

**THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

Claim No. BVIHCR 22 of 2014

Between:

THE QUEEN

Claimant

and

ALBERTO ROSA DE LA ROSA

Defendant

Appearances: Mr. Valston Graham, Senior Crown Counsel with him Ms. Leslie Ann
Faulkner, Senior Crown Counsel, Counsels for the Crown
Mr. Patrick Thompson, Counsel for the Defendant

2015: October 13th

RULING

[1] **ELLIS J:** The Court is asked to rule on the admissibility of DNA evidence in the case against the Defendant, Alberto Rosa De La Rosa. The Crown alleges that on 16th November 2012, the deceased, Rick Bautista Familia was out with his friends at a local bar. Following an exchange of words with the deceased outside the bar, the Defendant pulled a knife from the bag which he was carrying, showed it to the Deceased saying "Look what I have for you". The Deceased later noticed that he had a cut on his neck and when he realized this, he went into the bar and assaulted the Defendant with a beer bottle, striking him in the mouth. Shortly thereafter, the Defendant pulled his knife and stabbed the deceased in the chest. He thereafter ran outside, tossing the knife on the ground. The Deceased went through the back door of the bar and collapsed outside. He was later pronounced dead at the scene.

- [2] The Defendant thereafter left Tortola and returned only after extradition proceedings were commenced to effect his return to the Territory. He returned and was arrested on 10th July 2014
- [3] During the course of the investigation the Police processed the scene and collected several exhibits including: a swab of the apparent blood from a black handle knife; swabs from handle of the black handed knife; black knife case with apparent blood swab of apparent bold stain on the bar floor and a tooth located on the floor. These samples were secured and later delivered to DNA Labs International for processing.
- [4] The evidence of Detective Sergeant Ballantyne is that on 18th April 2012, the Defendant was arrested in an unrelated matter and was processed by the RVIFF Scenes of Crime Unit. His buccal swabs were volunteered to the Police and later handed over to DNA Labs International for analysis. The Defendant's DNA profile was then stored on the intelligence database. A report was later received from DNA Labs International in relation to the exhibits submitted and it was revealed that a number of the exhibits contained the DNA profile of the Defendant.
- [5] The Defence contends that this Report and the evidence of the expert forensic DNA analysis are not admissible. Counsel argued that the retention of the Defendant's sample following his arrest in 18th April 2012 is prima facie unlawful in the absence of an appropriate statutory underpinning. He further submitted that it was in breach of the Defendant's fundamental rights under Article 19 of the Virgin Islands Constitution. Counsel cited a number of judicial authorities and he submitted that the alleged breach was a significant breach which in the context of this criminal trial demands that the evidence be excluded.
- [6] The Prosecution trenchantly resisted this contention. He submitted that the Defendant voluntarily consented to provide his DNA sample. Having reviewed the relevant judicial authorities, he submitted that they these authorities do not indicate

that it is unlawful to retain DNA samples. What is in issue is the *indefinite* retention of the sample of an un-convicted person. Counsel related that this offence occurred on 16th November 2012 when the sample would have been obtained from the Defendant in an unrelated case in April 2012. He submitted that the Defendant immediately following the offence the Defendant fled the Territory giving the police no opportunity to request a fresh sample. He submitted that in those premises the Defendant should not be rewarded for his bad behavior. He further submitted that the length of time that the sample was retained was not unreasonable.

- [7] In the absence of specific legislation or rules or guidance prohibiting the retention of the DNA sample or profile and in circumstances where the Defendant consented to the sample, Counsel submitted that the retention of the sample was not unlawful or unconstitutional. Counsel concluded that the Court must consider that the qualified right under Section 19 demands that the Court balance the need to prevent and detect crime. Weighing these factors demands that the evidence be admitted.

COURT'S ANALYSIS AND CONCLUSIONS

- [8] Police agencies throughout the region are empowered to prevent crimes and apprehend criminals.¹ In carrying out these duties, the law permits police officers to utilize a plethora of investigate techniques aimed at detecting and preventing crime and identifying and prosecuting criminals. The Court accepts that statutes are generally not needed to prescribe each and every procedure that the police may use to obtain information that could be helpful in discharging their duties. And there can be no doubt that the use of DNA sampling and profiling have revolutionized the detection, investigation and prosecution of crimes. Indeed for

¹ Section 21 of the Police Act and section 4 of the Police Act Cap 165

some time, this tool has been effectively relied on by the courts of this jurisdiction in countless criminal proceedings.

[9] At its core, the acquisition of a DNA sample from an individual's body must be considered a search of the person. As in any other search, an individual can waive the right to be free from unreasonable searches and seizures by consenting to a search. Where an individual has so consented, this Court is satisfied that the absence of specific legislative authorization would not *without more* invoke fundamental rights provisions.²

[10] However, when it comes to the retention and re-use of the sample and the storage of the DNA profile in a database, the position is vastly different. There is now persuasive judicial authority on this issue which makes it clear that the retention of DNA samples even when obtained by consent, invokes the protections afforded under Article 8 of the European Convention of Human Rights. The equivalent provision under the BVI Constitution is Article 19 which provides:

- (1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.**
- (2) Except with his or her own consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.**
- (3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—**
 - (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilization of any other property in such manner as to promote the public benefit;**

² See Article 19 (2) of the BVI Constitution

- (b) for the purpose of protecting the rights and freedoms of other persons;
- (c) to enable an officer or agent of the Government of the Virgin Islands, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government of the Virgin Islands or that authority or body corporate, as the case may be;
- (d) to authorize, for the purpose of enforcing the judgment or order of a court in any proceedings, the search of any person or property by order of a court or the entry upon any premises by such order; or
- (e) for the prevention or detection of offences against the criminal law or the customs law.

[11] Article 19 sets out a qualified right for respect for private life. Private life encompasses an individual's physical integrity, autonomy and dignity, but the Constitution recognizes that interference with this right may be permissible in certain circumstances and for the purposes of this matter, the qualification set out in Article 19 (3) (e) is relevant.

[12] Indeed, there can be no doubt that the taking retention and use of DNA samples and the compilation and maintenance of a database of DNA profiles, pursues the legitimate purpose of the prevention and detection of crime. This was wholly accepted by the European Court of Human Rights in the now classic case of **S and Marper v United Kingdom**.³ However, the Court went on to hold unanimously that the retention and storage of the Applicants' fingerprints and DNA samples was disproportionate and not necessary in a democratic society.

³ [2008]ECHR 1581- Applications Nos. 30562/04 and 30566/04

[13] The particular context of that case is significant. At the time when that matter arose, the existing legal framework on taking and retaining biometric data was set out in Section 64 of the **English Police and Criminal Evidence Act 1984 (PACE)**. This legislation did not specify any time limits for retention or any procedure by which data could be removed from an individual's record. The Police were therefore able to retain this data from arrested individuals for an indefinite period.

[14] In considering whether the indefinite retention of samples from a suspected but un-convicted person was proportionate and struck a fair balance between the private and public interest, the Court held at paragraph 119 of the Judgment that:

“In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed (see paragraph 35 above); in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.”

And at paragraph 125:

“...the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate

interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.”

[15] This judgment superseded the findings of the domestic courts of the UK i.e. the Divisional Court, Court of Appeal and House of Lords so that the judgments rendered in these are of limited assistance to this Court. It has since been affirmed in the English Court in **R (on the application of GC) v The Commissioner of Police of the Metropolis [2011] UKSC 21**, per Lord Dyson and **Gaughran v Chief Constable of the Police Service of Northern Ireland [2015] UKSC 29**.

[16] There can be no doubt that DNA is a useful and proven resource in the battle against crime because of the assistance which it provides in identifying individuals. The utility of this investigative tool cannot be underestimated and this has been at least partially recognized by the Legislators of this Territory who at section 167 of the Evidence Act prescribe that:

- (1) The Attorney General may make rules prescribing matters
 - (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed, for carrying out or giving effect to this Act.
- (2) Without prejudice to the generality of subsection (1), rules made under this section may provide for:
 - (a) the admissibility of DNA evidence;
 - (b) the offences in respect of which DNA evidence shall be admissible; and
 - (c) the laboratories and other facilities authorised to create DNA data banks.

[17] Unfortunately, Counsel for the Prosecution has advised the Court that the matter has progressed no further than this bald provision. So that as in **S and Marper**, there is currently no legislative or other legal framework, specifying any time limits

for retention or any procedure by which data could be removed from an individual's record within the BVI.

[18] This state of affairs is particularly troubling because this is an issue which has troubled these Courts in the past. Indeed, this Court is aware that on occasion, the Prosecution has adopted the cautionary position of resiling from their reliance on such evidence.

[19] In light of the compelling persuasive judicial authorities, the Court has no difficulty in concluding that in the absence of a legislative framework expressly authorizing retention and reuse DNA samples and the storage of the DNA profiles acquired from an un-convicted individual and where no evidence has been presented that that at the time that the individual consented to the sample, he was informed by the police that the sample or profile can be used for *any subsequent* investigation and that he explicitly consented to the use of the sample for the investigation of other crimes, such retention, re-use or possession of his DNA profile is inconsistent with Article 19 of the BVI Constitution and constitutes a disproportionate interference with that un-convicted individual's right to respect for private life.

[20] Notwithstanding the clear and unequivocal guidance provided by the ECHR on issues related to the fundamental rights of the individual, it is clear that the judgment did not concern the admissibility of evidence at a trial. In the Court's view it would be an error to treat the definitive conclusions drawn as an implication that any evidence obtained must consequently and inevitably be inadmissible. The Court considers that it must still have regard to provisions of the Evidence Act, 2006 - in particular and to Section 125 which provides:

“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.

(2) Without limiting subsection (1), where

- (a) a confession was made during or in consequence of questioning, and
- (b) the person conducting the questioning knew or ought reasonably to have known that
 - (i) the doing or omission of an act was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or
 - (ii) the making of a false statement was likely to cause the person who was being questioned to make a confession,

but nevertheless, in the course of that questioning, the person conducting the questioning did or omitted to do the act or made the false statement, evidence of the confession, and evidence obtained in consequence of the confession, shall be taken to have been obtained improperly.

(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.”

[21] The Court must therefore weigh the factors in s.125 (3) in considering the critical issue of whether the evidence relating to the sample taken from the Defendant Alberto Rosa De La Rosa on 28th April 2012, is admissible.

[22] Given the conclusions herein, the Court finds that the evidence obtained as a consequence of the April 2012 sample falls within Section 125 of the Evidence Act. Further, having considered the factors prescribed by Section 125 (3) of that Act, the Court finds that this evidence is not admissible and should be excluded.

[23] First, the Court has considered that the 2012 sample was obtained with the consent of the Defendant. The Court is satisfied that the retention of the sample and the storage of the DNA profile invoked his fundamental rights guaranteed under the Constitution. The Court has also considered the relevant timeline. The Court is not persuaded by the Prosecution that the lapse of 7 months could justify the admission.

[24] The Court is also not persuaded that the Defendant's flight would *without more* have precluded a second and fresh and lawful sample taken with the consent of the Defendant upon his return to the Territory in July, 2014.⁴ There has been no evidence led that the Defendant refused to submit to a fresh sample. As such, the court is not satisfied that there was any real difficulty in obtaining the evidence without interference with his fundamental rights.

⁴ The Court noted that the DNA Report was received by the RVIPF on 30th January 2013; the Defendant returned to the Territory on 10th July 2014; the matter was committed to trial in the Magistrate's Court on 12th September 2014 and the Indictment laid on 10th November 2014.

- [25] Further, the Court is satisfied that the existing lacuna has been well known for some time. Concerns have been raised in previous proceedings which should have cautioned the investigators against the indiscriminate and arbitrary unregulated retention and use of DNA samples of un-convicted persons.
- [26] The Court has also considered the importance of the nature in these proceedings as well as the probative value of the material. They correctly contend that the evidence is probative of a connection to the offence before the Court. The Prosecution has advanced that the case is partly circumstantial. However, it is not disputed that the Prosecution's case is also grounded on the direct evidence of eyewitnesses. It follows that the circumstantial connection raised by the DNA evidence is by no means the fulcrum of the Prosecution's case.
- [27] Moreover, although the Counsel did not address the Court on the matter, the Court must also consider whether it is possible for this evidence to be adduced without bringing into the fore evidence of bad character of the Defendant. There can be no doubt that this is an obvious part of the narrative of how the DNA comparison was achieved or came about. It may well show his previous interaction with the police. The Court has to consider whether it will leave the jury to speculate as to the background behind the previous sample. Would it lead the jury to speculate as to why the sample was taken; would it tend to cast him in an unfavourable light? Will it be fair to him to let the evidence of previous dealings /interaction with the police into the trial? Will such prejudice be compounded by the introduction of the DNA evidence?
- [28] Having weighed the competing interests and having considered the factors identified at Section 125 (3) of the Evidence Act, the Court is satisfied that the DNA evidence should be excluded.

[29] Finally, the Court would just wish to remind Counsel of the cautionary tale of **R v Weir**⁵ In that case a defendant gave a sample of DNA during an investigation, but the sample was not destroyed on his acquittal. The statute in that case; Section 64 of the Police and Criminal Evidence Act required that the samples be destroyed, and evidence based upon samples not so destroyed cannot be admitted. In that case the DNA evidence linked Weir to a murder by the profile extracted from an earlier saliva sample in a case which had been discontinued. Notwithstanding that the evidence as to guilt in the brutal murder was overwhelming, the Court of Appeal ruled that evidence obtained from a cross match relating to a different crime was not admissible. The Court then quashed the conviction.

[30] It is hoped that the relevant authorities will finally move assiduously to correct this grave lacuna.

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Vicki Ann Ellis
High Court Judge

⁵ [2000] 3 WLR 1164, [2000] Crim. LR 994, [2000] 4 All ER 360, [2000] 2 Cr App R 416