

In January 2000 multi-millionaire retired British businessman Tony Fetherston and his wife Margaret were spending their annual holiday at their Caribbean vacation home in Basseterre, the capital of St Kitts.

About 7 p.m. on the 26th, Margaret was talking on the telephone when she heard their enclosed yard's doorbell, which rang when someone opened the gate. She asked Tony to see who it was. He went outside, and after several moments she heard him say "Oh god," followed by a loud noise. She called out to Tony. After he didn't answer she hung-up the phone and closed and locked the door. She peeked out the window and saw a figure with a "mask-like head covering" with two eye slits. She heard the person say something about money, but he didn't try to get into the house.¹

Margaret called emergency services. Tony was pronounced dead at the scene and his autopsy determined he died as the result of a shotgun blast to his chest.

Fetherston's murder was a major news story in England, and the St. Kitts authorities were under a lot of pressure to solve the crime.

Suspects ID'd and evidence tested

During the ensuing investigation four people were identified as suspects in the murder. One of them was Joseph Hazel, a 27-year-old house painter and neighbor of the Fetherstons.



Joseph Hazel

In a corner of the Fetherston's yard the police found a piece of maroon cloth with two holes cut in it – resembling the "mask" described by Margaret. Also, near the Fetherston's house, police found maroon colored jeans with the right leg cut-out above the knee.

Four hair roots were recovered in the "mask," but no blood was visible. Hair and blood samples of Hazel, the other three suspects, and Fetherston were sent along with the jeans and "mask" to the Forensic Science Centre in Barbados for analysis. The lab determined that "there was a physical fit when the 2 items were placed next to each other."² The lab could not link any of the suspect's hair or blood to the clothing items, so they were sent to the London Metropolitan Police Laboratory.

DNA Ruled Insufficient To Support Capital Conviction – Joseph Hazel Released From Death Row

By Hans Sherrer



Tony Fetherston

The clothing and biological samples were examined by 15 lab technicians during the seven months the items were at the London laboratory. The final report by Dr. Kamala De Soyza concluded that the four hairs found in the mask did not match any of the four suspects, and neither did biological material believed to be saliva recovered from the inside of the mask. There was no blood detected on the "mask."

No hair or blood was found on the jeans, but a small amount of biological residue in the crotch area revealed the DNA profiles of two persons. Hazel couldn't be excluded as one of those persons, and the lab's report stated two possibilities: "One was that the DNA came from Hazel and an unknown person unrelated to him. The second proposition was that the DNA came from two unknown persons unrelated to Hazel."³

Hazel insisted he had nothing to do with Fetherston's murder and he was with friends when it occurred. However, based on the lab report he was charged with capital murder in June 2001.

Hazel's trial

After being jailed for almost three years, Hazel's trial began in March 2004. The prosecution's case rested solely on the possibility that Hazel's DNA might have been present on the jeans from which the mask was possibly fashioned – even though he wasn't linked to the mask presumably worn by the assailant. There was no other evidence of any kind suggesting Hazel committed the crime, and there was no testimony of any acrimony between the two men. The DNA evidence's value in implicating Hazel was undercut on cross-examination when Dr. De Soyza testified, "A person's [Hazel's] DNA could have found its way" onto the jeans if a person sat "on a chair on which the person [Hazel] sat."⁴

The value of the DNA evidence to implicate Hazel was further undercut when De Soyza also acknowledged on cross-examination, that "...the DNA tests revealed "moderate support" that the cloth came from the pants and moderately strong support for the view that the maroon cloth was worn as a mask."⁵

Thus there was scientific based doubt as to whether the "mask" that had no known connection to Hazel, was fashioned from the jeans, or actually from some other material source.

Nevertheless, based solely on De Soyza's testimony suggesting Hazel's DNA might have been present on the jeans from which the "mask" – that didn't have his DNA – might have been fashioned, the jury convicted him of Fetherston's murder by a 10-2 majority verdict. Sentenced to death, Hazel appealed.

Hazel's appeal

In November 2006 the Eastern Caribbean Court of Appeal considered Hazel's appeal substantive enough that he was ordered released on bail pending the Court's decision. Three months later, in February 2007, the Court quashed Hazel's conviction.

The three-judge panel ruled that the passions inflamed by Fetherston's life being ended by "a very sad and cold-blooded incident" could not be allowed to cloud the truth that the DNA evidence relied on by the jury "did not clearly link Mr. Hazel to the murder." The Court wrote:

"Because DNA profiling is a function of the random occurrence ratio, the question whether the evidence from a DNA test shows that an accused person actually committed the crime for which he or she is charged is often, as in the present case, a matter of statistical probability. Lord Hope explained the effect of this in *Michael Pringle* in this way:

"Let it be assumed that the evidence about the random occurrence ratio is that one person in 50,000 has a DNA profile which matches that which is obtained from the crime scene. The fact that the defendant has that profile tells us that he is one of perhaps fifty thousand people who share that characteristic. ... But that is all that can be said about it. The question whether the statistic points to the defendant as the actual perpetrator will depend on what else is known about him. If it is plain from the other evidence that he could not have committed the crime because he was elsewhere at the time, the fact that the defendant's DNA profile matches that on the sample taken from the crime scene cannot be said to show that he did commit it. That proposition will have been negated by the other evidence. So the probative effect of the DNA evidence must

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Post-Hypnotic Evidence Barred In Canada

By JD Staff

Canada's Supreme Court ruled in a February 2007 decision that post-hypnotic evidence cannot be used in criminal trials. (*R. v. Trochym*, 2007 SCC 6 (Feb. 1, 2007))

Stephen Trochym was a postal supervisor convicted in 1995 of murdering Donna Hunter, a woman he was intimately involved with. Her throat had been slashed with a bread knife.

Hunter's body was found in her Toronto apartment in October 1992. It was determined that she had been murdered in the early morning hours of a Wednesday, and that eight to twelve hours afterwards her body had been repositioned. It also appeared she had been sexually assaulted before being murdered.

During the investigation of the crime, a neighbor, Ms. Haghnegahdar, was questioned by the police. She gave a statement in

which she described seeing Trochym in the area of Hunter's apartment at 3 p.m. on Thursday, the day after her murder.

No evidence recovered from the crime scene implicated Trochym in the murder, but the police pursued their only tenuous lead: That Trochym had been involved with Hunter and he was seen in the vicinity of her apartment the day after she was murdered. To find out if the neighbor would change the day she saw Trochym to Wednesday, the police obtained her consent to have her memory enhanced by hypnosis. After being hypnotized she changed her original recollection by saying she saw Trochym at 3 p.m. on Wednesday – not Thursday.

Trochym was then charged with Hunter's murder. The prosecution's theory was he murdered Hunter very early Wednesday morning and returned about 12 hours later to move her body to make it appear she had been killed during a rape. The lynchpin of the prosecution's case was the neighbor's post-hypnosis recollection that she saw Trochym on Wednesday.

Trochym's lawyers objected to the admissibility of the neighbor's testimony based on

her post-hypnosis recollection of when she saw Trochym. The trial judge, however, sided with the prosecution and allowed the jury to hear the neighbor's post-hypnosis testimony. With her as the prosecution's star witness, the jury convicted Trochym of second-degree murder in July 1995.

After Trochym's appeal to the Court of Appeal for Ontario was dismissed in July 2004, he applied for and was granted leave to appeal to the Canadian Supreme Court.

The Supreme Court quashed Trochym's conviction by a 5-3 majority on February 1, 2007. After examining the scientific basis of hypnosis using a multi-pronged analysis similar to the U.S. Supreme Court's *Daubert* test,¹ the Court ruled it is a scientifically unreliable technique. Consequently, the trial judge erred by allowing the neighbor's post-hypnosis testimony into evidence. The Court stated in part:

"Although hypnosis has been the subject of numerous studies, these studies are either inconclusive or draw attention to

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depend on the question whether there is some other evidence which can demonstrate its significance."⁶

Based on their understanding that the suggestive DNA evidence was inadequate to support Hazel's conviction without complementary evidence, the Court wrote in regards to Hazel's claim on appeal that the prosecution's evidence was insufficient:

"Dr. Browne [Hazel's appellate counsel] complains that in the first place the trial judge should have withdrawn the case from the jury at the end of the case for the defence because insufficient evidence linking Hazel to the murder made it unsafe for the judge to have left it to the jury.

The attack was made on the sufficiency of the DNA evidence because identification was a critical issue in this case. ...

... Where, on assessment, the judge thinks that the quality of the evidence is poor, the judge should withdraw the case from the jury and direct an acquittal. No witness saw Hazel kill Mr. Fetherston. The prosecution relied on circumstantial evidence based on the DNA results to link Hazel to the crime.

... While DNA profiling is rather reliable

in providing individual genetic blueprints it will not in every case perfectly and clearly link a person to a crime."⁷

The Court concluded its analysis by observing:

"In this case the DNA evidence did not link Hazel to the murder of Mr. Fetherston in a manner that would support his conviction on proof beyond a reasonable doubt. ...

... The identification evidence was tenuous. ... the DNA evidence was not by itself so conclusive that it provided sufficient circumstantial evidence to make a *prima facie* case against Hazel. It was a question of statistical probability that the DNA evidence pointed to Hazel as the possible perpetrator of the murder. ... there was no 'other evidence' that supported the DNA evidence so that, compendiously, the jury could properly have inferred guilt therefrom. In his summation, the learned judge told the jury that there was no evidence in the case that supported the DNA evidence.

In the absence of DNA evidence that clearly linked Hazel to the murder and there being no supporting evidence, ... The learned trial judge should have withdrawn the case from the jury because there was insufficient evidence of identification to make a *prima facie* case

against Hazel. I would therefore grant the appeal on this ground, and, in the result, quash the conviction and sentence against Joseph Hazel."⁸

Fetherston's widow responded to the news of Hazel's release and quashed conviction, "I am shattered – but not totally surprised, because there has always been confusion [about Hazel's identification]."⁹

Since Hazel's conviction was quashed due to insufficiency of the evidence, he cannot be retried without new evidence. Hazel was jailed for 5-1/2 years, including 2-1/2 years on death row.

Endnotes:

1 Although a very wealthy couple, the Fetherston's St. Kitts house was very modest. A person who lived in Basseterre wrote the following: "I looked at a couple other rentals, including a small house in Fortlands. The agent who showed it to me mentioned in passing that it was Tony Fetherston's house. It was a tiny little house, I mean there are tents bigger than that, and I sort of liked him for having billions but being quite comfy with his wife in a little poky house. No one had lived in it since the murder. I didn't take the house." Source: Personal – from Gall and Gumption blog, Wednesday, February 28, 2007.

2 *Joseph Hazel v The Queen*, ECSC1606, ¶ 9.

3 *Id.* at ¶ 12.

4 *Id.* at ¶ 33.

5 *Id.* at ¶ 32.

6 *Id.* at ¶ 31 (Quoting from, (*Michael Pringle v The Queen*, Privy Council Appeal No. 17 of 2002).

7 *Id.* at ¶¶ 25-29.

8 *Id.* at ¶¶ 32, 34-35.

9 St. Kitts murder conviction quashed, *Suffolk and Essex online*, February 21, 2007.