



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

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

5
6
7 **THE QUEEN**

8
9 **.v.**

10
11
12 **DENCLE VIC BARNES**

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16 **Appearances:** **Mr. Greg Walcolm, Senior Crown Counsel, for the prosecution**
17 **Mr. Jonathan Hughes, Samson Law for the Defendant**

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

21
22 **Date of Hearing:** **28 April 2022**

23
24 **Further Submissions:** **9 May 2022**

25
26
27 **Date of Ruling:** **12 May 2022**

28
29 **HEADNOTE**

30 *Criminal Law – The Police Act (2021 Revision) – Retention and use of*
31 *Non-intimate Sample from Defendant – Application to exclude DNA evidence*
32

33 **RULING**

34 **BACKGROUND**
35

- 36 1. The defendant is before the court on an indictment containing four counts, one count of Illicit
37 Trafficking, contrary to the Misuse of Drugs Act and three counts relating to offences contrary to
38 the Firearms Act.
- 39
- 40 2. On 22 May 2020, the witness Andrew Beckford was interviewed by police about his involvement
41 in this offence as well as the involvement of another individual. In the course of that interview, he
42 stated that he and the other individual, whom he identified as the defendant, had consumed drinks

1 during the course of their journey carrying drugs to the Cayman Islands. The police re-attended
2 the scene where the drugs were found and forensically recovered an energy drink bottle.

- 3
4 3. Upon forensic examination, DNA was recovered from a swab taken from the energy drink bottle.
5 That recovered DNA was cross- referenced with the Police Criminal Justice Arrestee database, and
6 on 17 September 2020 DS Marcia Cordner of the Royal Cayman Islands Police Service [“RCIPS”]
7 received a DNA “Hit” Memorandum indicating a match to the defendant. The Memorandum also
8 stated:

9
10 *“If this match is of interest, it is recommended that an evidentiary Known Sample*
11 *be obtained from the individual listed in 1.2 above and submitted to the CIFSL*
12 *under the same laboratory and Agency file number in 1.1”*

- 13
14 4. The DNA Hit Memorandum was served on the defence as unused material before trial.
15
16 5. The Prosecution subsequently served, as part of the evidence it proposed to call at trial, a DNA
17 report dated 1 October 2021 in which it was stated that there was a match between the DNA found
18 on the swab recovered from the energy drink bottle and an earlier sample taken from the defendant
19 in the course of another investigation in 2017. It is this report that the defence now seek to have
20 excluded from the evidence to be presented to the jury at trial. The court embarked on a *voir dire*
21 to determine the admissibility of the DNA report.

22
23 THE APPLICATION TO EXCLUDE

- 24
25 6. Counsel for the defendant submitted, in the first instance, that the police did not follow the correct
26 procedure in taking the sample from the defendant and the prosecution has not adequately
27 established the provenance of the evidence. At the *voir dire*, counsel for the defendant noted that
28 the defendant’s objections were as to *“how the sample was collected, stored and how it came to be*
29 *used in this case.”*
30
31 7. Counsel for the defendant referred to the statement of Acting Detective Sergeant Kevin Ricketts
32 dated 24 December 2017, in which he stated that on the previous day he had interviewed Dencle
33 Vic Barnes and:

34
35 *“Requested a buccal swab from Mr. Barnes and he agreed, therefore I recovered*
36 *two buccal swabs from him, sealed and labelled them in his presence and marked*

1 *the exhibit as my exhibit with ref#KR3/DB. I subsequently handed over to SPC*
2 *Mark Miller at the George Town Police Station, exhibits KR1/MC, KR2/DB and*
3 *KR3/DB for safekeeping.”*

4
5 8. Counsel referred the court to the provisions of the *Police Act (2021 Revision)* which creates
6 different rules for the taking of intimate and non-intimate samples. The definition of non-intimate
7 samples includes ‘*a swab taken from any part of a person’s body other than a part from which a*
8 *swab taken would be an intimate sample*’. There is no issue on this application that the swab taken
9 from the defendant in 2017 was a non-intimate sample

10
11 9. Counsel submitted that the provisions of Section 37 of the *Police Act* were therefore applicable:

12 **“SECTION 37**

13 (1) *Except as provided by this section, a non-intimate sample may not be taken*
14 *from a person without the appropriate consent.*

15 (2) *Where a person gives consent to the taking of a non-intimate sample that*
16 *consent shall be in writing.”*

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21 10. Section 37 goes on to describe all the scenarios in which a sample may be taken without written
22 consent, and the conditions that must be satisfied. Subsection 14 then reads:

23 “(14) *If a non-intimate sample is taken from a person at a police station, whether*
24 *with or without the appropriate consent —*

25 (a) *before the sample is taken, a police officer shall inform that*
26 *person that it may be the subject of a random search; and*

27 (b) *the fact that the person has been informed of this possibility*
28 *shall be recorded by a police officer as soon as practicable*
29 *after the sample has been taken.”*

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34 11. Counsel for the defendant submitted that the prosecution had failed to satisfy the provisions in the
35 subsections 2 and 14, the burden being on the prosecution to do so beyond reasonable doubt. He
36 invited the court to exercise its discretion under section 40 of the *Evidence Act (2021 Revision)*, to
37 exclude the DNA evidence



1 **FURTHER SUBMISSIONS FOR THE DEFENCE**

2
3 12. The court, after hearing oral submissions and considering previously provided written submissions,
4 invited counsel to address the court further regarding the following:

5
6 *“The defendant’s buccal swab was taken on the 23rd December 2017 during the*
7 *course of an investigation for being concerned in the importation of ganja.*

- 8 I. *How was that matter [relating to the subject buccal swabs KR3/DB]¹*
9 *determined in relation to the defendant? Was he charged, convicted, or*
10 *acquitted?*
11 II. *If he was not convicted, can counsel address whether Sections 31, 33 and 39*
12 *of the Police Law have any relevance to the instant application.”*

13 13. In response, counsel for the defendant submitted that *“there is no evidential basis to assert that the*
14 *defendant was convicted on the same matter for which the buccal swab was collected.”* He argued
15 that the prosecution needed to prove that it did proceed to charge with respect to that particular
16 investigation, during the course of which the sample was taken, otherwise the sample would have
17 been liable for destruction under section 33.

18
19 14. Further, counsel argued with regard to Section 39, that the section states that *“any fingerprints,*
20 *footprints, impressions of footwear or samples or the information derived from samples taken under*
21 *any power conferred by this Part from the person may be checked...”* It was submitted therefore
22 that: The words *‘taken under’* must mean *‘taken in accordance with’*, that is to say *‘taken in*
23 *compliance with’*. The defence’s central submission that the buccal sample in this case was not
24 taken in compliance with section 37 and it therefore followed that section 39 could not be engaged.

25
26 15. Counsel for the defendant argued that checks under section 39 i.e checks of non-intimate samples
27 against other previously taken samples of a defendant are limited to cases in which written consent
28 has been provided. He referred to the provisions of Section 39, (4) (b) in that regard where there
29 was a sample taken from a person in connection with the investigation of an offence:

30 (a) ; **and**

¹ Inserted to contextualize in Court’s inquiry

1 (b) that person has given that person's consent in writing to the use in a
2 random search of the fingerprints, footprints, impressions of footwear or
3 any of the samples and of information derived from them,

4”

5
6 PROSECUTION'S SUBMISSIONS

7 16. In response, counsel for the prosecution submitted that the prosecution had proved the provenance
8 of the sample from the evidence of now Detective Sergeant Ricketts given during the course of the
9 *voir dire*.

10
11 17. Sergeant Ricketts' evidence on the *voir dire* was as follows:

12
13 “He agreed to give a sample and he would have had to sign a form that is also
14 inputed with the buccal swabs also sealed with the buccal swabs.

15

16 Suspect buccal swab collection sheet. Yes, I see the form itself. I am not seeing
17 where he signed. I am seeing where I signed and a witness to the taking has signed.
18 It appears that sample may have been taken without his written consent. His
19 signature not there but he did agree for it to be taken hence it was taken.

20

21 After samples were taken I would usually seal it and I would transport it to the
22 exhibit department, exhibit store or at safe at GT police station for items of
23 exhibits.

24
25 I know what is an exhibit chain of custody form.

26

27 Shows exhibit person connection to officers recovering it, when it was recovered,
28 time it was received and the number of person who had access to it, who it was
29 passed on to during the course of the investigation.

30

31 Persons passed on to, would include persons who work at the lab if it were ever
32 sent to lab.



1

2 *I have a copy of chain of custody form.*

3 *The swab was received on 23rd December 2017 at 10:12pm. It was sealed at 10:15*
4 *pm. Then I gave it to 274 PC Miller at 11:15 pm. PC Miller was at George Town*
5 *Police Station at the time. In the capacity as officer in charge in shift, acting as*
6 *the Sergeant, this is an example of a constable acting [as Sergeant].*

7 *I see where Miller received it on 23/12 at 11'13 and handed it to a safe locker at*
8 *11:15 pm the time he received it.*

9 *Next contact was Howell on 02/01/18, [who] got it from the storage, safe storage*
10 *where Miller placed it.*

11 *Howell handed it over to N. Rankine the exhibit custodian at 9:29*

12 *Next contact with it was 29/09/21 at 14:09 handed it over to Ms. Cordner the*
13 *Scenes of Crime Manager*

14 *Her role is to handle it, take it and transfer it to lab for it to be compared.*

15 *DS. Cordner on 29/09/21 handed it to Reid at 2:15 pm.”*
16

17 18. Counsel for the prosecution further submitted, in relation to the taking of the swabs, KR3/DB, by
18 DS Kevin Ricketts on the 27 of December 2017, that the officer need not have obtained the
19 defendant’s consent in writing. He argued that because the defendant’s buccal sample was being
20 taken after being arrested for an arrestable offence, the police are empowered by section 37(3)(b)
21 to obtain a non-intimate sample from him without his consent, provided that the conditions under
22 the section are met.
23

24 19. Counsel referred to Section 37 subsection 3 which states as follows:

25
26 *“A non-intimate sample may be taken from a person, without the appropriate*
27 *consent—*

28 (a) *if—*

29 *i that person is being held in custody by the police on the authority of a*
30 *court; and*

31 *ii a police officer of at least the rank of Inspector authorises it to be taken*
32 *without the appropriate consent; or*



1 (b) where the following conditions are satisfied —

- 2 i the person is in police detention in consequence of that person's arrest
3 for an arrestable offence; and
4 ii either that person has not had a non-intimate sample of the same type
5 and from the same part of the body taken in the course of the
6 investigation of the offence by the police, or that person has had such
7 a sample taken but it proved insufficient."

8 20. Counsel also referred the court to the provisions of Section 37(18) arguing that the strength of the
9 defence submission regarding the lack of written consent was considerably reduced by that
10 subsection. He concluded that the court should consider Section 37, as a whole, for its true and full
11 import and that the breach of procedure complained of was not in the circumstances of this case
12 evidence of unfairness so as engage the Court's discretion to render the DNA evidence
13 inadmissible.

14
15 21. For the prosecution it was further submitted that the swabs KR3/DB were properly taken by the
16 police on 27 December 2017 and that the sample from the defendant therein contained was not
17 subject to destruction by virtue of section 33 as the investigation in which the sample was taken
18 resulted in the defendant being convicted for the offences for which he had been arrested. Counsel
19 submitted that if the Court was satisfied of the defendant's conviction the police were therefore
20 allowed to retain that swab for use in other investigations in which the defendant was a suspect.

21
22 22. Counsel argued that by virtue of section 39(4) of the *Police Act* the RCIPS were allowed to use the
23 retained swabs to compare to the swabs taken from the items recovered in the investigations relating
24 to this indictment. It was urged that the Court should refuse the defendant's application to exclude
25 the DNA evidence.

26
27 **Court's analysis and conclusions**

28 23. A number of sections of the Police Act are engaged upon this application.

29
30 **The need for written consent - Section 37 of the Police Act**

31
32 24. The investigation in which the swabs KR3/DB were taken leading to the defendant being charged
33 for the offences of importation of ganja and human smuggling were filed as Summary Court Charge

1 No. 06602/2017. I accept the evidence of Officer Ricketts as to his taking of the sample after the
2 defendant was arrested, that the defendant consented to the taking of the sample at that time and
3 also that there was no written consent on the part of the defendant.
4

5 25. Regarding the taking of the sample without consent, Section 37 (1) and (2) of the *Police Act* apply.
6 A non-intimate sample may not be taken without the appropriate consent and that consent should
7 be in writing.²
8

9 26. The section does contemplate that a non-intimate sample may be taken without appropriate consent
10 in the circumstances outlined at Section 37(3). Section 37(3) applies in this case where the
11 defendant on the 23 December 2017 was detained because he had been arrested for an arrestable
12 offence and he had not had a non-intimate sample of the same type and from the same part of the
13 body taken in the course of the investigation of the offence by the police. No question has been
14 raised by the defence in this latter regard nor any evidence to the contrary presented on the *voir*
15 *dire*.
16

17 27. Section 37 (14) goes further to require that regardless of intimate or non-intimate sample, “(a)
18 *before the sample is taken, a police officer shall inform that person that it may be the subject of a*
19 *random search; and (b) the fact that the person has been informed of this possibility shall be*
20 *recorded by a police officer as soon as practicable after the sample has been taken.*” Section
21 37(14) was not complied with in this case.
22

23 28. However, I note the provisions of Section 37 (18)
24

25 “(18) *Where any non-intimate samples have been taken contrary to the procedure*
26 *prescribed in this section, the failure to follow the prescribed procedure shall not*
27 *render the non-intimate sample evidence inadmissible in any legal proceedings.*”
28

29 29. The defendant does not dispute that he consented to the taking of the sample by Officer Ricketts.
30 His objection is to him not having given written consent. I am satisfied that although the provisions
31 of Section 37(14) were not complied with, that this fact does not render the sample inadmissible. I
32 must go further to consider whether it should be excluded for unfairness.
33

² The relevant provisions are referred to at paragraph 9 above



1
2 **The destruction of the sample - Section 33 of the Police Act**
3

4 30. Section 33 of the Police Law states:
5

6 *“Subject to subsection (4), on the acquittal of any person whose*
7 *photographs, descriptions, measurements, fingerprints, palmprints,*
8 *footprints or other physical specimens have been taken pursuant to this*
9 *Part, such photographs, descriptions, measurements, fingerprints,*
10 *palmprints, footprints or physical specimens shall be destroyed or handed*
11 *over to that person at that person’s option.*
12

13 31. I accept the evidence presented by the prosecution on the *voir dire* relating to the chain of custody
14 of the sample, that the procedure for storing the sample, once taken, was followed up to the time at
15 which the sample was used as a point of comparison in this case. There is no evidence or submission
16 that the sample had deteriorated, or that its storage had been affected in any way.
17

18 32. The defendant was convicted of both offences of importation of ganja and human smuggling and
19 sentenced to concurrent terms of imprisonment with respect to each offence. I have seen a copy of
20 the defendant’s conviction record in relation to that charge of 06602/2017 and I am satisfied that
21 the defendant was convicted as the prosecution submits.
22

23 33. The statement of Officer George Hilton dated 9 of May 2022 produced by the prosecution on this
24 application states that he was the arresting officer in relation to the offences for which the defendant
25 was charged in 2017. This evidence is consistent with that of Officer Ricketts. Officer Hilton
26 confirms that the offences were charged as Summary Court charge no 06602/2017. He also
27 confirms that he is aware that the defendant was convicted in relation to those charges.
28

29 34. This section does not apply in this case with regard to the destruction of the non-intimate sample.
30 It has been proved to the satisfaction of this court that the person from whom such sample was
31 taken, the defendant, was convicted of the offence for which he had been arrested and during course
32 of which arrest the sample was taken.
33
34



1 **The use of the retained sample – Section 39 of the Police Act**

2 35. Section 39(1) states:

3
4 *“Where a person has been arrested on suspicion of being involved in an arrestable*
5 *offence or has been charged with such an offence or has been informed that that*
6 *person will be reported for such an offence, any fingerprints, footprints,*
7 *impressions of footwear or samples or the information derived from samples taken*
8 *under any power conferred by this Part from the person may be checked against*
9 —

10
11 (a) *other fingerprints, footprints, impressions of footwear or samples to*
12 *which the person seeking to check has access and which are held by or*
13 *on behalf of, any one or more relevant law-enforcement authorities or*
14 *which are held in connection with or as a result of an investigation of*
15 *an offence; or*

16 (b) *information derived from other samples if the information is contained*
17 *in records to which the person seeking to check has access and which*
18 *are held as mentioned in paragraph (a).”*
19

20 36. The prosecution’s position is that *“Section 39(1) does not in any way limit the use to be made by*
21 *way of comparison, of a sample taken from a defendant. The language is quite broad and should*
22 *be considered to include samples that are not subject to destruction, by virtue of section 33, which*
23 *had been taken in relation previous investigations.”*

24
25 37. Further that:

26
27 *“The legislature would have contemplated such use being made of a sample*
28 *previously taken from a convict, to be used for comparative purposes in relation*
29 *to investigations commenced after the convict has begun serving his sentence, and*
30 *in which that convict is a material suspect.”*

31
32 38. It was submitted that is for that reason, among others, that the duty to destroy samples taken in
33 relation to an investigation under section 33, was limited to investigations which did not result in
34 convictions.
35

1 39. The further question for this court is whether the prosecution is correct in this approach or whether
2 samples such as the non-intimate sample taken from the defendant, kept due to his having been
3 convicted, and not subject to destruction per Section 33 of the Act, was limited in its use by section
4 39(4), limited to cases in which written consent has been provided.

5
6 40. Subsection 39 (4) reads:

7
8 *“(4) Where—*

9 *(a) fingerprints, footprints, impressions of footwear or samples have been*
10 *taken from any person in connection with the investigation of an offence*

11 *other than in circumstances to which subsection (1) applies; and*

12 *(b) that person has given that person’s consent in writing to the use in a*
13 *random search of the fingerprints, footprints, impressions of footwear*
14 *or any of the samples and of information derived from them,*

15 *(c) the fingerprints, footprints, impressions of footwear or, as the case may*
16 *be, those samples and that information may be checked against any of*
17 *the fingerprints, footprints, impressions of footwear, samples or*
18 *information mentioned in subsection (1)(a) or (b).”*

19
20 41. Section 39 (1) limits the application of this section. Subsection (1) applies

21
22 *“Where a person has been arrested on suspicion of being involved in an arrestable*
23 *offence or has been charged with such an offence or has been informed that that*
24 *person will be reported for such an offence.”*

25
26 42. Section 39(4) relates to samples that have been taken from any person in connection with the
27 investigation of an offence **other than in circumstances to which subsection (1) applies** i.e. a
28 person connected with the investigation of an offence who has **not** been arrested on suspicion of
29 being involved with an arrestable offence, has **not** been charged with such an offence or who has
30 **not** been informed that that person will be reported for such an offence.

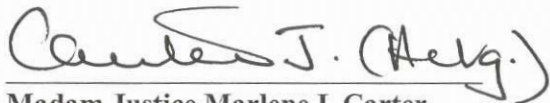
31
32 43. It is clear to this court that there may well be persons such as witnesses or other persons of interest
33 in an investigation who do not fall within the ambit of Subsection 39 (1) and it is to such persons



1 that the safeguard of Section 39(4) applies and for whom the protection contemplated by the
2 subsection are aimed.

3
4 **Conclusion**

5
6 44. The defendant's written consent to the taking of the sample was not sought at the time it was taken
7 in December 2017. That sample is still admissible in evidence despite this failing on the part of
8 the officer taking the sample. The provenance of the sample from the time it was taken has been
9 established to the satisfaction of this court. The effect of the defendant's conviction for the offence
10 for which he was arrested in December 2017 is that the defendant is a person who falls within the
11 ambit of Section 39(1)(b). There is no requirement for the authorities to have his consent for use of
12 the non-intimate sample held by them and to which they have access, here the buccal swabs, for
13 comparison for DNA purposes in this case. In all the circumstances I do not find that the admission
14 of this evidence, will operate unfairly against this defendant. The prosecution is allowed to lead
15 this evidence at trial.

16
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19
20 **Madam Justice Marlene I. Carter**
21 **Judge of the Grand Court (Acting)**