

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

11 / 10 / 13.

Case No: A923/12

In the matter between:

VINCENT SODO MZINGISI

Appellant

and

THE STATE

Respondent

STATE WHERE CHEVER IS NOT APPEAL TO	
(1) REPORTABLE YES/NO.	
(2) OF INTEREST TO OTHER JUDGES	W
(3) REVISED ✓	
18/11/13	<i>[Signature]</i>
DATE	SIGNATURE

JUDGMENT

[1] The appellant stood trial, together with two other accused, in the Regional Court of Sebokeng on charges of murder and robbery with aggravating circumstances. The two other accused were acquitted on all charges in terms of section 174 of the Criminal Procedure Act 51 of 1977, but the appellant was convicted on the charge of murder and was sentenced to 15 years imprisonment. He was found not guilty on the charge of robbery and was granted leave to appeal against his conviction of murder.

[2] The appellant was convicted on circumstantial evidence only. The essence thereof is contained in Exhibit C, the post mortem examination report and Exhibit G, a DNA analysis report. At the beginning of the trial the post mortem report "*and its contents*" were admitted by the appellant

and his co-accused. They all had legal representation and they all confirmed that these admissions could be recorded in terms of section 220 of the Act.

[3] Later during the trial the DNA results were also admitted by the appellant and his co-accused. It happened as follows:

“Prosecutor: ... I want the Court to find out if there is any objection in that regard it was analysing the blood found from the shoes and the clothing that relates (to) accused 1 and accused 2.”

[4] After all the legal representatives had indicated that there was no objection, this report was handed in as Exhibit G. In his judgment the Magistrate came to the conclusion that: *“the DNA results implicate accused person (referring to the appellant) that the blood of the deceased is on his shoe and jacket”*. The central question is whether this finding, in view of all the other evidence, is sufficient to sustain a conviction of murder.

[5] The facts can be summarised as follows: The appellant and his two co-accused were drinking one evening at a certain hostel. They later left and were not seen again that evening. The next morning the deceased was found lying in the street. He had a stab wound on his chest. The police investigated the matter and found droplets of blood on a

jacket and the shoes of the appellant as well as on a jacket of another accused (who was referred to as accused number 2). These items of clothing were then taken away and put in sealed bags for forensic analysis. From the record it appears that the street where the deceased was found is in the vicinity of the hostel.

[6] According to the post mortem report the deceased's death was caused by a stab wound in the chest. It also indicates that a blood specimen, identified as F/A 189673 was taken from the deceased for DNA analysis. Exhibit G, the DNA analysis report, indicates in table 1 thereof that the DNA result of jacket "B" and left shoe "F" matches the DNA result of "*reference sample (FA 189672/3 '346/09')*". It also states that the most conservative chance of the blood on the clothing coming from a person other than the deceased is one in 590 billion.

[7] The appellant also testified. According to him he knows nothing about the murder. He testified that the next morning (after he and his co-accused had been drinking the previous night at the hostel) he and accused number 2 were apprehended by members of the community. They were then assaulted. According to him they also took his jacket and shoes and also the jacket of his co-accused. They later returned his shoes, but not his jacket. On a question whether he had any interaction with anyone else before he was apprehended by members of the community, he replied that he had been in the company of accused number 2.

[8] Counsel for the appellant argued that the DNA report does not unequivocally prove the guilt of the appellant. She submitted that the circumstantial evidence, properly analysed, does not justify the inference that the appellant had murdered the deceased as the only reasonable one.

[9] The approach to circumstantial evidence is set out in R v Blom 1939 AD 188 at 202-203. The test to be applied is twofold: first, the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. Second, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct.

[10] If the DNA results were to be accepted as correct, i.e. prove beyond reasonable doubt that the blood found on jacket "B" and left shoe "F" is blood of the deceased, then in my view it should follow that the appellant was not only present at the scene where the deceased was stabbed, but also that he was close to him. This inference would seem to be justified as there is no evidence that the shoes of any other person were taken by the police, except those of the appellant.

[11] However, this is not the end of the inquiry. The next question to be considered is who stabbed the deceased? To answer this question

one should also take into account the following evidence: the appellant had been in the company of his co-accused the night before the murder was committed. His evidence was further that before he was apprehended by members of the community the next morning, he had been in the company of accused number 2. The police noticed blood on the jacket of the appellant as well as on that of accused number 2. Both jackets were taken away for purposes of DNA analysis. Jacket "B" referred to in the DNA report was not identified, or, to put it differently, that jacket could have been the jacket of the appellant or that of accused number 2. This means that it is reasonably possible that accused number 2 was also present and close to the deceased when he was stabbed.

[12] If the test referred to earlier is properly applied, can it be concluded that the only reasonable inference to be drawn from the proved facts is that the appellant is the person who stabbed the deceased? I think not, because the possibility that the deceased was stabbed by accused number 2 cannot be excluded.

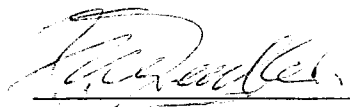
[13] There is no evidence of any common purpose to commit a murder. It is possible that the intention was to rob the deceased and in the process one of the accused decided to stab the deceased. For all these reasons I am of the view that the appeal should succeed.

[14] I propose the following order:

The appeal is upheld and both the conviction and sentence on the charge of murder are set aside.


D S FOURIE
JUDGE OF THE GAUTENG
HIGH COURT
PRETORIA

I agree, and it is so ordered.


F G PRELLER
JUDGE OF THE GAUTENG
HIGH COURT
PRETORIA

18 November 2013