

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: CA&R 23/2011
Date heard: 23 May 2012
Date delivered: 25 May 2012

In the matter between:

JUSTIN NAJOE

Applicant

ANDRICO WILLIAMS

SHANNON WAVEN SHANE MOPP

JUNAID VAN VUGHT

and

THE STATE

Respondent

J U D G M E N T O N A P P L I C A T I O N F O R B A I L

DAMBUZA, J:

[1] The applicant is one of four accused who have been charged with robbery with aggravating circumstances, kidnapping, unlawful possession of a firearm, unlawful possession of ammunition and two counts of murder. He is presently held in custody, awaiting trial in respect of these charges at the St Albans Correctional Facility, Port Elizabeth. Trial is set to proceed on 10 September 2012.

[2] As is apparent from the charges, some of the offences with which the applicant has been charged are offences listed under Schedule 6 of the Criminal Procedure Act 51 of 1977 (the Act). These are robbery with aggravating

circumstances and the two counts of murder.

[3] Consequently the onus is on the applicant to satisfy the court, on a balance of probabilities, that the interests of justice permit his release on bail. In this regard section 60 (11) of the Act provides that:

“(11) Notwithstanding any provision of this Act where an accused is charged with an offence referred to-

(a) in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law unless the accused, having been given reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release”.

[4] The applicant did not give oral evidence; he filed an affidavit in which he sets out his personal circumstances and the reasons why I should order that he be released on bail. He is a 23 year old man who lives with his parents at 37 Beaumont Street, Bethelsdorp, Port Elizabeth. His family has lived at this address for three years. At the time of his arrest he was employed as a cashier at Checkers, having left school in 2006. In the past he has also held employment with Ackermans in Greenacres, Port Elizabeth and has assisted his father in his garden services business. There are no other pending charges against him. He has one previous

conviction of assault with intent to do grievous bodily harm, for which he was sentenced on 14 February 2008, to 18 months correctional supervision.

[5] Evelyn Howley, A neighbour to the applicant gave evidence in support of the application. Her evidence in essence was to the effect that in the 17 years during which she has known the applicant she has never had a problem with him and has generally never known him as troublemaker. She also handed into court a petition signed by 24 other neighbours and members of the community who know the accused from church. They all register their support for the applicant being admitted to bail.

[6] It is trite that there is no closed list of factors that constitute exceptional circumstances under section 60(11). What becomes evident from the numerous cases in which the courts have considered applications for bail where the applicants face charges listed under schedule 6 of the Act is that what constitutes exceptional circumstances is, in each case, determinable in the circumstances of a particular case. The following are some of the guidelines laid by the courts for determination of exceptional circumstances:

“An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent.....In any event one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be

imagined and outlined in advance, it is probably because it is not exceptional.....In requiring that the circumstances proved must be exceptional the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated (under s60 (4)-(9) of the Act)”¹

[7] The writers Du Toit and Others in the *Commentary on the Criminal Procedure Act* say the following:

“the proven circumstances have to be weighed in the interests of justice. According to Comrie J ‘the true enquiry....is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant’s release. And ‘sufficiently ‘ will vary from case to case’....Where an accused adduces sufficient evidence of innocence and such evidence is so strong that it can be said that he has reasonable prospects of success at his trial, he has established ‘exceptional circumstances’”.

[8] *”In essence the court will be exercising a value judgement in accordance with*

¹ Kriegler J writing the unanimous judgement in *Sv Dlamini; S v Dladla and Others; Sv Joubert; Sv Schietekat* 1999 (2) SACR 51 (CC)

the relevant facts and circumstances, and with reference to all the applicable criteria."²

[9] At the hearing of this application both counsel for the applicant and for the state were in agreement as to the applicable guiding principles on what constitutes exceptional circumstances. The issue is whether the factors advanced by the applicant in support of his application do, in the context of this case, constitute exceptional circumstances.

[10] As I understand the case made out by or on behalf of the applicant, it is that, because he is a person of good character who has a traceable address, has held a steady job and whose family and relatives reside in Port Elizabeth he is not likely to sabotage the administration of justice by absconding or not standing trial. Further, on the contents of the police docket, he is only implicated, *prima facie*, in the offence of robbery with aggravating circumstances and kidnapping (the latter not being a schedule 6 offence), so he contends.

[11] Other factors which constitute the context within which I evaluate whether the applicant has proved that the interests of justice permit his release on bail appear in the evidence of the investigating officer, Warrant Officer Johan Reubenheimer. The Investigating Officer outlined the incident from which the charges emanate. They are that in the early morning of the day of the incident the two deceased were attacked whilst in a red VW Polo vehicle belonging to Owen Daniel Demingo, the male deceased. Demingo was in the company of Sarah- Jane Oliphant, the second deceased when the incident occurred. Domingo was dispossessed of his vehicle and both he and Oliphant were bundled into the boot thereof. The vehicle was driven

² S v Petersen 2008 (2) SACR 355 (C)

away by one of the assailants, the others being passengers. Cash was withdrawn from Demingo's bank account from a cash dispensing machine located along the Marine Drive in Port Elizabeth. The bodies of the deceased were found later that day. Both of them had died as a result of a bullet wound each to the head.

[12] Warrant Officer Reubenheimer admitted that on the contents of the docket, at some stage prior to the deceased being shot, the applicant was dropped off at or near his home. But Reubenheimer insisted however that the applicant's involvement in the incident did not necessarily end at that stage because the applicant was, later on that same day, found in possession of Demingo's shoes and the "face" of the radio of the VW Polo. According to Reubenheimer, there is also evidence of pointing out made by the applicant which relates to the offences.

[13] A consideration of the applicant's personal circumstances in isolation may show that in all probability he will stand trial. Further, as Reubenheimer also admitted, there is no evidence that he might interfere with the witnesses. All the witnesses, it would seem, are police officers. But those are not the only relevant factors in this inquiry; nor do they outweigh other relevant considerations in this application. In my view the interests of justice will best be served if those factors favourable to the applicant are weighed against those that are not. I am alive to the fact that my duty is not to make a provisional finding of guilty or innocence. And the applicant states in his affidavit that he intends to plead not guilty at the trial. But the strength of the evidence relating to his alleged implication in the robbery is no small matter in the consideration of the interests of justice. I cannot ignore the fact that the state has presented oral evidence through Reubenheimer who was subjected to

cross examination. On the other hand, the applicant, who bears the onus in this application, only filed an affidavit as he has every right to do. Compared to Reubenheimer's evidence, the applicant's allegations in the affidavit about himself, together with his criticism of the strength of the state case against him remain untested just. In any event, the applicant's own account, the state has a strong prima facie case against him on the charges of robbery with aggravating circumstances and kidnapping. If the applicant is convicted he could face a sentence of a long term of imprisonment.

[13] Whilst it is true that any length of time spent by an innocent person in custody is too long, and that the applicant has already spent over a year in detention. Reubenheimer's evidence was that the police investigations in this matter were finalized in three weeks. The delay in bringing the matter to trial is neither the fault of the state nor that of the defence. The problem is congestion of court rolls. As things stand, the case will go to trial on 12 September 2012, just over three months from now.

In all, I am not persuaded that the applicant has discharged the onus on him to prove, on a balance of probabilities that the interests of justice permit his release on bail.

[14] The application is dismissed

N.DAMBUZA

JUDGE OF THE HIGH COURT