



[2018] JMSC Crim 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CRIMINAL DIVISION (CLARENDON CIRCUIT COURT)

BETWEEN

REGINA

APPLICANT

V

AND

LENWORTH HOWITT

DEFENDANT

IN OPEN COURT

Mrs Tracy-Ann Robinson, Assistant Director of Public Prosecutions for the Crown

Mr. George Clue for the Defendant

April 12 and 30, 2018

DNA Evidence Act 2016 – Non-intimate sample sought from accused – Accused consented then withdrew consent to provide sample – Whether Court order required for the taking of a non-intimate sample from an adult who does not consent – Whether sample can only be taken during the “investigative stage” before a defendant has been charged and placed before the court – Interpretation of Sections 2, 15, 20 and 25 of the Act

D. FRASER J

The Application

[1] On April 12, 2018 the prosecution applied for a court order under the DNA Evidence Act, 2016 (the Act) requiring Mr. Lenworth Howitt, defendant in a case of sexual intercourse with a person under the age of sixteen, to provide a non-intimate sample to allow for DNA Analysis. The complainant in the case against Mr. Howitt has given birth to a baby. The prosecution seeks a sample from Mr.

Howitt for comparison with the DNA characteristics of the child to see if he is the father. The application was opposed by the defendant.

- [2] On April 30, 2018 the court declined to make the order sought, but declared that the Act permitted the sample to be taken provided the relevant criteria was met. The court proposed to remand the defendant for a short period for the relevant authorities to obtain the non-intimate sample provided the provisions of section 15, 20 and if necessary 25 were satisfied. Counsel for the defendant then requested and the court granted a stay of the implementation of the decision pending a written notice of an appeal. As promised, after counsel for the defendant indicated he wished to appeal the decision, these are the full written reasons for the court's ruling.

The Submissions

- [3] Counsel for the prosecution submitted that given the circumstances in which the prosecution alleged the offence was committed, resulting in a child being born, section 15 of the Act empowered the police to take a non-intimate sample, which was not intrusive, from the accused for comparison. Counsel also relied on the fact that while present counsel was in attendance on his behalf, during the question and answer exercise, the accused man had indicated a willingness to take a paternity test in respect of the complainant's child. It was only subsequently that the accused had withdrawn his consent. She submitted that the legislation permitted the sample to be taken, even where consent was withdrawn.
- [4] Counsel for the defendant submitted that the aim of section 15 of the Act was to assist the investigative stage of matters. Therefore, it was during the investigative stage that the officer should have come to the court to seek an order for a sample, to see whether the defendant could be included or excluded. However once that stage had been passed and the defendant was now charged and before the court, the matter had proceeded beyond the time for such an order to

be made. He indicated his client was not prepared to consent at this stage to a sample being taken from him for the purposes of DNA analysis.

- [5] Counsel for the prosecution in response contended that the court request had been made from the matter was before the lower court and given that the accused had not followed through on his response to the query whether he was willing to give a sample the investigation had not been completed. Counsel maintained that the accused was being difficult having initially given his consent and then withdrawing it when the matter came before the court. Counsel submitted that the Act does support officers taking a non-intimate sample from the accused at this stage.

Analysis

- [6] An examination of the Act shows that section 15 (1) treats with the taking of samples. Section 15 (1) (a) provides that in taking a non-intimate sample, informed consent may be given, but where it is not given, or it is subsequently withdrawn, then reasonable force may be used to obtain the sample.
- [7] A non-intimate sample is defined in section 2 of the Act to mean a sample of: saliva; hair, other than pubic hair; a nail; and any material found under a nail. It also means a buccal swab; a skin impression; and a swab, washing or sample taken from any part of a person's body other than a part from which a swab, washing or sample taken would be an intimate sample.
- [8] Pursuant to section 14 of the Act, informed consent in the context of this case would mean consent in writing. This is so as Mr. Howitt is an adult who is not a protected person, meaning that he does not suffer from any disability, impairment or injury that would affect his understanding or ability in relation to his determining whether or not he should consent to giving a sample.
- [9] Under section 15 (1) (b), informed consent is required for the taking of an intimate sample, otherwise a court order is required. An intimate sample as

defined in section 2 includes a sample of blood; urine; semen; tissue fluids obtained by breaking the skin; or pubic hair. It also includes a swab; washing or sample taken from any part of a person's genital or bodily orifice other than the mouth; dental material; or foetus, or products of conception.

[10] Section 15 (2) (a) addresses the situation where consent for the taking of a non-intimate sample is withheld or having been given is subsequently withdrawn, which is the situation in this case. It provides that, before a detention officer, which includes any member of the Jamaica Constabulary Force, seeks the consent of the person from whom a non-intimate sample is required, he shall inform such person that if consent is declined, or given and then withdrawn, the non-intimate sample may be taken by the use of reasonable force pursuant to section 25 of the Act.

[11] Section 20(1) indicates that a detention officer may take a non-intimate sample, or cause a non-intimate sample to be taken from a person who is detained for a relevant offence, for the purposes of the generation of a DNA profile in respect of the person to be entered in the reference index. It also provides in subsection (2) that such sample may be taken only if informed consent has been given, or an authorizing officer¹ authorizes it to be taken for the purposes given in subsection (1). Subsection 3 provides that the authorizing officer shall not give an authorization unless he has reasonable grounds:

- (a) for suspecting the involvement of the person from whom the sample is to be taken in the commission of the relevant offence in respect to which he is detained;

¹ The definition of authorizing officer under section 2 of the Act includes an officer of the Jamaica Constabulary Force of the rank of Sergeant and above

- (b) for believing that the sample will tend to confirm or disprove the involvement of that person in the committal of the relevant offence;
and
- (c) that the results of the forensic testing of the sample may be given in evidence in any proceedings.

A relevant offence as defined in section 2 of the Act means, “an offence punishable by a term of imprisonment”.

[12] Section 25 applies where a person detained for a relevant offence refuses consent to the taking of a non-intimate sample, or having given such consent withdraws consent prior to the sample being taken, or where the Court has ordered the taking of an intimate sample (see subsection (1)). In any of those circumstances one or more detention officers may use such force as is reasonably necessary to enable the sample to be taken, or to prevent the loss, destruction, or contamination of the sample (see subsection (2)). Section 25 (3) prohibits the use of force to obtain a sample from a child under the age of twelve² Subsection (4) provides that the power to use such reasonable force should not be exercised unless authorised by an authorizing officer.

[13] Subsection (5) outlines that where it is intended to exercise the power to use reasonable force, one of the detention officers concerned shall inform the person from whom the sample is to be taken; (a) of that intention, and (b) that an authorization to do so has been given by an authorizing officer. Subsection (6) indicates that a sample to be taken by the use of reasonable force should be obtained in the presence of an authorizing officer and that authorizing officer shall determine the number of detention officers reasonably necessary for the purposes of the sample being taken.

² This is understandable given that under section 63 of the Child Care and Protection Act a child under the age of twelve is presumed to be *doli incapax*.

Disposition

- [14] It is clear from the Act and the sections I have rehearsed, that there is no requirement for a court order to obtain a non-intimate sample from an adult who is not a protected person. In fact, it also appears from my quick review of the entire Act, that a court order is never required to obtain a non-intimate sample, even when the person is a protected person, or a child. Other safeguards such as parental presence or observation, or the consent of the Children's Advocate are required, but not a court order. I am however, not required in this application to decide in relation to either a protected person or a child and so I make no final pronouncement in respect of those circumstances.
- [15] The case before me involves an adult who is not a protected person. A court order is only required when an intimate sample is being sought and that is not the case in this matter. There is no limitation in the Act that prevents a sample being obtained after a matter has been placed before the Court, which is the import of Mr. Clue's submissions. There is no general rule that investigations must end after a matter is placed before the court and the Act carries no such prohibition in respect of obtaining a non-intimate sample. The guiding considerations for when a non-intimate sample can be properly sought are those contained in section 20 subsection 3 paragraphs a to c, previously outlined at paragraph 11 ante.
- [16] This is a case in which the defendant is charged with the offence of sexual intercourse with a person under sixteen and the virtual complainant has delivered a child. Conviction of this offence is punishable by imprisonment. The taking of the sample may confirm his commission of the offence, if paternity is established. Such evidence may be given in evidence if obtained. The preconditions under section 20 subsection (3) (a) to (c) would therefore it seems have been met to empower the taking of a non-intimate sample from the accused man by an authorised detention officer.

- [17]** There is one final matter to be addressed. When the scheme of the Act is examined, (see for example sections 2, 15, 20 and 25), it contemplates that a sample is obtained from somebody who is detained. The accused man is now on bail. What I am therefore prepared to do, is to remand the accused for only as long as necessary to enable the requisite detention and authorizing officers, if they deem appropriate, to take the required steps in accordance with sections 15, 20 and 25 in relation to notification, and authorization if necessary, to obtain the desired non-intimate sample.
- [18]** The accused man having indicated his intention to appeal this ruling, I stayed the effect of my ruling, pending the filing of the appeal.