

**IN THE CARIBBEAN COURT OF JUSTICE  
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS**

**CCJ Appeal No. CR 1 of 2009  
BB Criminal Appeal No. 15 of 2006**

**BETWEEN**

**CLYDE ANDERSON GRAZETTE**

**APPELLANT**

**AND**

**THE QUEEN**

**RESPONDENT**

**Before The Rt. Honourable  
And The Honourables**

**Mr Justice de la Bastide, President  
Mr Justice Nelson  
Madame Justice Bernard  
Mr Justice Wit  
Mr Justice Hayton**

**Appearances**

**Mr Alair Shepherd QC, Mr Philip McWatt and Ms Wendy Maraj for the Appellant**

**Mrs Donna Babb-Agard and Mr Anthony Blackman for the Respondent**

**JUDGMENT OF THE COURT  
Delivered by  
The President and Justices Nelson and Bernard  
on the 3<sup>rd</sup> day of April 2009**

## **J U D G M E N T**

- [1] The appellant, Clyde Anderson Grazeette, was convicted on November 21, 2006, of the murder of a young woman, Rosanna Griffith, and sentenced to death after a trial before Cornelius J and a jury. On September 18, 2008, the Court of Appeal (Peter Williams, Connell and Moore JJA) dismissed Grazeette's appeal against conviction. We heard the appellant's further appeal against conviction on February 6, 2009. At the conclusion of that hearing we dismissed the appeal but gave the appellant special leave to appeal against the sentence of death. That appeal is still pending but we proceed now to give our written reasons for dismissing the appeal against conviction.

### **The facts**

- [2] On May 19, 2001 Rosanna Griffith, aged 18, of St. Stephen's Hill, Black Rock, in St. Michael left her home with her sisters, Crystal and Cindy, and a friend, Rhea, and went to Carlton Supermarket. After they had made their purchases and emerged from the supermarket, the three others went back in to purchase yogurt and ice-cream while Rosanna remained outside the door of the supermarket. When the three came out of the supermarket and went to the spot where they had left Rosanna, she was nowhere to be seen. She never returned home.
- [3] On May 20, 2001 her partially naked body was found lying in a track at St. Stephen's Hill. She had been sexually assaulted, strangled and murdered. A vaginal swab taken from Rosanna's body revealed the presence of semen. Samples of hair and blood were also taken from the body.
- [4] On May 31, 2001, the appellant heard that the police were looking for him and went voluntarily to the Central Police Station in Bridgetown in company with a lawyer. There he met Detective Constable Rouse and Detective Constable Garrett. Constable Rouse indicated that he wanted to interview the appellant in connection with the death of Rosanna. In the course of the interview Constable Rouse informed the appellant that during the course of investigations police "had discovered what they suspected to be ejaculatory fluid on the body of Rosanna and that there was a test whereby we could determine from whom the fluid came." Constable Rouse inquired of the appellant whether he was willing to give a blood and hair sample for the purpose of such a test. The appellant replied: "I frighten for needles, but I will give the blood and hair." The appellant was taken to the office of Dr. Murray, a medical doctor, at Thorpes, St. James by Constable

Rouse, who was accompanied by Constable Garrett. There he gave a blood sample.

- [5] On May 31, 2001, the appellant also gave to Constable Rouse an account of his movements on the evening of May 19, 2001. This account was reduced to writing in the form of a movement statement. In that statement the appellant denied he had anything to do with Rosanna's death. He did admit however that he was on the roadside at St. Stephen's Hill when a young woman and three younger girls walked past him. These would almost certainly have been Rosanna and her sisters and their friend on their way to the supermarket. In his statement he made the following further admissions: "I know this young lady by seeing her walking through the district but I do not know her name. I usually would pull at her or make remarks as she passed. As she passed I reached out at her but I did not touch her."
- [6] The appellant also admitted in his statement that later on that evening he saw a female relative of the young woman he had seen earlier, walk down St. Stephen's Hill. Both Rosanna's mother and aunt testified that they had separately gone in search of Rosanna after the other children returned home without her.
- [7] The appellant was also seen in the compound of the Carlton Supermarket around 9:00 p.m. that evening by a policeman, Constable Dalton Thorne who testified to that effect.
- [8] In the late evening of May 31, 2001 Constable Rouse arrested the appellant but later released him on June 3, 2001. He was re-arrested on May 12, 2002, and later charged with Rosanna's murder. This was after the police received a report of the results of DNA testing carried out at the FBI Laboratory in Washington D.C.

### **The Case against the Appellant and his Defence**

- [9] The case against the appellant depended almost exclusively on evidence given by a DNA Examiner from the FBI Laboratory that the DNA of the seminal fluid found on the vaginal swab taken from the victim's body, matched the DNA of a blood sample taken from the appellant. Clearly, if this evidence was admitted the defence would be problematical to say the least. On the other hand, without this evidence the case against the appellant would collapse, as while there was the circumstantial evidence of his presence very close to the scene of the murder at or about the time when it was committed and his crude attempts to flirt with Rosanna (paras. [5] to [7] above), this was quite inadequate to support a conviction.

- [10] The defence of the appellant was, as indeed it had to be, that the blood sample which was found by DNA testing to match the seminal fluid on the vaginal swab, was not in fact the blood sample that was admittedly taken from him.

### **The Main Ground of Appeal**

- [11] The main ground of appeal on which the appellant relied, was that having regard to the inconsistencies and gaps in the evidence of the chain of custody of the blood sample taken from the appellant, the trial Judge ought to have excluded evidence of the results of the DNA testing. Counsel's principal submission was that the prosecution had failed to discharge the onus which lay on it of proving that the blood sample with the matching DNA was in fact the blood sample taken from the appellant in its pristine condition. It was submitted that without that foundation being laid, the evidence of matching DNA was inadmissible. It was contended for the appellant that the deficiencies in the chain of custody evidence affected the admissibility of the DNA evidence, not just its weight. This argument was not advanced in the Court of Appeal and no objection on this ground was taken at the trial to the admission of the DNA evidence. These being criminal proceedings, however, we do not consider that these failures to challenge the admissibility of the evidence barred the appellant from doing so before us.
- [12] The principal ground of appeal was buttressed by the submission that some of the evidence adduced in an effort to maintain a chain of custody, was in fact hearsay and not admissible under any of the exceptions to the hearsay rule created by the Evidence Act.

### **The Chain of Custody Evidence**

- [13] The chain of custody evidence begins with the taking of the blood sample from the appellant by Dr. Murray at his office on May 31, 2001. This was done in the presence of two police officers, Constable Garrett and Constable Rouse (although Dr. Murray does not mention Rouse). Dr. Murray testified that he collected a sample of the appellant's blood "in a phial which was labelled. The phial was then put into an envelope which was sealed and handed back to the Constable." Dr. Murray then made an entry in the Police Medical Journal and handed that back to the Constable.
- [14] Constable Rouse's evidence was that he took with him to Dr. Murray's office "two containers, a transparent evidence bag and the Police Medical Journal". According to Constable Rouse, Dr. Murray having taken the blood sample from the appellant "handed the items to Constable Garrett and made an entry in the Police Journal". Constable Rouse then took possession of these items and kept them in his custody.

- [15] According to Constable Rouse he took two phials to Dr. Murray and when he got them back the two phials were sealed in an evidence bag on which he placed his initials. He also said that the appellant placed his signature on the phials.
- [16] Constable Rouse further testified that after they returned to the Station the appellant gave him two hair samples, one from his head and the other from his pubic area, and these samples were put in separate envelopes.
- [17] Constable Rouse also swore that after their return to the Station, the blood samples taken from the appellant were kept in the evidence bag in which they had been placed, in a refrigerator in the Criminal Investigation Department in his custody, until he handed them over together with the two hair samples obtained from the appellant, to Sergeant Walcott on July 13, 2001. He also handed over to Walcott at the same time blood and hair samples taken from other suspects.
- [18] The relevant part of Constable Garrett's evidence in chief with regard to the collection of the appellant's blood sample reads as follows:

“Constable Rouse was in possession of a sealed phial, a transparent evidence bag and the Police Medical Journal ... On completion Dr. Murray handed Rouse the sealed transparent evidence bag containing two phials with what appeared to be blood. Dr. Murray then made an entry in the Police Medical Journal ... .”

Constable Garrett swore that he too placed his initials on the evidence bag in which the two phials were placed. Constable Garrett confirmed in cross-examination that two phials were given to Dr. Murray and he was sure of that, although as appears from the passage just quoted, he first spoke in his evidence in chief of a single phial.

- [19] Constable Garrett also testified that after they returned to the station, Constable Rouse obtained hair samples from the head and pubic area of the appellant and “placed them in separate brown envelopes and sealed them”.
- [20] Sergeant Walcott, who is a qualified forensic scientist, testified that on July 13, 2001, he received from Constable Rouse packages containing blood and hair samples from a number of suspects. One of these which was attributed to the appellant, comprised a sealed evidence bag containing two white envelopes, one containing two “tubes” and the other containing samples of hair. The other samples were all in sealed evidence bags bearing the names of the respective suspects to whom they were attributed. Sergeant Walcott kept all these items in police custody “in the appropriate environment” until he travelled with them on July 17, 2001, to the FBI Laboratory Evidence Control Centre in Washington

D.C. for the purpose of having the samples subjected to DNA analysis and comparison.

- [21] Sergeant Walcott's evidence was that he submitted the samples to an "evidence technician" at the FBI laboratory. Sergeant Walcott designated as "SP1" the hair and blood samples attributed to the appellant. The samples taken from other suspects were designated "SP2", "SP3" and "SP4" respectively. Sergeant Walcott described what happened at the hand over to the evidence technician in these words:

"[He] ensured that on arrival and receipt, the packages were all sealed and had the appropriate markings, which provided an integrity seal. Once that was done, that technician in my presence placed their seal on that, on each bag containing the items submitted. I signed an Evidence Control Form, which they would have kept in their custody at that point."

The evidence technician who received the items was not called as a witness nor was the Evidence Control Form which was signed by Sergeant Walcott, put into evidence.

- [22] The only person from the FBI Laboratory who was called as a witness was Jennifer Luttman. She was a Forensic DNA Examiner employed by the FBI. Her functions (which she performed in relation to the items submitted for examination in this case) were to manage and supervise a team of biologists who did the preliminary bench-work on items submitted to the Laboratory for examination. She reviewed and interpreted their case-notes, decided what items were to be tested, what examinations were to be done and which items were to be the subject of DNA analysis. She wrote the report and testified orally as to her findings.
- [23] She explained that the DNA of the semen found on the vaginal swab taken from the victim was compared with the DNA samples taken from all the suspects including the appellant. She found that she was "able to exclude" eight other suspects from whom she had blood samples, but "at all 13 locations, the DNA matched Clyde Graze's".
- [24] The blood sample which she treated as the appellant's was marked "K4" by the Laboratory and according to her, together with the head and pubic hair samples marked "K2" and "K3" respectively, were the same items which had previously been marked "SP1" by Sergeant Walcott. She, however, had not received the items from Sergeant Walcott and was not herself responsible for, nor had she witnessed, the re-designation of the samples comprising "SP1" as "K2", "K3" and "K4". She however did testify that all of the blood samples which she examined

(including “K4”) were labelled both with the names of the respective persons from whom they had been taken and the dates on which they had been taken.

### **Criticisms of the Chain of Custody Evidence**

[25] The following were the main criticisms leveled at the chain of custody evidence.

#### **Two phials or one?**

Mr. Shepherd for the appellant pointed to the totally unexplained inconsistency between on the one hand, the evidence of Dr. Murray and Ms. Luttmann that the former took and the latter received only one phial of blood from the appellant and on the other hand, the evidence of the policemen, Constables Rouse and Garrett and Sergeant Walcott, that there were two phials of blood taken from and attributed to the appellant. Mr. Shepherd argued that if the police witnesses were to be believed, then Ms. Luttmann ought to have found matching DNA in two of the phials of blood tested, not one.

#### **Opening of the Evidence Bag**

[26] It was submitted for the appellant that the evidence clearly disclosed that the evidence bag in which the appellant’s blood sample had been placed and sealed, must have been opened while in Constable Rouse’s custody if for no other purpose than to place in it the hair samples provided by the appellant. This it was contended was the only explanation of how the evidence bag in which the blood taken from the appellant was placed at Dr. Murray’s office, came to contain the appellant’s hair samples as well. The evidence of both Constables was that this evidence bag was sealed at the doctor’s office and initialled by both Constables, but the package which was received by Sergeant Walcott from Constable Rouse was described by Sergeant Walcott as consisting of an evidence bag containing two white envelopes, one of which contained hair samples and the other “two tubes”, all of these being attributed to the appellant. It was submitted therefore that the integrity of the package containing the appellant’s blood samples, had been compromised and the chain of custody thereby broken.

#### **Gap in chain of custody**

[27] Mr. Shepherd also relied quite heavily on an alleged gap in the chain of custody evidence which occurred at the point when the items brought from Barbados by Sergeant Walcott were handed over to the evidence technician at the FBI

Laboratory. As already mentioned, that technician did not give evidence and the Evidence Control Form prepared by him was not put in evidence. This Form apparently consisted of a list of the items submitted by Sergeant Walcott for testing showing both how each of these items had been designated by Sergeant Walcott and how they were re-designated for purposes of testing by the Laboratory. As a result, it was submitted, there was no evidence, or at least no admissible evidence, that the blood sample which was marked “K4” by the evidence technician, was in fact the same blood sample (or one of the blood samples) that formed part of the item marked “SP1” by Sergeant Walcott. The argument was that the only evidence creating the vital link between “K4” and “SP1” was at best hearsay evidence given by Ms. Luttman who had neither received “SP1” nor assigned its new designation to the blood sample marked “K4”.

[28] In order to demonstrate that reliance cannot be placed on assumed conformity with standard procedures adopted by a forensic laboratory, in order to render admissible the results of testing when the link between the sample tested and the sample taken from the accused depends on identification by a person who is not called as a witness, counsel for the appellant referred us *inter alia* to *R.v. Fizzell*<sup>1</sup>. In that case blood had been found on a boot worn by a murder accused and the prosecution led evidence that upon testing that blood was found to match the blood of the victim which was of an unusual type. It emerged, however, in cross-examination that the blood taken from the boot had been placed on a plate for examination together with numerous other blood samples and the person who placed it on the plate and recorded in writing its position on the plate in relation to the other samples, was not called as a witness. The expert who gave evidence of the testing and its results, had not witnessed either the placing of the blood on the plate nor the recording of its position. The accused’s conviction for murder was quashed on appeal and a new trial ordered on the ground that the results of the test should not have been admitted in evidence.

[29] It was pointed out that to make matters worse in the instant case there was a discrepancy in the prosecution’s evidence as to the number of suspects samples of whose blood were submitted for testing at the Laboratory. Sergeant Walcott testified to having submitted samples taken from four persons which he marked respectively “SP1”, “SP2”, “SP3” and “SP4”. “SP1” comprised the hair and blood samples taken from the appellant and “SP2”, “SP3” and “SP4” consisted of samples taken respectively from three other suspects. Ms. Luttman on the other hand received and tested blood samples from five suspects apart from the

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<sup>1</sup> [1987] 31 A. Crim. L.R. 213

appellant. She identified these samples as those marked by Sergeant Walcott “SP2” to “SP6” both inclusive. Moreover, she provided the names of the five persons to whom the samples were attributed, these having been written on the labels affixed to the samples. The suggestion was that this discrepancy served further to discourage reliance on the assumptions which alone correlated the items marked by Sergeant Walcott in the “SP” series with those marked in the “K” series by the unidentified technician.

### **Packaging of appellant’s hair samples**

- [30] There were other inconsistencies to which attention was drawn by counsel for the appellant. There was for instance a discrepancy between the police witnesses as to the packaging of the hair samples provided by the appellant. Both Constables Rouse and Garrett said that the samples from the appellant’s head and pubic area were put in separate envelopes which according to Constable Garrett were brown in colour. The evidence of Sergeant Walcott, however, was that these hair samples were contained in one white envelope inside the evidence bag which he received from Constable Rouse.

### **Sergeant Walcott’s hearsay evidence?**

- [31] It should be mentioned for the sake of completeness that Mr. Shepherd also submitted that the evidence of Sergeant Walcott that the package which he marked “SP1” contained samples that were attributed to the appellant, amounted to inadmissible hearsay. We unhesitatingly reject that submission. Admittedly Constable Walcott could not testify that these samples were in fact taken from, or provided by, the appellant but that was not necessary for the purpose of maintaining the chain of custody. It is implicit in his evidence (and that of Constable Rouse) that the attribution of samples to the appellant was made by Constable Rouse who had seen the blood sample taken from the appellant. In so far as Sergeant Walcott testified that the same samples that had been attributed to the appellant by Constable Rouse when they were handed over to him, were marked “SP1” and submitted by him to the FBI Laboratory with the same attribution, and that in the interim these samples were kept in secure custody, his evidence was not hearsay and did serve to maintain the chain of custody.

### **Relevant standard of proof**

- [32] It is important to advert to two matters, one of law and the other of fact, which have a bearing on our determination of the principal issue in this case. The question of law is: what is the standard of proof which the prosecution must satisfy in order to establish a foundation for the admission of the DNA evidence? It was submitted for the appellant that the appropriate standard was proof beyond

reasonable doubt as that was the standard required in criminal cases by Section 134(1) of the Evidence Act which reads as follows:

“(1) In criminal proceedings, the court shall not find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.”

It was argued that this was the governing section rather than Section 135 which, though it prescribes proof on a balance of probabilities for establishing the facts necessary for determining the admissibility of evidence, begins with the words “subject to this Act”, and is not expressly made applicable to criminal proceedings. Section 135 provides as follows:

“135 (1) Subject to this Act, in any proceeding the court shall find that the facts necessary for determining

- (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
- (b) any other question arising under this Act

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is satisfied as mentioned in sub-section (1), the court shall take into account, *inter alia*, the importance of the evidence in the proceedings.”

[33] We reject this argument and hold that –

- (a) the stricter standard of proof required by Section 134 (1) is applicable to the determination of the guilt of the accused, and
- (b) where facts have to be established in order to render evidence admissible, then even in criminal proceedings the standard to which those facts must be proved, is on a balance of probabilities, as ordained by Section 135 (1).

A court, however, will not easily be persuaded that this standard has been met when, as in this case, the evidence the admissibility of which is in question, is of great importance.

[34] In this case therefore, the evidence of the DNA results was admissible if the prosecution established on a clear balance of probabilities that the blood sample with the matching DNA was in fact taken from the appellant. If the chain of custody evidence met that standard, then the Judge was right to permit the DNA

results to be given in evidence. As no objection to the evidence was taken at the trial, what we have to decide is whether on the evidence led in this case, a judge who properly directed himself would have found that on a clear balance of probabilities the blood sample in which the matching DNA was found, was taken from the appellant and that there had been no tampering with it before it was tested.

### **Peculiarity of DNA testing**

- [35] The pertinent factual matter to which we have alluded, is that the very nature of DNA testing makes the process less vulnerable to abuse than some of the older types of forensic testing. In other types of testing e.g. for the presence of a prohibited drug, it is always possible for an unscrupulous investigator to substitute for the item taken from the accused something obtained from another source, which the investigator knows will prove positive on testing. In the case of DNA testing, however, it is only the perpetrator himself who knows which sample will produce the tell-tale DNA match. Accordingly, with DNA testing, while there is always the possibility of an accidental mix-up of samples, there is much less scope for deliberately falsifying the source or identity of a sample submitted for testing in order wrongly to incriminate a particular person.

### **Assessment of the evidence**

- [36] We turn now to make our own assessment of the evidence of chain of custody. The case for the appellant is encapsulated in the following two sentences taken from the written submissions filed by counsel on his behalf:

“It is submitted that the evidence as to the chain of custody is at least very confusing, difficult to reconcile and contains different descriptions as to how the samples were packaged. There is no clear chain of custody evidence upon which a court or jury could infer that the particular sample(s) was actually the sample which tested positive for DNA evidence found on the victim.”

The criticisms made in the first sentence are justified in relation to some at least of the chain of custody evidence. We do not agree, however, with the conclusion stated in the second sentence.

- [37] The inconsistencies in the evidence to which reference has been made above (see paras. [25], [26], [29] and [30]) are difficult, though not impossible, to explain. With regard, for instance, to the conflicting evidence as to whether one or two phials of blood were taken from the appellant by Dr. Murray, kept by Constable Rouse and passed by him to Sergeant Walcott, and finally submitted by Sergeant

Walcott to the FBI Laboratory, it is at least possible that if there were in fact two phials of blood taken from the appellant, one of them may have been omitted from the items listed and marked by the technician who received them, because he (or someone directing him) thought that it would be a waste of time and effort to test two blood samples known to have come from the same person. There is of course no evidence that this is what actually happened but it is a possible explanation that does not offend against common sense. It does not explain, however, Dr. Murray's evidence of having taken a single phial of blood from the appellant.

[38] With regard to the presumed introduction of the appellant's hair samples in the sealed evidence bag in which his blood samples had previously been put, it is not altogether clear whether there is a difference between an "evidence bag" and an "envelope" or whether the two terms may have been used interchangeably. We note that Dr. Murray speaks of the phial containing the blood which he had drawn from the appellant being placed in an "envelope" although both Constables Rouse and Garrett say the blood samples were placed in an "evidence bag". Sergeant Walcott described the item attributed to the appellant as an "evidence bag" containing "two envelopes", one containing blood and the other hair. Is it possible that the "envelope" which according to Sergeant Walcott contained the "two tubes", was in fact the "evidence bag" in which Dr. Murray placed and sealed the appellant's blood sample? If so, then Sergeant Walcott's description of the package which he received from Constable Rouse, would not provide any basis for an inference that the bag (or envelope) containing the appellant's blood sample must have been opened.

[39] We turn now to the discrepancy between the evidence of Sergeant Walcott and Ms. Luttman as to the number of blood samples taken from suspects other than the appellant which were submitted for testing by the FBI Laboratory (three marked "SP2" to "SP4" according to Sergeant Walcott, and five marked "SP2" to "SP6" according to Ms. Luttman). Walcott did testify that he was advised by Constable Rouse that he had blood and hair samples from three suspects and blood samples alone from two, making a total of five suspects (other than the appellant) from whom blood samples had reportedly been obtained. This was confirmed by Constable Rouse. Both Constable Rouse and Sergeant Walcott testified that Constable Rouse handed over to Sergeant Walcott a number of samples taken from these other suspects. Constable Rouse said that he handed over samples from at least three other suspects. He was not able to refresh his memory from his police note-book as he had left the Police Force and could not find it. His lack of certainty on this point is therefore understandable. In any event, it really does not matter how many samples taken from other persons were

tested and found not to match the male DNA on the vaginal swab as long as the evidence established that the one sample which provided the DNA match, was that (or one of those) taken from the appellant.

- [40] We may say in parentheses that it is unfortunate that the items that were tested by the FBI Laboratory were not tendered in evidence at the trial together with the packages in which they were kept. Proof of the chain of custody would have been a lot less problematical if, for instance, Dr. Murray had identified from the witness-box his handwriting on the label which he affixed to the sample of blood which he took from the appellant, and the two Constables had been able to identify their initials on the bag (or envelope) in which that sample was placed. Although we enquired of counsel for the respondent, we were not given any satisfactory explanation why these items were not made exhibits in the case.
- [41] Even after the unsatisfactory aspects of the chain of custody evidence have been acknowledged and considered, there still remains in our view a hard core of evidence which serves to identify the phial of blood which was marked “K4” by the time it reached Ms. Luttman, as the same phial of blood which was taken by Dr. Murray from the appellant and labelled by him. This phial of blood was kept in the custody firstly of Constable Rouse and then of Sergeant Walcott. It has not been suggested at any stage that the custody in each case was not safe and secure. According to Constable Rouse, he kept the item in a sealed bag in a refrigerator in the Criminal Investigation Department and Sergeant Walcott spoke of it being kept “in police custody”. There is no reason to believe that any unauthorised person had access to the sample while it was in the custody of these police officers.
- [42] As indicated above, Sergeant Walcott attested that the samples arrived at the FBI Laboratory intact and without tampering. Indeed the appellant’s expert witness, Professor Schanfield, asserted that if a sample did not have an adequate chain of custody on the identity documentation a forensic laboratory would refuse to test it.
- [43] One basic means of identification that was placed, and appears from the evidence to have remained, on the blood sample taken from the appellant, was the label affixed to it by Dr. Murray. Dr. Murray did not say precisely how he labelled the sample, but in its ordinary English meaning “label” refers to a piece of paper or other material attached to an object and giving information about it. It is clear that ‘labelling’ would have involved at the very least writing on the label the name of the person from whom the blood was taken. It would also have been quite natural for the labeller to also write the date on which the sample was taken. As has already been pointed out, the appellant’s blood sample was identified to Sergeant

Walcott by Constable Rouse when he handed it over to Sergeant Walcott, and there is no doubt that Sergeant Walcott similarly identified the sample when he delivered it for testing to the evidence control technician at the FBI Laboratory. We accept that there is no direct evidence, or at least none that is admissible, that the technician who received the items for testing from Sergeant Walcott, assigned to the appellant's blood sample which up to then was part of the item marked "SP1", the new designation "K4". But we do not consider that this is necessarily fatal to the chain of custody. One needs to be reminded of dicta of Romilly J, in *R v Larsen* (2001) BCSC 597 who said at [62]:

"... Canadian case law makes it clear that proof of continuity is not a legal requirement and that gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity."

- [44] The evidence of Ms. Luttman is that the item marked "K4" was a phial of blood which bore a label bearing the name of the appellant and the date when it was taken. On a balance of probabilities the inference is irresistible that this was the label affixed by Dr. Murray to the phial of blood taken from the appellant. The evidence suggests that that label had remained on that phial untouched until it was delivered to the evidence control technician at the FBI Laboratory. It is difficult to imagine any circumstance in which the evidence control technician or any other member of the Laboratory's staff would have interfered with that label. It was also the evidence both of Sergeant Walcott and Ms. Luttman that all the blood samples taken from other suspects were separately packaged and labelled with the names of the respective persons from whom they were taken and the dates on which they were taken. Sergeant Walcott also testified that these packages were sealed up to the time they were delivered to the Laboratory. This evidence tends to render it improbable that there was any accidental mix-up of the blood samples.
- [45] The instant case is distinguishable on the facts from *Fizzell* (supra) because the blood sample "K4" can be identified as that taken from the appellant by virtue of the label placed on the phial by Dr. Murray. Its identification therefore does not depend on the evidence of the technician who designated it "K4". If it did, the facts would have more closely resembled those in *Fizzell*.
- [46] We hold therefore that the evidence of the results of the DNA testing was admissible because there was evidence sufficient to persuade a judge who properly directed himself, that on a balance of probabilities the blood sample with the matching DNA had been taken from the appellant and had not been interfered with prior to its being tested. We hold that in coming to this conclusion a judge would not have had to rely on any hearsay evidence.

### **Section 115 of the Evidence Act**

[47] No criticism was made of the judge's directions to the jury with regard to the inconsistencies in the chain of custody evidence and therefore we do not have to consider the adequacy of those directions. There was, however, another ground of appeal on which some reliance was placed. This was based on Section 115(1) of the Evidence Act which provides as follows:

“(1) In criminal proceedings, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the accused, the court may refuse to admit the evidence.”

It was submitted that the probative value of the DNA evidence was outweighed by the danger of unfair prejudice being caused to the appellant by its admission. We reject this argument summarily as the probative value of the DNA evidence was manifestly so great that once the chain of custody evidence was strong enough to justify its admission, there was no scope for the exercise of the exclusionary discretion provided by Section 115 (1). As was pointed out by McHugh J. in the Australian case of *Papakosmas v.R*<sup>2</sup>:

“Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted.”

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<sup>2</sup> (1999) 196 CLR 297 at [91]

**Conclusion**

[48] For these reasons therefore we dismissed the appeal and affirmed, as the Court of Appeal did, the appellant's conviction. As already indicated, however, the appellant has been given special leave to challenge on appeal to us the mandatory death sentence passed on him and a hearing of his appeal against sentence has already been scheduled. Obviously, as long as that appeal is pending the death sentence must not be carried out, but it has not been thought necessary to seek from this Court a formal order to that effect.

/s/ M. A de la Bastide

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The Rt. Hon. Mr. Justice Michael A. de la Bastide (President)

/s/ R F Nelson

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The Hon. Mr. Justice R. Nelson

/s/ D. P. Bernard

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The Hon. Madame Justice D. Bernard

/s/ J Wit

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The Hon. Mr. Justice J. Wit

/s/ D Hayton

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The Hon. Mr. Justice D. Hayton