

Synopsis of Reference re: R. v. Steven Murray Truscott

Background to these Proceedings

On September 30, 1959, a judge and jury found Steven Truscott guilty of the murder of Lynne Harper and sentenced him to hang. The sentence was later commuted to life imprisonment. His attempts to appeal that conviction failed. In 1966, the federal Minister of Justice referred the conviction to the Supreme Court of Canada for its consideration (“the first Reference”). An eight-member majority of that court upheld the conviction. In 2001, Mr. Truscott made a further request to the Minister of Justice for a review of his conviction. On October 28, 2004, the Minister of Justice referred the conviction to the Court of Appeal for Ontario, having been satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in this case. The Minister directed that the court determine the matter as if it were an appeal on the issue of fresh evidence.

A panel of the Court of Appeal, composed of Chief Justice McMurtry and Justices Doherty, Weiler, Rosenberg and Moldaver, heard testimony from seventeen witnesses in June and July 2006. These witnesses included people who lived at the Clinton R.C.A.F. Station in 1959 where the appellant and Lynne Harper lived, legal counsel and police officers who were involved with the case, as well as experts in the fields of pathology, gastroenterology and entomology. Between January 31 and February 14, 2007, the court heard the oral argument of counsel for the appellant and for the Attorney General of Ontario (“the Crown”).

Summary of the Decision

In a decision released today, the court unanimously holds that the conviction of Mr. Truscott was a miscarriage of justice and must be quashed. The court further holds that the appropriate remedy in this case is to enter an acquittal. The court thus orders that Mr. Truscott should stand acquitted of the murder of Lynne Harper.

In Part I of its reasons, the court provides an overview of the history of the proceedings involving the appellant. The court summarizes the four main evidentiary pillars of the Crown’s case against the appellant and the salient features of the defence case.

In Part II, the court sets out the legal framework that governs its analysis and explains the nature of the two-stage analysis that it employs in deciding this Reference. The first stage of the analysis is a consideration of the material that the appellant tendered in these proceedings that the court concludes is admissible as fresh evidence on appeal pursuant to s. 683(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The second stage of the analysis involves the determination of the appropriate remedy.

In Part III, the court conducts the first stage of its analysis. The court reviews new expert pathology and gastroenterology evidence, as well as archival documents that relate to the

credibility and reliability of the evidence of the doctor who performed the autopsy on the body of Lynne Harper. The court concludes that this material, which was not considered at trial or on the first Reference, qualifies as fresh evidence under the relevant provisions of the *Criminal Code*. This fresh evidence significantly undermines the medical evidence relied on by the Crown in the prior proceedings to establish that Lynne Harper died before 8 p.m. on June 9, 1959.

The time of Lynne Harper's death was a critical issue at trial and on the first Reference. On the Crown's theory of the case, if Lynne Harper died between 7 and 8 p.m., then the appellant must have killed her, while if she was killed some time after 8 p.m., then the appellant was not the perpetrator. The court concludes that the fresh evidence relating to the time of death, considered in the context of the entirety of the evidence, could reasonably be expected to have caused the jury to at least have a reasonable doubt that Lynne Harper died before 8 p.m. If the jury had a reasonable doubt on this factual issue, it could not have convicted the appellant. The result of the prior proceedings therefore could reasonably be expected to have been different if this fresh evidence had been available. The court's determination to admit this fresh evidence means that as a matter of law the verdict cannot stand. The conviction must be quashed as a miscarriage of justice.

In Part IV, the court explains its approach to the second stage of its analysis, the determination of the appropriate remedy. Under the governing provision of the *Criminal Code*, where a conviction is quashed on appeal, the court has three remedial options: order an acquittal, order a new trial, or order a new trial and enter a stay of that new trial. Counsel for the appellant asked the court to enter an acquittal based on the factual merits of the case at it now stands and to declare that the appellant is innocent of Lynne Harper's murder. The Crown submitted that the court should enter an acquittal only if it is satisfied on the totality of the evidence that no reasonable jury could convict. If the totality of the evidence could reasonably support a conviction, the Crown submitted that the court should order a new trial.

The court is not satisfied that the appellant has been able to demonstrate his factual innocence. The court is also not satisfied that an acquittal would be the only reasonable verdict of a new trial. In most cases, this conclusion would lead the court to order a new trial. However, the court concludes that ordering a new trial would not be an adequate remedy given the unusual features of this case, which include: a new trial would be a practical impossibility at this time; the appellant and his family have lived under the burden of this miscarriage of justice for almost fifty years; and this court is the first judicial body to have before it a substantial amount of material that could have assisted the appellant's counsel in making full answer and defence on his behalf at trial and on the first Reference.

In these unique circumstances, the court approaches the appropriate remedy by envisioning how a hypothetical new trial of the appellant would proceed in light of the entirety of the new information now before the court. The court proceeds on the basis that the appellant should be entitled to an acquittal if it concludes, based on all of the new

information now available, that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial. The court is satisfied that the appellant has met that standard.

In Part V, the court provides a detailed analysis of what a hypothetical new trial of the appellant would look like. In so doing, the court examines the evidentiary record from the prior proceedings, the fresh evidence admitted on this Reference and a mass of other material, none of which was previously judicially considered.

The court's analysis of the likely outcome of a hypothetical new trial proceeds as follows:

- Section A summarizes the new material offered by the appellant that the court concludes would not affect the Crown's case.
- Section B examines the impact of the new material offered by the appellant on the four main evidentiary pillars upon which the Crown's case rested at trial.
- Section C considers how the new material could be used to strengthen the case for the defence.
- Section D discusses how the crime scene evidence, which is not changed by the new information, could be relied on by the defence in attempting to raise a reasonable doubt.
- Section E examines what is left of the Crown's case against the appellant.

In Part VI, the court concludes by summarizing the effect of the fresh evidence and the new material placed before it that was not previously considered in a judicial forum: **see paras. 776-787**. The court outlines how this material weakens the four evidentiary pillars of the Crown's case, as well as how it enhances the reliability of the defence evidence. Finally, in the words of s. 696.3(3)(ii) of the *Criminal Code*, the court allows Mr. Truscott's appeal, sets aside the conviction against him and enters an acquittal.

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