THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CRIMINAL DIVISION)

SAINT LUCIA

CLAIM NO. SLUCRD 2008/0499

BETWEEN:

THE QUEEN

Complainant

and

ALEXANDER BONNETT

Defendant

Appearances:

Mr. Colin Foster for the Defendant
Mrs. Victoria Charles-Clarke, Deputy Director of Public Prosecutions for the Prosecution

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2010: June 2 & 18, July 15 & 27

RULING

[1] **BENJAMIN, J:** By an indictment laid by the Director of Public Prosecutions on August 17, 2009, the Defendant is charged for the offence of murder alleged to have been committed on February 29, 2008 at Malgretoute, Monchy, contrary to section 85(b) of the Criminal Code of Saint Lucia 2004.

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[2] By Notice filed on January 29, 2010, the Director of Public Prosecutions signaled the Crown's intention to lead additional expert evidence through the testimony of Andrew David Parry, a forensic scientist. Attached to the said Notice was the witness statement detailing the examination of a kitchen knife alleged to have been recovered from the scene of the alleged offence. The purpose of the examination was stated to be for ascertaining the presence or absence of bloodstaining and the determination of the source thereof using DNA profiling analysis.

[3] In addition, the Crown sought the leave of the Court pursuant to section 29 (2) and (5) of the Evidence Act, 2002 to lead the evidence of the forensic scientist by way of video-link on the basis that the witness resides outside of Saint Lucia in England. Coupled with this ancillary application was an application to the Court for a direction under section 29(5) (b) of the Evidence Act.

[4] Counsel for the Defendant opposed the application by the Crown on a number of grounds which were set out in skeleton arguments submitted on July 23, 2010 and supplemented by oral arguments. The grounds were as follows:

(a) The witness statement did not provide the qualifications of the forensic expert to enable the verification of their authenticity;

(b) The witness statement is not authenticated by a Notary Royal or any relevant authority, in accordance with section 149 of the Evidence Act, No. 5 of 2002

(c) The Crown has failed to provide to the Defence any statistical calculations of the random occurrence ratio on which the DNA evidence is based so as to link the DNA profile of the defendant to the bloodstain said to have been found on the knife;

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(d) The introduction of DNA evidence is not relevant to the case and would result in prejudice to the defendant;

(e) There exists a need for procedural safeguards to regulate the reception of DNA evidence and that the said safeguards ought to be made clear to both sides ahead of trial; and

(f) The description of the expert's qualifications as disclosed in the witness statement does not indicate expertise in the specialized field of DNA analysis.

[5] The grounds set out at (a) and (f) can be taken together. The witness statement of Andrew David Parry reflects the letters "BSc" appended to his name and his occupation is stated as "Forensic Scientist". Under the heading of "Qualifications and Experience", the following is stated:

> "I am a Bachelor of Science and have been employed by the Forensic Science Service as a Forensic Scientist since 1987. I have dealt with numerous cases of the type discussed in this statement".

The foregoing information omits to detail the training of the witness in DNA profiling analysis and the breadth of his experience in this specialized field. The lack of detail does not afford the defence an opportunity to probe the expertise of the witness nor does it establish his expertise in the stated field. I would add that it would also be useful to the Court for some information to be furnished about the Chepstow Laboratory of the Forensic Science Service at which the analysis was stated to have been performed. The Crown must therefore provide background information about the training, qualifications and

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experience of the witness as well as details about the facility at which the analysis was carried out.

[6] The obvious starting point on DNA (deoxyribonucleic acid) testing is an explanation as to what the phenomenon represents in the criminal trial process. Phillips, L.J in delivering the judgment of the Court of Appeal in Doheny & Adams v R [1996] EWCA Crim. 728 provides this explanation:

> "DNA consists of long ribbon-like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes – 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of a crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex..."

[7] The process of DNA testing was succinctly described by Lord Taylor, CJ in Deen, The Times, January 10, 1994, and this description was adopted by Phillips, L.J. in Doheny and Adams, supra. I can do no better than to do the same. The learned Chief Justice said:

> "The process of DNA profiling starts with DNA being extracted from the crime stain and also from the sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the

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fragments in a gel and drawing than electromagnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto-radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not".

Therefore, the achieving of a match represents the first stage in the process of seeking to prove identity by DNA profiling.

[8] Phillips, L.J went on to elaborate on the process of DNA profiling in the following dicta:

"Even if a number of bands correspond exactly, any discrepancy between the profiles, unless satisfactorily explained, will show a mismatch and will exclude the suspect from complicity..."

"The characteristics of an individual band of DNA will not be unique. The fact that the characteristics of a single band are to be found in the crime stain and the sample from the suspect does not prove that both have originated from the same source. Other persons will also have that identical band as part of their genetic make-up. Empirical research enables the analyst to predict the statistical livelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups 'the random occurrence ratio'.

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"As one builds up a combination of bands, the random occurrence ratio becomes increasingly more remote, by geometric progression. Thus if two bands, each of which appears in 1 in 4 of the population are combined, the combination will appear in 1 in 16 of the population, and if to these are added a further band that is found in 1 in 4 of the population, the resultant combination will appear in 1 in 64 of the population. This process of multiplication is valid on the premise that each band is statistically independent from the others. The frequency of the blood group is a factor which is statistically independent and thus this can also be validly used as multiplier. If the DNA obtainable from the crime stain permits, it may be possible to demonstrate that there is a combination of bands common to the crime stain and the suspect which is very rare".

His Lordship went on to caution against the trap of the so-called "Prosecutor's Fallacy".

[9] The caution was helpfully highlighted in the article "The Prosecutor's Fallacy and DNA Evidence" [1994] Crim L.R. 711 at pp 711 – 712. The learned writers, David J. Balding and Peter Donnelly, wrote:

"One error, which was highlighted in the case of People v Collins has been dubbed the "Prosecutor's Fallacy" since, although not necessarily the case, the error usually favour the prosecution. It is possible that a forensic scientist will make this error in presenting DNA evidence and thus misinterpret its probative value. In addition, it may happen that the evidence is initially presented correctly but judge or counsel inadvertently commits the fallacy in summing up. Many studies show that untrained intuition is prone to error in reasoning with probabilities. A third

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danger is then that a jury not warned of the problem may make the error even when the evidence has been presented, and summed up, correctly. It is crucial that judges and counsel is cases involving DNA evidence both guard against making the prosecutor's fallacy explicitly and warn jurors against making it privately".

[10] I consider it necessary to have embarked upon a brief exposition provided by the extracts from the judgments and article in order to highlight the complexity of the process of DNA testing. It is clear that DNA profiling is easily prone to pitfalls and error in both the chemical analysis as well as in its application in the trial process. Accordingly, it is here unnecessary to deluve into the Prosecutor's Fallacy. Suffice it to say that the role of the expert is distinct from that of the jury.

[11] In Doheny & Adams, Phillips, L.J emphasized the potentially highly probative nature of DNA evidence based on the random occurrence ratio. The matter was put thus:

"The cogency of DNA evidence makes it particularly important that DNA testing is rigorously conducted so as to obviate the risk of error in the laboratory, that the method of DNA analysis and the basis of subsequent statistical calculation should – so far as possible be transparent to the defence and that the true import of the resultant conclusion is accurately and fairly explained to the jury".

It was for these reasons that the Court adopted the following procedure to be followed in relation to DNA evidence:

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1. "The scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio.
2. Whenever such evidence is to be adduced, the Crown should serve upon the defence details as to how the calculations have been carried out which are sufficient for the defence to scrutinize the basis of the calculations.
3. The Forensic Science Service ("FSS") should make available to a defence expert, if requested, the databases upon which the calculations have been based".

In my view, the suggested procedures are sound and eminently suitable for adoption as protocols for the use of DNA evidence in St. Lucia.

[12] In response to the defence's submission as to the non-disclosure of the random occurrence ratio the Crown asserted that no such request was received until June 24, 2010. Tacitly, conceding the guidelines set out in Deheny and Adams, the Crown asked leave to disclose the requested data together with additional details of the qualifications of the expert.

[13] The challenge by the defence to the relevance of the DNA evidence is based on the simple assertion that the said evidence would at best demonstrate that the defendant was present at the scene of the crime. It was argued that the latter circumstance was not disputed by the defendant.

[14] The short answer of the Director of Public Prosections was that this attempt to have the evidence excluded is premature. To this, I would add that the defendant has not given a

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statement under caution nor has any defence statement been filed. It is within the province of the Crown to buttress its case by adducing proof of all matters in issue. Accordingly, this ground is without merit at this stage of the proceedings.

[15] The Evidence Act No. 5 of 2002 provides in section 149:

> "...all deeds, wills, declarations and affidavits and other writings purporting to be executed, acknowledged, proved, declared or disposed in a country or state outside of Saint Lucia and verified on oath before."
>
> (i) A diplomatic or consular representative for Saint Lucia, or
>
> (ii) A Judge of any Superior Court, certified as such by a diplomatic or consular representative for Saint Lucia; or
>
> (iii) A notary public certified as such by a diplomatic or consular representative for Saint Lucia, shall be deemed to have been sufficiently executed, acknowledge, proved, declared, or disposed to and shall be received as evidence in any Court...."

The defence's contention is that the witness statement is of foreign origin and omits a jurat to the effect that it was deposed to before a notary public.

[16] The Crown countered that it was not proposed to tender the report embodied in the witness statement of Andrew David Parry at trial; but rather that the oral evidence of the expert witness is proposed to be led at trial thus obviating the need for authentication of the witness statement.

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[17] A proper construction of section 149 aforesaid contemplates the authentication of documents to be used in specie for contentious or non-contentious matters. The provision when construed eiusdem generis targets documents, which of their very nature require authentication. There appears on the first page of the witness statement a declaration that essentially conforms to the section 153 (2) (b) of the Evidence Act. Accordingly, the Crown has satisfied the procedural requirements for the disclosure of a witness statement.

[18] The final challenge by the defence to the use of DNA evidence at trial is that there are no regulations enacted to govern the use of such evidence. It was urged there are therefore no safeguards to guide the admission of DNA evidence.

[19] Section 167 of the Evidence Act No. 5 of 2002 enacts:

(1) The Minister may make regulations prescribing matters –

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

(2) Without prejudice to the generality of subsection (1), the Minister may make regulations for the procedure for taking DNA samples for evidence and for the admission of such evidence by the Courts.

Given the discretionary nature of the power given to the Minister to make regulations for taking of DNA samples for evidence and for admission of such evidence in court, no prohibition against the use of DNA evidence is thereby created

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by the absence of such regulations. It cannot be denied that such regulations would be useful and quite likely desirable. As such, I do agree with the Director of Public Prosecutions that the DNA evidence cannot be excluded in the absence of regulations but rather the same can be received in evidence under the general rules of evidence.

[20] The order of the Court is as follows:

(1) The Prosecution shall furnish to Defence Counsel on or before 15th June 2011: -

(a) Details of the qualification of the expert witness and of the facilities at which the DNA testing was conducted;

(b) Evidence of the DNA comparison together with the calculations made by the expert witness of the random occurrence ratio;

(c) Details as to the methodology of the calculations so as to enable the defence to scrutinize the basis of the calculations; and

(d) The Prosecution shall cause the expert witness to make available to any defence expert identified by the Defence Counsel, the databases upon which the calculations have been based.

(2) In the event that the Prosecution fails to furnish the information set out in paragraphs 1(a), (b) and (c) in any event and in paragraph (d) upon request, the evidence of the expert witness, Andrew David Parry, shall not be admissible in evidence.

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[21] Turning to the application made by the Crown at the outset, subsection (2) and (5) of section 29 provide as follows:

(1) .....

(2) "In any case other than in subsection (1) the judge may, either on the application of a party or a witness or on the judge's own initiative, direct that a vulnerable witness is to give evidence in a manner described in subsection (5)

(3) .....

(4) .....

(5) Where a judge makes a direction pursuant to subsections (1) or (2), the judge in addition direct that:

(a) .....

(b) The witness gives evidence from the appropriate place outside the courtroom, either in Saint Lucia or elsewhere by means of technology which allows for the witness to see and or hear a person in the courtroom and be seen and heard by the persons listed in paragraphs (a) (i) (ii) and (iii)".

No regulations have been made for the implementation of alternative methods of testimony of vulnerable witness. The defence did not offer any objection to the application.

[22] The expert witness stated his address on the witness statement to be the Forensic Science Service Ltd and there is no demur that the address is of a location in England. Accordingly the expert witness falls within the definition of a "vulnerable witness" under section 2 of the Evidence Act.

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[23] Accordingly, it is directed that the evidence of the expert witness, Andrew David Parry, be given by video link technology. For the avoidance of doubt, it must be added that the Crown must comply with the orders of the court previously made in this ruling.

[24] Counsel for the Defence must be commended for embarking upon the pre-trial arguments which are the subject of the judgment.

KENNETH BENJAMIN
HIGH COURT JUDGE

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