Appendix I
Jury Charge

10:25 A.M. JANUARY 30TH, 1970.

HER MAJESTY THE QUEEN VS DAVID EDGAR MILGAARD.

MEMBERS OF THE JURY ALL PRESENT.

BOTH COUNSEL PRESENT.

THE ACCUSED PRESENT.

C H A R G E

THE COURT: Members of the Jury, at the commencement of this trial I outlined to you generally the manner in which it was expected that the proceedings would be carried on. I informed you at that time that at the conclusion of the evidence and at the conclusion of the addresses by counsel that I would have certain directions to give to you. By necessity I must repeat some of the remarks I made at that time.

First of all, I would like to join with counsel in expressing my appreciation for your attention to this matter. It has been a long trial - going on ten days now - and it is very obvious to me that you have paid very careful attention to the evidence. That has been obvious not only from your attitude but from the questions which have been relayed to me from time to time.

Where a person is charged before a judge and jury with a crime, the jury has a particular responsibility and the judge has a particular responsibility. You are charged with the responsibility of finding the facts in the case. I am charged with the responsibility of

making decisions with respect to law and directing you insofar as the law applicable to the case is concerned. I am also charged with the responsibility of determining whether any particular evidence shall be admissible or not admissible. The reasons why you were asked to leave from time to time was in order that I could consider certain presentations which were made as to whether proposed evidence was in fact admissible or not. Once I made my ruling and if I did rule that the evidence was admissible, then that evidence was given in your presence and in your hearing.

You have the sole responsibility of determining facts. You and you alone. And while my responsibility is confined to matters of law and the admissibility of evidence I am entitled to, and indeed it is my duty if I feel the necessity, to make reference to certain of the evidence as I recollect it. And I might even during the course of my remarks suggest to you what inferences and what conclusions you might draw from such of the evidence that you accept. In doing so, however, I am only expressing my own opinion. Counsel for the Crown and counsel for the accused addressed you with respect to the facts. They asked you to draw certain conclusions. But what they said and what I will say is only done for the purpose of endeavoring to be of assistance to you and not with the slightest idea of invading your field in the realm of finding facts, drawing

inferences and reaching conclusions. Those are your sole responsibility. Yours and yours alone.

You are therefore under no obligation to accept or agree with any opinion, conclusion or deduction which I may suggest. If you think I am wrong in any opinion I express or any conclusion or deduction that I may make reference to, it is not only your duty to act on your own opinions, conclusions and deductions but you must disregard what I say if you come to some conclusion which is contrary to what I suggest. And if through inadvertence - and this is quite a common mistake that judges make from time to time - if through inadvertence I should in the course of my remarks say anything to the effect that something has been proved or something has been established by the evidence, you must realize that I am in error in doing so. I have no right to tell you that anything has been proved or established. Such conclusions are entirely your function and entirely for you to determine. I may and probably will say that you may have no difficulty in the light of certain evidence in arriving at a conclusion. I may say that. But that does not mean you have to arrive at that conclusion. Yours is the sole responsibility of arriving at conclusions and determining questions of fact.

Again as I pointed out to you at the commencement of this trial when you took your oaths as jurors you each swore to give a true verdict according to the evidence. The evidence

of course is the testimony of the witnesses who gave their evidence under oath in the witness box and those exhibits which were entered as exhibits at this trial. You must banish from your minds anything that you may have heard concerning this case outside of this court room. It is obvious that this case has been of considerable interest to the citizens of this community. It is very obvious from the number of people that have attended here every day that it has created a great deal of interest. Things have been said over the radio, on television, reported in the newspapers and no doubt you from time to time prior at least to your being jurors in this case have heard persons expressing opinions about what might or might not have taken place. But please disregard all of that and reach your conclusions only on the evidence that was brought forth in this court room under oath. Everything else must be ignored.

In telling you that you have the sole responsibility of finding the facts I must also tell you that the question of the credibility of witnesses is entirely up to you. The matter of credibility and the weight that you will give to the evidence is your responsibility. And in considering the evidence of a witness it is not necessary for you to accept the whole of the evidence or reject the whole of the evidence. You may accept part, you may reject part. You may accept all, you may reject all. You may conclude if you feel that it is proper to do so

that a witness, even though you may believe him or her to be an honest witness, may have made a mistake. You are not required to conclude that a witness is lying in order to reject part or all of that particular witness's evidence. Witnesses are just human beings and as such may make mistakes. Each being different they do not necessarily think or react the same way. The evidence of a person whom you believe to be lying may be true in part. Because a person appears to be discredited along certain lines there may be some parts of his evidence that you will accept. That is entirely a matter for you to decide.

In testing credibility you should consider carefully the person's demeanor in the witness box, remembering of course that a witness box is a foreign place for most people to find themselves in and that some may be more nervous than others and not able to express themselves as well as others. You will consider the apparent powers of observation and recollection of a witness. You will consider his or her age, education and apparent intelligence or lack of it. You may feel that a witness is biased or prejudiced or has an interest in the outcome. Then again you must consider in assessing the weight that you will place on that particular person's evidence - matters of character, background, the type of life that a person has been leading. His record as a citizen are again matters that you will take into consideration.

I will deal a little more extensively with the particular witnesses at a later point during my remarks but it must be obvious to you that the evidence of a so called upright reputable citizen is to be preferred to that of a person who may have been leading a dissolute life, a life of crime, or has been acting in such a reprehensible manner that you may consider that his evidence is suspect.

You are entitled to bring to bear on the problems with which you are faced and to rely upon the experience that you have gained in life in your association with your fellow men and women. You must use your good common sense in relating the evidence to the issues. You should not guess but you may make reasonable deductions and draw reasonable inferences and conclusions from the evidence.

In the eyes of the law the accused came into this court an innocent man and he is presumed to be innocent until his guilt has been established by the Crown to your satisfaction beyond a reasonable doubt. There is no obligation upon the accused to prove his innocence. He is required to prove absolutely nothing. The onus of establishing the guilt of the accused rests on the Crown and that onus remains upon the Crown throughout the whole of the trial and that means that the Crown must prove every ingredient necessary to sustain the charge that has been brought. This onus never shifts; it has been on the Crown throughout the

whole of the trial and still remains upon the Crown. In order to find the accused guilty the Crown must establish every ingredient of the offence - and I will deal with the ingredients a little later - every ingredient of the offence to your satisfaction beyond a reasonable doubt.

There is nothing mysterious about these words "reasonable doubt". They are words of every day common usage. The words "reasonable" and "doubt" are known and used by all of us in our every day affairs. It can be said that "reasonable" is being or remaining within the bounds of reason. There is no special meaning. A "reasonable doubt" is an honest doubt and not one conjured up as an excuse for not doing your duty. It is not a fanciful or illusory doubt nor a figment of the imagination. A reasonable doubt must have real substance to it and it must be founded upon reason and good common sense. The law does not require the Crown to prove an offence to have been committed to the degree of absolute certainty. It must establish it to your satisfaction beyond a reasonable doubt.

So if, after you have weighed and carefully considered all of the evidence and applied the law to it as I shall give it to you, you find yourselves wavering and unable to come to an abiding conviction amounting to a moral certainty that the accused committed the offence charged, then there is a reasonable doubt and you must acquit him. If, however, after weighing and carefully considering all of the

evidence you are left with an abiding conviction amounting to a moral certainty which satisfies your reason and your common sense that the accused did in fact commit the offence, then there can be no reasonable doubt and it would be your duty to bring in a verdict of "guilty".

In criminal trials a jury's verdict must be unanimous. This does not mean that you have to reach a verdict but in order to reach a verdict of "guilty" you must be unanimous. In order to reach a verdict of "not guilty" you must be unanimous. If it so happens that one or more of you cannot agree with the others, after having conscientiously applied yourself to the task, then there can be no verdict. I hope that you will be able to arrive at a verdict but if you cannot arrive at a verdict, if you cannot arrive at a conclusion in which all of you are unanimous, then you will have no alternative but to merely report that fact to me. You must not abandon your own conscientious conclusions merely for the purpose of reaching a verdict. I know that you will apply yourselves conscientiously and diligently to the problems and I hope that you can come to a verdict, you can reach a verdict, but to put it shortly, the Crown must establish the guilt of the accused beyond a reasonable doubt to the satisfaction of each one of you.

The accused is charged with non-capital murder of Gail Olena Miller. He is charged with the murder of that girl allegedly to have taken

place on the 31st of January, 1969.

In dealing with the law which is applicable to a charge of murder it is necessary for me to make reference to certain sections of the Criminal Code.

First of all, a person commits homicide when directly or indirectly by any means he causes the death of a human being. A person commits homicide when directly or indirectly by any means he causes the death of a human being.

Homicide falls into two categories, either culpable which means blameworthy, or not culpable which means not blameworthy. Homicide that is not culpable is not an offence. An example of homicide which is not culpable, that is not blameworthy, is killing by pure accident, death by misadventure. A person commits culpable homicide, that is blameworthy homicide, when he causes the death of a human being by means of an unlawful act; and for the purpose of this lawsuit I will only refer to one unlawful act with which I think you will be concerned and that is assault or assault causing bodily harm.

A person commits an assault when without the consent of another person he applies force intentionally to the person of the other directly or indirectly - without that person's consent.

As I stated the accused in this case is charged with murder - he is charged with non-capital murder. There are what is known as

two offences relating to murder, one is capital murder, the other is non-capital murder. Murder in both instances is the same thing except that with respect to capital murder it has to do with the murder of a person in a particular category, such as a police officer, jail warden and so on. The accused is charged with non-capital murder.

The first question for you to decide is whether the death of the deceased Gail Miller was a culpable homicide, that is blameworthy, or not culpable homicide, that is not blameworthy. If the Crown has satisfied you beyond a reasonable doubt that the death of Gail Miller was a culpable homicide, as I have defined it to you, then you proceed to the next question as to whether such constituted murder.

I may say in the facts of this particular case that you may - and I referred to this in my opening remarks - you may have little difficulty in concluding that this woman was unlawfully assaulted and that the assault resulted in her death. If you do find that then you will find that she was murdered. It is entirely for you to decide, however.

If you have decided or do decide that the death of Gail Miller was culpable homicide then you will be faced with the problem was it murder. Again on the facts of this case you may have little difficulty in arriving at the conclusion that she was murdered as a result of this unlawful act, because culpable homicide is

murder where the person who causes the death of a human being means to cause the death or means to cause bodily harm that he knows is likely to cause death and is reckless whether death ensues or not.

You will notice the use of the word "means". That indicates that there must be an intent - an intent to cause the death or an intent to cause bodily harm that the person knows is likely to cause death and is reckless whether death ensues or not.

So that if you find that it was culpable homicide and if you find that the person either caused the death and meant to cause the death or that he caused the death and that in doing so he meant to cause bodily harm that he knew was likely to cause death and was reckless whether death ensued or not, then it would be murder. In either of these situations the Crown must prove both the act of killing and the intent of the person who did it, and both must be proved to your satisfaction beyond a reasonable doubt.

Of course a person's intent may be proved in several ways. The very actions themselves may indicate that intent. The evidence here appears to be - it's entirely up to you to decide but appears to be so clear that someone intended to either kill or to cause bodily harm which that person knew was likely to kill and was reckless whether death ensued or not, that I don't think I need to go

into a long discussion as to the methods by which an intent is determined. Some things speak for themselves. A person's intent may be revealed by his acts and by his conduct and a person is usually able to foresee one of the natural and probable consequences of his acts, so that as a general rule it is reasonable to infer that he did in fact foresee them and intend them. This is simply a matter of common sense. If therefore a person is capable of knowing what he is doing and is able to foresee the natural or the probable consequences of that which he is about to do and then goes ahead and does it, you may reasonably presume or infer that he intended the natural or probable consequences of his act.

Of course again I repeat that you may draw inferences. It is not a question that you must draw them. You may draw them. You don't have to draw them. If, however, on a consideration of all the facts it is your opinion that it is the correct inference, then you are entitled to draw that inference. I may again suggest to you - and it's just a suggestion, it's entirely up to you to decide - that in the circumstances of this particular case you may have little difficulty in concluding that a murder was committed and a brutal one at that.

In dealing with the law respecting the facts that are presented to you in evidence I must inform you that there are two types of

evidence by which matters of fact are proven. One is direct evidence and the other is circumstantial. When you see something done your testimony as to what you saw is direct evidence. For example, if somebody testified that he saw a person stab another, then that is direct evidence that the person did so stab. If a person admits that he stabbed a person and you believe his admission, that would be direct evidence. On the other hand, if a person is stabbed and another person is found later splattered with blood and testimony is given that a short time previously to being so found he had been seen with the deceased, that is circumstantial evidence which may be considered in determining whether in fact the person who was splattered with blood did the stabbing. There may be evidence of a number of different facts in a particular case which is circumstantial. As a further example, if in addition to being splattered with blood he had the deceased's wallet or some other possession on his person.

By direct evidence is meant that the existence of a given thing is proved by testimony of one who himself has seen it or admission by the accused if you believe the admission. By circumstantial evidence is meant that other facts rather than direct evidence are proved from which the existence of the given fact may be logically inferred. The Crown endeavors in such cases where it depends

006187

on circumstantial evidence to obtain as much evidence of facts as it can which tend to show that the accused committed the act. Some of these may be more valuable from the point of view of proof than others. Some may be so slim that they would hardly be worthy of consideration.

It is my duty to inform you that a jury in a case where the evidence is purely circumstantial - and I pause here to say - where the evidence is purely circumstantial with respect to the identity of the accused with the murder - the evidence of course may be direct that there was a murder took place, the evidence may be such that the death is proved directly - but the important thing is with respect to the identity of the accused, where the evidence is purely circumstantial that a jury before finding a person guilty upon such evidence must be satisfied not only that the circumstances are consistent with a conclusion that the offence was committed but also satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the accused is guilty. Again if you have a doubt as to whether the inference of guilt should or should not be drawn from such evidence, the accused must have the benefit of that doubt and you will not draw the inference of guilt.

I suggest that the important thing for you to decide in this case is whether

the accused did or did not kill Gail Miller. You will of course have to conclude first of all whether the killing took place. You will have to conclude whether in fact she was murdered. Then you must go on - and it is I suggest with deference the really important part of this case - the question of identity whether it was the accused who did the killing. You don't have to find that somebody else did the killing, all you have to determine is whether it has been proved to your satisfaction beyond a reasonable doubt that the accused did it. And if it is not so proved then of course your task is at an end.

You have listened for the better part of ten days to the evidence in this case. Some of it was very relevant, some I may suggest in my view at least not so relevant.

You heard the story that the accused accompanied by Wilson and Nichol John left Regina sometime in the early morning of January 31st. It was estimated to be somewhere in the neighborhood of twelve or twelve thirty in the morning. You also heard evidence that the journey took quite a little time. Although Wilson admitted that he was merely guessing he said that it was somewhere in the neighborhood of seven hours. In any event his testimony I think was that they left about twelve or twelve thirty, arriving in Saskatoon somewhere in the vicinity of six thirty. You will recollect that evidence better than I. You will

also recollect that during the course of the journey they were stopped for about an hour in Craik.

The evidence if you accept it of both Wilson and John is that they endeavored to locate the home of one Cadrain, and that during the course of endeavoring to locate this home they passed or came to a girl who was walking in the same direction that they were, who wore a black coat. Neither John nor Wilson were able to or did see the features of this woman. Both gave evidence that the car was stopped, that an inquiry was made by the accused as to the location of - in one case the witness referred to Pleasant Hill, in the other case the witness referred to Peace Hill; I don't think you will have any difficulty in concluding probably, being Saskatonians, that they were looking for Pleasant Hill. In any event according to them they were not able to obtain the information they required and they went on three-quarters of a block to a block and became stuck. The evidence of Wilson was and I think it was also the evidence of John that it was in the process of endeavoring to make a U-turn. Now from that time on it would appear from the evidence that the accused, Wilson and John were all in that neighborhood, around 20th and "O" and "N" and the location of the church and of the funeral chapel and of the motel and of the service station. It seems from all the collective evidence that their time was occupied in moving

around that area, principally for the purpose of endeavoring to locate the Cadrain household.

Dealing with the question of time, I mentioned to you before that Wilson said he thought they arrived about - I made a mistake - he said they arrived in Saskatoon five thirty to six a.m. but he also said he was just guessing at times. Nichol John said that they arrived in Saskatoon about six thirty. There is evidence which places them in that locality from the Danchuks. Mrs. Danchuk said as I recollect it that their car was stuck between seven thirty and seven forty-five and that a few minutes after it was stuck the car with the three people in it arrived on the scene. There is the evidence of the manager of the motel that he gave a map to a young man who came in without any shoes on. He could not identify that man but he said that he had no recollection of giving a map to any other person that morning or during the times that we are interested in, and you might reasonably conclude that that man was the accused, because the evidence of both John and Wilson is that they went to the motel for the purpose of obtaining directions. The motel man said as I recollect it that he opens up about seven o'clock and this was shortly after - approximately seven ten that the car arrived at the motel for the purpose of obtaining the map and the directions.

The evidence of the girl Adeline Nyczai,

who was a fellow resident with the deceased at the home at 134 Avenue O South, said that she saw the deceased Gail Miller at between twenty-five and a quarter to seven, dressed ready to go to work. She said she didn't have her shoes on but you recollect that this deceased girl was wearing those big long overshoes and it might be reasonable to assume that those were the last things that she would put on before leaving the house. Nyczai also said that the deceased usually left the house about seven o'clock but the last that she saw of her was between twenty-five and a quarter to seven. So that it is a matter for your consideration, it is possible that she may have left shortly after Nyczai did see her dressed and ready to go to work.

There is of course some speculation as to which route she took on her way in all likelihood to catch a bus. If you look at the sketch P.1 you will see that she had probably three alternative routes. I think Mr. Caldwell suggested two. His theory was that she came down Avenue "N". The house in question, which was 130 Avenue "O", is situated at the corner of 21st Street and Avenue "O". She could have come down Avenue "O", she could have come down Avenue "N", she could have skirted through this alleyway and out at the blind end - the "T" end; it wouldn't have saved her any time, it wouldn't have saved her any distance to go down the alley, as I see it. According to the evidence she

could have picked up a bus on 20th at either "O" or "N". Now, if she was the girl who was walking along the street when the car with Wilson and the accused and John stopped to make an inquiry - if she was the girl and if you accept the evidence of John and Wilson that it was on a street, then you would conclude I suggest that it was either Avenue "N" or Avenue "O" that she was walking on. But of course there is nothing conclusive to demonstrate that in fact she Gail Miller was the one who walking down the street. The girl who was stopped had a coat on which apparently was similar to the one worn by the deceased - a black coat. I know nothing about women's clothing of course except I occasionally have to pay for it, but it was described by one of the witnesses - I think it was John - as something I think she called an A cape or something to that effect, whatever it was anyway you will recollect it and certainly the lady on the jury will; and I don't know whether this particular coat was as described by John or not, that is whether it was this particular A cape or A line as she described it. However, that's a matter that you will consider. As I said there is nothing at all to show positively that the person who was walking down the street was Gail Miller. The only thing that you have is the time that she likely left the house and the time that they likely were driving along the particular road; and in that connection again I refer you to the

fact that it appears if you accept the fact that there was only one person who got a map that morning from the motel-it appears that it was somewhere around seven ten that they arrived out at the motel which is located as you recollect out here on the left hand side of this - west in any event of the location with which we are concerned out on Circle Drive.

What are the pieces of evidence which tend to inculpate the accused, tend to show that the accused might have been the one who caused the death? First of all, there is evidence which you will consider to show that he was in that locality at or about the time the murder was probably committed; and although the body was not discovered until about eight twenty-five by the Marcoux girl, the fact that the deceased was found in the alley so close to home, the fact that there is evidence which indicated the time that she likely left there, then you might conclude that the death took place shortly after she left the house. That's entirely for you to decide, however. I will deal in a few minutes with the suggestion or possible suggestion that she might have been taken there after she was killed.

There is the evidence that he was in the vicinity. Wilson of course was also in the vicinity; so was John. There is the evidence which you may consider, which you may accept or reject with respect to the blood stain on the trousers of the accused and the rip in

his pants. Both Wilson and Cadrain testified that there was blood. Wilson I believe confined it to the pants; he said that there was no blood on the shirt or sweater. Cadrain on the other hand said there was blood on the shirt and the pants. Cadrain said that there was a rip in the crotch when he changed his pants; Wilson didn't know whether he saw the rip at the time the pants were changed or whether he saw a rip when the accused was in Regina prior to embarking on this trip. John as I recollect it said that she saw no blood on the clothing.

Then you have the evidence of Wilson of the emotional condition of John when he returned to the car after he and the accused had departed looking for help. He said as I have it that when he left John was calm and that when he returned he found her in hysterics. He also said that when the accused returned five or six minutes later to the car that she immediately moved over to his side and I think that he made some kind of reference to the fact that she appeared to be afraid; I can't remember exactly how it came out now but the impression he gave or apparently tried to give was that she was moving over to his side to get away from the accused. And then he said that he walked not more than five blocks, he was certain that he walked four blocks, that he was gone somewhere in the neighborhood of fifteen minutes and that it was five or six minutes after he returned that the accused

returned to the car. But you will recollect the questions that were put to him in cross-examination when he admitted that he had said at the preliminary inquiry that it was only two and a half blocks and he cut down the entire time I think it was to some five minutes or so. He said that that was wrong, that he had said those things but that now he had given more time to think it out - I think he used the words "in depth" he was certain that he had gone four blocks and that he was more certain that the time was longer than he had indicated before. And he said that the accused returned to the car and that the accused said "I fixed her - or something to that effect." He said this was made by the accused immediately after he returned and that the statement was volunteered. According to him Wilson, Wilson said "You what?" and then nothing further was said.

Dealing with the evidence of Nichol John on that point you will recollect that her story was that there were two places where the car was stuck prior to being stuck in the alley behind Danchuks. Wilson said there was only one time that it was stuck prior to that. But she did get to a point where they were stuck when both Wilson and the accused departed from the car, left the car, and she said that Wilson went one way and the accused another way, that the accused went in the direction from which the girl had been coming.

I want to deal at this time specifically with the evidence of this girl Nichol John. You heard her in the witness box. You must have got some impression of the type of character she is, the kind of a person who would go on this particular kind of a trip in the first place, the kind of a girl who would admittedly do the things that she did in and around Regina, the fact that she was a user of drugs - those are the kind of things I referred to before which you will take into consideration in assessing a person's evidence. What kind of a person are they? Are they likely to be telling the truth? Are they likely to be lying? But I want to deal with it specifically and for the purpose of trying to avoid making any errors I have had a large portion of her evidence typed out by the court reporter, because as you will recollect I gave permission to Mr. Caldwell to cross-examine her on a statement that she allegedly gave to the police and I told you at the conclusion of that evidence that anything that she did not adopt at the time she gave the evidence in the witness box in that statement was not evidence against the accused. Even though she might be asked a statement - did you say this, did you say that, did you say something else - unless she in the witness box adopted that, admitted she said it and admitted it was true, it cannot be considered as evidence against the accused and I repeat that to you now, so that there will be

006197

no question at all in your minds about it. But there were certain things which were read to her which she did admit. She admitted that she gave a statement, she admitted that it was in writing, she admitted that she had the opportunity of reading it over, she admitted that it was in narrative form, she admitted that she signed every page of it. She told you the kind of a room she was in when she gave the statement. I'm only going to pick out those parts of her testimony where she admitted that she had made a statement to the detective sergeant and admitted that those were true, because as I say you must disregard anything that she did not accept as being the truth. This question was put to her:

"Now, did you tell Detective Sergeant Mackie:

'After we got to Saskatoon . . ' "

And then Mr. Caldwell said:

"My Lord, I am referring to the middle of the page -

'After we got to Saskatoon we drove around for about ten or fifteen minutes. Then we talked to this girl. This was in the area where Sergeant Mackie drove me around.'

Did you tell him that?"

Answer: "Yes."

Question: "Is that true?"

Answer: "Yes."

Question: "Did you tell Detective Sergeant Mackie: . . "

". . 'Ron was driving the car at this time. He drove to the curb where Dave spoke to this girl.'"?

Answer: "Yes."

Question: "You remember telling him that?"

Answer: "Yes."

Question: "And was that true?"

Answer: "Yes."

Question: "Did you tell Sergeant Mackie:

'Dave was on the outside passenger side of the front door. Dave opened the door to talk to this girl as she approached along the sidewalk. Dave asked this girl for directions to either down town or Pleasant Hill.'

Did you tell him that?"

Answer: "Yes."

Question: "You remember telling him that?"

Answer: "Yes I do."

Question: "And was that true?"

Answer: "Yes."

And then I asked the question:

"You distinctly remember saying that?"

Answer: "Yes, I remember saying that."

And then Mr. Caldwell:

"Did you tell Sergeant Mackie:

'He offered to give her a ride to wherever she was going. She refused the ride. Dave closed the door . . "

006199

And then there was that other reference that she didn't admit and which is not evidence and then she said in answer to the question:

"Did you tell Sergeant Mackie that?"

"Not all of it. I don't remember saying part of it. The first part I said but I don't remember saying the last part here."

And then:

"Alright, did you tell Sergeat Mackie:

'We started to drive away and only went about half a block where we got stuck and we ended up stuck at the entrance to the alley behind the funeral home.'

Did you tell him that?"

Answer: "Yes."

Question: "You remember telling him that?"

Answer: "Not too clearly."

Question: "Was that true?"

Answer: "Yes."

Question: "Did you tell Sergeant Mackie:

'Ron and Dave got out and they tried to push the car. They couldn't get it out.'

Did you tell him that?"

Answer: "Yes."

Question: "Do you remember telling him that?"

Answer: "Yeah, I did."

Question: "And was that true?"

Answer: "Yes."

Question: "Okay. Did you tell Sergeant Mackie:

'I recall Dave going back . . '"

006200

"..'. in the direction we had spoke to
the girl. Ron went the other
way past the funeral home.'
Did you tell Sergeant Mackie that?"

Answer: "Yes."

Question: "And do you remember telling him?"

Answer: "Yes."

Question: "And was it true?"

Answer: "Yes."

My question: "So he did go back in the direction of the girl?"

Answer: "Yes."

And then this question - you recollect in her evidence before she was cross-examined that she said when the accused came back to the car that she had merely moved over, or had moved over, she didn't say why she did it as I recollect, she may have done but she did not indicate that she moved over because she didn't want to sit beside him - and then this question was put to her on the cross-examination on the statement:

"Alright: did you tell Mackie:
'The next I remember sitting in the car. I don't remember Ron being in the car or coming back. I remember Dave coming back and getting into the front seat of the car. I remember moving over towards the driver's side because I didn't want to be near him.'
Did you tell Mackie those things?"

Answer: "Yes I did."

Question: "And did those things happen?"
Answer: "Yes."
And you will also recollect that in her evidence given before the cross-examination that she stated that she saw a paring knife with a maroon handle as I recollect it in the car but she didn't know who had it; this was in the car on the way from Regina to Saskatoon. And then she was asked this question by Mr. Caldwell:

"Now, did you tell Sergeant Mackie, referring to a stop:

'Shortly after Dave got back into the car I saw a knife he had.'

Skipping on:

'This knife was a kitchen knife used to peel potatoes and things like that. It had a maroon handle.'

Did you tell him those things?"

Answer: "Yes I did."
Question: "And you remember telling Mackie that?"
Answer: "Yes."
Question: "And just briefly that part of your statement was on the way to Saskatoon from Regina - that's where that occurred?"
Answer: "Yeah, I know."
Question: "You agree with that?"
Answer: "Yes."
And my question: "That was true?"
Answer: "Yes."

I repeat again that those things which she did not admit must be completely disregarded;

006202

and also with respect to those things that she did admit as being true that they are only the evidence of this girl and they may be true or they may not be true; it's entirely up to you to determine whether she was telling the truth when she admitted that she had said those things and that they were true.

Then we have the incident of the purse or vanity case or whatever you like to call it that was thrown out of the car on the trip to Calgary. You will recall the evidence of both Wilson and John that there was no such article in the glove compartment up to the time they arrived in Saskatoon. You will also recall the evidence of Wilson, John and Cadrain that John found this article, this purse, that it contained lipstick, eye make-up and a powder compact and that nothing was said in answer to John's inquiry as to who owned these or to whom do they belong, but that the accused took it and threw it out the window.

The presence of that purse may be a piece of evidence that you can take into consideration in determining whether or not it was the accused who took the purse from the deceased; but on the other hand there may be an entirely different explanation for it. That purse may have had nothing whatsoever to do with the deceased. There is nothing to link it up to her. There were duplicates of those things that were contained in the purse which was found in the car in the deceased's purse;

there were a number of duplicates with one exception and that is the powder; there was no evidence as I recollect it of any powder or powder compact being found in the deceased's purse and there was a powder compact in this bag that was found in the car. So you might ask yourselves - well, isn't it quite likely that the purse in the car was from an entirely different source; what would be the necessity for so much duplication?

In addition to the evidence of John which I have just read to you about her statement that the accused had possession of a paring knife with a maroon handle, there was the evidence of Wilson that he saw the accused with a similar implement when they were driving up from Regina. He said that the accused was on the outside, that John was in between the two of them and he was driving. The dashboard light was working but there was no overhead light in the car; he said it was dark. Whether you accept the fact that he was able to see the color of the handle of the knife or not under those circumstances is entirely for you to determine. In any event there is the evidence of both these persons that the accused did have a paring knife in his possession. Again it is only evidence, the evidence of two people who to a considerable extent could be considered as discredited along the lines I have indicated before. It's entirely a matter for you as to what weight you will place on their evidence.

And then there was the further statement according to Wilson that the accused when in the bus depot in Calgary had said to him that he had hit a girl or got a girl in Saskatoon. He said that they were words to that effect and that the accused had said he put her purse in a trash can and that he thought she would be okay.

There is the further evidence of the two witnesses who didn't give evidence at the preliminary inquiry and about whose testimony the authorities only learned a comparatively short time ago, that is Malnyk and Lapchuk, the occasion in the Parklane Motel in Regina, and I know that you will carefully consider the circumstances under which these persons said that the accused made certain statements and again the type of witness whose evidence we have to consider. Malnyk said that it took place in May of 1969, that he together with Lapchuk had gone about ten thirty p.m. to the motel, where they found the accused with two girls in a motel room. Malnyk said that previously to this he had been discussing the matter with the accused and that the accused had said that he had had a saliva test and that if it turned positive he would be arrested. I have no doubt - I shouldn't say I have no doubt but you may easily come to a conclusion that both Malnyk and Lapchuk had been discussing this particular incident in Saskatoon with the accused on maybe a number of occasions, because

at that time the accused must have been a suspect, he had had a saliva test taken; and as Lepchuk said he had been bugging the accused about it. Malnyk said that the accused who apparently was under the influence of drugs after this news item came on the radio, got up on his knees on the bed with a pillow between his knees, started hitting the pillow as if stabbing it and said: I killed her or I stabbed her - the witness wasn't sure which - fourteen times. And he said the accused said: I fixed her. And then he rolled over on his side and started laughing hysterically and loud, I think in answer to a question in **cross-examination he agreed it was** in a crazy way. He said he wasn't under drugs but that the accused was high. And in considering that witness's evidence you will recollect that he has had considerable trouble with the authorities, that he was convicted of theft in the spring of that year and given a suspended sentence, that he is presently charged with armed robbery in Regina, that he hopes he will be able to establish an alibi and have the charges withdrawn, that he himself uses and used drugs, although he hadn't done so for a time previous to this particular incident, and that his evidence first came to light as a result of a conversation he had with Wilson about two weeks ago. Of course Wilson knew that he was going to be giving evidence in this case, Wilson knew the story that he expected to tell at the trial of the accused and

presumably he was discussing the incident with Malnyk and Malnyk said that he Malnyk then volunteered this information which he gave in the witness box, so it seems to me the obvious conclusion is that Wilson must have gone hot-tailing it off to the police and told them about it and that's how the police were able to trace these men down and of course once they got the lead it wouldn't be too difficult to find that Lapchuk also was involved in it.

Lapchuk gave evidence somewhat similar to that of Malnyk, although while Malnyk said it was on the bed that he jumped on top of the pillow and started hitting it, Lapchuk said that he jumped off the bed and straddled the pillow on the floor and in this case Lapchuk said that the accused said: Where is my paring knife? Then he went through the motions of stabbing the pillow and he said: Yes, I stabbed her fourteen times and she died. Lapchuk said: I don't know if he said killed her or stabbed her, but nothing further was said and his explanation was that he was too shocked, he had not expected a reply like that. He said the accused just shrugged his shoulders, gave a little laugh and sat down. He also said that the accused was high, was under the influence of something. There was no liquor there and the feeling I had was that he was high quite likely as a result of the use of drugs. Now this man himself was also a drug user, although according to him not a confirmed one. He takes drugs once every two

weeks, maybe once a week. He has a bad criminal record. He was convicted of offences of forgery and uttering and of theft, the possession of a sawed off .22. He is presently out on bail for forgery and uttering and the possession of stolen goods. He admits that he stole the accused's wallet and that the accused eventually learned about this and that the accused just laughed it off because as Lapchuk said, the accused wasn't concerned because he the accused hadn't got into any trouble over it. He was convicted of the same offences that Wilson was convicted up in Edmonton involving a charge of conspiracy.

You may ask yourselves what would be the motive in these persons of dubious character inculpating the accused, which they endeavored to do. You have to consider whether the fact that they are both now charged with crimes might have something to do with it. They might have been trying to ingratiate themselves with the police, they might not. They might be telling the truth in this particular instance, they might not be telling the truth. That's entirely for you to determine.

The man Cadrain gave evidence that when the accused changed his clothes in his Cadrain's home, that the accused had blood on his pants and on his shirt. Now, Cadrain hasn't got the record that some of these others have of breaches of the law. He was convicted of vagrancy in Regina but otherwise he appears to

have a clean record. He didn't go very far in school, I think it would have been obvious to you that he is not a very well educated person, he couldn't understand some of the simpler words that were put to him in questions. You will also recollect that he didn't give this information when he was first questioned about it. His explanation is that he just didn't tie it up, the death of this woman with anything that might have been done by anybody in his party. He indicated that he wasn't too concerned about it as far as he was concerned because he knew he had nothing to do with it and you might easily conclude that if he was sleeping at home he wasn't likely to get up at seven o'clock in the morning to go prowling around in that kind of weather looking for somebody to rob; in any event the evidence on the part of one of the witnesses at least is that when they arrived at the house somewhere around the neighborhood of shortly after nine o'clock, that he was there.

You of course have the evidence that there was a knife blade under the body when it was discovered and that the maroon handle which was found located in a lot nearby was according to the expert witness from Regina the handle which belonged to this particular blade. There is evidence that the accused had two knives, a hunting knife and a paring knife. We haven't heard much about the hunting knife if he did have two knives. It might occur to you to wonder why he didn't use the heavier knife if he did use

a knife at all instead of the paring knife. If the accused did commit the murder I suggest to you that the evidence is such that you might conclude that it was somewhere between a quarter to seven and ten minutes past seven - if he did - because the girl was ready to leave the house at between twenty-five to seven and a quarter to seven and they arrived at the motel at about seven ten. There was a suggestion that possibly the girl was killed at some other location and her body was dropped there. I don't know what you think of it, that suggestion doesn't appeal to me too strongly on the evidence, but again that's a matter for you. If that had been done it seems to me that there would have been some evidence to indicate the presence of a car. Furthermore if the girl had been killed somewhere else why would she be dragged into that alley so close to her home? Furthermore why would her personal belongings be spread all over the locality? Why would the body be dumped and then the purse put into a trash can, the knife handle thrown into a particular yard, the scissors into another yard, the keys into a yard, the boot and sweater hidden under the snow? That she was the subject of a very vicious maniacal attack seems very apparent - seems very apparent, I say. You have seen that picture depicting her condition after she was turned over - and of course you have these pictures with you - lying there in that condition.

As has been indicated by counsel one

of the strangest features of this case is the fact that there are no stab wounds in the dress, yet there were stab wounds in the coat and there were stab wounds in the front of her. I think the evidence of the doctor was that there were four stab wounds in the back, one on the side, three or four in the middle section and I think one in the collar bone; you will recall that evidence - anyway there were multiple stabbings. The Crown has advanced one theory to you that she may have been stabbed and either rendered unconscious or killed and afterwards raped. One would have thought if that was so that whoever did the raping would be pretty well covered with blood; and if those were the circumstances and the accused had done it surely the Danchuks even though they weren't looking for blood would have seen blood if there had been a profusion of it, because how could a person be in contact with a woman like that, bleeding as she must have been bleeding, and not become himself fairly well covered with blood? And how was it that the coat was on her arms and yet her dress was pulled down? Of course there is always the possibility that she was threatened with a knife, raped and afterwards killed; there is always that possibility; whether you consider it or not is entirely up to you. But the fact remains is that she was killed and the fact remains is that somebody had sexual relations with her and the fact remains that her body was

in such a condition that there is evidence from which you might conclude in addition to the fact that she had sperm in her vagina, that she was raped at that particular spot and it wasn't something that may have happened back home with somebody with whom she consented to have intercourse. Her pants were pulled down, why the dress would be pulled down I wouldn't know if the pants were pulled down, but apparently it was. And she was according to the evidence, which you may accept or not, that she was stabbed in the back through the coat and the coat must have been on her then when she was stabbed. Furthermore the wounds that were inflicted on the back were the fatal wounds.

There is a complete lack of footprints which would indicate that she was running away or that she was dragged there. It seems obvious that if either she or whoever attacked her had been walking in other than the travelled portion of the lane that the footprints would have been seen leading up to that particular spot. You will recollect the evidence of the officer that it was so cold that the snow was just like sand and it may have been that both persons got there walking in the centre of the alley on the smooth portion of the alley. There seems to be very cogent evidence that some kind of a struggle took place; otherwise why would all that portion be tramped down? And her hands were clenched. Now, I don't know what that means, there was no

question asked of the doctor, but there was snow clenched in her hands, which may have been clenched in dying agony, I don't know, but there is certainly evidence generally to indicate that there was a struggle which took place there.

As I say, if that girl was struck down by a sharp instrument as has been indicated and was bleeding profusely in the manner which is indicated in the photograph which is part of Exhibit P.3, and that it was after that that she was sexually attacked, you would expect I think to find a considerable quantity of blood on her attacker. On the other hand if she were forced to submit to sexual intercourse by threats and knifed afterwards, there might not be the same likelihood because the individual in question wouldn't necessarily be in the same proximity to her as he would be if he were having sexual relations with her. There is no evidence of any damage to the genitals which would indicate there was any forcible entry, although the doctor said that her physical make-up was such that intercourse could be had fairly easily. He did, however, say that she was a young girl and if she had wanted to resist could have put up quite a struggle.

Some of the evidence which was adduced I suggest is not of very much assistance to us. The fact that the wallet was found near Cadrain's is not evidence really which you could link up with the accused. Whoever robbed her may have

throum it anywhere, and the fact that it was three doors away from Cadrain's doesn't, I suggest, implicate the accused to any degree at all. Anybody, any person might have dropped it in that particular locality. It was her wallet, I don't think you can have any doubt that it was her wallet; the contents contained belongings of hers and the hospitalization cards were found nearby. The toque I suggest to you is of no consequence whatever. That toque might have been the toque of some small boy who got a nose bleed and dropped his hat and went running home; it wasn't turned over to the police until some considerable time afterwards, it may have been found shortly afterwards but there is nothing in any way to connect it up with anybody in the car, that is John, the accused or Wilson or nothing to connect it up with Cadrain. There were no evidences of scratches on the face of the accused on that day. I think that if there had been any noticeable scratches it would have come to the attention of people like the Danchuks or the man in the motel or Cadrain, or Wilson or John.

There is a suggestion that the slashing must have been done by a right handed person. You will have to take into consideration the evidence you heard in that regard, the evidence of the police officer who indicated that he thought it was done by the right hand and he gave his reason for that. The doctor said that it might have been done, it all depended on

the manner in which the persons were facing each other. There is evidence by one of the officers that the accused is left handed; that of course doesn't necessarily mean that because a person is left handed they would use the left hand for the purpose of stabbing; a person might use the left hand for one purpose and the other hand at the same time for another purpose. But I merely point that out to you as something which you will have to take into consideration in determining whether or not it eliminates the accused as a possible murderer. I checked my notes and I believe that Mr. Caldwell must have been in error when he said that the accused went to the bathroom and that gave him an opportunity to clean up. The notes I have on it and your recollection will be as good if not better than mine, was that there was some evidence that he was being given a drink of water and that he may have been alone while Mrs. Danchuk was going to get him a drink of water or he may have been alone after he got the drink of water, I don't know, but I don't think there was any suggestion in the evidence that he had an opportunity of going to the bathroom and cleaning up.

Going back to these statements allegedly made by the accused, the statement which Wilson said he made after they returned to the car when it was stuck and they went for help, the statement which Wilson says was made in the bus depot in Calgary, and the statements

which were made according to Lapchuk and Malnyk in the Parklane Motel, in the first place you must consider whether the witness who gave evidence that a statement was made is telling the truth. If you come to the conclusion that he wasn't telling the truth or that you have a doubt as to whether he was telling the truth, then you must disregard that entirely. If you come to the conclusion, however, that one of the witnesses or all of the witnesses were telling the truth when they said that the accused said such and such a thing - if you come to the conclusion that they were telling the truth, you must go further and determine whether or not in fact the accused was telling the truth, because it could only be accepted as evidence against the accused if you concluded that he did make the statement and that in making the statement he was telling the truth. Sometimes persons make statements which are completely untrue - for various reasons. Persons have been known to admit to things that they didn't do; persons have been known to boast about things that they didn't do. And so in order to consider that evidence you would have to find not only that the statement was made or the statements were made but that the person who made the statement was in fact telling the truth. There is no evidence of any of the three - John, Wilson or the accused - being under the influence of drugs or liquor in Saskatoon on January the 31st. The evidence is to the

contrary. There is no evidence that Wilson and the accused were under the influence of drugs in the bus depot. There is evidence, however, that the accused was under the influence of drugs when he was alleged to have made these statements in the motel. Now, being under the influence of drugs would he be more likely to create a bit of a sensation by admitting something that wasn't true? Would he be more likely under the influence of drugs to have his inhibitions removed and be more careless about guarding his tongue? Those are all matters that you will have to consider in determining whether or not if you do believe these witnesses that the accused did make those statements, whether the accused in fact was telling the truth when he made the statements.

You will also recollect - this was drawn to your attention by counsel in answer to a question by myself - Wilson did not pursue the subject in the bus depot because he didn't believe that the accused had done that. You will also recollect that there was no evidence that could be found which indicated that a car had been stuck at any particular place; whether if a car was stuck under those circumstances with summer tires on there would be marks indicating that it was so stuck is a matter up to you. I think one of the police officers stated that if the wheels turned sufficiently and became warm that they might melt the snow and then when it froze again

there would be some indication that a car had been stuck there.

I will repeat what I said earlier in my remarks that in order to find the accused guilty of this offence, that you would have to conclude that each ingredient of the offence had been proven to your satisfaction beyond a reasonable doubt. If you have a reasonable doubt with respect to any ingredient which is required in order to establish the offence, the accused must be given the benefit of that doubt. You will have the exhibits with you. I would request you to please select a foreman who may speak on your behalf. It may be that I will call you back for further instructions after I have heard from counsel, it may not, but if you have any questions yourselves please indicate that to the officer who will have you in charge; if possible I would like to have it written out so that I could consider it before bringing you back in again.

Would you please swear in the officers, Mr. Hibbert?

TWO R.C.M.P. OFFICERS DULY SWORN

THE COURT: Will you please retire.

JURY RETIRE AT 12:10 P.M.

JURY OUT

THE COURT: Gentlemen? Mr. Caldwell?

MR. CALDWELL: I have no suggestions to make, My Lord.

THE COURT: Mr. Tallis?

MR. TALLIS: My Lord, there are a number of observations I would like to make and first of all I want to deal with one or two factual situations which I think merit Your Lordship making reference to.

As I recall Your Lordship's charge, reference was made to the deceased being in the house where she resided and being observed ready to go to work. Now, as I understand Your Lordship's observations you said that the only thing left for her to put on were her shoes, and with the utmost deference to Your Lordship's recollection may I suggest that the evidence in fact establishes that she did not have her shoes on; she was dressed in her uniform and her hair was combed back but on the contrary the evidence points to the fact that she did not have her coat on or gloves or anything like that. Now this may well be a matter which the jury will recollect on their own but Your Lordship having made reference to it I feel duty-bound to draw this to your attention because one might well get the impression that Your Lordship was saying to them in effect that here she was ready to go to work except for putting on her shoes. As I say my recollection may be in error but having checked my note as quickly as I could I do not think it is.

006219

JURY OUT

THE COURT: On that point, Mr. Tallis, I had that checked this morning. You may be correct about that but the witness did use the words "ready to go to work".

MR. TALLIS: Yes, the only thing is that when I cross-examined I specifically as I recall it put questions on the issue of her coat and so on, because I think there is quite a difference.

THE COURT: Yes.

MR. TALLIS: As I say I am not asserting positively that I am precisely correct but that is my recollection and I say this is of importance because I have already submitted to the jury and I think Your Lordship has made some reference to the time element here as quite important.

Now secondly and I say this with the utmost deference, I suggest that some areas of Your Lordship's charge must be amplified and I say it for this reason. When we come to - to going into the facts of the case Your Lordship started out with a reference by saying - what are the facts that in effect incriminate the accused?

THE COURT: I think I used the word inculpate.

MR. TALLIS: Perhaps I didn't quote the exact words but I think the term I used is virtually synonymous and having then . .

THE COURT: . . did I not use the words "which might be considered"?

MR. TALLIS: Yes but having then proceeded on that footing I think if I may say so with the utmost

deference it is unfortunate that Your Lordship did not make reference in converse terminology to facts which tend to exonerate him.

THE COURT: Well, I made reference to the facts. You're suggesting that I should have used the words "those things which you would consider as exculpatory"?

MR. TALLIS: That's right. Now for example - and I just want to take a few examples, My Lord, Your Lordship made specific reference for example to the emotional condition of John if the evidence is accepted, and yet we find on the evidence that not too long after - if this is accepted by the jury - Nichol John is riding in the front seat with them. Then later on when they left Saskatoon she is allegedly in the front seat between David and one of the other boys. So I would suggest with respect that these are factors that ought to be alluded to in dealing with a matter of this kind.

Now, also another point which I would like to use by way of example, Your Lordship has referred in some detail to the evidence of Nichol John and given a charge on the law and referred to your earlier ruling, and you have pointed out that they have to determine whether or not what she said in adopting certain portions of her statement is in fact the truth. But then for example you made reference to the knife that she said at one point she saw David with - the maroon handled

one. In cross-examination for example she said that the hunting knife was the only one she could recall David having in his hand and I would say with the utmost respect that factors such as this which tend to counterbalance one another should be alluded to because a lay jury quite often is prone to take something which a judge has said and in my view unfortunately divorce it from other aspects of the case.

Then in my submission to you I have earlier suggested that Your Lordship ought to have referred specifically using that terminology to facts which tend to exculpate the accused. You have already referred to a number of them without using that particular term. But as I understand the charge you attempted to summarize in effect the position of the Crown and with the utmost respect I suggest Your Lordship in referring to exculpatory facts omitted a number of essential areas. One I suggest that should be emphasized having regard to the series of events that were detailed, including the nature of the wounds and where certain items were found is the question of the time element and the time that might well be consumed in activities of this kind. Secondly - and I suggest Your Lordship has only partially covered this by referring to - and I think Your Lordship did this quite fairly the fact that on the Crown's theory intercourse was had with the girl after she had

JURY OUT

been stabbed and down there, one would expect to find blood in some substantial quantity. But I suggest, My Lord, that in considering that aspect of the case, Your Lordship should also have made reference by way of exculpatory facts to the conduct and demeanor of the accused as seen by independent witnesses. Rasmussen . .

THE COURT: . . I get into a wide area there. Some of the worst culprits are the smoothest and smartest ones when they have been discussing things with people, Mr. Tallis; I'm getting into a very wide area there.

MR. TALLIS: Well, this may be so but Your Lordship has referred to other aspects of conduct and I suggest with respect that these are areas that should be canvassed.

THE COURT: You mean things have happened with his conduct months afterwards?

MR. TALLIS: No, no, immediately afterwards - his conduct at the motel, his conduct at Danchuks. Now, Your Lordship has properly observed that there was nothing in the way of scratches and so on - and I am not talking about months and months after - this is before the jury and since neither aspect of it was referred to in Your Lordship's charge I think we can leave it with them, but having set up the charge in this form and made reference to certain of these things, I think that this should be done.

Then in addition to that Your Lordship made reference to the evidence of Cadrain and I

006223

JURY OUT

suggest with the utmost deference that in your summary of what was said you did not point out as specifically and emphatically as might have been pointed out that Cadrain when he was interrogated by the police in Regina said that he was endeavoring to tell the truth and was recollecting everything that he could recollect up to that time and at that time he had absolutely no recollection of blood on the accused.

THE COURT: I thought I indicated that, that he had no recollection of any . .

MR. TALLIS: . . yes but something further has to be added to that; at that time his position was that he was endeavoring to tell them everything he could remember as in reference to certain other witnesses.

THE COURT: Yes?

MR. TALLIS: Now, I think that, My Lord, with respect summarizes a number of basic points which I feel Your Lordship should reconsider.

THE COURT: Ask the jury to come back please - do you wish to say anything, Mr. Caldwell?

MR. CALDWELL: No, My Lord; I don't object at all.

THE COURT: Ask the jury to come back, will you please?

006221

JURY RETURN AT 12:25 P.M.

THE COURT: Members of the jury, I have been asked to draw certain things to your attention which I am very glad to do. You will realize of course that in my dealing with the evidence that I do not purport to do it exhaustively, it would be impossible for me to do it exhaustively. As indicated by counsel they themselves couldn't deal with it exhaustively. But certainly if I gave certain impressions in connection with my charge which might be considered as being somewhat unfair I want to clear them up immediately.

First of all I dealt with the evidence which I referred to as being the type of evidence which you might consider as inculpating or incriminating the accused. You recollect I went through the various things such as the evidence of these witnesses about some blood on his clothing, the evidence with respect to the statements that he is alleged to have made and so on. And then I went on and brought out matters and drew them to your attention which were indicative of the fact that he didn't commit the crime, that is exculpatory matters, but I didn't refer to them as exculpatory, I didn't refer to them as matters which you could consider which were the opposite of incriminating, and you will recollect that after I was through with a certain number of observations I went on and I said there were no scratches on his face, the

006225

type of characters who were giving this evidence was such that you would have to scrutinize it very carefully, the fact that there was no profusion of blood on him and the fact that a person who would have sexual intercourse with a woman after she had been stabbed would likely have blood on him, the fact that Danchuks saw no blood - those are all intended to be by way of exculpatory, those things which you can consider which indicated the accused was not - and apparently I didn't indicate it plainly enough to you to show that I was trying to place before you those facts which you would consider in discounting any suggestion that these other matters were incriminating. And that's what I intended to do - I intended to try and give the picture as it was from the point of view of the Crown and then endeavor to draw to your attention those facts which would indicate or might indicate to you that the accused had nothing to do with this offence.

I also referred to the time that the girl Adeline Nyczai saw the deceased in the house and I used the words that Nyczai had said that she was ready to go to work but she didn't have her shoes on. Now you will recollect this evidence better than I did. I know that she said "ready to go to work" but she also said that she didn't have her shoes on and I also believe this - and again it will be a matter of your recollection - that she

didn't have her coat on and she didn't have her gloves on and there's nothing to indicate that she in fact did leave the house immediately after Nyczai saw her. She might have left there ten minutes later, she might have gone back into the room and done something or other; the only evidence is that Nyczai did hear a door closing or footsteps or something like that but there is nothing to pin it down as to the time when she in fact did leave the house.

I also referred to the evidence of Wilson when he said that John was hysterical when he returned and I also referred to John's evidence in which she had admitted that she had moved over towards Wilson when the accused got in the car. But you will also bear in mind this - that if she was hysterical as a result of something happening, if she was afraid of the accused you would have thought that she would have taken the first opportunity to leave the car and not get back in it again; in other words, she wouldn't have continued on with the other two on their little jaunt up to Edmonton, she wouldn't have remained with them if she had been that upset or that hysterical or that concerned about it; if she was afraid of the accused and she had ample opportunity to get out of the car and stay out of the car at the various places they stopped around Saskatoon.

Also I read to you the statement that John made which she said was true that she saw

the accused with a paring knife in his hand. It has been drawn to my attention that in cross-examination she said something to the effect that she didn't actually see the accused with the paring knife in his hand.

Some considerable time was taken by counsel and by me too in dealing with this matter of time and the question as to when the deceased left the house may be of very considerable importance to you in determining whether or not the accused could have had the time to rape, murder and steal, or whether the time was such that it was too short for him to have been able to do all these things which as you will recollect one of the police officers said in connection with the coat - well, this would all take some time. So you bear in mind the time factor, I suggest, Members of the Jury, very seriously in determining whether or not the accused could have done the things with which he is charged - could have done the thing with which he is charged.

Also there is no evidence of his actions that morning after arriving at the motel - I think the motel was the first place where he saw anybody who might have seen his condition other than the two occupants and other than the people who helped push the car - and we haven't got their evidence - and in the Danchuk house and in the Cadrain house - that there was nothing about his manner or speech or

conduct which was anything other than normal. In other words, there was nothing from which you might conclude that he was upset about anything or had a guilty conscience or he had done something that was wrong.

I referred briefly to Cadrain's evidence. You will recollect that he went to the police after he returned to Saskatoon but that he was first questioned by the police in Regina and he admitted that at that time he had no recollection of anything unusual in the appearance of the accused, no recollection of any blood on him, and I think no recollection of a rip in the trousers at that time when he was being questioned, and he said that he was trying to tell everything that he remembered truthfully and that he had no recollection of those things.

Thank you, gentlemen.

JURY RETIRE AT 12:35 P.M.

JURY OUT

THE COURT: Anything further, gentlemen?

MR. TALLIS: No, My Lord.

THE COURT: Very well, we will rise. I don't think we need to plan on being back before two o'clock.

MR. TALLIS: Thank you, My Lord; we can eat then.

COURT ADJOURNED AT 12:35 P.M. JANUARY 30TH, 1970.

THE JURY ADJOURNS ITS DELIBERATIONS AT 12:45 A. M. JANUARY 31ST, 1970, RETURNING TO THE COURT HOUSE AT 10:00 A. M. JANUARY 31ST, 1970.