

**GEORGE NAPHAZI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 11 NOVEMBER 2021

**Application for leave to prosecute an appeal in person**

**MAKONESE J:** On 4<sup>th</sup> November 2021 I received a request to furnish reasons for refusing an application for leave to prosecute an appeal in person. On 5<sup>th</sup> April 2017 I issued an order refusing the applicant's application for leave to appeal in person. These are my reasons.

The applicant was arraigned before a Magistrate sitting at Bulawayo on the 7<sup>th</sup> May 2015 facing a charge of contravening section 65 (1)(a) of the Criminal Law (Codification & Reform) Act (Chapter 9:23). Applicant was convicted on one count of rape and sentenced to 18 years imprisonment with 3 years suspended on the usual conditions of good behaviour.

Aggrieved with both conviction and sentence, applicant noted an appeal with this court. It is not clear from the record exactly when the appeal was noted. The state filed a Notice of opposition to this present application.

**NATURE OF THE APPLICATION**

This is an application for leave to prosecute an appeal against conviction and sentence in person. The applicant must demonstrate that there are reasonable prospects of success and that the appeal is not frivolous. The application is granted after a careful consideration of the grounds of appeal and the evidence on record. The court must satisfy itself that the appeal itself does have merit before allowing the applicant leave to prosecute the appeal. This court is empowered to exercise its discretion upon consideration of the evidence on record that was led in the court *a quo*. I must emphasise that this application is not just there for the taking. This is so because allowing every applicant to prosecute an appeal in person may result in abuse of court process.

## **FACTUAL BACKGROUND**

On the 24<sup>th</sup> September 2014 around 1000 hours the complainant was sleeping on a bench at Centenary Park, Bulawayo. Applicant enquired from complainant why she was sleeping on the bench. Complainant indicated that she had nowhere to go and had lost her employment. Complainant indicated that her mobile phone battery was flat. She further indicated that she had not bathed for 3 days and her clothes were dirty. Applicant advised complainant that she could spend the day in the park and sleep by the Revenue Hall near City Hall. Complainant willingly followed applicant into the park where they met a lady who was introduced to her as applicant's sister. Complainant was offered water to bath and was able to wash her clothes. There was a quarrel between complainant and a certain man who accused the applicant of having brought complainant to the park. Applicant was assaulted by this man whom complainant later knew to be Shepherd. Applicant was infuriated and took complainant's mobile phone and clothes. Complainant followed applicant to a secluded area in the park. Complainant testified that applicant hit her on the face and demanded that she have sexual intercourse with him as compensation for this assault by Shepherd. Applicant fell to the ground. Applicant removed complainant's jacket and pant. He produced his penis, parted her legs and had sexual intercourse with her. After the rape, applicant ordered the complainant to stand up and gave her a piece of cloth to wipe herself. Applicant stated that he was not going to leave the complainant at that place as she was now his wife. The complainant later made a report to the police. On his arrest the applicant denied the allegations and averred that the report was fake. Applicant conceded that he and the complainant were strangers before the day in question. He argued that the reason the complainant falsely implicated him was that she was desperate. She was two months pregnant, had lost a job and had nowhere to stay. Applicant was not able to explain why applicant had to wait for 3 days without shelter for her to incriminate him and not any other man if she was so desperate. The court *a quo* conducted an inspection *in loco* at the scene of the crime. The court observed that the place was secluded. The court *a quo* analysed the evidence and was satisfied that the complainant was a credible witness. The learned Magistrate found the evidence of the applicant to be improbable and false beyond reasonable doubt.

## **APPLICANT'S SUBMISSIONS**

The applicant avers that there are numerous discrepancies in the proceedings in the court *a quo*. Applicant states that there was inconsistency in the evidence of the complainant.

Applicant alleges that there was total lack of corroboration on the part of the complainant's testimony. Further, applicant alleges that the court relied on the evidence of a single witness and "overlooked" the complainant's credibility. Applicant argues that the state failed to prove its case beyond reasonable doubt. Applicant then proceeds to make a general allegation that the trial Magistrate conducted the trial unjustly. Applicant then tries to re-argue his matter and make his own assessment of how the evidence of the complainant should have been treated. It is fair to say that applicant's attack on the findings of the court *a quo* are without any merit. The learned Magistrate carefully assessed the evidence that was placed before him. He explained the law on how the evidence of a single witness ought to be treated in cases of rape. His approach cannot be faulted.

## **SUBMISSIONS BY THE RESPONDENT**

On 5<sup>th</sup> April 2017, the state filed its response to the application for leave to prosecute the appeal in person. The state submitted that there are no prospects of success on appeal. The state contends that the only issue that was before the court *a quo* was whether the applicant had sexual intercourse with the complainant as payment for his trouble in assisting her on the day in question. The state avers that the state proved its case beyond reasonable doubt. The court *a quo* handed down a thoroughly reasoned judgment. The evidence adduced against the applicant was overwhelming. The court *a quo* exercised its sentencing discretion judiciously. There was no misdirection at all.

## **THE APPLICABLE LAW**

In applications of this nature the primary consideration is whether the applicant has prospects of success on appeal. If the appeal is doomed to fail the applicant is not entitled to leave to prosecute the appeal in person. The court is required to examine the record and assess the chances of the appeal succeeding. A perusal of the record indicates that the trial Magistrate considered all the evidence before him. An inspection *in loco* was conducted for the court to satisfy itself that the evidence led by the complainant was credible. The court concluded and recorded that the place where the rape occurred was a secluded place. This

led to the conclusion that the applicant had the opportunity to commit the offence. The evidence against the applicant was clear and credible. The applicant's version of events was rejected by the trial Magistrate. This court as an appeal court may not re-assess the evidence led in the court *a quo*.

In *S v Mutasa* 1988 (2) ZLR 4 (SC) the court held that:-

*"..... the correct approach to adopt when considering an application for leave to appeal should not be based on whether an appeal is arguable or not, but on its prospects of success....."*

In this matter, I was satisfied that the appeal carried no prospects of success. The appeal was doomed to fail. The appeal itself has no merit as applicant merely seeks to attack the judgment of the court without focusing on the factual findings of the court.

It is for these reasons, that I dismissed the application for leave to prosecute the appeal in person.

*National Prosecuting Authority*, respondent's legal practitioners