EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

Claim Number: **NEVHCR2017/0003**

Between **Director of Public Prosecution**

and

Reece Walters

Before: **His Lordship Justice Ermin Moise (A.g)**

Appearances:

Mr. Teshaun Vasquez with Ms. Lanein Blanchette of counsel for the Crown
Ms. Marsha Henderson with Ms. Saundra Hector of counsel for the Defendant

Defendant present

2019: April, 29th.
April, 30th

JUDGEMENT

[1] **Moise, J (A.g.).:** The defendant in this case faces one count of murder contrary to the common law. The prosecution has disclosed, and intends to rely on, a certificate of analysis of a forensic DNA Analyst, Ms. Alicia Cadenas. In that analysis, it was concluded that the defendant could not be excluded as one of three possible contributors to the mixed profile found on the exterior of a used condom found at the crime scene. In a separate report it was also concluded that the profile obtained from blood found under the deceased's fingernails matched that the defendant and he therefore could not be excluded as the sole contributor to that profile. The defence objects to the tendering of this evidence and makes submissions that it is inadmissible. I have determined that the evidence is to be admitted and these are my reasons for doing so.

The evidence

[2] In his deposition of 24th November, 2016, Police Officer 687 Antonio Browne states that on 9th September 2014 he was on duty at the Charlestown Police Station when he received instructions from Superintendent Mitchel. On the basis of these instructions, he proceeded to the Cotton Ground Police Station and had a conversation with a Corporal Gordon upon his arrival. After that conversation he went into an interview room at the Cotton Ground Police Station where he saw the defendant sitting at a table. He told the defendant his reason for being there and asked him for a non-intimate sample from his body. He spoke to the defendant for a while and the defendant asked him some questions. He states that he explained to the defendant that the samples can help disprove his involvement in a crime being investigated by the police. After providing that explanation Corporal Gordon brought a consent form for non-intimate samples to be taken from the defendant. He read the form to the defendant and asked him if he was willing to give the sample. The defendant obliged and signed the consent form. According to Officer Browne the defendant complied and did it willingly.

[3] Officer Browne states that he placed his safety gear on, took a comb and combed the defendant's hair. He got some strands and folded them in a clean tissue. He also took some hair samples from the underarm with a new comb. Officer Browne then took some saliva swabs from the defendant's mouth and also scrapings from under his finger nails. He packaged each of these items individually in the defendant's presence and placed them in an evidence bag. This was sealed in the presence of the defendant and an explanation was provided to him as to the reasons for so doing. Officer Browne states that he signed the seal and invited the defendant to do so; which he did. The items were placed in a refrigerator in an exhibit room at the Charlestown Police Station.

[4] These samples were subsequently handed over to a Mr. Alexander in St. Kitts for the purpose of making them available for DNA testing. The defendant takes no issue at this stage with the process of analysis and it is not necessary to go into the details regarding the elements of the facts regarding the chain of custody. The main issue of contention is that the evidence is inadmissible as the proper procedure for the collection of samples of the defendant's saliva were not complied with.

The Law

[5] It is argued, and not contested by the crown, that a DNA Act was passed by the legislature in 2013 in conjunction with a new Evidence Amendment Act. This Act sought to repeal section 154 of the Evidence Act of 2011 (The Act). However, this has not been fully promulgated, making section 154 the applicable regime regarding the admissibility of DNA evidence. That much was decided by Williams J in the case of ***R v. Roosevelt Browne***[1]. Section 154 of the Evidence Act of 2011 states as follows:

> ***(1) Subject to the provisions of this section, the Police shall, where there are reasonable grounds to suspect that materials taken at the scene of the offence will tend to connect the accused person with the offence, request for an intimate sample to be taken from the accused person for the purpose of carrying out a DNA test on that person.***
>
> ***(2) An intimate sample may be taken from a person in police detention only if***
>
> ***(a) a police officer of at least the rank of superintendent authorises it to be taken; and***
>
> ***(b) the appropriate consent is given by the person, which consent shall be in writing.***
>
> ***(3) An officer shall give the authorisation pursuant to the provisions of subsection (2) of this section only if he or she has reasonable grounds***
>
> ***(a) for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence;***
>
> ***(b) for believing that the sample will tend to confirm or disprove the involvement of the person.***
>
> ***(4) An officer may give an authorisation under subsection (2) of this section orally or in writing, except that if he or she gives it orally he or she shall confirm it in writing as soon as is practicable.***
>
> ***(5) Where an authorisation is given and it is proposed that an intimate sample shall be taken in pursuance of the authorisation, then the officer shall inform the person from whom the sample is to be taken of the giving of the authorisation, and of the grounds for giving it.***

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[1] NEVHCRD2016/0001

(6) An intimate sample, other than a sample of urine or saliva, shall be taken by a medical practitioner.

(7) Where the appropriate consent to the taking of an intimate sample from a person is refused without good cause, in any proceedings against that person for an offence,

(a) the court, in determining

(i) whether to commit that person for trial, or

(ii) whether there is a case to answer; and

(b) the court or jury, in determining whether that person is guilty of the offence charged, may draw inferences from the refusal as may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence against the person in relation to which the refusal is material, and the person refusing to give the consent shall accordingly be informed of the provisions of this section.

(8) The results of a DNA test shall not be admissible in evidence unless

(a) the accused person was, as required by subsection (5) of this section, informed beforehand the reason why his or her sample was being taken;

(b) the scientist who carried out the DNA test adduces evidence of DNA comparisons together with calculations of the random occurrence ratio:

(c) the prosecution served on the defence sufficient details of how the calculations referred to in paragraph (b) of this subsection were based.

...

[6] Counsel for the defendant argues that in order for saliva samples to be taken from the defendant there must be compliance with section 154(2), (3) and (5) of the Act. Counsel argues that, in accordance with subsection (6), saliva is deemed to be an intimate sample[2]; although it need not be taken by a medical practitioner. She argues that the evidence suggests that what was communicated to the defendant was that a non-intimate sample would be taken from him. Indeed the form presented to the defendant for his signature was a notification to take a non-intimate sample; although the form did indicate that saliva fell into that category. In these circumstances it is argued that there is nothing in the evidence to suggest that authorization

[2] It would seem that in the legislation passed by parliament in 2013 saliva was not deemed to be an intimate sample.

was given to take an intimate sample from the defendant, neither did he sign any consent form or agree to the taking of an intimate sample. Given that there is no compliance with the provisions of section 154 (2), (3) and (5) of the Act, it is argued that the samples were improperly obtained. It must also be noted that whilst Officer Browne states in his evidence that a superintendent of police authorized his taking of the samples orally, there had been no subsequent compliance with subsection (4) which required that this authorization be reduced to writing as soon as is practicable. This is further evidence of the noncompliance with section 154 of the Evidence Act 2011.

[7] The second argument raised by the defendant is that subsection (8) (a) of section 154 renders the evidence inadmissible. This section states that the evidence of DNA results shall not be admissible unless ***"the accused person was, as required by subsection (5) of this section, informed beforehand the reason why his or her sample was being taken".*** Counsel for the defendant argues that this subsection must be read in conjunction with subsection (5) and that in informing the defendant of the reason the sample is being taken, the officers must advise the accused that the collection of the sample was authorized and the grounds upon which the authorization was given. With respect to counsel, I do not agree with that submission. The only precondition placed in that section is the need to inform the defendant of the reasons why the sample was being taken. There is no requirement to also inform him of the authorization by a more senior police officer in order for the inhabitation provided for in subsection (8) to apply.

[8] It is further argued that the defendant was not informed of the reasons the samples were taken from him. I also do not agree with that submission. The evidence suggests that not only did Officer Browne explain to the defendant that the samples may be tested as a means of proving or disproving his involvement in the crime which was being investigated, but that the content of the form was read over to him. This form indicates that the reason for taking the sample was that a stain derived from a crime exists and there are reasonable grounds to suspect that the defendant was involved in the offence and for believing that forensic DNA analysis could confirm or disprove such suspicion. This, to my mind, would be sufficient to satisfy the basis upon which an intimate sample ought to be taken in accordance with the provisions of section 154 (1) of the Evidence Act 2011; save and except that the form referenced saliva as a non-intimate rather than an intimate sample.

[9] The crown, on the other hand, argued that whilst there may not have been full compliance with the provisions of the Act, the court retains an inherent discretion to admit the evidence. Counsel refers the court to the case of ***Kuruma Son of Kaniu v. Reginam***[3] in which Lord Goddard CJ noted the following in his judgment:

> ***"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."***

[10] In that case the Privy Council came to consider the admissibility of evidence derived from a stop and search of the defendant by officers below the rank of inspector. This was in violation of the legislation which granted the authority to stop and search only to police officers above the rank of assistant inspector. As noted above, this infraction did not invalidate the admissibility of the evidence derived from the search. I can find at least two judgments of our own court of appeal in which this decision had been applied. In the case of ***William Penn v. The Queen***[4] Edwards JA relied on the ***Kumara*** decision for the conclusion that ***"[a]s a matter of law, once the evidence of fingerprints is relevant it is admissible subject to the overriding discretion of the court to exclude it if there is any suggestion that it was obtained oppressively."*** In the case of ***Eric Llewellyn Jemmott v The Commissioner Of Police***[5] Signh JA sought to explain that prior to the introduction of PACE in the UK in 1984, the method by which evidence was obtained was strictly irrelevant and sited Kumara as support for the principle that evidence obtained from an illegal search was admissible. Even after the introduction of PACE the authorities suggested that ***"evidence obtained improperly or by trick, may be excluded, if the admission of evidence would have such an effect on the fairness of the proceedings that the court ought not to admit it."***

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[3] [1995] 1 All ER 236
[4] BVIHCRAP 2006/001
[5] Grenada Magisterial Appeal No 4 of 1999

[11] The Crown also refers the court to the case of ***Jeffery v. Black***[6] where the court came to consider the issue of the admissibility of illegally obtained evidence. As it relates to the general discretion which the court has to deem evidence inadmissible, Lord Widgery CJ stated the following:

> ***"...the justices sitting in this case, like any other tribunal dealing with criminal matters in England and sitting under the English law, have a general discretion to decline to allow any evidence to be called by the prosecution if they think that it would be unfair or oppressive to allow that to be done. In getting an assessment of what this discretion means, justices ought, I think, to stress to themselves that the discretion is not a discretion which arises only in drug cases. It is not a discretion which arises only in cases where police can enter premises. It is a discretion which every judge has all the time in respect of all the evidence which is tendered by the prosecution."***

[12] His Lordship goes on to state that he ***"cannot stress the point too strongly that this is a very exceptional situation, and the simple, unvarnished fact that evidence was obtained by police officers who had gone in without bothering to get a search warrant is not enough to justify the justices in exercising their discretion to keep the evidence out."*** The underlying proposition here is that regardless of the manner in which the evidence was obtained, the court always reserved a discretion to admit the evidence unless it would be unfair and oppressive to do so.

[13] The crown also relies on the case of ***R v. Stewart***[7] where the court came to consider information derived via eavesdropping on conversations between two prisoners. Philmore LJ noted that the trial judge rightly exercised his discretion to admit the evidence in circumstances where the conversations overheard were not only inconsistent with the defendant's innocence but disclosed that they were preparing to concoct alibis to deceive the court. Philmore LJ therefore concluded that ***"it is difficult to see how in such circumstances a court could have ruled out this evidence and not allowed it to be put before the jury."*** This was despite the manner in which the evidence was collected in the first place.

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[6] [1978] QB 490
[7] [1970] 1 All ER 689

[14] Counsel for the crown therefore argues that subsection (8) of section 154 of the Evidence Act ought not to take away from the court's inherent jurisdiction to admit evidence which was obtained contrary to the express provisions of the legislation. The underlying consideration ought to be fairness and the issue must be balanced to determine the probative value of the evidence against the prejudice it may cause to the defendant if admitted. Counsel also asks the court to consider the defendant's admission which placed him at the crime scene and links him to the condom from which samples were taken to which his own DNA profile was matched. I would proceed with some caution however in referring to the defendant's statement as an admission as he continues to deny murdering the deceased. He does accept however, that he was on the scene and that he did use a condom. I also note that the DNA reports speak to more than findings of DNA evidence on the condom, but also to findings of the defendant's DNA on blood extracted from the deceased's fingernail clippings.

[15] For my part I am of the view that the provisions of section 124 and 125 of the Evidence Act of 2011 are also relevant to this discussion, despite the fact that counsel for crown made only a passing reference to these provisions. The sections state as follows:

124. Criminal proceedings: discretion to exclude prejudicial evidence.

> ***In criminal proceedings, where the probative value of evidence adduced is outweighed by the danger of unfair prejudice to the accused, the court may refuse to admit the evidence.***

125. Discretion to exclude improperly obtained evidence.

(1) Evidence that was obtained

> ***(a) improperly or in contravention of a law, or***
>
> ***(b) in consequence of an impropriety,***
>
> > ***shall not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.***

...

(3) For the purposes of subsection (1), the court shall take into account, among other things, the following matters:

(a) the probative value of the evidence;

(b) the importance of the evidence in the proceeding;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;

(d) the gravity of the impropriety or contravention;

(e) whether the impropriety or contravention was deliberate or reckless;

(f) whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention;

(g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.

[16] This section is relevant to the general discussion at issue as the legislature, in its own wisdom, did not seek to take away the court's discretion to admit evidence which may have been improperly obtained or in contravention of the law. The court must consider the factors outlined in section 125 in the exercise of its discretion although the starting point is that the evidence ought not to be admitted unless the court is so satisfied that it should.

Conclusions

[17] As I have indicated earlier, section 154 (8) seeks to render evidence from a DNA expert inadmissible in only three circumstances. That is, (a) if the defendant was not informed beforehand of the reason why his or sample was taken in accordance with subsection (5); (b) if the scientist who carried out the DNA test does not adduce evidence of the DNA comparisons together with calculations of the random occurrence ratio; and (c) if the prosecution does not serve on the defence sufficient details of how the calculations referred to in paragraph (b) were based. The defendant takes issue only with the first of these requirements.

[18] Despite the fact that the defendant was informed that the samples to be taken were non-intimate samples and that the form which was read to him referred to non-intimate samples, it seems clear

form the evidence that he was informed that samples of saliva would be taken from him. He was given the reasons for such samples being taken. At the Preliminary Inquiry the defendant cross examined officer Browne who indicated that the defendant was informed of his right to have an attorney present and opted not to wait for his attorney. I do not find that the evidence warrants the exclusion of the DNA evidence on the basis of section 154 (8). I am therefore of the view that the provisions of sections 124 and 125 of the Evidence Act 2011 apply in the circumstances of this case.

[19] There remains a general discretion to admit the evidence if it is fair to do so and not oppressive in any way. I can find nothing in the evidence which suggests to me that it would be oppressive, prejudicial or generally unfair to admit the DNA evidence. There can be no doubt that the findings contained in the certificate of analysis are of probative value to the prosecution's case. In fact there may be some value to the defendant, given that a minor DNA profile of a third party was also found to be present in the samples taken from the condom on the scene. Defence counsel requests that this much should be left to the jury while excluding the findings which relate to the defendant. I do not agree that this is a proper manner in which the court's discretion is to be exercised.

[20] I am also of the view that the evidence is important in the proceedings as it links the defendant to the crime scene based on the probability that he contributed to this DNA profile. It therefore cannot be fair to redact from the evidence the results of the samples taken from the defendant whilst allowing the jury to consider the remainder of the report. Further, the relevant offence here is that of murder of a young lady and subsection (3) of section 125 makes this an important fact to consider. This is also balanced against the defendant's own statement to the police in which he gave a full account of his involvement with the deceased on that day.

[21] Regarding the contravention pointed out by counsel for the defendant, I am not of the view that this is so grave, neither is there evidence to suggest that this was deliberate or reckless to the extent that the evidence should be excluded. Whilst I would conclude that there was perhaps no difficulty in obtaining the evidence without contravention of the provisions of section 154 of the Act[8], overall I am satisfied that the desirability of admitting the evidence outweighs the undesirability of doing so.

[8] This is also a factor which the court is obliged to consider in keeping with the provisions of section 125 of the Act.

[22] In the circumstances the application to exclude the DNA evidence in this case is denied and the crown may proceed to rely on the evidence of the DNA analyst during the course of the trial.

Ermin Moise
High Court Judge

By the Court

Registrar