

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 49B/06

Heard on: 15/02/18

Delivered on: 20/03/18

In the matter between:

MALUSI ZIDE

Appellant

and

THE STATE

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NHLANGULELA DJP

[1] This matter concerns an application brought by Mr Zide for leave to appeal against the judgment on convictions. The application is opposed by the state.

[2] The application for leave to appeal against the sentence had also been initiated, but it was abandoned on the day of hearing of the present application.

[3] The success, or otherwise, of this application will depend on whether the application measures up to the test of existence of prospect(s) of success on appeal. *Mr Mpepanduku* for the State, brought the case of *S v Smith* 2012 (1) SACR 567 (SCA) to the attention of this Court. The test is stated in the *Smith* case at para 7 in the following terms:

“What is the test of reasonable prospects of success postulants 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.”

[4] The test as aforementioned was again applied in *Kruger v The State* (612/13) [2013] ZASCA 198; 2014 (1) SACR 647 at para 2 (2 December 2013). What indicates the test has been consistently applied by the Supreme Court of Appeal and in turn, by the general divisions of the High Court of the Republic as they are bound to do so. Since this Court is equally so bound, it must apply this test to the letter and spirit of it.

[5] In applying the test to this case I must break – down the statements made in the *Smith* case in the following manner:

- (i) The High Court having the application for leave to appeal to the Full Court or Supreme Court of Appeal must make its decision dispassionately based on the facts and the law. What the court is expected to do is disabuse its mind of the fact that it convicted the Applicant and its decision is now being criticised on appeal.
- (ii) The applicant for leave must convince the court on proper grounds that he/she has prospects of success on appeal.
- (iii) The prospects of success must not be remote, but should be those that have a realistic chance of succeeding.
- (iv) A mere possibility of success is not enough.
- (v) That the case stated in the application for leave will be arguable on appeal is not enough.
- (vi) The case stated by the Applicant must not be inherently hopeless.
- (vii) The grounds of appeal must be sound and rational.

[6] The present application is premised in the grounds that maybe summarised in the following terms:

- (a) The court *a quo* should not have admitted the confession allegedly made by the Appellant on 05 August 2004 because the Peace Officer (Captain Nodlabi) appear on exhibit J at pages 2

and 3 (the warning statement of Siphathise Zide dated 26/07/2004) as being the Investigating Officer. Upon taking the warning statement of Siphathise (the co-accused of the applicant), Captain Nodlabi gained knowledge of the facts of the case later, in the same way that the Investigating Officer, would which influenced him when he later on took a confession of the Appellant on 05 August 2004.

- (b) The Court *a quo* failed to take into account that whereas Mr Gwebityala (the Investigating Officer) testified that the firearm that had been revealed by the Applicant was recovered in the dongas, the confession statement points to the firearm having been recovered in the mealie fields. Therefore, even if the confession is admissible in evidence the same is shown by the evidence of Mr Gwebityala to be untrue and/or unreliable to warrant consideration as being the evidence at all.
- (c) The Court *a quo* erred in not finding that in the absence of [a trial within a trial] the pointing out and the failure by the state to exhibit the firearm in court during the trial point to the fact that the Appellant had no knowledge of the firearm or the knowledge of where it was hidden.

[7] The summary of the grounds that is made herein above reflects the context in which grounds were presented on behalf of the Appellant during arguments. More must be said about the pointing out so that the context in

which it arose may be appreciated. At the trial there was never a trial within a trial on the issue of the pointing out a firearm. The issue of pointing out came out of the confession statement only after a ruling had been made on the admissibility of the confession. In the circumstances the fact that the Appellant pointed out the firearm is not in dispute. What then remains for consideration is whether the Court *a quo* erred in finding that the Applicant did have knowledge of the existence of the firearm, the whereabouts of which were disclosed by him to Captain Nodlabi through the confession statement.

[8] It was submitted on behalf of the State that the application should be dismissed as there is no evidence gainsaying Captain Nodlabi's explanation that he was never the Investigating Officer at any stage, including at the time when he took the warning statement of Siphathise. It was contended that the recovery of this firearm of the Appellant in dongas, instead of the mealie field, is not a contradiction. The firearm was not placed into the dongas so that its existence was attributed to the Applicant wrongly. On the issue of the pointing out it was submitted that the convictions were based on the admissible confession statement in which the pointing out is mentioned. Finally, it was submitted that the Appellant failed to show existence of any prospect of success on appeal.

[9] In deciding the relief sought the Court will be guided by the statements that were made in the cases of *Smith, supra*.

[10] The criticism levelled against Captain Nodlabi's action in taking the warning statement and the confession was raised on the basis that the knowledge of the case he gained from the warning statement was deliberately transferred by him into the confession. In other words, the proposition was that Captain Nodlabi made a confession statement for the Applicant. In my judgment on the trial-within a trial I found that Captain Nodlabi was not an Investigating Officer at any stage, and the warning statement was recorded on a pro-forma which suggests wrongly so, that only an Investigating Officer can complete the form. The uncontroverted facts of the case are that any member of the police force asked by the Investigating Officer to record a statement of a suspect can complete the form. Further, I found that the contents of the warning statement and those of the confession were different in material respects, including that the warning statement was exculpatory and the confession was incriminatory. So, I found that whatever, prior knowledge that Captain Nodlabi could have obtained from the warning statement it did not prejudice the Appellant in any way.

[11] The finding made that the firearm that was recovered by Mr Gwebityala on information derived from the Applicant puts paid to the issue now being raised that the firearm ought to have been exhibited in court during the trial. The description of the firearm was not the basis for the convictions. The issue of description of the firearm came up only during sentence proceedings.

[12] The correctness of the finding that the contents of the confession are true is not disturbed regardless of the fact that the firearm was hidden in the dongas and that it was not exhibited in court.

[13] In my opinion the grounds of appeal raised are merely arguable. The grounds advanced on behalf of the Appellant are not premised on the correct interpretation of the proved facts. To that extent they are unsound and irrational. They do not have a realistic chance of success on appeal. They can safely be categorised as remote and/or hopeless. I arrive at these conclusions dispassionately, based on the proved facts of the case, and not based on some hypothetical considerations.

[14] In the result the application for leave to appeal against the convictions is dismissed.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

For the Appellant	:	Mr V Gwebindlala of
	:	c/o V Gwebindlala & Associates
		MTHATHA.

For the Respondent : Adv L. Mpepanduku
: The Director of Public Prosecutions
MTHATHA.