AYTUGRUL v THE QUEEN (S315/2011)

Court appealed from:	New South Wales Court of Criminal Appeal [2010] NSWCCA 272
Date of judgment:	3 December 2010
Date of grant of special leave:	2 September 2011

The Appellant and the deceased, Ms Sevda Bayrak, were former lovers. The Crown alleged that the appellant murdered Ms Bayrak on the evening of 26 November 2005. The case against him however was circumstantial. The Crown submitted that the appellant's motive for killing her came from the failure of their relationship. Ms Bayrak had apparently refused his request to marry and he was also upset that she had formed a new relationship. On 9 December 2008 the appellant was convicted of Ms Bayrak's murder.

The appellant appealed against his conviction on two grounds. The first related to the use that was made of the DNA evidence. The second was that the verdict was unreasonable. On 3 December 2010 the Court of Criminal Appeal (McClellan CJ at CL, Simpson & Fullerton JJ) unanimously dismissed the second ground, while only McClellan CJ at CL would have allowed the first.

The DNA evidence from hair found at Ms Bayrak's apartment was equivocal. That evidence indicated that it could have come from either a male or a female. Two DNA samples were also found on an abrasion under Ms Bayrak's chin. One profile was consistent with that of a Mr Tunc (Ms Bayrak's new lover), while the other was definitely not the Appellant's. There were also unidentified fingerprints found at the scene. No blood was found in the Appellant's car.

The statistical evidence relating to the DNA was presented to the jury in two forms: “random occurrence (or likelihood) ratios” and “exclusion percentages”. Random occurrence ratios express the frequency with which a particular DNA profile is expected to occur in a population. They are expressed as “one in every X persons”. An exclusion percentage is the proportion of people in that same population who would not be expected to have that same DNA profile. The appellant submitted that DNA evidence expressed as exclusion percentages should have been rejected. He submitted that, when expressed as percentages of close to 100%, such evidence was unfairly prejudicial and should have been rejected pursuant to s 135 or s 137 of the *Evidence Act* 1995 (NSW) ("the Evidence Act").

McClellan CJ at CL held that the trial judge should not have allowed the exclusion percentages, all of which invited a subconscious “rounding-up” to 100%. His Honour found that the trial judge's directions on this issue would not have eliminated the risk of unfair prejudice to the appellant, a prejudice that substantially outweighed the probative value of the evidence.

Justices Simpson and Fullerton however were not convinced that there was any deficiency in the way the DNA evidence was put to the jury. Neither

Justice considered that such evidence, framed as it was, was unduly or unfairly prejudicial, confusing or misleading so as to enliven consideration of s 135 or s 137 of the Evidence Act.

The ground of appeal is:

- The Court of Criminal Appeal erred in holding that the trial judge did not err in admitting statistical evidence expressed in exclusion percentage terms.