

# The Criminal Law Quarterly

Volume 53, Number 2

November 2007

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## Editorial

### The Stephen Truscott Case

The Ontario Court of Appeal's decision in *R. v. Truscott*, 2007 ONCA 575, will hopefully put to rest a case that has raised serious concerns since Mr. Truscott was convicted of murder and sentenced to hang in 1959.

The reference heard by five of the most senior and experienced judges on the Ontario Court of Appeal assesses both old and fresh evidence in great detail and concludes that the conviction was a miscarriage of justice. The Court of Appeal determined that in the unique circumstances of the case, most notably its age, an acquittal should be entered on the basis that it would be the probable result of a hypothetical new trial that could not be held so long after the events in question.

The Court of Appeal emphasized that its job on this reference was to determine the appeal in light of fresh evidence. It stressed that "an appeal is not a wide-ranging investigatory process like a public inquiry or . . . the kind of open-ended factual inquiry into past events that might be conducted by an historian or journalist": *ibid.*, at para. 70. In particular, it did not assess the fairness of the 1959 trial or the 1966 reference for a variety of reasons including its concerns about applying contemporary standards to past events.

Perhaps for this reason, the Court of Appeal did not assess the evidence through the contemporary learning about wrongful convictions. For example, there is no reference to the analysis conducted by numerous Canadian public inquiries into wrongful convictions and in particular the frailties of forensic evidence, identification evidence and post-offence conduct and other evidence that is highly prejudicial to the accused and of limited probative value.

Nevertheless, there is much to be learned from the Court of Appeal's judgment. The case underlines the dangers of overstating the certainty of forensic evidence. The pathologist Dr. Penistan testified at trial that Lynne

Harper died within a 45-minute time span that coincided with Truscott's limited opportunity to have committed the crime. There was competing evidence at trial and on the reference. Nevertheless, the majority of the Supreme Court supported Dr. Penistan's testimony in part on the basis that he was the only expert actually to observe the body.

The Court of Appeal considered extensive evidence about the timing of death. It did not rely on the evidence of the Crown's expert, Dr. Spitz, who agreed with Dr. Penistan. The Court of Appeal noted that Dr. Spitz relied on his own experience, but was unable to cite scientific evidence in support of it: *ibid.*, at para. 166. The Court of Appeal heard from other expert pathologists who testified that it was not scientifically sound to narrow the time of death, as was done by Dr. Penistan.

In addition, the Court of Appeal considered archival material in the form of draft autopsy reports and notes and a 1966 "agonizing reappraisal" memo that suggested that Dr. Penistan himself may have had doubts about the accuracy of his precise estimate of the time of death at trial. All of this new evidence could reasonably affect the verdict because "if the jury concluded that she died after 8:00 p.m., or even if the jury had a reasonable doubt on that factual issue, it could not have convicted the appellant": *ibid.*, at para. 244. Although not stated by the Court of Appeal, the circumstances of this case underline the importance of full documentation and disclosure of the working material of forensic experts.

Entomology evidence also was offered to support the proposition that Lynne Harper died after Truscott's limited opportunity to have access to her: *ibid.*, at para. 380. Here again the Court of Appeal found fault with the Crown's witness who was the only entomology expert to support the idea that Lynne Harper could have died before 8.00 pm. The Court of Appeal noted that the Crown's expert based his testimony on his experience and "was unable to demonstrate that his experience had been replicated by other scientists": *ibid.*, at para. 313.

In finding two Crown experts to be unreliable, the Court of Appeal emphasized the importance of evidence-based forensic science that allows for the testing of results. Conversely, it has sent an important warning about the dangers of relying on even the most extensive experience of any one expert who cannot marshal evidence and scientific support for his or her opinions. The Court of Appeal's findings that two critical Crown experts were unreliable when they supported the Crown's theory about the time of death also begs the question of what would have happened if the defence had not called their own experts or if the trier of fact did not recognize the limits of the expert's experience-based approach.

Despite fresh evidence that cast doubt on all four pillars of the case, the Court of Appeal refused to rule that a reasonable jury could not convict Stephen Truscott. It summarized what remained of the Crown's case as

scientific evidence that did not rule out the possibility that Lynne might have died before 8.00 p.m; witnesses who did not see the appellant with Lynne north of Lawson's Bush; and some statements made by the appellant from which "a jury could conclude based on the post-disappearance statements of the appellant that he was not being honest with the police regarding his movements that evening and that he was attempting to divert police attention away from the scene of the crime, knowing that the body was in Lawson's Bush": *ibid.*, at para. 775.

The conclusion that a conviction could be a reasonable verdict is sobering given the sustained and successful defence attack on the scientific evidence, the testimony of Arnold George, and the prejudicial but largely non-probative evidence of penis lesions. This conclusion reaffirms that there are no guarantees in our justice system. It highlights the limits of judicial screening devices in keeping cases from the jury.

The Court of Appeal also refused Mr. Truscott's request that he be declared innocent, stating that "the appellant has not demonstrated his factual innocence. To do so would be a most daunting task absent definitive forensic evidence such as DNA. Despite the appellant's best efforts, that kind of evidence is not available.": *ibid.*, at para. 264.

It is not clear exactly what to make out of the above passage. Many would argue that courts should not and have no jurisdiction to make determinations or declarations of innocence. They would argue that even entertaining a request for a declaration of innocence is a slippery slope that will undermine the integrity of the not guilty verdict and the presumption of innocence. A different panel of the Court of Appeal accepted these arguments in *R. v. Mullins-Johnson*, 2007 ONCA 720.

Whatever the force of these arguments in ordinary cases, they are in my view less persuasive in cases such as *Truscott* where extraordinary procedures were used to challenge a long-standing and notorious conviction. In such cases, the accused should have an option to seek a declaration of innocence from a court should he or she so desire. The critical role that findings of innocence will have in the compensation process also should not be ignored.

If the accused in such extraordinary circumstances requests a determination of innocence, the standard used should be fair and realistic. It is not crystal clear what standard of proof the Court of Appeal applied in reaching the conclusion that there was not enough evidence to support a declaration of innocence. At several junctures, the Court of Appeal indicated that the defence evidence went beyond simply raising a reasonable doubt about the accused's guilt: *ibid.*, at paras. 380, 504 and 615. Yet the Court of Appeal found it was not sufficient to support a declaration of innocence.

In my view, it would be wrong to require that the accused establish

innocence beyond a reasonable doubt despite the Supreme Court's articulation of such a standard in the unique circumstances of hearing a direct reference in the David Milgaard reference: *Reference re: Milgaard (Can.)*, [1992] 1 S.C.R. 866.

It is unrealistic to expect individuals to establish any fact, let alone a difficult fact such as innocence, on the proof beyond a reasonable doubt standard. At most, an individual should be expected to establish innocence on a balance of probabilities, perhaps in a process not altogether different from that used by the Court of Appeal in the *Truscott* case in determining the probable result of a new trial. Allowance should also be made for the fact that an accused on a reference cannot attack the credibility of all the witnesses who have previously testified in a case. It is not realistic to expect that there will be a total absence of evidence that, if believed by the jury, could support guilt.

In addition, it is unrealistic to expect that in most cases there will be "definitive forensic evidence such as DNA". Although such evidence can be retained and used in cases involving murder and sexual assault, it will often not be available in other serious cases or in older cases. The Supreme Court has recognized this fact in *United States of America v. Burns*, [2001] 1 S.C.R. 283 at para. 109. Indeed, the increased awareness of wrongful convictions in that case counsels reconsideration of the *Milgaard* standards.

As important as DNA exonerations have been in raising awareness of wrongful convictions, there is a danger that they will raise and even define the standard for recognizing that an innocent person has been wrongfully convicted. Such an approach should be avoided because it will leave many victims of wrongful convictions without full and effective remedies.

K.R.