JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 176/04

BEFORE: THE HON. MR. JUSTICE PANTON, P
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

R. v HOZEN HORNE

Miss Althea McBean for the applicant
Mrs. Simone Wolfe-Reece and **Miss Dahlia Findlay** for the Crown

24th, 25th September, 2nd November, 2007 and January 23, 2008

DUKHARAN, J.A. (Ag.):

The applicant Hozen Horne was charged on an indictment which alleged that he, on a date unknown, between the 19th and 21st June, 1998, in the parish of St. Catherine, murdered Leisha Smith. He was convicted in the St. Catherine Circuit Court before N. McIntosh, J. and a jury. He was sentenced to life imprisonment and ordered to serve twenty (20) years before being eligible for parole.

This matter first came before a single judge who refused leave to appeal against conviction and sentence.

The deceased Leisha Smith, was a young girl of twelve (12) years old, and was last seen by her friend, Pauline Smith, on the 19th June, 1998 heading in the direction of Half Way Tree, St. Andrew. That same night, a girl fitting the

description of the deceased was seen in a car being driven by the applicant, heading to his house in Essex Hall, St. Andrew. His car was seen at his house up to 1:00 a.m. Two (2) days later, Leisha Smith's partially decomposed body was found by a fisherman under the Causeway Bridge with her feet bound.

The Prosecution's case

The prosecution relied on circumstantial evidence, which included DNA evidence, to prove its case against the applicant. The applicant knew the deceased, as she used to visit his workplace. Pauline Smith, who was the deceased's friend, accompanied her to his workplace at Molynes Road, St. Andrew and would see her talking to him. The last time she saw the deceased was on the 19th June, heading in the direction of Half Way Tree. She described her friend as short, and brown in complexion.

Rupert Biggs knows the applicant and was his neighbour in Essex Hall. He knows him as "metro man" as he drove a geo-metro motor car. He recalls a Friday night in June, 1998 when he was playing dominoes in Essex Hall Square. He saw the applicant in his car about 9:00 p.m. when he drove to the Essex Hall Square. In the car, with the applicant, was a young female, whom he described as having a round face and of brown complexion and appeared to be eleven or twelve years old. He was able to see the applicant, and the young girl, with the assistance of a street light. The car had stopped close to where he was playing dominoes. Shortly after, the applicant went to his home nearby with the young girl. Up to 1:00 a.m. when Mr. Biggs went home he saw

the applicant's car parked at his home. While he was playing dominoes he never saw the car come back up.

Nigel Fuller also testified that he too knows the applicant as he was also his neighbour. He said on the 19th June, 1998, he too was in Essex Hall Square when he saw the applicant in his car with a young girl whom he described as about fourteen years old and of brown complexion with braided hair.

Mr. Bonroy Rowe, a security guard, having received information from a fisherman, discovered the body of the deceased in the water on the 21st June, 1998. He subsequently made a report to the police who had the body removed from the water.

A post mortem was performed by Dr. Kadiyala Prasad who said that the body was decomposed, with the face, abdomen and chest swollen. There were bloodstains and fluid coming from the mouth and nostrils of the deceased. Her feet were bound together. The cause of death was due to drowning. Dr. Prasad concluded that death would have occurred within two to four days of his examination. The body of the deceased was subsequently identified by her mother Angela Goodridge.

Detective Sgt. Everette Taylor had the clothes of the deceased removed. On the 21st June, 1998 having received information, Sgt. Taylor went to the Half Way Tree Police Station where he saw the applicant. He cautioned him and told him that he received a report that he was responsible for the death of Leisha Smith. The applicant is alleged to have said "Officer, me no knew weh

you talk bout." The applicant was taken to his home in Essex Hall by Sgt. Taylor and other policemen the same day where he was asked for the clothing he was wearing on the 19th June, 1998. On the 30th June, the police returned with the applicant to his house where a search was carried out and a quantity of toilet tissue, items of clothing, a pillowcase and a bed spread were taken by Sgt. Taylor. On the 2nd July the applicant was again taken to his house by Sgt. Taylor, accompanied by other policemen and Miss Sharon Brydson, the Government Analyst. Miss Brydson collected bed linen, kitchen towel and other items. All items collected on all three occasions were labelled and sealed and taken to the Forensic Laboratory for analysis. On the 9th July, 1998 the applicant voluntarily gave blood samples at the request of Sgt. Taylor. These samples were also sent to the Forensic Laboratory for analysis.

On the 26th July, 1998 the applicant was charged for the murder of the deceased. He was cautioned and is alleged to have said "Lawd a weh this me get m'self in a?"

On the 12th August, 1998 the body of the deceased was exhumed. Dr. Ralston Clifford, the Government pathologist, removed a piece of the sternum, the mandible (jawbone) and soiled panty from the remains of the deceased. These were sealed and sent to the Forensic Laboratory for testing.

DNA Evidence

DNA tests were carried out by Miss Sherron Brydson, a Government Forensic Analyst. Tests were conducted on a portion of the deceased's

sternum and mandible (jawbone), as well as on several items of clothing from both the deceased and the applicant. Tests were also conducted on blood samples, as well as bed spread, towel, toilet tissues and other items taken from the applicant's house. Miss Brydson also examined the applicant's Metro motor car. DNA analysis was done for the purpose of detecting the presence of blood and semen.

In conducting DNA tests, Miss Brydson used what she referred to as markers, which was the procedure used internationally at the material time. She used the seven marker system on the analysis of the sternum and the mandible (lower jaw bone), as well as blood samples taken from the applicant. Other items included a bed sheet, tissue paper, shirt, kitchen towel and underpants taken from the house of the applicant. Two areas of blood stains on the bed sheet were tested and the DNA profile was the same as the profile of the sternum taken from the deceased. In effect she said that the person's DNA on the sternum was also on the sheet which was taken from the appellant's house. She came to the conclusion that only 1 in 6,250,000 persons would have that DNA.

In relation to the toilet tissue, semen was found on three areas, and the DNA profile was the same as the sample of blood that was taken from the appellant. Statistically, this profile could be found in 1 in 35,714 persons. The applicant admitted to using the tissues found in his room. In relation to a kitchen towel and a shirt, the bloodstains found on those items had similar DNA profile as

on the sternum. Miss Brydson formed the view that, based on the blood analysis that she did, and with a high degree of certainty the deceased was inside the applicant's house. This was based on the DNA findings on the sheet, kitchen towel and underpants when compared with the DNA which was extracted from the sternum of the body of the deceased. She also opined that the seven or eight marker system she used did not render the results unreliable or inaccurate and was just as accurate as the tests that are being done now.

The Defence

The applicant gave evidence and denied any involvement with the deceased. Although he admitted he knew the deceased, he denied taking her in his car on the night of the 19th June, 1998 to his house. He said that he was alone at home and he watched television and then went to his bed. He said he last saw the deceased when she came to his workplace on Molynes Road. He gave her $20 and she left. He did not know where she went after that.

Grounds of Appeal

Miss McBean, for the applicant, abandoned original grounds filed by the applicant, but sought and was granted leave to argue three supplemental grounds as follows:

(1) The verdict arrived at in the matter is unreasonable having regard to the evidence.

(2) The learned trial judge erred in that she gave insufficient directions on circumstantial evidence which adversely affected the appellant's chances of acquittal.

(3) The learned judge failed to properly direct the jury on the issue of the DNA evidence.

In ground three there is the complaint that the learned trial judge failed to properly direct the jury on the issue of DNA evidence.

Counsel for the applicant submitted that, the learned trial judge had a duty to assist the jury with the meaning and the method of testing in respect of DNA evidence and this was not done. She contended that the definition of DNA given by the learned trial judge was unforensic and vague.

The learned trial judge in her summation explained to the jury the definition that was given by the analyst Miss Brydson, and at page 643 said:

> "So the DNA is what each individual consists of. And what we get from our parents. She explained that it determines everything about us like the colour of our eyes, the length and texture of our hair and so on. All those things that goes on inside our body. And she said that this DNA is unique to each individual, unless you have an identical twin or you know, other variations.

And at page 644 she continued:

> "She said she would first do a test to take out, extract the DNA from the sample, for example, of blood or semen, she extracts the DNA and then she would go on to another test now, to see how much DNA she was able to obtain. She would do another test, now, to amplify it, you know, multiply so she can make more of it you may remember her telling you that in the DNA tests that she conducted she used what she referred to as markers. Several of them. And she gave you the numbers."

Counsel for the applicant submitted that these passages could not have properly assisted the jury in appreciating the full import of the DNA science. She

relied on the case of ***Regina vs Alan Doheny and Gary Adams*** [1997] 1Cr.App.Rep 369 which gives guidance on procedure in relation to DNA evidence and the approach which a jury should take to this kind of evidence. In this case Phillips L. J. listed thirteen procedures which should be adopted where DNA evidence is involved.

They are:

> "I. 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.
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> 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 scrutinise 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.
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> 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.
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> 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.
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> 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 the 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.
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> 13. In relation to the random occurrence ratio, a direction along the following lines may be appropriate, tailored to the facts 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.'"

In ***Michael Pringle v The Queen*** Privy Council Appeal No. 17/2002 at paragraph 14, the Board approved of the guidelines given by Phillips L. J.

Counsel for the applicant argued that the learned trial judge confined her review of the DNA evidence only to items which produced results. She was also contending that the learned trial judge ignored the findings of semen from blood group B on the sheets, as well as a T shirt, which could not have come from the applicant. With regards to the findings, counsel complained that conclusions were stated in respect of the scientific evidence, instead of leaving it as a matter for the jury, and that the learned trial judge made what amounted to findings of fact, rather than, have the jury understand the nature and purport of scientific evidence and come to their own conclusions. With regards to the Random Occurrence ratio it was submitted that the analyst as well as the learned trial judge gave the jury the impression that the result

pointed to only one possibility in that, no one else in the population would have the DNA profile of the applicant.

It was also submitted by Counsel for the applicant that the procedure used in collecting and storing of samples used for DNA was not secure and there was the possibility of inaccuracies and contamination. The items should be kept in a controlled area until testing.

Counsel for the Crown, Mrs. Wolfe-Reece was asked to respond to ground 3. She submitted that the directions given by the learned trial judge were adequate, based on the DNA evidence. She said that the failure of the learned trial judge to mention blood group B (the applicant being blood group O) was not fatal and there was other evidence, which the jury could find, that the applicant was present. She further submitted that even in the absence of scientific evidence, there was enough circumstantial evidence, to convict the applicant.

It is quite clear that in ***R v Doheny and Adams*** (supra), the trial judge is required to give careful directions in respect of expert evidence and guidance should be given to the jury. The court ought not to make findings that ought to be left to the jury. At page 650 of the summation the learned trial judge stated:

> "She tested two areas of bloodstains and the DNA profile was the same as the profile of the sternum allegedly taken from the body of Leisha Smith. So Miss Brydson is saying that the person from whom that

> sternum was taken, that person's DNA was also on the sheet which was taken from the accused man's room."(emphasis mine)

And at page 651 of the summation the learned trial judge said:

> "... you may well find it easy to conclude that it was Leisha Smith's DNA on the sheet and that she was in the accused man's room. Now exhibit 8 was the tissues. She had found semen on three areas and she did DNA on those and she said that the DNA the profile was the same as the sample of blood that was taken from the accused."

In Doheny ***and Adams*** (supra) Phillips L.J. said at page 374:

> "When the scientist gives evidence it is important that he should not overstep the line which separates his province from that of the jury."

We are of the view that, the learned trial judge fell into error in reviewing the evidence of the analyst. The above passages clearly, in our view, indicate definite conclusions arrived at which was a matter for the jury to determine. This could have given the jury the impression that these were findings of facts on which they could rely. This certainly was an area in which they ought to have come to their own conclusions.

In dealing with the Random Occurrence ratio, the learned trial judge gave the jury the impression that the result pointed to one possibility, by stating no one else in the population would have the DNA profile of the applicant.

We have come to the conclusion that there were defects in the Judge's summation in relation to the DNA evidence. Judges are well advised to pay

particular attention to the guidelines as set out in the ***Doheny*** case as it is quite easy to fall into error in this area.

The question therefore, is that, in the absence of scientific evidence, whether there is enough circumstantial evidence that a jury could come to a verdict adverse to the applicant. We do not think so. Although the applicant was seen with a young girl going to his house, the deceased was not positively identified as only scientific evidence put her at the applicant's house.

We are of the view that the conviction cannot stand, and that the appeal should be allowed. It therefore becomes unnecessary for this court to consider the merits of grounds 1 and 2. We have considered the principles as set out in ***Reid v Regina*** [1998] 27 WIR 254 and we are of the view that a new trial should be ordered in the interest of justice.

Accordingly, the application for leave to appeal is granted, and the hearing of the application is treated as the hearing of the appeal. The appeal is allowed, the conviction is quashed and the sentence set aside. A new trial is ordered to take place as early as possible.