

IN THE HIGH COURT

(BISHO)

CASE NO.: CC99/2002

DATE: 25 NOVEMBER 2002

In the matter between:

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THE STATE

versus

THEMBINKOSI ALFRED

EXTEMPORE JUDGMENT

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EBRAHIM JP:

The accused Thembinkosi Alfred has been charged with the crime of rape. At the commencement of the trial Miss Ncobo who appears for the State applied for the trial to be held in camera, that is behind closed doors. Mr Lalla who appears for the accused did not oppose the application. Accordingly in terms of the provisions of section 153(3)(a) of the Criminal Procedure Act, 51 of 1977 the Court ordered that the trial proceeded in camera and that the identity of the complainant not be disclosed.

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In response to the charge the accused pleaded not guilty. On behalf of the accused Mr Lalla informed the Court in terms of the provisions of section 115(1) of the Criminal Procedure Act, 51 of 1977 that the basis of the accused's defence was that he was at home at the time that the offence occurred. The accused confirmed to the Court that what Mr Lalla has conveyed is correct.

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The complainant, Linda Tutu, who was 12 years old, was going to testify. In view of the fact that she was so young the Court questioned

her to ascertain whether she understood the difference between a truth and a lie and if so what the consequences were of telling a lie. The Court also enquired into whether she understood what it meant to take an oath. After conducting an enquiry the Court was satisfied that she was a competent witness, but did not comprehend what an oath was. In view thereof the Court admonished her in terms of section 164 of the Criminal Procedure Act to tell the truth.

A summary of her testimony is the following: On a Sunday in October 2001, the exact date being unknown, she was at home with her brother Luyanda and other individuals. These people were Zuyanda, Lusanda, Vuzile, Nomfuso and two friends of her brother. Her brother and his friends were drinking beer and watching television in the sitting room whilst she and the other girls sat in the bedroom. On three occasions her brother and his friends left the home and later returned to again watch television. It appears that on the last occasion one of her brother's friends, named Tunki, namely the accused was unable to find Luyanda and then asked her to help him look for the Luyanda. She accompanied him to the outside toilet in the yard to look for him. When they arrived there she queried why they were looking for Luyanda there and the accused responded by giving her R5-00 and saying that in 2005 she was going to his 'cherry' that is his girlfriend. She, however, returned the R5-00 to him. The accused then pushed her towards the fence next to the toilet. She fell and cried and got up again. Thereupon the accused told her to take off her panties and when she refused removed them himself. The accused in turn took off his own trousers and bikini, that is his underpants. She was still crying at this stage but he forced her to lie on the grass on her back. Using his

hands he parted her legs and when she asked him what he was doing he told her not to ask and produced a knife and held it at her throat. The accused then inserted his penis in her vagina and executed up and down movements. This was painful and she continued crying and also kicked her legs. After a while he stopped and they both dressed and he ran away. She returned to the house where she met Luyanda and told him that the accused had said that he wanted her to be his 'cherry', namely his girlfriend in 2005. She was still crying. However, she did not tell Luyanda nor anyone else there that the accused had raped her. She says she did not disclose this as she feared the accused would kill her. Luyanda then chased after the accused. She was unable to walk properly after the incident and was asked by Miss Ncobo to demonstrate how she walked. She did so by taking small strides with her legs parted. She explained that the reason why she walked in this manner was because of pimples on the inside of her thighs, but she was no able to say what had caused the pimples to appear.

Some weeks later Leletu told her to go to the clinic which she did. At the clinic she was told to return with a parent the following day, but she did not do so. Eventually the pimples disappeared. In January 2002 she was told by her aunt Margaret Tutu to go to the Cecilia Makiwane Hospital to be tested for Aids. This occurred after she had told her aunt what had happened to her in October 2001. At the hospital she told the doctor what had happened to her. She says that she disclosed to her aunt what had happened as her sister Thabisa had said that if she did not tell then she, that is the complainant, would be arrested. In addition to her aunt and Thabisa another aunt Vuyiswa was present together with Sikona and Ntombizandile. They also told

her that if she did not disclose what had occurred she would be tested with a machine.

Cross-examined by Mr Lalla she agreed that a person Mongezi had arrived on the scene shortly after the incident and asked what was happening. She related to Mongezi that the accused wanted her to be his girlfriend. She and Mongezi entered the house and there she told Luyanda the same story. She confirmed that she had not told them that the accused had raped her. She claims her private parts had bled and was swollen. During the course of the day she said the accused had left and returned to the house more than once before he finally left that evening. On 1 January 2002 her aunt Margaret had enquired why she was walking with difficulty and asked her if she had been raped. But she denied that she had been raped. Present were Nomvisa and Vuyiswa. It was only after Nomvisa threatened that they would take her to a doctor who would establish that she had been raped that she then admitted to them that she had been raped.

Re-examined by Miss Ncobo she said that she had not been able to walk properly as it was painful. There also had been a white water like substance on her private parts.

In reply to questions from the Court she stated that she had a good relationship with her four brothers and six sisters. She usually discussed her personal affairs with her sisters. The night of the incident Luyanda had not asked her if the accused had done anything to her. She had wanted Luyanda to chase the accused in order to find out why he wanted her to be his girlfriend. She eventually admitted that she had been raped as she was afraid of being arrested. It was her aunt Margaret who had at first raised the question whether she had been

raped.

Margaret Nololo Tutu testified that she was the aunt of Linda Tutu. On 1 January 2002 as a result of a report she received she and three others, namely Thabisa, Leletu and Vuyiswa questioned Linda. They had asked her if she had been raped. She says the area below Linda's eyes were faded and blue and she thought that she had been assaulted. At first Linda kept on crying and would not reply despite Thabisa insisting that she had to tell them if she had been raped. She checked Linda's panties and found a brownish stain, but when she asked Linda about this she said that she did not know what had caused it. Finally Linda told them that she had been raped by a person named Tunki. She related that Tunki had been drinking with Luyanda and that they left later on. Tunki returned however and said that he was going to relieve himself. Tunki then sent two of the children, namely Vuzile and Noritsi also known as Zuyanda to the shop. Linda told them further that she and Nomfuso remained behind and that Tunki has asked her to accompany him to look for Luyanda and that she did so. Linda also told them that next to the toilet, it was outside, Tunki stopped and gave her R5-00 and said that she was going to be his girlfriend in 2005. But she had returned the R5-00 to him. Linda said further that the accused then ordered her to take off her panties and when she refused he did so himself and raped her. She did not ask Linda what she meant by saying that she had been raped. Linda also did not provide any further details, nor did she, the witness, enquired further since they were all crying as they feared she may have been infected with Aids. Linda did say, however, that she had told Mongezi that Tunki had threatened her with a knife. Further subsequent to the incident she had on various

occasions met Tunki who would then threaten to stab her. When asked by Miss Ncobo if Linda had said when the rape occurred the witness replied that she had said it was in October 2000 on a Sunday. The date she related the story to the witness was 1 January 2001. In response to numerous questions from Miss Ncobo regarding these dates the witness insisted that the rape occurred in October 2000 and that her discussion with Linda took place in January 2001. She also said that Linda was taken to the clinic in 2001 as well as to Cecilia Makiwane Hospital.

During cross-examination she stated that on 1 January Linda did not have any difficulty in walking. The witness then said that she could now remember that the conversation with Linda had taken place in 2002. She had previously made a mistake as this had happened long ago. The real name of the person Nomvisa was Thabisa and she had told Linda that she would be taken to a doctor where a machine would indicate if she had been raped. The witness stated further that she had subsequently spoken to Luyanda to tell him what had happened and that Luyanda had been furious of what his friend had done.

In replying to the Court's questions the witness had difficulty in explaining why she had remember during the lunch adjournment that she had made a mistake with the dates of events. She stated further that when she spoke to Luyanda he had not been aware that Linda had been raped. Luyanda only knew that she had been threatened with a knife, but had not asked her why Tunki had done so. The witness then said thereafter that Luyanda had not known that Linda was threatened with a knife until she, that is the witness, told him thereof.

Luyanda Nekene testified that he and the accused were friends.

On a Sunday in October 2001 they and a friend of the accused were drinking beer at home between 3 and 8 pm. They consumed 5 by 750 ml of Castle Lager. At 8 pm as they wanted more beer and because he did not want to continue drinking before the children they went to the shebeen. Along the way Tunki said, that is the accused, that he was 5 returning home as he wanted to relieve himself. Luyanda and the other person continued to the shebeen but the accused did not join them thereafter. Later he returned home and found Linda crying in the yard. He asked her why she was crying and she said the accused had given her R5-00 and told her that he wanted her to be his girlfriend. Linda told 10 him this in the presence of Zuyanda, Lusanda and Nomfuso. He was furious and went to the accused's home to look for him but did not find him home. He explained that the accused stayed in a separate room and that he found it open with the light on. He looked for the accused the following day as well but did not find him. It was only four days 15 later that he found the accused. He told the accused that he had been looking for him, but did not ask the accused where he had been. When he asked the accused about what he had said to Linda the accused denied this. Luyanda responded by saying that a child could never lie about something like this and left the accused. 20

During cross-examination he denied that Bongikosi had been the person who had been drinking with him and the accused on that day. He had, however, never asked the person for his name. He denied that they had left and returned to the house a few times between 3 and 8 pm. He and the others had only left at 8 pm and he then returned at 25 about 9 pm. On his return he did not find Mongezi there, Mongezi only arrived later. He did not know if Linda had spoken to Zuyanda, Lusanda

and Nomfuso. Linda had not told him that she had been raped. Nor did she tell him that the accused had threatened to kill her. But he had noticed that she was frightened. He had asked Linda if the accused did anything else besides giving her the R5-00 and she had replied no. He denied that the accused had come to his home again the following day. He also denied that they had met subsequently. When it was put to him that the accused denied that he had confronted the accused about the incident involving R5-00 he responded to this by saying that Linda had told him of the R5-00.

Questioned by the Court he said that he had not thought of asking the accused's friend what his name was. Even though they had drunk a large quantity of beer he had not been effected by it. On the night of the incident he had gone to the accused's home on two occasions. But he did not thereafter go to the accused's house even although he was very cross about what had happened. Before he left for Gauteng in November 2001 he told his aunt, Vuyiswa, what had occurred. This was about a month after the incident. She had told him that she would speak to Linda about it. At the time the incident occurred he viewed it in a serious light, but not thereafter. He was cross that the accused had offered her R5-00 to be his girlfriend. Linda had not said that the accused wanted her to be his girlfriend in 2005. He was phoned by his aunt, Margaret, in February 2002 at the time that he was in Gauteng and she then told him that he had to come back to make a statement as Linda had been raped. Until then his aunt Margaret had not spoken to him about the incident.

Mongezi Adolfo Shosha testified that he was a neighbour of Linda. On an evening towards the end of October 2001 he saw her coming

from outside from the toilet. She was crying and when he asked her what was wrong she said that it is Tunki, that is the accused. The witness followed her inside and heard her speak of a knife and R5-00 and thought that the accused had wanted to rape her. She was relating this to the other children who lived there. One of them was Noritsi whom he had only now found out when he came to court was called Zuyanda, another was Nomfuso. But he could not remember the names of the others. He then ran to look for the accused but did not find him. He could not say what Linda's physical appearance was when he saw her that evening. He only remembers that she was crying.

During cross-examination he stated that Linda did not say that she was assaulted, she had also not disclosed that she had been raped. He did not enquire any further into what had transpired. He had not discussed the incident with Luyanda either. Subsequently Luyanda told him that he had seen the accused the following day, but the accused had denied doing anything to Linda. Luyanda had not told him where he had met the accused. The witness thereafter did not make any further enquiries about the incident.

In reply to questions from the Court he said that he thought that the accused should be prosecuted as he, that is the witness, considered sexual molestation to be a serious offence. But he changed his mind when he heard that the accused had not done anything to Linda. This was the following day. Luyanda had said that the accused had come to his home as he had heard that they were looking for him.

Nomfuso Nekene who was 14 years old was also called to testify. In her case too because she was so young the Court conducted an enquiry to establish whether she understood the difference between the

truth and a lie and the consequences of telling a lie. The Court also enquired into whether she understood what it meant to take an oath. After conducting this enquiry the Court was satisfied that she was a competent witness, but unable to comprehend what was meant by an oath. In view thereof the Court admonished her in terms of section 164 of the Criminal Procedure Act, 51 of 1977 to speak the truth.

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She states that she was the cousin of Linda Tutu. On a Sunday in October 2001 she, Linda, Zuyanda, Lusanda, Vuzile, Luyanda and Tunki, that is the accused, and his friend were watching television. The three men were drinking beer. She and Linda was sent to buy more beer. After they returned they continued watching television until about 8 pm. The accused had also sent Zuyanda and Lusanda to buy cigarettes. Shortly before 8 pm Luyanda, the accused and his friend left. After 20 minutes the accused returned and asked them to keep some money for him, but they refused to do so. The accused said one of them should go with him to look for Luyanda and she suggested that Linda go. The accused and Linda left. Shortly thereafter Luyanda arrived and asked where the accused was and she explained that they had gone to look for him, that is Luyanda. They then heard Linda scream and went to investigate. She saw Linda coming from the direction of the toilet. She observed her by peeping through the back door which she described as a half door. She then went to the front door to open it so that Linda could enter. Linda told Luyanda that the accused had given her some money and wanted her to be his girlfriend. The accused had also produced a knife and threatened to stab her if she did not accept his proposal. She did not say what amount the accused had given her. Luyanda was angry and went to look for the accused.

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Lusanda, Zuyanda and Vuzile arrived whilst she was asking Linda what had happened. The witness, Nomfuso, then said it was Luyanda and not Linda who had told her that the accused had produced a knife. Luyanda had told her this after he returned from looking for the accused.

She stated during cross-examination that Luyanda and the others had not left and returned a few times between 3 and 8 pm. After they left at about 8pm it was a few minutes before Linda returned screaming and Luyanda then asked her what was wrong. The witness then stated that she was not present when Linda and Luyanda spoke. Linda had not stated what the accused had done with the knife. Zuyanda had also spoken at length to Linda. After that evening she did not again speak to Linda about the incident. She had noticed that evening that Linda was not walking normally.

Re-examined by Miss Ncobo on this aspect she said that she could not demonstrate the manner in which Linda had walked.

In response to questions from the Court she said that Linda had walked with difficulty. In spite of this she did not ask her about it and she thought it was simply her style of walking. She was not able to explain what was meant by rape. She and Linda had a good relationship, but did not confide in each other. Linda also had a good relationship with Zuyanda. Nomvisa who was 25 years old was the eldest in the house and was like a mother to them. If Linda needed anything Nomvisa was the first person she would speak to. However, that night Nomvisa was not there, because she had gone to Mdantsane. She could not recall when Nomvisa returned. Subsequent to that night Linda never complained of being ill, nor did she complain of anything else.

Dr Rosalinda Boado a medical practitioner who had qualified in 1975 and had been practising since then testified. She had examined Linda on 3 January 2002. She compiled a medical report which was handed in as **EXHIBIT "B"**. At the time of the medical examination Linda was crying when she related that she had been abused by a person named Tunki in October 2001. The medical examination revealed that the edge of her hymen was irregular and that there were bumps at what was described as the 3 o'clock, 7 o'clock and 8 o'clock positions. The irregularity in the hymen was due to a previous injury as a result of either penetration or a fall. Although she observed that there was a cream discharge this was not abnormal.

It emerged during cross-examination that Dr Boado did not find any pimples or other injuries on the inner thighs of Linda. There was also no indication that she walked with difficulty. In her opinion the injuries to the hymen would have bled. The injuries could have been caused by a single act of intercourse. On the other hand the injuries could also have been caused through masturbation. The child had been brought there by someone named Leletu Nekene. Linda's first name had originally been recorded as Zoliswa on 3 January 2002. But on 12 November 2002 at the insistence of an Inspector Klaas her first name was changed to Linda. She was told by Inspector Klaas that the person who had brought the child in had made a mistake with her name. Dr Boado was able to recall that Leletu had told her that she was caring for Zoliswa as the aunt who had previously cared for her had died. Dr Boado was unable to say why there had been a delay of 2 months in reporting the rape. In her view the complainant would have had difficulty in walking after the rape.

In reply to the Court's questions she stated that she had not enquired from the complainant if she had masturbated or had injured herself while exploring her vagina or doing something else. She had at first objected to changing the first name, but Inspector Klaas had insisted that she do so. She could not now say with certainty if the child she examined was Linda Tutu or not. She found it strange that Leletu who was the child's cousin would not have known what her correct name was. She considered it to be a normal part of sexual development for children to masturbate. She did not ask the child to relate what had happened to her, she had also not asked her to explain what she meant by being sexually abused. The irregularity of the hymen on its own was not indicative of sexual abuse, but viewed with the bumps that is as a result of the injuries it was more probable that there had been abuse.

Leletu Nekene testified that she was related to Linda Tutu. In October 2001 they stayed in the same house. During the first week of November 2001 she noticed that Linda was walking badly, that is she was limping. Linda was walking stiff legged with her legs apart. When she enquired from Linda about this Linda said her thighs were inflamed. She did not enquire further but told Linda to go to the clinic, which she then did. On her return Linda said that she had been told to bring her parent along. In view of this Leletu telephoned Linda's mother to convey to her what Linda had said, but to her knowledge Linda and her mother did not return to the clinic. Approximately 3 days later Linda was walking normally again. At no stage had Linda told her that she had been raped. It was only on 1 January 2002 that Linda said so when Margaret Tutu asked her if she had been raped. Leletu then said that she was not present when Linda spoke to Margaret. However, at some

stage she spoke to Linda and asked her to tell her what had actually happened on the day she was raped. Linda replied that Tunki, the accused, had asked her to accompany him to look for Luyanda and then raped her near the toilet. But she did not ask Linda why she had not told anyone that she had been raped. Linda also said that whenever she met the accused he would produce a knife and asked her if she had told anyone and then threatened he would kill her. She confirmed that she had been the person who took Linda to the Cecilia Makiwane Hospital to be examined by a doctor.

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It emerged during cross-examination that she could not remember if Dr Boado had asked her for the name of the complainant. At some stage she had become aware that the complainant's name was recorded as Zoliswa, but she did not correct this. She could not explain why she did not do so. In October 2001 Linda had not spoken to her about the incident. Even though they were close Linda did not confide in her.

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Questioned by the Court Leletu Nekene said that she phoned her aunts Margaret and Ntombizandile to tell them what Linda had related to her. Thereafter she did not do anything further. She was surprised to hear that Linda had not testified that she had told her what had happened. Even Nomfuso had spoken to her, that is the witness Leletu, about the incident. It was only after the 1 January 2002 that Linda told her of meeting the accused and his threats with a knife. It was Nomvisa, Leletu's sister who had insisted that Linda had to say if she was raped. Nomvisa had also threatened to take Linda to the doctor to be tested by a machine.

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This concluded the case for the State.

The accused, Thembinkosi Alfred, then testified in his own

defence. He confirmed that he had been at Luyanda's home in October 2001 and that he, Luyanda, Bongikosi and Siyanda watched soccer on television and drank beer. At about 7 pm Bongikosi left and thereafter so did he and went home. He remained at home and later Bongikosi arrived to sleep there. He himself eventually went to sleep. He denied returning to Luyanda's home later on. He also denied that he had offered Linda R5-00, he had also not raped her, nor had he ever threatened her. The following day he went back to Luyanda to borrow a cassette. Luyanda did not speak to him about Linda's accusation that he, the accused, had offered her R5-00 so that she could be his girlfriend in 2005. He says he continued visiting Luyanda until Luyanda went to Johannesburg.

Cross-examined by Miss Ncobo he said that his friendship with Luyanda ended when he, that is the accused, was arrested. He had not accompanied Luyanda to the shebeen. Luyanda was still at the house at the time that he, that is the accused, left to go home. He could not say why Nomfuso and Linda had said that he had asked one of them to go with him to look for Luyanda. He was also unable to say why Linda was implicating him. Similarly he could not say why Luyanda had claimed that he came to his home and did not find him there, that is the accused's home.

In reply to questions from the Court he said that during the time that he and the others had been drinking he had not gone to the toilet. Luyanda knew both Bongikosi and Siyanda. During the period October 2001 to 3 January 2002 he was not told by members of his family that anyone had looked for him. The other children who stayed with Linda knew where he resided.

This concluded the case for the defence.

Both Miss Ncobo and Mr Lalla addressed the Court on the merits,..
 But I do not intend setting out their submissions in detail, suffice to say
 that Miss Ncobo contended that the State had proved the guilt of the
 accused beyond a reasonable doubt. While conceding that there were 5
 contradictions in the evidence of the State witnesses she nevertheless
 contended that they have corroborated each other on material aspects.
 Mr Lalla contended on the other hand that there was a reasonable doubt
 in regard to the accused's guilt and that he should therefore be acquitted.

An assessment of the medical evidence reveals the following: 10

- (a) At some stage the complainant, Linda Tutu, sustained injuries to
 her vagina. Dr R Boado had found during the course of her
 medical examination conducted on 3 January 2002 that the
 hymen was irregular and displayed bumps at the 3, 7 and 8
 o'clock positions. These bumps were injuries that had healed. Dr 15
 Boado was not able to say however when the injuries had
 occurred.
- (b) In the opinion of Dr Boado the injuries to the vagina were as a
 result of sexual intercourse or masturbation and possibly even a
 fall, though the latter was unlikely. 20
- (c) The injuries would have caused bleeding and the complainant
 would have walked with difficulty.
- (d) Dr Boado did not ask the complainant how the injuries had been
 caused.
- (e) Dr Boado also failed to enquire from the complainant whether she 25
 had masturbated or even fallen and injured herself.
- (f) When Dr Boado examined the patient she was told that her name

was Zoliswa Tutu, some 11 months later an Inspector Klaas instructed her to change the first name to Linda. Ultimately therefore Dr Boado was unable to verify that the person she examined was indeed the complainant Linda Tutu.

I have omitted to mention that at the outset of the trial the State applied for the amendment of the indictment to change the first name of the complainant from Zoliswa to Linda. The defence had not objected to this application and the amendment had therefore been granted by the Court.

In regard to whether the accused raped the complainant or not the only direct evidence thereof is that of the complainant herself. Apart from the medical findings of Dr Boado who examined the complainant some 2 months after the alleged rape there is no independent evidence which could substantiate that she was raped. Despite the fact that the first name of the patient was changed on **EXHIBIT "B"** the medical report at the urgings of Inspector Klaas the defence has not suggested that it is not the same person who was examined at the time as the complainant who testified in court. I have assumed therefore that the complainant and who Dr Boado examined was in fact Linda Tutu.

This apart the findings of Dr Boado are by no means decisive that the complainant was indeed raped. Her findings suggest that sexual intercourse may have taken place, but it is also probable that the complainant's injuries may have been caused through masturbation. Unfortunately Dr Boado did not make the relevant enquiries to exclude this probability. The final analysis therefore I cannot hold that the medical evidence substantiates the complainant's claim that she was raped.

Insofar as the complainant's evidence and that of the remaining State witnesses are concerned these are fraught with numerous contradictions, inconsistencies and improbabilities. On the evening that the rape supposedly occurred at least five of her cousins spoke to the complainant immediately after the incident. This occurred in fact within a minute or two of the alleged rape taking place. Yet at no stage either then, nor the following day, nor at any time thereafter until 1 January 2002 did the complainant tell them or any other close member of her family or even a friend that the accused had raped her. She says the reason why she did not do so is because the accused had threatened to kill her, however, if such a threat had been uttered by the accused it is scarcely likely that she would then have made any incriminating allegations of any nature against the accused. Yet she was clearly not afraid to reveal that the accused had made an improper suggestion to her about being his girlfriend. In these circumstances her claim that she feared the accused would kill her if she revealed that he had raped her does not have the ring of truth to it.

In addition there are contradictory versions of what she told various individuals in respect of the alleged threat. According to her aunt Margaret Tutu the complainant told her the accused had made threats on occasions when he met her subsequent to the night of the rape. Luyanda on the other hand said that she never told him that her life had been threatened. Nomfuso Nekene said that she told them the accused had threatened her with a knife in order to get her to agree to be his girlfriend. Leletu Nekene's version of the threat is similar to that provided by Margaret Tutu. As I have stated previously the complainant only revealed that she had been raped by the accused when

she subjected to intensive questioning on 1 January 2002 by her aunt Margaret Tutu. This questioning was accompanied by threats of her cousin Nomvisa that she would be taken to a doctor and tested by means of a machine. Nomvisa also threatened that she would be arrested by the police if she did not admit that she had been raped. It is evident that the complainant did not volunteer of her own free will that she had been raped. She did so under duress and then to only after initial denials that this had occurred, the questioning also suggested that she had been raped and coerced her into an admission. Prior to this the complainant had more than sufficient opportunity to disclose that she had been raped but clearly she failed to do so.

Neither the complainant nor any of the other State witnesses impressed me with their testimony. In addition to there being contradictions, improbabilities and inconsistencies in their own testimony the witnesses also contradicted each other on material aspects. Luyanda Nekene who claimed that he was furious at the accused for attempting to get the complainant to be his girlfriend, did not bother to pursue the issue any further after that evening. While he claims he looked for the accused thereafter and never found him his evidence is contradicted by Mongezi Shosha who said that Luyanda told him late the following day that he had spoken to the accused earlier that day. Mongezi went on to say that Luyanda told him that the accused had denied that he did anything improper to the complainant. Margaret Tutu and Luyanda also contradicted each other in regard to when and how they spoke to each other about what had occurred to the complainant. Much of the evidence of the State witnesses was filled with hearsay evidence, speculation, supposition, fabrication, reconstruction of events

and their own opinions as to what transpired. They have not impressed me with their credibility and I do not find their evidence to be reliable.

The complainant herself was not a credible witness. As I have indicated there are a number of improbabilities in her version of the events. The reason she has furnished for not disclosing immediately or soon thereafter that she had been raped is not substantiated by any other evidence. She did not impress me as being truthful, I cannot accept her evidence as being reliable. Her version is inconsistent and improbable in many respects. Certain witnesses who were present when she was interrogated were also not called by the State to testify.

On the other hand, although the accused was not particularly impressive as a witness I am unable to reject his version as being false or not reasonably possibly true. Miss Ncobo during cross-examination asked the accused why the complainant and other witnesses would implicate him in a crime that he did not commit, but this cross-examination was misdirected. It is not for the accused to prove his innocence, but the onus rests on the State to prove his guilt beyond a reasonable doubt.

After evaluating all the evidence I have the distinct impression that the truth of what transpired that evening has not emerged. I have a suspicion that something may have occurred between the accused and the complainant, but what that was the evidence has failed to establish. The accused is indeed fortunate in this respect. The quality of the evidence adduced by the State does not reach the requisite standard of prove beyond a reasonable doubt and the accused cannot, therefore, be convicted of the crime of rape as set out in the indictment, nor am I able to find that the evidence established that he committed any other

competent offence.

In the result the accused is found not guilty of the offence of rape
and is discharged.

Y EBRAHIM	:	JUDGE PRESIDENT
BISHO	:	HIGH COURT