JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 111/98

BEFORE: ***THE HON. MR JUSTICE DOWNER, J.A.***
THE HON. MR JUSTICE WALKER, J.A.
THE HON. MR JUSTICE PANTON, J.A.

MICHAEL PRINGLE v. REGINA

Ravil Golding for the applicant
Carrington Mahoney,Acting Deputy Director
Of Public Prosecutions, and Miss Grace Henry,
Assistant Crown Counsel, for the Crown

February 1, and July 31,2000.

PANTON, J.A:

This applicant for leave to appeal was convicted on October 30, 1998 of the offence of Capital Murder in the St. Ann Circuit Court before Cooke, J and a jury. He had been charged with murdering Kevan Davidson "between the 9th day of June, 1996, and the 10th day of June, 1996, in the parish of Saint Ann...during the course or furtherance of a rape." He was sentenced to "suffer death in the manner prescribed by law". The grounds of appeal were filed on January 24, 2000. They read thus:

> *"1. The learned trial judge erred in law when he told the jury that it was not necessary for him to remind them of the mechanism of the testing of the DNA evidence. (Page 273 of the transcript)*
>
> *2. The learned trial judge failed to direct the jury that they could only convict the applicant if they*

> *rejected his defence and were satisfied beyond a reasonable doubt on the Crown's case".*

It is appropriate at this stage to mention that Mr.Golding, for the applicant, conceded that the second ground was misconceived as the learned judge had indeed dealt with the matter complained of at page 278 of the record. This is what Cooke, J. said to the jury in that regard:

> *"I now go to the evidence of the accused man. His defence is one of alibi, which simply means that the accused man says he was somewhere else at the material time. But as the burden of proof is on the prosecution, the defendant, the accused does not have to prove that he was elsewhere. On the contrary, it is for the prosecution to disprove the alibi. If you conclude that the alibi was false, that does not, of itself, entitle you to convict the accused. The prosecution must still establish his guilt".*

We are in agreement with the concession made by Mr. Golding.

THE CASE FOR THE PROSECUTION

Dr. Fiona Henry-Pinnock who conducted the post mortem examination on the female deceased on the 21st June, 1996, concluded that she had died as a result of massive external haemorrhaging resulting from a deep laceration to the left side of her neck. The laceration was consistent with having been inflicted by a machete. The doctor took from the body samples of pubic hair, nail scrapings and blood as well as a vaginal swab. These items were subsequently subjected to forensic analysis.

The deceased, a singer, and her husband, a musician, lived in Mount Ararat, St. Ann. On the night of the 9th June,1996, they had been together at a bar in the district having beers. They went home, but whereas her husband

retired to bed, the deceased went back on the road. Next morning, the body of the deceased was discovered at the side of a gully about five or six chains from her house. As indicated earlier, her throat had been cut. She was fully dressed. Beside her on the ground were her handbag and a Red Stripe beer bottle. There were bloodstains nearby and the grass appeared to have been trampled.

The applicant, according to the prosecution, has been linked to this crime in two ways. Firstly, by an admission that he made to a fellow inmate in a cell at the Runaway Bay Police Station and, secondly, by the results of DNA tests.

(1) <u>The admission</u>

Frederick Simmonds, who the applicant acknowledges as a cell-mate at the Runaway Bay Police Station lock-up, gave evidence of a conversation between the applicant and one Winston Montgomery in the cell. The applicant has denied that Montgomery was ever in the cell with him. He said that Montgomery was in the neighbouring cell. In the conversation, the applicant is supposed to have said that he had on an earlier occasion been accused by the deceased of rape and robbery, and that he had served a term for those offences. On the night in question (the 9th June), he saw the deceased in a bar in the district. He went to his house, changed his clothes, put on overalls and his Karl Kani shoes, and took up his machete. He went in the gully from where he heard her singing coming along the road. He came on to the road, covered her mouth, pulled her into the gully and cut her throat with the machete. He then went back through the gully to his house. To conceal his criminal conduct, he burnt the overalls, buried the gloves, scraped the handle of the machete, and polished the shoes. A boy who

lived in the same house as the applicant made the announcement next morning of the finding of the body. The applicant, according to Simmonds, said that he went to view the body "like everyone else". Further, said Simmonds, the applicant expressed the opinion that he would not be found out as he had taken care of everything.

The prosecution produced a pair of Karl Kani shoes which the applicant identified at the trial as his own, he having been given it by his brother in 1995.

(2) <u>The DNA tests</u>

On the 26th June, 1996, Dr. Yvonne Cruickshank, Government Analyst, and Director of the Police Forensic Laboratory, received the vaginal swab and blood sample that had been taken by Dr.Fiona Henry-Pinnock from the body of the deceased. She also received blood samples taken from the husband of the deceased as well as from the applicant. She tested them and subjected them to DNA analysis. She found that human blood and semen were present in the vaginal swab. The blood sample of the deceased was classified as Group A whereas both samples taken from the husband of the deceased and the applicant fell in Group O. It was, she said, necessary to distinguish these two Group O samples. And this is where the DNA analysis was particularly important.

The term "DNA" means "deoxyribonucleic acid". It enables the making of distinctions between individuals. No two persons, except for identical twins, have the same blueprint which would be discovered by DNA, according to Dr. Cruickshank.

She found that the vaginal swab had a mixture of fluids from two different persons, one of whom was the deceased herself. The other person was a male due to the presence of spermatozoa. The analysis of the applicant's blood gave a similar reading to that given in the female fraction of the vaginal swab. According to Dr. Cruickshank, the spermatozoa found on the vaginal swab could have come from the applicant. She was of the view that there was a 99.999 percent chance that the spermatozoa came from the applicant.

On the other hand, she found that it definitely did not come from the husband of the deceased.

THE DEFENCE

The applicant denied making the statements attributed to him by Simmonds. He also denied involvement in the commission of the murder. Indeed, he never saw the deceased on either the 9th or 10th June, 1996. He gave evidence that on the night of the 9th June, he first went to his cousin's house, then to his aunt's and finally retired to bed in his house which adjoins his aunt's. He got awake at about 7:30 next morning.

THE CHALLENGE TO THE CONVICTION

As indicated earlier, there is only one ground on which the applicant is seeking to challenge his conviction. For ease of reference, that ground is repeated at this point:

> *"The learned trial judge erred in law when he told the jury that it was not necessary for him to remind them of the mechanism of the testing of the DNA evidence. (Page 273 of the transcript)."*

The context of the learned judge's statement is important. Hence, the full text of the relevant portion leading up to the quoted passage is set out hereunder:

> *"Now, let us go to the evidence of Dr. Cruickshank. There is evidence, if you accept it, that over a period of time a blood sample was taken from the deceased, blood sample was taken from the accused, a swab was taken from the vaginal cavity of the deceased and a blood sample was taken from the husband, Donald Davidson. These were sealed and sent to the Forensic Laboratory for testing and the person who supervised the testing and who gave evidence about the results was Mrs. Cruickshank.*
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> *She gave her qualifications. She has a BSc. in Chemistry and Biochemistry,Master of Science, Forensic Sciences and Ph.D. in Chemistry and she has done over forty thousand blood samples and over forty thousand seminal testing, that is to do with semen.*
>
> *She told you that she received the samples in respect of the blood from Lulu, that is, Kevan Davidson. That was type A. In respect of the blood from the accused man, it was type O. And in respect of the blood from the husband it was type O.*
>
> *So, the accused man and the husband have the same blood grouping, type O, which you might not find particularly curious since over 52 percent of all Jamaicans have this Group O blood. But, Dr. Cruickshank didn't leave it there, she did a DNA testing on it, which is short for Deoxyribonucleic Acid. She says that this testing can provide a blueprint which is able to distinguish each human being from another human being. It provides what she calls a blueprint, you see, and it distinguishes the characteristics of one individual from another, those both obvious and not obvious, and she said that no two persons have the same blueprint unless they are identical twins.*

> *So now, she did further testing, DNA testing, and she used markers, that is, she used one marker which was known as D1S80, and another marker is* ***HLADQ@.****".*

And then followed this exchange which includes the words complained of by the applicant.

> *"HIS LORDSHIP : Just a moment, Mr. Foreman and members of the jury. Counsel, both counsel, I wish you to follow me very, very closely at this stage.*
>
> *MR.HIBBERT: Yes, m' Lord.*
>
> *MR.LYN-COOK: Yes, m'Lord.*
>
> *HIS LORDSHIP: Please.* ***Now, I discussed this matter with counsel and we all came to the conclusion that it is not necessary for me to remind you of the mechanism of the testing, so I'm not going to do that. I'm now only going to tell you what her findings were and the critical finding had to do with the swab, the vaginal swab, and this is where I'm going to go right now".***

Mr. Golding submitted that once the prosecution was relying on the evidence, the judge had a duty to direct the jury on it. He said that there may have been scope for degradation, cross-tampering etc. of the evidence. Hence, the procedure used was important as it was on that basis that the charge of capital murder had been laid. He further said that counsel had no power to fetter the judge's duty to give proper directions; so, the apparent agreement between counsel as to the approach that the judge should take was of no effect so far as the applicant was concerned. The result of what the learned judge had said to the jury was the sanctioning of the mechanism used by the prosecution in respect of the DNA analysis, leaving no room for argument- according to Mr.

Golding. This was wrong, he said, as it was for the jury, not the judge, to approve the mechanism. Upon the completion of Mr. Mahoney's reply to Mr. Golding's submissions, the latter conceded that the learned judge had in fact dealt with "some aspects of the mechanism".

Mr. Mahoney contended that there was no error committed by the judge in making the statement complained of. Had the judge not made the statement, he submitted, there would have been no ground for a legitimate complaint as the summing-up was comprehensive and fair. All relevant issues were dealt with. He pointed to the fact that Dr. Cruickshank's evidence was adequately summarised by the judge for a proper understanding of it by the jury. Indeed, he said that notwithstanding the statement of the judge in respect of the mechanism, he had in fact dealt with the mechanism of the analysis. Hence, he said, the complaint was ill-founded.

The Deputy Director of Public Prosecutions reminded us of the judgment of this Court in the case ***R. v. Anthony Rose*** *(Supreme Court Criminal Appeal No. 105/97) delivered on July 31, 1998. There, Harrison, J.A., in delivering the judgment said:*

> *"A summing-up is not required to conform to any particular format nor to any set formula. What is required is a careful direction of the jury of their functions, the relative law involved, what evidence to look for and how to apply that evidence to the law in order to find facts. Kerr, J.A. in* ***Edwards v. R.*** *(1983) 20 J.L.R.203, describing the nature of a summing-up said at page 205:*
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> > *'As recently as September of this year, in the case of* ***Beverley Champagnie et al****, Supreme*

> *Court Criminal Appeals Nos 22-24 of 1980, this court reiterated the oft expressed that it is the effect of the summing-up as a whole that is important; the trial judge is not obliged to follow any formula or pronounce any shibboleth, and went on to quote with approval a passage from* ***R. v. O'Reilly*** *(1967) 51 Cr. App. R. page 349. Where however, directions on a particular aspect of the law have been authoritatively approved and advocated by an appellate court, the prudent and appropriate use of such directions is recommended'.*
>
> *Neither is a trial judge required to identify every bit of evidence capable of amounting to a particular aspect of proof. He cannot be faulted, in the circumstances of some cases, if he describes the nature of the evidence capable of establishing proof, gives some examples and leaves it to the jury to decide what evidence they accept and what inferences they may draw as satisfactory proof."*

It is fitting at this stage to point out that at page 260 of the record, the learned judge told the jury what they should do if he failed to mention any portion of the evidence. He said:

> *"Now as I try to assist you, if you notice that I omitted evidence,* ***the fact that I omitted evidence or any part of the evidence, does not mean you must not take that into consideration, that which I have omitted.*** *If I appear to stress evidence, the fact that I may so appear does not mean that you must give that evidence any more weight than you think it deserves".*

This direction would have left no doubt in the minds of the jurors that they were to consider all the evidence in the case, including any omitted by the judge.

Proof of the offence of capital murder as laid against the applicant required proof that the applicant not only killed the deceased but that he did so in furtherance of the commission of rape. In view of this, notwithstanding the

admission of the applicant as testified to by Simmonds, the examination and analysis of the blood samples and the vaginal swab formed a significant aspect of the case for the prosecution. The link between the applicant and the spermatozoa on the vaginal swab was damning. It was important therefore that the evidence of the analyst should be carefully considered by the jury, after appropriate directions by the learned trial judge.

We are of the view that this evidence was the subject of proper directions by the judge. He reminded the jury of Dr. Cruickshank's qualifications and experience. He stated the methods used by her in the making of the analysis of the blood samples, and the conclusions at which she had arrived. The learned judge also mentioned to the jury the need for them to consider the possibility of contamination or tampering so far as the process was concerned. This he did although there was no evidence to suggest that the process may have been flawed. Finally, Mr. Golding's submission that the learned judge left no room for argument in respect of the scientific evidence ignored the judge's final charge to the jury. This is what he said as recorded at page 286 of the record:

> *" I left out something which I want to tell you. It has to do with Mrs. Cruickshank. She is regarded as an expert witness and you notice her qualifications.* ***But the fact that she is an expert witness does not mean that you must accept what she says.*** *You will assess her evidence just like the evidence of any other witness but, of course, you would bear in mind, right, her scientific expertise, okay. Right. So* ***it is not that because she says so you must swallow it.*** *You must subject it to analysis just like any other witness. Do you follow that?"*

He also said:

> *"....you heard addresses from counsel on both sides as each invited you to interpret the evidence as they saw it. I also may make some comments but, let me tell you nonsense is nonsense wherever it comes from, whether from me, Mr. Hibbert or Mr. Lyn-Cook and if it is nonsense you disregard it".*

The jury could not have been in any doubt whatsoever that the ultimate decision was theirs on all the evidence that they had heard, whether the judge reminded them of it or not, and whether he commented favourably on it or not. The learned judge, having given proper directions, and there being evidence to support the conviction, there is no basis for the granting of this application. That being so, the application is refused; the conviction and sentence are affirmed.