# IN THE MATTER OF A REFERENCE RE:

# STEVEN MURRAY TRUSCOTT

1967

*Jan. 25, 26, 27, 30
May 4

*Criminal law—Murder—Youth of 14½ years convicted of murder—Circumstantial evidence—Whether proper trial—Reference to Supreme Court of Canada—Supreme Court Act, R.S.C. 1952, c. 259, s. 55.*

In 1959, the accused, a boy of 14½ years, was found guilty by a jury of the murder of a girl of 12 years and 9 months. Most of the evidence was circumstantial and the accused did not give evidence at his trial. The conviction was unanimously affirmed by the Court of Appeal. An application for leave to appeal to this Court was refused in February 1960.

Pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1952, c. 259, the governor general in council, in April 1966, referred to this Court for hearing and consideration the following question: "Had an appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by Section 597A of the *Criminal Code* of Canada, what disposition would the Court have made of such an appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?"

At this hearing, the Court received a large body of evidence, much of it relating to the medical aspects of the case and also heard the oral evidence of the accused who had not given evidence at the trial.

*Held:* Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ. would have dismissed such an appeal; Hall J. would have allowed the appeal, quashed the conviction and directed a new trial.

*Joint opinion* of the Chief Justice, Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.: The verdict of the jury, read in the light of the charge of the trial judge, makes it clear that they were satisfied beyond a reasonable doubt that the facts, which they found to be established by the evidence which they accepted, were not only consistent with the guilt of the accused but were inconsistent with any rational conclusion other than that he was the guilty person. On a review of all the evidence given at the trial, the verdict could not be set aside on the ground that it was unreasonable or could not be supported by the evidence. The verdict was in accordance with the evidence. Furthermore, the judgment at trial could not have been set aside on the ground of any wrong decision on a question of law or on the ground that there was a miscarriage of justice. It follows that the judgment of the Court of Appeal dismissing the appeal made to it was right. The effect of the additional evidence which was heard by this Court, considered in its entirety, strengthens the view that the verdict of the jury ought not to be disturbed.

*Per* Hall J., *dissenting:* The trial was not conducted according to law. There were grave errors in the trial. Nothing that transpired on the hearing in this Court or any evidence tendered before this Court can be used to give validity to what was an invalid trial.

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

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*Droit criminel—Meurtre—Garçon de 14½ ans trouvé coupable de meurtre—Preuve circonstancielle—Le procès a-t-il été instruit correctement—Question déférée à la Cour Suprême du Canada—Loi sur la Cour Suprême, S.R.C. 1952, c. 259, art. 55.*

En 1959, l'accusé, un garçon de 14½ ans, a été trouvé coupable par un jury du meurtre d'une fillette de 12 ans et 9 mois. La majorité de la preuve était circonstancielle et l'accusé n'a pas témoigné à son procès. Le verdict de culpabilité fut confirmé unanimement par la Cour d'Appel. Une requête pour permission d'appeler devant cette Cour a été refusée en février 1960.

Conformément aux dispositions de l'art. 55 de la *Loi sur la Cour Suprême,* S.R.C. 1952, c. 259, le gouverneur général en conseil, en avril 1966, a déféré à cette Cour la question suivante pour audition et considération: «Si un appel avait été présenté par Steven Murray Truscott à la Cour Suprême du Canada, tel que cela est maintenant permis par l'article 597A du *Code Criminel* du Canada, comment la Cour aurait-elle disposé de cet appel après avoir considéré le dossier existant ainsi que toute preuve additionnelle que la Cour peut, à sa discrétion, entendre et considérer?»

Lors de cette audition, un grand nombre de témoignages et de documents ont été présentés, dont une grande quantité se rapportait aux aspects médicaux de la cause, et la Cour a aussi entendu le témoignage de l'accusé qui n'avait pas témoigné lors de son procès.

*Arrêt:* Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie et Spence auraient rejeté un tel appel; le Juge Hall aurait maintenu l'appel, annulé le verdict de culpabilité et ordonné un nouveau procès.

*L'opinion collective* du Juge en Chef et des Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie et Spence: Le verdict du jury, considéré à la lumière de l'exposé du juge au procès, démontre qu'ils étaient satisfaits hors de tout doute raisonnable que les faits, qu'ils ont trouvé avoir été établis par la preuve qu'ils ont acceptée, étaient non seulement compatibles avec la culpabilité de l'accusé mais étaient incompatibles avec toute autre conclusion rationnelle que celle qu'il était la personne coupable. Sur un examen de toute la preuve qui a été présentée au procès, le verdict ne peut pas être mis de côté pour le motif qu'il était déraisonnable ou ne pouvait pas s'appuyer sur la preuve. Le verdict était d'accord avec la preuve. Bien plus, le jugement de première instance ne peut pas être mis de côté pour le motif qu'il y avait eu erreur sur une question de droit ou pour le motif qu'il y avait eu une erreur judiciaire. Il s'ensuit que le jugement de la Cour d'Appel rejetant l'appel qui lui avait été présenté n'était pas erroné. L'effet de la preuve additionnelle qui a été entendue par cette Cour, considérée en entier, renforce l'opinion que le verdict du jury ne devrait pas être changé.

*Le* Juge Hall, *dissident:* Le procès n'a pas été instruit selon la loi. Il y a eu de graves erreurs dans le procès. Pour rendre valide ce qui était un procès invalide, on ne peut pas se servir de ce qui s'est passé lors de l'audition devant cette Cour ou de la preuve qui a été présentée à la Cour.

Son Excellence le gouverneur général en conseil (C.P. 760, en date du 26 avril 1966) a déféré à la Cour Suprême du Canada dans l'exercice des pouvoirs conférés par l'article 55 de la *Loi sur la Cour Suprême,* S.R.C. 1952, c. 259, la question telle qu'énoncée plus haut.

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Reference by His Excellency the governor general in Council (P.C. 760, dated April 26, 1966) to the Supreme Court of Canada in exercise of the powers conferred by section 55 of the *Supreme Court Act,* R.S.C. 1952, c. 259, of the question stated above.

*G. A. Martin, Q.C., E. B. Jolliffe, Q.C.,* and *R. J. Carter,* for Steven Murray Truscott.

*W. C. Bowman, Q.C.,* and *D. H. Scott, Q.C.,* for the Attorney General for Ontario.

*D. H. Christie, Q.C.,* for the Attorney General for Canada.

Joint opinion of THE CHIEF JUSTICE, CARTWRIGHT, FAUTEUX, ABBOTT, MARTLAND, JUDSON, RITCHIE and SPENCE JJ.:—On September 16, 1959, Steven Murray Truscott, a boy of 14½ years, went on trial for the murder of Lynne Harper, a girl of 12 years and 9 months. The trial lasted until September 30, 1959, when the jury returned a verdict of guilty with a recommendation for mercy. An appeal to the Court of Appeal for Ontario[1] against the conviction was dismissed on January 21, 1960. On the same date the sentence of death was commuted to a term of life imprisonment. An application for leave to appeal to this Court from the judgment of the Court of Appeal was refused on February 24, 1960. At that time this Court had jurisdiction to entertain an appeal only in two cases: (a) where there was dissent by a judge of the Court of Appeal on any question of law (there was no such dissent in this case), or (b) on any question of law with leave of this Court.

By Order-in-Council P.C. 1966/760, dated April 26, 1966, pursuant to s. 55 of the *Supreme Court Act,* His Excellency

[1] (1960), 32 C.R. 150, 126 C.C.C. 109.

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the Governor General referred to this Court for hearing and consideration the following question:

> Had an Appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by section 597A of the Criminal Code of Canada, what disposition would the Court have made of such an Appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?

Section 597A of the *Criminal Code* of Canada was enacted by 1960-61, c. 44, s. 11, in the following terms:

> 597A. Notwithstanding any other provision of this Act, a person
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> (*a*) who has been sentenced to death and whose conviction is affirmed by the court of appeal, or
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> (*b*) who is acquitted of an offence punishable by death and whose acquittal is set aside by the court of appeal,
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> may appeal to the Supreme Court of Canada on any ground of law or fact or mixed law and fact.

It came into force on July 13, 1961. On this Reference, therefore, we have power to review law or fact or mixed law and fact.

The Court also received a large body of evidence, much of it relating to the medical aspects of the case. It also heard the oral evidence of the accused. He had not given evidence at the trial.

The case against Steven Truscott was that he met Lynne Harper in the school grounds on the Clinton R.C.A.F. Station at about 7.10 on the evening of June 9, 1959; that he travelled north with her on the cross-bar of his bicycle on the county road; that he turned into Lawson's bush, which is about half way between the school grounds and Highway No. 8; and that he murdered the girl there. His defence was that the girl had asked him to take her to the intersection of Highway No. 8 and the county road; that he took her to this intersection and left her there, and when he was part way on his return journey, he saw a car stop at the intersection and pick her up, and that he never saw her again.

For an understanding of the evidence, it is necessary to describe the neighbourhood, a sketch plan of which is attached to these reasons. The R.C.A.F. Station is at the southerly end of a county road which goes north to King's Highway No. 8. This highway runs east and west. On leaving the Station, immediately on the right is the Robert Lawson farm property. Close to the road there are the usual buildings, including a barn. On the left is the O'Brien

farm property. At the northerly limit of the Lawson property there are 20 odd acres of bush, mostly second growth ash, elm, maple and basswood. The wire fencing between the bush and the road is not in very good condition. There is an entrance to the bush along the northerly limit. It is referred to throughout the evidence as the "tractor trail". From the southerly end of the county road to the tractor trail is 3,366 feet. 1,568 feet farther north the Canadian National Railway crosses the road at right angles. Then, 491 feet farther north there is a bridge over the Bayfield River. This bridge is referred to frequently in the evidence. Then, 1,300 feet farther north is the intersection of the county road with King's Highway No. 8. East from the bridge over the Bayfield River and visible from the bridge there is a swimming hole about 640 feet away.

We will first describe the movements of Lynne Harper in the late afternoon and early evening of June 9. She arrived home from school between 5.15 and 5.30 p.m. and she had finished her supper by 5.45 p.m. After supper she left the house for a short time to apply for a permit for the swimming pool for that evening. She could not get the permit because it was necessary for an infant to be accompanied by a grown-up person. Her parents were unable to go with her that evening. About 6.35 she went to the schoolhouse to assist a Mrs. Nickerson, who was conducting a meeting of Junior Girl Guides. Mrs. Nickerson confirms the time of her arrival. Mrs. Nickerson said that Truscott came along shortly before 7 p.m. and that Lynne Harper went over to speak to him and that after a few minutes they left together on foot in a northerly direction, Truscott pushing his bicycle. She puts the time between 7.00 and 7.10 p.m.

An estimate of the time was also made by a Mrs. Bohonus, an officer of the Brownie Pack, who came to assist Mrs. Nickerson. Mrs. Bohonus said that shortly after she arrived, she looked at her watch and it was ten minutes to seven. According to her, not more than five or ten or, at most, fifteen minutes later, Steven Truscott appeared and talked to Lynne Harper. Mrs. Bohonus does not say how long they talked or at what time they left.

Three boys, Hatherall, Westey and McKay, were at the football field adjoining the school and the county road. They saw Truscott and Lynne Harper come from the

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school area to the county road. Lynne Harper got on the cross-bar of Truscott's bicycle and the two went north on the county road.

We will now deal with Steven Truscott's movements during the early evening of June 9th before he met Lynne Harper. We begin with the evidence of Jocelyne Goddette. She, Lynne Harper and Steven Truscott were all in the same class, Grade VIII, at school. Jocelyne Goddette's story was that Steven Truscott had made an arrangement to meet her at Lawson's wood to show her a new calf. He told her to keep the arrangement quiet because Mr. Lawson did not like people trespassing on his property. She says that he called at her house about 5.50 p.m. and that she told him that she could not come out at the moment because of domestic duties and that she would meet him later if possible. Truscott denies that he made such an arrangement and the call at the house. Jocelyne Goddette's father said that there was a call such as his daughter described but that he did not know who the caller was.

Truscott arrived home for supper between 5.15 and 5.30 p.m. His mother sent him to the store at the end of the street to get some coffee. She fixes the time as close to six o'clock because there was need to hurry in order to get there before closing time. He obtained the coffee and returned home. After supper he went out. His mother had told him that he had to be back by 8.30 p.m. because she and her husband were going out and he was needed for baby sitting.

Paul Desjardine, a fourteen year old boy, rode north on his bicycle to go fishing at the bridge over the Bayfield River at about 6.10 p.m. He met Steven Truscott a short distance south of Lawson's bush. Steven was alone and was riding his bicycle around in a circle on the road. There was no conversation. Truscott denies that there was such a meeting.

Mrs. Beatrice Geiger left her house in the married quarters on the Base riding one of her sons' bicycles to go to the bridge. This was about ten minutes past six. On the way to the bridge Steven Truscott passed her in the bush area riding his bicycle. They were both going north. Steven went as far as the bridge, stopped a second or two, took a look

around and headed south again. She met him the second time at about the railroad tracks. This would be around twenty-five minutes past six or half past six. Truscott said that he did not remember seeing Mrs. Geiger.

Kenneth Geiger, the twelve year old son of Mrs. Geiger, left his home about a quarter or twenty minutes after six to go swimming. He walked to the school and met Robb Harrington and the two boys rode double on one bicycle down to the river. On the way down from the school area to the bridge he saw Steven Truscott. He was sitting on his bicycle in the middle of the road almost opposite the "tractor trail", which is on the northerly limit of Lawson's bush. He was facing towards the station. They passed Steven at about 6.25 or 6.27 p.m. Steven said to Kenneth Geiger that Mrs. Geiger was at the bridge and Kenneth Geiger said that he knew that. Robb Harrington estimates the time as being a quarter to seven. Truscott denies that he ever saw or spoke to Kenneth Geiger.

Ronald Demaray saw Steven on the bridge just before he went home. He believes that he got home between 6:30 and 7 p.m. and that it would take him ten minutes to get home from the bridge. As far as he could see, Steven was alone and just seemed to be looking around.

Richard Gellatly, a boy of twelve years, was at the river on the evening of June 9. He had to return home to get his swimming trunks. He met Steven riding Lynne Harper towards the bridge on the county road about one-quarter of the way from O'Brien's farm. Gellatly was riding south on his bicycle and Steven Truscott and Lynne Harper were riding north. He met them on the station side of Lawson's bush, that is, on the south side. He gives the time as 7:25 p.m. He says that he could be a few minutes out. He put on his trunks at home and returned to the river. It was about ten minutes after he passed Steven and Lynne that he went back to the river. He did not see Steven again. He was familiar with Steven's bicycle. He did not see the bicycle. He said that if it had been lying alongside the road by Lawson's bush or anywhere alongside the road, he would have seen it.

Mrs. Donna Dunkin drove to the river on the county road from the married quarters on the evening of June 9. She

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travelled from the married quarters at the station and pulled off the road just north of the railroad tracks. She saw Richard Gellatly riding his bicycle towards the station just as she pulled off the road to park. She also saw Philip Burns, who was walking behind Richard Gellatly. At the time she saw them, they were between the railway tracks and the bridge over the river. Philip Burns would be no more than ten feet behind Richard Gellatly. She placed the time between 7:05 and 7:15 p.m.

Philip Burns, a boy of eleven years, who was unsworn, started to go south to the Air Force Station from the bridge on foot. He was behind Richard Gellatly. Gellatly started from the bridge on a bicycle. Burns left at approximately 7 o'clock. He fixes the time because he asked Mrs. Geiger what time it was. She did not have a watch. Sergeant McCafferty was close and he said it was around five to seven. Sergeant McCafferty gave evidence on the point and said that when Mrs. Geiger asked him for the time he looked at his watch and said either ten to seven or ten past seven, he could not remember which. Philip Burns says that he swam over to the south side of the river, put on his clothes and went up on the bridge where he waited around for five or ten minutes after being told the time, then he started for home.

Gellatly had left the swimming hole at about the same time. He went along the north bank of the river and Burns along the south bank of the river. Both were on their way home. They left the bridge at about the same time, Burns on foot and Gellatly on his bicycle. This was between 7 and 7:15 p.m.

Gellatly gave evidence that he met Truscott and Lynne Harper south of Lawson's bush at a point between the bush and O'Brien's farm. Burns says that he never did meet Truscott and Lynne Harper or either of them. While walking on his way home, he did meet Jocelyne Goddette and had some brief conversation with her. She was on her bicycle and she was near the south side of the bush closest to the station. She was going north towards the river. Further south along the road near O'Brien's farm and about two minutes later, he also met Arnold George, who was also going north and was behind Jocelyne Goddette.

When Burns met Jocelyne Goddette he had been walking for about ten minutes after leaving the bridge with Gellatly. Michael Burns, a brother of Philip Burns, says that Philip got home about 7:30 p.m.

Jocelyne Goddette, who was thirteen years of age at the time, says, in more detail than we have already outlined, that on Monday, June 8, she had a conversation at school with Steven Truscott. She said to him that on Sunday, the day before, she had gone to Lawson's barn and had seen a calf there. Steven asked her if she wanted to see two more new-born calves. She said "Yes" and he asked her if she could make it on Monday, and she said "No". He asked her if she could make it on Tuesday and she said she would try. Then on Tuesday, he repeated his invitation and she told him she did not know whether she could go and he invited her to meet him if she could go on the right-hand side of the county road just outside the fence by the woods. He repeated his warning not to tell anybody. The time for the appointment was six o'clock. She says that he called at the house at ten to six when she told him that she could not go but that she would try later. She had her supper and left the house about 20 minutes after 6 or 6:30, and went towards Lawson's barn to see if Steven was there. It would take but a few minutes to get to Lawson's barn. She stayed there for about five minutes. Steven was not at Lawson's and she went to see if he was at the meeting place. The meeting place was on the right-hand side of the county road just outside the fence by the woods. She met Philip Burns at the southerly limit of Lawson's bush and had a brief conversation with him. She bicycled north and got off her bicycle and walked slowly looking into the woods. She turned in the tractor trail and went three-quarters of the way in and then looked towards the railway bridge. She shouted Steven's name twice and then looked towards the woods and shouted it three or four times. She turned her bicycle around on the hard part of the ground and at that point she saw Arnold George going past. Arnold George also saw her on the tractor trail forty feet back. She did not see any sign of Steven on the tractor trail. When she saw Arnold George he was just going past the entrance to the tractor trail. She and George were both looking for Steven Truscott and they had a brief conversation. While they

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were talking Bryan Glover passed on his way to the bridge. He noticed them but did not stop. She came out of the tractor trail and went towards the river to the bridge. She did not see Steven at the river. She stayed there five or ten minutes and went back to Lawson's farm. She estimated that she got back to Lawson's a little before seven. She remained in the barn with Mr. Lawson for an hour and a half while he was doing his chores. The next morning at school she asked Steven why he had not been there and he just shrugged his shoulders.

Bryan Glover says that he arrived at the bridge a minute or two before George. He then looked for some friends on the west side of the river and about five minutes later returned to the bridge, saw his friends on the railway bridge over the river and went to join them. When George arrived at the bridge he says that he went over to the swimming hole, still looking for Truscott.

There is obviously something very wrong with Jocelyne Goddette's times. The jury would have to test her estimate of time along with the evidence of the time when Philip Burns and Arnold George were on the road and spoke to her and Bryan Glover who passed and noticed her, and also the evidence of Mr. Lawson. Lawson says that she first arrived at his barn at approximately 7:15. She left at 7:25. He fixes this time because she asked him the time before she left. She returned in twenty minutes to half an hour later.

Teunis Vandenpool, a boy of 15 years of age, lived on a farm on Highway No. 8 about a mile and a quarter east of the county road. On June 9 after supper he went swimming. He left his home at five or ten minutes after seven. He went west on Highway No. 8 and then down the county road. He was travelling by bicycle and was at the junction of Highway No. 8 and the county road about 7:15 or 7:20 o'clock. He didn't see any persons at or near the corner. He didn't see a car stopped. After he reached the corner he went down towards the bridge.

Between the bridge and the railroad is a field and he went down the path leading towards the river. This would be west of the bridge. He had his bathing suit on and he took off his clothes and went in the water. He remained in the water for ten or fifteen minutes and went home. He

estimates that he made the return trip to the intersection of the county road between 7:30 and 7:35 o'clock. He arrived home at a quarter to eight. He noticed that when he started to do his homework, which was immediately after he got home. He didn't know Lynne Harper or Steven Truscott. He did not see a girl on a bicycle on the county road or a boy in red jeans. Truscott was wearing red jeans that evening. There were bicycles parked on the bridge but no persons on the bridge.

Steven Truscott was back at the schoolyard at 8 p.m. or shortly after that hour. He was back at home by between 8:25 and 8:30 p.m. according to the evidence of Mrs. Truscott, and he was seen at his home by his friend Arnold George about 8:45 p.m. We deal later with the conversation between these two at that time.

Truscott admitted that he had met Gellatly. He made this admission to F/Sgt. Johnson and Sgt. Anderson of the Ontario Provincial Police on Wednesday, June 10, and to Sgt. Wheelhouse of the R.C.A.F. and Constable Hobbs of the O.P.P. on Thursday morning, June 11. F/Sgt. Johnson said that Truscott's definition of the place of meeting was "just about the brow of the hill," which is a short distance south of the tractor trail; Sergeant Anderson that it was "halfway between the intersection at the school, the public school and the bush", which is about where Gellatly said it was; Sergeant Wheelhouse that is was "about halfway between where I had picked up Lynne and the crest of the hill", which is much the same as the admission to Sergeant Anderson.

The case went to the jury with five witnesses saying that they did not see Truscott and Lynne on the road. Two of these were actively looking for him.

The Crown's submission was that after he passed Gellatly he turned into the bush with Lynne and that this accounted for the failure of the other witnesses to see him on the road with Lynne. On the other hand, three witnesses who were called by the defence, Douglas Oats, Gordon Logan and Allan Oats, say that they did see Truscott on the road. The first two, Douglas Oats and Gordon Logan, say that they saw him cross the bridge with Lynne on his way to the highway. Allan Oats says that he saw Steven on the bridge alone some time between 7:30 and 8 p.m.

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Douglas Oats, aged 11 years, said that he was on the bridge over the Bayfield River on the evening of June 9 looking for turtles. Steven Truscott and Lynne Harper came by him on the bridge. He turned around and put up his hand and said "Hi". Lynne was seated on the cross-bar of the bicycle. They were going north towards No. 8 highway. He did not see Lynne again and did not see Steven again that night. He stayed on the bridge until about 7.30 and got home about a quarter to eight. The only time that he saw Steven that night, Lynne was with him.

Gordon Logan, aged 13, first heard that Lynne Harper was missing on the morning of June 10 just before school started. The previous evening he had been down at the Bayfield River fishing and swimming. He saw Steven and Lynne go by on the bridge on Steven's bicycle. Lynne was sitting on the cross-bar on the bicycle. He made this observation when he was down at the swimming hole. He was out of the water. The two were near the north side of the bridge when he last saw them travelling towards Highway No. 8. He was standing just by the bend in the river on a big rock. This rock is 642 feet from the bridge at water level. He saw Steven about five minutes later when Steven rode back to the bridge, stopped and got off his bicycle. He does not know what Steven did from then on.

The presence of Gordon Logan at the swimming hole at 7:30 p.m. was confirmed by Beatrice Geiger, who was at the swimming hole at that time. She also said that there were people on the bridge. She could not tell whether they were men or women or children, or boys or girls. She did not pay too much attention. She thought that from where she was, had she been looking for someone she knew, she could have recognized him.

Allan Oats, 16 years of age, says that he went for a ride on his bicycle towards the river. He turned back when he was about 800 feet from the bridge. He saw Steven standing on the bridge wearing red pants and a light coloured shirt. He places the time between 7:30 and 8 o'clock.

The prosecution suggested that Douglas Oats was mistaken; that on his own admission he only saw Truscott once that evening and that the time must have been 6:30 p.m., when Douglas Oats was looking for turtles at the

bridge and Truscott was alone at the bridge. This was based on the evidence of Mrs. Geiger and Demaray.

Gordon Logan's evidence was questioned on the ground of credibility and ability to make the observation that he claimed to have made.

The credibility of Allan Oats was also attacked. He had evidence highly favourable to Truscott on Tuesday, June 9. He said that he mentioned it to nobody except his mother and no one else knew about it until Tuesday, June 16, when he was approached by Mrs. Durnin at the request of Truscott's father.

This conflict between evidence pointing to a disappearance into Lawson's bush and evidence asserting that Steven Truscott had crossed the bridge with Lynne Harper on his way to the highway and had returned alone, was the critical issue in this case and it was entirely a jury problem. The Judge's instruction to the jury on the issue was emphatic and clear:

> Now then, it is the theory of the Defence, and they brought evidence to show that, as I say this little Douglas Oats saw them going across the bridge and then, in a few minutes, according to the boy by the name of Gordon Logan—Gordon Logan also says he saw them going north on the bridge and in about five minutes he says he saw Steven return alone. Well, as regards Gordon Logan, it will be for you Gentlemen to say whether you believe his evidence, and it is very important, Gentlemen, because if you believe the Defence theory of this matter and believe Steven's statement to the police and to other people, that the girl was driven to Number Eight Highway and entered an automobile which went east; it is my view that you must acquit the boy if you believe that story.
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> In other words, I will put it this way. In order to convict this boy, you have to completely reject that story as having no truth in it, as not being true. You have to completely reject that story.

Arnold George says that on the evening of Lynne Harper's disappearance he went to Truscott's house about 8.45 p.m. He gives the following account of their conversation:

> Q. What was said?
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> A. Well, I asked him where he had been that night and he said: "Down at the river". I said: "I heard that you had given Lynne a ride down to the river," and he said: "Yes, she wanted a lift down to Number Eight Highway." And I said: "I heard you were in the bush with her". And he said: "No, we were on the side of the bush looking for a cow and calf." And he said: "Why do you want to know for?" and I said: "Skip it and let's play ball."

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At the preliminary hearing he had not said anything about Steven saying that he was on the side of the bush looking for a cow and calf.

Truscott in his oral evidence denied that there was ever any such visit from Arnold George or any such conversation.

Next, on the evening of Wednesday, June 10, Arnold George says that he had another conversation with Steven:

> Q. And what was said on that occasion?
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> A. Well he said that he—like the Police had questioned him and that he had told them he had seen me down there, and it wasn't me, it was Gordie Logan; and he thought that Gordie was me and he said that I had seen him, so he told the Police that. And down there at his house he told that to me and he said that the Police were going to go down to my place to check up, so I agreed that I would tell them what was just said.

George did support Truscott's story in his statements to the police but after the discovery of the body the following day, Thursday, July 11, he retracted them. His evidence at the trial we have already outlined. It was that he had been looking for Steven and had not seen him.

Truscott, on the reference, denied that this conversation ever took place either on the evening of Wednesday, June 10, or at any other time.

On Wednesday evening, June 10, there was talk about the disappearance among five boys who were together at the bridge. These were Paul Desjardine, Arnold George, Thomas Gillette, Bryan Glover and Steven Truscott. Paul Desjardine was telling Truscott that he had heard that he had taken Lynne into the bush. The account of the conversation varies from boy to boy but there is no doubt, according to these witnesses, that a suspicion was being voiced and that Truscott was appealing to Arnold George in support of his denial and that George was supporting him to the extent of saying that Steven was at the side of the bush looking for the cow and the calf.

Truscott did not give oral evidence at the trial. His defence that he had taken Lynne Harper to the intersection where she had been picked up by a strange car was before the jury in the form of exculpatory statements given to the police. On the reference he did give oral evidence in more detail. He described his movements from the time he left school until he went home to supper. Before supper and

just before the store closed, he went to get the coffee for his mother. He left home about 6.30 p.m. and went first to the school grounds. He found no one there and rode down to the railroad tracks on his bicycle. He could see no one at the river so he turned around a couple of times and went back to the station. He said that he met no one on the way down or back. He stopped at the end of the school and was watching the Brownies. Lynne Harper came over and asked him for a lift down to No. 8 Highway. After a few minutes they walked to the county road and then got on the bicycle. He says that they left at 7.30 p.m. He fixed the time by the school clock. On the way down to No. 8 Highway he passed Douglas Oats on the bridge. He let Lynne Harper off at the highway and rode back to the bridge. When he arrived at the bridge, he looked back and saw "there was a car pulled in off the highway and she got in the front seat". He said the car was facing northeast. He described the car as a 1959 grey Chevrolet with what appeared to be a yellow coloured licence plate. He next said that he stayed at the bridge for five or ten minutes and from there saw Arnold George and Gordon Logan at the swimming hole. He then went back to the school, arriving there about 8 p.m.

On Truscott's return to the school grounds there is evidence that there was some curiosity among a group of children about what had happened to Lynne Harper. Several children had seen him leave with her. He came back alone. When asked whether they made any comment to him or whether there was any conversation with them, he replied in the following words:

> I believe one of them asked me—they said "What did you do with Harper, feed her to the fish?" and I replied that I had taken her and let her off at Highway No. 8.

When Truscott returned to the schoolyard at approximately 8 p.m, no one noticed anything unusual about his demeanour, conduct or the condition of his clothing. Most of his conversation appears to have been with his older brother Kenneth. This conversation was testified to by three witnesses who were standing fairly close. These witnesses were John Carew, Lorraine Wood and Lyn Johnston. It had to do with an exchange of bicycles and an exchange of shoes. Kenneth Truscott had with him a smaller bicycle belonging to a younger brother. Steven Truscott was going

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home and he left his own bicycle and took the smaller one with him. There was also some conversation between the two about shoes. Steven Truscott was wearing crepe-soled canvas shoes belonging to Kenneth. Kenneth was wearing a pair of Steven's high boots. No exchange was actually made.

The crepe-soled canvas shoes did not enter into the trial because of a ruling of the trial judge that the prosecution had no right to call more expert evidence. But on the reference a photograph was introduced of the impression of a shoe near the girl's body. The marks of the rubber in a foot impression near the body of Lynne Harper corresponded with the marks of the shoe worn by Truscott to this extent: The shoes were of similar manufacture, the marks resembled each other, but the most that the evidence proves is that someone wearing shoes similar to those worn by Truscott on the night of the disappearance made a foot impression close to the body of Lynne Harper. There was no further identification. The evidence does not prove that the impression was made by the very shoes worn by Steven Truscott.

Truscott was unable to state the exact time of his arrival at home but his father and mother were still there. He says that he spent the rest of the evening at home and that the first occasion on which he knew that anything unusual had happened to Lynne Harper was when her father came to the house the following morning, which would be June 10, before he had left for school. The following is his account on the brief conversation at the house:

Q. What happened when he came?
A. He asked me if I had seen Lynne.
Q. Did he ask you or did he ask your mother?
A. I believe he asked my mother and my mother called me over and I informed him that I had given her a ride to the highway.
Q. Anything else?
A. I don't remember anything else.
Q. Do you remember when the first time you mentioned, if you did mention it, a grey 1959 Chevrolet car to anybody?
A. I don't remember who the first one was that I mentioned it to.
Q. Do you remember when you mentioned it, even if you do not remember who you mentioned it to?
A. I believe it was the police.

Mr. Harper's account of the conversation is that Truscott did say on this occasion that Lynne "had hitched a

ride on No. 8 Highway". There is nothing in the record to indicate that Truscott had mentioned the car to anyone on his return to the schoolyard.

We have already said in dealing with the evidence of Arnold George that George said that he visited Truscott soon after Truscott's return to the house to enquire about Lynne Harper. He also gave evidence of another conversation the following evening when he said that he was asked to say that he had seen Truscott at the bridge. We have also mentioned Truscott's denial of both these conversations.

Truscott gave his own version of the conversation among the five boys at the bridge on Wednesday evening, June 10. It differs from the account given by the boys at the trial. Their evidence is summarized above. This is Truscott's account:

Q. Was there any conversation about Miss Harper?
A. One of the fellows mentioned something about it, yes.
Q. Do you remember what it was he said?
A. He said, "I heard you had Lynne in the bush".
Q. What did you say?
A. I asked him who had told him this and he said Arnold George did. I went over and asked Arnold George and he said he had never told anybody that.
Q. Were you in the bush with her?
A. No, sir.
Q. How was this said when it was said, that he heard you had her in the bush?
A. More or less kidding with each other.
Q. Did you make any statement that you were not in the bush, you had just been at the edge of the bush looking for calves, or anything of that nature?
A. No, sir.
Q. Had you been anywhere near the bush looking for calves with Miss Harper?
A. No, I wasn't.
Q. Do you remember any discussion about that time about calves in the bush?
A. No, sir.

Truscott denied any conversation with Jocelyne Goddette concerning the making of an appointment to go looking for newborn calves. He denied that he called at Jocelyne Goddette's house about 5:50 p.m. to confirm the appointment. He denied that on the trip down to the river between 6 and 7 p.m. he met Ken Geiger and Robb Harrington. He denied any conversation with Geiger about his mother being at the

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river. He denied that he had seen Mrs. Geiger or Paul Desjardine during the course of that trip and said that he did not remember any of them giving evidence at his trial. He denied having seen either Robb Harrington, who was with Geiger, or Ronald Demaray, who says that he was at the bridge while Truscott was there. These were all people who gave evidence that they met him and described his movements on the road between 6.30 and 7.00 p.m.

He denied that he had met Gellatly on the highway and said that he did not remember telling the police that he had met Gellatly. At the trial Gellatly's evidence had not been challenged on cross-examination.

He denied that Arnold George came to his house at 8.30 p.m. on June 9 and that he had any conversation with George at any time during that evening. This was the occasion when George said that he had heard that Truscott was in the bush with Lynne and when Truscott had replied that he was on the side of the bush looking for a cow and a calf.

He denied that he had any conversation with George the following evening, Wednesday, June 10. This is the occasion when George said that he had agreed with Truscott to tell the police that he, George, had seen Truscott at the bridge on Tuesday evening.

Truscott told the police that when Lynne entered the car at the highway intersection, it was facing northeast and that he could see the colour of the licence plate when he was standing on the bridge looking towards Highway No. 8. The police questioned this. Constable Tremblay, Ontario Provincial Police, stood on the bridge on Wednesday, June 10, with Truscott and his mother. From the bridge Tremblay noted that he could not see any licence plates on cars proceeding along Highway No. 8 and also, that when a car with black and white plates travelled north on the county road and reached the highway, he could no longer see the licence plates. The bridge is 1,300 feet from the highway intersection. A photograph was introduced which seemed to support the police evidence.

On the reference this photograph was described as being highly distorted and not representing what could be seen by the human eye standing where Truscott said he was

standing. Also on the reference, evidence was given by a team of private investigators who had various colours of licence plates that identification of colour could be made from the bridge. The Crown did not introduce evidence to contradict this.

In the final argument, Crown counsel said he accepted the evidence such as it was. His criticism of the evidence was that on the admission of the witness who drove the car, it could only be placed in the position where it was photographed by driving east across the intersection, stopping and backing up to place the car in a northeasterly position where it would catch the late afternoon sun, and that no car travelling from west to east would get into that position in the way Truscott described to pick up a hitch-hiker standing on the southeast corner of the intersection. The evidence given on the reference proves no more than this, that if a car is placed in this position at a certain time with the sun shining on the licence plate, an investigator standing at the bridge and knowing what he was looking for could identify colours, but not entirely without error.

The evidence at the reference upon this topic would seem to weaken the Crown's submission to the jury as based on the evidence adduced at the trial that Truscott could not have seen from the bridge what he alleged he had seen, i.e., that Lynne Harper entered a 1959 grey Bel-Air Chevrolet with a yellow licence plate, as it would seem that if that car had been in the one position in which the vehicle used by the witness LaBrash to carry out his test had been placed, Truscott could have made such observation. The purpose of that evidence at trial, however, was to attack the credibility of Truscott on this important part of his defence. Since the evidence was given at trial, Truscott has testified on the reference. We refer herein to the parts of his testimony which simply cannot be believed. In such circumstances, the evidence given at the reference in relation to the possibility of making the observation of an automobile so placed becomes of much less importance.

The body of Lynne Harper was found on Thursday, June 11, 1959, at 1:45 p.m., in Lawson's bush some distance in from the tractor trail. The evidence strongly pointed to this as the place where she was raped and murdered. We have

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already quoted from the instruction of the trial judge to the effect that the jury could not convict unless the jury entirely rejected the evidence of Douglas Oats and Gordon Logan that they saw Truscott on the bridge with Lynne Harper on their way to the highway intersection. All the evidence, including the medical evidence, has to be related to this critical issue.

An outline of the problem facing the jury at the trial seems to be this. First of all, they had the time of departure from the school grounds fixed with reasonable certainty by the evidence of Mrs. Nickerson and Mrs. Bohonus at not later than 7:15 p.m. Then, on his own admission, Truscott met Richard Gellatly between the school yard and Lawson's bush. He did not meet Philip Burns as he should have done if he had continued on his way to the highway. He was not seen by Jocelyne Goddette and Arnold George as he would have been if he had continued on to the highway and had returned alone from the intersection to the bridge. The jury's conclusion must have been that after passing Richard Gellatly and before Philip Burns, Jocelyne Goddette and Arnold George had an opportunity to see him, he had disappeared with the girl into Lawson's bush.

Before they could come to this conclusion the jury had to reject the evidence of Douglas Oats and Gordon Logan and they must have done so with the emphatic warning of the trial judge in their minds. On Truscott's story, the girl was proposing to go to a place where there were a few ponies. This was about 500 yards east of the intersection. Yet according to him she was still at the intersection when Truscott had returned to the bridge 1,300 feet to the south, from which point he says that he saw her getting into a car, although she was only proposing to go 500 yards. If this were true, then whoever picked her up or some other person would have had to bring her back to Lawson's bush, either dead or alive, unnoticed by anyone. If dead, he would have had to place her body in the bush and create the appearance that she had been murdered at that spot.

We do not think that there is any doubt about the place of death. The position of the body, the scuff marks and a footprint at the foot, and the flattening of the vegetation between the legs, indicated that the act of rape took place

there. There were a number of puncture wounds on her back and shoulders, some of which were caused before death and some after death. Under the wound in her left shoulder, which she suffered before death, was a pool of fluid blood lying on the vegetation. The wounds were consistent with their having been made by twigs scattered around the ground. A small quantity of blood was found on the dandelion leaves at the fork of the body. Under her left shoulder was a button from her blouse. According to the evidence of Elgin Brown, this button would be ripped from her blouse when it was torn to form the ligature with which she was strangled. Her clothing was in the area where the body lay.

There was evidence on the reference but not at the trial given in support of a theory that the girl had been killed elsewhere and her body subsequently brought back to the woods where it was found. This evidence was based on an observation from photographs of the body of what appeared to the witness to be a condition of blanching. This will be dealt with later.

We will do no more at this point with the medical evidence than attempt to summarize what was before the jury and what the issues were. The first witness was Dr. J. Ll. Penistan, who held an appointment as pathologist in the Attorney General's Department and was pathologist in charge of the laboratories at the Stratford General Hospital. He arrived at Lawson's bush at 4:45 p.m. on June 11. He described the position of the body on the ground and the state of the body and the clothing. The girl's blouse had been torn up one side and was tied tightly around the neck and secured by a knot under the jaw on the left side. There was a pool of blood under the left shoulder, enough to enable him to take a sample amounting to a dessert or tablespoonful. He described the condition of the ground below the fork of the body and took samples of dandelion leaves.

The body was removed to Clinton where he conducted an autopsy the same evening. He certified the cause of death as strangulation by a ligature. He removed from the stomach about one pint of a meal of mixed meat and vegetables. Very little of the meal had passed from the duodenum

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into the small intestine. His conclusion on the time of death is contained in the following extract from his report:

> *Note on time of death:* This opinion, which would place the time of death between 7.15 and 7.45 p.m. on 9th June, 1959, is based on the following observations and assumptions:—
>
> 1. The extent of decomposition, which is entirely compatible with death approximately 45 hours prior to identification, having regard to the environmental and climatic conditions.
> 2. The extent of rigor mortis. This had almost passed off, a finding again compatible with death at the suggested time.
> 3. The limited degree of digestion, and the large quantity of food in the stomach. I find it difficult to believe that this food could have been in the stomach for as long as two hours unless some complicating factor was present, of which I have no information. If the last meal was finished at 5.45 p.m., I would therefore conclude that death occurred prior to 7.45 p.m. The finding would be comparable (sic) with death as early as 7.15 p.m.

The other medical evidence given by the prosecution related to the condition of Truscott's penis. On the evening of Friday, June 12, 1959, in the presence of his father, Truscott was examined by Dr. Addison, the family physician, and Dr. Brooks, Senior Air Force Medical Officer. They found what they described as two lesions, one on each of the lateral sides of the shaft of the penis, about the size of a twenty-five cent piece, oozing serum. These lesions were immediately behind the glans. The penis appeared swollen and slightly reddened at the distal end.

Dr. Addison said it looked like a brush burn of two or three days' duration. He was of the opinion that there was nothing inconsistent with the injuries having been caused by entry into a young small virgin. The injuries could have been caused by a boy of Truscott's size and age trying to make entry into an under-developed 12 year old girl.

From his examination of the penial injuries, Dr. Brooks was of the opinion that they had been incurred between 60 and 80 hours previously. In fixing the time he allowed for the fact that the injuries would not be exposed to the air.

The medical evidence for the defence was given by Dr. Berkely Brown. He is a specialist in internal medicine and a member of the staff of the Department of Medicine, University of Western Ontario Medical School. His opinion was that normal emptying time of the stomach after a mixed meal would be three and one-half to four hours.

As to the condition of the penis, he thought that it was highly unlikely that penetration would produce the lesions described. His opinion was that it is rare that the penis is injured during rape and that if it is, the injury is usually to the frenum.

We do not wish to give any impression from this brief summary that the medical evidence at trial was in any way perfunctory. It was, in our opinion, careful and detailed, and it was tested by careful and detailed cross-examination. Our purpose at the present time is to show that the medical issues before the jury were well defined. These issues were the time of death and the condition of Truscott's penis as implicating him in the commission of the crime. On the reference many more witnesses were called. Some supported Dr. Penistan's opinion on the time of death, some Dr. Brown's. Some said that the condition of Truscott's penis was consistent with rape. Others supported an innocent explanation, including Truscott himself. This evidence will have to be analysed in detail. The prosecution submits that the whole of the evidence, including the medical evidence given at trial, after being weighed by the jury leads inevitably to the conclusion of guilt and that there was no room for any other rational conclusion. The Crown's further submission is that there were no new issues raised on the reference in connection with the time of death and that there was simply more evidence relating to it and that the weight of this evidence supports Dr. Penistan's opinion that death occurred within two hours of the last known meal, that is, before 7:45 p.m.

We next set out the following more detailed summaries of the medical evidence:

(a) Medical evidence at the trial as to the time of death.
(b) Medical evidence at the trial and on the reference relating to the condition of Truscott's penis.
(c) Medical evidence on the reference taken witness by witness.

(a) *Medical evidence at the trial as to the time of death*

From the opening of the trial the attention of the jury was sharply focussed on the importance of the medical evidence as to the time of death.

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In opening the case to the jury Crown Counsel referred twice to the medical evidence as to the time of death as follows:

> On this day, Tuesday, June 9th, you will hear witnesses tell of Lynne's movements after she left school, playing football as some member of the school team. Some playing field on or near the locale of this, being driven home by her teacher, having her supper with her mother and father, and being seen walking away from her home after the completion of supper. I am avoiding, quite deliberately, giving you times in there of when she arrived home. When she had her supper. When she finished her last meal. When she left the house. I will simply say it was about the supper hour. These times are important, Gentlemen, and I want you to note them as you hear from her parents. They won't follow one another probably. The mother first and perhaps a little later the father, but I would ask you to note, when they are in the box, what she had to eat. Also when she finished her meal, and I will tell you why. You will later hear from a Provincial Pathologist who did a post-mortem on her body, and he will give you an opinion on the time of her death, based on his observation of her stomach and its contents. His opinion will be based, probably the time of death, to the time of finishing the last meal, so I will prefer you to hear that, because it is of such importance, from the lips of the witnesses, themselves.
>
> * * *
>
> The body was later removed—when I say later, that same afternoon, that later afternoon, to Clinton, where Doctor Penistan, who arrived on the scene at the bush did a post-mortem. He will testify as to the cause of death and also the probable time of death.

As witnesses were called for the defence, Counsel for the Defence was required to address the jury first. His address commenced at 10.00 a.m. on Tuesday, September 29th, 1959, and concluded at 4.40 p.m. the same day. There was an adjournment for lunch from 12.45 p.m. to 2.15 p.m. and during the afternoon there was a short recess.

All that Counsel for the Defence said as to the time of death as shown by the medical evidence was as follows:

> Now then, there is the question of the time of death. The opinion of an expert is only as good as the facts on which it is based, the opinion is based. If the opinion of an expert is based on facts that are incorrect, then that opinion should carry no weight. When Doctor Penistan said to you Gentlemen: "I place the time of death between seven and seven-forty-five, and I place it at that time because a stomach with a normal meal should empty in from one to two hours, but this meal was poorly masticated and that would increase the time which would be taken to digest this food and I allowed an extra hour because of the poorly masticated meal, and allowing that hour I have placed the time of death at seven to seven-forty-five, because I concluded this food had not been in that stomach more than two hours". And you heard about his examination. The stomach was emptied into this quart sealer, and then he and Doctor Brooks took the sealer and turned it around like this, and looked at it. And they say they

saw this and they saw that. Now, what in the world kind of examination is that on the contents of the stomach to base a time of death? To give evidence on a serious charge such as this?

Here was a Government Pathologist making his examination by looking at the contents in a bottle with the light against him and the light behind him. There was no chemical examination of the contents of that stomach. There is no evidence of any chemical examination of the contents of that stomach. Doctor Penistan was asked if there was any examination to determine the hydrochloric acid content of the stomach, which is a good gauge as to the time to which digestion had progressed. No such test was made.

Now, you heard the evidence of Doctor Brown. He graduated in 1940. He spent a year in pathology and five years in the Army, doing post-graduate work for two years at London, Ontario. He took two more years in London, England. He received a degree of Member of the Royal College of Physicians. He is on the staff of the Medical school of Western University. He specializes in diseases of the stomach. He is a consultant to the Ontario Cancer Association. Consultant to the Department of Veterans' Affairs and consultant to the Ontario Hospital, but not on mental problems, but the internal physical problems. Now, there is a man of very considerable standing and must be a man who knows his specialty or he wouldn't have attained such prominence, and his specialty is the stomach. And what did he tell you? He said that the stomach normally empties in between three and a half and four and a half hours, not one to two hours, as Doctor Penistan said.

Now I suggest to you that a man who specializes in the problems of the stomach is in a very much superior position to help you as to the emptying time of the stomach, rather than a pathologist who does not specialize in the stomach or its problems, and I ask you to accept the evidence of Doctor Brown when he said that the normal emptying time of the stomach was three and a half to four hours. And he said further, because of this poorly masticated food, it would require a further hour and it would take four and a half to five and a half hours for the stomach of this girl to empty.

Now, Doctor Penistan based his estimate that this food had not been in this stomach more than two hours, on the assumption that the stomach normally empties between one and two hours. I suggest to you that if the stomach emptied in one to two hours, that people would be extremely hungry before the next meal, four or five hours later. I suggest to you that it is only proper that you accept the expert opinion of Doctor Brown. If his opinion is accepted, then you must reject the estimate of the time of death by Doctor Penistan, because it is not based on proper facts. The time of death may be very important. You heard Doctor Brown also say that it was the effort to determine the time of death by the progress which had been made in the digestion of the meal of the stomach was quite unreliable and an unsatisfactory way of determining the time of death. You heard him say that a complete examination of the small bowel would be helpful in determining how much food had passed from the stomach. You heard Doctor Penistan state that the stomach was distended with one pint of food. Now, we have no information as to how much food was consumed. I asked Mrs. Harper how much meat was served to the girl and she didn't know. Her husband had served it. So none of the witnesses gave you any information as to how much food had been consumed. Surely it would take considerably longer to digest a big meal than a small meal. You heard Doctor Brown say that if a pint of food is consumed, that the stomach will produce a pint of digestive juices and you then have

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two pints in the stomach, and according to him the stomach wouldn't be fully distended—the stomach of this girl wouldn't be fully distended unless it contained three or four pints.

And then, again, Doctor Penistan may be in error in his estimate of the contents of the stomach. You saw the jar. About a half a pint. A quart sealer, about a quarter of the sealer is filled with the contents. Now, it may be said that some part of that was used up in tests, but we know of no tests. The doctor certainly didn't use any up. I suggest to you it would be dangerous to assume that the doctor removed more than that quantity of food from the stomach. And I do, with all sincerity, suggest to you twelve men, on whose shoulders rests the question of the guilt or non-guilt of this accused, that it would be highly dangerous, in view of the evidence of Doctor Brown, to accept the evidence of Doctor Penistan on that point.

Counsel for the Crown dealt with this question of the time of death as follows:

On Tuesday, June 9th, Lynne Harper, age twelve, played ball after school, was driven home by her teacher, Miss Blair, and then had her supper of turkey, peas, etc., finishing at a quarter to six. You have the evidence of both her parents on that. When her body was found in the bush, Thursday, June the 11th, Doctor John Penistan, a Provincial Pathologist with a highly specialized education and training, and years of experience in determining causes of death and time of death, and all the particulars can only be arrived at by a doctor trained in a specialist field.

He arrived soon after the body was found and attended at the scene where it was found in Lawson's bush. He made a study of the position of the body, the surroundings, calculated the climatic conditions that applied. The marks, the terrain, made some observations on what he noticed about the flattening of vegetation between the legs. Marks, I said. This blouse about the neck. He was at a great advantage to find it there and see the body at the scene. And then he had the body removed to a Funeral Home in Clinton and performed a full post-mortem examination there. From careful study he gave the opinion that death had taken place where the body was found, in Lawson's woods. I do not believe he was cross-examined on that. That was his stated, clear opinion, that death had taken place in Lawson's woods. He gave the cause of death as strangulation by the blouse knotted around the neck. And, Gentlemen, you will have among the Exhibits you take out to the Jury room, a picture, Exhibit forty-two, that will show you how that blouse was about the neck. That picture was taken at the funeral home.

Now, Doctor Penistan, after all these observations, gave the time of death, which is important. He gave the time of death as from seven p.m. to 7:45 p.m. on the date of Tuesday, June 9th. That is an hour and fifteen minutes, two hours after the last meal, and no one has raised, I suggest, a suggestion or doubt, serious doubt but what she finished her last meal—consumed her last food at a quarter to six, as described by her parents.

Now, on what did he base his observation? On what did he base his opinion? First he had the stomach, which he described as distended with about a pint of contents. These were put in a jar. The jar was taken to Toronto, to Mr. Brown. The evidence of Mr. Brown was he turned the jar and contents over to Mr. Funk of the laboratory. You heard my explanation, that I had run out of expert witnesses. I did not call Mr. Funk, but I made him available to the defence. You haven't heard from Mr. Funk. I

only leave to you, Gentlemen, from the evidence of Doctor Penistan, what went into the jar, the amount that went into the jar, to draw your reasonable inference.

Now, he observed the limited degree of digestion or change in these contents. The absence or near absence of anything in the intestine, the small intestine leading from the stomach. He observed the extent of decomposition, and he observed the extent of rigor mortis in the body, and from those three factors he arrived at the opinion he gave you of the time of death as being from 7:00 p.m. to 7:45 p.m.

Now, what doubt does the defence cast on that opinion of Doctor Penistan, on the time of death? Obviously the defence speaks to show you that it was later, that Doctor Penistan was wrong. And on what do they rely? I might have mentioned, incidentally, that Doctor Brooks was present during the autopsy and confirmed the observations that he and Doctor Penistan each made of the stomach contents, the extent of digestion and so on. But Doctor Brooks, probably, despite his high qualifications in the general field of medicine, did not give opinions or attempt to do so on the rigor mortis factor, because he acknowledged that to be the field of Doctor Penistan.

Now in advancing their theory that death was later. What does the defence put before you? They called Doctor Brown who never saw the stomach, who never was in the woods, never saw the body, never saw the quantity of food in the stomach when it was opened, the nature of the food, never noted the emptiness of the intestines. No chance to know anything about rigor mortis, the state of the body, its decomposition, but just from learning, just from learning. He gives a time of three and a half, four hours, for an average meal. He doesn't know how much the girl ate. Nobody has any actual record of that. He gave this estimate of three and a half to four hours for an average meal to leave—mind you, Gentlemen, to empty out of the stomach. But this stomach, as described by Doctor Penistan when he removed it and looked at it, was distended with food. It wasn't an empty stomach. It was, largely, a full stomach.

So I suggest, with all respect to Doctor Brown and his qualifications, that he just hasn't any basis for giving a counter estimate on the time of death at all. I don't know whether, if you followed through on his opinion, when an average meal leaves a stomach in three and a half hours, and you found a half empty stomach, whether that means the food has been there one hour and a half, or one hour and three-quarters, I don't know how he would enlarge that. But he simply based everything on an empty stomach, which wasn't here. And again, Gentlemen, he didn't have any of those other aids, rigor mortis, decomposition and the other things to go on with at all. So I say, with all respect, there is nothing, absolutely nothing for Doctor Brown to give you, or Doctor Brown did give you, to interfere with Doctor Penistan's opinion.

Now, Doctor Brown was quoted yesterday as saying that the examination of the stomach, as a means of indicating time of death, was an unreliable test. I did not so regard his evidence. I suggest to you, Gentlemen, that what he said was acknowledging it was used, that he said it was and it has to be used with caution.

Well, you heard Doctor Penistan during his considerable time in the box, and I suggest from your observations of Doctor Penistan, his person, manner of giving testimony and his responsible official position and years of experience, you can safely assume he would be cautious in a case like this, and everything considered, taking the three bases for his opinion, that you can take it with safety that this girl was killed, that she died

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from 7:00 p.m. to 7:45 p.m. on Tuesday, June 9th. I don't know whether the doctor—I think they made it clear, but the stomach ceases to function on death and that is the basis for this test. Nothing more gets out of the stomach once death takes place.

Now, we come to apply that opinion of time of death and I suggest to you Gentlemen, it is awfully important when this girl died. Now, who was with her during this time? What person or persons had the opportunity to kill her from 7:00 p.m. to 7:45 p.m.? I suggest that a review of the facts narrows those facts like a vice on Steven Truscott and no one else.

The trial judge dealt with the medical evidence as to the time of death as follows:

Doctor Penistan said, having regard to the food that he found in her stomach, and the fact that in his opinion the stomach empties itself after a meal within two hours, that she had died within two hours after having her supper.

The evidence was that she had left home at a quarter to six, that she had finished her supper, I should say, at a quarter to six in the evening, so Doctor Penistan concluded that she had died before a quarter to eight.

Later he said:

According to Doctor Penistan, and to the medical evidence, she died at a time which is not altogether, in any view, inconsistent with her having finished her dinner at about a quarter to six. Doctor Brown says, and I must draw it to your attention, that it takes three and a half to four hours to empty the stomach and it is on the basis of that that the defence asks you to say that she could not have been killed before Steve returned at 8:00 p.m. You have Doctor Brown's testimony. It is unfortunate always, that medical men should disagree on what is more or less a scientific point. Doctor Brown says three and a half hours to four hours.

Now, the stomach, of course, was not empty. Doctor Penistan said there was still a pint of food in the stomach and he removed that pint. It is true there is not a pint of food in the bottle now, and it is for you Gentlemen to accept or reject Doctor Penistan's evidence that he took a pint out, but Doctor Brooks was there and saw the pint. Don't forget that the bottle went to the Attorney-General's Laboratories, for tests and we don't know exactly what happened to it there except it was handed to some man whom we have not seen. It will be for you to say whether you accept Doctor Penistan's theory, an Attorney-General's Pathologist of many years' standing, or do you accept Doctor Brown's evidence.

In his objections after the conclusion of the judge's charge, counsel for the defence said:

And, My Lord, it is the theory of the Defence that Doctor Penistan was in error when he said that the time required to empty the stomach after a normal meal was one to two hours. You did tell them that Doctor Brown said that this time was three and a half to four and a half hours, but it is the theory of the Defence if Doctor Penistan was incorrect and Doctor Brown was right, then that would throw out Doctor Penistan's calculations as to the time of death. With respect, My Lord, I would submit Doctor Brown's evidence was dismissed very summarily by Your Lordship. This is a man of very considerable prominence, and should carry a considerable amount of weight, My Lord.

In the course of a re-charge of the jury the trial judge dealt with this as follows:

I am asked to point out to you that the theory of the Defence is that Doctor Penistan is in error when he says it only takes an hour or two hours to empty the stomach and you can accept the evidence of Doctor Brown, or at least, Doctor Brown's evidence should raise a doubt in your mind. You can understand the point is that his theory is that food took three and a half hours from a quarter to six to leave the stomach, that she must have died at a time later than the time that Steven was at the river, that she must have died after Steven came home, and therefore, it couldn't be Steven who killed her. That is what the theory of the Defence is. I am not going to go over all the evidence again.

Dr. Penistan's evidence in chief as to the time of death as shown by the quantity and condition of the stomach contents was as follows:

Q. Yes, that is my next question, Doctor.

A. The stomach, under normal conditions, proceeds with the digestion of food and as it is digested the stomach empties through the duodenum into the small intestines. This process is normally completed within two hours. I have to bear in mind here that the food in the stomach, as I said, appeared to have been very poorly chewed, appeared to have been bolted, and swallowed without proper chewing, which would tend to slow down the digestion and the emptying of the stomach. I think, therefore, that while—if I found a normal meal, normally chewed, well-chewed meal in the stomach, digested to the slight extent this food was digested, I would conclude that it had not been there for more than an hour. I would, however, make some allowance for the fact of the poor chewing of the food and give as my opinion that the food had not been in the stomach for more than two hours.

Q. Could it have been for a lesser time?

A. It could certainly, sir have been for a lesser time.

Q. To what?

A. I would estimate between one and two hours.

Q. You were in the Courtroom when Mrs. Harper testified this girl finished her meal at a quarter to six?

A. I was, sir.

Q. On that basis, sir, you would put her time of death at . . .

A. As prior to a quarter to eight.

Q. As early as . . .

A. Probably between seven and a quarter to eight.

As to fixing the time of death from post-mortem changes he said in chief:

Q. Apart from the stomach, these contents, Doctor, is there any other observations that would assist in determining the cause of death or the time of death?

A. Yes, sir. I referred in my description of the body to the post-mortem changes which were beginning to occur in the fat underneath the skin and in the lungs and indeed, in most of the organs of the body. I refer also to the fact that rigor mortis was still, although

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only just, demonstrable. Having regard to the environment and the atmospheric conditions about that time, which as I recollect clearly the weather was hot and the environment was damp, conditions under which changes tend to take place rather more rapidly than usual, I felt that these—the state of the body suggested that death had occurred some two days previously.

Q. I take it, Doctor, that is supplementary to your stomach observations?

A. That is divorced from the observations on the stomach. Should I add it was my view that the changes were entirely compatible with the time of death as shows from the stomach contents and the other evidence?

In cross-examination, the question of the accuracy of an estimate made from observing post-mortem changes was dealt with as follows:

Q. Doctor, you told us about the post-mortem changes in this body?

A. Yes, sir.

Q. And there were many factors that could contribute to the variation of time that it would take for those changes to occur, would it not?

A. Yes, sir.

Q. And that is not a very accurate way of estimating the time of death. It would be difficult to tie it down within five or six hours of those changes, wouldn't it?

A. Yes, sir.

The cross-examination of Dr. Penistan was directed to showing the unreliability of an estimate of the time of death based on an examination of the contents of the stomach. It showed:

i) that the examination of the stomach contents was visual and by the naked eye;

ii) that there were differences between the description of the contents as given by Dr. Penistan at the trial and (a) at the preliminary hearing and (b) as recorded in his notes made at the time of the autopsy;

iii) that there are many factors which may slow down or speed up digestive processes;

iv) that unchewed peas, of which there were many, are not digested in the stomach at all because they are covered by cellulose;

v) that the doctor made no test of the hydrochloric acid contained in the stomach contents.

Dr. Brooks described the removal and visual examination of the stomach contents. He was not asked to give an opinion as to the time of death.

Dr. Brown's evidence may be summarized as follows:

He said, in chief, the normal emptying time of the stomach after a mixed meal containing starch, protein and fat would be three and one-half to four hours; that one hour should be added if the meal was poorly masticated; that any estimate of time of death from stomach contents must be made with caution as there are so many factors which can cause great variations; and that in cases of accidents requiring an emergency operation it is thought dangerous to operate if the patient has eaten within the past six or eight hours because he may vomit and cause suffocation.

In cross-examination he said that in the normal case the stomach would be empty at the end of three and one-half to four hours and counsel for the Crown stressed that the stomach of the deceased was by no means empty. Dr. Brown agreed that Dr. Penistan had a better opportunity of forming an opinion than he himself had because Dr. Penistan had actually seen the contents of the stomach. He said he had never before been called into court to testify as to the time of death of a deceased person.

(b) *Summary of medical evidence at trial and on the reference relating to the condition of Truscott's penis.*

At the trial, evidence was given by Doctors Addison and Brooks, who medically examined Truscott on the night of June 12 at the R.C.A.F. guardhouse at Clinton. The only other evidence by an actual observer of his condition was given by Truscott himself on the reference.

The medical examination was conducted in the presence of Truscott's father. Dr. Addison, a medical doctor at Clinton, who had practised for 20 years, described his observations as follows:

> The penis, on first examination, appeared swollen and slightly reddened on the distal end . . . By stretching the skin, pulling it upwards towards the body, there were two large raw sores—they were like a brush burn. They were raw and there was serum oozing from the sores. They were located just behind the groove on the lateral side of the penis on either side. Roughly about the size of the ball of my thumb. The diameter, circumference involved would be roughly that of a quarter—a twenty-five cent piece—each one.
>
> I have never seen one as sore as that at any time—of that nature. I have seen one a few months ago that had a cancer of the penis that looked an awful lot sorer. And I attended one, at one time, a cow stepped on, that was a lot sorer. . . . . It (Truscott's) was sorer than any I have ever seen other than those two I have mentioned.

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Dealing with the cause of these injuries he said:

> There would have to be friction in an oval shaped orifice. An oval shaped knot hole or something like that. Something of an oval shape and sufficiently rough to cause a friction or wear of the outer surface of the skin.

He expressed the opinion that these abrasions could have been caused by a boy of this size and age trying to make entry into a girl of twelve. Truscott was sexually developed, the same as any man, and trying to make entry could cause the sores on his penis.

There was no scab on these lesions, there was a serous discharge.

Dr. Brooks was the senior medical officer at the R.C.A.F. station at Clinton. He described Truscott as a sexually well developed adult. He found on each side of the shaft of Truscott's penis, a lesion just bigger than a twenty-five cent piece. There was no bleeding. There was oozing and, by the time of the examination, the oozing was stagnant. He estimated the duration of the lesions at between 60 and 80 hours before. He stated that this was the worst lesion of this nature that he had ever seen. Since he started medical school he had done 20 years of medicine and he had never seen one as bad as this.

In his opinion the lesions were caused by pushing the erect organ into a very narrow orifice. They could have resulted from penetration or attempted penetration of the private parts of a young girl such as Lynne Harper. There was no injury to the glans of the penis.

Evidence was given at the trial on behalf of the defence by Dr. Brown, of London, Ontario, who was in the Canadian Army for five years, and who subsequently did post-graduate work in internal medicine, with emphasis on diseases of the digestive system.

The facts stated by Doctors Addison and Brooks were recited to him. He stated he had seen very similar types of lesions. He said a lesion of the size of a twenty-five cent piece is a large size. He had seen lesions of at least a ten-cent size.

As to the cause of such a lesion, he said it would be highly unlikely that penetration would produce a lesion of this sort. The penis is rarely injured in rape. When injured, it is usually a tearing injury confined to the head of the penis, which has a larger circumference. When the hymen is

ruptured by the head there may be a pulling that will tear the urinary opening and the fold of skin (frenum) leading from that opening to the foreskin.

Truscott testified for the first time at the Reference. He said that the description of the lesions given by Doctors Addison and Brooks at the trial did not fit the condition that existed on the night the examination was made. The sores were a lot smaller than they had been described. There was a sore on each side, well on the way to healing. There was no oozing whatsoever. They had been in that condition for two weeks.

When he first noticed anything unusual, it was about six weeks prior to his arrest. There were little blisters. They continued to worsen until the time he was "picked up". One blister would break and it just seemed that more would appear. He did not know what caused them to break.

He did not tell his father about them because he was embarrassed. The first persons whom he told about the condition as he first noticed it were his counsel on the Reference when they interviewed him at the penitentiary. He was then asked by Counsel what it looked like when he first noticed it.

The condition had never existed before. A similar condition did develop subsequently on his back and side of the neck. The condition of his penis cleared up while he was at Guelph. It just seemed to heal and went away. It did not hurt.

On the Reference, evidence was given relating to this point by a number of doctors.

Dr. Marcinowsky described an inflamed cyst of the dorsum of Truscott's penis, at Guelph, in May 1962.

Dr. Danby, a specialist in dermatology, practising in Kingston, gave evidence as to his treatments of Truscott for dermatitis at Kingston on different occasions in respect of his face, shoulders, upper arms and ears. Dealing with the condition described by Dr. Addison, he expressed the opinion that if there were an injury which had occurred two or three days before, there would have been bleeding visible in and around the lesions.

He disagreed with Dr. Addison's opinion as to the possible cause of the lesions, i.e., attempting to have intercourse with a young girl. He had never, in his experience, seen

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lesions of the kind described attributed to forceful intercourse. He had never seen lesions on the side of a penis attributed to force in intercourse. He was not aware of any medical literature, describing such lesions, attributing them to force in intercourse.

If the condition originated in a number of blisters, that condition could have resulted in lesions of the kind described, apart from intercourse. The condition could have begun as a case of herpes simplex. The area is one where sweating, contact of skin surfaces, secondary bacterial infection and irritation could combine to produce lesions.

Dr. Wrong, of Toronto, a specialist in dermatology, was questioned as to his opinion of the view expressed by Dr. Addison concerning the possible cause of the lesions. He said that such lesions are seen in many dermatological conditions, not just following injury. They are seen with many diseases in which blisters appear on the skin.

> I would say these lesions are not diagnostic of any one specific thing and I personally, if I had examined him, with the descriptions read, would not have been able to say definitely these could not have been caused by such alone.

He said it is extremely unlikely to have such an injury caused by intercourse or attempted intercourse, but he would not say it was impossible. He had not found anything comparable to this in the standard textbooks.

It would be unusual for simple herpes to affect two sides of the penis at the same time, but not impossible. Simple herpes of itself would not produce erosions. Secondary infection could do so, i.e., simple herpes plus infection, or irritation from sweating, and the skin surfaces rubbing together.

Dr. Petty, of Baltimore, is the assistant medical examiner for the State of Maryland. He had never seen lesions on either side of the shaft of the penis allegedly as a result of intercourse of any type. He had never read of penial lesions following intercourse. It was highly improbable that they could have been caused in that way.

Dr. Camps, of London, professor of forensic medicine at the University of London, when asked about the opinion of Doctors Addison and Brooks respecting the cause of the lesions, said:

> From a mechanical point of view and from my experience I don't think that this is the sort of injury which could occur from sexual intercourse. It

is the wrong part of the organ for one thing. The commonest injury occurring in this type of forced intercourse is a tear of the prepuce, which mechanically is one place that is vulnerable and which can be pulled on, or when push and force is exerted it is pulled in that way.

Asked regarding medical literature on the subject, he had not found anything indicating a lesion of that sort.

However, so little interest is paid in textbooks to this type of injury that in many textbooks it is barely mentioned.

Dr. Simpson, of London, head of the Department of Forensic Medicine at Guy's Hospital, called by the Crown, gave the following evidence:

Q. Finally, Dr. Simpson, I think you have read and you have heard read in this Court the evidence of a Dr. Addison and a Dr. Brooks relating to penile injuries to the accused Steven Truscott, and I think, sir, I know you were aware, in addition to that evidence, the evidence of Mr. Truscott himself relating to these injuries. Have you any comments regarding those, sir?

A. Yes, sir, when I first read the description of these I had not seen a picture of them and, of course, I did not see them, but when I first read a description of them I found them perplexing, for I would agree with the evidence I heard, they are not the ordinary kind of injury one sees in forcible or difficult sexual intercourse. But having heard the evidence of Steven Truscott that he—if I understood it correctly—already had some condition of soreness on his penis, this seems to me to give a clue to the rather curious nature of these two patches.

Q. In what way, Dr. Simpson?

A. Well, I think that if Truscott was right and he had patches there, there are two possibilities. One is that these patches—I think they were described as quarter size or thereabouts, patches on each side of the penis, and the other is that these patches were rubbed in some way which caused them to become more sore or to weep or crust, and I would regard that as being consistent with the penis being thrust into or being held, to be pushed into or being held in some way in a sexual gesture as a part of a sexual assault.

### (c) *Summary of Medical Evidence given on the Reference witness by witness*

*Henry John Funk* is an analyst in the biological field with the Attorney General's Department. On June 12, 1959, he received the jar containing the stomach contents. On a visual examination he described it as being made up of pieces and chunks. Its general consistency reminded him of a thick stew. His examination was made between June 12 and August 31. He found pineapple, celery, pickled cucumber, cauliflower, peas, onion, potatoes, and what appeared to be two types of meat. It seemed to be consistent with ham and some type of fowl. Many of the foods that were

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supposed to have been eaten by Lynne Harper he found in the mixture. The total volume of the mixture was 250 cubic centimetres—eight to nine ounces.

*Dr. Noble Sharpe.* He has been the Medical Director of the Attorney General's Department since 1951 and is now about to retire. From 1923 to 1950 he did hospital pathology. He received the jar from Funk on June 12. For his examination he removed between 50 and 60 cubic centimetres. He saw undigested food mixed with some that was partially digested. He recognized certain vegetables but remembers only peas, some of which had been swallowed without chewing and were whole. He made no further examination of the recognizable parts because Mr. Funk was going to make the detailed examination.

The stomach contents were strongly acid. He concluded that gastric juices had been secreted and it was not just a recently chewed and swallowed meal. His rough estimate of the time needed to develop that amount of acid was about one hour. It was quite a good amount. He saw some muscle fibres, striated muscle fibres, and knew that meat had been eaten but had no idea what kind of meat. He described the contents as resembling a thick, lumpy stew. There was little or no fluid in it. Based on the thick consistency and the fact that the acid was present, he considered that the stomach contents had not been long enough in the stomach to be suitable for passing out into the duodenum. It was not in the condition of chyme, at which stage the contents are ready to pass into the duodenum.

It is known that after an ordinary meal the contents are ready to leave the stomach at the end of two hours and that they go out in small amounts, about three cubic centimetres at a time, for the next two hours so that by the end of the fourth hour after the food has been taken, the stomach is usually nearly empty. In his opinion the stomach contents had been in the stomach for one to two hours after eating. He admitted that there are many conditions that cause variation—likes and dislikes, preparation of the food, proper cooking, whether or not the food is fatty as fatty food takes longer to digest, the state of hunger of the person concerned, whether he had been exercising before eating or taking it easy, emotions, anatomical position of the stomach, and many others.

He agreed with what he wrote some time ago in an article "Rate of Cooling as an Index of Time of Death". It is as follows:

> For a long time I had felt that pathologists are placed in an awkward position by the emphasis in courts on estimation of the time of death from the rate of cooling, rigor mortis, decomposition and stomach contents. These four bases for estimation depend on variable factors. The pathologist is usually asked by the investigating officer to give them a rough starting time for investigation or the period in which particularly to focus. This may get into the report and is later mentioned in court.
>
> Both prosecution and defence are prone to emphasize those points which are of benefit to their particular view of the case. The time based on one or more of these four examinations is at most an approximation, an inspired or educated guess. It is more likely only a probability or a hunch. It is of use to the investigator but of much less value to the court.

*Dr. Cedrick Keith Simpson* is head of the Department of Forensic Medicine, Guy's Hospital, London; Professor of Forensic Medicine, University of London; Lecturer in Forensic Medicine, University of Oxford; Home Office Consultant since 1935, and has done work with the Forensic Science Group of Scotland Yard since that date. The summary of his opinion is contained in the following extract:

> A. I would say that, my lord, it appears to me in this case most creditable that Dr. Penistan paid particular attention to this matter. In my own experience this is not always so. I would say that his conclusion, based, as I see it, on the presence in the stomach of something approaching a pint of relatively dry food, that is to say, without a measureable quantity of fluid which could be separated from it, from the fact that it was of a kind and quality which he observed and had confirmed in the laboratory, from the fact that this whole amount, with the exception of a little material which had passed on to the small bowel, still lay in the stomach, I would say that unless he took into consideration some unusual or extraordinary conditions, that he was right to conclude that it was likely that death had taken place somewhere up to two hours after eating that meal.

There was a fragment of food in the bronchial air passage, which is common in asphyxial deaths. The cause of death was strangulation by a ligature. There was injury to one of the voice box bones, discoloration of the face and the characteristic asphyxial hemorrhage in the lungs and thymus gland.

On an examination of the photographs taken at the scene where the body was found, there was nothing inconsistent with death having taken place where the girl was found

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and photographed. He agrees with Dr. Penistan that the twigs on the ground would cause the type of puncture wound found on the body.

As to lividity, looking at two photographs taken in the mortuary, he agreed that the chin and left cheek and region over and above the left eyebrow and the nose showed pallor against the general colour of the face, the colour he takes to be that described as lividity engorgement. The discoloration was consequent on strangulation. His explanation was that two other photographs taken where the body was found show the body turned on its left side and lying partly on some sheeting or covering. So long as the blood was fluid when this took place, it would be natural for the pressure to give these areas just where they appear to have developed. He was asked how long blood remains fluid in a dead body and he could not give any definite answer. Sometimes it never appears to clot; sometimes it clots in a short period and becomes dissolved again. The variations are so vast that no figure can be given. As to the absence of acid phosphatase on the twigs and dandelion leaves which were preserved for sampling and taken at the scene of the crime, he said:

> A. Well, I have seen many cases of both sexual intercourse against resistance as shown by injuries and other marks about the body, and I would say that in some of them one does see seminal fluid not only in the vagina but at the orifice and extending from it on to the thighs or down between the crotch, but by no means always, and I would certainly not regard the absence of spermatozoic fluid on the ground between the crotch area as giving any evidence that sexual intercourse of some kind did not take place where the body lay.

As to rigor mortis, one of the witnesses said that an arched back and the fingers indicated that this was present in the mortuary. Dr. Penistan had said that rigor mortis had almost passed away. Dr. Simpson said that he was surprised to hear the witness refer to the arched back as an indication of the degree of rigor. He said that was the natural shape of the body and that dead or alive, it would preserve its shape. He says that one sees that every day. It is a matter of common sense and personal observation.

As to the suggestion of rigor mortis in the fingers by Dr. Petty, he said that two of the fingers were being held by the assistant to hold the hand in a certain position for the taking of photographs.

His estimate of the emptying of the stomach and the time of death as indicated by it is contained in the following extract:

Q. Doctor, if I may turn for a moment, sir, to a general discussion of the stomach contents—and again in this matter I am making the assumption and premise that you have heard read the evidence of Dr. Penistan regarding the stomach content, you have heard the evidence of Mr. John Funk and you heard the evidence of Dr. Noble Sharpe—based on that premise, what do you say, doctor, as to setting of a time or approximate time of death from stomach contents?

A. Well, sir, I would say that based upon my own experience of those cases in which the time of the last meal is known, and based upon the relatively few quotations that can be listed from the textbooks in forensic medicine—I refer to Sidney Smith and Polson, in particular, and based upon the enormous—I think no other word could be used to describe it—enormous literature from the physiologists on the emptying process of the stomach, it would seem to me there is general consensus of view that the process of emptying is a gradual one which appears to be best described in terms of a half life, that is to say, during a period of time which seems to be within thirty minutes and an hour, around about forty-five minutes, perhaps, the stomach half empties itself, and then in a similar period half empties itself again, and again, and again. So that it is described as a half life. I would say that if these observations are correct—and there is an overwhelmingly large literature in support of this—that one might have expected, as Sidney Smith and Polson and my own experience, of course, one might have expected the bulk of the meal to have left the stomach inside two hours. This seems to me a generalization which experience and experiment support.

Q. Based on what you have read from the original trial transcript and what you have heard in this Court, what conclusion and opinion would you have come to in this matter?

A. As I say, I think—certainly earlier in my evidence, sir—I think that based on the amount of food in the stomach as compared with the little, the very little, I think it was described, that had started to pass into the small bowel, based on its character and the relatively little indeed which appears to be an unmeasurable quantity of food which was present, that this girl's death must, if the stomach be taken as an indication of it—and I think it is the one useful indication in this case—must have taken place within two hours of her taking that meal.

Q. Doctor, are there, as has been described in this Court, variables that do in fact affect the digestion, such as emotion?

A. Yes, sir, I think that if that view is looked at more critically, I think one has to be prepared if there is some evidence to qualify it in some way. If there is some evidence about outside conditions that—such as emergency, for instance—that may affect the stomach, then one must be prepared to qualify it, but in the absence of such evidence I would say that Dr. Penistan was quite right to give as an indication and estimation a period which is about usual, about normal, which would be likely, and the last thing I would

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say, sir, about that, is that there are of course upper and lower limits to this. Some stomachs, some stomach contents empty a little earlier and some a little later.

Q. Doctor, I just have two further questions, one dealing, sir, with the evidence that was given in this Court relating, Dr. Simpson, to changes in the decomposition of this body, and very generally, and paraphrasing again, they were referred to as swelling, bloating and lack of venous patterning and other decomposition changes. What value, if any, sir, based on your experience, do you attach to decomposition changes such as I have just mentioned to you?

A. I would say, sir, that those words, described as stated decomposition which is becoming well marked, and they did not appear to be present in this case, that the earliest of changes is commonly, usually, I think, a discolouration in the flanks of the body or in the veins rising up out of the trunk, and this is likely to be seen from about forty-eight hours, but it varies according to temperature.

Q. Were you surprised to read and to hear and not to find here swelling and bloating and a venous pattern?

A. No, sir, no, these I would not expect to be likely to become evident until about the second to third, to fourth day, or later on, that depending on the outside conditions.

Q. There was also a reference very briefly to the lack of greenish discolouration in the flanks of the body. What is your comment, if any, sir, regarding that?

A. Well, sir, this is the earliest of the signs. As I say, it would be likely to appear somewhere about the second day, the forty-eighth hour, but it need not be present. Indeed it need not appear at all.

*Dr. Milton Helpern* has been Chief Medical Examiner for the City of New York since 1954 and is visiting Professor of Pathology, Cornell University; Professor and Chairman of the Department of Forensic Medicine, New York University School of Medicine. Cause of death was strangulation. The food of microscopic size in the bronchials was one incident in the process of dying by strangulation. The place of death was where the body was found. He disagreed with Dr. Petty that twigs would not cause the puncture wounds. He agreed with Dr. Simpson that apparent blanching and whitening shown in the photographs to which he referred was attributable to the body having been turned on its side and that the only valid evidence on this subject was to be found in a photograph of the body before it was disturbed or turned and which showed no blanching. He disagreed with Dr. Petty that there was any evidence of rigor mortis in the arched back or the fingers.

His opinion as to stomach contents is contained in the following extract:

Q. Now, based on your experience that goes back many years, sir, based on those, the factors developed and shown by that testi-

mony, what if any opinion would you have as to how long that stomach content had been in that particular stomach of this young girl?

A. In my opinion, from the amount of food in the stomach and from the fact that this was a healthy body, the body of a healthy young girl, and from the fact that death was rapid, I think it is reasonable to conclude that the time it took this person to die was rather short, and from all these factors I would conclude that this food had been ingested no more than two hours after—that is, that death had occurred, I'm sorry, gentlemen—that death had occurred no more than two hours after the food was ingested. I think that is the rule in these cases.

Q. That is from your experience in these matters, sir?

A. Yes, I have been particularly interested in recent years in the emptying time of the stomach, and we have had enough cases in which we could find a large amount of recently ingested food, that is, easily recognizable food in large amounts and in which we were able to determine the time the food was ingested, and in those cases the food was ingested less than two hours prior to death.

I might explain, in discussing this I don't want to be—to appear to be just arbitrary about this thing. There are conditions which do slow up the emptying of the stomach, and the most common condition that does this is coma. In other words, this opinion could not be common in a man who was knocked down by an automobile and then died as a result of brain injury, having lain in a coma for several days. I have seen food in the stomach in cases like that which has been in the stomach for over a week, but in a person who is healthy, who dies suddenly or rapidly, I would say that this amount of food and the condition it was in is indicative of a time of death, about two hours or within two hours of the ingestion of the food. Now, this is the rule.

*Dr. Samuel Robert Gerber* has been the Coroner, since 1937, of Cuyahoga County, Ohio, which includes the City of Cleveland.

Without going into his evidence in detail, he agreed with Dr. Simpson and Dr. Helpern as to the cause of death, the place of death and the cause of the signs of blanching.

He agreed with the others and Dr. Penistan that the arched back and the fingers were no indication of rigor mortis.

His opinion was that the food had been in the stomach less than two hours after ingestion.

*Dr. Charles Sutherland Petty* is now Assistant Medical Examiner for the State of Maryland. He was Chief Resident in Pathology at various hospitals from 1952 to 1955 and a Teaching Fellow at Harvard Medical School in the Department of Pathology from 1952 to 1955; Instructor

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and Assistant Professor of Pathology, Louisiana State School of Medicine 1955 to 1958; Associate Professor of Forensic Pathology, University of the State of Maryland and Associate in Public Health Administration, Johns Hopkins University.

Dr. Penistan's report was put before him and he was asked for his conclusion as to the time of death. His opinion was that the time of death could only be stated within very broad limits. These broad limits are stated to be:

A. These broad limits lie anywhere between several minutes to several hours; thirty minutes to perhaps eight hours. The missing factors here: Dr. Penistan mentioned the bolting of the food or the rapidity evidently with which the food was eaten. The fact it had not been well chewed is a factor which caused him to advance the time from one hour to perhaps two hours after eating, the interval between eating and death. But I do not see that he has taken into consideration any of the many other factors which might change the emptying time of the stomach or change the amount of food that one would see in the stomach at the time of the autopsy.

Q. What are, in a general way—Would you describe the factors which must be—which cause a variation in the rate of digestion and the rate of the emptying of the stomach?

A. Well, there are many. We do not know, for example, whether this girl was taking drugs; we do not know whether this individual, in fact was emotionally disturbed; we do not know whether there was loss of the stomach contents significantly, that is, into the duodenum or, indeed, further into the small and large intestine; and, as a matter of fact, we do not know how much, if any, of the food was lost through either opening into the stomach. There are two, the top opening from the esophagus and the bottom opening into the duodenum. We do not know even, for example, whether or not there was loss of food through the esophagus either during the act of dying or after the death occurred.

On a consideration of Dr. Brooks' evidence given at the trial as to the contents of the stomach, he repeated his opinion that the estimate would vary from minutes to hours.

The evidence of Mr. Funk, the analyst, and Dr. Noble Sharpe was then put before him and he was asked to assume the correctness of the description of the contents given by these witnesses. His answer was:

Q. Now, again assuming the correctness of the description of the contents given by Mr. Funk and Dr. Sharpe, does that affect the opinion that you have expressed?

A. No, sir, it does not, because we do not know what factors were present between the time the meal was eaten and the time that death occurred.

Again returning to Dr. Penistan's evidence as between one and two hours, or prior to a quarter to eight, and probably between seven and a quarter to eight, his answer was:

> Q. The question I want to now ask you, what is your opinion as to whether the time of death can be put within such narrow limits, based on the stomach contents and the state to which digestion had proceeded, assuming the evidence of Dr. Penistan as to his observations is correct, and assuming the evidence of Mr. Funk and Dr. Sharpe, as to their observations, is correct?
>
> A. Based on the appearance of the stomach contents, the amount of the stomach contents, the degree to which the stomach contents had apparently been digested, I would find myself completely unable to pinpoint any time, a figure such as seven o'clock to seven forty-five, or a quarter to seven to a quarter to eight.

On being questioned about Dr. Penistan's finding that very little had passed through the duodenum into the small intestine, he replied:

> Q. Just taking the information as you have it, the facts I have given to you by themselves, if you were in possession of those facts and that description, what would be the limits either way in which you would place the time of death?
>
> A. Again, sir, several minutes, 20, 30, 40 minutes, perhaps five days, possibly as long as eight hours.

(NOTE: It says five days in the record. We assume that the witness must have intended to say five hours.)

He then went on to deal with rigor mortis and what is sometimes called post-mortem lividity or hypostasis. He found evidence of rigor mortis from the arched back and the position of the fingers and the position of the leg on the mortuary table "provided the leg has not been placed there deliberately or accidentally".

His conclusion was that the onset of rigor mortis is rapid in a warm environment (and the weather was very warm on June 9, June 10 and June 11). He also says that rigor mortis disappears more rapidly in a warm environment and his conclusion was that this body had been where it was found "perhaps less time than has been indicated in some of the evidence I have read". His conclusion was that death occurred later than 7:45 p.m. on June 9.

> From the photographs and the rigor mortis alone I would be unable to say precisely when death occurred but that from this amount of rigor mortis I would be inclined to put it on the light side of two days. The light side or the short side of two days, rather than forty-eight hours.

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He noted the absence of bloating and venous patterning and skin slippage. He would expect to see this sort of thing in a body dead forty-eight hours in the temperatures which were given in evidence.

Then, by way of summary:

Q. Then, Doctor, I now, having taken you over Dr. Penistan's evidence with respect to the stomach contents and his evidence with respect to the existence of rigor, his evidence with respect to the beginnings of putrefaction and having referred you to the photographs of the—Taking the total picture into consideration, the amount of fluid, the evidence of post-mortem changes as described and shown in the pictures, can you come to any opinion as to the time of death?

A. Well, the best opinion I can come to on the time of death is this: It is my opinion that the body has been dead in the neighbourhood of thirty, thirty-six hours, possibly forty hours and I am taking my time now from the autopsy time, not from the time of sighting of the body; but I cannot narrow the limits to less, perhaps, than twelve hours. I clearly have the impression from examination of these photographs, and with particular reference to those things that I have pointed out already to this Court, that the body has been dead not an inconsiderable time short of forty-eight hours; but, I cannot pinpoint that in time, less perhaps. A range perhaps of less perhaps than eight or ten or twelve hours.

Q. In your opinion is it possible for anyone, on the basis of the facts that have been disclosed with relation to the stomach contents, post-mortem changes, to place that period of death within the narrow limits of 7:00 p.m. and 7:45 p.m. on June the 9th?

A. Of course not. Not unless we know precisely what happened between the time that the child was last seen and the time when death occurred; and, of course, if we knew that we would know the time of death.

The time of the autopsy was approximately 48 hours after the girl was last seen.

He next went on to deal with the place of death. Dr. Penistan's report as to what he found when he arrived at the scene was put to him in detail. First, he did not think that the puncture wounds had been caused by twigs. He referred to the puncture wound under the left shoulder, a scratch mark on the front of the left thigh extending over the left kneecap and down to the top of the left foot, and small "interruptions" of the skin's surface on the buttock. He thought the scratch marks on the leg indicated a dragging of the body in a limp condition. He disagreed with any theory of the causation of the marks by twigs. He thought the twigs would be pressed down and would not penetrate. He demonstrated by the use of fountain pens scattered on the desk before him.

He would have expected some spots of semen, acid phosphates to be present at the crotch or very close to it or on the leaves or twigs or whatever was immediately beneath that point of the body.

As to the presence of vegetable matter in the bronchi, he thought it was in a microscopic amount. He called it a remarkable finding in view of the presence of the ligature about the neck. All the other experts thought it was a normal incident of death by strangulation.

Q. What inference did you draw or what is your conclusion from the presence of vegetable matter in the bronchi?

A. I call this a very remarkable finding in view of the presence of a ligature about the neck. The blouse or the ligature about the neck would certainly compress the neck organs and would certainly tend to cause the esophagus, or the tube leading from the mouth down to the stomach, to be collapsed; and I would find it difficult to explain how this food material, this vegetable material found its way into the lung passages that have not a route to go out of the stomach, through the esophagus, to be aspirated and drawn into the air tubes themselves. I think it is quite remarkable in view of the ligature or restricting band about the neck.

Q. What would that indicate to you about the time the vegetable matter got into the bronchi?

A. Inhalation of apparently vomited stomach contents is not an unusual thing during death. I would, therefore, believe this occured during the act of dying, possibly slightly before, during the act of attack, whatever that may have been; and, therefore, I believe this related to the death, if that is an answer to your question, sir.

Q. Are you able to form any opinion as to whether aspiration of the vegetable matter into the bronchi occurred before or after the application of the ligature?

A. As I have already indicated, I think that this occurred before the application of the ligature.

He next examined the photographic exhibits at some length leading up to the conclusion that the body was on its left side shortly after death. It is expressed in the following extract:

Q. What in your opinion caused that?

A. I believe this body laid on its left side for a period of time after death and was moved at a later time.

Q. And why do you reach that conclusion?

A. Because of the pattern of the wrinkles present and the depression on the outer aspect of the left upper arm and the blanch or relatively white areas involved in the left breast and probably also the left side of the face. I believe this is the pattern of a post-mortem lividity which develops shortly after death when the body was on that side so that the blood drained down into that side, that the hypostasis became, as forensic pathologists put it,

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fixed or partially fixed so that when the body was again placed on its back that the markings of its previous position were left and did not vanish because all of the blood had been drained out of that area into what was now the bottom and down side of the body. So, in this photograph, if taken in conjunction with the other photograph which we have seen, it is my opinion that the body was first on its left side and then was turned at a later time and put on its back in the position in which it was found.

Q. And what would cause—You say, for instance, on the left breast there is an area that is whiter?

A. Yes.

Q. What would create the whitening or lighter colour?

A. This is where the breast itself was pressing against whatever the body was lying on and prevented the blood from flowing into that area.

Q. How soon after death would the body have to lie in that position to develop this pattern?

A. This is not subjected as rigor mortis and stomach contents to any specific or definitive answers. The blood begins to settle in the body immediately following death. The point really is at what point was the body moved after death. If the body remained on its left side for a period of time after death until some of the blood was fixed, that is, there was some clotting, perhaps, of the small blood vessels, possibly some passage of red blood cells out into the surrounding tissue, then the point at which this occurred to a significant degree, but the main majority of the blood was still fluid so that when the body was shifted again now onto its back the ordinary hypostasis pattern developed. I could not say precisely, but I would say possibly the inner limit of an hour, an hour and a half, the inner limit of several hours. I do not know, four, six hours, somewhere within this period of time.

Q. How long would the body have to lie in that position?

A. I would say the body would probably have to lie there for a period of certainly an hour or two, in this region.

As to the lesions on the penis, he said that he had never seen lesions on either side of the shaft of the penis allegedly as a result of intercourse of any type. Nor did he know of any reference to this possibility in the literature. He thought it highly improbable that these lesions would be caused by intercourse.

*Dr. Frederick Albert Jaffe* is presently lecturing in Pathology at the University of Toronto and is an Assistant Pathologist, Toronto Western Hospital. He has been a Regional Pathologist for the Province of Ontario since 1951. He is soon to assume the duty of Medical Director of the Forensic Section in succession to Dr. Noble Sharpe.

He considered that the stomach contents and the state to which digestion has proceeded after the last known meal a most unreliable guide as to the time of death. He had read

the evidence of Dr. Penistan as to the stomach contents; also that of Dr. Brooks, and heard the evidence of Dr. Sharpe and Mr. Funk. On the assumption that the girl started her dinner at 5.30 p.m. and finished at 5.45 p.m., he would not place the time of death within the period 7.00 to 7.45 o'clock with any reasonable degree of certainty.

His opinion of the time of death, as indicated by the post-mortem changes, is contained in the following extract:

> Q. Now, dealing—passing from the stomach contents to the post-mortem changes which were observed, again assuming you heard read the evidence of Dr. Penistan as to the post-mortem changes he observed, that is, the very slight rigor that was present, the infestation of the body by maggots, and assuming the correctness of all Dr. Penistan's observations and also his statement that autolysis was present but the body had not yet begun to putrefy or had not reached a stage of putrefaction, do those facts enable you to form an opinion as to when death occurred?
>
> A. Only within very wide limits. I believe on the basis of Dr. Penistan's description and the photographs which I was able to see, that death has occurred no less than twenty-four hours before the discovery of the body.
>
> Q. Could you go any farther than that?
>
> A. To me the really outstanding feature of the body, both basing my view upon the autopsy protocol and Dr. Petty's description of the photographs, is the absence of those changes of decomposition which one would expect to find in a body which had allegedly lain two days in an environment which was certainly very hot and humid. This to me is one of the outstanding characteristics of this body. I would place the time perhaps half way between twenty-four and forty-eight hours.

He agreed with Dr. Petty as to the cause of the blanching.

*Dr. Francis Edward Camps* is a lecturer in Forensic Medicine at the London Hospital Medical College, Royal Free Hospital Medical College and the Middlesex Hospital Medical School and a professor of Forensic Medicine at the University of London.

His opinion of the significance of the contents of the stomach is contained in the following extracts:

> Q. First of all, Dr. Camps, what is your opinion as to whether the contents of the stomach and the state to which digestion has proceeded in relation to the last known meal consumed by the deceased, is a reliable guide to the time of death?
>
> A. It is so variable that this generally has been described as being of no value in assessing the time of death within a limited period. That is to say, what you can say is, first of all, that the contents indicate the nature of the last meal that the person has had. In other words, it enables you to say they have had nothing else to eat since the last meal. And, secondly, that death has occurred

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within a number of hours. It is possible, by taking other matters into consideration, to place perhaps within that number of hours a distance in one or other direction; but other than that, it is quite impossible.

* * *

Q. Assuming the correctness of the observations of Dr. Penistan and Dr. Brooks and Dr. Sharpe and Mr. Funk, what is your opinion as to whether on this—on that basis you could, with any reasonable degree of certainty, state that the time of death of the deceased was between the hours of 7:00 p.m. and 7:45 p.m., having regard the fact that she finished her last known meal at 5:45?

A. I would say it is quite impossible and, in fact, I would say it could be dangerously misleading to the investigating officers.

As to rigor mortis, he disagrees with Dr. Penistan's finding in the following extract:

Q. Does the evidence with respect to the existence of rigor mortis and its extent enable you to express any opinion with respect to the time when death occurred?

A. No. I think, once again, there is so much variation in rigor mortis that, at the best of times, you cannot express an answer except within a reasonably broad limit. In this particular case I think it was a pity that the examination for rigor mortis was not done at 1:45 but waited until 7:15. But, on the basis of the appearance of the body, of the fact that the appearance is, to some extent, and I can say no more than that, present again only at the scene of the crime but also on the autopsy table, I think one must assume that rigor mortis was pretty established still, certainly a little earlier in the evening.

On this point he is in direct conflict with Doctors Penistan, Simpson, Helpern and Gerber. As to post-mortem changes, his opinion is expressed in the following extract:

Q. You have also heard the evidence read of Dr. Penistan with respect to the other post mortem changes—that is, the presence of autolysis, the infestation of certain parts of the body by maggots, and assuming again the correctness of those observations, does that enable you to determine the time of death?

A. No. I would like to make it quite clear, if I may, I am in no way criticizing Dr. Penistan's observations. The only thing here is, first of all, that the autolysis I find supremely surprising for forty-eight hours, to be so little in the temperature and under these conditions.

In the temperatures established during the 48-hour period, he would have expected to find more post-mortem changes than were found on this body. The implication of this is contained in the following extract:

Q. Does he not refer to autolysis in paragraph 4?

A. Yes, that is right. Yes, I would repeat what I said, that the temperature, even putting it at its lowest, for forty-eight hours I

> would expect to find more post mortem changes than were found in this body. The implication of that, had I been there, would have been, having found the stomach contents in the condition which could be to indicate death at the end of one hour or up to nine or ten hours, would make me put my time of the death closer to the ten than to the one. That is the only observation I can make. I find, also, it is very remarkable from this point of view that there is no green discolouration of the abdomen on the right side, which we normally reckon to appear somewhere about forty-eight hours. So that would also tend to put it back.

He explained the blanching in the same way as Dr. Petty, i.e., that the body had lain on its side. He thought an hour might be reasonable. It might have been much less than that.

He expressed some doubt whether the puncture marks described by Dr. Penistan would have been caused by twigs. He thought they would more likely cause scratch marks, not a straight hole. He thought that some sort of sharp thing that might have caused the scratch mark down the leg might have caused the puncture marks.

Because of the absence of acid phosphatase, he expressed the opinion that where the body was found was not the place where the rape occurred. He thought that if it had occurred here, there would have been more injury on the back.

As to the injury to Truscott's penis, he did not think it was the kind of injury that could occur from sexual intercourse. The commonest injury is a tear of the prepuce. "However, so little interest is paid in textbooks to this type of injury that in many textbooks it is barely mentioned."

Another body of medical evidence had to do with dermatology.

*Dr. Emilian Marcinkovsky* is a physician at the Ontario Reformatory at Guelph. On March 3, 1961, he treated Truscott for an infected burn of the right internal ear. He treated him with compresses and chloromycetin. He found that Truscott was sensitive to this drug and he was kept in hospital. On June 28, 1961, there was further treatment.

On December 27, 1962, Truscott was suffering from dermatitis in the armpits. The doctor thought it was the result of chemicals, the detergent in the washing. He called it contact dermatitis.

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On May 15, 1962, he treated him for an inflamed cyst of the dorsum of the penis. On May 24, he marked the medical card "Cyst now not inflamed. Excision will be indicated if frequently inflamed."

*Dr. Norman McKinnon Wrong.* He graduated in 1927 from the University of Toronto and has been on the teaching staff since 1932. From 1954 to 1962 he was Associate Professor of Medicine in charge of Dermatology at the University of Toronto. His opinion on the cause of the lesions on the penis is:

> Q. What is your opinion as to whether the lesions—the lesions as described, could be caused in that way?
>
> A. The lesions described, or what we call erosions of the skin, such erosions are seen in many dermatological conditions, not just following injury, superficial injury of the skin, and we see them with many diseases in which blisters appear on the skin, so that I would say these lesions are not diagnostic of any one specific thing, and I personally, if I had examined him, with the descriptions read, would not have been able to say definitely these could not have been caused by such alone.
>
> Q. Have you any opinion as to the likelihood of an injury such as that being able to be caused by intercourse or attempted intercourse?
>
> A. I would think it rather unlikely or extremely unlikely. I would not say impossible, but I would say extremely unlikely that a lesion on the side of the shaft of the penis would be caused by intercourse.
>
> Q. Are you familiar with any medical literature attributing lesions of that kind on the sides of the penis to trauma or injury involved in or received during forcible or violent intercourse?
>
> A. I have not gone over the medical literature exhaustively, but I have not found anything comparable to this in the standard textbooks.

He also was of the opinion that it was most unlikely that the abrasion on the right labia of the deceased about the size of a finger-nail, was caused by a penis. He thought that the condition of the penis described by Dr. Brooks and Dr. Addison indicated simple herpes.

As to the precise conditions observed by Dr. Addison and Dr. Brooks, he explained them as follows:

> A. I think simple herpes plus infection or plus irritation from sweating and the skin surfaces rubbing together. I don't think that simple herpes in itself usually produces erosion, but secondary infection could very well produce these erosions.

He had never seen any lesions on the shaft of the penis which had been attributable to forcible intercourse or trau-

ma. He had seen injury about the meatus and around the frenum, but never traumatic lesions on the shaft of the penis as a result of intercourse.

*Dr. Charles William Elliott Danby* is an Assistant Professor of Medicine at Queen's University, and the Consultant in Dermatology for the three federal penitentiaries at Kingston, Collins Bay and Joyceville.

He treated Steven Truscott on January 30, 1964, for infected dermatitis of the left side of his face extending from the level of his eyelid down to below the mouth, with an oozing, scaling and crusty condition. His opinion was that this was secondarily infected dermatitis due to some agent that had irritated his skin. Truscott told him that it had been present for a year. The doctor saw him on five subsequent occasions, the last time being April 24. There was good improvement up to March 1st. Then, on April 15th, he had a patchy nummular type of eczema involving the back part of his shoulders, upper arms and his face and ears. On his last visit, April 24, he had improved.

Counsel then put to him the description of Truscott's condition that was given by Dr. Addison and Dr. Brooks at the trial.

Q. This was the view expressed by Dr. Addison, a brush burn of two or three days' duration, was his description. But that is part of the description. Assuming the size, the description of the raw sore, oozing, having the appearance of a brush burn of two or three days' duration; from that description would you be able to reach any conclusion as to the nature and cause of these injuries?

A. I would think that in the area where these lesions have been described, if it were an injury that had occurred three days before, or two days before, there would have been haemorrhage or bleeding visible in and around these lesions. Now, one must remember that in this area the skin is very thin. I would think a good comparison would be the thickness of the skin of your eyelid. If we remember that the skin is made up of two parts, the epidermis and dermis. For convenience, the epidermis is the outer layer of the skin, below which there are blood vessels ready to bleed and is not thicker than six one hundredths of a millimetre. It is tissue paper thin. I would think that if this had been due to injury there would have been haemorrhage.

Q. Would you be able to give any information as to the extent or the degree of the bleeding or haemorrhaging that would occur from injury of that kind?

A. I have in the past, and I still do occasionally, perform an operation called dermo-abrasion of the skin in which we abrade the skin in order to improve the appearance of scars. Now, we do not have to abrade it very deeply to get copious bleeding.

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He went on to say that he did not think that these lesions could have happened by the penetration or attempted penetration of the organ into the private parts of a young girl. He had seen six or seven cases of a tearing of the praeputium. He was not aware of any medical literature on this subject.

Next, he dealt with the injury to the labium majus. This was testified to by Dr. Penistan and Dr. Brooks. He thought it very unlikely, if not impossible, that this could occur from an attempted penetration.

He thought that the condition described by Dr. Brooks and Dr. Addison was herpes simplex (cold sores).

There was, in addition, evidence given by psychiatrists called by the Crown and the Defence. We do not consider that this evidence assists us in coming to our conclusion.

*Conclusions*

After all the evidence given on the Reference, the issues are still the same as those which faced the jury—who raped and killed this girl. The evidence both as to fact and opinion has to be considered as a whole. We begin with Truscott's oral evidence on the Reference. It differs from the evidence given by all those witnesses who saw him on the road before 7 p.m. and described his movements. These movements give an impression of aimless loitering of no particular significance to him. This may account for his failure to remember whom he had met and who had seen him. On the other hand, although as a boy of $14\frac{1}{2}$ years, he had heard all these witnesses give evidence at the trial. The evidence had some connection with that of Jocelyne Goddette and to the jury could have indicated that he was waiting for someone and that the person for whom he was waiting was Jocelyne Goddette, who by her subsequent actions indicated that she was looking for him and did not find him.

The evidence of the time of departure from the school grounds is of decisive importance in this case. According to Mrs. Nickerson and Mrs. Bohonus, it was not later than 7.15 p.m. and Truscott had appeared about 7 p.m. On the Reference Truscott for the first time gave his time of departure as within a minute of 7.30 p.m. By 7.30 Richard Gellatly and even Philip Burns on foot were back at home.

But Truscott had told the police that he did remember meeting Gellatly. Gellatly remembered meeting Truscott and he was not cross-examined. One of the certainties in this case is that this meeting did happen. We find it impossible to accept Truscott's evidence given before us that he and the girl left at 7.30 p.m. and that they did not meet Gellatly.

Further, Jocelyne Goddette, according to Mr. Lawson's evidence, left Lawson's barn at 7.25 p.m. If Truscott's time is taken, she would have been on the road ahead of him. So would Arnold George, for she and George were on the road near the bush at approximately the same time. Jocelyne Goddette and Arnold George could not have failed to see Truscott and the girl if they had left the school grounds at 7.30 p.m. The case for the prosecution, as put to the jury, was that Truscott and Lynne were ahead of Jocelyne Goddette and Arnold George and were not seen after passing Gellatly.

Our conclusion is that Truscott's evidence on the Reference does not and cannot disturb the finding implicit in the jury's verdict, that after passing Gellatly, Truscott and Lynne went into Lawson's bush.

It is also implicit in the jury's verdict that the girl died where she was found in Lawson's bush and that she was not picked up at the intersection and subsequently brought back dead or alive by someone other than Truscott. We do not think that this conclusion could be disturbed by anything to be found in the evidence given at the trial or on this Reference.

We have described the conditions found by Dr. Penistan when he went to the scene. Dr. Petty and Dr. Camps said that they would have expected to find spermatozoic fluid at the crotch or in the blood at the crotch or on the leaves and twigs in the immediate area of the crotch if intercourse had taken place where the body was found. Dr. Simpson said that he "would certainly not regard the absence of spermatozoic fluid on the ground between the crotch area as giving any evidence that sexual intercourse of some kind did not take place where the body lay". Dr. Penistan said that the intercourse took place "while the child was dying, when the heart had stopped or had almost stopped beating". His reason for this conclusion was that although the

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injuries to the parts were severe, the bleeding from them was extremely small.

Dr. Petty developed a theory based upon an examination of the photographs that the body must have lain on its left side for an hour or two following death. We have quoted at length from his evidence and that of others on this subject. He found signs of blanching on the left side of the face, the left breast and the left arm from certain photographs taken after the body had been moved both at the scene and after transportation to the mortuary. These signs are not apparent from the photograph of the body lying on its back, taken at the scene before the body was turned on its side. Dr. Simpson, Dr. Helpern and Dr. Gerber all said that if the photographs did indicate some blanching, the simple explanation was to be found in the movement of the body at the scene and afterwards. The descriptions given by Dr. Penistan and Dr. Brooks of the condition of the body at the autopsy were inconsistent with the existence of any blanched areas on the face capable of demonstrating hypostasis. They were the only ones who saw the body. The others were testifying from their observation of photographs.

Dr. Penistan said that the face was dusky in colour as far down as the ligature and that this dusky colour was caused by strangulation and not by post mortem changes. This colouring was absent from the rest of the body except perhaps for the arm, where some post mortem lividity had occurred. He pointed out that this was a dependent part whereas the front of the face was not. The colour of the face was due to the fact that the blood could not escape past the ligature and not due to hypostasis, that is, a condition caused by settling of blood in the dependent parts of an organ.

Our conclusion on the evidence relating to blanching is that whatever traces suggesting this condition were observable from the photographs are to be attributed to the movement of the body in the bush, movement to the mortuary and movement in the mortuary. This evidence does not disturb our conclusion that the place of death was where the body was found.

On the subject of rigor mortis, we think that the man who actually saw the condition had an overwhelming ad-

vantage over those who were testifying from photographs. He says that the condition had almost passed off. Yet Dr. Petty testified to rigor mortis from what others described as the natural arching of the back and a natural position of the fingers which were being held by the assistant in order that a photograph could be taken. We are of the opinion that Dr. Penistan's evidence on rigor mortis must be accepted and that defence evidence on this subject tending to put the time of death at a later hour must be rejected.

On the question of the contents of the stomach and the state of digestion as indicating the time of death, there was diversity of opinion. Doctors Sharpe, Simpson, Helpern and Gerber supported Dr. Penistan's opinion that death occurred prior to 7.45 p.m. Dr. Petty, Dr. Jaffe and Dr. Camps rejected any possibility of such precise definition. We have already set out their opinions in detail earlier in these reasons. There is no need of repetition. We do, however, wish to explain that with each medical expert we chose the opinion which he expressed in his own words in examination-in-chief. We think it is better done this way because we could not see that on cross-examination any expert retracted or seriously modified what he said in chief.

We think that the evidence indicates that this was the same meal that the girl had finished eating at 5.45 p.m. We know the time of the meal. This was a normal healthy girl of 12 years and 9 months who had eaten a normal meal. There is no evidence of any complicating factor apart from an expression of annoyance because she could not go swimming.

Dr. Petty spoke of factors which might change the emptying rate of the stomach—drugs (which seems to be out of the question in this case), loss into the duodenum, loss through the esophagus during the act of dying or after death occurred. We have the definite evidence of Dr. Penistan on loss into the duodenum. He says there was very little. It is difficult to think of loss through the esophagus when one considers how this girl died. There were microscopic particles of food in the bronchii, a common occurrence in death by strangulation.

Again we say that this opinion evidence must be related to all the other evidence. We have the known facts of the

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meal, the time when she finished, that she was in the school grounds engaged in normal activity after the meal and before she started down the road. We have the time when she started down the road and it was not later than 7.15 p.m., not 7.30 as Truscott said. She was found 42 hours later in a bush off the road at 1.45 p.m. on Thursday, June 11, 1959. The jury's verdict must have rejected Dr. Brown's time of three or four hours after the meal because it contained no possibility of accuracy in relation to this case if they came to the conclusion that Truscott did not take the girl to the intersection.

We are faced with the same problem. No new issues were raised before us but there was a great volume of new evidence. The weight of the new evidence supports Dr. Penistan's opinion. But the decisive point in this case is still the one put to the jury by the trial judge and decided against the accused.

The Court heard 467 pages of new oral evidence on this Reference. According to firmly established rules, none of this would have been admissible had these proceedings been by way of appeal. But in view of the terms of the Order of Reference the Court decided to hear everything and did hear everything that the parties thought relevant.

Another aspect of the medical evidence related to the condition of Truscott's penis. Truscott, in his evidence before us, introduced an explanation of the condition of his penis, as described by Dr. Addison and Dr. Brooks following their examination on Friday evening, June 12, 1959, three days after the girl's disappearance. They saw the condition and described it in detail. Their opinion was that it was consistent with forcible intercourse with a girl of the age of Lynne Harper. Truscott's father was present when this examination was made. Truscott and his counsel were present in court when the evidence of the two doctors was given. There is no indication in any of the evidence that was before the jury that these injuries were the result of a pre-existing condition. On the reference, Truscott said that there was a pre-existing condition which started about six weeks before he was picked up. This is his evidence:

> A. It was about six weeks before I was picked up. And it started off, what appeared to be little blisters, and continued to worsen from there until it was in the state it was when I was picked up.

Q. What caused it to worsen? How did its appearance change?
A. Well, one blister would break and it just seemed that more would appear.
Q. Do you know what caused them to break?
A. No, I don't.
Q. Now, when you first noticed this condition that you described did you tell your father about it?
A. No, I didn't.
Q. Was there any reason why you didn't.
A. I was too embarrassed.
Q. Do you recall the first person to whom you described this condition when you first noticed it?
A. Yes, I do.
Q. Who was it?
A. It was yourself and Mr. Jolliffe.
Q. Myself and Mr. Jolliffe. And where did you describe that to us?
A. Collin's Bay penitentiary.

We find it impossible to accept Truscott's statement that he had never described the condition of his penis, as it existed prior to June 9, 1959, to anyone before he described it at the penitentiary to his counsel on the Reference. It may be that, on his first discovering the condition he was too embarrassed to tell his father about it. But when the condition existing on June 12 was discovered by Dr. Addison and Dr. Brooks on their medical examination of him, in the presence of his father, and when those two doctors described the condition which they found at the trial, and drew inferences from it, it is incredible that no disclosure was made by him to his father and to his then counsel as to the condition which he says had existed for six weeks before he was picked up.

If the condition which Truscott described did exist for some time prior to June 9, we have the evidence of Dr. Simpson that the patches could have been rubbed, causing them to be more sore, and that this is consistent with a sexual assault. Dr. Danby and Dr. Wrong, the two expert dermatologists called by the defence on the Reference, who testified on this matter, both recognized the possible impact of irritation in activating the condition described by Truscott.

Our conclusion is that there was a pre-existing condition and that it was disclosed by him prior to his trial, although no evidence about it was given before the jury. The serious condition found and described by Dr. Addison and Dr.

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Brooks was consistent with the aggravation of a pre-existing condition resulting from a sexual assault upon Lynne Harper.

When the case went to the jury, they had before them the evidence given at the trial which we have summarized above. It was all circumstantial. Their verdict read in the light of the charge of the trial judge makes it clear that they were satisfied beyond a reasonable doubt that the facts, which they found to be established by the evidence which they accepted, were not only consistent with the guilt of the accused but were inconsistent with any rational conclusion other than that he was the guilty person. On a review of all the evidence given at the trial we are of opinion that, on the record as it then stood, the verdict could not be set aside on the ground that it was unreasonable or could not be supported by the evidence. Indeed, it being implicit in their verdict that the jury completely rejected the evidence of those witnesses who said that they had seen Truscott pass over the bridge with Lynne Harper, and Truscott's statements as to having seen Lynne Harper enter a motor car, we are of opinion that the verdict was in accordance with the evidence.

We are also of opinion that the judgment at trial could not have been set aside on the ground of any wrong decision on a question of law or on the ground that there was a miscarriage of justice. It follows that, in our opinion, the judgment of the Court of Appeal for Ontario[1] dismissing the appeal made to it was right.

On this Reference we heard the additional evidence summarized above. It disclosed differences of opinion amongst the expert medical witnesses who testified. As has already been pointed out, none of this fresh evidence would have been allowed if the case had come before us on an appeal in the ordinary way under s. 597A of the *Criminal Code*. Because of the terms of the Order-in-Council referring the matter to us, we decided to receive this evidence and it becomes our duty to weigh it with a view to determining whether it causes us to doubt the correctness of the judgment at the trial. We have come to the conclusion that it does not.

1 (1960), 32 C.R. 150, 126 C.C.C. 109.

There were many incredibilities inherent in the evidence given by Truscott before us and we do not believe his testimony. The effect of the sum total of the testimony of the expert witnesses is, in our opinion, to add strength to the opinion expressed by Dr. Penistan at the trial that the murdered girl was dead by 7.45 p.m. We have dealt above with the evidence which we heard as to what observation of a car at the junction of Highway No. 8 and the county road could be made from the bridge 1,300 feet to the south.

We have already stated our conclusion that the verdict of the jury reached on the record at the trial ought not to be disturbed. The effect of the fresh evidence which we heard on the Reference, considered in its entirety, is to strengthen that view.

We turn now to certain legal objections taken by counsel for the defence on the Reference. He argued that the learned trial judge should have declared a mistrial because Crown counsel, in his opening address to the jury on September 16, said in part:

> I might say then that in sequence that on Friday night—I should say the Friday a statement was taken from the accused by Inspector Graham and the other Police, one of the other Policemen, signed that night by him...

At this point he was stopped by the trial judge.

The Court of Appeal for Ontario rejected this submission on the ground that in his opening address read as a whole Crown counsel had made it clear to the jury that the statements made by Truscott to the police which he intended to introduce were not in the nature of "confessions at all or anything like that".

In our opinion there is another ground on which the submission should be rejected. In the discussion had in the absence of the jury after the learned trial judge had stopped Crown counsel from making any further reference to the statement he made it plain that if the statement, when tendered, was ruled inadmissible he would be prepared to declare a mistrial. On the afternoon of September 18, the statement was ruled inadmissible but counsel for the accused did not then or at any subsequent point in the trial ask that a mistrial be declared. We think it clear that defence counsel elected to proceed with the trial and that the verdict cannot be impugned on this ground.

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Defence counsel also submitted that the trial judge erred in permitting Jocelyne Goddette and Arnold George to be sworn. The determination of this question depends on the interpretation to be placed on s. 16 of the *Canada Evidence Act* which was considered in this Court by Anglin C.J.C., in *Sankey v. The King*[1], where he said:

> Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be safely predicted, from his mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime. *Crim. Code,* section 17-18. A very brief inquiry may suffice to satisfy the judge on this point. But some inquiry would seem to be indispensable.

We are of opinion that the learned trial judge properly exercised the discretion entrusted to him and that there were reasonable grounds for his concluding that both Jocelyne Goddette and Arnold George understood the moral obligation of telling the truth.

The reasons of our brother Hall indicate that he would have ordered a new trial on a number of grounds. Since we feel obliged to differ from the opinion he has expressed, we think it necessary to state our view on each of the grounds dealt with in his reasons.

1. *Truscott's admonition to Jocelyne Goddette to keep the appointment secret.*

The judge's ruling on this point was favourable to Truscott. He limited the effect which the jury could give to Jocelyne Goddette's evidence on the appointment to an explanation of why she was on the road looking for Truscott.

We think the evidence had a wider relevancy. According to many witnesses, Truscott was moving about the road between 6.30 and 7 p.m. The suggested inference from this is that he was looking for Jocelyne Goddette. Then he turned up at the school grounds at 7 p.m. and talked to

[1] [1927] S.C.R. 436 at 439-40, 48 C.C.C. 195, 4 D.L.R. 245.

Lynne Harper. His explanation of the conversation was that she was looking for a ride to the intersection.

It is said that this was uncontradicted. It could not be otherwise with an unheard conversation between two persons, one of whom was dead at the time of the trial.

The conversation between Truscott and the girl is open to another interpretation. It took place only a few minutes after Truscott had been on the road looking for Jocelyne Goddette according to the Crown's submission. It was open to the Crown to put it to the jury that he was taking Lynne Harper when Jocelyne Goddette failed to appear, and taking her on the same errand.

The admonition to Jocelyne Goddette to keep the matter secret is no more a reflection on Truscott's character than the invitation itself. It is part and parcel of the same conversation and one part cannot be separated from the other. The jury was entitled to know what the whole conversation was and the witness when testifying to such a conversation should not be compelled to stop at a certain point. This was early in the trial. The girl's credibility was involved. No one knew at this stage whether Truscott would give evidence at the trial. If she had only been permitted to tell one part of the conversation, it is impossible to tell how counsel for the defence would have used that.

We do not think that any of this conversation between Truscott and Jocelyne Goddette was any reflection on Truscott's character. To put it at its worst for Truscott, it means no more than this: that he had a tentative date arranged with Jocelyne Goddette. He wanted a date with a girl that night and he took Lynne Harper when Jocelyne Goddette was not available. We have already mentioned that this has some bearing on the submission of the prosecution that his story of the ride, the sole purpose of which was to take her to the intersection, may not have been true. It does not amount to trying to prove bad character or a disposition to murder and rape.

Counsel at the trial was satisfied with this instruction given by the trial judge. He had no reason to object and

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there is no ground for saying that on this point there should be a new trial. Counsel on the reference did not take this objection.

*Maxwell v. The Director of Public Prosecutions*[1] is no authority for the rejection of the evidence in question here. In that case, a person was charged with manslaughter as a result of the performance of an abortion. He gave evidence of his good character. He was cross-examined about a previous trial for manslaughter involving another alleged abortion. He had been acquitted at that trial. The cross-examination was held to be bad on two grounds—as not being relevant to the issue before the jury and because it did not tend to impair the credibility of the accused as a witness.

2. *The bicycle tracks.*

This has to do with the bicycle tire marks which were found in the field north of Lawson's bush. Corporal Erskine gave evidence about these tire marks which he had photographed. Defence counsel did object to the admissibility of the evidence from the photographs. The tire marks were similar to the marks that would be made by Truscott's bicycle.

Defence counsel emphasized that these tire marks were of little or no significance in the case. He dealt with the matter in the following extract:

> Then there was evidence about marks along the roadway at the north side of the bush, and Exhibits twelve, thirteen and fourteen were taken by Corporal Erskine and filed here. These exhibits showed the dried mud along the north edge of the bush in this little laneway or driveway. Now, these were taken, according to the note on the back, on the 13th of June. We heard the evidence of the Sergeant from the R.C.A.F. Station as to the rainfall. In June there had been a trace of rain on the 1st. No rain from then until either the 10th or the 11th, when it was .24 or .27 inches, about a quarter of an inch. .24, I think he said. He said if it was .25, it would be a quarter. However, it makes no difference because it was after the 9th of June, which is the important date. But we had no rain in June prior to the 9th, except a trace, and you heard Sergeant Calvert say a few drops or a little sprinkle you would walk out in without putting a coat on.
>
> Now I suggest to you that it is quite clear from all these pictures that these tracks were made when the mud was soft. You can see where the mud squeezed up between the little irregularities in the tire. It must have been soft to make that mark. It couldn't possibly happen if this dirt was in the hard-packed condition that we find it in these conditions. That dirt must have been baked hard long before the 9th of June. We have the

[1] [1935] A.C. 309, 24 Cr. App. R. 170.

temperatures in the eighties, high temperatures, hot weather. My friend may say to you that May was a rainy month. You heard Sergeant Calvert go over the rainfall for the last sixteen days of May, and .25 or .2, so and so of rain. Very light rain. The total rain in sixteen days, something over three inches. Many of you men are farmers. You know the effect of these pictures much better than I do. You can use your own good judgment as to how long it took for that land to become parched like that, how many days before the pictures were taken the last rainfall had occurred and these tracks made there.

Immediately afterwards he pointed out that the evidence showed that Truscott had been along the tractor trail at least three times, the last one of which was about a week before the 9th of June. He and his friend were building a tree fort in the bush. Crown counsel dealt with that in the following way:

The bicycle marks, Gentlemen, I am not going to linger over. Corporal Erskine's evidence that he found tire marks, combinations of the two wheels, but they are in as Exhibits. You will have them with you. That he made comparison and that he found those marks in the laneway and you will remember the distance down. I, frankly, don't. That they compare. That they are a combination. Now, it is true there could be similar tires, certainly, but where you get radically different tires—you look at them and you will find them in combination, it would seem to be fairly strong evidence that that bicycle was down there.

But gentlemen, as I said about a circumstantial evidence case, that is the beauty—there is nothing beautiful about this at all—but that is one of the strong facts about it. You have a pile of facts and if there is one or two that are not conclusive you still, you still have the conclusive proof of the facts that are there.

A defence witness was called to say that Steven and he had a tree house or fort or something, and that Steven was in with his bicycle. I wouldn't waste your time by arguing that isn't a possibility, but I just put this forward for what it may seem to be worth for you, that that is more evidence that Steven was down that lane with that bicycle. By no means conclusive it was that night he was down. The Defence went to great efforts to counteract those marks.

That soil—or that weather expert, Calvert, Sergeant Calvert, about the dryness. Now we all know this about farms, if you get an area near a bush and there are lots of trees in that lane, and that area will stay a longer time damp. Other things might be quite dry, adjacent portions, even if you don't get any rain. There was plenty of rain in May and none in June, but there could be dampness, I suggest to you what is elementary, enough to make those marks, but that is only one of the great stack of facts that are amassing for your assistance.

The trial judge dealt with them as follows:

Nothing belonging to the accused boy was found in the locality, in the neighbourhood of the body, as you will recall. There was a tire mark in the field about seventeen feet north of the fence that ran along this lane, and Constable Erskine, who testified, said that the marks of the tire were similar, I think that is as high as he put it, were similar to the tires

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that were put in evidence of the bicycle belonging to the accused boy, and you are asked to find that those marks were made by this bicycle. That is what the Crown asks you to find. The bicycle is not a common one.

If the trial judge's remarks are taken in conjunction with the address of Crown counsel and the defence, there could be no doubt here that the issues were squarely before the jury, and defence counsel did not see fit to object to the charge on this point.

We cannot agree that it was conclusively shown that the tire marks must have been made many days preceding June 9th, nor that the learned trial judge should have directed the jury in the light of the evidence of the meteorologist Calvert to exclude from their consideration the evidence relating to the tire marks. It was for the jury to weigh the evidence of the tire marks in the light of the evidence given as to the weather conditions. We do not think that anyone took this evidence as a salient feature of the case. The salient feature of the case is Truscott's disappearance from the road after the meeting with Gellatly.

3. *The locket*

This was worn by Lynne Harper on the evening of June 9th. It was not found on her body but hanging on the wire fence that ran along the west side of Lawson's bush. The inference is open that whoever murdered Lynne Harper removed the locket from her neck. To do so he had to unclasp it. It was found unclasped and suspended on the wire fence. Truscott had described the locket in some detail. The evidence was properly admissible and the question was one of weight for the jury.

The matter of the locket and its significance to the jury was raised in the address to the jury of counsel for the defence. His suggestion to the jury was that the place where the locket was found was the place where the girl was taken into the bush either alive or dead. This suggestion is contained in the following extract from his address:

> Now the evidence would indicate that if Lynne Harper were dragged in there, through that wire fence, that she was dragged in at a point on the County Road about three hundred feet south of the north edge of the bush. And the reason for saying that is this, that that is the point where Corporal Sayeau says the locket was found.
>
> Now, we have this locket. Do you remember a locket was put in as an Exhibit? A locket and chain, and that the chain was delivered to Mrs.

Archibald by Sandra. You remember the little girl, Sandra Archibald. When Sandra gave the locket to her mother, the mother said the chain was open, and Sandra told you how she found the locket and chain suspended partly over one wire. Part of it may have been on the ground and part of it was suspended over the wire on the fence, with the chain on the outside and the locket on the inside, or vice versa. Probably you will remember that better than I do. But that appears to be where—the point where this girl was brought, or her body entered that area. Now, I suggest if Truscott took Miss Harper in at that point, somebody would have seen it. The fence there was in much better condition than the fence on the north side. It is most unlikely that he would drag the bicycle in. If he had dragged it in there would be, in all likelihood, some mark on the bicycle.

The Crown was entitled to answer this proposition and we do not regard that answer as theorizing "without one iota of evidence", "inflammatory" or a "fanciful theory".

4. *Car bearing Licence No. 981-666*

When Truscott was asked by the police what he had seen on the road when he took Lynne Harper to the intersection as he said, he mentioned Richard Gellatly and he also said that he had seen on the road an old model Dodge or Plymouth car bearing licence No. 981-666 but that the first three digits may have been in a different order. He also said that there was a man and a woman in this car. There was such a car with licence No. 891-666 belonging to a Mr. Pigun, who was then stationed at Clinton. A number of people, including Mr. Pigun, who owned cars with licences bearing some resemblance to the number given, were called to testify and all said that they were not on the county road on the evening of June 9th. Hall J. is of opinion that the Crown was not entitled to call these witnesses because this was a collateral matter and Truscott could not be contradicted on it.

In our view, this was not a collateral matter. It was strictly relevant to the fact in issue—whether Truscott was on the road when he said he was. In effect, he said that from leaving the school grounds with Lynne Harper and until his return, that he was never off the road and that he saw a car bearing a certain licence number. The owners of all these possible cars say that they were not on the road.

The inference that the jury was asked to draw in part from this evidence and from all the other evidence is that Truscott did not see and could not have seen the car that

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he described; that if he had actually been on the road all the time he would not have made such a statement because he would have known better and that, in consequence, he was not where he said he was at the material time. Facts relevant to this issue are not collateral facts.

5. *The Judges' Instruction*

It will be for you to say whether you accept Doctor Penistan's theory, an Attorney-General's Pathologist of many years' standing, or do you accept Doctor Brown's evidence.

The criticism made is that the extract above quoted was a misdirection and that the jury should have been told that as between Dr. Penistan and Dr. Brown, if the evidence of Dr. Brown left a reasonable doubt in their minds as to the time of death, they must acquit. We disagree with this proposition. The choice was not simply between Dr. Brown and Dr. Penistan. That evidence had to be considered in relation to the whole of the evidence, and a reading of the trial judge's instructions in full to the jury makes it plain that that is what they were told to do.

These are the instructions that he gave to the jury, in summary, at the very end of his charge:

Now, Gentlemen, in order to arrive at a verdict in this case—before I mention that, I wish to say to you this. You will have to ask yourselves, about each branch of the evidence. Is it consistent with the boy's guilt? And is it inconsistent with any other rational conclusion? But you just can't separate one piece of evidence from the other from the rest of the evidence. You will have to ask yourselves on the whole evidence which you accept, on the whole evidence that you accept, is this evidence susceptible of any other conclusion than that this boy is the killer of Lynne Harper? But if you think any other rational conclusion possible on this evidence, you will acquit him, and if the evidence raises a doubt in your mind, you will acquit him. When I say raises a doubt in your mind, I mean a reasonable doubt. Not a foolish doubt or a doubt because you are hesitant about doing your duty, and I am sure I need not say to a Jury of the County of Huron that I know you will accept your responsibilities in this matter, come what may, and that you will bring in a verdict according to your conscience. It must not be a doubt that is raised by fear, prejudice or caprice, but an honest doubt of a Juryman endeavouring to do his duty.

In order to bring in a verdict you must all agree upon it. If you do not agree you cannot bring in a verdict—you disagree. There is no obligation on any of you to agree. If, after you have discussed it fully, and considered it dispassionately among yourselves, you should disagree with your fellows, it is your duty to express your disagreement. Do not forget what I said about the onus of proof. The onus of proof is entirely on the Crown. It never shifts. There is no obligation whatever or any duty

on the prisoner to prove his innocence. It is for the Crown to prove his guilt and the Crown must prove that guilt beyond a reasonable doubt. You must feel sure about it.

Now, Gentlemen, as I see this case you may bring in a verdict of course, of not guilty. The jury is always able to do that if the Crown has not proved its case or you have even a reasonable doubt about it. You may bring in a verdict of not guilty or you may bring in a verdict of guilty as charged. There is no other verdict open to you in this case on this evidence.

6. *Dr. Brooks should not have been permitted to give his opinion that the sores on Truscott's penis and the condition of the body at the scene indicated a very inexpert attempt at penetration.*

Dr. Brooks graduated in medicine in England in 1943. He was registered to practise in England in 1946. He is a member of the College of General Practitioners in Canada. He was the Senior Medical Officer at the R.C.A.F. Station at Clinton, Ontario.

He saw these penial lesions. He had an opinion as to their cause. He thought they were about three days old. He also had an opinion about the injuries to the girl which he had seen in the bush and in the mortuary.

We are of the view that a general practitioner with this experience is entitled to give his opinion to the jury as to the cause of the conditions that he found, whether it is a physical cause or any other cause. This kind of evidence is not limited to specialists. *Regina v. Kuzmack*[1] does not state any such rule.

In *Regina v. Kuzmack,* the accused was convicted of murder. It was alleged that he had stabbed a woman and severed her jugular vein. His defence was that the death was an accident. He said that the woman attacked him with a butcher knife and that she was killed accidentally when he was trying to take the knife away from her. The woman also had cuts on the fingers of the right hand. The doctor who testified as to the cause of death also said that when the right hand was put up to the neck, the wounds on the fingers were in the same direction as the wound on the neck. His conclusion was that the hand was on the neck when the knife was put into the neck. His conclusion was rejected by the Appellate Division as "a mere guess which

[1] (1954), 110 C.C.C. 338, 20 C.R. 365.

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anyone might have made". Whether or not this was a correct ruling in the particular case is of no concern now. But the ruling is not authority for rejecting the opinion of a general practitioner as to the cause of lesions which he had personally observed and described.

7. *Admissibility of the underpants as evidence.*

These were the garments that Truscott was wearing at the time of his arrest and were taken from him then. They were very dirty and showed traces of blood and male sperm. It was open to the jury to infer that these were the underpants that Truscott was wearing on June 9 and to decide whether the traces of blood and male sperm had any significance in the case. The trial judge cannot withdraw consideration of such evidence from the jury.

8. *Extracts from the instructions given to the jury in relation to the evidence of Philip Burns.*

It is said that the trial judge gave contradictory instructions regarding the evidence of Philip Burns, and the following extracts are cited in support of this conclusion:

> Now the first is that Philip Burns was, of course, not sworn, and he said he didn't see Lynne and Steve on the road as he went north, and no one corroborates him in that respect, so that his evidence is worthless so far as you can use it in convicting the accused boy.
>
> * * *
>
> Then you, of course, won't forget Philip Burns' evidence that he left the river around between seven to seven-ten or thereabouts, seven-fifteen, and walked up the road and saw nothing of Steve and Lynne as he went up the road. That evidence was given, as I told you before, without Philip Burns being sworn.

We do not interpret the first extract, when read in context, as being a direction to the jury that Burns' evidence was worthless. The jury had been recalled as a result of objections raised by counsel to the charge, and in the first sentence of that extract the trial judge is only stating what that objection was, and not his own ruling upon it. This is made clear by the next three following sentences:

> But you could hardly corroborate a statement that I didn't see somebody. You may corroborate that he wasn't on the road, and I expect that is what Philip meant, that Steve and Lynne weren't on the road as he passed along it.

Now, of course, he met Jocelyne and he met Arnold George as he went along that road, and they were sworn, and they said that they didn't see Lynne or Steve on that highway, so in that respect their evidence is capable of corroborating Philip's.

In our opinion this instruction was correct.

9. *Direction regarding the evidence of Douglas Oats and Gordon Logan.*

The learned trial judge dealt with the effect of the evidence of these two boys in the following passage from his charge:

Now then, it is the theory of the Defence, and they brought evidence to show that, as I say, this little Douglas Oats saw them going across the bridge and then, in a few minutes, according to the boy by the name of Gordon Logan—Gordon Logan also says he saw them going north on the bridge and in about five minutes he says he saw Steven return alone. Well, as regards Gordon Logan, it will be for you Gentlemen to say whether you believe his evidence, and it is very important, Gentlemen, because if you believe the Defence theory of this matter and believe Steven's statement to the Police and to other people, that the girl was driven to Number Eight Highway and entered an automobile which went east; it is my view that you must acquit the boy if you believe that story.

In other words, I will put it this way. In order to convict this boy, you have to completely reject that story as having no truth in it, as not being true. You have to completely reject that story.

In our opinion this was a clear-cut, positive direction to the jury as to the impact of the evidence of Oats and Logan, if accepted by the jury, and there is a positive direction to acquit if Truscott's story, supported as it was by that evidence, were believed. The jury is not directed that they could only acquit if they believed that story, but that, if they believed it, they must acquit. The continuing onus upon the Crown to prove its case beyond reasonable doubt, and the absence of any obligation upon the accused to prove his innocence was clearly stated on more than one occasion, as shown in the extract from the charge previously quoted.

What this particular passage does, and quite properly does, is to make clear to the jury the vital importance of the evidence of Oats and Logan, and to stress that they could not convict Truscott unless his account of what happened was completely rejected as having no truth in it.

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10. *Reference as to the possibility of Truscott having returned with Lynne Harper from No. 8 Highway.*

In charging the jury the trial judge had two undisputed facts from which to start. First, that Truscott had ridden Lynne Harper on his bicycle north on the county road toward No. 8 Highway. Second, that her raped and dead body was found in Lawson's bush, and that, in consequence of that, someone had brought her there, alive or dead. The Crown's case was that Truscott had taken her there, and that he had never taken her to No. 8 Highway. The case for the defence was that Truscott had left her at that highway, and had returned alone, she having been picked up in a car at the highway, and that some unknown person had brought her back to Lawson's bush. The trial judge apparently felt obligated to discuss all possibilities and suggested the possibility of her having been brought back from No. 8 Highway by Truscott.

In our opinion this was unnecessary, but when he finally dealt with the matter, in answer to a request by the jury for further direction of evidence, corroborated or otherwise, of Lynne Harper and Steven Truscott having been seen together on the bridge on the night of June 9, he made it abundantly clear that there was no witness who said that he had returned to the bridge with her, and that there were two witnesses, Allan Oats and Logan, who said he was on the bridge alone.

We cannot agree that the effect of the judge's direction on this point withdrew from the jury the most vital issue in Truscott's case. It was quite clear from the charge that the jury could not convict Truscott if they accepted Logan's evidence.

11. *Reference to Truscott's "calmness and apathy".*

In his charge the trial judge put the question "You will ask yourselves and you will ask yourselves the reason if this boy is guilty, why he has shown such calmness and apathy."

Counsel for the defence had urged that Truscott's demeanour and attitude, when he returned to the school yard and was seen there by a number of children, was completely

inconsistent with guilt, and in putting this question to the jury the trial judge sought to raise this issue in their minds.

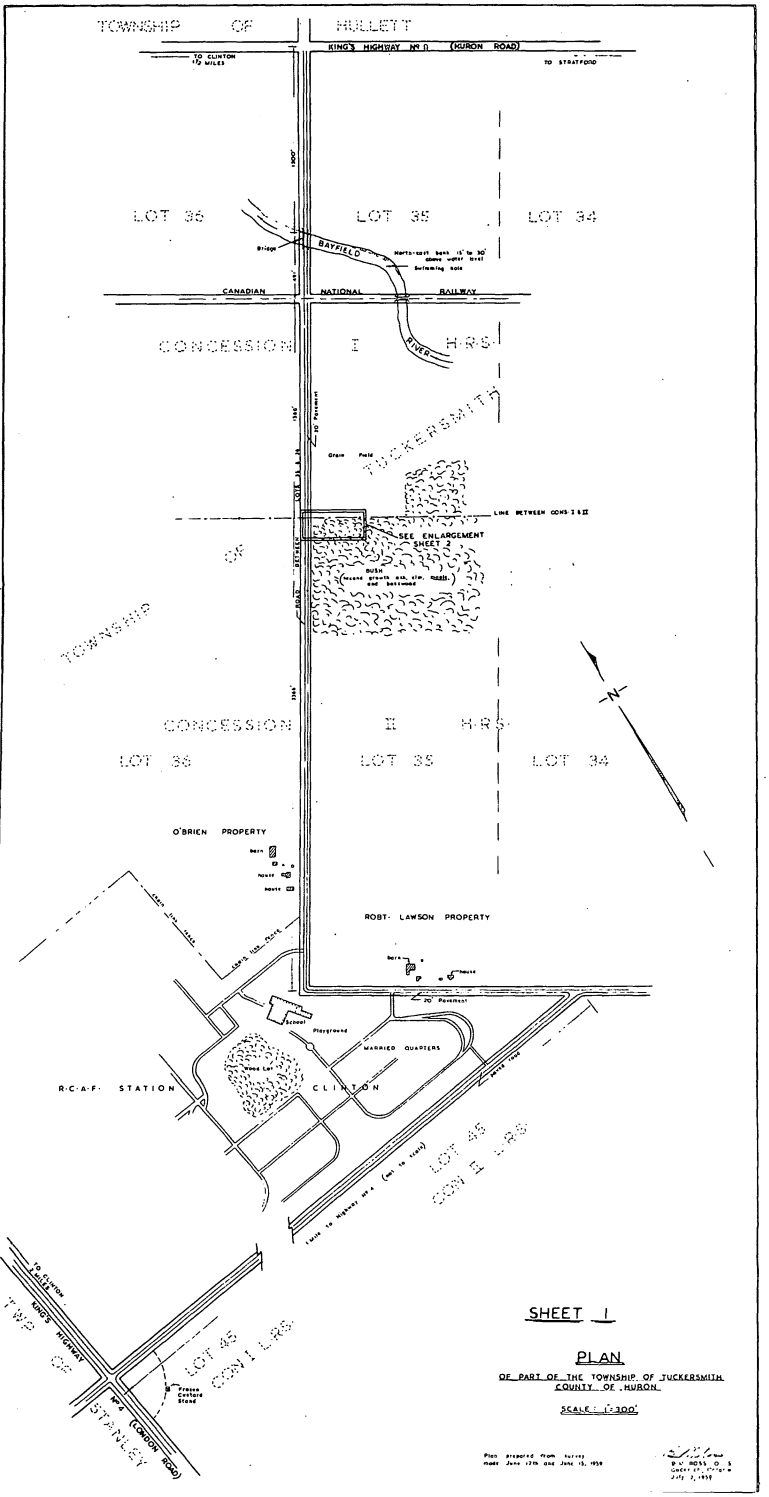
What he meant is clearly illustrated in his original charge, when he said "It is pointed out by the Defence, and very properly so, and it is something you must consider, and that is his demeanour when he returned, that he seemed to be natural."

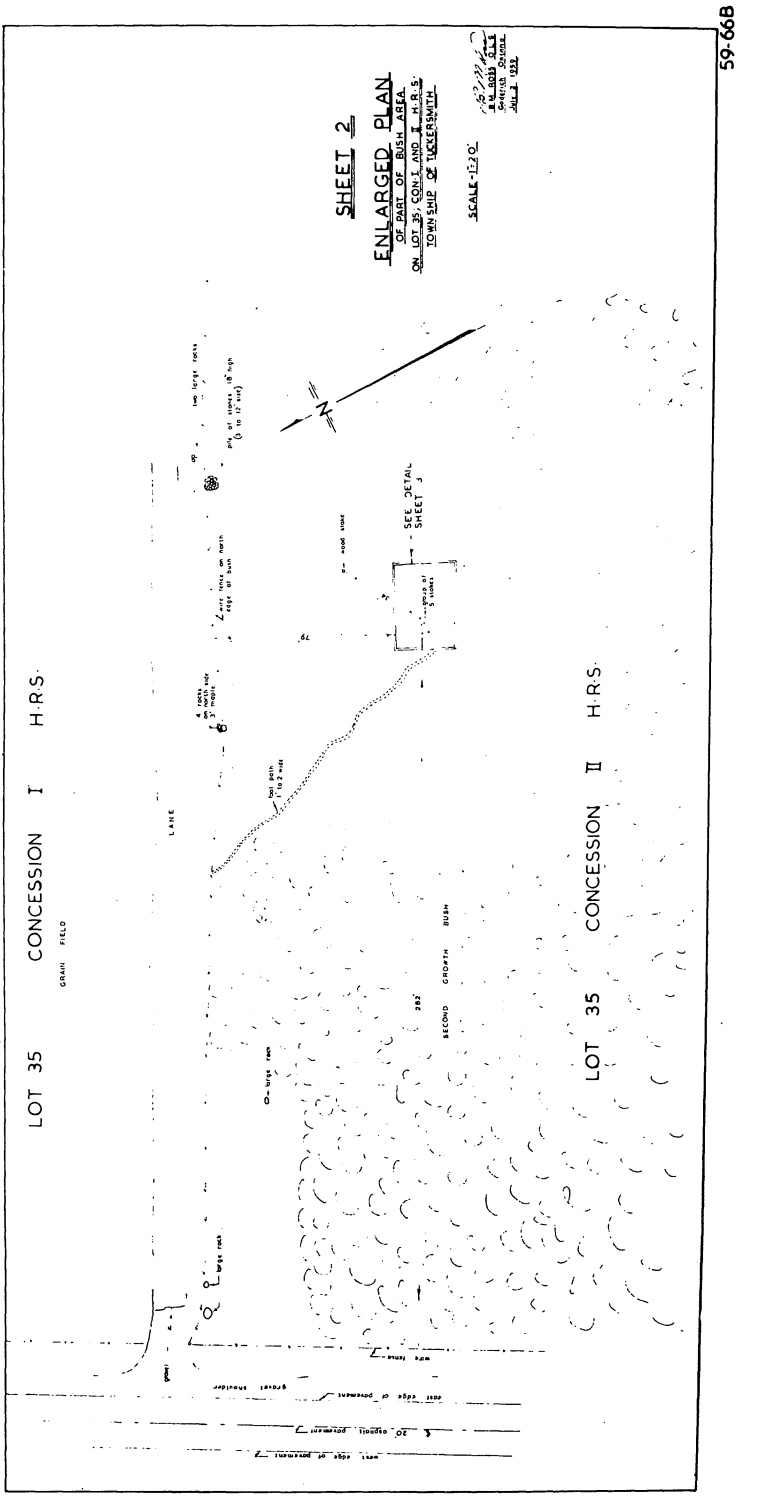
He then cited the evidence of three children who had seen him at the school yard, who described his appearance as "normal".

From time to time in the course of these reasons we have mentioned the fact that defence counsel took no objection to certain rulings made by the trial judge, certain evidence that was introduced to which objection is now taken and certain comments of the trial judge and Crown counsel made in the course of the proceedings. It should be clearly understood that it is not suggested that the failure of defence counsel to object to the admissibility of evidence or to any part of the trial judge's charge or to any comments by the judge or counsel in the course of the proceedings constitutes an answer to any valid objections now made to the conduct of the trial. The failure of defence counsel to make such objections is only mentioned in these reasons for the purpose of indicating that counsel who acted on Truscott's behalf do not appear to have attached any importance or validity to the objections in question.

*Answer to the question submitted on the Reference*

For all of the foregoing reasons our answer to the question submitted is that had an appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by section 597A of the *Criminal Code* of Canada, on the existing record and the further evidence this Court would have dismissed such an appeal.


TOWNSHIP OF HULLETT
KING'S HIGHWAY No. 8 (HURON ROAD)
TO CLINTON 10 MILES
TO STRATFORD
LOT 36
LOT 35
LOT 34
BAYFIELD
CANADIAN NATIONAL RAILWAY
CONCESSION I H.R.S.
RIVER
TUCKERSMITH
LINE BETWEEN CONS. I & II
SEE ENLARGEMENT SHEET 2
TOWNSHIP OF
CONCESSION II H.R.S.
LOT 36
LOT 35
LOT 34
N
O'BRIEN PROPERTY
ROBT. LAWSON PROPERTY
School
Playground
MARRIED QUARTERS
R.C.A.F. STATION CLINTON
LOT 35 CON I H.R.S.
TO CLINTON
KING'S HIGHWAY
TWP OF STANLEY
LOT 35 CON I H.R.S.
(LONDON ROAD)
SHEET 1
PLAN
OF PART OF THE TOWNSHIP OF TUCKERSMITH
COUNTY OF HURON
SCALE: 1"=300'


59-66B
SHEET 2
ENLARGED PLAN
OF PART OF BUSH AREA
ON LOT 35, CON. I AND II, H.R.S.
TOWNSHIP OF TUCKERSMITH
SCALE 1:20
LOT 35 CONCESSION I H.R.S.
LOT 35 CONCESSION II H.R.S.
GRAIN FIELD
LAKE
SEE DETAIL SHEET 3
BUSH
GROWTH
SECOND
N

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HALL J. (*dissenting*):—Steven Murray Truscott, then age 14½ years, was tried before the Honourable Mr. Justice Ferguson and a jury at Goderich in September 1959 on an indictment as follows:

> The Jurors for Our Lady The Queen present that Steven Murray Truscott on or about the 9th day of June, 1959, at the Township of Tuckersmith, in the County of Huron, did unlawfully murder Lynne Harper, contrary to The Criminal Code of Canada.

On the 30th day of September 1959 the jury returned a verdict of guilty with a recommendation for mercy. An appeal to the Court of Appeal for Ontario[1] by Steven Murray Truscott against his conviction was dismissed on the 21st day of January 1960. By Order-in-Council P.C., 1960-87, dated the 21st day of January 1960, the sentence of death passed upon Steven Murray Truscott upon his conviction on the indictment aforesaid was commuted to a term of life imprisonment in the Kingston Penitentiary. Application for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario was refused on the 24th day of February 1960.

Section 597A of the *Criminal Code* was enacted in 1961, providing as follows:

> 597A. Notwithstanding any other provision of this Act, a person
>
> (*a*) who has been sentenced to death and whose conviction is affirmed by the court of appeal, or
>
> (*b*) who is acquitted of an offence punishable by death and whose acquittal is set aside by the court of appeal,
>
> may appeal to the Supreme Court of Canada on any ground of law or fact or mixed law and fact. 1960-61, c. 44, s. 11.

By Order-in-Council P.C. 1966-760, dated the 26th day of April 1966, pursuant to s. 55 of the *Supreme Court Act*, His Excellency The Governor General referred to the Supreme Court of Canada for hearing and consideration the following question:

> Had an Appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by section 597A of the Criminal Code of Canada, what disposition would the Court have made of such an Appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?

[1] (1960), 32 C.R. 150, 126 C.C.C. 109.

When the application was made in February 1960 for leave to appeal to this Court from the Court of Appeal of Ontario, s. 597A had not yet been enacted. The application so made was under s. 597(1)(*b*) which provided that an appeal lay by leave to the Supreme Court on a question of law alone. The application then made was restricted to the following grounds:

1. Was there any evidence of such a character that the inference of guilt of the Appellant might, and could, legally and properly be drawn therefrom by the jury?
2. Was the Appellant deprived of a trial according to law by the remarks made by Crown Counsel in his opening to the jury?
3. Did the learned trial Judge err in allowing the Crown witnesses, Jocelyne Goddette, Anold George, and Tom Gillette to be sworn?
4. Did the learned trial Judge err in failing to properly define corroboration for the jury?
5. Did the learned trial Judge err in instructing the jury that certain unsworn witnesses were in fact corroborated?
6. Did the learned trial Judge err in his charge to the jury in regard to the doctrine of reasonable doubt?

On the reference in this Court, the substantial grounds upon which the trial and conviction were challenged were materially different from the foregoing although there were included some elements of the same grounds, but essentially this is a completely new procedure and the Court must now deal with law and fact and with questions of mixed law and fact. Much new evidence was heard in these proceedings under the authority of the Order-in-Council and the accused himself testified for the first time. He maintained his innocence as he had done since his conviction in 1959.

Having considered the case fully, I believe that the conviction should be quashed and a new trial directed. I take the view that the trial was not conducted according to law. Even the guiltiest criminal must be tried according to law. That does not mean that I consider Truscott guilty or innocent. The determination of guilt or innocence was a matter for the jury and for the jury alone as its dominant function following a trial conducted according to law.

The case against Truscott was predominantly but not exclusively one of circumstantial evidence. I recognize fully

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that guilt can be brought home to an accused by circumstantial evidence; that there are cases where the circumstances can be said to point inexorably to guilt more reliably than direct evidence; that direct evidence is subject to the everyday hazards of imperfect recognition or of imperfect memory or both. The circumstantial evidence case is built piece by piece until the final evidentiary structure completely entraps the prisoner in a situation from which he cannot escape. There may be missing from that structure a piece here and there and certain imperfections may be discernible, but the entrapping mesh taken as a whole must be continuous and consistent. The law does not require that the guilt of an accused be established to a demonstration but is satisfied when the evidence presented to the jury points conclusively to the accused as the perpetrator of the crime and excludes any reasonable hypothesis of innocence. The rules of evidence apply with equal force to proof by circumstantial evidence as to proof by direct evidence. The evidence in both instances must be equally credible, admissible and relevant.

Applying the foregoing to the trial under review, I find that there were grave errors in the trial brought about principally by Crown Counsel's method in trying to establish guilt and by the learned Trial Judge's failure to appreciate that the course being followed by the Crown would necessarily involve the jury being led away from an objective appraisal of the evidence for and against the prisoner. The Crown approached the prosecution on the theory or hypothesis that young Truscott had planned to take Jocelyne Goddette into Lawson's bush to have some improper relations with her and when she failed to show he was so intent on taking some girl to Lawson's bush that evening that when Lynne Harper came to him in the school yard he seized upon this accidental meeting to persuade her to go with him and to her death. This approach is borne out (1) by Crown Counsel's statement in his opening address to the jury as follows:

> I should deal with the accused, who is in the same grade, although older than the deceased girl, and at the same school. He was, at the time, and still is, the son of a Warrant Officer who also lives in the Married

Quarters on the Station. Now, in considering the movements of this accused relative to the crime, you will hear from one, who may be a very important witness in your estimation, Jocelyne Goddette. She is a girl from the same grade, and she will tell you of arrangements she made with Steven Truscott at school on the Monday and the Tuesday before, in or near this same bush where this body was found, to look for a certain purpose she will outline. You will hear that better from her lips as to their arrangement together to go to this bush, and that was at, let us say in the area of six o'clock, roughly. *You will hear better the times from her and certain things said by way of caution of bringing anyone or telling anyone.*

(The italics are mine.)

and (2) by the questions put to Jocelyne Goddette which stressed the secrecy of the original arrangement with Jocelyne for the two to meet at about six o'clock on the county road near the bush area. The evidence given by Jocelyne Goddette as to her arrangement to meet with Truscott was as follows:

Q. And on Monday, June 8th, Jocelyne, did you have a conversation with Steven Truscott?

A. Yes, sir.

Q. Will you tell what that conversation was, please?

A. Well, on Sunday, I had gone to Bob Lawson's barn and I had seen a calf there. I mentioned that to Steve on Monday, and he asked me if I wanted to see two more newborn calves . . . And I said: "Yes". And he asked me if I could make it on Monday and I said: "No", because I had to go to Guides.

MR. HAYS:

Q. Make what?

A. If I could go with him to see the calves and I said: "No".

Q. Where were you to go with him?

A. Well, he didn't tell me on Monday.

Q. Well, go ahead?

A. And then he asked me if I could make it on Tuesday and I said I would try. And then on Tuesday, he told me if I could go and I just told him I didn't know, and he said to meet him, if I could go, on the right-hand side of the County Road, just outside of the fence by the woods, *and he kept on telling me not to tell anybody because Bob didn't like a whole bunch of kids on his property.*

(The italics are mine.)

Q. Now, that is on Tuesday, June 9th, is it, that that conversation is, Jocelyne?

A. Yes, sir.

Q. And when were you to go?

A. Well, at six o'clock.

Q. On Tuesday?

A. Yes, sir.

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Q. And where—did you see Steven later after school?
A. Yes, sir. He came to my house at ten before six and I didn't answer the door, my brother did, and Steven asked me if we had any homework and I said we had English for our English test on Wednesday, and when he was just getting on his bike to go away, I told him I didn't think I would be able to make it because we were just starting supper, but that I would try.

This evidence was admissible and relevant to establish why Jocelyne said she was looking for Truscott that evening excepting possibly the words I have put in italics, but reading as it does the phrase was rather innocuous because it gives the reason for keeping quiet, and with nothing more the learned judge could have told the jury to ignore it. Even a failure to do this would not have been serious. However, after some intervening questions and answers the subject was deliberately reopened and the following question was put to Jocelyne by Crown Counsel and an answer solicited which emphasized the secret aspect of the proposed meeting of these two teen-agers:

Q. Was there any more conversation between you then, on Tuesday?
A. Well, he just kept on telling me to "don't tell anybody to come with you", and that is all.

and this was magnified by the learned judge who, following this question and answer, said:

HIS LORDSHIP:

Q. Say that again. He just kept on telling me what?
A. Not to tell anybody.

This was when the damage was done. These last two answers were wholly inadmissible. In dealing with this particular item, the majority opinion says:

The admonition to Jocelyne Goddette to keep the matter secret is no more a reflection on Truscott's character than the invitation itself. It is part and parcel of the same conversation and one part cannot be separated from the other. The jury is entitled to know what the whole conversation was and the witness when testifying to such a conversation should not be compelled to stop at a certain point.

That observation is only partly correct in that it is incomplete. It expresses the ordinary rule but that rule is subject to a number of exceptions. It is often the duty of counsel to forewarn a witness not to volunteer or blurt out as part of the narrative in an answer evidence that while part of that

narrative is inadmissible as, for instance, references to confessions or admissions made by an accused or evidence of bad character and many others. It is not a case of volunteering or blurting out that is being dealt with here but a conscious and deliberate drawing from the witness evidence that was bound to be prejudicial and as an integral part of establishing the Crown's theory that Truscott was planning harm to Jocelyne Goddette.

The evidence had no probative value to prove Truscott murdered Lynne Harper and should have been rejected when tendered by the rule which excludes evidence of similar acts which Viscount Sankey said in *Maxwell v. Director of Public Prosecutions*[1] was "one of the most deeply rooted and jealously guarded principles of our Criminal Law". Having thus laid this foundation, Crown Counsel elaborated the theory and put it forward as proof of Truscott's guilt in his summation to the jury saying:

> Now, there is substantial support for Jocelyne's evidence that she went looking for Steven, and support for her evidence of these conversations. She went on to tell how she couldn't go with him on Monday night. Well then, there was a tentative date for six o'clock on the Tuesday night. And that he, Steven, came to the house and called for her. He called there at ten minutes to six but she was having her supper, *and I suggest to you, Gentlemen, that if they were late having their supper, it was a God's blessing to that girl.*
>
> (The italics are mine.)
>
> * * *
>
> Here is the relevancy of that, Gentlemen. He missed his first prospect and what more logical and likely person to accept his proposal to go with him on short notice than a girl he knows is fond of him, soft on him, whatever you will, and likely to take up his invitation?
>
> Now, we are told—again we come back to Mrs. Nickerson and Mrs. Bohonus. They talked and she sat on the bicycle tire and they went—I suggest that they then went down to the bush. I suggest that is a reasonable inference, that Steven gave Lynne the new-born calf invitation that he had previously extended to Jocelyne, and that he gave her that, either at the school or as they rode—walked or rode, and if it wouldn't sound like a good proposition to an adult or to some girls, older girls, other girls, we must remember, it was coming from a boy that she liked. She was fond of. That she would want to be with. And, unfortunately, that may have removed what would otherwise be a little caution. And also, there was evidence that Lynne was interested in ponies, at least, and

[1] [1935] A.C. 309 at 317, 24 Cr. App. R. 170.

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had gone to this house on the highway, to see ponies. I don't think, Gentlemen, I am asking you to make too much of a deduction but what she would be very likely to fall for the lure of the new-born calves coming from Steven, *and that she went with him to the bush and to her doom.*

(The italics are mine.)

There was no evidence of the conversation between Truscott and Lynne in the school yard or as they left together excepting Truscott's statement to the police that Lynne had asked him for a ride to No. 8 Highway which from the nature of things was uncontradicted. There was no suggestion in the evidence of those who saw Truscott and Lynne together in the school yard from which it could be inferred that Truscott was trying to induce or persuade Lynne to go anywhere with him. Mrs. Bohonus said it was Lynne who appeared to her to be doing the talking.

The learned judge in his charge to the jury recognized the impropriety of this prejudicial and inflammatory appeal but too late to undo the harm as I shall discuss later. Notwithstanding what the learned judge said in this regard, it is significant to note that at pp. 54 and 55 of the Crown's factum on this reference is to be found:

> It is submitted that the following inference may be properly drawn from the evidence adduced at the trial and from that evidence supplemented by the evidence on the Reference:
>
> (1) *Truscott was bent on taking a girl into Lawson's Wood on June 9th.* His expressed purpose was to look for new-born calves, but this was coloured by his desire for secrecy;

(The italics are mine.)

The majority opinion also says:

> We do not think that any of this conversation between Truscott and Jocelyne Goddette was any reflection on Truscott's character. To put it at its worst for Truscott it means no more than this: that he had a tentative date arranged with Jocelyne Goddette. He wanted a date with a girl that night and he took Lynne Harper when Jocelyne Goddette was not available. We have already mentioned that this has some bearing on the submission of the prosecution that his story of the ride, the sole purpose of which was to take her to the intersection, may not have been true. It does not amount to trying to prove bad character or a disposition to murder and rape.

This appears to ignore the reality of the situation when considered in the actual setting as it was being developed at the trial by Crown Counsel and entirely repugnant to what Crown Counsel said in the extracts from his summation to

the jury quoted above when he said, referring to Truscott having called for Jocelyne Goddette *"and I suggest to you, Gentlemen, that if they were late having their supper, it was a God's blessing to that girl"*, and when he followed that with his reference to Lynne Harper and said that Truscott gave Lynne the new-born calf invitation and *"that she went with him to the bush and to her doom"*.

The majority opinion rightly points out that the facts in *Maxwell v. Director of Public Prosecutions* differ materially from those of the case at bar. It was not the factual situation that Viscount Sankey was dealing with in the extract that I have quoted. He was stating a long established principle applicable to many factual situations. *Maxwell*'s case was an obvious if not a flagrant violation of the principle. Violations can and do occur in less obvious instances. The present case is one of those. Crown Counsel was pursuing a planned course of action that included the subtle perverting of the jury to the idea that Truscott was sex hungry that Tuesday evening and determined to have a girl in Lawson's bush to satisfy his desires, if not Jocelyne, then Lynne.

It was inevitable that this horrible crime would arouse the indignation of the whole community. It was inevitable too that suspicion should fall on Truscott, the last person known to have been seen with Lynne in the general vicinity of the place where her body was found. The law has formulated certain principles and safeguards to be applied in the trial of a person accused of a crime and has throughout the centuries insisted on these principles and safeguards being observed. In the great majority of cases adherence to these fundamentals is not difficult but in a case like the present one, when passions are aroused and the Court is dealing with a crime which cries out for vengeance, then comes the time of testing. It is especially at such a time that the judicial machinery must function objectively, devoid of inflammatory appeals, with the scales of justice held in balance.

This standard was not lived up to in the trial under review in a number of instances which one by one were

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damaging to Truscott and taken collectively vitiated the trial. Nothing that transpired on the hearing in this Court or any evidence tendered here can be used to give validity to what was an invalid trial. A bad trial remains a bad trial. The only remedy for a bad trial is a new trial. Accordingly, the validity of the trial is, in my view, the dominant issue. With deference to contrary opinion, I see no purpose in erecting a massive and detailed structure of evidence, inference and argument confirming a verdict that has no lawful foundation upon which to rest.

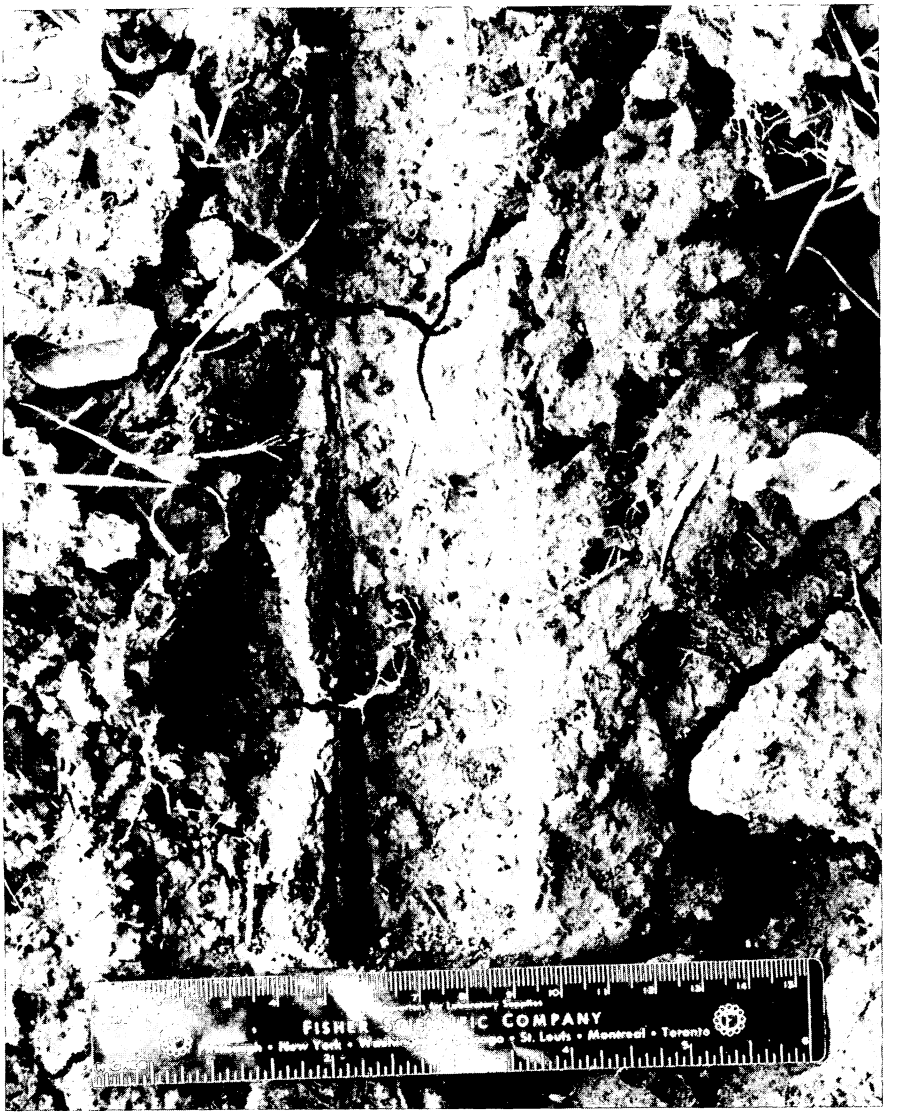
It was the Crown's theory at the trial that Truscott took Lynne into Lawson's bush by way of the tractor trail, having carried her on the handle bar of his bicycle to a point on the tractor trail some 350 feet east of the county road and then induced her to enter the bush through the fence, concealing his bicycle nearby. It must be observed in passing that at the hearing in this Court Mr. Bowman, of Counsel for the Crown, advanced the theory that Truscott took Lynne into the bush from the county road at or near the point where the locket was later found hanging on the fence. Crown Counsel at the trial had an altogether different theory which he put forward concerning this locket —but I shall revert to this later.

At the trial the Crown led evidence to show that Truscott entered the tractor trail with Lynne. This was evidence by Corporal Erskine, the very first witness called by the Crown, that on the 13th day of June (two days after Lynne's body was found) he observed and photographed certain bicycle tire marks which corresponded with the tread on the tires of Truscott's bicycle. Defence Counsel objected to the photograph (Exhibit 13) being received, but was overruled by the learned judge who said regarding the photograph:

> Mr. Hays seems to think it has something to do with the case. I don't think I can rule it out on the grounds you put forward.

This Exhibit 13 shows conclusively that the tire marks photographed by Corporal Erskine must have been made many days preceding June 9th. The marks were made when

the soil in which they were imprinted was wet and there had been no rain in the area, with the exception of a trace in the night of May 31st-June 1st and that throughout the period June 1st to June 9th the temperature had been in the high 80's and low 90's. Perhaps the best way to illustrate the impossibility of these tire marks having been made on June 9th is to reproduce Exhibit 13 showing the parched terrain with the wide cracks in the surface. Here is a reproduction of Exhibit 13:



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Notwithstanding that the evidence completely negatived the use of these tire marks as evidence implicating Truscott on June 9th, Crown Counsel argued to the jury in his summation as follows:

> The bicycle marks, Gentlemen, I am not going to linger over. Corporal Erskine's evidence that he found tire marks, combinations of the two wheels, but they are in as Exhibits. You will have them with you. That he made comparison and that he found those marks in the laneway and you will remember the distance down. I, frankly, don't. That they compare. That they are a combination. Now it is true there could be similar tires, certainly, but where you get radically different tires—you look at them and you will find them in combination, it would seem to be fairly strong evidence that that bicycle was down there.
>
> But, Gentlemen, as I said about a circumstantial evidence case, that is the beauty—there is nothing beautiful about this at all, but that is one of the strong facts about it. You have a pile of facts and if there is one or two that are not conclusive you still, you still have the conclusive proof of the facts that are there.

The learned judge should have charged the jury in the light of the evidence of the meteorologist Calvert and with Exhibit 13 before him that they must exclude from their consideration the evidence relating to these bicycle tire marks. This he failed to do, but instead, and in my opinion wrongly, left the jury to understand that they could use that evidence as part of the proof against Truscott that he had ridden Lynne along that tractor trail the night she disappeared. He said:

> Nothing belonging to the accused boy was found in the locality, in the neighbourhood of the body, as you will recall. There was a tire mark in the field about seventeen feet north of the fence that ran along this lane, and Constable Erskine, who testified, said that the marks of the tire were similar, I think that is as high as he put it, were similar to the tires that were put in evidence of the bicycle belonging to the accused boy, and you are asked to find that those marks were made by this bicycle. That is what the Crown asks you to find. *The bicycle is not a common one.*

(The italics are mine.)

That was misdirection on a salient feature of the evidence for it was part and parcel of the Crown's case at the trial that Truscott took Lynne into the bush from the tractor trail and that he had hidden his bicycle so well that it was not seen by Jocelyne Goddette when, as she says, she went along the tractor trail looking for Truscott and calling his name. This presupposes that Truscott had the foresight to anticipate that Jocelyne would come along the tractor trail looking for him and to conceal his bicycle against that

eventuality; a theory that attributed to Truscott a carefully planned design to harm Lynne and escape detection.

The majority opinion, in dealing with the matter of the bicycle tire marks, says: "We do not think that anyone took this evidence (the tire marks) as a salient feature of the case." I find it difficult to see how this statement can be substantiated. Who knows what the jury considered salient? This evidence was regarded as sufficiently important by Crown Counsel as to insist that it be received.

I referred earlier to Mr. Bowman's theory that Truscott took Lynne into the bush from the county road at or near the place where Lynne's locket was found on the fence. In his argument to this Court, Mr. Bowman said:

> My submission was, my lord, that they disappeared from the county road, and my submission was that it might be reasonably inferred that they went into the wood, and that they got into the wood through the barbed wire along the county road. It was broken down in two or three places, and the locket was found there, which could have some significance. They could have gone in any where, my lord, but I submit that there is one possible way. Whether or not that is what the jury accepted I cannot say.

However, at the trial, in dealing with this locket, Crown Counsel put forward a more sinister theory which, if accepted by the jury as Crown Counsel intended it should be, made the 14½ year old Truscott out to be a cunning criminal who, having taken the locket from Lynne when he strangled her, *later and before he was taken into custody planted the locket where it was found to mislead the police* and to lay the foundation for a defence to be used later if necessary that Lynne was murdered elsewhere and then brought to where she was found. He said to the jury:

> Now, the Defence has raised the matter of a locket. And do you recall Steven's statement to Constable Hobbs and Corporal Wheelhouse—maybe it is Sergeant Wheelhouse on Thursday. He was interviewed by Hobbs and another officer, Johnson, I believe on Wednesday. And then when Hobbs went back on the Thursday, he said: "Have you anything to add?" "Yes, she was wearing a necklace like a gold chain and heart, possibly plastic." I am not sure whether one or the other officer put in the word "Plastic".
>
> "With an Air Force Crest embedded in it." Mark you, not on it, but in it, and sure enough, it is in it, not on it, but in it.
>
> Now, I ask you, Gentlemen, is that not an awful lot of details for this boy to have observed about this locket, if it is Lynne's, as he would ride along the road with her. Would he be able to give such a minute description of it as that, if that is all the chance he had to observe it? Now, Gentlemen, the Defence introduced this matter of the locket on the basis that it was found on the west—on a wire of the fence on the west

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side of the bush along the County Road. And the theory is, I take it, from what my learned friend said yesterday, that in some way she was murdered elsewhere, brought back and dragged through the fence and this pulled off and stuck on the fence.

* * *

I have a theory, Gentlemen, to put forward only for your consideration, and that is this: that her attacker removed that locket, undid the fastener when the girl was dead, and he couldn't have got it off any other way, it is just too small to go over her head. And he took it off and took it with him and studied the detail after that he could never have studied in the interval of time that she was on the bicycle, to have found that that crest was embedded in the locket. It is only theory, Gentlemen. Reason it out for yourselves. And then if you deduce it that way, ask yourselves the possible identity of anyone who would take a souvenir away from a body like this. Who would want to take it away? Would it be someone rather young? Would an older man ever be bothered with it? You may have difficulty reasoning out the "why". But ask yourselves this, if it were taken, studied out so that these details could be given, *could it have been taken back and planted, so to speak, where it was found?* And what is the point of that? Remember, there is Wednesday, Thursday, Friday, before the accused is arrested, but the investigation is on.

(The italics are mine.)

The learned judge permitted Crown Counsel to so theorize to the jury without one iota of evidence to support the theory that Truscott under suspicion as he then was had the cunning to *plant* the locket where it was found—a theory that was prejudicial and inflammatory. This was error in a material aspect.

Now, what was the evidence regarding this locket? First, it was not actually identified as the one Lynne was wearing on June 9th. Lynne's father, F/O L. B. Harper, refused to say the locket produced in Court was Lynne's, saying only that Lynne had one similar to it. Mrs. Harper said she did not know whether Lynne was wearing her locket or not that evening and when shown the locket she said, "I couldn't say certainly. It looks like it. It was very similar." The locket produced in evidence was said to have been found by a ten year old girl, Sandra Archibald. Her unsworn evidence was as follows:

Q. Sandra, when you were out picking berries, did you find something valuable?

A. Yes.

Q. Where did you find it, Sandra?

A. I found it near the woods where Lynne was found.

Q. Could you say just where it was?

A. I can't remember.

Q. What did you find, Sandra?
A. I found a locket, like a necklace.
Q. Pardon?
A. I found a heart-shaped necklace.
Q. A heart-shaped necklace?
A. Yes.
Q. Could you describe it? Tell us about it a little more?
A. It was whitish and had this Air Force thing inside, and when I found it, it was open.
Q. What was open, Sandra?
A. The chain that you put around your neck.
Q. And where was it, Sandra?
A. Well, the chain, it was hanging on the fence and it was inside, in some grass and the heart was outside.

Her evidence as to finding the locket was not corroborated. Having found it, she said she took it home and gave it to her mother the same day. The mother, Mrs. Aida Archibald, testified as follows:

Q. Are you the mother of Sandra Archibald, who testified here yesterday, Mrs. Archibald?
A. Yes sir.
Q. And I produce to you a locket which is Exhibit twenty-three in this matter. Would you look at it, Mrs. Archibald. Did that come into your possession at any time?
A. Yes sir.
Q. At what time?
A. Around ten to five on June the 19th.
Q. From what source?
A. From my daughter. She picked it up.
Q. That is Sandra, who testified?
A. Yes sir.
Q. And what did you do with it?
A. Well, at the time I didn't know what to do.
Q. What did you do?
A. And some of the kids...
Q. Never mind what anybody said. What did you do?
A. I turned it over to two S.P.'s.
Q. Who was that?
A. Sergeant Johnson and Mr. Wheelhouse.
Q. At the time your girl gave it to you, was the clasp open or closed?
A. It was open, sir.
Q. When you turned it over it was in the way you got it?
A. I put it in a Kleenex, sir.

Truscott had told Constable Hobbs on June 11th that Lynne was wearing a gold chain necklace with an R.C.A.F. crest in it when giving the ride to Lynne on his bicycle. It was from this evidence that Crown Counsel was permitted

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to dramatize the locket incident into a formal submission that it was *planted* where it was found by Truscott to mislead the police.

It was not the only fanciful theory put forward by the Crown to the jury to prejudice Truscott without any supporting evidence. Evidence was led that Truscott told police officers Wheelhouse and Hobbs on the Thursday that he had seen an old model Dodge or Plymouth car somewhere on the county road on the evening of June 9th bearing Licence No. 981,666. The Crown called a witness from the Department of Transport, one Saunders, to show that Licence No. 981,666 was registered to one Thompson of Brampton. Thompson, on being called, said he was not near Clinton at all that evening. Saunders testified that Licence No. 189,666 was registered to one Vasil of Toronto and was for a 1957 Pontiac four door; that Licence No. 198,666 was issued to one Mika of Scarborough for a 1955 Buick; No. 819,666 was in the name of McLaren of Drumbo and was for a 1957 Oldsmobile hard top. Then as to No. 918,666 registered to a Miss Wilkins of Kitchener for a 1949 Plymouth, Miss Wilkins was called and said her car was never out of the Kitchener area; finally as to No. 891,666, a Mr. Pigun then on the R.C.A.F. Station at Clinton was called to establish that his car, a 1949 Chevrolet Sedan, was not on the county road on the evening of June 10th. Now all this evidence was, in my opinion, inadmissible. Truscott had not volunteered having seen a car with Licence No. 981,666 in proof of having taken Lynne to No. Eight Highway. He does not suggest that he met that car north of the tractor trail. His statement in this regard as given by Constable Hobbs is as follows:

> Q. What was the next you saw of Steven Truscott?
>
> A. I next saw Steven Truscott at the school at the R.C.A.F. Station, Clinton. It was the following morning, Thurdsay, June the 11th, 1959. I was accompanied by Sergeant Wheelhouse of the R.C.A.F. Police. We went into the school and inquired of Mr. Trott, the teacher, if we could have a room in which to question various children regarding the missing girl, with hopes of finding some information as to where she might be. I started off by having Steven brought into the room and I asked him if there was anything further he could add to our conversation of the date previous. He said: "Yes, she was wearing a gold chain necklace that had a heart with an R.C.A.F. crest in it." I asked him if he had seen anyone else while he was giving the ride to Lynne on his bicycle. *He replied that he had seen Richard Gellatly. I asked him*

> *if he saw any other vehicles, motorcycles or motorcars during this ride. He replied that he had seen an old grey Plymouth or Dodge.* I asked him if he could remember the occupants. He said: "A man and a lady." I said: "By any chance, Steven, can you remember the licence number of the car?" He said: 'Yes, it was 8 . . ." pardon me. "It was 981 666." I asked him if he saw anyone else. He replied that on the way down he had waved to Arnold George, who was swimming in the river. I asked him again to repeat the licence of this old grey Plymouth or Dodge and he did, without hesitation. He said: "981,666." I asked him what he did after watching the others swimming at the river. He replied that he cycled back up the County Road. I asked him a third time to repeat the number of this motorcar, this old grey Plymouth or Dodge, and without hesitation again, he gave me the number 981,666. Our conversation ended and I went to a telephone to get a registration check on this licence number.

(The italics are mine.)

The majority opinion says in connection with this item: "In our view, this was not a collateral matter. It was strictly relevant to the fact in issue—whether Truscott was on the road (the County road) when he said he was." The fact is Truscott never suggested that he was not on the County road. He told police he carried Lynne northward on that road and on the Crown's theory he carried her 3,366 feet before he reached the tractor trail—well over half a mile. It was at this time that he met Richard Gellatly and on being further questioned told of having seen the car with Licence No. 981666. No suggestion here that he was saying he saw that car north of the tractor trail. If there is one fact upon which Crown and Defence and all Counsel were in agreement it is that Truscott carried Lynne on his bicycle from the south end of the County road to a point at least as far north as Lawson's bush. The statement regarding this car was accordingly a collateral matter. Evidence in contradiction of it was therefore inadmissible; it was tendered as Crown Counsel said:

> Now, this is only on the question of credibility. There is nothing in the main theory of this case that bears on that car, as far as I know. But again, if a man, or a young man, is telling falsehoods, *I put it forward as indicative of a guilty state of mind.*

But even more improperly it was argued by Crown Counsel that it was additional evidence of Truscott's cunning. He put it to the jury this way:

> 891,666 a 1949 grey Chevrolet registered to Mr. Pigeon. Now, we called Mr. Pigeon. He is with the R.C.A.F. Station at Clinton. We called him and he testified how on the night in question he went down from his

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garden on Number Four Highway, south to Brucefield going out, not by the east side—not by the County Road at all, but down through what is described as the main gate. I don't say he used that expression. You will be able to figure it out from the map. He never was near where Truscott put him, *and I suggest, Gentlemen, with respect, that Steven Truscott had seen that car around in the interval between the Tuesday and the Police coming to him, and he was getting some ammunition ready and he snapped out a number on the gamble that that car might have been on the County Road.* He got one digit off on the number. He got a shade off on the make. It is a Chev. against a Plymouth or Dodge. He had the grey right. But it misfired because we were able to bring before you Mr. Pigeon, and he never was on the County Road that night, and he related his movements.

(The italics are mine.)

The learned judge admitted this evidence and this was error. The error was compounded and the real damage done when he permitted Crown Counsel to make the charge of fabricating evidence without stopping him then and there. Without this unsupported suggestion, the calling of seven witnesses on this aspect of the case alone would have been nothing more than a waste of time, but all this time was used so Crown Counsel could put to the jury the idea that Truscott had fabricated the story in preparation for his defence. One may question in this connection why the evidence was limited to a transposition of the first three ciphers only. If one of the 6's be transposed with the figure 1 the number of possibilities is greatly increased.

The learned judge showed that he was well aware that the case was one where the jury might be influenced by the nature of the crime for he warned them at the beginning of his charge as follows:

> There is another matter I should like to mention to you. The circumstances of the killing of this little girl are shocking. As I said, they are revolting in the extreme, and one would think that only a monster could be guilty of such a killing. The accused is charged with this monstrous crime and he is just a lad of little more than fourteen years, fourteen and a half. Now, you must not permit the fact of his youth in any way to prevent you from bringing in a verdict in accordance with your conscience. Nor, on the other hand ought you to allow the revolting nature of the facts surrounding this case in any way influence you to bring in a verdict which is, in any way, shape or form, contrary to the evidence, or based on anything but the evidence. You must not be prejudiced in any way.

But that warning came too late. It was nullified in advance by the manner in which the Crown had elected to build its case and by the judge's failure to exclude the evidence with

which I have dealt and by his failure to stop Crown Counsel when in his speech to the jury he advanced subtly worded inflammatory arguments which should have been repudiated on the spot. Only in respect of the reference to Jocelyne Goddette did the judge tell the jury to disregard what Mr. Hays had said and in this particular instance the warning came much too late. It was not possible in my opinion to undo the damage done by this belated direction. There are instances where a trial judge may, by directing the jury to purge from their minds evidence which should not have been heard or to completely ignore erroneous statements or arguments made to them, enable a Court of Appeal to say under s. 592(*b*)(iii) that no substantial wrong or miscarriage of justice has occurred, but the present case is not one of those. The errors and inflammatory arguments were too numerous and too integrated into the whole of the case as to be capable of coming within the exception provided for by that section.

The evidence was as conclusive as evidence can be that Lynne was strangled and raped. It was argued on behalf of Truscott both at the trial and before this Court that Lynne was not murdered where her body was found. I do not find it necessary to go into this phase of the case in detail because, in my view, the evidence was such that the jury, if the issue had been properly left to them, could find that she was murdered at the place where her body was found. I will deal later with this aspect of the charge.

More important, however, in so far as Truscott is concerned is the submission that the evidence failed to establish that her death occurred prior to 7.45 p.m. on June 9th. If she was murdered later than this time, Truscott could not be the guilty person. It is as simple as that.

The argument that death was later than 7.45 p.m. June 9th was stressed by Defence Counsel at the trial. Both the Crown and the Defence went fully into the medical aspects of this issue before the jury.

In summary, at the trial Dr. Penistan the pathologist had testified that in his judgment death had occurred in the period between 5.45 and 7.45 p.m. June 9th, basing his opinion on the fact that Lynne had finished her supper at a quarter to six and that when the autopsy was performed, it

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was found that the stomach had not emptied as it would normally have done within two hours. Another medical man, Dr. Berkley Brown, a specialist in internal medicine on the staff of the University of Western Ontario, called on behalf of Truscott, testified that the stomach would not empty for a matter of three and a half to four hours. Here was a conflict on a decisive aspect of the case which the jury would have to resolve. The learned judge charged the jury as follows:

> According to Doctor Penistan, and to the medical evidence, she died at a time which is not altogether, in any view, inconsistent with her having finished her dinner at about a quarter to six. Doctor Brown says, and I must draw it to your attention, that it takes three and a half to four hours to empty the stomach and it is on the basis of that that the defence asks you to say that she could not have been killed before Steven returned at 8:00 p.m. You have Doctor Brown's testimony. It is unfortunate always, that medical men should disagree on what is more or less a scientific point. Doctor Brown says three and a half hours to four hours.
>
> Now, the stomach, of course, was not empty. Doctor Penistan said there was still a pint of food in the stomach and he removed that pint. It is true there is not a pint of food in the bottle now, and it is for you Gentlemen to accept or reject Doctor Penistan's evidence that he took a pint out, but Doctor Brooks was there and saw the pint. Don't forget that the bottle went to the Attorney-General's Laboratories, for tests and we don't know exactly what happened to it there except it was handed to some man whom we have not seen. *It will be for you to say whether you accept Doctor Penistan's theory, an Attorney-General's Pathologist of many years' standing, or do you accept Doctor Brown's evidence.*

(The italics are mine.)

The last sentence was clearly a misdirection to the jury. The jury should have been told that as between Dr. Penistan and Dr. Brown, if the evidence of Dr. Brown left a reasonable doubt in their minds as to the time of death, they must acquit. No jury can be told that they have to accept the evidence of one witness or that of another. The burden is on the Crown to satisfy the jury on every material aspect of the case beyond a reasonable doubt. I do not find it necessary to go in detail into the medical evidence given on the reference in this Court. This has been done in the majority opinion and is seen to be contradictory in the extreme. This much must, however, be said that it tends strongly to increase the doubt a juryman may honestly have had as to the time of death, if properly charged.

The medical evidence tendered in this Court and not heard by the jury cannot be used to nullify the damage

done by this misdirection. The jury should have been properly charged. This Court cannot substitute its view of the medical evidence for that of the jury.

There is, however, one aspect in particular of the medical evidence heard in this Court that has an important bearing on the case. It is the evidence relating to the penile lesions. At the trial the Crown, on the evidence then before the Court, argued that the sores on Truscott's penis as described by Drs. Addison and Brooks had been caused by rape or forced intercourse. That was the theory of the Crown and the case went to the jury on this hypothesis. As such, it was, I think, the most damaging piece of evidence at the trial connecting Truscott with Lynne's death. The point was stressed by Crown Counsel. He said in part:

> Now, Gentlemen, Doctor Addison is a General Practitioner in the Town of Clinton, and has been for many years. You heard his background, his qualifications, and I suggest to you, one and all, that Doctor Addison comes into this case with no axe to grind and is worthy of credence. That Doctor Addison was an impressive witness, that is for you, Gentlemen. You saw him and heard him. Now, Doctor Addison would know all about, from his years and years of general practising, know all about the shape and nature and so on, of the private parts, both of a man and of a twelve-year old girl. And Doctor Brooks would know the same thing, and both those men pledged their opinion in that box, that the injuries to the accused's private parts were such as could have been caused by penetration of a young twelve-year old girl's private parts, and they went further, that observing these wounds, they would give their opinion they were from two to three days old.
>
> * * *
>
> Gentlemen, that is right in Doctor Addison's line and right in Doctor Brooks' line, and they gave that time as being two, three, four days, which would bring it right to the indecent assault on this girl, within latitudes, but you didn't get any help from Doctor Brown. To my best recollection of his evidence, he never talked about that at all. He couldn't. He didn't see them. If you received his evidence differently, use it. But I just submit, in short, that Doctor Brown's evidence in the abstract, we might call it, no matter how well intentioned, just can't, I respectfully suggest, throw any shadow of doubt on the opinions of Doctor Addison and Doctor Brooks as to cause and time that I have gone over.

The medical evidence given in this Court greatly negatived this theory although it was said that having sores of the kind described, they could be aggravated or rubbed by intercourse or by some other cause. There is a great difference in the two positions. The possibility of aggravation of an existing condition by one of two or more causes is altogether different from the assertion that the sores were

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initially caused by raping the girl. This becomes of greater significance when the admissibility of Dr. Brooks' evidence at the trial is considered.

Particular stress was placed on Dr. Brooks' evidence that in his opinion the sores on Truscott's penis indicated "a very inexpert attempt at penetration". Dr. Brooks' evidence on this point was inadmissible. He was testifying as an expert as to a matter that was not in his special knowledge and the evidence was prejudicial to the prisoner. The majority opinion deals generally with the admissibility of Dr. Brooks' evidence. The only part which I consider inadmissible is the phrase just quoted.

In *Regina v. Kuzmack*[1], the right of a medical witness to testify as an expert, was dealt with by Porter J.A. as follows:

> When the doctor gave his evidence before the jury he was called as an expert to give his opinion as to the cause of death. Such an opinion is admissible when, but only when, the subject on which the witness is testifying is one upon which competency to form an opinion can only be acquired by a course of special study or experience. It is upon such a subject and such a subject only that the testimony is admissible. In the testimony of the doctor in this case, having described the wound in the neck, he went on to discuss two small cuts on the hand of the deceased, stating that they had been caused by a sharp instrument and could have been caused by the knife.
>
> "Q. Those cuts on the right hand, on the fingers, did they have any particular significance to you? A. The only thing I can say is to point out that when the hand was put up to the neck the wounds in the fingers were in the same direction as the wound in the neck. Q. And what is your conclusion from that? A. I would say that they could have occurred at the same time. Q. In what manner? A. I should think that the hand was at the base of the neck when the knife was put into the neck."
>
> The latter conclusion was quite incompetent for the doctor to give as an expert because it was merely conjecture and not on a subject requiring any special study or experience. It was a mere guess which anyone might have made. Yet it was given to a body of laymen by a doctor with the weight that ordinarily attaches to an opinion expressed by a professional man, and a doctor in particular.

There were references to another piece of evidence which, in my judgment, were very prejudicial to the prisoner. They are the references to the male sperm said to have been found on the underpants Truscott was wearing on the Friday night when he was arrested. Crown Counsel invited the jury to speculate from the dirty appearance of the

[1] (1954), 110 C.C.C. 338 at 349-50, 20 C.R. 365.

garment that the undershorts in question were those Truscott had been wearing when he assaulted Lynne. Here is how he put it:

> My suggestion to you, Gentlemen, is that these are the underwear he was wearing, whether he took them off temporarily or not at the time of the indecent assault on the girl, and he did get this sperm at that time. You are just as capable as I on reasoning that out, and I would be less than fair to you if I said or left you with the impression that you had nothing to go on. I tell you what I think you can go on. You can forget the evidence of bowel movement. You can overlook that when you get the garment out, and you can look at the rest of the underwear, and you can figure, as I suggest to you, that it was worn a long time, and that is about all I can be of assistance to you, in this respect. Forget the fecal matter and just look at the other, and I think you will arrive at the conclusion—I suggest you will arrive at the conclusion he had it on for a good many days, and that you may be able to make the deduction that that is what he was wearing. As I say, whether he had it off temporarily, or not, at the time of the actual attack, and that the sperm is from the attack on the girl.

In his charge to the jury, the learned judge said:

> It is said that the soiled underpants are consistent with innocence. You will recall the underpants that were taken off the boy at the jail were fouled as well as soiled. You need not pay any attention to the fouling. Mr. Brown, who examined them in the laboratory, said that they showed evidence of blood inside and out. Inside and out. There were minute quantities, but particularly around the fly.

After the judge had finished his charge, Crown Counsel, amongst other things, in discussing objections to the charge, said:

> And the other thing, My Lord, in your reference to the shorts at the jail, the Crown does attach great significance to the finding of male sperm on those shorts. Your Lordship mentioned blood. Your Lordship did not make reference...

and on recalling the jury, the learned judge said in part:

> Then, of course, the Crown relies very much on the fact that male sperm was found on the dirty underpants. That is consistent with an act of sexual intercourse, but of course, it is by no means conclusive that it is the result of sexual intercourse at all or sexual intercourse with this girl. It could be the result of other things, you know, but it is a circumstance which is not inconsistent. *It is consistent with an attack on this girl.*

(The italics are mine.)

All this might have been unobjectionable if there had been evidence upon which the jury could have found that the underpants in question had been those actually worn by Truscott on the evening of June 9th. But there was no evidence to that effect. The point was conceded in the

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argument before this Court. That being so, the references by Crown Counsel and particularly what the learned judge said were prejudicial in the extreme based as they were on something that was not in evidence at all. Those underpants should never have been marked as an exhibit or shown to the jury. In any event, if reference could have been made to these underpants, then it was incumbent upon the learned judge to put to the jury the defence which had been urged by Truscott's counsel that the medical evidence established that male sperm had a very short life. That sperm ejected on the Tuesday would have been dead and not identifiable as such long before Friday night in the circumstances of the heat and filthy condition as testified to. This he did not do.

A great deal of discussion took place regarding the evidence of the children who testified at the trial, some under oath, some not. I do not find any error in this regard. The learned judge exercised the discretion he had and in my view that discretion ought not to be interfered with. He charged the jury correctly that the unsworn testimony had to be corroborated before it could be acted upon. His charge on the subject of corroboration was correct. I must, however, refer specifically to the manner in which he dealt with the evidence of Philip Burns who had not been sworn. In instructing the jury, he referred to this witness and said correctly:

> Now the first is that Philip Burns was, of course, not sworn, and he said he didn't see Lynne and Steve on the road as he went north, and no one corroborates him in that respect, so that his evidence is worthless so far as you can use it in convicting the accused boy.

However, when the jury was recalled a few minutes later for more instructions, he said concerning this same witness:

> Then you, of course, won't forget Philip Burns' evidence that he left the river around between seven to seven-ten or thereabouts, seven-fifteen, and walked up the road and saw nothing of Steve and Lynne as he went up the road. That evidence was given, as I told you before, without Philip Burns being sworn.

How can one evaluate the effect on the jury of this contradictory instruction?

Nor was this the only instance of contradictory and confusing instructions. The conflict between the evidence for the Crown on the one hand pointing to Truscott having

taken Lynne into the bush by way of the tractor trail and the evidence for the Defence that he had continued northward across the bridge with Lynne on the handlebar of his bicycle was, as stated in the majority opinion, the most vital issue in the case and it was one entirely for the jury. The learned judge in his charge put the issue to the jury as follows:

> Now then, it is the theory of the Defence, and they brought evidence to show that, as I say, this little Douglas Oats saw them going across the bridge and then, in a few minutes, according to the boy by the name of Gordon Logan—Gordon Logan also says he saw them going north on the bridge and in about five minutes he says he saw Steven return alone. Well, as regards Gordon Logan, it will be for you Gentlemen to say whether you believe his evidence, and it is very important, Gentlemen, because if you believe the Defence theory of this matter and believe Steven's statement to the Police and to other people, that the girl was driven to Number Eight Highway and entered an automobile which went east; it is my view that you must acquit the boy if you believe that story.
>
> In other words, I will put it this way. In order to convict this boy, you have to completely reject that story as having no truth in it, as not being true. You have to completely reject that story.

The concluding sentence of the first paragraph of the above was clearly misdirection. The second paragraph was a proper charge and put the accused's case favourably to the jury, but what did it convey to the jury when he equated the error with the correction by introducing the latter with *"In other words"*? A judge may state a proposition incorrectly and effectively correct the mistake but he does not do it by equating two divergent propositions.

Additionally, real and irreparable harm was done to the accused on this vital issue when the jury, having asked for a redirection as follows:

> FOREMAN OF THE JURY:
>
> A redirection of evidence, corroborated or otherwise, of Lynne Harper and Steven Truscott being seen together on the bridge on the night of June the 9th.

the learned judge, after reviewing the evidence in some detail, said:

> That is the evidence with respect to him being on the bridge, the two of them being on the bridge together, the only evidence. They were there in the neighbourhood of seven twenty-five or seven-thirty, but as I pointed out to you, you must reject the story that he went to Number Eight and the girl got in a car there, you must reject that story to convict him. If you find that although he went to Number Eight Highway with the girl and he brought her back again—and she was back, somebody brought her back—you will have to find he did bring her back again—then

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the going back and forth across the bridge is of very little importance—very little importance, because the question is, did he kill her? That is the point in this case. If there is any other help I can give you, don't hesitate to ask me, Gentlemen, but that is all I can say about it now.

and still later when the jury was recalled a fourth time:

HIS LORDSHIP:

Bring the Jury back, please.

...Jury returned.

HIS LORDSHIP:

I dislike having to bring you back so often and interrupt your deliberations, but I do it only at the request of Counsel.

I told you when you were last out here, that if Steve brought Lynne back across the bridge, if he brought her back across the bridge, it doesn't make much difference whether he went over the bridge or not, but there is, of course, no eye witness that says that he did. No eye witness said that Steve and Lynne came back from Number Eight Highway, across the bridge, although there is Allan Oats and Logan who say that they saw Steve on the bridge alone. Logan saying five minutes after he went north he came back alone. Somebody brought her back some time. Somebody brought her back some time.

This introduction of the idea or theory that Truscott may in fact have taken Lynne to Number Eight Highway and brought her back to the bush had not the slightest foundation in the evidence or in any inference which could be drawn from the evidence. It came wholly out of thin air. The Crown's case was that Truscott had not taken Lynne to Number Eight Highway at all.

These redirections, particularly in view of the Foreman's question as quoted above, must on any objective reading of what was said, compel acceptance of the argument that the most vital issue in Truscott's case was actually withdrawn from the jury's consideration at this late time in the trial when they were told:

I told you when you were last out here, that if Steve brought Lynne back across the bridge, if he brought her back across the bridge, it doesn't make much difference whether he went over the bridge or not, but there is, of course, no eye witness that says that he did.

and coming as it did after the learned judge had said in his charge:

Now you see, if the accused boy drove or rode Lynne Harper to Number Eight Highway, then you must ask yourselves who brought her back, because somebody brought her back. Somebody brought her back. Is it possible that the accused brought her back? You will ask yourselves and you will ask yourselves the reason, if this boy is guilty, why he has shown such calmness and apathy. Is it because there is an element of truth in his

story that he took her to Number Eight Highway, because somebody brought her back. Did he bring her back, if he took her?

The reference to 'apathy' in this passage by the learned judge was purely gratuitous. The word itself or a condition or conduct so describing Truscott does not appear in the evidence. It had been urged that his appearance and conduct were normal. The learned judge wrongly transposed 'normal' into 'apathy'. The dictionary definition of 'apathy' is 'insensibility to suffering or feeling'. 'Apathy' in relation to the crime in question here was a description highly damaging to the accused.

As previously mentioned, it was urged as a defence that Lynne had not been killed where her body was found. I have already expressed my view on this branch of the case. I think the jury was entitled on the evidence before them to find against this contention. But it was a defence open to the accused on the evidence and which had to be left to the jury. Here again, in my view, the learned judge withdrew that defence from the jury when in his charge he said:

> The Defence theory, what the Defence asks you to believe, is that she was attacked elsewhere and brought back dead. That she was attacked elsewhere, killed some place else. That theory, of course, is contrary to the medical evidence which says she bled at the place where she was found dead. She bled there and she could not have bled there if she were dead. If she was dead there would be no bleeding.

When Truscott returned to the school yard about 8:00 p.m. on June 9th, he was asked by Warren Hatherall, "What did you do to Lynne Harper—throw her to the fish" to which he replied, "No I just let her off at the highway like she asked." The following morning Lynne's father came to the Truscott home at 7:30 a.m. to inquire if the Truscott boys had seen Lynne. The older boy Kenneth said "No". Then Steven said "Yes, I took her to the corner on my bicycle and she hitched a ride on number eight highway". Later that same morning at 9:30 a.m., Truscott was interviewed by the police and he told the police that he had picked Lynne up outside the school the evening before between seven and seven-thirty; that Lynne told him she may go to see the people in the little white house on the highway and that she had to be home at eight or eight-thirty. He also said that having left Lynne off at number eight highway he cycled back to the bridge and while there

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looked back and saw her getting into a late model Chevrolet, which had a lot of chrome and could have been a BelAir model. He also said it appeared to have a yellow licence plate. He was interviewed several times in the next few days and told the same story, adding some details as he was questioned more closely.

The Crown took the position that Truscott was lying as to his movements after he reached the Lawson bush area on the county road. Accordingly, a great volume of evidence was tendered and received to convince the jury that Truscott was lying and that he had not gone any further north on the county road than the tractor trail at the north limit of Lawson's bush. No objection can be taken to this procedure because the Crown had the burden of establishing beyond a reasonable doubt that Truscott had taken Lynne into the bush and there murdered her, in other words, to translate Truscott from the situation that he had had the opportunity to commit the crime into the certainty that he was the only one who could, in the circumstances, have done so.

It was for the jury to weigh that evidence. In the evidence so to be weighed was the vital question whether in fact Truscott could have seen and recognized a Chevrolet BelAir car with a yellow licence plate. Truscott insisted to the police that he had. The police evidence at the trial supported by photographs was that licence plates could not be seen from the bridge where Truscott said he was when he said he saw Lynne get into the car. On the evidence which the jury then had, the jury could reasonably have believed that Truscott was lying in saying that he saw a yellow licence plate. However, in referring to this important point, the learned judge confused the statement by Truscott to the police that he had seen a yellow licence plate with the statement made in respect of the old car with Licence No. 981,666. In his charge to the jury dealing with being able to see a car on number eight highway from the bridge, he said:

> The boy was asked by the Police, naturally, what happened, and he told the Police that he took her down to Number Eight Highway. He repeatedly told the Police that, and she got in a car. The Police took him down to the bridge and he pointed the spot where he was standing on the bridge, and the bridge is thirteen hundred feet south of Number Eight Highway, and they conducted certain experiments there to demonstrate that not only was it not possible, according to the police testimony, to see

the numbers on a licence plate, but that you couldn't distinguish the licence plate at thirteen hundred feet. You heard the officers testify that that couldn't be seen.

Now, you have to regard, of course, for the differences in ages and the possibility that a man at age forty has not as good eyesight as a boy aged fourteen. The Crown asks you to say that the story is a fabrication because you couldn't see the licence plate, much less could you read the numbers at that distance. And if he brought her back, if it was he who brought her back, it doesn't matter much. It doesn't matter much

and later said:

The Crown submits the story about going away in a car is a complete falsehood because you couldn't read the licence plate from the distance that Steve says you could read it,...

When Defence Counsel drew the error to the learned judge's attention, he recalled the jury and said in part:

I made an error in telling you that the number Steve gave of the car, was the car on Number Eight Highway. This was a car on the County Road, but it was not the car on Number Eight Highway.

That would have corrected the error effectively, but having so corrected the mistake, he continued:

You will recall the Police went down and took photographs of the car, took photographs of the road with a car at the end of the road, and a car at Number Eight Highway, and they ask you to find from that and from the evidence of the Police officers, themselves, that it would have been impossible to have seen the licence plate of the car from the bridge and therefore, the story told by the accused is a fabrication.

neutralizing the correction he had made by inviting the jury to conclude from the photographs and the police evidence that no one could have seen the licence plate at that distance and in consequence Truscott's story was a fabrication.

On the reference in this Court it was shown that a yellow licence plate on an automobile at the intersection of number eight highway could be seen from the bridge if the car was in a certain position at the intersection. The Crown did not attempt to controvert this evidence. I am bound to say that had the evidence given on the reference regarding what could be seen from the bridge and concerning the unreliability of the photographs used by the Crown on this point been before the jury in the first instance, the jury could reasonably have taken an entirely different view of Truscott's story as put in evidence by the police *and of his credibility*.

At the trial the Defence stressed that Truscott could not have raped and murdered Lynne in the forty-five minute

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time interval that he was away from the school yard because if he had done so his clothes and person must necessarily have shown evidence of a struggle and he would have been blood stained and his appearance abnormal. The evidence was all one way that on his return to the school yard at about 8:00 p.m. he was normal without any blood on his clothes or on his person and that he chatted with some school mates before continuing on home to babysit as he had been asked to do by his mother. The mother too testified that there was no blood on the clothing and that the boy was normal as usual.

The learned judge dealt with this aspect of the defence as follows:

> At about eight o'clock the accused boy appeared back at the school. Ask yourselves, on this evidence, is there any explanation, on any construction of it, of the whereabouts of the boy between around seven-thirty and the time he appeared back at the school. John Carew saw him around eight o'clock and Lyn Johnson saw him and Lorraine Wood saw him come back and he stopped and talked to his brother, Kenneth. They heard some conversation about the trading of wheels and about the shoes he was wearing. Oddly enough, the older brother, Kenneth, has not appeared in this case. It is pointed out by the Defence, and very properly so, and it is something you must consider, and that is his demeanour when he returned, that he seemed to be natural. William Wilkes, who is age fifteen, who was called by the Defence—bring William Wilkes in, if he is here. He is in grade Nine at the Clinton Collegiate Institute.
>
> He says that they sat on the ground for ten or fifteen minutes and he talked to Steve, who appeared perfectly normal, and there were no marks on him or anything of that kind. Lyn Johnson says that he appeared to be normal. Lorraine Woods says he appeared to be normal, but I point out, Gentlemen, there are two sides to that meeting. There was a group of boys and girls playing around in this locality. They were all acquaintances. Perhaps I shouldn't say all. Lyn Johnson and Lorraine Wood were acquaintances of this boy. There was a group of children. Truscott didn't go over to them. He didn't go over to them, didn't spend any time with them. He talked to his brother and that is all, and then he went directly home. He may have been normal, but did he do what you would think a boy of that age would do, meeting his girl friends and boy friends when he came back on to the grounds. He was asked by Warren Hatherall, who had seen him go away, he was asked: "What did you do with Harper, feed her to the fishes?" Hatherall wasn't sure whether he answered or not. He didn't give an answer that Hatherall could give us, anyway.
>
> Stewart Westey corroborates Hatherall in part in that respect, because he says that when Hatherall asked the question, Truscott said: "I let her off at the highway like she asked."
>
> And William McKay, he wasn't sworn, a child age ten, said he saw Steve leave with Lynne and return alone and he asked Steve where Lynne was. Of course, his evidence unsworn testimony, age ten, is corroborated by Westey and by Hatherall. As I pointed out, Truscott didn't stop and talk to these boys, he went directly home. Miss Johnson and Lorraine

Wood were not closer to him than fifteen feet. It is for you to say whether *at that hour of the night* they were in a good position to observe his demeanour and the looks of his clothes.

(The italics are mine.)

The jury who heard this direction could not but be influenced into believing that Truscott somehow kept away from anyone who might have sensed abnormality in his conduct or observed blood on his clothes or person. Any fair reading of the evidence given by those who were in the school yard when Truscott returned at 8.00 o'clock must convince one that Truscott did not keep away from anyone there, but on the contrary acted very normally while staying on the school premises for some ten to fifteen minutes. The reference to 'that hour of the night' would imply that the evidence indicated a condition of poor visibility. It was actually about 8.00 p.m. daylight saving time nearing mid-June when according to all the evidence on the point it was still broad daylight. Lyn Johnson, a witness for the Crown, who was, as the learned judge says, not closer than fifteen feet (she said about twenty-five feet) was able to describe how Truscott was dressed. She said in answer to Crown Counsel:

Q. How was Steven dressed?
A. He had a red pair of jeans on and a whitish shirt and brown canvas boots with thick rubber soles, and red socks.

A trial judge has the right to express his own opinion or opinions in the course of his charge to the jury, but he has the *duty* to put the defence of the accused fairly to the jury. This he did not do on this branch of the case.

For all of these reasons, as stated at the beginning, I would quash the conviction and direct a new trial.

Because I take the position that there should be a new trial, I have refrained from commenting on many aspects of the evidence such as the evidence of Jocelyne Goddette for the prosecution and that of Gordon Logan for the accused and that of many other witnesses and factors, the weight and value of which will be for the new jury if there is one. However, it should, I think, be said that if Jocelyne Goddette's evidence is accepted as sworn to by her it was about 6.30 p.m. and not at 7.30 p.m. that she was along the county road and the tractor trail looking for Truscott. In this connection the majority opinion says, "There is some-

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thing very wrong with Jocelyne Goddette's times". She could be mistaken as to the time but it must cast doubt on her testimony that Truscott came to the Goddette home at about ten minutes to six. The interval between the two events was very short. That Truscott went to the Goddette residence shortly before six was an important and integral part of the Crown case. Jocelyne Goddette was the Crown's key witness in disproof of Truscott's story that he had taken Lynne further north than the tractor trail.

In several places throughout the majority opinion the point is made that as to such and such evidence or ruling or absence of ruling no objection was taken at the trial by Defence Counsel.

I could cite a score of decisions of this Court which say categorically that failure of counsel to object to the admissibility of certain evidence or to a trial judge's rulings in the course of the trial or to his charge to the jury, is not an answer to the objection or objections when advanced even for the first time in this Court. There are situations when the failure to object in the first instance will preclude counsel from being allowed to change his position, instances exist where the failure to object was intentional or not exercised and held in reserve to be raised on appeal and so on. In all of these, of course, the Court frowns upon the objection being raised for the first time on appeal. No such situation exists here. The consequences of Defence Counsel's failure to object at the trial do not fall upon counsel, but upon the client, in this case a 14½ year old boy on trial for his life.

I appreciate that after nearly eight years many difficulties will be met with if a new trial is held both on the part of the Crown and on the part of the accused, but these difficulties are relatively insignificant when compared to Truscott's fundamental right to be tried according to law.

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