



HIGH COURT OF AUSTRALIA

18 April 2012

YUSUF AYTUGRUL v THE QUEEN

[2012] HCA 15

Today the High Court dismissed an appeal by the appellant, Yusuf Aytugrul, against his conviction for murder. The Court held unanimously that evidence given at the appellant's trial which expressed results of DNA testing as an exclusion percentage was admissible when accompanied by an equivalent frequency ratio and an explanation of the relationship between the two.

The appellant was tried for and convicted of murder in the Supreme Court of New South Wales. In addition to other circumstantial evidence, the prosecution relied on evidence from an expert witness who had conducted a DNA analysis on a hair found on the deceased's thumbnail. The results of that analysis showed first, that the appellant could have been the donor of the hair, and second, how common the DNA profile found in the hair was in the community. In relation to the second aspect of the results, the expert gave evidence to the effect that one in 1,600 people in the general population would be expected to share the DNA profile that was found in the hair ("the frequency ratio") and that 99.9 per cent of people would not be expected to have a DNA profile matching that of the hair ("the exclusion percentage").

The appellant appealed to the New South Wales Court of Criminal Appeal on grounds that included the ground that "a miscarriage of justice occurred because of the prejudicial way in which DNA evidence was expressed to the jury". The Court of Criminal Appeal, by majority, dismissed the appeal.

The appellant then appealed by special leave to the High Court, alleging that the Court of Criminal Appeal should have held that the trial judge had erred "in admitting statistical evidence expressed in exclusion percentage terms". Section 137 of the *Evidence Act 1995* (NSW) ("the Act") requires a court in a criminal proceeding to refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. Section 135 of the Act relevantly gives a court discretion to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party or be misleading or confusing. The appellant submitted that, in effect, s 137 required exclusion of evidence which expressed the results of the DNA testing as an exclusion percentage. The appellant further submitted that, if that were not so, the only proper exercise of the general discretion given by s 135 would have seen the evidence excluded.

The High Court unanimously dismissed the appeal. The evidence of the exclusion percentage was accompanied by both reference to the relevant frequency ratio and an explanation of how the exclusion percentage was derived from the frequency ratio. The evidence given was clear. The appellant's submissions accepted that evidence expressed in the form of an exclusion percentage had, of itself, some probative value. Given that the exclusion percentage and the frequency ratio were different ways of expressing the same statistical statement, the probative value of the exclusion percentage was necessarily the same as that of the frequency ratio. Although the evidence was adverse to the appellant it was in no sense unfairly prejudicial, or misleading or

confusing. Consequently, the majority of the Court of Appeal was right to conclude that neither s 137 nor s 135 of the Act was engaged. There was neither a wrong decision on any question of law nor a miscarriage of justice on any other ground.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*