

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: CC03/2022

In the matter between:

ASAVELA NYOKA

Applicant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 11 MAY 2023

VAN ZYL AJ:

Introduction

1. This is a bail application in terms of section 60 of the Criminal Procedure Act 51 of 1977 ("the CPA). The applicant has given evidence by way of affidavit.
2. The applicant is currently, since April 2021, incarcerated at Pollsmoor Prison on an unrelated charge. He was convicted of robbery and sentenced to five years' imprisonment in terms of section 276(1)(i) of the CPA. The applicant indicates that he did not previously apply for bail in the present matter, but wish to do so now because he is eligible for parole. The Parole Board has informed him that, should he be granted bail, his release on parole could be considered.

The charges against the applicant

3. The starting point in bail applications generally is section 60(1)(a), which provides that *“an accused who is in custody in respect of an offence shall ... be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.”*

4. Section 60(4) enjoins the Court, in determining a bail application, to have regard to the following factors in deciding whether to grant bail:

“The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

5. Section 60(11) of the CPA constitutes an exception to the general entitlement to be released on bail as set out in section 60(1), read with section 60(4):

“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 a 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;..”

6. The applicant stands accused of two counts of murder, one count of attempted murder, arson, robbery with aggravating circumstances, and two counts of possession of an unlicensed firearm, as well as two counts of the unlawful possession of ammunition. The applicant’s case therefore falls squarely within the ambit of Schedule 6 of the CPA insofar as murder and robbery with aggravating circumstances are concerned. In the premises, the applicant must show, by adducing evidence, that exceptional circumstances exist which, in the interests of justice, permit his release on bail.

7. The murders fall within the provisions of section 51(1) of Act 105 of 1997, in that the State alleges that the offences were committed in the execution or furtherance of a common purpose or conspiracy, and where the minimum sentence on conviction would be life imprisonment.

8. In *S v Petersen* 2008 (2) SACR 355 (C) at para [54] it was stated that “...it is clear that the onus is on the accused to adduce evidence, and hence to prove, the existence of exceptional circumstances of such a nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of justice”.

9. In paragraphs [55] and [56] of the same case the concept of “exceptional circumstances” was explained as follows:

“Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, different degrees of exceptionality, unusualness, extraordinariness,

remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. ... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria."

10. I agree with the applicant's counsel that a charge in respect of a Schedule 6 offence is not an absolute bar to the granting of bail, and that bail is not punitive in character. That much is clear from a proper interpretation of the relevant provisions of the CPA. The question is whether the applicant has shown the existence of exceptional circumstances in the present matter.

The applicant's personal circumstances

11. The applicant argues that his personal circumstances, viewed in totality, should be regarded as exceptional.

12. He indicates that he has a fixed address, namely his mother's house. This is where he will live if granted bail, and he will not evade his trial.

13. The applicant has four small children (two from a current relationship, and two from previous relationships), and has had a stable relationship with his current girlfriend for the last fifteen years. His girlfriend is unemployed and she and the children are dependent upon him. The applicant also assists his other children financially. He has a close relationship with all of his children and sees them often. He is thus at present unable to meet their material and emotional needs.

14. The applicant's mother is 63 years old and suffers from health problems. Although she lives in the Eastern Cape, she relies on the applicant for transport to medical facilities in Cape Town whenever she comes for medical care in the city. She also relies on the applicant's financial assistance to bolster the grant that she

receives.

15. The applicant worked as a taxi driver prior to his incarceration, and also had a car wash and braai stand. He intends resuming this work should he be granted bail.

16. The applicant indicates that he suffers from various health problems. It appears from the records attached to his affidavit that he receives medical attention regularly in relation to a variety of complaints. It is clear from the records, however, that his condition is not chronic.

17. The applicant is not in possession of a valid passport and can afford to pay a bail amount of R3 000,00.

18. In his affidavit, the applicant lists the factors set out in section 60(4)(a) to (e) (quoted earlier) of the CPA, but without further elaboration. He does undertake not to transgress those provisions.

The strength of the State's case

19. The applicant intends to plead "not guilty" to the charges against him, and that the case against him is weak.

20. The State argues, however, that it has a strong case against the applicant. The relevant background is as follows.

21. On 25 December 2019, Mr Zwelithini Mbanjwa (now deceased) woke from his night's sleep to people attempting to set fire or damage to his house in Hout Bay by throwing petrol bombs. Several shots were also fired towards his house. Forensic evidence was recovered at his house, including ballistic evidence. Mr Mbanjwa identified the applicant and his co-accused as the persons who attempted to set his house alight.

22. Mr Mbanjwa and the deceased in one of the murder charges against the applicant and his co-accused were friends and partners in the taxi industry. Such

deceased was the owner of a Toyota Quantum taxi. On 26 November 2019 the bodies of two deceased persons were discovered in the Quantum, which had been abandoned next to Macassar Road. They had been shot.

23. The NAVIC navigation system was used to trace the movements of the Quantum which was driving towards Rhodes Drive Constantia Main Circle (Hout Bay) incoming at 20:37 on 25 November 2019. One of the deceased also owned a Samsung cellular phone with number 078 944 2783. The Quantum was last seen on 25 November 2019 at 20:46 driving on the M3 towards the N2 highway. Cellular phone records linked to the applicant and his co-accused show that they were travelling along the same route at the same time as the Quantum on the day of the incident. A fingerprint of the applicant's co-accused was found on the Quantum owned by one of the deceased.

24. Expended ammunition found on the Hout Bay scene indicated that two firearms were used in the shooting. Ballistics revealed that a 9mm Parabellum Calibre Norinco Pistol, recovered in Dutywa, Eastern Cape is linked to the death of the two deceased.

25. To this the applicant responds that there is no fingerprint evidence placing him in the vehicle in which the two deceased were found. There is cell phone evidence that the State could use at trial but the State would have to prove that the applicant's phone was in his possession. The applicant states that he does not wish to disclose his full defence until the trial. However, as regards his phone, he had left it in his van, which he then lent to a Mr Happy Msenga to drive. The applicant let Mr Msenga use the phone for two reasons: the applicant had clients who needed to go to the Eastern Cape who would call on that phone number. As Mr Msenga was driving the van, it was convenient for him to answer the phone should those clients call. The applicant also did not want his girlfriend to be aware of that phone, because he used it to speak to other girlfriends.

26. The ballistics evidence that the State intends to use indicates that the firearm for which the applicant was charged with possession of in Dutywa, is the same firearm that was used in the commission of the current offences. The applicant

states, however, that the inference that he fired that firearm and committed the double murder is not the only logical inference that can be drawn, as a firearm is moveable and may have been in the possession of a different holder.

27. There is no obligation on an applicant for bail to challenge the strength of the State case (*Panayiotou v S* [2015] ZAECGHC 73 (28 July 2015) at para [56]). If the applicant does choose to challenge the strength of the State's case against him in bail proceedings, then he attracts a burden to of proof to show that there is a real likelihood that he will be acquitted at trial. In *Panayiotou v S* (at para [57]), the Court held that, in order to enable the court to come to the conclusion that the State case was weak or that he was likely to be acquitted, he was required to adduce convincing evidence to establish this.

28. On consideration of the applicant's explanations, I am not convinced that the applicant has discharged this burden.

29. The State submits that the applicant has a previous conviction for robbery and appears to have a tendency to commit violent offences when out on bail. The matter that was pending against the applicant in Dutywa, for possession of an unlicensed firearm (that is, the firearm implicated in the present matter) and ammunition, was previously withdrawn apparently due to COVID regulations. Counsel indicated that it might be reinstated. Be that as it may, the applicant was out on bail in the Dutywa matter when he was apprehended on the robbery charge in respect of which he was subsequently convicted.

30. The applicant was apprehended in respect of the current charges against him after he was contacted, while in prison serving his sentence for robbery, by one of his co-accused in the current matter, who was using the cell phone handset belonging to one of the deceased to make the call.

31. The applicant says that he does not know where the witnesses relevant to the present matter reside. He was, however, and as indicated earlier, identified by one of them (that witness has since passed away). The State's counsel informed the Court that the applicant is linked to another murder – although not yet charged - and

that it appears at this stage that it was the applicant who gave the order for the victim to be killed from prison. The applicant accordingly displays a tendency to commit crimes irrespective of whether he is subject to the strictures of bail.

Conclusion

32. In my view, and on a consideration of the matter as a whole, the personal circumstances advanced by the applicant do not constitute exceptional circumstances as contemplated by section 60(11) of the CPA. Those personal circumstances should also not be over-emphasised over the seriousness of the charges that the applicant is facing, and the apparent strength of the State's case when considered at this stage (which is, obviously, not trial stage). The setting of stringent bail conditions will not overcome this hurdle.

33. A final consideration (although not an overarching one) is the view that the community would take of offences such as those with which the applicant is charged. It is well-known that taxi violence is rife in the broader Cape Town area, and that innocent persons are suffering as a result. Public confidence in the justice systems will thus be undermined should he be released on bail.

Order

34. In the circumstances, it is ordered as follows:

The application is dismissed and bail is refused.

P. S. VAN ZYL AJ

Appearances:

For the applicant **I. Jansen**, (Jansen & Associates Attorneys)

For the respondent **E. Cecil** (Director of Public Prosecutions, Western Cape)