Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. CC66/2019

Before: The Hon. Ms Acting Justice Mangcu-Lockwood
Date of hearing: 22 February 2021
Date of judgment: 25 February 2021

In the matter between:

BRANDON BEUKES (ACCUSED 3) Applicant

and

THE STATE Respondent

JUDGMENT

MANGCU-LOCKWOOD AJ,

Introduction

1. This is an opposed application for bail. The applicant, who is legally represented, deposed to an affidavit in support of the application; and the opposing affidavit on behalf of the State is deposed by a detective warrant officer who is stationed in the Anti-Gang Unit of the South African Police Service.

2. The bail application, which was launched on or about 23 November 2020, was initially set down for hearing on 10 February 2021. However, on that day the applicant had not been requisitioned from custody to attend the court proceedings; and the applicant's legal representative informed the Court he had not yet obtained instructions regarding whether the applicant would be giving oral evidence or not. The matter was accordingly postponed to allow the applicant's representative to obtain instructions in that regard. I was later informed that the applicant would not be giving oral evidence, and that the matter would proceed by way of argument on the postponement date of 22 February 2021, based on the affidavits already delivered. Indeed on 22 February 2021, the bail application was argued before me, with the accused in attendance.

3. The applicant was arrested on 20 September 2018. He is an accused, together with 10 others, in a matter that is currently on the pre-trial roll of this Court, on charges relating to activities of a gang operating in Steenberg and Muizenberg, which is known as the Junky Funky Kids or 'the JFK gang'. The draft indictment against the 11 accused, which is 52-pages long, involves charges based on the Prevention of Organised Crime and Corrupt Activities Act 121 of 1998 (POCA). The specific charges against the applicant include two murders, two attempted murders, and several counts of possession of an unlicensed firearm and ammunition in terms of the Firearms Control Act 60 of 2000. The two charges of attempted murder

involve the firing of shots at two police officers who were on patrol at 8:15am on a Thursday morning on 20 September 2018.

4. It is alleged by the State that the role of the applicant in the JFK gang is that of a hitman, and that he issued the order for at least one of the execution-style murders. The State has direct eye-witness evidence to the murders, including a witness in terms of section 204 of the Criminal Procedure Act 51 of 1977 (CPA), as well as ballistic evidence.

The applicable law

5. Since the charges against the applicant involve offences listed in Schedule 6 of the CPA, this application must be determined in terms of section 60(11)(a) of the CPA, which provides as follows:

> *"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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. In terms of the provision, the *onus* is on the applicant to adduce evidence, and hence to prove to the satisfaction of the Court, the existence of exceptional circumstances of such a nature as to permit his release on bail. The Court must also be satisfied, in terms of the provision that the release of the accused is in the interests of justice. The standard of proof is on a balance of probabilities.[1]

[1] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (2) SACR 51(CC) at [61], [78] and [79].

7. There is no exhaustive list or definition of what constitutes 'exceptional circumstances' in terms of the provision.[2] Personal circumstances which are really 'commonplace' do not constitute 'exceptional circumstances' for purposes of section 60(11)(a).[3] *'Exceptional'* is indicative of something *'unusual, extraordinary, remarkable, peculiar or simply different*'.[4] At the same time, an accused is given broad scope to establish 'exceptional circumstances', which could relate to the nature of the crime, the applicant's personal circumstances, including his or her emotional condition, or anything else that is particularly cogent.[5]

8. Regarding the consideration of interests of justice, section 60(4) of the CPA provides as follows:

> *"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."*

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[2] *S v Jonas* 1998 (2) SACR 677 (SE) at 678E-G.

[3] *S v Scott-Crossley* 2008 (1) SA 404 (SCA); 2008 (1) SACR 223 (SCA) para [12].

[4] *S v Petersen* 2008 (2) SACR 355 (C) at para [55].

[5] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* at [75] – [76]; *S v Botha & Others* 2002 (1) SACR 222 (SCA) at [19].

9. Subsections 60(5) to (10) provide guidance on what factors should be taken into account when considering the factors set out in section 60(4). The factors relevant to this case are considered later in this judgment.

10. In considering a bail application, it is well to take into account the following passage from *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat:*

> *'Bail proceedings are sui generis. . .The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus. . . .'*[6]

11. In exercising a judicial discretion, a court must consider the totality of the evidence[7] and decide the matter on the probabilities[8].

The grounds for the bail application

12. The applicant's affidavit sets out his personal circumstances, including his residential address, marital status, family life, purported details required in terms of section 60(11B) of the CPA, as well as factors to be taken into account in favour of his release on bail. The specific reasons for requesting bail are stated as follows in the applicant's affidavit: *"I can earn money to*

[6] S *v Dlamini; S v Dladla; S v Joubert; S v Schietekat* at 713H-714J.
[7] *S v Stanfield 1997 (1) SACR 221* (C) at 226 C - D.
[8] *S v Diale & another* 2013 (2) SACR 85 (GNP) para 14.

support my young daughter and her mother. I am young and the prison environment does not make me feel that I need to live and should I be released on bail it can change my outlook on life because in jail your sense of dignity is lost. The child is getting older not knowing her father and it can leave lasting scars on a young child. Lost a few family members while in prison and couldn't attend funerals. Jail life is hard and he has responsibilities outside prison such as his daughter."

13. During argument, Mr Salie representing the applicant emphasised the following as exceptional circumstances:

    13.1. That the applicant has been in custody since his arrest in 2018;

    13.2. If given bail, the applicant could earn an income;

    13.3. That the trial in the main case could take a very long time.

14. In response to the applicant's reliance on the loss of ability to earn an income, and his financial duties towards his wife and child, the State has produced an affidavit from the wife of the applicant, Emily Beukes. Although she confirms that she and the accused are married and have a daughter born on 15 February 2017, she also states that, at the time of his arrest, the accused was unemployed and only did 'odd jobs'. The applicant did not dispute this evidence. It therefore appears that the applicant's claims of financial loss as a result of incarceration are over-stated. So too are the claims that he was supporting his daughter and would continue to do so if released on bail. In any event, even if the applicant was gainfully employed, it was held in *Ali v S* 2011 (1) SACR 34 (ECP) that financial loss is an

inevitable consequence of the incarceration of any gainfully employed person.[9] According to that case, what might meet the exceptionality requirement in section 60(11)(a), depending on the circumstances of a case, is evidence that the applicant's dependants will starve if he is not released to fend for them. The applicant has not attempted to make out such a case. In this regard, I also take note of the fact that the applicant was arrested in September 2018, and yet only applied for bail for the first time on 23 November 2020, citing amongst others, these financial reasons. There is no mention or detail in his application of how this period of incarceration has affected his wife and child financially, or why this application is only being brought now citing these financial reasons.

15. Regarding the negative effect that the applicant's long incarceration will have on his daughter, the applicant did not provide more than to state that she (his daughter) will grow up not knowing her father. This is not an unusual consequence of incarceration, and does not amount to an exceptional circumstance.

16. Regarding the allegation that the prison environment does not make the applicant *'feel that he needs to live'*, it is not clear whether this is a reference to a medical condition, or simply that the applicant feels demotivated about life. If it is the former, the applicant has failed to provide any substantiation by way of medical evidence. It has been held that, if the accused wishes to make out a case that continued detention will seriously prejudice his health, this will have to be set out clearly, and be corroborated

[9] At para [20].

by evidence.[10] If it is the latter, it is not an unusual consequence of incarceration, and does not amount to an exceptional circumstance that warrants the applicant's release on bail. The applicant has simply failed to provide details regarding this issue, and has failed to meet the *onus* to adduce evidence in regard thereto.

17. In my view, all the reasons given by the accused for the bail application are not unusual or out of the ordinary for an accused in his circumstances. Instead, the reasons given are personal circumstances which are to be expected of an accused awaiting trial. This is especially the case when the personal interests cited by the accused are balanced against the interests of society, and the proper and effective administration of justice. The reasons do not amount to exceptional circumstances as contemplated in section 60(11)(a).

18. Regarding the interests of justice in favour of his release on bail, the applicant has made a number of averments which are disputed by the State.

The likelihood of interfering with witnesses

19. First, the applicant states that there is no likelihood that he will interfere with any of the state witnesses, or tamper or interfere with any exhibits or evidence in the case. The applicant's representative also emphasised

[10] *S v Yanta* 2000 (10 SACR 237 (Tk) at 250 C - D.

during argument that, since it is alleged that the applicant is a member of a gang, witnesses could in any event be intimidated by and through other gang members, whether or not the applicant is incarcerated, and there has been no such reported intimidation, which shows that there will be no intimidation of witnesses if he is released on bail.

20. In terms of section 60(7) in considering whether the ground in subsection (4) (c) has been established - i.e. whether 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 - the court may, where applicable, take into account the following factors, namely-

a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
b) whether the witnesses have already made statements and agreed to testify;
c) whether the investigation against the accused has already been completed;
d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
g) the ease with which evidentiary material could be concealed or destroyed; or
h) any other factor which in the opinion of the court should be taken into account.

21. In my view, when considering the likelihood of the accused attempting to influence or intimidate witnesses, a significant factor is that the JFK gang operates in the Steenberg area, where the accused grew up and is familiar with people. There were furthermore eye witnesses to the alleged offences, including a section 204 witness, which suggests that the applicant is familiar with the identity of the witnesses. Because the witnesses are known to the applicant and live in his community, the applicant will more than probably influence and intimidate them. This is more so given his alleged role of a hitman and his apparent authority to issue orders for the murder of people in the name of the JFK gang. It suggests that he is capable of finding ways and resources to influence and/or intimidate witnesses.

22. I am also mindful that, according to the State's affidavit, witnesses who were to testify against members of the JFK gang in another case involving members of the JFK gang were shot at, leading to the arrest of a member of the JKF gang. This suggests that the *modus operandi* of the JFK gang is that of not only intimidating witnesses, but seeking to eliminate them.

23. The fact that witnesses implicating the applicant have not yet been intimidated, or reported intimidation, does not mean that they may not still be intimidated. As the applicant himself asserts, it will probably take a long time before the trial is finalised. This provides too long a potential period for witnesses to be intimidated if the applicant were released on bail.

24. In the circumstances of this case, in which the applicant apparently wields significant power in the JFK gang, including to issue orders, bail conditions prohibiting communication between the accused and witnesses are not likely to be effective and enforceable.

25. All these factors are significant in reaching the conclusion that there is a very real likelihood that the applicant will intimidate witnesses if released on bail. In the circumstances of this case, the need to ensure proper functioning of the criminal justice system, including the bail system, far outweighs the applicant's personal freedom, and there is a likelihood that his release on bail will undermine, if not jeopardize, the administration of justice.

The likelihood of evading trial

26. Secondly, the applicant avers that he is not a flight risk as his roots are firmly within the community, and he does not possess a passport. He has also never been charged or prosecuted for attempting to evade justice. The applicant has also provided an alternate address, 20 Boniface Street, Montague Village in Retreat (*'the alternate address'*), which he states is owned by Caroline Arendse and is far from 'the complainant'. Furthermore, the applicant states that he intends to plead not guilty to the charges against him.

27. In terms of section 60(6), in considering whether the ground in subsection (4) (b) has been established - i.e. whether there is the likelihood that the

accused, if he or she were released on bail, will attempt to evade his or her trial - the court may, where applicable, take into account the following factors, namely-

a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
b) the assets held by the accused and where such assets are situated;
c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
f) the nature and the gravity of the charge on which the accused is to be tried;
g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
j) any other factor which in the opinion of the court should be taken into account.

28. In considering the relevant ones amongst these provisions, the starting point is that the State avers that it has a very strong *prima facie* case against the applicant. It will be remembered that the applicant is charged with not one but several very serious crimes in terms of Schedule 6 of the CPA and section 9 of POCA. A significant bow in the State's arrow in this

regard is the confirmation by the applicant's wife that the applicant is indeed a member of the JFK gang, which is not denied by the applicant.

29. On the other hand, the applicant simply states that he intends to plead 'not guilty' to the charges against him. He, however, has not seriously challenged the State's allegation that there is a strong *prima facie* case against him, or provided any details regarding why he is to plead 'not guilty'. It has been held that an accused who alleges innocence and claims that he will ultimately be acquitted, must prove his future acquittal on a balance of probabilities.[11] He could do this by adducing acceptable evidence that the State's case against him is non-existent or is subject to serious doubt.[12] Where an accused, confronted with allegations that he has committed a Schedule 6 offence, does not make out a *prima facie* case of the prosecution failing, there is no duty on the prosecution to present evidence in rebuttal.[13]I therefore accept, based on the evidence, that there is a strong *prima facie* case against the applicant.

30. It was furthermore common cause in open Court that, if the applicant is convicted, he faces a lengthy term of direct imprisonment. It has been held that *'the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond'*.[14]

[11] *S v Mathebula* 2010 (1) SACR 55 (SCA) at paras [11] – [13].
[12] *S v Jonas* 1998 (2) SACR 677 at 679H.
[13] *S v Mathebula op cit*, para [12]; *S v Viljoen*, 2002 (2) SACR 550 (SCA) at para [15].
[14] *S v Hudson* [1980] 1 All SA 130 (D) at 131.

31. In addition to the above, there is the unsatisfactory situation regarding the alternate address provided by the applicant in his affidavit. It is not viable. The detective officer who is a deponent to the State's opposing affidavit visited the alternate address and discovered that the surname of the occupants was Langenhoven, which has no bearing on the accused or Caroline Arendse whose name is mentioned in the accused's affidavit as the owner. In fact, Caroline Arendse lives at another address, and was, in any event, not willing to receive the accused at her residence should he be released on bail. This discrepancy was not explained by way of replying affidavit or in Court on behalf of the accused. What is clear is that, had the detective not investigated the alternate address, the State and this Court would have been none the wiser regarding the true facts regarding the alternate address. This is untenable situation which, in my mind, raises the likelihood that, if the accused were released on bail, he will attempt to evade his trial.

32. The averment that the applicant does not possess a passport and is therefore not a flight risk does not remove the likelihood that the applicant might evade his trial. An accused does not always need a passport in order to evade a trial. He could simply remain in his general residential area but evade the authorities. Given the power that the applicant wields in the JFK gang referred to above, and therefore within his community, this is not difficult to imagine on the facts of this case. For the same reasons, imposing bail conditions to ensure that the applicant reports to the police at

regular intervals would also be difficult to enforce. The bail conditions would also be easy for the applicant to breach or undermine.

33. For all the reasons discussed in this section, I am of the view that there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial, as contemplated in section 60(6).

The likelihood of endangering the safety of the public

34. The applicant avers that he will not commit any offences while out on bail. During argument, it was stated that, if the applicant were to commit a crime while out on bail, he could simply be re-arrested. It was also stated that, bail conditions can be put in place to ensure that the applicant reports to the police at regular intervals.

35. In terms of section 60(5), in considering whether the ground in subsection (4) (a) has been established – i.e whether 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 - the court may, where applicable, take into account the following factors, namely-

a) the degree of violence towards others implicit in the charge against the accused;
b) any threat of violence which the accused may have made to any person;
c) any resentment the accused is alleged to harbour against any person;

d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
f) the prevalence of a particular type of offence;
g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
h) any other factor which in the opinion of the court should be taken into account.

36. According to the State the offences against the applicant occurred over a 9-month period, indicating that the accused has a tendency to commit serious offences. In my view, this creates a high likelihood that, if released on bail, the applicant will continue committing the same offences.

37. Another important consideration weighing against the applicant's release on bail concerns his previous convictions.

37.1. Firstly, the applicant has failed to disclose all the previous charges against him. He states as follows in his founding affidavit: *"The details regarding my previous convictions are as follows: House Breaking 2013 – 2014 and Robbery 2014"*. This information has been shown to be false in the State's affidavit. In fact, the applicant has three previous convictions for theft, malicious injury to property and possession of an unlicensed firearm and ammunition. The State has attached some SAP69's to its affidavit as proof of the convictions, as well as the fact that the applicant received a suspended sentence for the possession of an unlicensed firearm and

ammunition. Again, the applicant failed to file a replying affidavit to explain this anomaly. This is a serious issue because section 60(11B)(a)(i) provides that *"in bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether the accused has previously been convicted of any offence"*. In Court, the applicant's representative informed me that the accused did not know about these previous convictions when he launched his application for bail. Upon further questioning by the Court, the applicant's representative indicated that the applicant did not dispute the truth of the contents of the SAP69's.

37.2. The second important issue concerning the previous convictions is that all three of the offences mentioned in the SAP69's are offences listed in Schedule 1 of the CPA, which suggests that the accused has a disposition towards committing such offences. It shows that the applicant has a propensity for serious criminal activity involving firearms and ammunitions, which, by definition are very serious crimes. This is an issue that I consider to be very relevant in the consideration of whether there is the likelihood that the accused, if he were released on bail, will endanger the safety of the public or will commit a Schedule 1 offence.

37.3. In light of the material bearing of the true previous convictions on this application, it is significant that they were not disclosed to this Court. I also find the applicant's explanation in Court – that he was not aware of the them - unsatisfactory

38. Lastly on this issue, the circumstances of the alleged offences by the applicant cannot be ignored. It is alleged that the applicant is a hitman in a gang, and has authority to order execution-style murders, with witnesses in sight, sometimes in broad daylight. It is also alleged that he is willing to go as far as to shoot at policemen who are on patrol - also in broad daylight. The violence and audaciousness implied in these allegations is profound and cannot be ignored. In my mind, it creates a very strong likelihood that the applicant will continue to commit similar offences if released on bail.

The likelihood of disturbing public order or undermining public peace or security

39. Lastly, the applicant avers that he does not believe that the interests of the community will be outraged by his release on bail.

40. In terms of section 60(8A) in considering whether the ground in subsection (4) (e) has been established - i.e whether 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 - the court may, where applicable, take into account the following factors:

a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

c) whether the safety of the accused might be jeopardized by his or her release;
d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
f) any other factor which in the opinion of the court should be taken into account.

41. I am of the view that the nature of the alleged offences by the accused and the circumstances under which the offences were committed, are likely to induce a sense of shock or outrage in the community where the offences were committed. I am also of the view that, given the circumstances of the alleged offences, there will be sense of shock and outrage in the applicant's community should he be released on bail. It is well-known that in the Western Cape, criminal gang activity is an unruly force that continues to torment communities, and is an issue that has created much public interest. As indicated by the State's opposing affidavit, schools sometimes have to be closed, and people are scared to move around in areas affected by the terror of gang activity. All of these factors are relevant to this application, and militate against the granting of bail to the applicant.

42. In all the above circumstances, the applicant has failed to establish 'exceptional circumstances' as contemplated in section 60(11)(a). It is furthermore not in the interests of justice for him to be released on bail.

43. In the circumstances, the application for bail is dismissed.

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N. MANGCU-LOCKWOOD

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Mr A. Salie
For the Respondent:	Adv. Swart
Instructed by:	National Prosecuting Authority