

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE

3 INDICTMENT NO: 33/08

4
5 THE QUEEN

6
7 V

8
9 KEITH BRIAN ORRETT
10 BRIAN EMMANUEL BORDEN
11 BJORN CONNERY EBANKS
12 KEITH ROHAN MONTAQUE
13



14 **Appearances:**

15 **Crown Counsel –**
16 **Ms Trisha Hutchinson and Ms Candia James**

17 **Defence Counsel –**
18 **Mr John Fox and Mr James Stenning of Stenning &**
19 **Associates for Keith Brian Orrett;**

20
21 **Mr Nick Hoffman instructed by Priestleys for Brian**
22 **Emmanuel Borden;**

23
24 **Mr Nicholas Dixey of Mourant for Bjorn Connery**
25 **Ebanks;**

26
27 **Mr Ben Tonner of Samson & McGrath for Keith**
28 **Rohan Montaque**

29 **Before:**

Honourable Mr. Justice Charles Quin Q.C.

30 **Heard:**

26th February and 1st & 2nd March 2010

31
32 **RULING ON ADMISSIBILITY OF EVIDENCE**

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34 1. Counsel on behalf of Brian Borden, Bjorn Ebanks and Keith Montaque all made
35 applications pursuant to Section 40 of the Evidence Law and under the Common
36 Law, to exclude the evidence of the Crown's forensic scientist, Mr. Kevin
37 Noppinger, relating to his findings of the DNA of these three Defendants on
38 questioned samples. They submit that Mr Noppinger's evidence should be ruled
39 inadmissible because, if allowed, it would operate unfairly against each of them.

1 2. On Count I Bjorn Ebanks and Keith Montaque are charged with possession of a P
2 Berretta shotgun between the 4th and the 7th of April 2008 at 4 Town Hall Courts,
3 West Bay, Grand Cayman. On Count II Brian Borden and Keith Montaque are
4 charged with possession of a Remington shotgun between the 4th and the 7th of April
5 2008 at 4 Town Hall Courts, West Bay, Grand Cayman.

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7 3. On Count I the Crown is seeking to adduce evidence from the forensic scientist, Mr.
8 Noppinger, that there is DNA matching both Bjorn Ebanks and Keith Montaque in
9 relation to Exhibit SB 35, namely, the barrel of the Berretta shotgun.

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11 4. In relation to Count II the Crown is seeking to adduce evidence from Mr Noppinger
12 of DNA matching both Brian Borden and Keith Montaque from the Remington
13 shotgun, namely Exhibits SB-37 and SB-38 and from a Remington round Exhibit
14 SB-40.

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16 5. It is accepted that Mr Noppinger received 25 question samples and seven reference
17 samples in April 2008. His laboratory – DNA LABS INTERNATIONAL –
18 processed all the samples in May and June 2008, using both the identifiler and
19 minifiler kits. The identifiler kit test examines 15 STR loci and the minifiler
20 examines 8. It is accepted that the minifiler is more sensitive and is better equipped
21 to deal with small amounts of DNA, and DNA which is possibly degraded or
22 inhibited.

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1 6. Mr Noppinger conducted the validation studies based upon his standard operating
2 procedure and his experience. Mr Noppinger accepted that at the time he conducted
3 these studies, the interpretation threshold for the minifiler was set at 200 RFU. Since
4 that time Mr Noppinger has altered the threshold and raised it to 400 RFU.

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6 7. The Defendants have called Dr Charlotte Word, another forensic scientist. Both Mr
7 Noppinger and Dr Word agreed that question samples which are Exhibits SB-37,
8 SB-38, and SB-40, were all characterized by the fact that they were mixed profiles
9 and also suffered from degradation and/or inhibition.

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11 8. It is accepted that Mr Noppinger and Dr Word differ in their opinions regarding the
12 interpretation of Mr Noppinger's DNA findings.

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14 9. The defence, through both Mr Noppinger and Dr Word, contends that we are dealing
15 with low-template DNA which, aside from degradation and inhibition issues, can
16 produce artifacts which produce low peaks, sometimes known as stutters.
17 Furthermore, because we are dealing with mixed profiles, major contributors can
18 hide minor contributors by a process known as masking. In addition the presence of
19 a stutter can also mask an allele in the profile of a minor contributory. Indeed, as has
20 been highlighted by defence counsel for Mr Borden, a partial profile means that
21 some loci will have only one allele, and, indeed, perhaps no allele. In addition both
22 Mr Noppinger and Dr Word have indicated to the Court that samples with the above
23 characteristics are particularly susceptible to stochastic effects.

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1 10. Accordingly, as the Crown concedes, the above factors, when combined, render
2 interpretation of data difficult, and this requires the exercise of caution on the part of
3 the analysis, both in interpreting the data and in calculating the statistical
4 frequencies, for the purposes of match probability.

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6 11. It is noteworthy that Dr Word accepted that the data upon which Mr Noppinger
7 relied was reliable. Dr Word also accepted that Mr Noppinger was right to use both
8 the identifier and the minifiler. Dr Word specifically said that if the identifier did
9 not provide sufficient data on all the points, she would then run the minifiler test.

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11 12. When asked about Mr Noppinger's statistics, as to whether they were appropriate,
12 Dr Word stated that, based on the testimony of Mr Noppinger, and her
13 understanding of how his programme works, she felt that the statistics Mr Noppinger
14 generated were in the appropriate range. Although they differed in relation to some
15 interpretation and conclusions, Dr Word agreed that Mr. Noppinger's practice and
16 procedure were well within accepted scientific standards and procedures of the
17 scientific community. Furthermore Dr Word testified that she felt Mr Noppinger's
18 calculations were correct and appropriate.

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20 13. However, all three defence counsel submit, that although they do not question Mr
21 Noppinger's qualifications, his 30 years of experience, or, indeed, his bona fides,
22 certain mistakes which he made have materially affected the evidence regarding the
23 three Defendants.

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1 14. Mr Hoffman, counsel on behalf of Brian Borden, has argued that these errors have a
2 “real-world” detrimental effect on his client. Mr Tonner, counsel on behalf of Mr
3 Keith Montaque, submits that Mr Noppinger’s judgment has been fundamentally
4 undermined.



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6 15. I come now to examine this submission in relation to Mr Noppinger’s evidence.
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8 16. In summary Mr Noppinger candidly admitted that there were two alleles that should
9 have been included, which he had not included, and further, there was one allele
10 which was not included which should have been included. Mr Noppinger candidly
11 admitted that this was an error made by a lab technician and he corrected the error in
12 his evidence.

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14 17. In addition, in one figure, Mr Borden’s defence counsel submits that Noppinger
15 made a calculation error by using the P^2 method as opposed to the 2P method,
16 thereby applying the wrong formula to part of one locus. Again, Mr Noppinger
17 frankly admitted this error and corrected it.

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19 18. Finally the defence counsel submit that in relation to Exhibit SB-40 Mr Noppinger
20 departed from his standard operating procedures by relying on one allele, rather than
21 his usual practice of three alleles at two loci. Mr Noppinger’s explanation is that
22 there was evidence from his examination that there were smaller alleles below the
23 standard threshold, and from his experience, and this examination, he felt that in the
24 case of Exhibit SB-40 Brian Borden could not be excluded as one of the major
25 contributors.
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1 19. As a result of this revelation Mr Noppinger reexamined and recalculated his figures
2 and then amended his conclusions to reflect the errors which had been made.

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4 20. The Crown's evidence is that the three Defendants – Borden, Montaque and Ebanks
5 – were found with Defendant Orrett in 4 Town Hall Courts, West Bay, Grand
6 Cayman, and furthermore, the two shotguns were found in the house with all four
7 defendants at the same time

8
9 21. The Defendants all submit through their counsel that this admission into evidence of
10 Mr Noppinger's opinion evidence, together with what has been described as low
11 template DNA evidence, will have a prejudicial effect before the jury, thereby
12 leading to the conclusion that the Defendants will not have a fair trial. As one
13 defence counsel put it, adding poor evidence to another portion of poor evidence
14 does not strengthen the Crown's case. All three defence counsel submit that the
15 weaknesses in the DNA evidence are so fundamental that the fact that it is DNA will
16 have a very prejudicial effect on the jury far outweighing any probative value.
17 Counsel for Brian Borden submits that the prejudicial effect of presenting any type
18 of scientific evidence to a jury is obviously high.

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20 22. In summary, all three counsel submit that the evidence that Mr Noppinger has
21 produced has had its credibility and reliability undermined, such that the Court
22 cannot rely on his analysis and conclusions. Counsel for all three defendants submit
23 that Mr Noppinger's evidence should be excluded, because its admissibility will
24 operate unfairly against each of them.



1 23. In addition, one other point was raised on behalf of Mr Bjorn Ebanks. First Mr
2 Noppinger has admitted that his analysis of Mr Bjorn Ebanks' DNA for the purpose
3 of match probability does not include possible relations of Mr Ebanks. Mr Dixey, on
4 behalf of Bjorn Ebanks, says when one includes relations into a matching
5 probability, it reduces that data to such a low point that it is clearly outweighed by
6 the prejudicial effect.

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8 24. I state for the record that all three defence counsel and Crown counsel have provided
9 the court with very helpful skeleton arguments and comprehensive research
10 regarding the law as it is in the UK and in the Cayman Islands.

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12 25. The Common Law has long recognized the inherent jurisdiction of the Court to
13 exclude evidence, where its prejudicial effect outweighs its probative value and the
14 case of *R v. Sang* 1980 AC 402 has long been adopted in the Grand Court.

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16 26. In addition, Section 40 of the Evidence Law of the Cayman Islands gives the Grand
17 Court the discretion to exclude evidence where it would "operate unfairly against an
18 accused."

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20 27. The case of *R v. Bonython* (1984) 38 SAAR 45 is often cited both in England and in
21 the Cayman Islands, where the Supreme Court of South Australia stated that the
22 subject matter of the evidence must be part of "a body of knowledge or experience
23 which is sufficiently organised or recognized to be accepted as a reliable body of
24 knowledge or experience."
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1 28. None of the three defence counsel is attacking Mr Noppinger's expertise or his
2 integrity as a witness. However, they do submit that his error in the reporting of the
3 alleles and his error in applying the incorrect statistical calculation in order to
4 calculate one matching probability, has undermined his evidence, so that the Court
5 should not rely upon it.

6
7 29. In my view Mr Noppinger acknowledged these errors as soon as they became
8 apparent. In addition he provided a completely honest and reliable explanation and
9 further recalculated and adjusted his figures to reflect the proper findings so that his
10 evidence and his report before the Court were amended. I note also that Dr Word
11 agreed with Mr Noppinger's methodology and his approach, and did not challenge
12 his calculations.

13
14 30. The Crown submits that despite these errors Mr Noppinger's methodology, analysis
15 and conclusions are not only well founded but are scientifically sound and well
16 within the accepted scientific standards and practices. Mr Noppinger has conceded
17 that there are difficulties with low template DNA with degradation and inhibition
18 complications. There is no evidence before this Court of any risk of contamination
19 which would undermine Mr Noppinger's findings. The bases of the calculations are
20 transparent and well within the appropriate methods known to the scientific
21 community. Mr Noppinger concluded that he relies upon his findings. Accordingly,
22 in this Court's view his evidence was not shaken or fundamentally undermined.

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1 31. When this Court reviews Mr Noppinger’s evidence with the amendments and the
2 support his analysis and methodology received from Dr Word, it has no difficulty in
3 finding that Mr Noppinger’s evidence does have the sufficient reliable scientific
4 basis to be admitted.

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6 32. All counsel have referred to the judgment of Lord Justice Philips, as he then was, in
7 **R v. Doheny** 1997 1 Cr. App. R. 369 in which he stated:

8 *“The significance of the DNA evidence will depend upon what else is known about*
9 *the suspect. If he has a convincing alibi at the other end of England at the time of*
10 *the crime, it will appear highly improbable that he can have been responsible for*
11 *the DNA evidence, and this becomes very significant.”*
12

13 33. All counsel also relied on the dicta of Lord Justice Moore-Bick in **R v. Bates** 2006
14 EWCA Cr. App. R. 1395 in which he stated with respect to considering the
15 admissibility of DNA evidence:

16 *“In arriving at the correct conclusion it is important to remember that scientific*
17 *evidence frequently only provides a partial answer to a case, or to an issue in a*
18 *case. However, the test of admissibility is not whether the answer is complete, but*
19 *whether science can properly and fairly contribute to the matter in question.”*
20

21 34. The Crown relies on this authority and submits that Mr Noppinger’s evidence is
22 directly relevant to the issue of possession. The Crown submits that Mr. Noppinger’s
23 evidence establishes, by way of matched probability, a statistical frequency that the
24 Defendants Borden, Ebanks and Montaque could not be excluded as contributors to
25 the DNA deposited on the firearms in question.



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1 35. The Crown submits that Mr Noppinger’s evidence, taken along with the presence of
2 the Defendants in the house where the firearms were found all at the same time is
3 highly probative of the fact that they were in possession of the relevant firearms.

4
5 36. The Court in *R v. Bates* encountered similar problems to this case. There they were
6 also dealing with a mixed sample. Lord Justice Moore-Bick stated:

7 *“If only a partial profile can be obtained from the sample under test, there would*
8 *be some loci at which only one allele, or perhaps no alleles at all, have been found.*
9 *That may be due to a variety of causes which include masking, the loss of some*
10 *molecules from the sample, and the tendency of molecules with a high molecular*
11 *weight to degrade. In very rare cases there may be no allele at that locus. Such*
12 *“voids” are potentially significant because, if the missing allele did not match*
13 *either of the alleles at the locus of the person under investigation it would establish*
14 *conclusively that he (or she) had not provided that sample of DNA. Every partial*
15 *profile carries within it, therefore, the possibility that the missing information*
16 *excludes the person under investigation, but there is currently no means of*
17 *calculating the statistical chances of that being the case.”*
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19 37. Lord Justice Moore-Bick said:

20 *“We can see no reason why partial profile DNA evidence should not be admissible*
21 *provided that the jury are made aware of its inherent limitations and are given*
22 *sufficient explanation to enable them to evaluate it. There may be cases where the*
23 *matched probability in relation to all the samples tested is so great that the judge*
24 *would consider its probative value to be minimal and decide to exclude the*
25 *evidence in the exercise of discretion, but this gives rise to no new question of*
26 *principle and can be left for decision on a case by case basis.”*



28 38. The judge went on to state:

29 *“The fact that there exists in the case of all partial profile evidence the possibility*
30 *that a “missing” allele might exculpate the accused altogether does not provide*
31 *sufficient grounds for rejecting such evidence.”*
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33 39. I have been urged by all three defence counsel to consider this matter in light of this
34 dicta, in other words, each judge, in a case of this nature, must look at the case
35 before it and therefore, as no principles have been laid down such cases must be
36 dealt with on a case by case basis.

1 40. If I hold that the evidence is admissible, defence counsel can obviously cross
2 examine Mr Noppinger as to the weaknesses in his evidence. They have their own
3 experienced and distinguished expert in Dr Word and, with her assistance they can
4 put forth their clients' cases fully, and also ensure that the jury understands the
5 nature of the DNA evidence in this case with all its weaknesses and limitations.

6
7 41. In the Privy Council decision of **R v. Pringle** 2003 WL 116971 Lord Hope of
8 Craighead stated:

9 *“The question of whether the statistic points to the defendant as the actual*
10 *perpetrator will depend on what else is known about him. If it is plain from the*
11 *other evidence that he could not have committed the offence because he was*
12 *elsewhere at the time, the fact that the defendant’s profile matches that on the*
13 *sample taken from the crime scene cannot be said to show that he did commit it.*
14 *That proposition would have to be negated by the other evidence. So the probative*
15 *effect of the DNA evidence must depend on the question whether there is some other*
16 *evidence which can demonstrate its significance. And it is for the jury not the*
17 *person who gives the DNA to assess its significance in the light of that other*
18 *evidence.”*
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20 42. In my view Dr Noppinger’s evidence can properly and fairly contribute to this case
21 and is therefore admissible.

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23 43. I have carefully considered the question of whether the Defendants can still have a
24 fair trial. Although it is quite clear that DNA evidence can be significantly stronger
25 than the DNA evidence before this Court, I do accept the Crown’s submission that
26 Dr Noppinger’s evidence is relevant and does have probative value. As in **R v.**
27 **Pringle** there is some other evidence in this case which can demonstrate the
28 significance of Mr Noppinger’s findings in relation to DNA. Furthermore I do not
29 accept that its admission into evidence will lead to any of the three defendants
30 having an unfair trial. I can confirm that this Court will always invite input from the
31 defence as to the appropriate directions on DNA evidence.



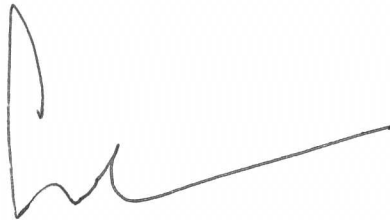
1 44. As I mentioned earlier and as the UK Court of Appeal stated in Bates, the jury
2 should be made aware of the inherent limitations of DNA evidence and the Court
3 must make sure that they are given sufficient explanation to enable them to evaluate
4 it.

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6 45. Accordingly, I reject the defence application to exclude Mr Noppinger's evidence.

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12 **Dated this 2nd March 2010**

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17 **Honourable Mr. Justice Charles Quin**
18 **Judge of the Grand Court**