JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 71/2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

HOWARD JONES v R

Ewan Thompson for the Appellant

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions, Miss Claudette Thompson, and Greg Walcolm for the Crown

14, 15, July 2009 and 23 April 2010

SMITH, J.A.

[1] On 3 September 2004, Anserd Rose (the deceased) of White Hall in the parish of Westmoreland died as a result of multiple sharp force injuries to the neck, chest and abdomen.

[2] On 3 May 2006, Howard Jones, the appellant, was convicted of Rose's murder in the Westmoreland Circuit Court presided over by Kay Beckford, J. He was sentenced to imprisonment for life. The learned judge made no order in respect of the minimum period that the appellant should serve before becoming eligible for parole.

[3] The appellant applied for leave to appeal against conviction and sentence. His application in respect of the former was refused and that in respect of the latter was granted.

[4] Before this court he has renewed his application for leave to appeal against conviction and has prosecuted his appeal against sentence.

The Prosecution's Case

[5] The case for the prosecution is based on circumstantial and DNA evidence. The deceased and the appellant had a written agreement for the sale of the appellant's house to the deceased. On 2 September 2004 at about 9:00 p.m. the witness Oneil Campbell and the appellant were at the Scrub-a-dub club in White Hall. The deceased entered the club shortly after they did. At about 10:00 p.m., Campbell left the appellant and the deceased in the bar drinking and talking.

[6] Meletia Bacchus, a shopkeeper, testified that she shared an intimate relationship with the deceased whom she knew as "Tunku". She knew the appellant for about thirteen (13) years. She knew him as "Charley". On 3 September 2004 at about 3:00 a.m. she went to the deceased's house. She knocked at his door and called him. She got no response. She sat on a block at his doorway. She testified that while she was sitting on the block she heard footsteps coming towards her. She thought it was the deceased, but it was the appellant. She described what happened in this way, "I thought it was Tunku so then suddenly I just looked up the somebody reached to me, I

could realize it was not Tunku, it was Charley" - page 27 of transcript. According to the witness, the appellant Charley said, "Which pussy this". Miss Bacchus was scared; she got up, knocked at Tunku's door repeatedly whilst calling his name. She looked at the appellant and saw him putting his shirt over his face. The appellant, she said, was at the same time trying to give her a bag. She ran off and went to her house which was nearby. She then saw the appellant walking towards her gate. His face was not covered. He walked past her gate and then returned. As he passed the gate on both occasions, according to Miss Bacchus, he was "looking over my yard like him looking for me".

[7] At about 8:00 the same morning Miss Bacchus heard of Tunku's death. She was running to the scene when she saw Charley, the appellant, who held on to her hand and told her not to go down there. This is how she described her encounter with the appellant. "I was on my way down there, like some distance from him, mi see Charley and him hold on pon mi hand and seh to me, me must not go down there like how dem do Tunku, how dem chop him up, soh me nuh fi goh down deh, me may drop down. And me tell him seh him fi let go off mi..." The witness went on to say that at a "marl road hole" she saw the dead body of Tunku.

[8] Another witness, Neville Dickson, a farmer, testified that on 3 September 2004 at about 7:00 a.m. he went to the marl road in White Hall. There he saw a crowd. He saw the dead body of a man. It was the body of the deceased, whom he knew as Tunku. On the ground he saw and took up a "little knife" with one key attached

thereto. The knife was about six (6) yards from the dead body. The appellant who was among the people gathered there approached him and demanded the knife. He knew the appellant well, they used to sell together at the Negril beach. Dickson refused the appellant's request and instead handed the knife over to police officers who were in a radio car.

[9] Detective Sergeant Orel Simpson was, in September 2004, the Sub Officer in charge of crime at Negril, Westmoreland. On 3 September 2004 he went to an open lot of land in Whitehall where he saw a crowd of people. On the ground he saw the dead body of a man. He observed multiple wounds all over this body. The body was lying on its back and was clad in short pants. Sergeant Simpson summoned crime scene technicians. The Sergeant began investigation. He spoke to persons in the crowd and consequently spoke to the appellant who was at the scene. He identified himself to the appellant and frisked him. The Sergeant removed money – more than one hundred thousand dollars – from the appellant's pocket. The Sergeant told the appellant he was investigating the murder of Anserd Rose (Tunku) and that he was a suspect. He asked the appellant where he lived. The appellant told him he lived nearby. Sergeant Simpson took the appellant to his home in a police vehicle. He was accompanied by Constable Godfrey Fletcher and another police officer. It was a two apartment board house in White Hall. The appellant used a key to open a door at the back of the house. He told the police that he occupied one of the rooms and rented out the other. The appellant took the police to the room which he occupied. Sergeant Simpson, Constable Fletcher and the appellant went inside this room. The other police officer remained

outside. An internal door which was bolted from inside the appellant's room separated his room from the other room. Inside the appellant's room were a bed, a stove and a table. The police found a black handled knife with what appeared to be blood stains thereon, in the appellant's room. On the bed the police saw a plaid shirt and pants with what appeared to be blood stains thereon. Sergeant Simpson saw a pair of boots on the floor. On one of the boots he saw what he described as bloodstains. During the entire search of the room the appellant was present. When he took up the boot he pointed to the stain and said to the appellant, "This seems to be blood stains". The appellant did not comment.

[10] Sergeant Simpson took the appellant and all the things he found in his room, with blood stains thereon, to the Negril Police Station. In his office and in the presence of the appellant, Sergeant Simpson placed the items in separate envelopes. Each envelope was sealed and appropriately labelled. They were marked A-D. Thereafter the Sergeant locked the envelopes away in a filing cabinet in his office. He told the appellant that he would be kept in custody on reasonable suspicion of murder. Later Sergeant Simpson gave the said envelopes to Constable Fletcher who took them to the Forensic Laboratory.

[11] On 16 September 2004 Sergeant Simpson received blood samples taken from the deceased at the time of the post mortem examination. These samples were in two (2) bottles, he said. He took these samples to the Forensic Laboratory.

[12] On 5 November 2004 Sergeant Simpson returned to the Forensic Laboratory where he retrieved the envelopes which Constable Fletcher had taken there. He also received the analyst's certificate. He subsequently charged the appellant with the murder of the deceased. The envelopes, with the knife, shirt, pants and boots were received in evidence as exhibits 2, 3, 4 and 5 respectively.

[13] Constable Godfrey Fletcher was, in September, 2004 attached to the Negril Police Station. On 3 September 2004 he accompanied Sergeant Simpson to an open lot near the Scrub-a-dub car wash. There he saw a crowd and the body of a man on the ground. He observed stab wounds on the body. He saw the appellant at the scene. The appellant was taken into custody, placed in a police vehicle and asked to direct the police to his house which he said was in White Hall. Constable Fletcher testified that the appellant used a key, which he took from his pocket, to open the door of a house which he told the police was his. Constable Fletcher's evidence as to what took place at the appellant's house is consistent with the evidence of Sergeant Simpson.

[14] Constable Fletcher told the court that on their return to the police station, the items taken from the appellant's room were placed in separate envelopes by Sergeant Simpson. He saw Sergeant Simpson seal and label the envelopes in the presence of the appellant. On 6 September 2004 on the instruction of Sergeant Simpson, Constable Fletcher took these envelopes along with completed Government Forensic Exhibit Forms to the Government Forensic Laboratory and handed them to the analyst. He received

receipts which he gave to Sergeant Simpson at the station. He identified exhibits 2, 3, 4 and 5 as items which were found in the appellant's room.

[15] Dr. Murari Sarangi is a Regional Consultant Pathologist with office at the Cornwall Regional Hospital in St. James. On 15 September 2004, he performed a post mortem examination of the body of Anserd Rose at the Doyley's Funeral Home in Savanna-la-mar. The body was identified to the doctor by one Jennifer Jones of Orange Bay in Hanover. A police constable was present at the examination. The doctor testified that he observed some thirteen (13) injuries. Injuries numbered 1 and 2 were to the neck. Number 1 was an incised chop wound. It was 7.5 cm long and 3 cm wide. It went deep to the neck structures. The major blood vessels, namely, the jugular vein and the common carotid artery were completely severed with signs of extravasation of blood around. Injury No. 2 was also an incised chop wound. It was 27 cm long, 3 cm wide and deep to the neck structures. It was just below injury number 1, with severance of the trachea, oesophagus and major blood vessels at the left of the neck. Injury number 3 was an incised wound 6 cm long and 1 cm wide and muscle deep to the left deltoid of the left arm. Injury number 4 was two (2) oval incised wounds to the front of the left side of the chest. Injury number 5 was an incised stab wound, oval in shape, 2.5 cm long and 1 cm wide, deep into the chest cavity, injuring the lower lobe of the left lung with resultant haemothorax. Approximately three (3) litres of blood was seen in the chest cavity. Injury number 6 was also an incised stab wound, oval in shape, located on the back of the left chest, deep into the front side of the chest cavity injuring the upper lobe of the left lung with haemothorax. Injury

number 7 comprised two (2) incised stab wounds, oval-shaped measuring 2.5 by 1.5 and 2.5 by 1 cms. These wounds penetrated the abdominal cavity injuring the coils of both small and large intestines with resultant haemoperitoneum. Injuries numbered 9, 10 and 11 were to the hand, the elbow and the wrist. They were consistent with wounds sustained while warding off an attack. Injury number 12 was an incised wound on the back of the left side of the head behind the ear. Finally, injury number 13 was another incised wound. It was located on the front and lower part of the left leg.

[16] In the opinion of the doctor, death was due to haemorrhagic shock secondary to multiple sharp force injuries especially to the neck, chest and abdomen with injuries to the major neck blood vessels, left lung and intestines accompanied by massive blood loss. The injuries, the doctor said, were caused by a sharp edged pointed weapon. In his opinion, exhibit 2, the knife, found in the appellant's room, could have been used to inflict the injuries.

[17] Dr. Sarangi told the court that he took a blood sample from the body of the deceased, put it in a glass tube, labelled the tube and handed it to the police constable number 8042 who was present at the post mortem examination.

[18] Garnett Ervin, a constable attached to the Criminal Investigation Department (CID) was stationed at the Negril Police Station in September 2004. His registration number is 8042. On 15 September 2004 he was present at the Doyley's Funeral Home and saw Dr. Sarangi perform a post mortem examination of the body of the deceased. He saw the doctor remove the blood sample from the said body. The doctor, he said,

placed the blood in a test tube, wrote the name Anserd Rose on the tube and handed it to him. Constable Ervin testified that he asked one Trevor Spence, an employee at the funeral home to keep the tube in the refrigerator at the funeral home. He had to resort to this because the refrigerator at the police station was not functional. He saw Trevor Spence put the tube in a refrigerator and close the door. On the following day the constable accompanied Sergeant Simpson to the funeral home. He spoke to Mr. Trevor Spence who removed the same tube from the refrigerator and handed it to Sergeant Simpson.

[19] Trevor Spence, a morgue assistant at Doyley's Funeral Home told the court that on 15 September 2004 he assisted Dr. Sarangi who performed the post mortem examination of the body of the deceased. He saw the doctor take a blood sample from the deceased and place it in a glass tube which he labelled and handed to Constable Ervin. The constable put the glass tube in an envelope on which he wrote the name Anserd Rose. At the request of the constable he placed the said tube in a "safe box" in the refrigerator. On the following day Constable Ervin along with Sergeant Simpson returned to the station to retrieve the glass tube. The witness said he handed the same glass tube to Sergeant Simpson in the presence of Constable Ervin.

[20] Vonetta Spence is a Forensic Officer at the Government Forensic Laboratory. Miss Spence testified that on 16 September 2004 she received at the laboratory, six (6) sealed envelopes from Constable G. Fletcher along with an exhibit form which contained a description of the contents of the envelopes. These envelopes, she said, were

received on behalf of the Government Analyst, Miss Sherron Brydson. She opened each envelope and entered its contents on the exhibit form to which lab number 1852 of 2004 was assigned. In an envelope marked 'A' was a black synthetic handled knife; in envelope marked 'B" was a multicoloured plaid shirt, in envelope marked 'C' was a pair of black denim trousers and in envelope marked 'D' a pair of black leather boots. She said that Constable Fletcher was present during this exercise. A copy of the form was given to Constable Fletcher. The envelopes were placed in a vault.

[21] On 20 September 2004, Miss Sharon Rose, a Forensic Officer at the Forensic Laboratory received from Sergeant Simpson a sealed envelope marked 'G' along with a forensic exhibit form. In this envelope, she said, was a glass tube with the name Anserd Rose written thereon. The tube contained a blood sample. She noted the details on the form to which the same lab number 1852 of 2004 was assigned. She also noted the lab number on the envelope which she also signed. The envelope with the glass tube containing the blood sample was placed in a refrigerator and a copy of the form given to Sergeant Simpson.

[22] Miss Sheron Brydson is a Senior Government Analyst at the Forensic Laboratory. She has been attached to the laboratory as a forensic analyst since 1983. On 22 September 2004 she retrieved from the vault, envelopes labelled FL 1852/2004. The envelope marked 'A' contained a black synthetic handle knife with a blade measuring approximately 25 cm in length. She said that she examined the knife and found human blood present in droplets and film on the handle. She marked the two (2) areas with a

yellow pencil and submitted these areas for DNA analysis. The envelope labeled 'B' contained a multi coloured plaid shirt. Human blood, she said, was present in brown stains and drops on the lower left front. These areas were marked and submitted for DNA analysis. She found no blood on the pair of trousers which was in envelope 'C'. Envelope 'D' had a pair of boots. On the left boot she found human blood in clots with brown film. These areas were marked with yellow pencil and submitted for DNA analysis. No blood was found on the right boot.

[23] Miss Brydson also told the court that she received the blood sample in a glass tube. This tube was in an envelope marked 'G'. She supervised the preparation of this sample for DNA analysis. A piece of cloth was stained with the blood which was allowed to dry before it was handed to Mr. Compton Beecher for DNA analysis.

[24] Mr. Compton Beecher was the Chief Forensic Officer at the Government Forensic Laboratory and was in charge of DNA analysis. Mr. Beecher gave evidence of the results of tests and analyses done by him which compared the DNA found in the blood sample taken from the deceased with the DNA extracted from the blood stains found on the knife, shirt and the left foot boot taken from the appellant's room. The expert witness said that he used eight (8) markers. For the knife he got two (2) samples. He did DNA analysis on both and found that both had the same profile. He also got two (2) samples taken from the shirt. He got no DNA profile at all from one. On the other, he got a partial profile - six (6) of the eight (8) markers were present. This, he said, was possibly due to degradation. In respect of the left foot boot he got two (2)

samples as well. These two (2) samples had the same DNA profile as the knife. He concluded that the DNA profile on the knife and that on the left foot boot would have come from the same individual. Mr. Beecher testified that the DNA analysis conducted on the blood sample taken from the deceased revealed a partial profile in that there was no genotype generated for one of the markers (CSF1PO). The genotypes obtained for the other seven (7) markers matched those of the knife and the boot. He testified that the profile for the markers that were obtained from the blood sample matched the profile found on the knife, the boot and the shirt (p. 297 of Record.).

[25] Based on the statistical analysis, that is, the process used to arrive at a probability, he concluded that the match probability was one in eighty two million six hundred and four thousand – 1:82,604,000. This, he said, essentially meant that it would be rare to find someone in the population of Jamaica with this particular genetic profile. As regards the population of Jamaica, he was asked:

> "Q. And you were saying you had conducted a study statistics and you mentioned the population of Jamaica, what was the population of Jamaica at that time, do you recall?
>
> A. It was between 2.5 and 3 million."

[26] In cross-examination, Mr. Beecher said that the United States of America uses thirteen (13) markers, Europe uses ten (10) and in Jamaica, eight (8) markers are used. He was asked:

"Q. And is it correct to say the more markers you have, the more accurate your results are likely to be?

A. Not necessarily, because that (sic) eight markers may give you, depending on how rare the profile is, it may give you a match probability of say, one in twenty billion. The more markers you use that number would increase. That number would say go into the trillions, but then you are working with a world population of six (sic) billion people so its not necessarily the case that using more markers will be more accurate."

The Defence

[27] The appellant gave an unsworn statement in which he raised the defence of alibi. In this statement the appellant referred to the agreement he had with the deceased for the sale of his (the appellant's) house. The deceased, he said, paid him $155,000.00 leaving a balance of $15,000.00. He recalled Oneil Campbell and himself going to the Scrub-a-dub Club. From there they went to another club. He and a female were in a room until 1:00 a.m. when O'neil knocked on the door and said that it was time to go home. He and O'neil were walking on the road when he met "Tin Tin" another female. He took this female to his house where they slept until 6:00 a.m. Later the same morning he was on his way to work when he heard that the body of a man was found at the marl hole. He, along with others went to marl hole where he saw the body. Many persons were there. Someone, he said, told the police that the deceased and he, the appellant, "had something". The police searched him and removed the money from his pocket. They then took him to his house. They searched his room in his presence. The police asked him what clothes he was wearing. They

removed a pair of boots, a shirt, pants and a knife from his room. He said that Sergeant Simpson handed the boots to Constable Fletcher who left with them and returned with them in a bag shortly after. The marl hole, he explained, was near to his house. The police, he said, put the shirt and the pants in the same bag in which the boots were. He was taken to the station along with the items removed from his house. At the station the police told him that they were going "to run a test on the clothes".

The Appeal

[28] Mr. Ewan Thompson, counsel for appellant, filed seven (7) supplemental grounds of appeal. He sought and obtained leave to argue supplemental grounds 1 - 5 and 7. Ground 6, which concerned what were described as "several interruptions of Defence Counsel," was abandoned, correctly so, we think, by counsel for the appellant. Grounds 1-4 involve complaints against the learned trial judge's directions and/or non-directions in respect of the DNA evidence. Ground 5 concerns the admission into evidence of the agreement for sale. Ground 7 is against the sentence imposed.

[29] The criticisms which Mr. Thompson makes of the learned judge's directions on the DNA evidence are: (1) that the judge did not give the jury any directions in law on the inherent limitations of the partial DNA profile obtained from the blood sample taken from the deceased; (2) that the judge failed to give the jury any explanation or assistance in understanding the significance of a partial profile in DNA evidence, (3) that the learned judge failed to direct the jury that there was a discrepancy in one of the markers or band in the DNA profile obtained from the blood sample in that there

was no genotype generated for that marker, and (4) that the learned judge as well as the DNA expert and the Crown Counsel, seriously misrepresented to the jury the significance of the DNA evidence.

DNA Profiles

[30] Deoxyribonucleic acid or DNA is found in nearly every cell of the body. It can be extracted from body fluids such as blood, saliva or semen or from the cells contained in other parts of the body such as bone, hair or fingernails. The process of DNA analysis is complex. This process was summarised by Moore-Bick, L.J. in **R v Richard Bates** [2006] EWCA 1395. It is important to note that in England at the time of **Bates**, the DNA analysis was done by reference to ten (10) markers and to the sex indicator. In Jamaica, at the time when Mr. Beecher did his analysis, reference was made to eight (8) markers and there was no sex indicator. It may be helpful, I think, to attempt to describe those aspects of the summary of the nature of DNA which are relevant to this appeal.

[31] Mr. Beecher told the court that the process starts with DNA being extracted from samples. The DNA from each sample is multiplied by a specific enzyme into fragments of different sizes. The fragments produced are sorted according to size by the process of electrophoresis. Then by a system called 'imaging' he is able to see the actual DNA fragments. Another complex method is employed to record the band pattern. The DNA analysis is based on the fact that different markers or regions or "loci" contain repeated blocks of material known as "alleles". Mr. Beecher told the court that in the instant

case, eight (8) markers or loci were used. Although the loci at which the alleles are found are the same in everyone, the number of blocks making the alleles at each locus differ from person to person. At each locus there are two (2) alleles – one inherited from the father and one from the mother. So for example at locus CSF1PO, Mr. Beecher said he got the profile genotype 8, 7 for the stains from the knife, the shirt and the boot. A person's DNA profile is obtained by reference to the alleles present at the chosen eight (8) loci. If two (2) alleles are identified at each of the eight (8) loci of a sample of a person's DNA in such a case, the analysis is said to have produced a complete profile for that person.

Profile Matching

[32] It is helpful to quote Moore-Bick, L.J.:

> "When testing material for a match with a particular suspect the first step therefore, is to obtain a complete profile of the 'suspects' DNA for the purposes of comparison. A profile of DNA obtained from stains, hair or other materials found at a relevant location can then be prepared in the same way and the two compared. Data drawn from empirical research is available to enable analysts to calculate the statistical likelihood of any person within the population having a particular allele at a particular locus. Using that data it is possible to estimate the statistical likelihood that a particular sample of DNA originated from the person whose profile is being used for comparison. This is usually referred to as the 'match probability'."

See **R v Bates** (supra) at paragraph 13. Any discrepancy between the profiles, unless explained, will show a mis-match and would exclude the suspect from complicity.

Partial Profiles

[33] The presence of more than two (2) alleles at a locus is evidence that the sample contains the DNA of more than one person. This is known as a "mixed profile". Where at any of the loci, due to a variety of causes, only one allele or no alleles at all have been identified, such a profile is referred to as a "partial profile". Thus as Mr. Beecher testified, the DNA analysis of the blood sample taken from the deceased yielded a 'partial profile' in that there was no genotype (alleles) generated for the marker (locus) CSF1PO. If the missing alleles of the partial profile of the DNA of the deceased did not match those at that locus of the other samples which were analysed, it would establish that the blood found on the knife, the shirt and the boot was not that of the deceased. Consequently, as Moore-Bick, L.J. said in **Bates'** case "every partial profile carries within it the possibility that the missing information excludes the person under investigation, but there is currently no means of calculating the statistical chances of that being the case" - paragraph 17.

Submissions and Analyses

[34] Mr. Thompson, for the appellant, submitted that at no time did the learned trial judge direct the jury on the inherent limitations of the evidence of the partial DNA profile of the deceased's blood sample which was put to the jury as matching the DNA profile on the knife, boots and shirt found at the appellant's house. He contended that based on such limitations it was not correct to tell the jury that the DNA profile of the blood sample matched the profile found on the knife, boot and shirt, without any further and proper explanation. Counsel relied on **R v Richard Bates** (supra); **R v**

Doheny and Adams (1997) 1 Cr. App Rep. 369 and **R v Michael Asserope** SCCA No. 279/2001, delivered in December 2003.

[35] Miss Llewellyn, Q.C., submitted that in the cases relied on by the appellant, blood samples were taken from the accused persons. In the instant case the blood sample was taken from the deceased. What is important in the instant case is the match probability as explained by Mr. Beecher.

[36] As stated before, the Crown's case against the appellant is based on circumstantial evidence. The DNA evidence provides one of the strands on which the prosecution's case is founded. It must be observed that although in the deceased's DNA profile, there was a void at one of the loci in that no alleles were identified there, there is no evidence of a mis-match. The burden of the analyst's evidence is that it would be rare to find another person in Jamaica with the same genetic profile as the deceased. This was his conclusion after finding that the DNA profile found on the knife, boot and shirt taken from the house of the appellant matched the DNA profile of the deceased found in the blood sample at the corresponding markers. What is important, as the learned Director of Public Prosecutions submitted, is the match probability or the frequency ratio or the random occurrence ratio. The import of the unchallenged evidence of the analyst is that there was "a combination of bands" (alleles) common to the stains found on the items taken from the appellant's house and the blood sample of the deceased which was rare. His evidence is that the match probability was 1 in 82,644,000.

[37] The learned trial judge, in my view, accurately and adequately directed the jury on the analyst's evidence in this regard. She told them (page 345):

> "Now the analyst apart from just doing the DNA profile has to predict the statistical likelihood of an individual that might be found in the genetic make up of the population. In other words, the analyst has to arrive at the frequency of the description of these markers in relation to the Jamaican population. He has to determine from collective data, the probability of finding persons in the population who would have a combination of similar markers to that of the deceased Mr. Anserd Rose. For each of the markers he examined he calculated the genotype, the genotype is the numbers under the markers frequency and multiply them together to calculate the match probability and he came to the conclusion that the match probability from the markers that were obtained from the sample of blood allegedly taken from Mr. Anserd Rose was one in 82,644,000.
>
> Then he said the Jamaican population at the time was 2.5 or 3 million, so that what he is saying to you that it will be very difficult to find a Jamaican with the same DNA profile since this is one in 82.6 million and you only have 2.5 - 3million people in Jamaica.
>
> Now, the analyst Mr. Foreman and members of the jury, cannot say that the blood on the knife and the left boot must be that of the deceased, what the analyst can tell you is that although it is possible for the next person in the eighty two million six hundred and forty four thousand persons (to have matching bands) it is possible, but it is highly unlikely that you will find that other person being in White Hall, Westmoreland with the same DNA profile as Mr. Anserd Rose on the third of September, shedding blood, and that it is highly unlikely ... It is matter of fact for you."

[38] The learned judge clearly had in mind Phillips, L.J's. description of the process of DNA profiling and the procedure which should be followed where use is made of such DNA evidence. In **R v Doheny** (supra) the learned Lord Justice said (p 372 B-E):

> "The characteristics of an individual band of DNA will not be unique. The fact that the identical 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 likelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups 'the random occurrence ratio'.
>
> 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 appear in 1 in 4 of the population are combined, the combination will appear in 1 in 16 of the population, and if to these is 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 ratio of the blood group is a factor which is statistically independent and thus this can also validly be used as a multiplier. If the DNA obtained 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."

[39] The above passage was approved by their Lordships' Board in **Michael Pringle v R** (2003) 64 WIR 159. In the **Pringle** case at paragraph 13 the Board in referring to DNA evidence said:

> "Markers are used to identify specific DNA sequences. In the present case only two markers are used. This means that the DNA evidence was less strong than it might well have been if further markers had been used on the relevant material. The more markers that are used, the less likely it is that the same profile will be obtained from samples taken from two individuals. The greater the number of bands that match within this profile, the lower is the random occurrence ratio."

In the instant case, eight markers were used. In respect of the blood sample no profile was observed in one (1) of the markers. However, there were seven (7) matching bands in the profiles observed in the stains on the knife and the boot taken from the appellant's house and the blood sample from the deceased. There is no reason to doubt either the matching data or the statistical conclusion based upon the matching bands. Thus the random occurrence ratio of 1 in 82.6 million persons deduced for the DNA evidence is indubitably highly probative. Of course, it is for the jury to consider this evidence along with the additional evidence and to determine whether or not the evidence on its totality satisfies them of the guilt of the appellant. The important factor was the frequency with which the matching DNA characteristics were likely to be found in the Jamaican population.

[40] In **Bates** the prosecution relied on partial profile DNA evidence which it was submitted, tended to show that the appellant had been present at the scene of crime. At the trial it was submitted on behalf of **Bates** that the DNA evidence should be excluded on the grounds that it was impossible to ascribe any statistical value to the potential exculpatory effect of the voids in a partial profile and thus it was not possible to produce a true match probability. That submission was rejected by the judge who admitted the evidence subject to an appropriate warning to the jury of the limitations of partial profile DNA evidence. On appeal to the English Court of Appeal it was argued, (a) "that the effect of the decision in **Doheny and Adams** is that only statistical evidence can properly be placed before the jury in relation to DNA analysis and that in

the case of a partial profile the inability to take account of the potential exculpatory effect of voids, invalidates any match probability; (b) that to invite the jury to assess for themselves the evidential value of a partial profile, having explained to them the potential significance of the voids, is to invite them to weigh up something which is inherently unquantifiable." – See paragraph 27 ibid.

[41] The English Court of Appeal in dismissing the appeal said (paragraph 28):

> "Perhaps the first point that should be made is that the evidence derived from the testing carried out by the Forensic Science Service in the present case was presented to the jury in the form of statistical match probabilities of the kind contemplated in **Doheny and Adams**. Moreover we can find nothing in that case to support the proposition that only match probability calculations which take into account the statistical value of every conceivable possibility are admissible in evidence or that evidence based on partial profiles must be rejected in every case.
> ... The court in **Doheny and Adams** was primarily concerned to provide guidance of a general nature in relation to the presentation of DNA evidence and to expose and eradicate the so-called 'prosecutor's fallacy' which elevated the significance of the evidence beyond its proper level. It was not concerned with the distinction between full profile evidence and partial profile evidence, although there are passing indications in the judgment that the court may have had partial profile as well as full profile evidence in mind – see, for example, the reference to "the frequency with which the matching DNA characteristics are likely to be found in the population at large "at page 371 - E. Moreover it is necessary to bear in mind that in one sense all profiles currently obtainable are partial inasmuch as present techniques only allow testing at 10 loci. We were told that at the time when the tests considered in **Doheny and Adams** were performed the analysis was carried out by reference to 6 loci; now it is carried out by reference to 10 and we were told in the course of argument that advances in technology may make it possible to test by reference to

> many more. It remains the case however, that the presence of one allele at one locus that does not match the profile of the comparator is sufficient to exclude that person as the contributor."

The court went on to express the view that the fact that there exists in the case of all partial profile evidence the possibility that a "missing" allele might exculpate the accused altogether makes it important to ensure that the jury are given sufficient information to enable them to evaluate the evidence properly.

[42] In the instant case, the DNA evidence was presented in the form of statistical match probabilities. Mr. Beecher testified that this is done "by taking a representative sample from the population, in this case it would be the Jamaican population, and look at how often the number or allele 9 occurs in the population. We would look at how often 10 occurs in the population and from that we would be able to generate a genotype frequency, that is how often does the combination 9, 10 occur in the population." Mr. Beecher said, he would calculate the genotype frequency for each of the genotypes that was obtained. These would then be multiplied together to calculate the match probabilities. By this method he concluded that the match probability was 1 in 82.6 million. This means that one person in 82.6 million has the particular combination of alleles found in the deceased's DNA profile. Bearing in mind the population of this country, one can safely say that the random occurrence ratio would be extremely remote. The analyst said it would be rare to find a second person in this population with this particular genetic profile. In the circumstances of this case it was

not necessary for the learned judge to warn the jury of the limitations of partial profile DNA evidence.

[43] This case can easily be distinguished from **Bates** where the expert statistician calculated the probability match in the case of two samples to be 1 in 610,000 moreover, these samples contained the male sex indicator. As Moore-Bick, L.J. pointed out (paragraph 21):

> "if the total population of this country (England) is assumed to be about 60 million, there are only about 100 people who share this particular combination of alleles. Moreover, if one assumes that about half of the population are male and half female, the presence of the male sex indicator means that in statistical terms this combination of characteristics is shared by about 50 males ..."

A match probability of 1 in 82.6 million is clearly much more compelling than one of 1 in 610,000. It was certainly in the interest of justice that the trial judge in **Bates** should have ensured that the jury was made aware of the limitations and the potential significance of the partial profile evidence. As said before, we are of the view that in the instant case the circumstances did not demand any such warning. The directions given by the learned judge were, as already stated, adequate.

[44] Mr. Thompson also contended that the analyst and the learned judge misrepresented to the jury the nature of the DNA evidence. Such misrepresentation, he submitted, only served to elevate the significance of the DNA evidence. The burden of this complaint is that the jury was told that the DNA profile of the deceased matched or was the same as those profiles observed on the knife, the boot and the shirt. This,

counsel submitted, was fallacious as, firstly, the expert did not get a DNA profile for the sample taken from the shirt (page 295) and, secondly, the sample of blood taken from the deceased only generated a partial profile DNA which had inherent limitations.

[45] We do not agree with counsel for the appellant that the analyst and the learned judge misrepresented the nature of DNA evidence to the jury. Mr. Beecher told the court that in regards to the blood sample taken from the deceased no genotype was generated at the marker CSF1PO and that this was due to possible degradation or breaking down of the DNA in the sample. However, the bands of the other seven (7) markers in the blood sample corresponded exactly with the bands in respect of the stains found on the knife and the boot. For the shirt no genotype was observed at D16S539 and D7S820. This was also due to degradation. But the genotypes generated at the other six (6) markers corresponded exactly with those in respect of the stains on the knife and the boot. Mr. Beecher testified that he was satisfied that there was a match between the DNA profiles of the blood sample and those of the stains on the knife, boot and shirt. This conclusion of the analyst, in our view, is clearly not a misrepresentation of the nature of the DNA evidence. We do not agree with counsel that the absence of alleles or genotypes at one of the markers in the DNA profile of the blood sample means that there was a mismatch. Mr. Beecher explained the absence of the genotype. He also explained the absence of the genotypes at two (2) of the markers on the profile of the stain found on the shirt.

[46] The learned judge correctly directed the jury on this aspect of the case. She told them at pages 343-4:

> "The witness said he received two samples taken from the shirt and got a partial profile from one that is, although they use the eight markers not all the eight markers were present on the samples from the shirt. He said... he got six markers and it was his opinion that this was due to possible degradation of the DNA profile. And the second sample he did not get any DNA profile at all. He could not get any markers. He did not get no profile. It was put to him for the (defence) that the reason that he had a partial profile was because it was too small and he said it was impossible, it is usually because of degradation, is not because it was too small or insufficiency was the word he used. So, he said because of this he (did not) use this at all in the probability test."

After reminding the jury of the DNA analysis carried out on the stains found on the boot and knife, the learned judge proceeded to deal with the blood sample. She said (page 344):

> "So Mr. Beecher said in addition he conducted DNA analysis on a sample of blood taken from the deceased Anserd Rose, this DNA partial, there was no genotype - is the markers - so he said there is no CSF1PO profile. The other seven markers obtained matched the profile that was found on the knife and boot, the left boot that is. The other seven markers for the blood of the deceased matched the profile of the knife and the boot."

Thereafter the learned judge went on to direct the jury on the statistical evaluation of the match.

[47] Now as was emphasised in **R v Deen** Times Report 11, 10 January 1994, unlike finger printing, a DNA profiling match is not unique. Thus after achieving a match, the

next stage is the statistical evaluation of the match. As we have already stated the random occurrence ratio depends on the number of bands which matched and the frequency in the population of such band matching.

We cannot agree with counsel for the appellant, that the directions given to the jury in this regard were a misrepresentation of the nature of DNA evidence.

[48] In the light of the preceding paragraphs, we think that there is no merit in the further complaints of the appellant that the learned judge failed to direct the jury that the fact that there was no genotype generated for marker CSF1PO in the blood sample, meant that there was a discrepancy in one of the markers or band in the DNA profile and thus a match was not established with the other samples. Counsel for the appellant relied on a statement in **R v Deen** (supra). However, in **Deen** there was a discrepant band which remained unexplained and was said to have produced a mismatch. In the instant case there was no mis-match and the absence of a genotype at marker CSF1PO was explained.

The Admissibility of the Sale Agreement

[49] Counsel for the appellant submitted that the learned trial judge erred in law in admitting the agreement between the appellant and the deceased for the sale of the former's house as there was no evidential link between the agreement to sell the house and the murder of the deceased. It was more prejudicial than probative, counsel contended. It is fair to say, we think, that there was no obvious conviction in the argument of counsel. The evidence is that the police searched the appellant and

removed from his pockets over One Hundred Thousand Dollars. The appellant claimed that he got the money from the deceased pursuant to the sale agreement. In our view, the written agreement was admissible as providing part of the background evidence of the appellant's relationship with the deceased immediately before the murder of the latter. It seems to us that rather than being prejudicial, the admission of the agreement was favourable to the appellant in that it lends support to his statement as to how he came by the money. This would certainly remove the basis for any speculation. In our judgment, this ground cannot succeed.

The Sentence

[50] The appellant was indicted for murder. The particulars read that he, " on the 3rd day of September 2004 ... did unlawfully kill Anserd Rose." He was sentenced to "imprisonment for life at hard labour." The complaint before this court is that the learned judge erred in that she failed to specify a period which the appellant should serve before he becomes eligible for parole. The following are not in dispute:

(i) The murder of which the appellant was convicted did not fall within the circumstances specified in section 2 (1) (a) to (f) of the Offences Against the Person Act (the Act).

(ii) The provisions of section 3 (1A) of the Act did not apply to him.

(iii) The appellant's conviction of murder fell within section 2 (2). Section 2 (2) of the Act provides:

"(2) Subject to subsection (3), every person convicted of murder other than a person -

(a) convicted of murder in the circumstances specified in subsection (1) (a) to (f); or

(b) to whom section 3 (1A) applies shall be sentenced in accordance with section 3 (1) (b)."

(Subsection (3) is not relevant to this appeal).

[51] By virtue of section 3(1) (a) a person who is convicted of murder falling within section 2 (1) (a) to (f) or to whom section 3 (1A) applies shall be sentenced to death or life imprisonment.

Section 3(1) (b) reads:

"3 - (1) Every person who is convicted of murder falling within –

(a)...

(b) section 2 (2) shall be sentenced to imprisonment for life or such other term as the court considers appropriate not being less than fifteen years."

Section 3 (1c) (b) provides:

"(b) where, pursuant to subsection (1) (b) a court imposes -

(i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or

(ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years, which that person should

> serve before becoming eligible for parole."

[52] The learned Director of Public Prosecutions conceded that the learned judge was obliged by virtue of section 3 (1c) (b) (i) to specify a period of not less than fifteen years, that the appellant should serve. But that is not the end of the matter. Section 3 (1E) of the Act provides for a sentence hearing. It states:

> "(1E) Before sentencing a person under subsection (1) the court shall hear submissions, representations and evidence, from the prosecution and the defence, in relation to the issue of the sentence to be passed."

The record of appeal does not indicate that subsection (1E) was complied with. However, since no complaint is made in this regard this court will not assume that there was non-compliance. At this point we are constrained to register our utter dissatisfaction with the manner in which the record of appeal was prepared. We note the many 'missing' pages in the transcript of the evidence and the incomplete index.

Conclusion

[53] For the reasons given, the appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence is varied to one of imprisonment for life with the direction that the appellant should serve fifteen (15) years before becoming eligible for parole. This sentence should commence as of 3 May 2006.