



[2024] JMFC Full. 01

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE CIVIL DIVISION**

**CLAIM NO. SU 2021 HCV 04209**

**BEFORE: THE HONOURABLE MRS. JUSTICE S. WINT-BLAIR  
THE HONOURABLE MRS. JUSTICE S. WOLFE-REECE  
THE HONOURABLE MRS. JUSTICE T. CARR**

**IN THE MATTER OF** the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 of the Constitution of Jamaica

**AND**

**IN THE MATTER OF** the applications of **BRNTON JOHNSON** and **JALEEL TWAIN FORBES** alleging violation of rights guaranteed under sections 13(3)(a), 13(3)(j), 14(1), and 16(5) of the Constitution of Jamaica by sections 5, 8, 15, 20, 21, 23 and 25 of the DNA Evidence Act, 2016

<b>BETWEEN</b>	<b>BRNTON JOHNSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE DIRECTOR OF PUBLIC PROSECUTIONS</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>nd</sup> DEFENDANT</b>

**HEARD TOGETHER WITH:**

**CLAIM NO. SU 2022 HCV 01330**

<b>BETWEEN</b>	<b>JALEEL TWAIN FORBES</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DETECTIVE CONSTABLE NIXEN LEWIS</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>nd</sup> DEFENDANT</b>

**FULL COURT**

**Mr. Norman Godfrey, Attorney-at-Law for the Claimants**

**Mr. Dwayne Green and Ms. Katrina Watson, instructed by The Director of Public Prosecution for The Director of Public Prosecution**

**Ms. Faith Hall, Mr. Jeffrey Foreman & Mr. Stephen McCreath, instructed by The Director of State Proceedings for Detective Constable Nixen Lewis & The Attorney General of Jamaica**

**Heard: October 30 & 31, 2023 and January 17, 2024**

**CONSTITUTIONAL LAW – The Constitution of Jamaica – The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 13(2), 13(3)(a), 13(3)(p), 13(3)(j), 14, 16(5), 18, 19 and 49 – Whether sections 5, 8, 15, 20, 21, 23 and 25 of the DNA Evidence Act breach the Claimant’s fundamental rights and freedoms guaranteed under sections 13(3)(a), 13(3)(j), 14 and 16(5) of the Charter – Whether any breach of the Claimant’s fundamental rights and freedoms guaranteed under the Charter are demonstrably justified in a free and democratic society – Part 56, CPR**

**WINT –BLAIR, J**

[1] I have read in draft the reasons for the judgment prepared by my learned sisters Wolfe-Reece and Carr, J. I agree with them and there is nothing I can possibly add.

**WOLFE-REECE, J & CARR, J**

[2] This is the joint judgment of Justices Wolfe-Reece & Carr. We have collaborated and contributed to its preparation equally.

## **INTRODUCTION & BACKGROUND**

- [3] The claims on behalf of Brnton Johnson and Jaleel Forbes were filed individually but were heard together as both touch and concern the constitutionality of specific provisions under the DNA Evidence Act, 2016 (**DNA Act**).
- [4] The factual circumstances surrounding the case of each Claimant, although similar in some respects, are different in others and will be set out separately.

## **CASE OF BRNTON JOHNSON**

- [5] The circumstances that gave rise to Mr. Johnson's claim for constitutional relief commenced with his arrest on 27<sup>th</sup> July 2012. He was charged with the offence of rape at the Mandeville Police Station in Manchester.
- [6] The Claimant appeared before the Manchester Resident Magistrate's Court (as it then was). On the 25<sup>th</sup> September 2012, the Claimant was offered bail and remained on bail until the 9<sup>th</sup> April 2018, when the case against him was transferred to the Manchester Circuit Court, where he was again offered bail on the 30<sup>th</sup> April 2018. The Claimant continued on bail while appearing before the Manchester Circuit Court.
- [7] On 27<sup>th</sup> February 2020, the Prosecution applied to the Court under sections 15, 20, 21, 23 and 25 of the DNA Act for a DNA sample to be taken from the Claimant. The application was made after the Claimant refused to provide consent to the taking of the sample. The Court granted the application and made the Order for the Claimant to be remanded solely for the purpose of taking of a non-intimate sample, after which the Claimant was to return to Court for his bail to be restored.
- [8] The terms of the Order of the Court are as follows:

*"The order is made for the Defendant to be remanded solely for the non-intimate sample to be taken. As I have done in the past, once the non-intimate sample is taken he is to be taken back to court for his bail to be restored."*

- [9] The Court granted the Claimant's application for a stay of execution of the said Order pending the hearing and outcome of this claim. The Claimant alleges that the Order, made under the DNA Act, impugned his constitutional rights.

### **CASE FOR JALEEL FORBES**

- [10] The circumstances that forms the basis of this claim for constitutional relief commenced on the 9<sup>th</sup> February, 2022, when Mr. Forbes at the request of Detective Constable Nixen Lewis (1<sup>st</sup> Defendant) attended the Spalding Police Station in Clarendon. The 1<sup>st</sup> Defendant sought from the Claimant a witness statement regarding the death of Mr. Ryan Roberts. When the Claimant failed to provide the said witness statement, the 1<sup>st</sup> Defendant arrested the Claimant and remanded him into custody as a suspect in the murder of Mr. Ryan Roberts. The Claimant was later transferred to the Asia Police Station in Manchester.
- [11] On the 10<sup>th</sup> February 2022, a Habeas Corpus application was made on behalf of Mr. Forbes in the Manchester Parish Court, which was granted. The terms of the Courts' order were that the Claimant be placed before the said Court on 11<sup>th</sup> February, 2022 at 11:00 am, and at which time, if he is not charged then he is to be released.
- [12] On the same day, the 1<sup>st</sup> Defendant conducted a question-and-answer interview with the Claimant, after which the Claimant was transferred to the CIB office at the Mandeville Police Station. The Claimant alleges that the 1<sup>st</sup> Defendant handcuffed him to a bench, and forcibly held him down from behind for buccal swabs to be taken from him. The Claimants' evidence is that the 1<sup>st</sup> Defendant took this course of action against him after he refused to provide consent to have his DNA sample taken from him.
- [13] Following the taking of the DNA sample from the Claimant, the restraints were removed and he was released from police custody.

## THE CLAIMS

[14] The Claimants have filed constitutional claims seeking declarations and other relief under section 19 of the Constitution of Jamaica. **(The Constitution)**

### *The Johnson Claim*

[15] The Claimant alleges that the Court Order breaches or is likely to breach his fundamental right to freedom of the person guaranteed under section 13(3)(p) as provided for under section 14, his right to protection from search; right to respect for and protection of private and family life; the right to privacy guaranteed under section 13(3)(j) and the right to the presumption of innocence guaranteed under section 16(5).

[16] The Amended Fixed Date Claim Form filed June 1, 2022, the Claimant seeks the following relief: -

1. Declarations that sections 5, 8, 15, 20, 21, 23 and 25 of the DNA Evidence Act, 2016 are in breach of the Constitution;
2. A Declaration that the abrogation, abridgement or infringement of the affected rights are not demonstrably justified in a free and democratic society;
3. A Declaration that the said provisions have contravened the Constitutional rights of the Claimants and other Jamaicans when he was on the 27<sup>th</sup> February 2020 ordered “remanded solely for the non-intimate sample to be taken, as I have done in the past, once the non-intimate sample is taken he is to be taken back to court for his bail to be restored”;
4. A Declaration that the Order made by the Manchester Circuit court on the 27<sup>th</sup> February made against the Claimant pursuant to sections 15 and 25 of the said Act is null and void and is struck down;
5. An order that the abovementioned sections of the Act are void and of no effect and are struck down;

6. Such further and/or other relief as this Honourable Court deems fit in the circumstances and such orders as are necessary to give effect to the declarations and order sought;
7. Costs, including Attorney's costs

***The Forbes Claim***

[17] The basis of the Claimant's claim is that the 1<sup>st</sup> Defendant's actions, which were also carried out pursuant to sections of the DNA Act, breached his fundamental rights and freedoms guaranteed under the Charter, specifically the right to life, liberty and security of the person guaranteed under section 13(3)(a), the right to freedom of protection of the person under section 14, the Claimant's right to protection from search; right to respect for and protection of private and family life; the right to privacy guaranteed under section 13(3)(j), and the right to the presumption of innocence guaranteed under section 16(5).

[18] The Claimant filed a Fixed Date Claim Form filed April 20, 2022, and seeks the following relief:

1. Declarations that Sections 5, 8 15, 20, 21, 23 and 25 of the DNA Evidence Act, 2016 are in breach of the Constitution;
2. A declaration that the abrogation, abridgement or infringement of the affected right are not demonstrably justified in a free and democratic society;
3. A declaration that the said provisions have contravened the Constitutional rights of the Claimant and other Jamaicans when he was on the 10<sup>th</sup> February 2022 at the CIB office at the Mandeville Police Station aforementioned handcuffed to a bench and forcibly held down from behind by the 1<sup>st</sup> Defendant to allow buccal swabs to be taken from him for the purpose of generating DNA sample;

4. An order that the abovementioned sections of the DNA Evidence Act, 2016 are void of no effect and are struck down;
5. Damages for False Imprisonment and Assault and Battery;
6. Damages for the infringement of his constitutional rights;
7. Aggravated and exemplary damages;
8. Costs including Attorney's costs

### ***Submissions of the Claimants***

[19] Mr. Godfrey submitted that it is incontrovertible that the impugned provisions, sections 5, 8, 15, 20, 21, 23 and 25 of the DNA Act violates the Claimants' Constitutional rights to *life, liberty and security of the person* under section 13(3)(a); and the right to *protection from search, respect for and protection of private and family life and privacy of other property and communication* under section 13(3)(j) of the Charter.

[20] Counsel argued that the Court Order in the Johnson case and the "forcible" taking of the DNA sample by way of buccal swab in the Forbes case are actions relating to the collection of personal data which is in breach of the Claimant's privacy rights. Mr. Godfrey relied primarily on the authorities of **R (On the application of Edward Bridges) v The Chief Constable of South Wales Police & Ors**<sup>1</sup>, **S and Marper v The United Kingdom**<sup>2</sup>, **R v Oakes**<sup>3</sup> and **Julian J Robinson v Attorney General of Jamaica**<sup>4</sup>.

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<sup>1</sup> [2020] EWCA Civ 1058

<sup>2</sup> [2009] 48 EHRR50, [2008] ECHR 1581

<sup>3</sup> 1 SCR 103

<sup>4</sup> [2019] JMFC Full 04

- [21] Reliance was placed on the judgment of Sykes CJ in **Julian J Robinson** (supra), who at paragraph 233 referred to the decision of the Indian Supreme Court in **KS Puttaswamy v Union of India Writ Petition**<sup>5</sup> on the issue of the right to privacy. He submitted that the **Julian J Robinson** case provides a complete and comprehensive guide on how constitutional litigation is to be pursued. He further argued that the new approach is the test of proportionality, which stipulates that the nature and extent of the State's interference with the right must be proportionate to the goal it seeks to achieve.
- [22] He urged that it cannot be considered in a free and democratic society that an individual should be subjected to the indignity of being held down and handcuffed and have force applied to extract from him material which contains his most personal information. This material which he and only he ought to be at liberty to disseminate. He submitted that such actions resulted in the Claimants, being deprived of all authority over their personal data.
- [23] Mr. Godfrey further argued that based on the authorities, the forcible taking of DNA sample by buccal swab in the Forbes case, the Court Order in the Johnson case; and the provisions of the DNA Act which empowers an authorizing officer to take or cause such samples to be taken amount to unlawful searches of the physical person. Counsel submitted that the impugned provisions of the Act and the actions of the State in both the Johnson and Forbes cases are unjustifiable interferences with the Claimants' constitutional rights as specifically provided for by sections 13(3)(a) and 13(3)(j) of the Charter.

### ***Section 15 of the DNA Act***

- [24] With regard to section 15 of the DNA Act, Counsel submitted that the infringement is not limited to the Claimants before the court but affect all persons. He stated that

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<sup>5</sup> Civil No 494 of 2012 delivered August 24, 2017



Section 15 speaks to the taking of a sample from any person and is not confined to taking a sample from a person who is in custody. He argued that section 15(1)(a) breaches the Claimants' constitutional rights because the taking of a non-intimate sample forcibly does not require an individual's consent. Mr. Godfrey posited that in the case of Mr. Forbes, the non-intimate DNA sample has already been taken from him by force but there is no evidence of what has become of the sample.

- [25] On the issue of the retention of the sample by the state, it was pointed out that the indices referred to in section 8(2)(a) include an index for convicted persons and an index for suspected persons but the section does not provide for a person who has been detained for a relevant offence.

***Section 20 of the DNA Act***

- [26] Counsel submitted that section 20 allows a person who is detained or in custody for a relevant offence to give his sample. The sample itself and the analysis from the sample are stored. However, there are no Regulations to the Act that guides how the different indices are to be managed. He submitted that there is the suspected person index and the convicted person index but there are no safeguards as to how the Claimant Mr. Forbes is to be or will be treated?
- [27] Counsel further submitted that there is an unanswered question of how it is determined by an authorizing officer which detainee is required to give a DNA sample once they are in detention, as there is also no Regulation that assists in this regard.
- [28] Mr. Godfrey contended that the Defendants have not brought themselves within the provisions of section 13(2) of the Charter and therefore the Court ought to declare that the impugned sections of the Act breach the Claimants' rights and that the abrogation or infringement of these affected rights of both Claimants are not demonstrably justified in a free and democratic society.

[29] With respect to the presumption of innocence set out section 16(5) of The Constitution it was submitted that this too has been infringed. He suggested that provisions of the DNA Act ran contrary to the presumption of innocence.

***Submissions of The Director of Public Prosecutions***

[30] Mr. Greene submitted that the Claimant has not proved on a balance of probabilities that the State breached his constitutional rights. He argued that the aim of the State in promulgating the DNA Act is to enhance the administration of justice and balance the right of the accused with the interests of the State.

[31] He submitted that in the case for Mr. Johnson, based on section 29 of the Criminal Justice (Administration) Act, bail is granted to an accused on a conditional basis, which means that bail may be varied from time to time. Under the DNA Act, provision is made that where consent is not given an application can be made to the Court to have the sample taken. The Claimant was on bail and at the time of the application was in the jurisdiction of the Court. The Court order made remanded him for the sole purpose of the taking of the non-intimate sample. He argued that this did not whittle down or lessen the burden on the Crown to prove the case against the Claimant. The burden of proving the case against him beyond a reasonable doubt still rests upon the prosecution, which may include the calling expert witnesses and evidence independent of evidence of the Claimant's DNA sample. Mr. Greene cited **R v Lenworth Howitt**<sup>6</sup>.

[32] It was further submitted that sections 5 and 8 of the DNA Act refers to a DNA Register and therefore the challenge to these sections are of no relevance to this Court. In summary Mr. Johnson's rights were not breached by the provisions of the DNA Act as the rights in question are not absolute. The Court must seek to balance those rights with the aims and reach of the legislation.

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<sup>6</sup> [2018] JMSC Crim 2

[33] In concluding Mr. Greene contended that the Court should find that the legislation is proportional. He argued that the taking of the sample is a fair requirement when balanced against the aims of the State. The legislation, he argued, is demonstrably justified in a free and democratic society based on the following criteria (1) consent is required; (2) reasonable force may be used if consent is not given or withheld and (3) only specific persons are authorized to take samples from persons, which may benefit the Crown or the Defendant in the case.

***Submissions on Detective Constable Nixen Lewis & The Attorney General of Jamaica***

[34] Ms. Hall commenced her submissions by suggesting that the Claimant cannot obtain the declarations sought on behalf of all Jamaicans because this would require an Order from the Court to act in a representative capacity. If the Court is minded to grant the declarations sought this can only be done in relation to the Claimants.

[35] She contended that the Court should also decline jurisdiction to grant constitutional redress because other forms of redress are available under the law to the Claimants. Counsel submitted that in the Forbes case, the Claimant's claim for false imprisonment, assault and battery is sufficient to address the issues raised without resort to a constitutional claim.

[36] It was further argued that this Court has no power to pronounce on the right to liberty without enquiring into the Order of the Court below. The constitutional court was not the proper venue for such an enquiry and Mr. Johnson had an alternate remedy which he could explore.

[37] In addressing the issue of infringement, Miss Hall submitted that it is the Claimant who has the burden of establishing that the provisions of the DNA Act have infringed on their constitutional rights. It is only after the Claimant discharges that burden that the Defendants are required to show that such an infringement is demonstrably justified in a free and democratic society. It was her submission that

based on the evidence, the Claimant has failed to prove the infringement set out in either of the claims.

[38] It was argued that the right to liberty in section 13(3)(a) in this context is to be distinguished from the wider interpretation given to it in the **Julian J Robinson** case. In this context, the right to liberty is restricted to physical liberty of the person and in the circumstances that right has not been infringed.

[39] Counsel further submitted that the DNA Act outlines the procedures and the safeguards that must be followed by the relevant officers in taking a sample. There is no evidence in the Forbes case that the proper procedure was not followed. It is not sufficient for the Claimant to allege that his right was infringed, he must go further to demonstrate how the right has been infringed. Ms. Hall submitted that the mere taking of the sample alone is not sufficient to infringe the right.

[40] If, however, the court is of the view that there was an infringement she submitted that this was demonstrably justified in a free and democratic society as the provisions of the DNA Act serve the legitimate purpose of providing relevant scientific evidence to either implicate or exculpate the Claimant.

### ***Sections 20 and 25 of the DNA Act***

[41] In relation to sections 20 and 25 of the DNA Act, Counsel argued that these sections do not concern the physical liberty of the person. These are not provisions under which the Claimant can be detained. The sections only outline how a DNA sample should be taken. In these circumstances, section 14 of the Charter which guarantees freedom of protection of the person has therefore not been engaged. Ms. Hall referred to the authority of **Saunders v The United Kingdom**<sup>7</sup>, which considered **Articles 6(1) and (2) of the European Convention on Human Rights** but there was no evidence of an intimate sample in the case. In any event, where

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<sup>7</sup>[1998] 1 BCLC

the sample was taken in this case, the burden is still on the Prosecution to prove the case against the Claimant.

**Sections 5 and 8 of the DNA Act**

[42] Counsel posited that sections 5 and 8 refer to the contents of the National DNA Register, and there is nothing on the facts of either case that links these sections to the Charter right to privacy under section 13(3)(j). Counsel submitted that the Claimant has only made a blanket assertion on behalf of all Jamaicans that the right to privacy has been breached but there is no evidence of this alleged infringement. In the case of Mr. Johnson, the sample has not yet been taken. In the case of Mr. Forbes, the sample has not yet been tested and therefore not yet in the database. Ms. Hall referred to the **Julian J Robinson** case, which confirms the extent of the right to privacy. It is accepted a breach of this right is an intrusion on the person's privacy of choice and physical body. However, based on the Oakes test and the recent decision of **Attorney General v Jamaican Bar Association; General Legal Council v Jamaican Bar Association**<sup>8</sup>, she submitted the intrusion is demonstrably justified in a free and democratic society. On this point counsel concluded that based on the test of proportionality, it was clear that the means to achieve the objectives of the State in the investigation and detection of crimes is rationally connected. Therefore, where a person is charged with a serious offence, such as Rape, his rights are diminished to achieve the objectives of the State.

[43] Ms. Hall relied on the line of cases which considered Article 8 of the Convention and the United States authority of **Maryland v King**<sup>9</sup>, which confirms that the State must balance the interests of both parties. She also distinguished the circumstances of the case **R (on application of Edward Bridges v New South**

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<sup>8</sup> [2023] UKPC 6

<sup>9</sup> 569 US 435 (2013)

**Wales**<sup>10</sup> with the circumstances of these cases, in that the Court found that there were no adequate safeguards embedded in the automated facial recognition (AFR) programme. She submitted that there are safeguards under the DNA Act.

[44] In conclusion it was submitted that the Court should find right to presumption of innocence in section 16 of The Constitution has not been engaged.

## ISSUES

[45] The main issues for consideration are as follows:

- i. Whether the Claimants constitutional rights have been abrogated, abridged, or infringed by the provisions of Sections 5, 8, 15, 20,21,23 and 25 of the DNA Act.
- ii. If the Court so finds, whether the breach is demonstrably justified in a free and democratic society.
- iii. Whether the actions of Detective Constable Nixen Lewis towards Jaleel Forbes constitute false imprisonment, assault, and battery.
- iv. Is Jaleel Forbes entitled to relief in damages for the torts.

## Relevant Legislative Provisions

### DNA Evidence Act, 2015

[46] Section 2 provides:

*“authorizing officer” means any of the following persons who authorized the taking of a sample--*

- a. *In the case of the Force, the Jamaica Defence Force or the Rural Police, an officer of the rank of Sergeant or above;*

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<sup>10</sup> 2020 EWCA Civ 1058

- b. *In the case of a forensic analyst, the Custodian*
- c. *In the case of the Independent Commission of Investigation, the person appointed as the Commissioner under section 3 (2) of the Independent Commission for Investigation Act;*
- d. *in the case of Correctional Services, a person of the rank of Assistance superintendent or above;*
- e. *In any other case, the most senior officer in the place of detention*

**“Detention officer”** means

- a. *Any member of the Force;*
- b. *Any member (of whatever rank) of the Jamaica Defence Force when acting in support of the Force;*
- c. *Any member of the Rural Police who is authorized by an officer of the Force;*
- d. *A forensic analyst;*
- e. *A correctional officer*
- f. *A person appointed as an investigator under the Independent Commission of Investigations Act; or*
- g. *Any other person with responsibility for operation of a place of detention;*

**“intimate sample”** includes any of the following taken, or caused to be taken, from a person under this Act

(a) *sample of--*

(i) *blood*

(ii) *urine*

(iii) *semen*

(iv) *tissue fluid obtained by the breaking of the skin; or*

(v) *pubic hair;*

(b) a swab, washing or sample taken from any part of a person's genitals or bodily orifice other than the mouth

(c) a dental material; or

(d) Foetus or products of conception;

**“non- intimate sample”** means any of the following taken, or to be taken, from a person under this Act--

(a) A sample of--

(i) saliva;

(ii) hair, other than pubic hair;

(iii) a nail; or

(iv) any material found under a nail;

(b) a buccal swab;

(c) a skin impression; and

(d) 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;

[47] **Section 4-** *The Principal objects of this Act are to make provision for-*

(a) *the taking of samples from persons suspected or convicted of criminal offences for forensic testing*

(b) *The taking of samples from persons suspected or convicted of certain criminal offences for the purpose of generating DNA profiles in respect of those persons to be entered in the investigation division of the National DNA Register;*

(c) *the regulation of the taking of samples from persons who volunteer to have such samples taken from them for the purpose of the investigation of offences or incidents that may have involved the commission of offences;*

(d) *the taking of samples from certain persons for elimination purposes and, where appropriate, the entry of their DNA profiled in the National DNA Register;*

(e) *the taking of samples for the purpose of generating DNA profiles in respect of missing, persons, unknown deceased persons or unknown persons to be entered in the identification division of the National DNA Register;*



*(f) the establishment, maintenance and operation of the National DNA Register by the Forensic Institute; and*

*(g) the retention or destruction, in certain circumstances, of samples and the destruction or removal from the National DNA Register, of any DNA profiles generated from those samples.*

**[48] Section 5** - *The Director of the Forensic Institute shall, as soon as may be after the commencement date, establish, maintain, and operate in accordance with this Act, for and on behalf of the Government of Jamaica, a consolidated forensic DNA databank to be known as the National DNA Register.*

**Section 8** - *(1) The National DNA Register shall comprise the following divisions-*

*(a) the investigation of division*

*(b) The identification division; and*

*(c) Such other division as the Minister may prescribe  
For the purposes of this section by order published  
in the Gazette.*

*(2) The investigation division of the National DNA Register shall contain the following indices of DNA profiles, the registrable particulars and other information that may be used to identify the person from whose biological matter each DNA profile was generated (whether before or after the commencement date)-*

*(a) the reference index comprising DNA profiles  
generated by means of DNA analysis from  
samples, taken from persons whose identities  
are known;*

*(b) the crime scene index comprising DNA  
profiles generated by means of DNA analysis  
from samples found at, or recovered from,  
crime scenes;*

*(c) the suspected persons index comprising DNA  
profiles generated by means of DNA analysis  
from samples of persons suspected of having  
committed relevant offences;*

*(d) the convicted persons index comprising*

*DNA profiled generated by means of DNA analysis, from samples of persons who have been convicted of relevant offences;*

*(e) the volunteers index comprising DNA profiles generated by means of DNA analysis from samples generated by means of DNA analysis from samples, taken from persons with their informed consent;*

*(f) the elimination index comprising the DNA profiles generated from samples taken from persons under PART VII;*

*(g) the statistical index comprising DNA profiles, registrable particulars and other information --*

*(i) obtained from the analysis of DNA material taken from persons in accordance with this Act or under an arrangement referred in Section 11(2)(f)(ii); and*

*(ii) kept for statistical purposes and may also be used for analytical purposes in the investigation of relevant offences; and*

*(h) such other index as the Minister may prescribe, for the purposes of this section by order published in the Gazette*

*(3) The identification division of the National DNA register shall contain the following indices of DNA profiled, registrable particulars and other information that may be used to identify the person from whose biological material each DNA profile was generated or the blood relatives of those persons (whether before or after the commencement date)-*

*(a) the missing and unknown persons index comprising DNA profiled derived by means of DNA analysis from samples taken from-*

*(i) Missing persons or blood relatives of missing persons to associate that DNA profile with the missing person;*

*(ii) Unknown persons; and*

*(iii) Unknown deceased persons;*

*(b) such other index as Minister may prescribe, for the purposes of this section by order published in the Gazette*

*(4) In addition to the DNA profiles referred to in subsection (1), the National DNA register shall contain, in relation to each DNA profile in any index, the following information-*

*(a) the identity of the person from whose bodily sample the DNA profile was generated;*

*(b) where applicable and scientifically possible, the intimate sample or the non- intimate sample used to generate the DNA profile; and*

*(c) such other information as the Minister may prescribe, by order published in the Gazette.*

**[49] Section 15 -** *(1) In order to take a sample from any person the following shall apply-*

*(a) To take a non-intimate sample, informed consent may be given but if informed consent is not given or is subsequently withdrawn, then reasonable force may be used to obtain the non- intimate sample;*

*(b) To take an intimate sample, informed consent may be given but if informed consent is not given or is subsequently withdrawn, an order from the Court shall be sought.*

*(2) Before a detention officer seeks the consent of a person from whom a sample is required to the taking of the sample or the detention officer causes the sample to be taken from the person, the detention officer shall inform the person of the following--*

*(a) the person refuses to consent to the taking of a non-intimate sample or if consent is given and is subsequently withdrawn by the person, the non- intimate sample may be taken by reasonable force in accordance with section 25; or*

*(b) if the person refuses to consent to the taking of the intimate sample, or if consent is given and is subsequently withdrawn by the person, an order of the Court for the taking of the sample may be applied in accordance with this Act.*

**[50] Section 20 (1) -** *Subject to this Act, a detention officer may take non- intimate sample, or cause a non- intimate sample to be taken, under this section 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.*

*(2) A non- intimate sample may be taken under this section only if--*

*(a) informed consent has been given, in writing, to the taking of sample; or*

*(b) an authorizing officer authorizes it to be taken under this section shall not be given unless the authorizing officer giving it has reasonable grounds.*

*(3) An authorization to take a non- intimate sample under this section shall not be given unless the authorizing officer giving it 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 of which he is detained;*

*(b) for believing that the sample will tend to confirm or disprove the involvement of that person in the commission of the relevant offence concerned; and*

*(c) that the results of the forensic testing of the sample may be given in any proceedings.*

**[51] Section 21 (1)** *Subject to this Act, a detention officer may cause to be taken, an intimate sample under this section from a person who is detained for a relevant offence for the purpose of the generation of DNA profile in respect of the person to be entered in the reference index*

*(2) An intimate sample may be taken under this section only if --*

*(a) an authorizing officer at the place of detention authorizes it to be taken for the purposes specified in subsection (1) and*

*(b) informed consent has been given in writing, to the taking of the intimate sample.*

*(3) An authorization to take an intimate sample under this section shall not be given unless the authorizing officer giving it has reasonable grounds-*

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- (a) *for suspecting the involvement of the person from whom the intimate sample is to be taken in the commission for the relevant offence in respect of which he is detained; and*
  - (b) *for believing that the intimate sample will tend to confirm or disprove the involvement of that person in the commission of the relevant offence concerned.*
- (4) *If a person expressly withdraws the informed consent given under subsection (2) (b), or if the withdrawal of that consent can reasonably be inferred from the conduct of the person, before or during the taking of an intimate sample under this section--*
  - (a) *that withdrawal of consent shall be treated as refusal to give the informed consent to the taking of the sample under this section*
  - (b) *an order of the Court for the taking of the sample may be applied for in accordance with this Act; and*
  - (c) *the provisions of this Part shall apply accordingly.*
- (5) *A withdrawal under subsection (4) of the informed consent given under subsection (2) (b) shall be recorded in writing by a detention officer as soon as practicable after such withdrawal.*
- (6) *The informed consent given under subsection (2) (b) to the taking of an intimate sample under this section may not be withdrawn after the sample has been taken*
- (7) *For the purposes of section 20 and this section, a sample taken from a person includes a sample taken from the person that consists of matter from the body of another person.*

**[52] Section 23- (1)** *A detention officer may apply to the Court for an order for the taking of an intimate sample from a person who refused consent thereto or who, having given consent has withdrawn it prior to the sample being taken.*

*(2) The Court shall, for the purposes of determining an application under subsection (1), have regard to whether it would be in the interests of justice in all the circumstances of the case, having due regard to the best interests of the person concerned, the interests of the victim of the offence in respect of which the person concerned is detained and the protection of society to make an order authorizing the taking of an intimate sample from the person concerned.*

**[53] Section 25- (1)** *This section applies where—*

- (a) *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*
  - (b) *A Court has ordered the taking of an intimate sample from a person detained for a relevant offence.*
- (2) *One or more detention officers may use force as is reasonably necessary to enable the sample to be taken, or to prevent the loss, destruction, or contamination of the sample*
- (3) *Subsection 92) shall not apply to a child under the age of twelve years*
- (4) *The power referred to in subsection 92) shall not be exercised unless an authorizing officer authorizes it.*
- (5) *Where it is intended to exercise the power conferred by subsection (2), 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 under subsection (4)*
- (6) *A sample to be taken under this section shall be taken in the presence of an authorizing officer and that authorizing officer shall determine the number of detention officers that is reasonably necessary for the purposes of subsection (2).*

**The Constitution (Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**

**[54] Section 13(2)** -*Subject to sections 18 and 49 and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –*

- (a) *This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
- (b) *Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.*

**Section 13 (3)**-*The rights and freedoms referred to in subsection (2) are as follows-*

- (a) *the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted.*

**Section 13-(3-) (j)**

*The right of everyone to -*

- (i) protection from search of the person and property;*
- (ii) respect for and protection of private and family life, and privacy of the home; and*
- (iii) protection of privacy of other property and of communication;*

**Section 13(3) (o)**

*The right to protection from torture, or inhuman or degrading punishment or other treatment as provided in section 16;*

**Section 13 (3) (p)**

*The right to freedom of the person as provided in Section 14;*

**Section 13(6)**

*No person shall be subjected to torture of inhuman or degrading punishment or other treatment.*

**Section 14 – (1)** *No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedure established by law in the following circumstances-*

- (a) In consequence of his unfitness to plead to a criminal charge*
- (b) In execution of the sentence order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted;*
- (c) In execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court of tribunal;*
- (d) In execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law;*
  - (e) For the purpose of bringing him before a court in execution of the order of a court;*
  - (f) The arrest or detention of a person -*

*(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or*

*(ii) where it is reasonably necessary to prevent his committing an offence;*

*(g) in the case of a person who has not attained the age of eighteen years, for the purpose of his care and protection;*

*(h) the detention of a person-*

*(i) for the prevention of the spreading of an infection or contagious disease constituting a serious threat to public health; or*

*(ii) suffering from mental disorder or addicted to drugs or alcohol where necessary for his care and treatment or for the prevention of harm to himself or other; or*

*(j) the arrest of detention of a person-*

*(i) who is not a citizen of Jamaica, to prevent his unauthorized entry into Jamaica; or*

*(ii) against whom action is being taken with a view to deportation or extradition or other lawful removal or the taking of proceedings relating thereto*

*(2) any person who is arrested or detained shall have the right-*

*(a) to communicate with and be visited by his spouse, partner or family member, religious counsellor and a medical practitioner of his choice;*

*(b) at the time of his arrest or detention or as soon as is reasonably practicable, to be informed in a language which he understands, of the reasons for his arrest or detention;*

*(c) where he is charged with an offence, to be informed forthwith, in a language which he understands, of the nature of the charge; and*

*(d) To communicate with and retain an Attorney- at- Law*

*(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and-*

*(a) shall be-*



*(i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court and*

*(ii) released either unconditionally or upon reasonable condition to secure his attendance at the trial or at any other stage of the proceedings; or*

*(b) if he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph*

*(4) any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody.*

*(5) Any person deprived of his liberty shall be treated humanely and with respect for the inherent dignity of the person.*

**Section 16 (5)** -*Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.*

## **ANALYSIS AND DISCUSSION**

**Whether the Claimants constitutional rights have been abrogated, abridged, or infringed by the provisions of Sections 5, 8, 15, 20,21,23 and 25 of the DNA Act.**

### **Determination of a breach**

**[55]** It is accepted that the Constitution is the supreme law of the land, therefore if any law is inconsistent with the Constitution it may be struck down by the Court. Section 2 of the Constitution plainly provides that:

*Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.*

**[56]** An individual who feels aggrieved by any legislative provision which appears to breach any of the rights conferred by The Charter may seek redress by making an application to the Supreme Court. The Charter specifically provides for this as follows;

*If any person, alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to same matter which is lawfully available, that person may apply to the Supreme Court for redress<sup>11</sup>.*

**[57]** The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 is to be read and construed as one with the Constitution. The Charter guarantees certain fundamental rights and freedoms to citizens as follows: -

*Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*

*(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges, or infringes those rights.*

**[58]** The fundamental rights and freedoms contained in Chapter III of the Constitution of Jamaica are therefore not absolute or unfettered. Section 13(1) makes it clear that protection of these fundamental rights and freedoms are guaranteed to the extent that they do not prejudice the rights and freedoms of others. In the same breath, section 13(2) establishes that Parliament reserves the right to enact legislation that may abrogate, abridge, or infringe those rights provided that the legislation is demonstrably justified in a free and democratic society. This view was confirmed in the recent Privy Council judgment in **Attorney General v Jamaican Bar Association**.<sup>12</sup>

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<sup>11</sup> Section 19 (1), The Charter of Fundamental Rights and Freedoms, (Constitutional Amendment) Act, 2011

<sup>12</sup> [2023] UKPC 6

[59] The recent decision of **Julian J Robinson v The Attorney General**<sup>13</sup>, discussed the test to be applied when considering an application for redress under the Charter. Batts J opined: -

*“The test of constitutionality of legislation now involves two stages, namely, A determination as to whether the law abrogates, abridges, or infringes a guaranteed right; and secondly, if it does, is the abrogation, abridgment or infringement demonstrably justified in a free and democratic society.”*

[60] In determining the burden and standard of proof, McDonald Bishop JA in the Court of Appeal case of **The Jamaican Bar Association v The Attorney General and The General Legal Counsel**<sup>14</sup> explained it as follows: -

*“The starting point...the Charter guarantees the rights and freedoms, which it seeks to protect and...they should not be abrogated, abridged, or infringed, unless it can be demonstrated (not merely asserted) that such abrogation, abridgment, or infringement is justified in a free and democratic society. The state, therefore, has the burden to bring justification, upon proof by the appellant of abrogation, abridgment, or infringement of a Charter right. This is a positive duty cast on the state to prove constitutionality.”*

[61] At paragraph 124, it was stated:

*That translates into both an evidential and legal burden cast on the state to establish constitutionality.*

[62] The question therefore is whether the Claimants have satisfied their burden at the requisite standard of proof that there has been an infringement of the right to life, liberty and security of the person guaranteed under section 13(3)(a). It is for each Claimant to show that based on the Court Order made in the Manchester Circuit Court and the taking of the non-intimate sample and/or the provisions of the DNA Evidence Act authorizing both acts in each particular case has breached their constitutionally protected rights.

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<sup>13</sup> [2019] JMFC Full 04

<sup>14</sup>[ 2020] JMCA Civ 37

- [63] In determining the nature and extent of the right, the modern constitutional approach must be applied. Based on **Julian J Robinson** case, a constitutional right must be given a purposive and generous interpretation. This means that the right ought not to be infringed or interfered with except 'in accordance with the law.
- [64] The authority of **Kevin Simmonds v The Minister of Labour and Social Security and The Attorney General of Jamaica**<sup>15</sup> speaks to the engagement of the right and confirmed the principle that if a right has not been engaged there can be no infringement<sup>16</sup>.

### **Application of the Law**

- [65] The Claimants both contend that the impugned sections of the DNA Act have breached and are likely to breach specific rights guaranteed to them by the Constitution. Mr. Johnson contends that his detention by virtue of a court order solely for the purpose of obtaining a DNA sample infringed on his right to liberty, the right to protection from search, the right to privacy of private and family life, property, and communication. He also argues that the sections breach his right to protection from torture or inhumane or degrading punishment or other treatment and that it breached the presumption of innocence. Mr. Forbes raises the same grounds but on different facts. The discussion as to whether there was in fact an infringement of these rights will encompass both Claimants.

### **The right to Life, Liberty and Security of the person**

- [66] Section 13 (3) (a) guarantees an individual the right to life, liberty, and security of the person. No one should be deprived of this right unless by execution of the court

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<sup>15</sup> [2022] JMFC FULL 02

<sup>16</sup> "In any case where it is alleged that there has been a breach of any of the rights or freedoms guaranteed, the right or freedom invoked must first be shown to have been "engaged". By engaged I mean that matter if the complaint arguably falls within the scope of the right or freedom guaranteed. It is only such a determination that the need for an enquiry into whether or not the right or freedom has been limited and if so, whether the limitation is demonstrably justified in a free and democratic society becomes necessary."

by way of a sentence upon conviction. The approach of the Canadian Courts on this issue, is seen in the authorities of **R v Cunningham**<sup>17</sup> and **Carter and others v Attorney General of Canada and another**<sup>18</sup>. Both cases considered the right to life, liberty, and security of the person under section 7 of the Canadian Charter. The approach of the Courts is that the right entails three separate but related rights. This means that each aspect of the right can be ascribed its own interpretation. In **Carter**, the Court noted that the right to life aspect is only engaged where there is a threat of death. As it relates to the other two aspects of the right to liberty and security of the person, the Provisional Court in **Cunningham**, per Kopstein J at pages 229 – 230 stated that:

*“...[Liberty] within the meaning of s 7 of the Charter may be properly considered by this court as beyond the idea of physical restraint and detention.*

*Similarly, the s. 7 right to “security of the person”, may protect rights in a different realm than the rights protected by other sections of the Charter. Again, in my view, the right to “security of the person” is an abstract right which may relate, in part at least, to actions of the State that have no relation to legal processes, but which may, none the less, undermine the security of the person. To take a blatant example, the exercise of the freedom of opinion or expression which is disturbing to the government or one of its agencies would be worth little, if upon the expression of an opinion the person expressing himself or herself suddenly found that he or she were the subject of great attention from the police, such as spot checks at every corner, constant observation, persistent questioning, or other forms of harassment.....that kind of harassment would undermine the security of the person..”*

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<sup>17</sup> 31CCC (3) 223

<sup>18</sup> [2015]1RCS 331

[67] In **Carter**, the Court also stated the following in relation to its interpretation of the right to liberty and security of the person:

*[64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. **Liberty protects “the right to make fundamental personal choices free from State interference: Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses “a notion of personal autonomy involving ... control over one’s bodily integrity free from state interference” (Rodriguez, at pp 578 – 88 per Sopinka J., referring to R v Morgantaler, [1998] 1 S.C.R. 30) and it is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering (New Brunswick (Minister of Health and Community Services v. G. (J.), [1998] 3 S.C.R. 46, at para. 58: Blencoe, at paras. 55 – 57: Chaoulli, at para. 43 per Descamps J.; para 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and Lebel JJ.)***

[68] There is no issue as to the right to life in this case as there is no threat of death in respect of the Claimants.

[69] The focus is on the rights of liberty and security of the person in relation to Mr. Forbes, is that he was detained for several days, and with regard to Mr. Johnson is the likelihood of his detention as a result of the court order to obtain a sample under the DNA Act.

[70] It is our considered view that section 13 (3) (a) cannot be read in isolation. In interpreting the Constitution, the Charter must be read in its entirety. Section 14 (1) provides that:

*No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances-*

*(d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law;*

*(f) the arrest or detention of a person –*

*(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence;*

[71] Section 14 raises exceptions to the right in circumstances where a person is arrested or detained in execution of a court order. There can be no doubt that the detention of Mr. Johnson was in accordance with the DNA Evidence Act. That is his evidence, the order of the Judge was specific to his detention for the purpose of collecting a sample. Once that was concluded he was to be brought to court for his bail to be reinstated. The potential interference with his liberty and security of the person is therefore not in breach of the Constitution as it is not an unlawful act.

[72] In the case of Mr. Forbes, he was detained in accordance with Section 14 (1) (f) of the Charter as he was taken into custody on reasonable suspicion of having committed the offence of murder. The evidence supports the conclusion that the detention was within the law, therefore we do not find therefore that his rights under sections 13 (3) (a) and Section 14 (1) were breached.

[73] Our view is buttressed by the decision of the Canadian court in **Blencoe v British Columbia (Human Rights Commission)**<sup>19</sup> In addressing their Charter right of life, liberty and security of a person, the Court found that the Canadian Charter rights of liberty and security of the person had not been engaged in the circumstances of the case. Per judgment of the Court (McLachlin CJ, L Heureux Dube, Gonthier, Major and Bastarache JJ), at 309 – 310, they stated the following:

*“... The liberty interest protected by s. 7 is no longer restricted to mere freedom from physical restraint. “Liberty” is engaged where state*

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<sup>19</sup> 2000 SCC 44

***compulsions or prohibitions affect important and fundamental life choices. The s.7 liberty interest protects an individual's personal autonomy. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. Such personal autonomy, however, is not synonymous with unconstrained freedom ... (emphasis applied)***

*The right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious ...*

*First, the s. 7 rights of "liberty and security of the person" do not include a generalized right to dignity, or more specifically a right to be free from the stigma associated with a human rights complaint. While respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the Charter this does not mean that dignity is elevated to a free-standing constitutional right protected by s. 7.... Like dignity, reputation is not a free-standing right. Neither is freedom from stigma. Second, the state has not interfered with the ability of the respondent and his family to make essential life choices. In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity. It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. Here, the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being."*

[74] The Canadian cases of **Cunningham** and **Carter**, though they provide useful interpretations of the right, ought to be distinguished from the present cases. While this Court adopts the view that the right to liberty and security of the person in



section 13(3)(a) are not restricted to physical liberty but extends also to the right to exercise personal autonomy over life choices which goes towards fundamental dignity of the individual and psychological integrity. There must be some evidence of harm or threat of harm by the actions of the state to the Claimant's physical and/or psychological well-being under the legislative measure, which is not present in the case.

**[75]** On the facts before this Court, there does not appear to be any harm or threat of harm by the intrusion of the taking of a non-intimate DNA sample by buccal swab. The taking of a buccal swab is non-invasive. It concerns a slight touch of the inside of the individual's cheek and would unlikely cause harm or threat to physical or psychological well-being of the individual if done in accordance with the law. There is also no evidence that the actions of the state interfere with either Claimant's and their family's ability to freely make essential life choices.

**[76]** The Court finds that there is no engagement or infringement of the right to liberty and security of the person in section 13(3)(a) of the Charter in either case. There is no evidence of a rational connection between the liberty and security of the person, as each Claimant's arrest and detention was done in accordance with the law of reasonable suspicion of having committed a serious criminal offence of rape and murder respectively. Neither Claimant was detained under the impugned DNA Evidence Act. When the Order of the Court was made in respect of Mr. Johnson, he was already detained and within the jurisdiction of the Court and on continuous bail. Mr. Forbes was also already within the jurisdiction of the Court when the non-intimate sample was taken from him, as he was detained and in the custody of the police on reasonable suspicion of murder and was to be charged pending the outcome of further investigations.

**[77]** It therefore follows there is no rational connection between the impugned provision of sections 15, 20, 21, 23 and 25 of the DNA Act and the rights guaranteed under section 13(3)(a). There is therefore no engagement or infringement of the right to life, liberty or security of the person under section 13(3)(a) or section 13(3)(p) or

section 14 by the Order of the Manchester Circuit Court, the taking of the buccal swab or the provisions of the Act authorizing these actions of the state.

**Protection from search: respect for and protection of private and family life: and privacy of other property and communication under section 13 (3) (j) of the Charter of Fundamental Rights & Freedoms (Constitutional Amendment) Act 2011.**

**[78]** There is no qualification or exception to the rights guaranteed under Section 13 (3) (j) which offers everyone the right to –

(i) protection from search of the person and property.

(ii) respect for and protection of private and family life, and privacy of the home; and

(iii) protection of privacy of other property and of communication.

**[79]** It is accepted that these are three separate and distinct rights guaranteed to the individual. Mr. Godfrey submitted that the actions of the state in both claims breach all three distinct rights of the Claimants.

**[80]** In the case of **Julian Robinson**, Sykes C.J in delivering his judgment, examined the right to privacy and opined that privacy involves three main areas, a) intrusion with an individual's physical body, b) informational privacy and c) privacy of choice.

**[81]** The taking of a DNA sample, although described as a non-intimate sample, involves an intrusion on the physical body of the Claimants. In the case of Mr. Forbes this was in fact done. In the case of Mr. Johnson, it is likely to be done.

**[82]** Further, the retention of the samples under Section 47 (2) the DNA Act breaches the right to informational privacy. The DNA profile is the personal information of the Claimants which would now be a part of a national DNA database. It is our finding that this right has been engaged and has been or is likely to be infringed.

## **The right to protection from torture or inhumane or degrading punishment**

[83] Section 13 (3) (o) enshrines the right of an individual to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsections (6) and (7). Section 13 (6) No person shall be subjected to torture or inhumane or degrading punishment or other treatment.

[84] The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has given a comprehensive definition of torture on which we rely as the Court has not been able to identify any legal authorities on this point within our Caribbean jurisprudence. The definition stated is useful in addressing this issue. It defines torture and inhumane or degrading treatment or punishment as follows:

***“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.***

*Inhumane or Degrading treatment or punishment has been defined by the Convention as treatment or punishment which causes intense physical or mental suffering. It can include serious physical assault or psychological abuse, cruel or barbaric conditions or detention. Treatment which is extremely humiliating or undignified. It is a broader concept than torture, often referring to treatment that is less severe than torture or that does not meet the definition of torture.”*

[85] Torture therefore by this definition is made up of three factors.

- a) it requires an act which is intentional and inflicts severe pain or suffering on an individual.
- b) the purpose of such an action is to obtain from that individual information or a confession.

c) the pain or suffering must be instigated with the consent or acquiescence of a public official or a person acting in an official capacity.

**[86]** In the case of the Claimants, it is our view that the collecting of the DNA sample by a buccal swab does not involve the infliction of severe pain or suffering. Further the intention is not to obtain a confession or to ferret out information from the Claimants. In the circumstances the method of collection of the samples does not fall within the definition as outlined under the Convention.

**[87]** There is also no basis to find that the buccal swab taken by an officer with reasonable force, if necessary, is inhumane or degrading treatment given the definition previously stated. Mr. Forbes in his evidence outlined that he was handcuffed to a bench and forcibly held down from behind to allow the buccal swabs to be taken. He did not indicate that he suffered mental or physical injury. There is no evidence from him to support a finding that the actions of the officers amounted to inhumane or degrading treatment.

**[88]** Mr. Johnson's claim is on the basis that the reliance on Section 21 DNA Act would cause him to be treated in an inhumane or degrading manner. The Act itself refers to the use of reasonable force in the obtaining of the buccal swab if a person does not consent. There is no basis to conclude that the reasonable force prescribed in the DNA Act is akin to inhumane or degrading treatment. We conclude that this right has not been engaged.

### **The right to freedom of the person**

**[89]** Section 13 (3) (p) enshrines the right to freedom of the person as set out in Section 14, as previously indicated Section 14 qualifies this right and in this case the Claimants fall within those stated qualifications. We do not find that the DNA Act has breached this provision.

### **The presumption of innocence**

[90] Section 16 (5) protects the right of the person who is charged with an offence to the presumption of innocence.

#### ***The Forbes case***

[91] Mr. Godfrey argued that Mr. Forbes' right to being presumed innocent until proved guilty was also breached by the actions of the 1<sup>st</sup> Defendant. However, the Court notes that Section 16(5) of the Charter becomes applicable only when the person has been arrested and charged with the criminal offence. It is only when a person is charged with a criminal offence that he or she becomes entitled to the protection guaranteed by this provision.

[92] Since Mr. Forbes was not charged with the offence of murder this right has not been engaged.

#### ***The Johnson case***

[93] Section 16(5) of the Charter provides that **“every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.”** This presumption of innocence provision forms part of the general right to due process under section 16, which is guaranteed to every individual charged with a criminal offence. By virtue of section 16(1) every person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court. In keeping with the right of due process, the Prosecutor is still tasked with the onus of proving the case against the Claimant at the criminal standard, which is beyond a reasonable doubt. This also includes the conducting of a fair trial before the Claimant can be convicted. There is no indication that the Claimant has been deprived of any aspect of the right to due process. He is represented by counsel and has been heard at every stage of the proceedings. This claim is testament to that fact.

- [94] The taking of the buccal swab is not conclusive evidence of guilt, and the Court cannot convict Mr. Forbes without a fair hearing. During a hearing there are procedural steps which a prosecutor must take to admit any evidence, such as samples obtained under the DNA Act as well as the results of any tests which may be conducted. The prosecutor is guided by the law and the principles of natural justice.
- [95] At this point, there is no evidence that the Court proceedings leading up to the trial of Mr. Johnson, which is yet to take place, have been unfair. In the circumstances, we find that there has been no breach of Mr. Johnson's right to the presumption of innocence guaranteed under section 16(5) of the Charter.
- [96] Several authorities from the United States of America were raised before the Court on the issue of the right against self-incrimination. There is no such provision in our Constitution which enshrines such a right. The authorities were not useful in the determination of the question of the right to due process.
- [97] In summary the Claimants have established and it is accepted that Sections 5, 15, 20, 21, 23, 25 of the DNA Evidence Act infringe upon their rights under Section 13 (3) (j) of the Constitution.

**Whether there is a reduced expectation of privacy of an individual who is detained on reasonable suspicion of committing an offence.**

- [98] The Defendants submitted that the right to privacy of persons detained on reasonable suspicion of having committed an offence are reduced and that this reduction of the right to an expectation of privacy is necessary to advance the process of justice.
- [99] The Court is fortified in its view that the right to privacy generally must be balanced against societal demands and interests. The issue of crime and crime solving within our nation is paramount and must be viewed as being an important societal interest. The legislature carries a responsibility to the people of Jamaica and must

seek to regulate and institute laws of the land to address these societal interests. The reduced expectation to privacy when a person has been detained on reasonable suspicion, is found to be reasonable. In the case of **Maryland v. King**<sup>20</sup>, the United States of America Supreme Court by a majority concluded that

*“that ascertaining an arrestee’s identity and criminal history is a crucial part of the arrest procedure and that a DNA test is just as valid and informative as fingerprinting. Determining an arrestee’s criminal history also serves the legitimate state interest of determining what level of risk the individual poses to the public and what conditions should be set on his/ her release from custody.”*

[100] The Court further found that balancing the detainees’ interests against the interests of the society was reasonable. They opined that DNA testing may significantly improve the criminal justice system and police investigative practices. The Court stated;

*“It is constitutionally reasonable for the State to undertake the “negligible” physical intrusion of swabbing the inside of a legitimately detained arrestee’s cheeks and using limited data from DNA to determine whether the individual is associated with the crime scene or victim.”*

[101] We accept and find that a person who has been detained on reasonable suspicion of having committed a criminal offence has a reduced expectation of privacy.

[102] In the circumstances, the taking of Mr. Forbes’ buccal swab and the Order for the taking of Mr. Johnson’s non-intimate sample breach the right to privacy of both accused. The question that remains is whether these infringements are demonstrably justified in a free and democratic society?

**Whether the breach is demonstrably justified in a free and democratic society.**

[103] Having accepted that the Claimants’ right to privacy was infringed, we now consider whether the infringement were demonstrably justified in a free and

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<sup>20</sup> 569 U.S> 435 (2013)

democratic society. If the infringement is demonstrably justified, the Claimant will not be entitled to the constitutional declarations sought.

[104] Ms. Hall submitted that the interference with the Claimants' privacy rights are demonstrably justified because of the legitimate State aim to investigate criminal offences and prosecute crimes. She argued that the means used to achieve this objective is proportional, as the reduced privacy interest of the suspect is required not only for identification purposes but may also benefit the suspect and these benefits outweigh the reduced right to privacy. Ms. Hall relied on the United States America case of **Maryland v King**<sup>21</sup> where consideration was given to similar issues of privacy and invasion under the Maryland DNA Collection Act.

[105] Ms. Hall further submitted that limitations on the right to privacy come into play when a person is detained and their right to physical liberty of the person contemplated in section 14 of the Charter guaranteed by section 13(3)(p) is limited by the operation of section 14(1)(d) and (f). She relied on **Julian J Robinson; R v Dymont** and **R v Beare**, which together state the following principles:

- a) Claims to privacy rights or interests must be balanced against other societal needs, especially those of law enforcement; and
- b) A person detained on reasonable and probable cause of having committed a particular criminal offence must reasonably expect that incidental to being taken into custody he will be subjected to certain 'procedures' in the criminal investigation process of fingerprinting, which is of great assistance or benefit in the process.

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<sup>21</sup> 569U.S.435 (2013)



[106] The Canadian Supreme Court in **R v Oakes**<sup>22</sup> stated what that must be satisfied in order to establish that a limit to a constitutional right is demonstrably justified in a free and democratic society as follows:

1. The objective which the measures responsible for a limit on a Charter right of freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

2. Once a sufficiently significant objective is recognised, the party seeking to limit the Charter right must show that the means chosen are reasonable and demonstrably justified. The courts in making a determination must therefore balance the interests of the persons or groups whose rights are or are likely to be infringed, with those of society

[107] The **Oakes** Test, which was repeated in **Attorney General v Jamaica Bar Association, The General Legal Council v Jamaica Bar Association case**<sup>23</sup>, It contains two criteria to satisfy the demonstrably justified in free and democratic society test:

- i. There must be a legitimate state measure or aim to justify interfering with the right;
- ii. The means or measures used must be demonstrably justified in a free and democratic society, that is proportional

[108] The proportionality test has its own components and these are:

- i. The measure must not be arbitrary, unfair or irrational;

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<sup>22</sup> [1986] 1SCR 103

<sup>23</sup> [2003] UKPC 6

- ii. The measure must be rationally connected to the objective. The impairment of the right must be minimal. (Minimal impairment) This includes using least intrusive means; and
- iii. There must be proportionality between the effects of the measure in limiting the right AND the legitimate state aim or objective

[109] The Court accepts that the proportionality test in **Oakes** has been satisfied by the aims and objectives of the DNA Evidence Act. When an accused has been detained on reasonable suspicion of having committed a serious criminal offence, the measures used in association with the continued criminal investigations require some methods of intrusion in order to properly identify the suspected persons. This is the basis for requiring certain data from these suspects, such as fingerprints. The taking of bodily DNA samples is not to be treated differently because the method of taking the sample differs slightly. There are also benefits to be gained from the providing and taking of the sample, as it creates the possibility of forming admissible evidence leading to either the exoneration or implication of each suspect.

[110] The powers of detention and authorizing officers under the DNA Act are a necessary measure to ensure law enforcement officers receive the relevant support in the criminal investigation process. In addition, the DNA Act contains built in safeguards to ensure least intrusive methods are used in the taking of samples from suspected persons under the Act. The safeguards include the requirement for consent to taking samples; the use of reasonable force being limited to the taking of non-intimate samples and the requirement of a Court Order for intimate samples where consent is absent. It does not appear that the Act imposes arbitrary powers on detention or authorizing officers in taking DNA samples from persons in custody. In the affidavit of Mr. Keneil Henry, he stated that the Jamaica Constabulary Force conducts training sessions for police officers in relation to the DNA Evidence Act designed to equip police officers with the requisite skills and knowledge of the procedures involved in taking non-intimate DNA samples. In

conclusion, the built in safeguards under the Act are prima facie sufficient to ensure non-arbitrary interference with the right to privacy and the Claimant has not rebutted this presumption.

[111] Mr. Godfrey also submitted on the issue of the retention of the samples taken. Regarding the case of the Claimant Forbes he submitted that the sample having been taken there was no indication or regulation to provide as to the index the sample would be assigned to. He further submitted that there were no measures in place to protect the Claimant's sample from misuse.

[112] Section 48(1) of the DNA Act provides inter alia that where a sample is taken from a suspected person and proceedings have not commenced after a period of eight (8) years, the person may apply to the Court to have the sample destroyed. The Court on hearing such an application if it is satisfied that it is in the interest of justice considering the provisions of Section 48(3) of the Act, may grant such an order. On further perusal of the Act Sections 51 and 54 sets out offences and penalties that may be imposed for any breach of the Act. The Court therefore does not find favour with this submission.

[113] Having considered a fair balancing of the rights of the Claimants and the State, the Court concludes that the relevant sections of the DNA Act are proportional to the legitimate aim of the State on conducting criminal investigations in aid of prosecuting those who allegedly have committed criminal offences in an efficient manner. In doing so, the breach of the Claimants' right to privacy is demonstrably justified in a free and democratic society. The Claimants are therefore not entitled to the constitutional declarations sought.

## **The Torts**

**Whether the actions of Detective Constable Nixen Lewis towards Jaleel Forbes constitute false imprisonment, assault and battery.**

[114] Mr. Forbes in his claim also sought damages for the torts of false imprisonment, assault, and battery which he says resulted from the actions of the 1<sup>st</sup> Defendant.

### **False Imprisonment**

[115] In the authority of **Peter Flemming v Detective Corporal Myers and the Attorney General**<sup>24</sup> , Carey JA stated the following with regards to the tort:

*“the action of false imprisonment arises where a person is detained against his will without legal justification. The legal justification may be pursuant to the valid warrant of arrest or whereby statutory powers, a police officer, is given the power of arrest in circumstances where he honestly and on reasonable and probable cause, believes a crime has been committed”.*

### **Assault**

[116] An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on his person (**Fagan v Metropolitan Police**<sup>25</sup>). To establish an assault, it is not necessary for the Claimant to show that the Defendant intended to use force, but only that the Claimant, at the material time, reasonably believed himself to be in danger of immediate unlawful force from the defendant.<sup>26</sup>

### **Battery**

[117] According to the **Halsbury's Law of England**<sup>27</sup> a battery is an act of the defendant which directly and intentionally or recklessly causes some physical contact with the person of the claimant without his consent. To constitute a battery there must be a voluntary and positive act on the part of the defendant. There can be no battery unless there is contact with the person of the claimant, whether directly or

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<sup>24</sup> (1989) 25 J.L.R 526

<sup>25</sup> [1969] 1QB 439

<sup>26</sup> Hepburn v. Chief Constable of Thames Valley Police [2002] EWCA Civ 1841

<sup>27</sup> Tort Volume 97A (2021)

by a weapon or projectiles. The touching must exceed the bounds of what is generally acceptable in the ordinary conduct of daily life.

[118] In cases involving the police, statute provides protection to the officer in claims of tort. The burden is on Mr. Forbes to prove on a balance of probabilities that Detective Constable Nixen acted maliciously or without reasonable and probable cause. Section 33 of the Constabulary Force Act states that,

***“Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause - and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.”***

[119] The protection offered under Section 33 is replicated in the DNA Act at Section 63 which provides immunity to any person who takes a sample in accordance with the Act. The section does not apply if the proceedings are brought on the grounds of unreasonable force being used in the taking of the sample. In this case Mr. Forbes did not expressly aver in his pleadings that the act was done maliciously or without reasonable cause. Such a failure in the pleadings is fatal. In the case of **John Crossfield v Attorney General of Jamaica and Corporal Ethel Hamilton**<sup>28</sup> Morrison, J (Ag) as he then was stated

***“For the tort of false imprisonment to triumph it must be shown that the Claimant was detained against his will without legal justification. The legal justification may be pursuant to a valid warrant of arrest or where by statutory powers a police officer is given a power of arrest in circumstances where he honestly and on reasonable grounds believes a crime has been committed.”***

[120] Section 64 of the DNA Act specifically provides that the person who has taken a sample in accordance with the Act is protected from liability once he has acted in good faith. The evidence of Constable Nixen is that based on information he

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<sup>28</sup> Claim No. CL E 219 of 2001

received from anonymous sources, in connection with the murder investigation that was ongoing, he formed a genuine and honest belief that Mr. Forbes committed the offence of murder. Based on this information he detained Mr. Forbes on reasonable suspicion of murder. The police officer within his investigation has a responsibility to detain and question persons who they reasonably suspect may have committed the offence. That detention in such circumstances is deemed to be lawful as such the Claimant has not satisfied this Court that there is a viable claim for false imprisonment. We find that the claim for false imprisonment fails.

**[121]** The further question is if the DNA sample that was obtained by a buccal swab constituted an assault and/or battery? It is often the case that in claims such as this that the lines become blurred in relation to what is an assault and what is a battery. The evidence of Mr. Forbes does not indicate an apprehension of fear and as such the sole issue is that of battery. The sample having been taken pursuant to the DNA Act is lawful. Additionally, Mr. Forbes in his evidence has not established that the officer acted maliciously or without reasonable or probable cause in the execution of his duties. The Court does not find that the torts have been made out by the Claimant, we therefore find that Mr. Forbes is not entitled to relief based on the pleaded tortious acts.

### **Costs**

**[122]** The Civil Procedure Rules Part 56 sets out a guide for the procedure where there is an application for administrative orders. Rules 56.15(4) and (5) of the CPR state that:

*4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*

*5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.*

**[123]** In our assessment of the instant case, we find that there is no evidence that the Claimants acted unreasonably in making the application or in the conduct of the application. Therefore, the Court finds no basis on which to make an Order for costs.

**DISPOSITION**

**ORDERS OF THE COURT:**

**Claim No: SU2021HCV04209**

1. The Orders sought in the Amended Fixed Date Claim Form filed on June 1, 2022, are refused
2. The Stay of Proceedings ordered on February 27, 2020 is discharged.
3. No Order as to Costs

**Claim No. SU2022HCV01330**

1. The Orders sought on the Fixed Date Claim form filed April 20, 2022 are refused.
2. No Order as to costs.

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**S. Wint-Blair, J**

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**S. Wolfe-Reece, J**

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**T. Carr, J**