IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO: CC 38/2011
Date Heard:8 February 2013
Date Delivered:8 February 2013

In the matter between:

BENEDICT DANIEL SWARTS Applicant

and

THE STATE Respondent

E X T E M P O R E J U D G M E N T

GOOSEN, J:

[1] The applicant has been arraigned for trial before this court on three charges, namely murder, unlawful possession of a firearm and unlawful possession of ammunition. The applicant is charged together with three other persons. The trial is scheduled to commence on 25 March 2013. The applicant now applies for bail pending the finalisation of the criminal trial.

[2] On Monday this week I was approached in chambers by the applicant's counsel and the prosecutor and requested to hear this application. I was informed that the application had been drawn in October 2012. It appears that the delay between then and now was on account of obtaining the investigating officer's opposing papers. On the assurance that the prosecution's opposing papers would be served later on that day I set the matter down to be heard this morning following completion of the opposed motion court roll. It was confirmed by Ms *Coertzen*, on

behalf of the applicant, at the hearing of the matter, that this application is the first occasion on which the applicant has applied for bail.

[3] The circumstances in which the alleged offences were committed and the nature of the offences is set out in the summary of substantial facts annexed to the indictment. According to that summary the deceased was one Shevandre Mintoor. It is alleged that the deceased and accused 2, one Eugene Steenkamp, played rugby for rival teams and that this resulted in long-standing differences between the two. It is alleged that accused 2 obtained the assistance of the other three accused persons, including the applicant, in order to kill the deceased. On 7 May 2010 the deceased was at a tavern watching some persons playing pool. All four of the accused persons arrived at the tavern in a motor vehicle. The applicant and accused 2 entered the tavern to look for the deceased. The applicant was armed with a 9mm parabellum calibre semi-automatic firearm. Whilst accused 2 went to the shop section of the tavern in order to distract the owner the applicant entered the tavern, walked up to the deceased and shot him five times. The accused then fled the scene and the deceased died on the scene as a result of gunshot wounds.

[4] Section 60 (11) of the Criminal Procedure Act, 51 of 1977 provides that:

> "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –
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> (a) In schedule 6, the court shall order that the accused be detained in custody until he/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/her release;
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> (b) In schedule 5, but not in schedule 6, the court shall order that the accused be detained in custody until he/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 the interests of justice permit his/her release."

[5] Schedule 6 to the Act refers, *inter alia*, to a charge of murder when it was planned or premeditated. It also refers to the offence of murder when committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

[6] It is clear from the summary of substantial facts referred to above that it is a central allegation in the State case against the applicant that the commission of the murder was planned or premeditated. It also appears from the indictment that the prosecution relies upon the existence of a common purpose between the accused persons to commit the offences for which they have been charged. Accordingly this application, having regard to the provisions of schedule 6 falls to be determined in accordance with the provisions of section 60 (11) of the Act. This requires that exceptional circumstances should be established which would warrant the applicant being admitted to bail pending finalisation of the criminal proceedings.

[7] The phrase "exceptional circumstances" has been the subject of a considerable amount of judicial interpretation. It is in my view unnecessary to attempt a detailed examination of all of the cases which seek to clarify the approach to be adopted in determining whether exceptional circumstances exist. It suffices in my view to point to *dicta* in two matters which reflect the scope of the enquiry and the manner in which a court is called upon to deal with the requirements of section 60 (11) of the Act. The first of these is a dictum by Horn AJ (as he then was) in *S v Jonas* 1998 (2) SACR 673 (SE) where the learned Judge said (at 678 e – i):

> "The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which would constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with the commission of schedule 6 offence when everything points

to the fact that he could not have committed the offence because, eg. he has a cast iron alibi, this would likewise constitute an exceptional circumstance."

[8] The second of these is a dictum by Van Zyl J in *S v Petersen* 2008 (2) SACR 355 (C) where the learned Judge said at paragraph 55 and 56:

"[55] On a meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

[56] 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. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question. See *S v Mahomed* 1999 (2) SACR 507 (C) [1999] 4 All SA 533 at 513 f – 515 f. 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."

(Emphasis added).

[9] In determining whether exceptional circumstances are established or not, regard must, of necessity, be given to the factors ordinarily taken into account in determining whether an accused person should be admitted to bail or not. That includes the factors enumerated in section 60 (4) as read with subsections (5), (6), (7), (8), (8 A) and (9) of the Act.

[10] In his affidavit in support of his application for bail the applicant states that he is 27 years old and that he ordinarily resides with his parents in Kirkwood and that he had been residing at that address for approximately 20 years prior to his arrest. Although he is not married he does have three minor children, aged 8, 6 and 3 years of age. Each of the children were born of different mothers and are presently living with their biological mothers. He passed Grade 11 and prior to his arrest was employed by Shellecke Logistics as a driver where he earned approximately

R2,500.00 per month. He had shortly prior to his arrest commenced his contract employment at Shellecke Logistics. Prior to this he was employed as a driver at Ndlela Lab in Port Elizabeth for two and a half years. He undertakes in his affidavit to comply with any bail conditions that may be imposed and in particular asserts that he will not endanger the safety of the public or of any person, that he will not commit any offences and will not attempt to evade his trial nor attempt to influence or intimidate witnesses or conceal or destroy evidence relating to the offence. He further indicates that he intends to plead not guilty to the charges against him although he does not wish to disclose the basis of his defence at this stage.

[11] In the opposing affidavit filed on behalf of the prosecution the investigating officer, Luvuyo Plaaitjie, confirms the summary of substantial facts referred to above. He points out in this regard however that the murder weapon allegedly used by the applicant has not yet been recovered and that this factor should weigh in considering whether or not the applicant should be admitted to bail, it being contended that the weapon may yet be available to the applicant and that this may pose some risk to witnesses or the public insofar as the potential commission of further offences is concerned.

[12] In regard to the strength of the State case against the applicant the prosecution will rely on eye-witnesses to the incident who are able to identify the applicant as having been involved. He further states that the incident was recorded on closed circuit television video and that the applicant is clearly and positively identified on the basis of this video footage as being a perpetrator. On the strength of these assertions the investigating officer submits that the prosecution has a very strong case against the applicant and that given the very serious nature of the offence and the minimum sentences applicable in the event that he is convicted, the

applicant should not be admitted to bail. It is further submitted that the personal circumstances advanced by the applicant do not constitute exceptional circumstances which would warrant the applicant's admission to bail.

[13] In argument before me it was pointed out that the applicant's co-accused have all been admitted to bail. It was suggested that the only reason the applicant has not been admitted to bail is because he has not previously applied for bail. I am not able to make such a finding. In this regard it should be noted that it is common cause that the applicant has been in custody since May 2010 shortly after the commission of the offence and that he has been awaiting trial since that date.

[14] The fact that the applicant is only now applying for bail, shortly before the commencement of the trial in this matter does raise some concern about his motivation for so doing now. The applicant has been represented in the lower court proceedings throughout the period during which he has been awaiting trial and he has appeared in court on a number of occasions in that regard. His co-accused made formal bail applications and, so I am advised, have been admitted to bail. In these circumstances one would have expected that the applicant himself would have made application to be released on bail. Although he is not obliged to do so some explanation for his failure to have previously applied for bail would, in my view, provide this court with some assurance as to his commitment to stand trial and would assist this court in determining whether there are exceptional circumstances which would warrant the applicant's admission to bail. In the absence of such explanation it is difficult to come to the conclusion that the bail application is not motivated by the imminent trial date.

[15] In my view the particular circumstances advanced by the applicant to warrant his admission to bail do not, properly and carefully considered, and having regard to all of the relevant circumstances applicable and factors to be taken into account, constitute exceptional circumstances which would warrant the accused's admission to bail.

[16] In the circumstances the applicant's application for bail is refused.

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G GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR APPLICANT:	Ms Coertzen, instructed by the Legal Aid Board
FOR RESPONDENT:	Mr Sesar, instructed by the National Prosecuting Authority, Port Elizabeth