PARTIES:	RICKY LATCHA
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL
FILE NO:	CA 9 of 1998 (9617126)
DELIVERED:	22 December 1998
HEARING DATES:	13 October 1998
JUDGMENT OF:	Kearney, Mildren and Bailey JJ

REPRESENTATION:

Counsel:

Appellant:	J Tippett
Respondent:	R Wild QC and J Adams

Solicitors:

Appellant:	Waters James McCormack
Respondent:	DPP

Judgment category classification:	A
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IN COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. CA 9 of 1998 (9617126)

BETWEEN:

RICKY LATCHA
Appellant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, MILDREN and BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 22 December 1998)

THE COURT:

[1] This is an appeal against conviction brought pursuant to s410(b) of the *Criminal Code*, the trial judge having granted a certificate that the case is fit for an appeal on the ground that the verdict of the jury is arguably unsafe and unsatisfactory and/or that there has arguably been a miscarriage of justice.

[2] The appellant, who is an Afro-Carribean from Guyana in the West Indies, was charged with and convicted of having sexual intercourse with KB without her consent. The Crown case, as presented to the jury, was that

KB, a 30 year old intellectually impaired woman, was raped by the appellant in the prosecutrix's flat on the afternoon of 8 April 1996. The Crown's principal witnesses were the prosecutrix Trudy Hinge, to whom the prosecutrix had made complaint, and a forensic biologist, Ms Kuhl, who gave evidence:

(a) that the prosecutrix's panties had human semen on them;

(b) that there was a match in three separate DNA systems between sperm taken from the panties and the appellant's blood;

(c) that from statistics available to her as to the relevant frequency of the occurrence of the appellant's DNA systems amongst the general population, she estimated:

    (i) with 97.5% confidence, that those three particular groups of typings were rarer than one person in 8,000;

    (ii) with 95% confidence, that the true value of the relative frequency occurs between one in 8,000 to one in 20,000 persons;

    (iii) that since calculating those figures in 1996, there are "a lot more numbers on the database now" and that, with 95% confidence, the relative frequency is between one in 11,000 and one in 20,000 persons.

The appellant's case was that no sexual intercourse took place at all.

[3] The learned trial judge instructed the jury to ignore the statistical evidence. His Honour's overall charge to the jury was very favourable to the accused. He drew attention to a number of matters relied upon by counsel for the accused as affecting the credibility of the complainant and the account she gave. His Honour gave what amounted to a corroboration warning to the jury. The appellant did not give evidence but his denials were before the jury in the form of a video-recorded interview by the Police, and his Honour instructed the jury that the Crown had to satisfy them that his denials should be rejected. As to the evidence of Ms Hinge, his Honour directed the jury that her evidence was admissible for the limited purpose of showing whether or not the prosecutrix was a credible witness. His Honour instructed the jury that the DNA evidence went no further than not to exclude the accused as the person responsible for the seminal stain on the panties. His Honour also criticised Ms Kuhl's evidence as to the significance of the seminal stains on the panties. The jury eventually convicted the appellant by a majority verdict.

[4] It is against this background that the appellant complains that the jury ought to have had a reasonable doubt as to the appellant's guilt. His Honour, in his charge to the jury, did not suggest that there was any particular piece of evidence which supported the prosecutrix's account, in the sense of being evidence which amounted in law to corroboration. The DNA evidence, as it was left to the jury, was worthless. This left only the prosecutrix's account which counsel for the appellant, Mr Tippett, submitted was so unsatisfactory that the jury ought to have had a reasonable doubt. Mr

Tippett also raised complaints about the admissibility of much of Ms Hinge's evidence and the admissibility of the statistical evidence and he submitted that his Honour's directions concerning corroboration were seriously flawed. The Director of Public Prosecutions, Mr Wild QC, submitted that there was nothing inherently improbable with the prosecutrix's account, that his Honour correctly admitted Ms Hinge's evidence, that the prosecutrix's evidence was credible and supported by Ms Hinge's evidence, and that his Honour was wrong to have directed the jury to ignore the statistical evidence. Mr Wild QC submitted that the presence of semen on the panties also supported her account, bearing in mind that the principal issue was whether or not sexual intercourse took place at all.

[5] We are satisfied that his Honour's charge to the jury concerning corroboration involved a serious misdirection.

[6] Subsection 4(5)(a) of the *Sexual Offences (Evidence and Procedure) Act* provides:

> On the trial of a person for a sexual offence or an assault with intent to commit such an offence –
>
> (a) the Judge shall not warn, or suggest in any way to, the jury that it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness.

[7] Subsection 4(6) provides:

> Nothing in subsection (5) prevents a Judge from making any comment on evidence given in a trial that it is appropriate to make in the interests of justice.

[8] In *Longman v The Queen* (1989) 168 CLR 79, the High Court considered a similar but not identical provision in s36BE of the *Evidence Act 1906* (WA). Brennan, Dawson and Toohey JJ said, at 85-86:

> The mischief at which the provision appears to have been aimed is the adverse reflection which a warning "required by any rule of law or practice" casts indiscriminately on the evidence of all alleged victims of sexual offences, the vast majority of whom are women, and the corresponding protection which the giving of a warning confers on an accused in all cases of sexual offences. It is evident that the legislature regards the reflection as unwarranted and the protection as unjust. If the alleged victims of sexual offences, as a class, are not regarded by the legislature as suspect witnesses, judges should no longer warn juries that allegations of sexual offences are more likely to be fabricated than other classes of allegations.
>
> In practice, the warning given under the rule of practice varies from case to case. There are no set words and the terms of the warning are adapted to the particular circumstances: *Reg. v. Hester*; *Reg. v. Spencer*. Of course, a warning might be needed not only to avoid the risk of miscarriage of justice which the rule of practice seeks to avoid but a risk of miscarriage arising for reasons other than the suspicion attaching to the evidence of any alleged victim of a sexual offence. Apart from the special rule, the general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case: *Bromley v. The Queen*; *Carr v. The Queen*. Does par. (a) dispense with any requirement to warn when the evidence of an alleged victim of a sexual offence is uncorroborated or only with the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class?
>
> To construe par. (a) in the former way would be to place the alleged victims of sexual offences in a category of especially trustworthy witnesses whose evidence need never be the subject of a warning however necessary a warning might be to avoid a perceptible risk of miscarriage of justice in the circumstances of the case. So wide a construction would not only override the reason which underlies the rule of practice, but would sterilize the trail judge's ability to secure a fair trial. That can hardly be the true construction of par. (a).

[9] Similar, but not identical, provisions in States other than Western Australia, were construed to like effect: see *R v Pahuja* (1988) 49 SASR 191, (1987) 30 A Crim R 118; *R v Murray* (1987) 11 NSWLR 12; (1987) 30 A Crim R 315; *Williams v The Queen* (1987) 26 A Crim R 193. Those authorities were specifically approved by *Longman* on this point. None of the provisions there considered were identical to ss4(5)(a) or (6) but in our opinion no significance can be attached to this. We consider that the effect is the same. Consequently ss4(5)(a) has the effect that a judge shall not give a corroboration warning merely because the accused is charged with a sexual offence, but if the circumstances are such that the general law requires a warning to be given so as to avoid a perceptible risk of a miscarriage of justice arising from those circumstances, the failure to give such a warning is appealable error: see *Longman*, supra, at 89-90.

[10] It was not submitted by Mr Wild QC that his Honour ought not, in the circumstances of this case, have given a corroboration warning. Indeed, given that the prosecutrix suffered from an intellectual impairment, the precise degree of which was not explored in the evidence, such a warning was required: *Bromley v The Queen: Karpany v The Queen* (1986) 161 CLR 315, *Doheny and Adams v The Queen* [1997] 1 Cr. App. R. 369 at 387. However that may be, the trial judge, having decided to give such a warning, was required to take care that the directions he gave did not mislead the jury. In a case such as this, where the trial judge having instructed the jury to "look to see if there is some support" for the prosecutrix's evidence "in the other evidence", did not proceed to instruct the jury either as to what

evidence was capable of amounting to that support, or the qualities it must have before it could be regarded as supportive, and where the only evidence which he suggested might be supportive of her testimony was the evidence of her recent complaint, there can be no doubt that this was a misdirection: *Small* (1994) 72 A Crim R 462 at 478-9; *Williams, supra,* at 200-201. When that misdirection is considered in the light of Mr Tippett's submissions concerning the reliability of the prosecutrix's account – the fact that the prosecutrix admitted to telling lies to the police and on oath as to the circumstances under which Latcha came to her home; the prosecutrix's intellectual impairment; her prior inconsistent statements concerning whether or not she had tried to borrow money from the appellant; the circumstances concerning the appellant's departure from the flat and the prosecutrix's unusual behaviour thereafter – to mention just some of the more outstanding features of this case – we consider that the verdict is one which, on the evidence before the jury (viewed in the light of the direction given about the use to be made of the statistical evidence), the jury should have entertained a reasonable doubt as to the accused's guilt.

[11] Mr Wild QC sought to argue that his Honour erred in law in his direction to the jury to ignore the statistical evidence, that that evidence should have been left to the jury, and that his Honour should have instructed the jury that that evidence, together with the DNA evidence and the evidence concerning the semen on the panties, amounted to independent evidence which tended to show that the accused had had sexual intercourse with the prosecutrix,

and that therefore the verdict should not be disturbed as there was no miscarriage of justice.

[12] Ms Kuhl's statistical evidence was initially led without objection by counsel for the accused. After the evidence had been led, counsel for the Crown put a question to Ms Kuhl which was leading, and this was objected to by Mr Tippett, who also appeared as counsel at the trial (AB129-130). In the absence of the jury, Mr Tippett then complained he had not been given any notice that the Crown intended to lead from her the change in the statistical probabilities from one in 8,000 to 20,000 to one in 11,000 to 20,000. His Honour granted an adjournment overnight to enable Mr Tippett to obtain instructions. The following morning Mr Tippett maintained his objection. Subsequently, Mr Tippett, in response to his Honour's comment that the evidence was already before the jury, sought a direction that the Crown should be precluded from relying on it. At this stage, the objection was limited to the evidence that related to the probability of 1:11,000–20,000, and was based upon the lack of opportunity to deal with this evidence due to surprise. Later Mr Tippett suggested that the whole of the statistical evidence was irrelevant except for the purpose of showing that the DNA results could not exclude the appellant as the person whose semen was on the panties. The learned trial judge, after referring to *Doheny and Adams v The Queen*, *supra*, rejected this submission. Mr Tippett re-iterated his 'surprise' argument, and obtained a further adjournment, until later that day. When the Court resumed, Mr Tippett said that he was ready to proceed, that he had been given a further report

from Ms Kuhl that morning, and that he objected to Ms Kuhl going outside of that report (AB147). The trial judge ruled that the Crown could call evidence to show how the figures were arrived at, but insisted that they should be explained in such a way as to "give the jury a chance to evaluate whether it's worth anything" and his Honour indicated that he would give Mr Tippett a further adjournment if needed (AB148). Mr Tippett maintained his objection to further evidence "beyond that of which he had had notice" (AB152), stating that he would not be able to deal with such evidence even if an adjournment was granted. Apparently, this additional evidence was as to the "methodology" used to arrive at the witness's statistical conclusions, of which the defence had had no notice, but which the trial judge felt should be placed before the jury, and which counsel for the Crown now wished to lead (AB153). The trial judge ruled that the Crown could lead this evidence but reiterated that he would, if asked to do so, grant a further adjournment to Mr Tippett at the end of the witness's evidence in chief. Counsel for the Crown then led the rest of Ms Kuhl's evidence. Mr Tippett did not seek any further adjournment, and he completed his cross-examination. No further objection was taken by Mr Tippett, who confirmed (AB191) he was not challenging the 1:8,000-20,000 figures.

[13] At the end of the evidence, his Honour heard further submissions concerning the statistical evidence. His Honour indicated to counsel that the statistical evidence was meaningless because only sexually active males could have left the semen sample, whilst the statistical evidence purported

to show the probability of some person, including females and non-sexually active males, having the same DNA grouping as the accused. After hearing further submissions, his Honour instructed the jury that the statistical evidence was not relevant for this reason, and directed the jury to ignore it. We do not consider that the evidence was irrelevant for the reason given by the learned trial judge. It is not essential, in sexual offences where the crime scene sample must have been left by a male, that the database relied upon by the Crown is confined to sexually active males, no matter how desirable this may be. There are no differences in DNA groupings as between sexes. The jury could have been told that the statistical likelihood ratios given understated the true position because only a sexually active male could have left the sample, and that they could accordingly adjust the ratios to take that matter into account: c.f. *Pantoja* (1996) 88 A Crim R 554 at 563 per Hunt CJ at CL.

[14] Ms Kuhl's evidence was that the database she used was based upon the "general population" of the Territory, "excluding fullblood Aboriginals" (AB163). In our opinion, that was not the appropriate database. In a case such as this, where the prosecutrix's evidence has identified the accused as the perpetrator, the relevant question is:

> What is the probability of obtaining a matching analysis of the crime scene sample if *someone else* left it?

In order to answer that question, the evidence as to probability must be based on the whole population, and not on a limited part of it. This was explained by Abadee J in *Pantoja, supra,* at 580, quoting from an article by

M Redmayne, *Doubts and Burdens: DNA Evidence, Probability and the Courts* [1995] Crim LR 464 at 477:

> But if the suspect is innocent there is no reason to believe that the person who left the DNA at the scene of the crime comes from the same racial sub-group: 'there is no reason to suppose that the population of the suspect places a narrow constraint on the population of the culprit unless the suspect is guilty'.

(See also *Pantoja, supra,* per Hunt CJ at CL at 562; B Robertson and T Vignaux, *DNA on Appeal – 11,* (1997) N.Z.L.J. 247 at 249).

[15] It is well recognised that the frequency of alleles varies between races. For this reason, the Forensic Science Service in England and Wales maintains separate databases for each of the major races such as Afro-Carribean, Asian and Caucasian: see K Hunter, *A New Direction on DNA?* [1998] Crim L.R. 478. It therefore could not be accepted in this case that the likelihood ratio was statistically valid, bearing in mind that Aboriginals, who were excluded from the database from which the ratio was derived, comprise a significant proportion of the Northern Territory's population. On this basis, the statistical evidence should have been rejected: see *Pantoja, supra*.

[16] There are a number of further difficulties. Ms Kuhl was not, in our opinion, properly qualified by the prosecutor to give the statistical evidence she purported to give. We do not say that she is not qualified to give this evidence, but her qualifications were not properly proved.

[17] In these circumstances, we do not think that the trial judge should have admitted the statistical evidence.

[18] The onus is on the Crown to show that no substantial miscarriage of justice actually occurred, within the meaning of s411(2) of the *Criminal Code* (commonly call "the proviso"). We do not consider that the Crown has satisfied us that this is such a case, for the reasons already given.

[19] In the circumstances, the appeal must be allowed and the conviction must be quashed, but because the DNA and statistical evidence might have been very significant if it had been properly proved by the Crown, we think that a new trial should be ordered. In these circumstances it is not necessary to consider the Crown's appeal against the inadequacy of the sentence imposed.

[20] A number of other issues were raised during argument concerning DNA evidence. We note that in other Australian jurisdictions the relevant population figure is based on the whole of the State but that in the United Kingdom the relevant population is that of the whole country (see for example, *Doheny and Adams*, *supra*, at 378,) although, if it is known that the defendant was in the place where the assault occurred at the relevant time, evidence (if available) may be led to show how many Caucasian (or Afro-Carribean, or as the case may be) sexually active males with matching characteristics are likely to be found in that area: *ibid*, at 374. The reason why a figure based on the whole population, or in a rape case, based on the sexually active male population of the relevant group, is chosen, is not only

because the database in the United Kingdom is based on the total population, but presumably on the fact that the United Kingdom is a relatively small country and it is not difficult for a criminal to be in some other more distant part of the country in a short period of time.

[21] It is a notorious fact that the Northern Territory's population is extremely mobile. There are a large number of tourists and other visitors. It is equally not difficult for a criminal to escape a crime scene and be anywhere else in Australia within twenty-four hours.

[22] In those circumstances we consider that fairness may require, depending on the circumstances, that evidence be given of a likelihood ratio based on the whole of the relevant population of Australia. We appreciate that, as there is as yet no national database, this would give rise to the difficulty that, unless the expert has access to every database in the country, any figure given assumes that the whole Australian population is in Hardy-Weinberg equilibrium and that it is valid to use a Northern Territory database to draw conclusions about the whole Australian population. Those are matters which the expert could comment upon and which the trial judge could instruct the jury to take into account, in line with the reasoning of Hunt CJ at CL in *Pantoja* (1996) 88 A Crim R 554 at 563. It would also have been open to the Crown to lead evidence of an appropriate figure based on the relevant Northern Territory and Darwin populations.

[23] Because this is the first time this Court has had an opportunity to consider DNA evidence, we consider that it is appropriate that we provide some general guidelines where the Crown proposes to lead evidence of this kind:

(1) Whenever DNA evidence and statistical evidence based thereon is to be adduced, the Crown should serve on the defence prior to the committal hearing a statement or statements from the expert or experts the Crown intends to call, which provide details of the DNA testing carried out, the nature of the matching DNA characteristics between the DNA in the crime sample and the DNA obtained from the defendant, and details as to how the calculations of the likelihood ratios have been carried out which are sufficient for the defence to scrutinise the basis of the calculations.

(2) Provided that the expert has the necessary data, it may then be appropriate for it to be indicated how many people with the matching characteristics are likely to be found in Australia, or in a more limited relevant sub-group, for instance, the sexually active males in the Darwin area, depending on the circumstances of the case.

(3) If the Crown intends to supplement or change the DNA evidence or the statistical evidence based thereon, after the committal hearing, it should serve such additional statements as are necessary to comply with guideline (1) in sufficient time prior to the trial for the defence to be able to meet that evidence.

(4) The forensic section of the Northern Territory Police Department should make available to a defence expert, if requested, the databases on which the calculations have been based (but not information which identifies particular individuals included in the databases). Any failure to do so in time for the defence expert to be available to assist the defence at the trial may lead to the exclusion of any statistical evidence at the trial.

(5) Wherever possible, sufficient of the crime scene sample should be kept by the forensic section of the Northern Territory Police Department for re-testing, and made available to the defence for that purpose, upon request.

(6) It is not necessary for the Crown to lead evidence from an expert in population genetics or from another scientific expert as to the statistical validity of the databases kept by the forensic section of the Northern Territory Police Department where the defence notifies the Crown that this is not in issue, or where objection is not taken at the trial.

(7) A scientist other than a population geneticist or an expert in a statistical discipline may have sufficient qualifications derived from professional experience and personal familiarity with the data on the relevant database and published population statistics to be permitted to give evidence of the likelihood ratios in the relevant population. If the Crown proposes to adduce evidence of this kind from such a

scientist, the Crown should serve on the defence in accordance with guidelines (1) or (2) a statement of the scientist's qualifications and experience.

(8) Disputes as to the admissibility at trial of DNA and statistical evidence, including the qualifications of witnesses, should be determined wherever possible by utilising the procedure provided for in s26L of the *Evidence Act*.

(9) Experts called to give statistical evidence should be led by the Crown as to any assumptions made in their calculations which, even though widely accepted, are not supported by empirical research, including:

(a) Hardy-Weinberg equilibrium;

(b) where the offender is of a racial group or sub-group for which there is no valid database and a general database has been used which does not take that fact into account, that fact.

(10) Experts should not give evidence as to the likelihood that it was the defendant's DNA found at the crime scene or use terminology suggesting that he or she is expressing such an opinion.

For further guidance see *Doheny and Adams v The Queen, supra*; *Pantoja, supra*; *The Queen v Luigi Vivona* (Court of Criminal Appeal, (Victoria), unreported, 12/9/94); *Regina v Green* (Court of Criminal Appeal, (NSW), unreported, 26/3/93).