

**IN THE DISTRICT COURT  
AT WAITAKERE**

**CRI-2016-090-001217  
[2017] NZDC 17314**

**NEW ZEALAND POLICE**  
Prosecutor

v

**[NATHAN SHULL]**  
Defendant

Hearing: 5 July 2017

Appearances: S King for the prosecution  
Defendant in person  
G English as amicus curiae

Judgment: 8 August 2017

---

**RESERVED JUDGMENT OF JUDGE K J GLUBB  
(Application for Suspect Compulsion Order)**

---

[1] The police suspect [Nathan Shull] committed a burglary on [date deleted] on the basis of a DNA profile obtained from blood stains found at the scene of the crime. Forensic testing matched that DNA profile with a DNA profile on the Crime Sample Database that had previously been linked to [Nathan Shull]. [Nathan Shull] has not yet been charged in relation to the burglary.

[2] [The Detective Inspector 1] of the [Region deleted] District Police applied in writing on [date deleted] pursuant s 13 of the Criminal Investigations (Bodily Samples) Act 1995 (“the Act”) for a Suspect Compulsion Order requiring [Nathan Shull] to give a bodily sample to the police for evidential analysis.

[3] [Nathan Shull] opposes the application.

[4] The central issue is whether in all the circumstances, it is reasonable for the Court to make that order.

### **Legislation**

[5] The application is brought pursuant s 13 of the Act, which provides:

#### **13 Application for order authorising taking of bodily sample**

(1) An application may be made in accordance with this section to a District Court Judge for an order requiring a suspect who is of or over the age of 17 years to give a bodily sample in any case where—

(a) there is good cause to suspect that the suspect has committed an imprisonable offence or offence against any of the provisions listed in Part 3 of the Schedule; and

(b) the suspect has refused to consent to the taking of a bodily sample in response to a suspect request made in respect of that offence, or a related offence.

(2) Every application under subsection (1) shall be made by a constable who is of or above the level of position of inspector, in writing and on oath, and shall set out the following particulars:

(a) the facts relied on to show that there is good cause to suspect that the respondent has committed an imprisonable offence or offence against any of the provisions listed in Part 3 of the Schedule:

(b) the reasons why it is considered necessary to obtain a suspect compulsion order in relation to the respondent, including the facts relied on to show that there are reasonable grounds to believe that analysis of a bodily sample taken from the respondent would tend to confirm or disprove the respondent's involvement in the commission of the offence:

(c) where possible, the type of analysis that is likely to be required in respect of the bodily sample sought from the respondent, having regard to the nature of the material (being material of the kind referred to in paragraph (b) of section 16(1)) found in any of the circumstances referred to in that paragraph.

(3) Subject to section 15, where an application is made under this section,—

(a) the applicant shall serve notice of the application on the respondent; and

(b) both the applicant and the respondent are entitled to appear and to adduce evidence at the hearing of the application.

(4) In considering an application made under this section, the Judge may take into account any oral or documentary material that the Judge considers relevant, whether or not it would be admissible in a court of law.

[6] On the hearing of an application for a suspect compulsion order, a Judge may make an order requiring the respondent to provide a bodily sample if satisfied of the matters in s 16(1) of the Act, namely:

- (a) there is good cause to suspect that the respondent (being a person who is of or over the age of 17 years) has committed the offence to which the application relates; and
- (b) material reasonably believed to be from, or genetically traceable to, the body of a person who committed the offence has been found or is available at the scene of the offence; ... and
- (c) there are reasonable grounds to believe that analysis of a bodily sample taken from the respondent would tend to confirm or disprove the respondent's involvement in the commission of the offence; and
- (d) the respondent has refused to consent to the taking of a bodily sample in response to a suspect request made in respect of the offence, or a related offence; and
- (e) in all the circumstances, it is reasonable to make the order.

[7] Section 16(2) of the Act provides that in considering whether or not to make the order, the Judge shall have regard to:

- (a) the nature and seriousness of the offence to which the application relates; and
- (b) any reasons given by the respondent for opposing the making of the order sought; and
- (c) any evidence regarding the importance, to the investigation of the offence, of obtaining a bodily sample from the respondent; and
- (d) any other matter that the Judge considers relevant.

## **Background**

[8] Between [dates deleted] 2015 a residential property in Auckland was burgled. The offender broke the [details of offending deleted]. The house alarm activated and the offender fled the scene.

[9] On [date deleted] 2015 police attended the crime scene and discovered traces of blood on [details deleted] window sill. A swab taken was sent to the Institute of Environmental Science and Research (“ESR”) for DNA analysis.<sup>1</sup>

[10] ESR extracted a DNA profile from the crime scene sample (“CSS”). The CSS did not match any profiles on the DNA Profile Databank (“DPD”).<sup>2</sup> It did, however, match DNA profile [unique identifier deleted] on the Crime Sample Database (“CSD”).<sup>3</sup>

[11] DNA profile [unique identifier deleted] came from a CSS obtained after a complaint of rape. On [date deleted] a 15 year old female complained to police that she had been raped in a park the previous night. ESR extracted a male DNA profile from a semen stain on the complainant’s underwear. The DNA profile was recorded on the CSD as DNA profile [unique identifier deleted]. It did not correspond to any DNA profile on the DPD.

[12] The rape complainant alleged that it was [Nathan Shull] who raped her. The pair knew each other as [details deleted]. [Nathan Shull] was 15 years of age at the time.

[13] On [date deleted] police spoke to [Nathan Shull] regarding the allegations. [Nathan Shull] admitted to having sexual intercourse with the complainant but said it was consensual. He refused to provide a voluntary suspect DNA sample when asked by police. He declined to make a formal statement.

---

<sup>1</sup> Affidavit of [Constable 1], Scene of Crime Officer, sworn 23 March 2017.

<sup>2</sup> The DNA Profile Databank is a database of DNA profiles that have been derived from bodily samples taken from known individuals in accordance with the Act.

<sup>3</sup> The Crime Sample Database is a database of DNA profiles that have been obtained from biological material located at crime scenes.

[14] Further enquiries were conducted by police and the investigation was ultimately discontinued. The police considered that the complainant was not a credible witness and there was insufficient evidence to prosecute [Nathan Shull].

[15] ESR has retained DNA profile [unique identifier deleted] on its CSD.

[16] [Nathan Shull] is now [age deleted]. He has no conviction history and has never been arrested or charged with a criminal offence. He has never given, voluntarily or compulsorily, a sample of his DNA to police.

**Is there good cause to suspect [Nathan Shull] committed the burglary?**

[17] In determining whether to make a suspect compulsion order, the Court must first be satisfied that there is good cause to suspect [Nathan Shull] committed the burglary to which the application relates. “Good cause to suspect” means no more than a reasonable ground of suspicion upon which a reasonable person may act. It involves more than a mere recognition that something is possible; it requires that the proposition in question is inherently likely.<sup>4</sup> It is distinguishable from a belief, which requires a conviction that the state of affairs in question actually exists. Whether there is good cause to suspect is a matter of fact to be determined objectively by the Court.<sup>5</sup>

[18] The Police submit there is good cause to suspect the blood found at the scene of the burglary is [Nathan Shull]’s blood and that he committed the burglary. In support, the police have provided material in the form of statements and reports pertaining to the rape allegation file.<sup>6</sup> In summary, the Police rely on a “crime scene to crime scene link” and the admission of [Nathan Shull] that inferentially attributes DNA profile [unique identifier deleted] to him. There is no other material linking [Nathan Shull] to the burglary.

---

<sup>4</sup> *Crawford v Allen* (1996) 3 HRNZ 631.

<sup>5</sup> Simon France (ed) *Adams on Criminal Law – Rights and Powers* (online loose leaf ed, Westlaw) at [CI13.02].

<sup>6</sup> Application for Suspect Compulsion Order: exhibits filed by the prosecutor, Mr King.

[19] Mr English, *Amicus Curiae*, contests some of the material provided by police on the grounds that it is inadmissible evidence.<sup>7</sup> He submits that the other material is insufficient to link [Nathan Shull] to the rape allegation or the burglary.

[20] It is important to highlight that s 13(4) expressly authorises the Court to take into account any relevant oral or documentary material, whether or not it would be admissible in a court of law. I am satisfied all exhibits should be considered to assess whether it is inherently likely that [Nathan Shull] committed the burglary. The Court's task is to assess information rather than weigh evidence and reach findings.<sup>8</sup>

[21] Taking into account all material provided by police, there is good cause to suspect [Nathan Shull] committed the burglary. A male DNA profile has been obtained from blood left at the scene. It is reasonable to infer this blood came from the burglar, who cut himself when entering or leaving the scene.

[22] That DNA profile matches DNA profile [unique identifier deleted] obtained following the earlier rape complaint. [Nathan Shull] was the named suspect. DNA profile [unique identifier deleted] has not been formally attributed to [Nathan Shull]. He was never required to provide an evidential sample. However, he admitted to having sex with the complainant on the evening in question. Therefore it is more likely than not that profile corresponds to him, as no other male DNA profile was extracted from the sample.

**Has material reasonably believed to be from the body of the person who committed the offence been found at the scene of the offence?**

[23] Traces of blood were found [details deleted] at the address on [date deleted], just over 24 hours after the burglary allegedly occurred. It can be inferred the burglar cut [themselves] entering or leaving the scene.

---

<sup>7</sup> Submissions regarding evidence provided by police.

<sup>8</sup> *Adams on Criminal Law*, above n 4, at [CI13.07].

**Are there reasonable grounds to believe that analysis of a bodily sample taken from [Nathan Shull] would tend to confirm or disprove [Nathan Shull]’s involvement in the burglary?**

[24] The compulsory suspect sample would be analysed by ESR and a profile obtained. The resulting profile would then be run against the profile of the crime scene sample. The result of that analysis would tend to prove or disprove [Nathan Shull]’s involvement in the commission of the burglary.

**Has [Nathan Shull] refused to consent to the taking of a suspect sample in relation to the burglary?**

[25] [Nathan Shull] has refused to provide a voluntary suspect sample.

**In all the circumstances, is it reasonable for the Court to make a suspect compulsion order in respect of [Nathan Shull]?**

[26] [Nathan Shull] does not want his DNA to be taken or recorded by police. He does not believe his DNA profile should currently be stored by police or ESR.<sup>9</sup> The primary issue in this case is whether it is reasonable in all the circumstances to require him to provide a DNA sample to police? In making that assessment the court shall have regard to any other matter the court considers relevant.

[27] There are features of the present case which support the making of the order. While the burglary in this case does not appear to be at the most serious end of the spectrum, burglary is nevertheless a serious offence. Burglary carries a maximum penalty of 10 years imprisonment.<sup>10</sup> Residential burglaries at the relatively minor end of the scale typically attract a starting point of 18 months’ to 30 months’ imprisonment.<sup>11</sup>

---

<sup>9</sup> It is noted that it is not [Nathan Shull]’s DNA profile that Police have stored. Rather, it is a DNA profile derived from a CSS which has not been formally attributed to an individual.

<sup>10</sup> Crimes Act 1961, s 231.

<sup>11</sup> *Arahanga v R* [2013] 1 NZLR 189 at [78] (CA); *Gorgus v R* [2016] NZCA 508 at [11].

[28] The analysis of the bodily sample obtained pursuant to the order would provide reliable and compelling evidence to prove or disprove [Nathan Shull]'s involvement in the burglary. Without the evidence, the police do not have a case at this stage. There is no other evidence linking [Nathan Shull] to the burglary, and there are no other suspects.

[29] There is no suggestion that the police or ESR have acted in bad faith or engaged in misconduct in collecting the CSS relating to the rape allegation and storing DNA profile [unique identifier deleted] on the CSD.

[30] In contrast, there are aspects of the application which give rise to a real sense of unease. It is questionable whether DNA profile [unique identifier deleted] has been reasonably or fairly retained by ESR on the CSD when it has been accepted that there is insufficient evidence to establish that any crime was committed. Is it unreasonable to grant an order that relies solely on information linking [Nathan Shull] to an alleged offence for which he has effectively been cleared?

[31] The retention of a CSS does not appear to be subject to the provisions of the Act. Rather, it is governed by policies developed by police in conjunction with ESR.

[32] Pursuant to an Official Information Act 1982 request, police advise:<sup>12</sup>

DNA profiles obtained from the analysis of crime samples are stored by ESR for Police on the DNA Crime Sample Databank. DNA profiles are generally only removed from the databank when it is identified that the DNA contributor legitimately had access to that crime scene.

And further:

Generally, DNA crime scene samples are not submitted to ESR for analysis unless it has been established that they relate to a crime. DNA crime scene profiles from cases that have been to court remain on the Crime Sample Databank regardless of the Court outcome.

[33] Police also advised the Court that:<sup>13</sup>

When a DNA profile obtained from a crime sample does not correspond with any profile on either the DNA Profile Databank, the Temporary DNA Profile Databank or the Crime Sample Database, the DNA profile remains on the Crime Sample Database.

---

<sup>12</sup> Police response to Official Information Act request Ref #[details deleted] dated 28 October 2016.

<sup>13</sup> Response to Amicus Curiae Submissions Regarding an Application for Suspect Compulsion dated 20 October 2016 at [18].

It will never be removed and it will be included in any search of all profiles subsequently loaded.

[34] On the available material relating to the rape allegation there was evidence the complainant had a tendency to lie; the evidence suggests [Nathan Shull] “legitimately had access to the crime scene”; there was insufficient evidence that any crime occurred; and there does not appear to be an unsolved crime remaining. On that basis, it is arguable that DNA profile [unique identifier deleted] should have been removed from the CSD, and that retention in those circumstances may be inconsistent with the policies outlined above. On this application, I am not required to make a finding on this point. However, had the profile been removed, there would be no “crime scene to crime scene link” and it follows nothing to link [Nathan Shull] to the burglary. I consider this analysis to be relevant.

[35] [Nathan Shull] was 15 years of age at the time he was alleged of rape. At the time, the police could have obtained a sample from him if he and one of his parents consented or if the police had obtained a juvenile compulsion order.<sup>14</sup> [Nathan Shull] declined a request for a voluntary suspect sample and no juvenile compulsion order was sought by police. Had a sample been taken compulsorily, and [Nathan Shull] never subsequently charged, the sample and any record of analysis or identifying information would have been destroyed as soon as practicable after the expiry of 24 months from the date the sample was taken.<sup>15</sup>

[36] If [Nathan Shull] was arrested for rape or the Police intended to charge him with rape, the police could have required him to give a bodily sample.<sup>16</sup> Had the sample matched profile [unique identifier deleted], that profile would then have been linked to [Nathan Shull] and a DNA profile would have been created. That sample would have been stored on the temporary DNA databank.<sup>17</sup> The sample and any record of analysis or identifying information would have been removed from the temporary DNA databank as soon as practicable after the charge was withdrawn or [Nathan Shull]

---

<sup>14</sup> Section 5(b)(ii) and (iii).

<sup>15</sup> Section 60.

<sup>16</sup> Section 24K.

<sup>17</sup> Section 24P.

was acquitted.<sup>18</sup> Any profile obtained from the sample could not have been held on the DPD.<sup>19</sup>

[37] Had [Nathan Shull] been required to give a DNA sample in relation to the rape allegation at the time, it is possible that sample would no longer exist, and there would be no evidence or material linking him to the burglary. This is relevant and it weighs against the reasonableness of making an order now on the basis of the CSS.

[38] It is acknowledged that if a suspect compulsion order was made and the police later attempted to adduce evidence of the results obtained, [Nathan Shull] could challenge the admissibility of that evidence. While this may alleviate the Court's concerns to some extent, in my view, in light of the unique circumstances of this case, compelling [Nathan Shull] to provide a bodily sample pursuant to a compulsory suspect order would amount to an unreasonable search and seizure.<sup>20</sup>

[39] It is trite to observe that the collection of a person's bodily sample is a significant intrusion upon the privacy rights of the individual. The intrusion would be more significant in this case as [Nathan Shull] is now [age deleted]; was only 15 years of age at the date of the alleged offence; and has never given a bodily sample to police for regulated retention on the DPD.

## **Conclusion**

[40] I am satisfied that it is not reasonable in the circumstances of this case to make a suspect compulsion order that would require [Nathan Shull] to give a bodily sample to police.

[41] The burglary CSS will remain on the CSD. That burglary can be prosecuted if it is matched to a DNA sample at a later date. Burglary is not subject to any time limitation.<sup>21</sup>

---

<sup>18</sup> Sections 24P, 24Q and 60A.

<sup>19</sup> Section 26.

<sup>20</sup> Bill of Rights, above n 15, s 21.

<sup>21</sup> Criminal Procedure Act 2011, s 25(2)(b).

[42] The application is declined.

K J Glubb  
District Court Judge