

KHOLWANI DONGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 26 JUNE 2022 & 7 JULY 2022

Application for leave to appeal

K. Ngwenya for the applicant
T. M. Nyathi for the respondent

DUBE-BANDA J:

1. This is an application for leave to appeal against conviction. On 16 March 2022, sitting at the Hwange Circuit Court I handed down a judgment (*S v Donga* HB 97/22) convicting and sentencing the applicant for one count of murder and six counts for attempted murder. He was sentenced to a total 85 years imprisonment with an effective of 25 years imprisonment.
1. The following facts were common cause; there was a serious feud between the family of the applicant and that of the now late Robert Donga (deceased 1). Applicant's family alleged that Robert Donga caused the death of the applicant's father. On the 9th February 2021, a fire broke out at the late Robert Donga's homestead engulfing a house which had seven people inside. Two persons died and five survived the fire. The fire started at approximately 0130 hours. The Forensic Scientist opined that the fire started outside the veranda going into the spare bedroom and sitting room simultaneously. The expert further opined that the fire was wilfully and intentionally caused and that an accelerant was used to start it.
2. The dispute turned on whether the State had proved beyond a reasonable doubt that it was the applicant who started the fire. The identity of the applicant as the assailant hinged on the evidence of identification of Ayanda Donga. She testified that she heard a loud sound and saw that the house was on fire. She jumped out of the house through the window and saw applicant who was approximately two metres from her. He called him by name and asked him the reason why he was burning old people inside the house.

She described the clothes applicant was wearing. He ran towards her, jumped over Buhle Hadebe and ran out of the gate.

3. In the application for leave to appeal the applicant has enumerated five grounds of appeal against conviction as *per* the draft notice of appeal. These are: the court *a quo* erred by making a finding that the State managed to prove its case beyond a reasonable doubt on the charge of murder and attempted murder yet the key state witness lacked credibility; the court *a quo* erred in that it did not approach the testimony given by the key State witness, Ayanda Donga with caution; the court *a quo* erred by making a finding that appellant was guilty based on evidence by State witnesses which was materially inconsistent and contradictory; the court *a quo* further misdirected itself by finding appellant guilty based on evidence given by State witnesses who clearly had a motive to give false testimony against the applicant; the court *a quo* misdirected itself by finding that the State had disproved appellant's *alibi* beyond a reasonable doubt.
4. In his proposed grounds of appeal and heads of argument, the contention is that Ayanda Donga was not a credible witness. It was contended that Ayanda Donga told the police that when the house caught fire she was awake, but told the court that she was awakened by the sound of the fire. It was contended further that the evidence of identification is not corroborated, and that this court in the main judgment did not exercise caution in analysing her evidence. It was contended further that Ayanda Donga's evidence contradicts that of her mother Angela Mpala in that the latter told the court that she called the applicant's name while she was outside the house, but Angela Mpala said she was inside the house when she heard her calling applicant's name. It was submitted that there was no evidence that applicant left the house at that night.
5. The principles applicable to applications for leave to appeal are trite. This Court must determine whether there are reasonable prospects that another court (Supreme Court), would come to a different conclusion to that reached by the trial court which is sought to be taken on appeal.

6. In *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7, this court set out the proper approach to the question as follows:

What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.

7. In *A-G v Muchadehama & Anor* SC 23/14 the court said:

When a right to appeal is given, subject to the condition that leave to appeal be granted, it is clear that the intention of the legislature is that some tribunal must have the power to decide, whether the right to appeal should be given or not. The object is to protect the process of the appellate court from frivolous and unnecessary appeals by means of an exercise of a screening power.

8. First the main judgment (*S v Donga* HB 97/22) is attacked on the basis that the identification of the applicant as the assailant was not corroborated. In *S v Mthethwa* 1972 (3) SA 766 (A) at 768B-C, Holmes JA warned of the dangers of too ready an acceptance of identification evidence. Such evidence must, because of the 'fallibility of human observation', be approached 'with some caution': a court must, before accepting that evidence, be satisfied that identifying witnesses are honest and that their observations are reliable.
9. On identification Ayanda Donga testified that the applicant was her half-brother's son. She knew him very well, and they grew up together. They went to school together. Initially they were staying at the same homestead, until applicant and his parents moved to their own homestead. Applicant in cross examination conceded that he grew up staying at the same homestead with Ayanda Donga and they grew up together and they knew each other very well. Ayanda Donga testified that she had good eyesight. She saw

accused who was approximately two metres from her. She was able to see him because there were solar lights outside and the light provided by the burning fire. She took some time looking at the accused and they were facing each other. Accused was wearing black shirt and a navy blue trouser. She screamed calling his name, and asked him what he was doing burning old people in the house. When his name was called, applicant ran out of the gate.

10. When the scene was still active Ayanda Donga reported to Buhle Hadebe that she saw applicant fleeing from the scene. Her mother Angela Mpala heard her calling the name of the applicant. Ayanda Donga telephoned Phibion Donga on the 9th February 2021, at around 0200 hours and reported to him that the applicant had set their house on fire. Again she telephoned Permanent Sibanda and reported to him that she saw the applicant fleeing from the scene. These telephone calls were made approximately thirty minutes after the fire had started and she was able to name the applicant as the culprit.
11. The investigating officer testified that it was Ayanda Donga who reported to him that morning that she saw applicant at the scene of crime and he was wearing a black shirt and navy blue trouser. The investigating officer proceeded to applicant's homestead. The applicant was not found home. His mother was at home. The mother told the officer that the applicant had gone to the business centre. The police saw clothes that matched the description given by Ayanda Donga, as those which were worn by the applicant when he was seen at the time the house caught fire. The clothes had just been washed. Water was still dripping from the clothes. The police took the clothes for forensic examination. Nothing came out of the forensic examination because the clothes had been washed.
12. Ayanda Donga described the clothes which were later found by the police at the applicant's homestead. The Forensic Report says that nothing of forensic value was obtained from the air-dried clothes. That corroborates the officer's evidence that the clothes were washed. The denials by the applicant and his mother that the clothes were washed as testified by the officer was just a falsehood.
13. These facts corroborate Ayanda Donga's version that she saw applicant at the scene of crime. She was honest and her observations were reliable. The court in the main

judgment found that Ayanda Donga was a very good witness, who did not state more than what she knew or believed. She was subjected to intense cross-examination but she stuck to her version. The contention that her evidence on identification was not corroborated has no prospects of success on appeal.

14. Applicant contends that Ayanda Donga told the police that when the house caught fire she was awake but in court she said she was awakened by the booming sound of the fire. The court in the main judgment said at p. 9 f the cyclostyled judgment:

The statements were not handed in as exhibits. It is trite that cross examiner may cross-examine on a document without handing it in as an exhibit. However, if there is cross examination on the content itself, or if it is used to contradict the witness, the document must be handed in. See: Pretorius JP *Cross-Examination in South African Law* (LexisNexis Butterworths 1977) 315. Otherwise there would be no way the court may accept that the version of the witness has changed or that she has contradicted herself. Counsel did not hand in the statements as exhibits. There is no way this court can assess the alleged contradictions without the statements having been tendered in as exhibits. Just reading excerpts of the statements into the record is inadequate. The court must have the entire document to ascertain whether the excerpts have been correctly read and in proper contexts. Failure to hand in the statements renders the cross-examination valueless. In any event from the excerpts read into the record in we could not discern any contradictions at all. Counsel was just harping on semantics.

15. There was no contradiction between the evidence given by Ayanda Donga given in court and what she was alleged to have said in her police statement. This contention has no prospects of success on appeal.
16. The contention that the evidence of Ayanda Donga contradicts that of her mother Angela Mpala in that the latter told the court that she called the applicant's name while she was outside the house, but Angela Mpala said she was inside the house when she heard her calling applicant's name has no prospects of success on appeal. I say so because the evidence of Angel Mpala was that when she was still in her bedroom struggling to escape from the burning house she heard Ayanda Donga calling applicant's name and accusing him of being cruel. In cross examination Angela Mpala said when Ayanda Donga called applicant's name she (Ayanda Donga) was inside her

bedroom. A logical explanation of the evidence of Angela Mpala is that she merely assumed that Ayanda Donga was still inside the bedroom at that point. I say so because Angela Mpala was herself inside her own bedroom, and the door to her bedroom was closed and engulfed by fire. She merely heard Ayanda Donga calling the applicants name, but she did not see her. Put differently and simple, she heard her voice, but did not see her with her own eyes. That showed that Angela Donga was an honest and truthful witness, speaking to what she saw and heard without any exaggeration. The ground of appeal turning on the alleged contradiction between the evidence of Ayanda Donga and Angela Mpala has no prospects of success on appeal.

17. It was submitted that there was no evidence that applicant left the house that night. Applicant's mother testified that though applicant had his bedroom outside the main house, she had asked him to use a spare bedroom in the main house after her husband passed away because she was afraid. She said on the night in question applicant did not leave the house the whole night. Her evidence was that before she got to bed she locked the only exit door, and put the keys under her pillow. Implying that whosoever wanted to leave the house should first wake her up.
18. The court in the main judgement found that her evidence was a falsehood. How could she have been afraid when she had another adult in the main house, i.e. Thandiwe Ngwenya. The court found further that the evidence that applicant did not close the door of the spare bedroom where he was sleeping was false. The evidence that her mother and Thandiwe Ngwenya were able to see him the whole night was a lie. No reason was given why he would keep his bedroom door open the whole night. Again the evidence that his mother locked the exit door and placed the keys under her pillow was found to be false. No reason was given for placing the keys under the pillow. That meant that whosoever wanted to leave the main house that night had to first wake her up. This was just a lie. The applicant and his witnesses lied on a material issue. They had something to hide and that was applicant was not at his home at the time the now late Robert Donga's house was set on fire. The contention that there was no evidence that applicant did not leave his home that night has no prospects of success.

19. In the light of the above considerations and applicable legal principles, having reflected on my judgment, and further having had regard to the submissions for and against leave to appeal, there is no basis for any conclusion to be reached that the factual matrix of this case will receive a different treatment from the Supreme Court. Put differently, I am not satisfied that, on the factual findings and conclusions of law involved, the Supreme Court may take a different view from that I arrived at in this matter.

20. Having stated the test and applying it to the facts of the present application, it becomes clear that the applicant falls short in satisfying the said test. This court is a door-keeper as it were to protect the process of the Supreme Court from frivolous and unnecessary appeals. It cannot grant leave to appeal where there are no prospects of success on appeal.

21. For the aforesaid reasons, I am respectful of the view that the applicant has failed to show on a balance of probabilities that there are reasonable prospects of success on appeal. The application stands to be dismissed.

In the result I make the following order: -

The application for leave to appeal against conviction be and is hereby is dismissed.

National Prosecuting Authority state's legal practitioners
Muvhiringi and Associates accused's legal practitioners