

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. SS 32/O3

In the matter between:

THE STATE

and

- 1. MOGAMAT PHADIEL ORRIE**
- 2. MOGAMAT SAMIR ORRIE**

JUDGMENT : 21 NOVEMBER 2003

BOZALEK J:

1. In this matter the accused are two brothers who are charged with two counts of murder, housebreaking with the intention to commit murder, attempted murder and various other ancillary charges. It is alleged that they broke into a safe house and shot a couple who were witnesses in a witness protection program.

2. The State has not yet completed its case and has now formally applied, by way of a notice of motion and founding affidavit for an order in terms of section 37(1)(c) of the Criminal Procedure Act 51 of 1997, (*the Act*) read with subsections 2(a) and (b), that the investigating officer is authorised, in conjunction with a medical officer or district surgeon, to take a blood sample of each of the accused *'in order to ascertain whether such sample(s) has any mark, characteristic or distinguishing feature by means of DNA analysis.'* The application is made by the State following the accuseds' refusal to furnish blood

samples in response to an informal request therefor. The application is opposed by the accused who have filed an answering affidavit which in turn elicited a reply from the State.

The background to the application

3. The murders are alleged to have taken place on 25 December 2000. It is common cause that blood samples of the accused were taken from them in accordance with the provisions of section 37 of the Act on or about 16 May 2001, not long after they were arrested. In the trial the State has led the evidence of the district surgeon who took the blood samples from the accused and the police officer who took them to his surgery for that purpose. Proof of the proper taking of the blood samples from the accused requires a careful description of the so-called '*crime kits*' utilised in the taking of the samples with particular reference to the procedure followed to ensure that no contamination of or confusion between samples takes place. For this purpose the accurate recording of which crime kits are utilised, the breaking of the seals of the crime kit, the recordal of seal numbers and the re-sealing of the samples is vital to establish the so-called '*chain of evidence*'. See in this regard *S v Maqhina* 2001 (1) SACR 241 (T).

4. Cross-examination of the two witnesses referred to above revealed some measure of confusion regarding which blood sample had been taken from which accused, a situation perhaps compounded by the fact that the witnesses were testifying as to events which took place more than two years previously and involved two similarly named brothers with similar features. It was at the conclusion of this evidence the State gave notice of its intention to apply for an order permitting the taking of fresh blood samples from the accused.

5. In his founding affidavit the investigating officer submits that there may be confusion regarding which of the two accused's blood sample was sealed in which particular crime kit. He contends that the taking of fresh samples will be in the interests of justice and will remove any doubt in this regard. The samples

are necessary for the purposes of DNA profiling. In this regard it is common cause that there is no eyewitness testimony directly implicating the accused in the killings. The State's case is built largely upon circumstantial evidence. An essential pillar thereof, at least in respect of accused No.1, is evidence allegedly establishing that his DNA profile, as ascertained from a blood sample, matches that obtained from blood samples found on curtains in the house in which the bodies of the couple were found and in a vehicle owned by accused No.2 following a search thereof some four days after the murders. The final paragraph of the summary of material facts reads as follows:

'By wyse van DNS-ontleding is gevind dat die bloed wat aan die binnegordyn van die oorledene se huis gevind is, ooreenstem met die bloed wat in die bakkie gevind is en dat dit ooreenstem met beskuldigde No.1 se bloed.'

The grounds of opposition

6. The application is strenuously opposed by Mr **Van der Berg** on behalf of the accused on a number of grounds. These include the claim that being subjected to such blood tests for the purposes of compiling a DNA profile will infringe the accuseds' fundamental constitutional rights to dignity, to freedom and security of the person, the right to bodily integrity, the right to privacy and the right to be presumed innocent and not to have to assist the prosecution in proving its case (sections 10; 12(1); 12(2); 14(a); 35(3)(h) and 35(3)(j)) of Act 108/1996 - '*the Constitution*').

7. In addition it is contended on behalf of the accused that the taking of a blood sample is only permissible when to do so may be said to be both reasonable and necessary. Mr **Van der Berg** argued that, in the circumstances of this case, the taking of further blood samples would be both unreasonable and unnecessary. I understood his argument to be that the unreasonableness arises from the stage at which the application is made, namely mid-trial, and by reason

of the State's ineptitude. Other factors cited as rendering the relief sought unreasonable are that the accused are thereby being required to assist the State in building a case against themselves and the prejudice which they will suffer should the order be granted. This prejudice is said to include the accused having to incur the trouble and expense of dealing with fresh DNA evidence when they have already performed such an exercise in relation to the existing DNA report.

8. As regards necessity it is firstly contended on behalf of the accused that, regard being had to the date of a report allegedly drawn up by the State's DNA specialist, said to be 3 May 2001, it must have been completed without the expert having access to the blood samples taken on 16 May 2001. Since the disputed samples could not have been used in drawing up the State's DNA report, so it is argued, the taking of fresh samples are unnecessary.

Necessity

9. For the sake of convenience I shall deal firstly with the lastmentioned argument. In my view it is without substance. In the first place there is at best a dispute of fact as to what is no more than a peripheral issue on the papers, namely, whether the State's DNA expert had access to the accused's blood samples at the time she drew up the report. There are, moreover, a number of possible explanations as to the apparent anomaly in regard to the date of the expert's report and the date of the taking of the blood samples. Furthermore, even assuming that the accused are correct in claiming that the DNA report was drawn up without access to the first batch of blood samples, this only strengthens the State's case for the taking of fresh samples since, if the initial samples are tainted by the confusion regarding from which accused they emanate, any evidence or subsequent report based on them is doomed to meet exactly the same challenge from the accused.

The constitutional challenge/reasonableness

10. The accuseds' arguments related to the reasonableness of taking the fresh samples are also founded upon allegations that the State is the author of its own misfortune in negligently conducting the exercise whereby the blood samples were first taken and, furthermore, in '*sitting on the evidence*' for more than two years. In developing this argument Mr **van der Berg** cast aspersions upon the State's *bona fides* and suggested that it had come to court with '*unclean hands*.' I can find no basis on the evidence presently before me to make any such finding. Indeed, the entire sequence of events is just as easily capable of the interpretation that the State led the evidence of the district surgeon and police officer in good faith only to find the shortcomings exposed by searching cross-examination. Even were I to be driven to the conclusion that the State presented the evidence in question well realising its inherent shortcomings, this alone would hardly warrant a refusal of the relief which the State now seeks. The words of Curlewis JA in *R v Hepworth* 1928 AD 265 at 277 remain as relevant today as they ever were:

'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice. He is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to

see that justice is done.'

Section 37 of the Act, insofar as it is relevant to this application reads as follows:

'37. Powers in respect of prints and bodily appearance of accused

- 1) Any police official may –
 - a) take the finger-prints, palm-prints, or foot-prints
or may cause any such prints to be taken -
 - (i) of any person arrested upon any charge;
 -
 -
 - c) take such steps as he may deem necessary in order
to ascertain whether the body of any person referred
to in paragraph (a)(i) or (ii) has any mark,
characteristic or distinguishing feature or shows any
condition or appearance: Provided that no police
official shall take any blood sample of the person
concerned nor shall a police official make any
examination of the body of the person concerned
where that person is a female and the police official
concerned is not a female;
 -
-
- (2) (a) Any medical officer of any prison or any district
surgeon or, if requested thereto by any police official,

any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.

.....

.....

3) *Any court before which criminal proceedings are pending may -*

a) *in any case in which a police official is not empowered under subsection (1) to take fingerprints, palm-prints or foot-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or*

shows any condition or appearance;

.....’

11. The Supreme Court of Appeal has recently expressed itself on the provisions of section 37. In *Levack & Others v Regional Magistrate, Wynberg & Another* 2003 (1) SACR 187 (SCA) the Court, per Cameron JA, dealt with an application to require an accused to submit a voice sample. It held that such a process does not compel a person to give evidence which incriminates herself or himself. I should note Mr **Van der Berg** disavowed the reliance which he initially placed on a right against self-incrimination. In doing so he in effect withdrew the accuseds’ complaint that they are being forced to assist the State in building a case against themselves or that the presumption of innocence was being violated.

12. *Levack’s* case elucidated also the interplay between sections 37(1)(2) and (3). The Court held that police powers to act under section 37(1) come to an end only when the accused has been convicted, and that, by corollary, so long as the police retain their section 37(1) powers, the court before which criminal proceedings are pending has no power to make the orders contemplated under section 37(3). The Court went on to state (at 199a-d) however that

‘This does not mean, however, that such a court cannot do so under section 37(1). In the present case, the police retained the power under

section 37(1)(c) to take steps as they might deem necessary to ascertain the characteristic and distinguishing features of the appellants' voices. This included the power to request the appellants to supply a voice sample. This power, in turn, could properly be supplemented by a court order requiring the appellants to do so. The regional court's order that the appellants supply the voice samples in question has reinforced and underscored the powers of the police, by making refusal to co-operate subject to sanction for contempt of court. In short, ss (1), (2) and (3) thus do not operate exclusively of one another. A court has the power to issue an order requiring an arrested person (or any other person contemplated in ss (1) and (2)) to comply with a request from any of the officials named to supply the autoptic evidence sought. In the present case, therefore, the police retained the power to request the appellants to supply the voice samples, and the regional court had the power to order that they do so. The precise source of the court's power is therefore best located as deriving from s 37(1)(c).'

13. It is clear from the above analysis that the fact that the State may seek a sample from an accused during the trial, does not, in itself, render such an exercise unlawful or unreasonable.

14. In *S v Huma & Another* 1995 (2) SACR 411 (W) it was held that the taking of finger-prints was neither inhuman nor degrading and does not constitute a contravention of a person's dignity as protected and enshrined in the then interim constitution. An involuntary blood test undoubtedly entails an invasion of the subject's right to privacy. Clearly however, the right to privacy is not inviolable and in appropriate circumstances must yield to other considerations of

public policy. (See *Seetal v Pravitha and Another N.O.* 1983 (3) SA 827 (D)). Building on *Seetal's* case Kotze J held in *M v R* 1989 (1) SA 416 (O) that the Supreme Court possesses the power to order both a minor and an adult to submit to a blood test. See also the case of *D v K* 1997 (2) BCLR 209 (N) where Moodley AJ stated at 220I:

'[t]he taking of a blood sample is a relatively painless procedure and can hardly be described as a cruel, inhuman or degrading treatment or punishment to the person submitting thereto.'

15. The taking of blood samples has become so widespread a practice in modern life that I would venture to say that it is an experience which virtually every person in a modern society experiences on one or more occasion in their life. It has long been, furthermore, a vital tool in the administration of the criminal justice system. Indeed, a criminal offence frequently prosecuted is that of driving a motor vehicle whilst having an excessive amount of alcohol in the blood stream. Without the taking of blood samples such a charge could not be pursued.

16. In general, local academic writers appear to agree that, although the taking of a blood sample against the will of a person is an infringement of their right to have no violence inflicted upon them, the reasonableness of the restriction on this right is clear. Hiemstra *Suid-Afrikaanse Strafproses 6de uitgawe*, Butterworths (2002) at p 78 and Steytler *Constitutional Criminal Procedure: a commentary on the Constitution of the Republic of South Africa*, 1996 Butterworths (1998) at p 76.

17. The taking of blood samples for the purposes of criminal investigation has long been a sanctioned procedure in overseas jurisdictions as well. In 1966 in *Schmerber v California*, 384 US 757 (1966) the United States Supreme Court dismissed a challenge to the constitutionality of the taking of a blood sample without the consent of the accused. The challenge was based on the premise that evidence so obtained infringed against the accused's right against self incrimination. That such tests are now used routinely in the United States for the purposes of DNA profiling appears indirectly from the case of *R v Stillman* (1997) 1 SCR at 607 in which the Canadian Supreme Court was called upon to determine the admissibility of certain hair samples, buccal swabs and dental impressions taken without the consent of the accused. The majority held that the taking of such samples infringed the accused constitutional right against unreasonable search and seizure and his right to security of person. It is important to note, however, that the samples were taken without the protection of the Criminal Code or any other statutory provision. The following passage from

the dissenting judgment of McLachlin J is instructive:

*'Despite emphatic dissents from four justices, **Schmerber** has stood the test of time in the ensuing 30 years it has been affirmed, reaffirmed and applied by the Supreme Court and courts below. The most eloquent testament to its unquestioned authority is the fact that despite the admissibility of DNA evidence in the US since 1988, a search reveals no case in which its use has been challenged under the Fifth Amendment. Moreover, discussion in the plethora of scholarly comments on DNA, DNA testing methods, identification by DNA and legislation authorising DNA data banks, proceeds entirely in the context of the Fourth Amendment guarantee against unreasonable search and seizure.'*

18. DNA (the abbreviation for Deoxyribonucleic Acid) is a relatively new type of testing which may be performed on a wide range of bodily samples, including blood, with a view to proving guilt, establishing innocence or proving relationships. The test, a complex one, is based upon the scientific thesis that all individuals, save for identical twins, possess a unique genetic code held in the 46 chromosomes which are made up of the complex chemical which is DNA. See *S v Maqhina (supra)* especially at 247c-248c where the scientific process is described and *The South African Law of Evidence Zeffert et al*, Butterworths (2003) p 713-714).
19. In keeping with trends in foreign jurisdictions, testing for DNA purposes is increasingly being recognised by our courts as a valuable evidentiary tool, not

least in criminal cases. See *S v R & Others* 2000 (1) SACR 33 (W) at 39d-40a and *S v Maqhina* (*supra*).

20. There can be little doubt that the involuntary taking of a blood sample for the purposes of DNA profiling is both an invasion of the subject's right to privacy and an infringement, albeit slight, of the right to bodily security and integrity. To the extent, however, that the involuntary taking of a blood sample from an accused for the purposes of compiling a DNA profile for use in criminal proceedings infringes his/her right to privacy, dignity and bodily integrity, I am of the view that the limitation clause in the Constitution (s 36 of Act 108 of 1996) permits the limitation of these rights, through the medium of section 37 of the Criminal Procedure Act. I consider that, taking into account the factors set out in section 36(1)(a)-(e), such a limitation is necessary and justifiable in an open and democratic society based on human dignity, equality and freedom. Put differently, the taking of blood samples for DNA testing for the purposes of a criminal investigation is a reasonable and necessary step to ensure that justice is done and is reasonable and necessary in balancing the interest of justice against those of individual dignity.

21. In the content of involuntary invasive procedures, it bears noting that in recent times our courts have gone as far as sanctioning the removal of a bullet from the body of an accused where the State sought it as real evidence of the commission of a crime. In *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) the Court held that granting the relief sought by the State would involve a limitation of rights and required that the limitation of rights test that section 36(1) of the Constitution provides, be applied. It held that a refusal to assist the applicant would result in serious crimes remaining unsolved, law enforcement being stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the resolution of such crimes. It goes without saying that these factors also carry considerable weight in the balancing exercise which section 36 requires in relation to the matter at hand. In *Gaqa's* case the Court found that the respondent's interests were of lesser significance and allowed the relief sought. See however the case of *Minister of Safety and Security and Another v Xaba* 2003 (2) SA 703 (D) where, in very similar circumstances, the court reached the opposite conclusion.

Application of the law to the facts

22. In the present matter, judging from the evidence heard so far and from the summary of material facts, it is clear that DNA evidence based upon blood samples taken from the accused is a central pillar of the State's case. For

the reasons given, uncertainty has now arisen regarding the origin of the blood samples upon which the existing DNA evidence, not yet presented to court, is based. The need for great care in the execution and recordal of all aspects of the testing process is plain. (See *S v Maqhina (supra)*). The accused initially submitted to the taking of blood samples, apparently without demur, in May 2001 in terms of section 37 of the Act. It is difficult to see the merits in their present refusal to undergo a second such test.

23. The objection to the taking of fresh blood samples is presented as being twofold in nature based upon the alleged unreasonableness and lack of necessity therefor. As I have already sought to demonstrate, the suggestion that there is no necessity for fresh blood samples is quite illogical. The inconvenience and infringement of personal liberties which the accused will suffer through the taking of fresh blood samples is, in my view, very limited and is justified and sanctioned by law. Although I can envisage circumstances in which a court might hold that the taking of a further set of blood samples from an accused would be unreasonable or unnecessary, this, however, is not such a case. Whilst the State's agents may have been careless in the taking of the first blood samples, although I refrain from expressing any view thereon at this stage, there has been no indication that the State has been *mala fide* either at that stage or in this application. As I stated above, the suggestion that the State has

come to court with unclean hands is simply not borne out on the papers and the evidence before me at this stage.

24. It was also contended that there was prejudice to the accused in the form of having to procure further expert evidence to deal with any fresh DNA report and the possible disclosure of genetic traits of the accuseds' family. Both from the State's reply and the paucity of detail supplied by the accused, it appears that the accuseds' legal team have yet to engage with the substance of the State's DNA evidence and the risk of duplication of effort and expense on the

part of the accused or their legal team, appears limited. Similarly the accuseds' fears of unwarranted invasions of their privacy are expressed in broad and even speculative terms. They can, if warranted, be met at the appropriate time by an order regulating the publication, treatment and disposal of any DNA report relied on by the State.

25. Finally, it was suggested by Mr **Van der Berg** that, at best, a case has only been made out for the taking of blood samples from accused No.1. This submission once again erroneously relies upon an acceptance of the accuracy of the existing DNA report and the integrity of the underlying blood samples. Furthermore, the cases against the two accused are interwoven and clarity as to whether one or both of the accused is linked to any of the blood stains can certainly not be achieved without both being subjected to fresh blood tests.

26. In the circumstances the application must succeed and I make the following order:

1. ***In terms of section 37(1)(c) of the Criminal Procedure Act 51/1997, read with subsections 2(a) and (b), Captain Clark is hereby authorised to take such steps in conjunction with the medical officer of any prison or district surgeon as may be appointed by him or this court, to take a blood sample of each of the respondents herein (accused No.1 and accused No.2) in order to ascertain whether such sample(s) has any mark, characteristic or distinguishing feature by means of DNA analysis.***

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L J BOZALEK