



1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL DIVISION**

3
4 **INDICTMENT NO: 17-2021**

5
6
7
8 **THE QUEEN**

9
10 **v.**

11
12 **DENCLE VIC BARNES**

13
14
15
16 **Appearances:** **Mr. Greg Walcolm, Senior Crown Counsel, for the**
17 **Prosecution**
18 **Mr. Jonathan Hughes, Samson Law for the Defendant**

19 **Before:** **Hon. Mrs. Justice Marlene I. Carter (Actg.)**

20 **Date of Hearing:** **25 April 2022**

21
22 **Date of Ruling:** **27 April 2022**

23
24 **HEADNOTE**

25 ***Criminal Law – Evidence Act (2021 Revision), Section 40 -***
26 ***Application to exclude photograph identification evidence***

27
28
29 **RULING**

30
31 **BACKGROUND**

- 32
33 1. The defendant is before the court on an indictment containing four counts, once count of Illicit
34 Trafficking, contrary to the Misuse of Drugs Act and three counts relating to offences contrary to
35 the Firearms Act. The present application arises from the use of a photograph spread sheet by the
36 investigating officer during the course of an interview of the Crown's primary witness. The
37 application is made pursuant to s.40 of the *Evidence Act*.



1 2. Counsel for the defendant has applied to exclude from the evidence to be presented at trial by the
2 prosecution, any reference to the photograph identification procedure carried out by the police with
3 the witness Andrew Beckford, on the basis that to allow such evidence would operate unfairly
4 against the defendant.

5
6
7 3. The evidence of Andrew Beckford is the main evidence against the defendant on the Crown's case.
8 Andrew Beckford was arrested in relation to the same incident which gives rise to the present
9 indictment. He has pleaded guilty to an offence relating to the drugs in question and has been
10 convicted of firearms offences for which he stands to be sentenced.

11 **THE APPLICATION TO EXCLUDE**
12

13 4. Counsel for the defendant has submitted that the court should determine the present application
14 having firmly in mind the safeguards contained within Code D of PACE. He referred the court to
15 the case of *Oliver v R*,¹ and to what he termed the "cautious approach" of the Cayman Islands
16 Court of Appeal ["CICA"]. In that case the CICA overturned the appellant's conviction, finding
17 that the trial judge should have excluded identification evidence on the basis that the officer who
18 had made the identification by CCTV, "made no attempt" to observe the kind of safeguards
19 contained within Code D of the Police and Criminal Evidence Act. He referred to the CICA's
20 observation that:

21
22 *"Although Code D of the Police and Criminal Evidence Act 1984 codes of practice*
23 *... had no direct application in the Cayman Islands, nonetheless the requirement*
24 *of basic fairness in the identification of persons... was a matter of common law"*
25

26 5. Counsel submitted that in the instant case none of the following recommended safeguards, per Code
27 D of PACE, were observed by the officer who conducted the photograph identification procedure.

¹ [2018(2) CILR 308



1 The safeguards which the defence submit were ignored by the officer conducting the identification
2 procedure were identified were as follows:

3
4 i. Before any identification procedure is undertaken, a description of the suspect must be
5 taken from the witness, written down and provided to the suspect or his lawyer, PACE
6 Code D, para 3.1

7
8 ii. The arrangements for, and conduct of, the eyewitness identification procedures shall be the
9 responsibility of an officer not below inspector rank who is not involved with the
10 investigation, PACE Code D, para 3.11

11
12 iii. When an eye-witness is shown photographs, they shall be told that the photograph of the
13 suspect may or may not be amongst them and if they cannot make an identification, they
14 should say so. The eye-witness shall also be told they should not make a decision until they
15 have viewed at least twelve photographs, PACE Code D, Annex E, para 5

16
17 iv. A record shall be kept of the showing of photographs on forms provided for the purpose.
18 This shall include anything said by the eye-witness about any identification or the conduct
19 of the procedure, any reasons it was not practicable to comply with any of the provisions
20 governing the showing of photographs and the name and rank of the supervising officer.

21 The supervising officer shall inspect and sign the record as soon as practicable, PACE Code
22 D, Annex E, para 11 & 12.

23
24 6. Counsel for the defendant submitted that:

25 *“There are procedural safeguards to be observed when conducting ID procedures.*
26 *By wholly failing to record any of the steps taken, the defendant is denied the*
27 *opportunity to fairly scrutinize the way in which this important evidence was*
28 *gathered.”*



1 7. Counsel also referred to PACE Code D paragraph 3.3 which reads:

2
3 *“An eye-witness must not be shown photographs, computerised or artist’s*
4 *composite likenesses or similar likenesses or pictures (including ‘E-fit’ images) if*
5 *in accordance with paragraph 3.1A, the identity of the suspect is known and they*
6 *are available to take part in one of the procedures under paragraphs 3.5 to 3.10.*
7 *If the suspect’s identity is not known, the showing of any such images to an eye-*
8 *witness to see if they can identify a person whose image they are shown as the*
9 *person they saw on a previous occasion must be done in accordance with Annex*
10 *E.”*

11
12 8. He submitted that the suspect, the defendant in this case, was known to the police. The police
13 should have determined his availability in accordance with paragraph 3.1A(b):

14
15 *“Reference in this Part to the suspect being ‘available’ mean that the suspect is*
16 *immediately available, or will be available within a reasonably short time, in order*
17 *that they can be invited to take part in at least one of the eye-witness identification*
18 *procedures under paragraphs 3.5 to 3.10 and it is practicable to arrange an*
19 *effective procedure under paragraphs 3.5 to 3.10;”*

20
21
22 9. Counsel submitted that in May 2020 the defendant was on Conditional Release from HMP
23 Northward and subject to strict license conditions. As a result, the police knew the defendant’s
24 address however *“there is nothing within the available evidence to suggest that the police made*
25 *any effort to contact or trace Mr. Barnes for the purpose of ascertaining his availability and*
26 *willingness to take part in a Video ID procedure (the procedure that takes priority of use over*
27 *photo-ID, unless an individual is unavailable).”*

28
29 10. Counsel referred to the interview during which Andrew Beckford identified the defendant as a
30 suspect which concluded at 4:12 p.m. on the 22nd of May 2020. The second interview during which
31 the photo spread was put to Mr. Beckford commenced at 4:56 p.m. Counsel invited the court to

1 consider that there was an interval of 44 minutes between the two interviews, during which time,
2 given that the defendant was on Conditional Release, the police could have determined that the
3 defendant was available.

4
5 11. In further support of his application to exclude this evidence, counsel for the defendant submitted
6 that the officer who conducted the photograph identification had failed to comply with the RCIPS
7 Standing Orders. He referred to Part II of Standing Order C4, governing the use of photographs in
8 the identification of suspects. At Paragraph 7, 'Rules to be observed':

9
10 *"Photographs of suspects should never be shown to witnesses for the purpose of*
11 *identification if circumstances allow for a personal identification. Even where a*
12 *mistaken identification does not result, the fact that a witness has been shown a*
13 *photograph of the suspect before his ability to identify him has been properly tested*
14 *at an identification parade will considerably detract from the value of his*
15 *evidence"*

16
17 12. Counsel concluded that the failures of the officer who conducted the photo identification, as
18 identified above at paragraph 6, coupled with the officer's apparent failure to consider an identity
19 parade before using the photo spread and the fact that the procedure itself was conducted under
20 what counsel termed oppressive conditions, [*"the ID procedure in this case was carried out in the*
21 *middle of a police interrogation. At the time, the witness was being interviewed under caution as a*
22 *suspect in a serious criminal case. He had just been told earlier that day that, unbeknownst to him,*
23 *there were two firearms and ammunition amongst the drugs that he had agreed to import into the*
24 *country"*] should lead this court to find that to allow the admission of the evidence would operate
25 unfairly against the defendant.

26
27 13. Counsel submitted that the instant application should be considered in the further context that the
28 evidence of Andrew Beckford is the evidence of an accomplice, which evidence should always be
29 approached with caution; that the nature of the evidence being visual identification evidence, which



1 by its nature could be considered potentially unreliable, required that safeguards concerning
2 identification by witnesses be adhered to; and, as well, the benefits which Andrew Beckford can
3 expect to accrue should he assist in the defendant's conviction by way of a reduction in his sentence.

4 THE PROSECUTION RESPONSE

5
6 14. Counsel for the prosecution, in response, submitted that "*The question for this Court is whether in
7 all the circumstances, the evidence from Andrew Beckford, specific to the identification
8 photospread procedure conducted during his second interview under caution, would offend the
9 basic requirement of fairness, so that it is admission would so unfairly operate against the
10 defendant.*"

11
12 15. The prosecution's position is that the admission of this evidence would not operate unfairly against
13 the defendant.

14
15 16. Counsel submitted as follows:

16 "28. *The police did not breach Code D of Pace nor the RCIPS Standing Orders C4
17 when conducting the identification procedure in this case. The police were
18 seeking to probe the assertion made by Andrew Beckford in relation to his
19 accomplice and seeking to trace that accomplice when the identification
20 procedure was conducted.*

21 29. *The defendant was not available to the police at the time of the identification
22 procedure.*

23 30. *The failures of the police suggested by the defendant were not in fact
24 committed by the police or were not required in these circumstances.*

25 31. *Andrew Beckford, on his evidence, would have had a significant opportunity
26 to be able to identify the defendant prior to being arrested. His identification
27 evidence cannot be said to be weak.*

1 32. *Andrew Beckford provided the name he was given by the defendant to the*
2 *police and identified him without being prompted in any way.*

3 33. *The identification procedure cannot be said to have been conducted in*
4 *oppressive circumstances as Andrew Beckford was represented by his attorney*
5 *during both interviews and was properly cautioned and advised of his rights*
6 *in their entirety.*

7 34. *At the time when Andrew Beckford made the identification of the defendant he*
8 *was not facing any charges nor was he convicted of any offence. It cannot be*
9 *said that he identified the defendant with a view to seek a reduction in the likely*
10 *sentence to be imposed should [he] be convicted.”*

11
12 17. Counsel invited the court to find that unlike the position in *Oliver v R*, where the issue was whether
13 the evidence of the officer who identified the defendant could be properly tested by the defendant
14 at trial, the officer having made no contemporaneous notes of the manner in which he identified
15 the defendant via the CCTV footage, a failure which the CICA found should have resulted in that
16 evidence being excluded, on the present evidence, the police:

17
18 *“a. Took a record of the witness’ initial description as this is clearly contained in*
19 *the audio and video record of both interviews under caution as well as the*
20 *transcripts produce[d] therefrom;*

21 *b. Did not fail to provide this description to the suspect or his attorney as the*
22 *suspect was not arrested nor available to the police at the time the identification*
23 *procedure was conducted;*

24 *c. Were not required to consider an identity parade before using a photo spread*
25 *in all the circumstances;*

26 *d. Did not misrepresent the witness’ description to the witness immediately before*
27 *he selected the photo; and*

28 *e. Did not conduct the procedure under oppressive conditions as the witness, who*
29 *was then a suspect was represented by his attorney and was properly*
30 *cautioned.”*

31

1 18. Counsel for the prosecution submitted that the audio and video recordings of the interviews of the
2 witness Andrew Beckford ensures that the initial description of the defendant given by Beckford,
3 and anything said by him about his identification or the conduct of the procedure, was recorded and
4 in the possession of the defendant.

5
6 “3. Andrew Beckford initially provided evidence to the police, identifying the defendant
7 as his accomplice, during his interview under caution, held on the 22.05.2020, the
8 day following his arrest. During that audio and video recorded interview under
9 caution Andrew Beckford, who was represented by his attorney who was present
10 during the interview, provided the name ‘Vic Barnes’ to the police as his accomplice
11 and also provided a physical description. He indicated that he had met ‘Vic Barnes’
12 in Whitehouse, Westmoreland in Jamaica some days prior to travelling to the
13 Cayman Islands via boat.

14
15 4. Andrew Beckford, based on his evidence, would have had a significant opportunity
16 to identify the defendant having initially interacted with him before leaving on the
17 voyage from Jamaica to Grand Cayman and thereafter being on the voyage with
18 him alone for several hours. The identification evidence cannot in those
19 circumstances be said to be weak.”

20
21 19. Further, the court was urged to consider the actions of the officer conducting the photograph
22 identification procedure in the context that, on the date in question, 22nd May 2020, the Cayman
23 Islands was “locked down” because of the Covid-19 pandemic. Counsel submitted that an identity
24 parade was not feasible in those circumstances, and it was in this context that the police chose to
25 use the photospread procedure.

26
27 20. Regarding the availability of the defendant, counsel submitted that at the time that the decision was
28 taken to utilize the photospread procedure the defendant was not a suspect, he was not arrested nor
29 was he in police custody. Counsel submitted that availability according to Code D at 3.1A (b)
30 meant that “*the suspect is immediately available, or will be available within a reasonably short*
31 *time...*” He submitted that neither of those scenarios was available to the police.



1
2 21. Counsel also took issue with the defence submission that the description of the defendant was
3 misrepresented by the officer who conducted the photospread procedure. While he agreed that the
4 witness stated that the suspect was stout, he suggested that the officer's description of "*medium*
5 *build*" was not a difference of any substance.

6
7 22. Counsel for the prosecution maintained that even if the court were to find that there were failings
8 regarding the safeguards suggested by Code D in the identification procedure, such failings did not
9 equate to a finding that the admission of such evidence would operate unfairly against the
10 defendant. He stated that none of the alleged breaches was of such significance to warrant the
11 exclusion of the evidence of the photospread identification. He submitted further that counsel for
12 the defendant had not articulated how these failings resulted in unfairness to the defendant. Counsel
13 for the prosecution noted that there had been no submission that the actual array of photographs
14 was somehow tainted and maintained that the defence could effectively test the identification
15 evidence.

16 COURT'S ANALYSIS AND CONCLUSIONS

17
18 23. Section 40 of the Evidence Act (2021 Revision) states:

19
20 *"Nothing in this Act derogates from the power of a court in any criminal proceeding*
21 *to disallow evidence otherwise admissible which, in the opinion of such court,*
22 *would, if allowed, operate unfairly against an accused person."*

23
24
25 24. In *Oliver v R*, the CICA the court endorsed the requirement that a defendant should be able to
26 effectively examine the reliability of a witness' identification as being essential to ensure basis
27 fairness to a defendant. It is in this regard that this court considers it incumbent on this application
28 to determine whether there has been a breach of Code D as the defence submits and further whether
29 such breach if found, has resulted in basic unfairness being denied to this defendant.

1
2 25. Counsel for the prosecution submits that in determining the application based as it is on the Code
3 D requirements for the conduct of the identification procedure that the court should examine:

4
5 “a. Firstly, whether the breach occasioned the mischief which the Code was
6 designed to prevent? And;

7
8 b. Secondly, was the breach caused by a flagrant disregard of the code, or was
9 the breach, or cumulative effect of more than one breach, capable of
10 engendering considerable suspicion that the identification procedure was
11 unfair?²”

12
13 26. The court is mindful that even where a breach of Code D has been established for failure to comply
14 with Code D procedures, that such failure is a factor to be considered by a court and may result in
15 the exclusion of tainted evidence. A finding of breach in and of itself is not determinative of the
16 application to exclude.

17
18 27. In the instant case having considered oral and written submissions from the defence and the
19 prosecution, I find the following regarding the breaches of Code D of PACE complained of by the
20 defendant:

21
22 (i) There is no issue that the officer who conducted the identification procedure Sergeant
23 Mendez is “*below inspector rank*” and was involved with the investigation. This is a
24 requirement of Code D para 3.11. However, that stipulation applies to “*eye-witness*
25 *identification procedures in paragraphs 3.5 to 3.10*” of Code D which concern video
26 identification, identification parade and group identification. At ***Annexe E, Showing***
27 ***Photographs to Eyewitnesses***, the requirement of Paragraph 1 is: “*An officer of sergeant*
28 *rank or above shall be responsible for supervising and directing the showing of*

² Archbold 2020 – Paragraphs 14-57

1 *photographs.*” There is therefore no breach with respect to the rank of the identification
2 officer.

3 (ii) The witness was not told that the suspect may or may not be amongst the photographs,
4 neither was he told that if he could not make an identification, he should say so. The witness
5 was also not told that he should not make a decision until he had viewed at least twelve
6 photographs.

7 (iii) No record was kept of the showing of photographs on forms provided for the purpose to
8 detail anything said by the eyewitness about any identification or the conduct of the
9 procedure, or any reasons it was not practicable to comply with any of the provisions
10 governing the showing of photographs.

11 (iv) Before the photo spread identification procedure was undertaken, a description of the
12 suspect was not taken from the witness, written down and provided to the suspect or his
13 lawyer. I agree with the prosecution’s submission on this point that while there was no
14 written note taken by the officer in this regard, there is an audio and video recording of the
15 interview in which the description was given, and this been reduced to a transcript. The
16 defence are in possession of the audio and video recording as well as the transcript.

17 (v) At issue however is the defendant’s availability as it relates to him being present and
18 provided with such description at the time of the identification procedure. It appears to
19 this court that had efforts being made to ascertain the defendant’s availability, these could
20 have ensured his attendance during the identification procedure given the circumstance of
21 him being on conditional release.

22
23 28. As counsel for the defendant points out in his submissions, even were the court to take judicial
24 notice of the fact of the COVID-19 pandemic and that the Cayman Islands were effectively locked
25 down during the relevant period, if efforts to ensure that the defendant was present had been made
26 there may have been no issue with finding other persons for an identity parade as the CI Detention



1 Centre affords the police the opportunity to conduct a video identification procedure³, obviating
2 the need to have the physical attendance or presence of other persons of similar description to the
3 defendant. This was a case of the suspect being known and available. The defendant could have
4 been available within a short time.

5
6 29. I do not consider that the identification was made in oppressive conditions as suggested by counsel
7 for the defendant. The witness was at the time of interview represented by counsel and had every
8 opportunity to confer with him at any point during the interview or before the subsequent
9 identification.

10
11 30. Having found that there were failures on the part of the police as per the Code D safeguards, the
12 next question that I must consider is whether those failures have resulted in the defendant being
13 denied basic fairness. I bear in mind counsel's submissions concerning the nature of the evidence
14 as accomplice evidence and the resulting need for caution and as well the potential unreliability of
15 identification evidence.

16
17 31. In *Oliver* the CICA decried the inability of the defendant to effectively examine the reliability of a
18 witness' identification which had been caused by the failures to observe the safeguards in Code D
19 as it related to identification of a suspect by a police officer by means of CCTV. In the instant
20 case, the defendant would not be denied such opportunity. While no written record was kept of the
21 showing of photographs on forms provided for the purpose to detail anything said by the eyewitness
22 about any identification or the conduct of the procedure, this is itself not surprising since Code D,
23 which requires forms be provided for such purpose, has no direct application in the Cayman Islands.
24 However, the detail that the forms would convey can be gleaned from the video and audio evidence
25 and transcript relating to the identification.

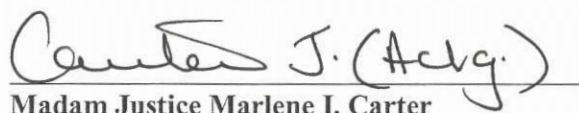
³ Counsel for the defendant in written submissions noted that "the Cayman Islands Detention Centre has a dedicated suite for the preparation and conduct of controlled video identification parades.

1
2 32. Counsel can explore at trial whether the investigating officer considered the practicality of
3 complying with any of the provisions governing the showing of photographs as per Code D.

4
5 33. This is not a case where on the face of the evidence that the prosecution will seek to lead from this
6 witness, the identification can be considered weak. This was a highly relevant factor in *Oliver*
7 where the identifying witness' evidence of identification via CCTV was the only evidence which
8 directly linked the defendant to the offences charged. Apart from being able to effectively examine
9 the reliability of the witness' evidence of the photograph identification procedure, the defendant
10 can test other aspects of the prosecution identification evidence.

11
12 34. I do not find that the identification officer ran roughshod over all the safeguards of Code D in
13 relation to the photo spread identification by the witness Beckford as suggested by counsel for the
14 defendant. I find that despite breaches of some of the safeguards that the cumulative effect of same
15 is not capable of engendering considerable suspicion that the identification procedure was unfair
16 or of these being such as to operate unfairly against the defendant. This is not a case in which this
17 court will exercise its discretion under Section 40 of the *Evidence Act* to exclude otherwise
18 admissible and relevant evidence because to do otherwise would operate unfairly against this
19 defendant.

20
21 35. The application to exclude the photograph identification evidence is denied.

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26
27 **Madam Justice Marlene I. Carter**
28 **Judge of the Grand Court (Acting)**