NMCS.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 279/01

BEFORE: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R V MICHAEL ASSEROPE

L. Jack Hines for the Appellant

Mrs. Jeneice Nelson-Brown, Crown Counsel for the Crown

29th, 30th September and 19th December, 2003

SMITH, J.A.:

The appellant Michael Asserope was charged on an indictment which alleged that he, on the 24th day of June, 1999 in the parish of Clarendon murdered Tamara Tamica Osbourne, in the course or furtherance of carnal abuse contrary to section 2(1)d)(iv) of the Offences against the Person Act. He was convicted in the Clarendon Circuit Court on the 6th December, 2001 and sentenced to suffer death in the manner authorized by law.

He was granted leave to challenge his conviction on grounds which mainly relate to the trial judge's directions on the DNA evidence.

The Prosecution's case

The deceased Tamara Osbourne, was ten years of age at the time of her death. She was a student at the Denbigh Primary School and lived with her adopted mother Mrs. Idella Osbourne and her sister Sherona Thomas in Denbigh, Clarendon.

The appellant, a taxi driver knew the deceased. In fact he was the "boyfriend" of Sherona, the sister of the deceased, and is the father of Sherona's infant child. On the 24th day of June, 1999 at about 6:45 a.m., Tamara left home for school but did not reach. About 8:15 a.m. Detective Sgt. Evan Williams received information and went to the Best Well Farm in May Pen Clarendon. There, he saw and spoke to the caretaker of the farm. He accompanied the caretaker to a section of the farm where there was a cluster of wild cane. There he saw Tamara Osbourne lying on her back in a pool of blood. There was a large wound to the neck and she was dead. He also saw her school bag about one and a half yards from the body. There were bloodstains on her clothing. There were large pieces of tissue paper on the ground near the body. These pieces of tissue paper had what appeared to be blood stains. There were blood stains on the shrubs around where she lay.

On the instructions of Sgt. Williams the body and the crime scene were photographed. Thereafter the body was removed to the Johnson's Funeral Home, Four Paths. Sgt. Williams took possession of the deceased's

clothes and shoes. About 4:00 p.m. the same day Sgt. Williams who is also called Mr. Bumpy, saw the appellant at the police station. He approached him and told him that he was investigating the murder of Tamara Osbourne and that he had information that he had driven her to school that morning. The appellant replied, "Mr. Bumpy, me no remember, sir". He searched the appellant's car in his presence and took possession of a number of items including a large dagger in a black sheath. The appellant told Sgt. Williams that the dagger belonged to him. From the pocket of the car Sgt. Williams removed a roll of white toilet tissue paper. The appellant was detained on suspicion of murder.

In the Criminal Investigating Branch office Sgt. Williams took from the person of the appellant a wristwatch with a brown leather band, a handkerchief, a leather band belt, a pair of sneakers and a wallet. Later that same day he took from the appellant a pair of denim trousers and underpants.

On Saturday, the 26th June, 1999 the appellant was interrogated by Det. Sgt. Williams. During the interrogation the appellant is alleged to have said, "Mr. Bumpy, I want to give you a statement bout what happen Thursday, sah". In the presence of a Justice of the Peace the appellant gave a caution statement which was written down by Sgt. McKenzie of the May Pen C.I.B. In this statement the appellant is alleged to have stated that on the morning of the 24th June he saw Tamara on the road

and picked her up in his taxi. When she came in the car she kissed him and told him that she loved him. He drove off with her. She told him she wanted to make love to him. He took her to a spot off the Glenmuir Road. The statement reads in part:

> "So me start to mek love with her and then the blood start and Tamara tek the toilet paper and start wipe up and me no remember nothing more after that".

The appellant was subsequently charged with murder and carnal abuse. He was cautioned and is alleged to have said "Mr. Bumpy you know say a obeah me wife obeah me sah?" With the appellant's consent, he was taken to the hospital where Dr. Wilson took a sample of his blood. The sample was placed in a glass tube by the doctor who labelled and sealed it and handed it to Sgt. Williams. The police Sgt. testified that the items he took from the crime scene, from the body of the deceased, from the appellant's car, and person, as well as the appellant's clothing and blood sample were placed in separate envelopes which he sealed and labelled "C" to "R". On the 29th June, 1999 he took these envelopes to the Forensic Laboratory and handed them to the forensic analyst.

On the 30th June Sgt. Williams attended the post mortem examination done by Dr. Brennan on the body of the deceased. The doctor found injuries which indicated that the deceased was brutally forced to submit to sexual intercourse. He said her throat was cut and

she bled to death. Sgt. Williams received from the doctor vaginal swabs and smears and a piece of sternum of the deceased. These were placed in envelopes which he labelled "S" to "U". These were also taken to the Forensic Laboratory.

On the 20th September, 1999 Sgt. Williams received from the Forensic Laboratory, certificates in respect of the contents of these envelopes marked "C" to "U" along with some of the envelopes. On the 22nd November, 1999 he received from the Laboratory a DNA report in respect of the items. Evidence was given by Ms. Brydson as to the blood type of the deceased and the appellant and as to the presence of semen and human blood on some of the items she received from the police. For reasons which will soon be obvious it is not necessary to refer to this aspect of her evidence in detail.

DNA evidence

DNA tests on the portion of the deceased's sternum, the various blood samples other items including the sheath, handkerchief and the deceased's vaginal swabs were carried out by Miss Sherron Brydson, a government forensic analyst. Two tests were used by Miss Brydson with a view to establishing the DNA on the samples. These were the "DIS80" which is one marker along the DNA and the polymarker system which has six markers – HLA, LDLR, GYPA, HBGG, D7S8 and GC. The results of the test on the sternum of the deceased gave the following readings:- On

the DIS 80 test it was 21,21, the HLA was 1.2, 4.1, the LDLR was BB, the GYPA was AA, the HBGG was BC, D7S8 was AB and GC was BC.

In relation to the blood sample taken from the appellant the readings on the DIS80 test 24, 28, on the HLA – 4.1,4.2/4.3; the LDLR-AB; GYPA-AA; HBGG –AB; D7S8 AA, and GC –AC. Miss Brydson said she tested two areas on the handkerchief which was allegedly taken from the appellant. One area did not give a result. The other area gave the following readings: DIS80 test –21,21; HLA was 1.2,4.1; LDLR was BB, GYPA was AA; HBGG was ABC; D7S8 was AB and GC was ABC. On two of the markers HBGG and GC there was a mixture or partial mixture of DNA. (Each individual has a maximum of two DNA types). However, the deceased's DNA type was found in all the markers. Thus the DNA characteristic found in the stain on the appellant's handkerchief bore similarities to those found in the portion of the sternum of the deceased. DNA tests were also done on the sheath which was taken from the appellant's car. Miss Brydson said she only got one result from the DIS80 marker which was 21,21. This was the same as the deceased's DNA type. In respect of the sternum DNA characteristic Miss Brydson gave the random occurrence ratio - the frequency with which the matching DNA characteristics are likely to be found in the population at large – as 3.8/1,000,000. This means that approximately 4 out of every million persons will have the same type as that found in the sternum . She could not state

categorically the random occurrence ratio in respect of the DNA found on the handkerchief because a couple of the markers had a mixture.

The Defence

In his defence the appellant made an unsworn statement. He asserted that he was forced to sign a statement which he did not dictate. He denied knowing anything about the murder.

The issues on appeal

Mr. Hines on behalf of the appellant sought and obtained leave to argue five supplemental grounds. The first and second relate to the caution statement. Counsel for the appellant complains that the trial judge failed to direct the jury that if they believed the appellant's statement he would not be guilty of capital murder or murder but only of carnal abuse.

The third and fifth relate to the DNA evidence. Counsel says that the trial judge misdirected the jury on the evidence of the forensic analyst and that he failed to explain to the jury the significance of the "random occurrence ratio."

The fourth relates to expert evidence. Counsel complains that the trial judge did not tell the jury how to treat with evidence of the expert witnesses.

The caution statement

The prosecution alleged that the appellant gave a caution statement in which he admitted to having sexual intercourse with the deceased. However, according to the statement he remembered "nothing more after that." Mr. Hines contends that it was incumbent on the trial judge to direct the jury that if they believed the statement in its totality then the appellant would be guilty of carnal abuse only. If he did not remember anything more than sexual intercourse with the young girl then the essential **mens reas** of murder would have been missing, counsel urged. He relied on the decision of the Court in ***R v Andre Jarrett*** SCCA No. 130 of 2001 (unreported) March 4, 2003 which followed the decision of the Privy Council in ***Alexander Von Starck v The Queen*** P.C. Appeal 22 of 1991 (unreported) 28th February, 2000.

We do not agree with counsel that the mere assertion that he remembered nothing after sexual intercourse is enough to raise specifically the issue of the lack of **mens rea**. We are of the view that in the circumstances the general directions given by the judge on intention (and there is no complaint about these) are adequate. We will not comment on the evidence in the light of the course we intend to take in disposing of this appeal. It is enough to say that there is no duty to leave to the jury defences which have not been put and which are fanciful or

speculative – See ***R v Critchley*** (1982) Criminal Law Review 524 and ***R v Bonnick*** 66 Cr. App. R. 266.

The DNA Issues

Misdirection on the evidence

The trial judge in his summing-up told the jury (p. 229):

> "The prosecution is not saying that Michael Asserope had any cut. The prosecution says that these things the handkerchief, the knife and sheath, the shoes were found on Michael Asserope, and they contained on scientific analysis, the DNA of Tamara Osbourne".

Again at (p.232) the trial judge said:

> "You have to look at the prosecution's case in its totality because he does not hold any burden of proving anything. But you examine it carefully because although he has set up an alibi objects taken from him bear the DNA of the deceased girl, if you accept the analyst's testimony."

Contrary to the analyst's evidence the above passages certainly indicate that the deceased's DNA was found on at least four objects taken from the appellant. The analyst's evidence was that only on the sheath of the dagger could she categorically say that the deceased's DNA was found. However, she stated that the result of the DNA test on the sheath came from only the DIS80 marker, the other areas did not give a result.

As regards the DNA found in the stain on the handkerchief, the analyst's evidence was that she used seven markers and the DNA type was the same as she found on the sternum. There were a few areas on

the handkerchief that had the appellant's typing. The DNA characteristics found on the handkerchief were much more representative of the deceased's DNA than that of the accused.

The analyst testified that there was human blood on the sneakers but she was unable to get a DNA type. She also found human blood on the knife but was also unable to get a DNA type.

Counsel for the Crown conceded that the trial judge misrepresented the DNA evidence and that this error was fatal to the conviction.

The random occurrence ratio

In response to a question by the prosecutor, Miss Brydson said that having done a statistical analysis in relation to the DNA type of the sternum she got a probability figure of 3.8/1,000,000. She said that for "every random individual you come across in Jamaica approximately 3.8 out of one million will have the same type as that found on the sternum". In response to a further question she said:

> "... the frequency of the accused is even less; he is 5.7/10,000,000 persons. We do not have so many people in Jamaica anyway".

This means that five or six persons in 10,000,000 have a DNA profile which matches that of the appellant.

In his direction to the jury the judge said:

> "The scientific evidence, the expert tells you, the ratio of probability is 3.8 in 1,000,000 and 5.7 in

> 10,000,000 the probability of that. So it means it is rare, not common, rare. And you remember crown counsel says that it does not always mean that those with that DNA are in Clarendon much less in May Pen area here. They are diffused all over"

Counsel for the Crown conceded that this direction is not only confusing but also incorrect. Further, the jury were not directed as to the approach which they should take to this kind of evidence. It is only fair to say that the trial judge did not have the benefit of the decision of their lordships in ***Michael Pringle v The Queen*** Privy Council Appeal No. 17 of 2000 (unreported) 27th January, 2003. In that case the Board approved the guidance given by Phillips LJ in ***R v Doheny*** [1997] Cr. App. R. 369 on procedure in relation to DNA evidence. In the ***Doheny*** case Phillips LJ, listed thirteen procedures which should be adopted where DNA evidence is involved.

For ease of reference we list them:

> "1. The scientist should adduce the evidence of the DNA comparisons between the crime stain and the defendant's sample together with his calculations of the random occurrence ratio.
>
> 2. Whenever DNA evidence is to be adduced the Crown should serve on the defence details as to how the calculations have been carried out which are sufficient to enable the defence to scrutinize the basis of the calculations.
>
> 3. The Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

4. Any issue of expert evidence should be identified and, if possible resolved before trial. This area should be explored by the court in the pre-trial review.

5. In giving evidence the expert will explain to the jury the nature of the matching DNA characteristics between the DNA in the crime stain and the DNA in the defendant's blood sample.

6. The expert will, on the basis of empirical statistical data, give the jury the random occurrence ratio – the frequency with which the matching DNA characteristics are likely to be found in the population at large.

7. Provided that the expert has the necessary data, it may then be appropriate for him to indicate how many people with the matching characteristics are likely to be found in the United Kingdom or a more limited relevant sub-group, for instance, the caucasian, sexually active males in the Manchester area.

8. It is then for the jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.

9. The expert should not be asked his opinion on the likelihood that it was the defendant who left the crime stain, nor when giving evidence should he use terminology which may lead the jury to believe that he is expressing such an opinion.

10. It is inappropriate for an expert to expound a statistical approach to evaluating the likelihood that the defendant left the crime stain, since

unnecessary theory and complexity deflect the jury from their proper task.

11. In summing-up careful directions are required in respect of any issues of expert evidence and guidance should be given to avoid confusion caused by areas of expert evidence where no real issue exists.

12. The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and to that which conflicts with the conclusion that the defendant was responsible for the crime stain.

13. In relation to the random occurrence ratio, a direction along the following lines may be appropriate, tailored to the fact of the particular case: 'Members of the jury, if you accept the scientific evidence called by the Crown this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics.'

These procedures are apparently intended for cases in which the prosecution places reliance upon the results obtained by comparing DNA profiles obtained from a stain, hair root, spermatozoa etc. left at the scene of the crime with DNA profiles obtained from a sample of blood provided by the accused. The majority of them, if not all would probably apply to the instant case, **mutatis mutandis**.

The random occurrence ratio in relation to the appellant's DNA type is of no relevance since the prosecution's case was not based on the matching of the characteristics between the DNA in the crime stain and the appellant's DNA. The trial judge should, we think, have emphasized the fact that the appellant's DNA type was not found on the deceased's vaginal swabs, or on any of the objects taken from the deceased or the crime scene. As regards the deceased's DNA it was incumbent on the trial judge to explain carefully to the jury the relevance of the analyst's evidence of the random occurrence ratio in arriving at their conclusion as to whether or not the blood stain on the sheath which was allegedly found in the possession of the appellant, came from the deceased. See ***Michael Pringle v. R.*** (supra) and ***R. v. Doheny*** (supra) for caution on "the prosecution fallacy". It was for the jury to say whether they were sure that the blood found on the sheath came from the deceased. Only if they were so sure could this be a strand in the circumstantial evidence. As the Court said in the ***Doheny*** case, careful directions are required in respect of any issues of expert evidence and guidance should be given to avoid confusion caused by areas of expert evidence where no real issue exists.

We hold that the trial judge failed to give the jury the necessary assistance. This failure, we think, renders the conviction unsafe.

Failure to give direction on expert evidence

This too was conceded by the Crown. It is the duty of the judge to make it clear to the jury that they are not bound by the expert's opinion and that it is for them to decide whether or not to accept and act upon the expert's opinion evidence. In this case the prosecution called two expert witnesses – Dr. Desmond Brennan, who performed the post mortem examination on the body of the deceased and of course, Miss Sherron Brydson, the forensic analyst. Dr. Brennan's opinion evidence did not in any way implicate the appellant. However, Miss Brydson's opinion evidence, if accepted by the jury, was capable of implicating the appellant. Accordingly, we are of the view that the failure of the judge to make it clear to the jury that they did not have to accept and act upon her evidence, amounts to a misdirection.

It is not necessary for the Court to consider whether or not the proviso should be applied in respect of this failure since the appeal must be allowed on grounds three and five.

Conclusion

We have come to the conclusion that the appeal should be allowed on the ground that there were defects in the judge's summing-up in relation to the DNA evidence. Counsel for the Crown invited the Court to order a new trial. Counsel for the appellant had earlier in his submissions suggested such a course. We note that the appellant was

taken into custody in June 1999 and was tried in December 2001. We have considered all the relevant factors and principles as enunciated in ***Reid v R*** (1978) 27 W.I.R 254 and in our judgment it is manifestly in the interest of justice that a new trial be ordered.

Accordingly, the appeal is allowed, the conviction quashed and a new trial ordered. The appellant is remanded in custody.