?

A. I never noticed.

Q. So Mrs. Mecure I would submit that you --

5 MR. ALLMAN: I object to counsel saying I submit. Ask  
questions, not make submissions.

THE COURT: That's right.

MR. FURLOTTE: You are not certain it was Allan Legere, are  
you?

10 A. Yes, I am.

Q. Did anybody besides yourself see this individual on  
that day?

A. Well, when I sang out to my husband my husband seen  
him.

15 Q. Your husband saw him. Any neighbours?

A. I don't know.

Q. You don't recall the exact date when you gave a  
statement to the police but you recall about a year  
and a half later, maybe November of 1990, that you  
20 gave your statement to the police?

A. I don't really remember when it was.

Q. But it would be approximately a year and a half  
later? You will have to answer. The recording  
25 machine can't take the shaking of a head.

A. It could have been.

Q. Could have been about a year and a half later.

A. Yes.

MR. FURLOTTE: I have no further questions.

30 MR. ALLMAN: Just to clarify that last point.



1           REDIRECT EXAMINATION BY MR. ALLMAN:

Q.       The statement Mr. Furlotte is talking about, I think, did you give a written statement to the police? Or a statement you signed. Do you remember doing that?

5       A.       I can't really remember.

Q.       Irrespective of that when did you first tell - report to the police what you had seen?

A.       Around November, yes.

Q.       I'm sorry?

10      A.       I'm pretty sure it was around November.

Q.       No, no, listen to the question carefully. When did you first report what you seen to the police?

A.       Well when I --

15      MR. FURLOTTE: I think she answered that in direct examination, the day of the sighting.

THE COURT: Yes, I think that was covered.

MR. ALLMAN: Fine. I'm obliged to my learned friend for that concession. I don't need to ask the question again.

20      THE COURT: You are all through with this --

MR. ALLMAN: I'm through with this witness, yes.

THE COURT: Thank you very much, Mrs. Mecure, you are excused.

25      MR. ALLMAN: I realize it's getting very close to half past. I have one witness I would like -- For one reason I would like to get her on, Mr. Furlotte indicated that he thought he would probably have no or very few questions.

30      THE COURT: Is she very short?

MR. ALLMAN: She will be 3 to 5 minutes with me and Mr. Furlotte has indicated - I realize he may change his mind, of course, but he indicated he didn't think he

1 would be very long.

THE COURT: Well, all right, we will go ahead with her.

She will be the last witness.

MR. ALLMAN: She will be the last witness today, yes. Rita  
5 McKendrick. Oh, I should just mention to the jury,  
we are going a little bit out of chronological order  
here with witnesses to accommodate witnesses' con-  
veniences.

10 RITA MCKENDRICK, called as a witness, having been  
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ALLMAN:

Q. What is your name, please?

A. Mrs. Rita McKendrick.

15 Q. Mrs. McKendrick on the 29th and indeed the 28th of  
May, 1989 did you live at 126 Wellington Street,  
Chatham, New Brunswick?

A. Yes, sir.

Q. Where is that in relation to the house that Nina and  
20 Annie Flam used to live in?

A. I live one street back from her house. One street  
back. I faced her back. Like the back yard.

Q. You faced the back of her house?

A. Of the house. I can't see her house but it's one  
25 street back from there.

Q. Do you remember the early hours of the morning of the  
29th of May, 1989 and what you did and what you saw?

A. Yes. I was going to bed around half past twelve, a.m.,  
and when I got upstairs I walked over the hall to the  
30 hall window and I looked down and to my right - I  
glanced down to my right. There was a person looking  
in a window, a lighted window in the back apartment

- 1 sort of on that slant as I was looking down, in a window. A male.
- Q. We will keep this fairly short Mrs. McKendrick. I am showing you a photograph, F-2. Do you want to put  
5 your glasses on?
- A. Yes, please.
- Q. Take a moment to familiarize yourself with that. First of all, if you can go from Water Street can you see where the Flams used to live?
- 10 A. No, we can't see the house from -- Oh, here, yes.
- Q. She was pointing, My Lord, to the burnt or the partly damaged location on Water Street. Is your residence also visible on there?
- A. Yes. On that back street here. The street next to it,  
15 right there.
- Q. She is pointing to that spot --
- THE COURT: What was the number of the photograph?
- MR. ALLMAN: Number F-2. To save her having to do any more than she has to I will show you where it is.  
20
- THE COURT: Yes, that's quite all right.
- MR. ALLMAN: Members of the jury she is pointing to that residence.
- THE COURT: I'm sorry. Again, which residence Mr. Allman did she point to?  
25
- A. The green house back there.
- MR. ALLMAN: And you said you saw an individual in the vicinity of a window of an apartment building. Which is the apartment building?
- A. The apartment building is here.  
30
- Q. That's two buildings to the left of the Flam building as you look at the picture that you were pointing at?
- A. Yes.

1 Q. And would it be the front or the rear as you look at  
it on the picture?

A. It was at the rear. There's a wing going from the  
rear and it was at the rear apartment building down-  
5 stairs.

Q. From what you tell me, did you say which floor of  
your house you were in?

A. I was on the top floor. And our house is --

Q. So you would be looking down?

10 A. And I was looking down. And our house is pretty high  
up because we're on a bank, and that house is down  
pretty low where I was looking.

Q. I believe I did show the jury, My Lord, but I will  
just confirm, show Your Lordship and then the jury  
15 the places to which she is referring.

THE COURT: This is F-2 you are using?

MR. ALLMAN: Yes. There were three places. She referred  
to the Flam residence, her own residence and the  
apartment building.

20 THE COURT: Excuse me, your own residence is that house or  
that house?

A. It's the green house with the brown trimming there.  
There's little trees in front of it. It's one street  
back. They live on Water Street; we live on Wellington  
25 Street.

THE COURT: It's the one with the brown gable?

A. Yes.

MR. ALLMAN: Members of the jury she is pointing to the  
30 Flam residence, her residence and the apartment  
building. What, if any, apart from the fact that  
this person was a male, description can you give of

- 1 the individual who was in the alley or the window of  
the apartment building?
- A. He was of medium size. I don't know - I'm not sure  
of the height because of the height that I was at, and  
5 I was standing at the window and I can't judge his  
height.
- Q. Do you remember what, if anything, at all that he had  
on in terms of clothing?
- A. His clothes were close to his body and I think he had  
10 a jacket on. A short jacket.
- Q. You think that?
- A. I think that.
- Q. How long would you have had him under your observa-  
do you think?
- 15 A. Well, I must have watched maybe for two minutes and  
I left to go to my bedroom to tell my husband and he  
was watching TV, and then I went back to the window a  
few minutes later and he was still there, and about  
20 two minutes after that he walked to the left towards  
the Flam building. There's a furniture store first  
and then there's the Flam house.
- Q. And did you see --
- A. I didn't see him because there was just a few steps  
after he left the building. He just took a few steps  
25 and I didn't see him after that.
- Q. Do you think you would be able to recognize -- Oh,  
I should ask you one other question. This is 12:30  
at night. What's the lighting conditions like?
- 30 A. The window wasn't that big in that apartment, you know  
it was just with one thing going down the middle, and  
from where I was looking I don't know where he was

1 exactly standing but he went from about halfway to  
about three-quarters of that one pane of window, you  
know, it was just one with a division down the side.  
It wasn't a great big window.

5 Q. And just one last question Mrs. McKendrick. Do you  
think if you saw him again you would be able to  
recognize that man?

A. I don't know.

Q. Do you recognize anybody in this court?

10 A. Would I recognize anybody in --

Q. As being the man, or not.

A. I recognize my husband.

MR. ALLMAN: Thank you.

15 THE COURT: Good answer. No, wait just a minute. Somebody  
else might have -- Mr. Furlotte?

MR. FURLOTTE: That's okay, My Lord, I have no questions.

THE COURT: Thank you very much for coming. That concludes  
your witnesses for today.

MR. ALLMAN: That's a convenient moment to stop.

20 THE COURT: Well, we'll adjourn quite quickly here. I want  
to say before we adjourn, just briefly, please don't,  
again, discuss the matter until we come back on Monday  
morning. We will be adjourning until 9:30 on Monday.  
25 We have made good progress I think so far. We have  
had - I think we have had 31 witnesses, and when you  
realize that last week we really heard witnesses only  
for a half day the first week and this week it has  
been three and a half days so it's a total of four  
30 days actually that we have sat to hear 31 witnesses  
so we are making good progress and we are up to schedul'  
as far as I'm concerned. Some witnesses were longer

1 than others and some shorter of course. But please  
don't -- and I caution you about - you will be reading  
newspaper accounts. I mean I should be telling you  
don't look at the newspapers and don't look at  
5 television, don't listen to the radio. You are going  
to do it anyway. You're human. But I tell you as I  
told you before, if you do, and I hope you don't,  
realize that there may be errors contained in that.  
I read a newspaper story a week ago and it reported  
10 that Corporal - that Mrs. Nina Flam had said to  
Corporal Dickson 'give me your gun'. Well, that's  
not what she -- You people didn't see that because  
it wouldn't be a paper that would be circulated in  
this area, but give me your gun, now that's not what  
15 she said. The evidence was 'Give me your jacket' as  
you'll recall. But I mean that is the type of error.  
Now I am not criticizing a reporter for that. It  
may have been a typographical error within the news-  
paper department or perhaps the reporter wasn't  
20 present. He may have said to somebody else what did  
he say. You know, these errors creep in. And you  
will find many errors in newspaper reports and TV  
reports and so on. They're not deliberate errors but  
it's the evidence that you hear here in the courtroom  
25 that governs the case and not what you read in the  
newspaper. Please remember that.

We are sorry about the death in the family of  
one of the jurors, and we congratulate some other  
juror for celebrating a birthday. I'm not going into  
30 personalities here. No other points. We'll be ad-  
journing until 9:30 A.M. on Monday morning.

(COURT ADJOURNS - 12:35 P.M.)