SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.6 OF 2004

BETWEEN:

JOSEPH HAZEL

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Dr. Henry Browne, Mr. Hesketh Benjamin with him for the Appellant
Mr. Dennis Merchant, Director of Public Prosecutions, Ms. Janine Harris, Crown Counsel with him for the Respondent

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2006: March 21;
November 13.

JUDGMENT

[1] RAWLINS, J.A.: The appellant, Hazel, was convicted for the murder of Anthony Fetherston and sentenced to death. He appealed the conviction and sentence on the following 3 grounds:-

(1) The learned trial judge erred in law in failing to direct the jury that there was no sufficient evidence to prove the case against him.

(2) The learned trial judge erred in law in failing to exclude the evidence of the DNA expert on the basis that it was more prejudicial than probative.

(3) The learned trial judge erred in law in failing to address the jury adequately on the DNA evidence in the case.

[2] When the appeal was heard, learned Counsel for Hazel, Dr. Henry Browne, advanced no submissions on the appeal against sentence. This issue was therefore not canvassed. I shall consider the grounds of appeal against the facts.

The facts

[3] On the evening of 26th January 2000 a very sad and cold blooded incident ended the life of Mr. Anthony Fetherston, an Englishman who had also made St. Kitts his home. He lived with his wife at their home at Fortlands, Basseterre. On that evening, Mrs. Fetherston was speaking to her daughter by telephone. Mr. Fetherston had gone to their bedroom. Sometime between 7:00 and 8:00pm the doorbell at the gate of their enclosed yard rang softly. Mrs. Fetherston called him to answer the doorbell. He went outside and onto the deck that was close to the kitchen door. Mrs. Fetherston continued her telephone conversation.

[4] According to Mrs. Fetherston, her husband was standing about 4 feet from her and there was someone inside the grounds. Mr. Fetherston was wearing his reading glasses. He looked quite puzzled. He said something in a quiet voice. There was some commotion. She asked him who was there. He did not turn to answer. He kept looking straight ahead. Mr. Fetherston exclaimed “Oh God” and there was a loud bang. Mrs. Fetherston, who was still on the telephone, looked up in time to see him (Mr. Fetherston) spin around and crash to the ground from the deck into the garden. Mrs. Fetherston thereupon slammed the telephone down and said something to Mr. Fetherston. He did not reply.

[5] With a measure of dexterity, Mrs. Fetherston managed to secure the kitchen doors. She had heard someone outside say something about money. She crawled on the floor and kept out of sight as best as she could until she managed to look through the louvers. She saw a figure with a dark mask-like head covering with 2 holes around the area of the eyes. She saw eyes staring through them.

She crawled into the sitting room, pulled the telephone from where it was and called Mr. Allcorn, a family friend, who was also the Honorary British Consul to St. Kitts and Nevis. She also called emergency for an ambulance.

[6] When it was all quiet outside, she went outside to look for her husband. He was lying on his back. She saw blood and a large hole in his chest. She removed his spectacles and picked up the key for the kitchen door to the garden. She went through the gate and into the road. Neighbours gathered. Mr. Allcorn arrived and the police followed shortly after him. At about 9:30pm Dr. Reginald O'Loughlin, Medical Practitioner, saw the body of Mr. Fetherston lying on the grounds of the Fetherston's property. He noticed the large wound to the chest. His examination revealed that death had already occurred.

[7] Dr. Stephen Jones, Consultant Pathologist, carried out an autopsy on the body of Mr. Fetherston on 29th January, 2000. It revealed that Mr. Fetherston suffered a 5.5cm shot gun wound to the anterior left chest. The wound bordered the 4th and 7th ribs. An area of speckled tattooing, which measured 32 x 21cm, surrounded the wound. There was also tattooing on the medial surface of the left arm.

[8] The Pathologist recovered 5 pellets from deep within Mr. Fetherston's chest wound. An internal examination of the chest revealed that the injury destroyed in its path the left 5th and 6th ribs, the left ventricle of the heart, the thoracic inferior vena cava, the vein and the artery that carried blood to the heart. Most of the right lower lobe of the lung was punctured. There were blood and bone fragments in the pleural cavity. The Pathologist concluded that Mr. Fetherston's death was caused by the shotgun injury to the chest.

[9] On the morning of 27th January 2000, a Police Officer found a maroon coloured jeans pants stuck between a concrete column which linked the Fetherston's property and an adjoining property. The right leg of the pants was cut out above the knee. The Police also found a piece of maroon cloth between some flowers in

the south-western corner of the Fetherston's yard. The cloth had two adjacent holes in it. The items were eventually handed over to Sergeant Leonard Browne of the C.I.D. He subsequently took them to the Forensic Science Centre in Barbados along with a sample of Mr. Fetherston's blood, as well as hair samples from Hazel and three other suspects. The report from Ms. Cheryl Corbin, the Director of the Barbados Centre, revealed that she examined the maroon cloth, which contained 2 holes that were 5cm by 3cm and 5.5cm by 4cm, respectively, and the pair of maroon pants in order to determine whether they fitted each other. She reported that there was a physical fit when the 2 items were placed next to each other.

[10] The items were repacked and sent eventually to the London Metropolitan Laboratory where DNA testing was conducted on some of the items by Forensic Scientist, Dr. Kamala De Soyza. Dr. De Soyza obtained a DNA profile from Hazel's hair sample.

[11] Dr. De Soyza's report states that the maroon cloth appeared to have been fashioned from the right leg of the maroon pants. She noted that the cloth was frayed at both ends. It had 2 seams, 1 of which was re-sown with dark green thread. The cloth was about 59cm long and 39cm wide across the wider end and 22.5 cm across the narrower end. It had 2 rectangular holes cut on either side of the seam at about 25cm from the wider end, which gave it the appearance of a mask. The DNA test on the cloth gave weak chemical reactions, which indicated the presence of saliva from an area between the rectangular holes and the wider end. No DNA profiles were obtained from the tests which were carried out on that area of the cloth and on 4 roots of hair that were removed from the cloth. No blood was found on the cloth.

[12] With respect to the maroon pants, Dr. De Soyza reported that the right leg was removed at the crotch level. The leg of the pants that remained had a seam, which was made narrower because it was sewn with a similar thread to that with

which one of the seams of the maroon cloth was re-sewn. No human hairs or blood were found on the pants. DNA profiles on the material that was removed from the lower fly and crotch area revealed the presence of body fluids from 2 persons. Most of the DNA matched Hazel's DNA. Because of this finding Dr. De Soyza considered 2 propositions. One was that the DNA came from Hazel and an unknown person unrelated to him. The second proposition was that the DNA came from 2 unknown persons unrelated to Hazel. She concluded from the profile that the DNA which was found in the pants was 58,000 times more likely to have come from Hazel and an unknown person unrelated to him than from 2 unknown persons unrelated to him.

[13] Hazel proffered an alibi in defence. After he was first arrested on 31st January 2000 and questioned about the death of Mr. Fetherston, he told the police that between the hours of 4:00pm and about 9:45pm on 26th January 2000, he was with David "Pungwa" Patrick on the passenger bus of Basil Gardener.

[14] Gardener confirmed that he saw Hazel at about 4:00pm on that day at the Ferry Terminal in Basseterre. According to Gardener, Hazel and Patrick travelled on the bus with him between Basseterre and Molyneaux. Just after 5:00pm, however, when they returned to the Ferry Terminal, Hazel alighted from the bus and Patrick drove with him (Gardener) to the home of someone for whom they did some work. He next saw Hazel some minutes to 8:00pm at the Ferry Terminal as he (Gardener) was taking Patrick home. He did not see Hazel again during that night. Patrick confirmed Gardener's account.

[15] It is against this background that I shall first consider ground 2 of the appeal. The question that arises on this ground is whether the DNA evidence was admitted in error.

Was the DNA evidence admitted in error?

[16] Mr. Merchant submitted that since, at the trial, learned Counsel for Hazel did not object to the admission of the evidence of the DNA expert they cannot now raise the objection on the appeal. The defence did not object to the actual admission of the DNA evidence. Neither did the defence apply subsequently to the trial judge to strike out that evidence on the ground that its prejudicial content outweighed its probative value.

[17] The failure of Counsel for the defence to object to the admission of inadmissible evidence would not usually be fatal to an appeal. However, failure to object may have a bearing on the question whether the accused was really prejudiced in his trial on that ground.[1] Where it is no more than arguable that that evidence was inadmissible, and defence Counsel did not object, a Court of Appeal should not be astute to consider a question that was not canvassed before the trial judge.[2]

[18] In the present case it was no more than arguable that the DNA evidence was inadmissible. It was the main evidence upon which the prosecution relied that had the potential to link Hazel to the murder of Mr. Fetherston. In a case against Hazel the prosecution was duty bound to disclose it, and they did.[3] It is therefore my view that the appeal fails on this ground because the failure of Counsel to object to the production of the DNA evidence tends to show that Hazel was not really prejudiced in his trial by the production of that evidence.

[19] I am confirmed in my conclusion because of what the Record of Appeal shows of the proceedings in relation to the admission of the DNA evidence of Dr. De Soyza. At the end of Dr. De Soyza's evidence in chief Mr. Merchant applied to have her written report which chronicled the testing procedures that were used and the

[1] See Archbold on Criminal Proceedings, 20th Edition 2003, at paragraph 7-74 under the rubric "Wrongful admission or exclusion of evidence.
[2] Ibid. on the authority of R. v Hook, The Times, November 11, 1994.
[3] See the authority of Alleyne JA, as he then was, in Daniel Dick Trimmingham v The Queen, St. Vincent and the Grenadines Criminal Appeal No. 20 of 2003 (22nd June 2004.)

findings tendered in evidence if defence counsel had no objections. Defence Counsel expressly did not object. The report was admitted as K.D.S.I. Later, defence Counsel went even further to ask the trial judge to admit a related document that Dr. De Soyza made in the course of conducting the DNA tests. This was a preliminary note on her analysis on hair and body fluids from the maroon pants. The prosecution had disclosed the document to the defence in keeping with their duty, but the prosecution did not tender it at the trial. At the behest of defence Counsel, the document was tendered and admitted as K.D.S.3.

[20] In the premises, there is, in my view, no merit in ground 2 of the appeal and I would dismiss the appeal on it.

Grounds 1 and 3

[21] On grounds 1 and 3, learned Counsel for Hazel attacked the sufficiency of the DNA evidence as well as aspects of the summation on the DNA results.

The summation on the DNA evidence

[22] In relation to ground 3, the learned trial judge was required, in summing up to the jury, to give careful and clear directions about the approach which they should have taken to DNA evidence. In Michael Pringle,[4] Lord Hope said that, in the summation, it is important that the trial judge should explain the true import of the conclusions that result from the DNA analysis to the jury and to give them careful directions on the approach to the evidence.[5]

[23] Dr. Browne complained that the trial judge merely adopted the conclusions of Dr. De Soyza and thereby conveyed to the jury that it was Hazel who murdered Mr. Fetherston. In my view, the learned trial judge exercised care in his directions on

[4] [2003] UKPC 9 (27th January 2003.
[5] At paragraph 14 of the judgment.

the DNA evidence. In the direction in relation to their treatment of the evidence of the 2 profiles that were found in the pants, the judge was required to put the evidence of Dr. De Soyza before the jury pointing out the opinions that were her own but direct them that the weight to be given to that evidence was for them to decide. The learned judge did that in this case. He also told the jury that although the evidence was that most of the DNA matched that of Hazel this was indecisive of his guilt and they should acquit him if they did not feel sure of his guilt.

[24] It was primarily important for the judge to draw attention to the 2 propositions which Dr. De Soyza formulated and her conclusions therefrom, accurately. The judge did so giving the statistical proportions that she gave. He directed the jury that the weight to be afforded to her expert evidence was within their purview. I would therefore dismiss the appeal on ground 3.

Insufficiency of the evidence

[25] Dr. Browne complains that in the first place the trial judge should have withdrawn the case from the jury at the end of the case for the defence because insufficient evidence linking Hazel to the murder made it unsafe for the judge to have left it to the jury.

[26] The attack was made on the sufficiency of the DNA evidence because identification was a critical issue in this case. Dr. Browne contended that this evidence was so weak that the trial judge should have withdrawn the case from the jury. However, he did not make a no case submission at the end of the case for the prosecution. While this is not by itself fatal to Hazel's appeal on the ground of insufficiency of the identification evidence, a no case submission could have assisted the trial judge to assess the quality of that evidence in keeping with the guidelines that Lord Widgery CJ provided in R. v Turnbull.[6]

[6] (1976) 63 Crim. App. R.132.

[27] In Turnbull, Lord Widgery stated[7] that where identification evidence is at issue, the trial judge should assess that evidence at the end of the case for the prosecution. Where, on assessment, the judge thinks that the quality of the evidence is poor, the judge should withdraw the case from the jury and direct an acquittal. No witness saw Hazel kill Mr. Fetherston. The prosecution relied on circumstantial evidence based on the DNA results to link Hazel to the crime.

[28] DNA profiling has become a valuable tool for forensic analysis and for the purpose of criminal trials. It has assisted in the conviction and exoneration of accused persons. When DNA evidence is used in that process, however, that evidence should be cogent and reliable. It must be gathered, analyzed, produced and given in a manner that is accurate and fair.[8]

[29] While DNA profiling is rather reliable in providing individual genetic blueprints it will not in every case perfectly and clearly link a person to a crime.[9] Lord Hope of Craighead pointed out in Michael Pringle [10] that the characteristics of any 1 section of DNA are not unique to an individual because other individuals may share the same DNA from a specific site. We have seen that in this case, while Dr. De Soyza concluded that Hazel's DNA is present at 10 loci points the DNA of another person is present at 2 of those points. Lord Hope continued by stating that the power of DNA profiling to discriminate depends upon the number of sections that are subjected to analysis. The more sections that are analyzed, he said, the greater the statistical likelihood that the DNA found on other material can be identified as coming from the same individual.

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[7] At pages 137-138.

[8] In Michael Pringle v R., op. cit. note 4, in paragraph 14 of the judgment, Lord Hope reiterated the guidelines which Phillip JA gave in R.v Doheny [1997] 1 Cr. App. R 309 regarding procedures relating to the use of DNA in a trial. This was to the effect that cogency and reliability requires DNA testing to be rigorously conducted to prevent contamination in the laboratory. Care must be taken to ensure that the method of analysis and the basis of statistical calculation are transparent to the defence. The true import of the conclusions that results from the analysis must be presented as evidence and explained to the jury as accurately and fairly as possible.

[9] Except perhaps in the case of identical twins.

[10] At paragraph 11 of the judgment.

[30] Importantly, in Michael Pringle, Lord Hope provided a clear and simple explanation of the use of DNA profiling and the evidence therefrom in criminal trials when he stated:[11]

> Sections of DNA extracted from traces of blood, hair or semen found at the scene of a crime can be compared with sections of DNA extracted from a sample of blood taken from suspects or from persons whom the police wish to eliminate from their inquiries. Any discrepancy which is found after subjecting them to comparison will exclude a suspect from the inquiry, unless there is a satisfactory explanation for the failure of the profiles to match each other. If one or more sections from the crime scene match those found in the suspect's sample, the next stage in the enquiry depends on statistics. The statistical likelihood of an individual section found in another person of the same race can be predicted. This is what is known as "random occurrence ratio". The more the number of sections that are found to match, the greater is the statistical likelihood that they originate from the same source.

[31] Because DNA profiling is a function of the random occurrence ratio, the question whether the evidence from a DNA test shows that an accused person actually committed the crime for which he or she is charged is often, as in the present case, a matter of statistical probability. Lord Hope explained the effect of this in Michael Pringle in this way:[12]

> Let it be assumed that the evidence about the random occurrence ratio is that one person in 50,000 has a DNA profile which matches that which is obtained from the crime scene. The fact that the defendant has that profile tells us that he is one of perhaps fifty thousand people who share that characteristic. One can then say, having regard to the population of the area, what the statistical probability is that he was the perpetrator. But that is all that can be said about it. The question whether the statistic points to the defendant as the actual perpetrator will depend on what else is known about him. If it is plain from the other evidence that he could not have committed the crime because he was elsewhere at the time, the fact that the defendant's DNA profile matches that on the sample taken from the crime scene cannot be said to show that he did commit it. That proposition will have been negatived by the other evidence. So the probative effect of the DNA evidence must depend on the question whether there is some other evidence which can demonstrate its significance. And it is for the jury, not the person who gives the DNA

[11] At paragraph 12.
[12] At paragraph 19 of the judgment.

> evidence, to assess its significance in the light of that other evidence.[13]

[32] In this case the DNA evidence did not link Hazel to the murder of Mr. Fetherston in a manner that would support his conviction on proof beyond a reasonable doubt. The maroon cloth, which was found on the Fetherston's premises, provided no DNA result that linked Hazel to it. In her evidence, Dr. De Soyza said that the tests on the 4 pieces of hair which were found in that cloth revealed nothing at all that linked Hazel to it. Ms. Cheryl Corbin reported that there was a physical fit between the cloth and the maroon pants. In her evidence, Dr. De Soyza provided strong added linkages between the pants and the maroon cloth. However, she stated in cross-examination that the DNA tests revealed "moderate support" that the cloth came from the pants and moderately strong support for the view that the maroon cloth was worn as a mask.

[33] The maroon pants were found in close proximity to the murder scene. The DNA tests on the pants revealed DNA profiles which matched that of Hazel at 10 loci points as is usually required. It also revealed DNA which matched that of another person, at 2 of these 10 loci points. We have seen that because of this Dr. De Soyza considered 2 proportions: that the DNA either came from Hazel and an unknown person unrelated to him or that it came from 2 unknown persons unrelated to Hazel. Her conclusion from this was expressed in proportional terms. She stated that the result was 58,000 times more likely to have come from Hazel and an unknown person unrelated to him than from 2 unknown persons unrelated to him. Hazel's link to the pants was not made any stronger when Dr. De Soyza said in cross-examination that a person's DNA could have found its way into the pants if someone wiped the pants on a chair on which the person sat.

[34] The identification evidence was tenuous. Notwithstanding this, the learned trial judge did not assess it at the end of the case for the prosecution. In my view, the DNA evidence was not by itself so conclusive that it provided sufficient

[13] Emphasis added.

circumstantial evidence to make a prima facie case against Hazel. It was a question of statistical probability that the DNA evidence pointed to Hazel as the possible perpetrator of the murder. However, there was little else known about him to link him to the crime. Except for the fact that the evidence of Gardener and Patrick did not bear out his alibi, there was no 'other evidence' that supported the DNA evidence so that, compendiously, the jury could properly have inferred the guilt therefrom. In his summation, the learned judge told the jury that there was no evidence in the case that supported the DNA evidence.

[35] In the absence of DNA evidence that clearly linked Hazel to the murder and there being no supporting evidence, it is my view that in keeping with the Turnbull and the Michael Pringle guidelines, it was unsafe to leave the case to the jury. The learned trial judge should have withdrawn the case from the jury because there was insufficient evidence of identification to make a *prima facie* case against Hazel. I would therefore grant the appeal on this ground, and, in the result, quash the conviction and sentence against Joseph Hazel.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal