

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 13 of 1991

In the matter between:

FREEDOM NYATHI

Appellant

versus

THE ATTORNEY GENERAL

Respondent

Coram: T. A. AGUDA, J.A.
B. A. DOYLE, J.A.
G. BIZOS, J.A.

Appellant in person
Mr. P. Sedie for the Respondent

J U D G M E N T

AGUDA, J.A.:

The appellant was on October 10, 1988 charged before the Magistrate Grade I, Gaborone with the offence of rape contrary to section 141 of the Penal Code, and punishable under section 142 of the same Code. There was an alternative charge of defilement of a girl under sixteen years of age, contrary to section 147(1) of the same Code. He pleaded not guilty to both counts. The prosecution called six witnesses and closed its case. The appellant gave evidence in his own defence and called two other witnesses. In a reserved judgment delivered on November 2, 1988 the learned magistrate found the appellant guilty on the first count, but returned no verdict in respect of the second count. He was sentenced to imprisonment for six years plus five strokes of the cane; and ordered to pay P5,000 to the victim of the rape.

The appellant filed an appeal to the High Court. In his Judgment delivered on January 15, 1991 the Judge *a quo* dismissed the appeal against conviction and sentence, but rightly, in my view, set aside the order as to the compensation of P5,000. On April 4, 1991, the appellant filed a Notice of Application for leave to appeal to this Court. That application came before Gyeke-Dako, J., on May 8, 1991, and leave to appeal was refused summarily on the same date.

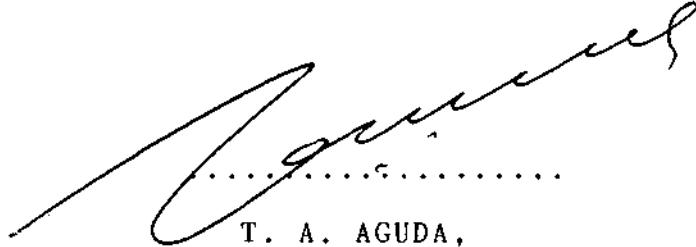
There is no evidence to show that subsequent to the refusal of that leave, the appellant has filed another Notice of Application for Leave to this court. Therefore, there is no Notice for leave to appeal before this Court, and this appeal is not therefore properly before this court.

It would appear that the Attorney-General was not notified of Gyeke-Dako, J.'s order dated May 8, 1991, otherwise he would not have embarked upon the preparation of respondent's Heads of Argument as a result of which this Court gave some consideration to this case at all. The Registrar of this Court must ensure that unless a fresh Notice of Application for leave to appeal is filed in a case in which a High Court Judge has refused leave, he should not put such a case on this Court's list, nor bother to call upon the Attorney-General to prepare a respondent's heads of argument.

I have carefully read the evidence led at the trial of the appellant at the magistrate's court, and I have no reason to hold that the magistrate was wrong to have convicted him, nor that the High Court was in any way in error to have dismissed the appeal of the appellant save as to the payment of

compensation. In all the circumstances the High Court acted properly in refusing leave to appeal to this Court.

The only order open to this Court to make is one striking out this appeal, which is accordingly struck out.




.....
T. A. AGUDA,
JUDGE OF APPEAL

I agree,



.....
B. A. DOYLE,
JUDGE OF APPEAL.

I agree,



.....
for G. BIZOS,
JUDGE OF APPEAL.

GIVEN AT THE COURT OF APPEAL OF BOTSWANA, LOBATSE, this 4th day of July, 1991.