

IN THE HIGH COURT

(BISHO)

CASE NO.: CC34/2002

DATE: 2 DECEMBER 2002

In the matter between:

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THE STATE

versus

SITANANA SYDNEY BANGANI

EXTEMPORE JUDGMENT

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EBRAHIM JP:

The accused, Sitanana Sydney Bangani, a 52 year old male was initially indicted on one count of indecent assault and one count of rape. However, at the trial prior to the accused being called upon to plead to these charges the State applied to amend the indictment by the addition of a further charge of rape. No objection was raised on behalf of the accused by Mr Simoyi who was representing him and the Court thereupon granted the amendment. This resulted in a further charge of rape being preferred against the accused.

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The accused pleaded not guilty to each of these three charges and he elected in terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 not to disclose the basis of his defence save to deny the allegations in each of the charges.

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Mrs De Kock who appeared for the State then applied for the proceedings to be held in camera, that is behind closed doors. This application was brought in terms of section 153(3)(a) of the aforesaid Criminal Procedure Act. This application was also not opposed by the

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defence and the Court thereupon ordered that the trial proceed behind closed doors, that is in camera.

A further application was brought by the State for both complainants who were 7 and 11 years old respectively to testify via an intermediary and by means of close circuit television. This application was made in terms of section 170A of the aforesaid Criminal Procedure Act on the basis that the complainants would be exposed to undue mental stress or suffering if they had to testify in open court. This application was similarly not opposed by the defence. Accordingly in terms of the provisions of section 170A of the aforesaid Criminal Procedure Act the Court approved the use of an intermediary and in terms of section 158 of the aforesaid Criminal Procedure Act the use of close circuit television facilities for the complainants' testimony to be received by the Court.

Miss Andisiwe Msindwana who the State proposed to use as an intermediary then testified in regard to her qualifications as well as her experience and competency to act as an intermediary. Her testimony was not challenged by the defence. Thereupon the Court granted the State's application for Miss Msindwana to be employed as an intermediary for the purpose of receiving the evidence of the complainants. Miss Msindwana was then duly sworn in to act as an intermediary and to faithfully and diligently and accurately convey the questions put to the complainants and to act similarly in conveying the replies from the complainants.

The first witness to testify was Zam Mantombazane Mzele, a 7 year old child. She was called to testify in respect of count 3 in the indictment. Because of her tender years the Court enquired into her

capacity to distinguish between the truth and a lie and what the consequences were of lying and also whether she understood what it meant to take an oath. After this enquiry the Court was satisfied that she was a competent witness, but since she did not understand what an oath was the Court admonished her to tell the truth in terms of section 165 of the aforesaid Criminal Procedure Act. 5

Zam Mzele testified that on a particular day she was returning from the telephone booth when an old man whom she said was "Umgungwane" called her and asked her when they were going to have an affair. When she responded negatively to this he made her lie on a bed and took off her skirt and panties and lay on top of her. She said the old man had also taken off his clothes and moved the lower part of his body up and down. She felt part of his body on her vagina and experienced pain. She was unable to recall how long this continued. The old man told her that they should do it again, but she replied that her mother would give her a hiding. He then offered to give her a banana but she refused this and walked home. Subsequently she told her friend Sisipho what had happened to her and Sisipho in turn told her mother. When her mother questioned her, that is Zam, she related what had occurred. Her mother also took her to a doctor who examined her. 10 15 20

During cross-examination she stated that she had not cried when the old man laid on top of her as it was not very painful. When she arrived at home her grandmother was present but she did not speak to her as her grandmother was sick. She added that she could also not understand her grandmother when she spoke. When her mother arrived home she was asleep. When Zam woke the next morning her mother was still asleep and after her mother awoke she attended to the laundry. 25

She did not, however, tell her mother what had happened to her, but it was Sisipho who did so. At the time Sisipho was 7 years old. Zam stated further that she was not taken to the doctor at the time to be examined. This only occurred when she came to court. She denied having been influenced to make the allegations against the accused and insisted that the incident had occurred.

In response to the Court's questions she said that she knew the old man by the name of Umgungwane. The house where he resided was situated in front of their house. She had never been asked to point him out. She had identified him as the old man at whose house Nontsikelelo had stayed. After the incident her vagina had been sore but she nevertheless walked easily. She did not notice anything on her panties when she undressed at home and her panties were still clean. Asked if there had been any bleeding the next morning she replied yes, but then said that there had not been any bleeding. She stated further that she had bled on some other morning, but she could not remember when this was. She could not remember in which year the incident occurred, nor when she was examined by the doctor, but thought that this took place in the year 2000. She could not remember if it was prior to or after Christmas.

Nontsikelelo Maseti who was 12 years old and the complainant in respect of counts 1 and 2 was then called to testify. Her testimony was also received via an intermediary and the close circuit television facility. In her case too, since she was a child, the Court conducted an enquiry similar to that conducted in respect of Zam Mzele. Nontsikelelo was also found to be a competent witness, but similarly did not understand what an oath was. She was also admonished in terms of

section 165 of the aforesaid Criminal Procedure Act to tell the truth. In her testimony she stated that during 1994 to 1996 she and her parents resided in the same house as an old man whose surname was Bangani. They moved from there in 1997 and in 1999 they resided at their present home. The old man Bangani was then not staying with them but had a house on the same grounds. On a certain day she and her friend Babalwa were watching television with the old man when he asked her to get into his bed. She did so and he then told her to switch off the light and to cover her head with a blanket. Thereafter he climbed on top of her and moved the lower part of his body up and down, but she did not feel anything. She was dressed while the old man was in his bikini underpants. She did not notice if he had taken it off. She said that his front thing was in her vagina, but then said it was on top of her panties. When she asked him what he was doing he replied that she would not understand and told her to keep quiet so that Babalwa could not hear her. Although Babalwa was in the same room Nontsikelelo did not call out to her. When Babalwa looked at them the old man told her to get out of the bed and she did so. He also told both of them not to tell anyone and gave them 10 cents.

Nontsikelelo stated further that there was another incident after this, but she could not remember when it was. It had occurred in the same house which they were sharing with the old man. He had asked her to come to his room to stay with him, but she refused to do so. He then carried her to his bed. There he took off her panties, lifted up her dress and inserted his thing in her private parts. This was painful and he also moved the lower part of his body up and down. He was only wearing his bikini underpants but at the time she felt pain he had taken

it off. She had told him that it was painful but he ignored her complaint. Babalwa was asleep in the other bedroom. The old man also placed his hand over her mouth. There was a knock on the door and the old man told her to run to Babalwa's bedroom. Thereafter he came to the bed and laid on top of Babalwa, but she pushed him away. When they told him that they were going to tell someone he said he would give them a hiding and also gave them some money. In spite of this Babalwa did tell Nosiphiwe. Nontsikelelo says that she told Babalwa what he had done to her. She was questioned by her mother and told her of the first incident only. She did not tell her mother of the second incident as she was afraid of her mother and the old man. She had not told anyone of the second incident. It was only recently that she told her mother and a policeman and a lady whom she described as a white lady who had questioned her. She said she told them about it the day before her testimony in court. She had not been taken to a doctor soon after the incidents to be examined. The doctor had only examined her yesterday, that is 1 August 2002 and the doctor had found that she had been raped a long time ago. She said that at the time that the incidents occurred she was 4 or 5 years old.

During cross-examination Nontsikelelo said that both incidents had occurred before 1998. The first incident took place when they were watching the 8pm movie on television. She still had her clothes on when the old man climbed on top of her. She was able to feel that he had his underwear on. She had not noticed if Babalwa was watching them. Before the old man climbed on top of her he looked at Babalwa and smiled at her and she smiled in return. After she got out of bed she again went to sit on Babalwa's lap. At the end of the movie on the

television she accompanied Babalwa to her home where she waited for her own mother to return. It was very late when her mother and father returned. However, she did not tell her mother what had happened as the old man had threatened to give her a hiding if she did so. She also feared that her own mother would give her a hiding. She admitted that her mother had always told her to tell the truth. 5

At this stage of the cross-examination Nontsikelelo began to cry and the Court adjourned with the proceedings until the next day. When the proceedings resumed the following morning Mr Simoyi informed the Court that the accused was terminating his mandate and wanted to engage the services of another legal representative. In view of this the trial was postponed to enable the accused to obtain the services of another legal representative. When the trial resumed Mr Dokolwana appeared and informed the Court that he was now representing the accused. 10
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Mr Dokolwana proceeded with further cross-examination of Nontsikelelo. Nontsikelelo then stated that on the first occasion the old man had not inserted anything in her vagina. He had been dressed in his pyjamas and she had her panties on. Later she discovered that her panties were wet. On the way to Babalwa's house she did not tell her what had happened, nor did Babalwa ask her. It was not she who told her parents, but it was Babalwa. After this her mother questioned her. She could not remember when this took place. The second incident occurred on an evening when her mother had again gone to a church activity. Both incidents occurred in the same week. On the second occasion she and Babalwa were in her mother's bedroom. The old man had then invited them to sit in his room, but they refused. She fell 20
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asleep but later awoke in order to go to the toilet. The old man then called her and she went to his room. He invited her to sleep in his bed, but she refused. He then dragged her to the bed and took off her underwear. He also undressed. She says she could not scream as he had covered her mouth and he then inserted his thing in her body. 5

There was a knock on the door and he then told her to go. No-one entered however. On her return to her mother's bedroom she did not tell Babalwa of any of this. When Mr Dokolwana put it to her that the accused denied having done anything to her, she insisted that he had done these things to her. She denied that she had been told by her 10

parents to say these things. Since she had not told Babalwa anything she thought that Babalwa must have seen what had happened. She had been afraid to tell Babalwa as the old man had threatened to assault her. At no stage had Babalwa discussed the incidents with her. After the second incident she had noticed that there was something brownish on 15

her panties when she was going to wash the panties. This substance was sticky. After the first incident there had not been anything on her panties at all. She described that the rooms in the house were divided by a curtain, now one could therefore easily hear what was happening in the next room. She had not told her mother that she was 4 or 5 20

years old when the incidents occurred nor had she told the police this.

Babalwa Siney was then called to testify. She was 15 years old and after an enquiry the Court found her to be a competent witness and that she knew what was meant by the taking of an oath. She was then sworn in. She testified that she knew Nontsikelelo Maseti. A long time 25

ago Nontsikelelo shared a house with an old man who was the accused at NU 1, Mdantsane. On one of her visits to Nontsikelelo they watched

television which was in the accused room. It was late in the day and at some stage Nontsikelelo went to the accused's bed and climbed under the blankets. She did not know why Nontsikelelo had done so and had not heard the accused call Nontsikelelo. The accused was also under the blankets and she saw him lying on top of Nontsikelelo who still had 5 her clothes on at the time that she climbed under the blankets. Nontsikelelo had also turned down the flame of the lamp when she got into the bed. Some time thereafter Nontsikelelo suddenly got out of the bed. She had not seen what the accused had done to Nontsikelelo but she had noticed that he moved his buttocks back and forth. She 10 observed all this through a hole in the newspaper which she was holding in front of her face. She had not seen the accused looking at her, and afterwards the accused had not said anything to her. It was Nontsikelelo who had asked to go home with her and they then left. On the way she asked Nontsikelelo what had happened and Nontsikelelo 15 replied that she should not tell anyone and that she would give her some money. Nontsikelelo appeared to be normal to her. She, that is Babalwa, could not recall when the incident had occurred but it could have happened about 3 years ago. It was some time later that she told Nosiphiwe what had happened. She had not told anyone else, not even 20 Nontsikelelo's mother. She had visited Nontsikelelo at the same house subsequently but could not remember if this was in the same week. On that occasion the accused approached them when they were in Nontsikelelo's mother's bedroom. He had asked them if they did not want to lie in his room. The accused then laid on top of her and she had 25 to push him away. Nontsikelelo had not told her of the second incident at any stage. She had been present when Nontsikelelo's mother found

out about the incident.

During cross-examination she stated that the incidents she knew off occurred while they were watching a television program called Jam Alley. She realised that it was wrong for the accused to have moved his body back and forth. She had not laughed at any stage, nor have the accused looked at her and smiled or laughed. She had been surprised by the accused's actions, but she nevertheless watched what was happening. After the incident Nontsikelelo appeared to be relaxed and normal. She had asked Nontsikelelo what she doing with the accused. It was then that Nontsikelelo said that she should not tell anyone and had promised to give her money. Nontsikelelo had only walked half of the distance to her home, and had then turned back to go home alone even though it was late at night. She was unable to say if Nontsikelelo was 4 or 5 years old at the time. It was the following day that she told Nosiphiwe of the incident. When the accused had lain on top of her, that is Babalwa, she had pushed him away and told him that he was old. This occurred some time in 1999, but she could not remember exactly when. She could not recall in which standard she was as this had happened a long time ago. She was not aware if anything had happened to Nontsikelelo that evening. She denied that she and Nontsikelelo had made a noise that evening. She also denied that the accused came into their room to separate them. He had also not asked them if they wanted to sleep there. She could not recall asking the accused for headache tablets for herself and Nontsikelelo. The accused was lying if he denied what she had related to the Court.

In reply to questions from the Court Babalwa said that she had told Nontsikelelo that the accused had lain on top of her. She had not told

anyone else as they might joke about it. She had actually asked Nontsikelelo if she had seen what had happened to which Nontsikelelo had replied yes. She had also told a committee of community members when she was questioned about what had occurred. Her mother and father were present then. She had been called aside by her mother who asked her if the accused had done anything to her. She did not tell her parents of what had happened to Nontsikelelo as she was afraid Nontsikelelo would get a hiding. She was also concerned that if she told someone else she and Nontsikelelo would quarrel about this. She admitted that it had been important to report the incident. Despite what had happened she was not afraid to sleep there again. She said that if the accused had tried to do something to her she would have shouted.

Nombeko Mzele, the mother of Zam, testified that on 2 December 1999 she saw Zam and another girl Sisipho standing facing each other. When she asked them what they were doing they did not reply and merely looked at the ground moving their feet. Zam was then 5 years old and Sisipho more or less 5 or 6 years old. She threatened to give Sisipho a hiding if she did not say what they were doing. As a result of this Sisipho replied that Zam had said that they must do funny things because this was what the old man had done to Zam. When she asked who the old man was Sisipho said that it was Nontsikelelo's grandfather. Zam cried when she spoke to her. She eventually persuaded Zam to talk by telling her that she would not give her a hiding. Zam said that the accused had done funny things to her when she had gone to the telephones. She had gone into his house to watch television and he then took off her panties. Mrs Mzele said that as a result of what Zam told her she called a neighbour. Together they examined her vagina, but

did not find anything wrong. The following day they were called to a meeting of a committee of community members and the day thereafter, that is 4 December 1999, the committee called in the accused. Thereafter they went to the police.

It emerged during cross-examination that in May 1999 she had noticed that there was a discharge on Zam's vagina and that Zam was experiencing itching and pain. She then took Zam to the clinic for treatment. This was prior to Zam telling her of what had happened to her. She did not question Zam about the itching and pain she was experiencing. Her own mother had questioned Zam and has specifically asked Zam if someone was touching her with his penis. The report she received from the clinic indicated that nothing improper had happened to Zam. Neither Zam nor Nontsikelelo had alleged that the old man had done anything to them. She was present when the doctor examined Zam on 4 December 1999. The doctor had said she could not find anything wrong and had told them to return to see Dr Klopper. On the Monday she returned to see Dr Klopper who then examined Zam and prepared a report. Dr Klopper also told her that she could not find any damage and could not say if Zam had been raped or not.

In replying to questions from the Court Mrs Mzele said Zam had stated that she had been raped, but could not recall on what date this had happened. It was Zam and not Sisipho who told her this. Sisipho only said that Zam had told her. Zam had conveyed to her that the old man had done filthy things to her.

Dr Anthony Rene Klopper then testified. She qualified as a medical practitioner in 1983 and thereafter pursued post-graduate studies. She held a Diploma in Child Health. She was employed at the East London

Hospital complex and ran a children's clinic for abused children. She was also involved in the Tutuzele Clinic that dealt with abused children. On 1 August 2002 she examined Nontsikelelo Maseti who had been brought to her by her mother and Inspector Klaas of the Child Protection Unit. She noted her findings on a J88 form which was handed in and is **EXHIBIT "A1"**. At the time she examined Nontsikelelo she noted that she was biting her nails very severely. This was probably due to anxiety. The gynaecological examination revealed that the configuration of her hymen was annular and distorted. There were clefs which were healed tears at the 5 o'clock and 7 o'clock positions. These were visible with the naked eye. She photographed these using a video colposcope, this photograph was handed in and is **EXHIBIT "A2"**. The hymen or rim was thickened and distorted which was indicative of a healed tear. These findings were suggestive of previous vaginal penetration. Nontsikelelo had informed her that there had been an attempt to penetrate her vagina through her underwear. And that her underwear had been wet. This occurred between 1997 and 1998. Nontsikelelo had also mentioned that there had been another occasion but she did not explore this. Dr Klopper explained that scarring occurred about 60 days after an injury. Prior to puberty the hymen was very tender and any touching would have been painful. Dr Klopper examines about 200 children per annum and had been doing so for the past 6 years. In her experience children did not easily disclose that they had been sexually abused, not even to their mothers.

A medical legal examination conducted by a Dr Van Wyk in respect of Zam Mzele was handed in by consent as **EXHIBIT "B"**. Dr Klopper was asked to comment on Dr Van Wyk's findings. Dr Van Wyk's report

indicated that all her findings were normal, except that the hymen had an irregular border. Dr Klopper stated that an irregular border of the hymen was not abnormal. However, even though the examination did not reveal anything abnormal this did not mean that there could not have been penetrative intercourse. Dr Klopper then referred to various studies which indicated that in certain instances children had been sexually assaulted even though the medical examinations had not revealed any signs of interference. She confirmed that she had personally examined Zam Mzele. There was a history of bed wetting and of her scratching her genitals. She did not find any urinary infection which could have caused the bed wetting. The scratching could have been due either to poor hygiene or sexual abuse. 5 10

During cross-examination Dr Klopper stated that in respect of Zam Mzele, while she did not exclude that sexual abuse may have occurred, it is also possible that there had not been any sexual intercourse. However, research studies showed that in one third of cases of sexual abuse the medical examination did not reveal anything abnormal. Bed wetting could occur even after the child had been toilet trained and could have been caused by a urinary track infection or stress. From the information provided to her it was said that the incidents in respect of Nontsikelelo Maseti had occurred in 1997 or 1998. She conceded that the distortion of the hymen could have been caused by a finger. But on the basis of research studies the most likely cause was penetration by a penis. On the basis of her findings the injuries could have been caused 4 to 5 years ago, but certainly not within 3 months of the medical examination. 15 20 25

In response to questions from the Court Dr Klopper said that a

child could experience pain even when the vagina was only touched. In the case of penetrative intercourse there need not be any bleeding even if the hymen was ruptured. There could also only be a discharge at a later stage. Her notes reflected that in respect of the incident in 1997 or 1998 there had been an attempt to penetrate through Nontsikelelo's 5 underwear, the medical examination she conducted in respect of Nontsikelelo on 1 August 2002 concerned an allegation of penetrative sexual intercourse. In her view if the injuries had been caused by digital penetration during the course of an examination by a lay person such an examination would have been very invasive. In her opinion a possible 10 reason for the child not revealing the incident of rape was because she was being psychologically defensive.

At the conclusion of Dr Klopper's testimony the State informed the Court that the child Sisipho would not be called to testify. The reason for not calling her was because she was only 4 or 5 years old at the time 15 of the incident.

Zolelwa Patricia Maseti who is the mother of Nontsikelelo testified that the accused was not related to them. Between 1993 to 1999 they stayed in the same house. On 2 December 1999 Zam and her mother Nombeko Mzele came to her home together with Sisipho Bokwani, the 20 Mzele's were her neighbours. Mrs Mzele asked Zam to relate what she had told her, Sisipho then replied that she would show the funny things the old man performed on Zam. When Mrs Maseti enquired what the funny things were Zam replied that it was 'zuma zumani' which meant that people were having sexual intercourse. Zam had told her that the 25 old man had called her when she returned from the telephone, he then gave her a banana and removed her panties. The old man also removed

his trousers and inserted his penis in her private parts. Nosiphiwe Mzele, Zam's sister arrived whilst she was relating this and Nosiphiwe said the old man had done the same thing to Nontsikelelo and had raped her. The witness then sent for Nontsikelelo and asked her what the old man had done to her. Nontsikelelo replied that the old man had raped her when her mother had gone to a church practice. Her mother is obviously the witness who testified. She could not provide a date however then this occurred. Nontsikelelo explained that the old man had been behind her when he executed up and down movements. He had also been dressed. Mrs Maseti also said that she did not go to the police station to lay a charge but attended a meeting of community members. At that meeting the accused had denied that he had raped Nontsikelelo. He had claimed that he had detected a smell coming from her and wanted to check if she was dirty. He had also said that she slept in his bed when her parents were absent as she was afraid. The rash Nontsikelelo had suffered from occurred two months prior to the allegation of rape surfacing. At the time of the rash she asked Nontsikelelo if an adult had been sleeping with her, but Nontsikelelo had denied this. She had not been aware of the second allegation of rape until Nontsikelelo made a statement to the police during the year 2000. She then said that she only became aware of this incident when she and Nontsikelelo consulted with counsel for the State during this year, that is 2002. She had been mistaken in saying that it was the year 2000. But she could not remember in which month the consultation had taken place.

During cross-examination Mrs Maseti claimed that she had not made a statement to the police. It was only Nontsikelelo who had done

so. However, when shown a document which it was said was her statement to the police she identified her signature there. By this stage as it was late in the day the Court adjourned until the following morning.

Upon resumption the next day Mrs Maseti again confirmed that it was her signature on the document. She could not recall that she had made the statement which was handed in as **EXHIBIT "C"**. Her description therein of what had happened to Nontsikelelo had been related to her by Nontsikelelo. Nontsikelelo had told her that she and the accused had been lying on their sides when he executed the up and down movements. It was also Nontsikelelo who told her that the accused had not taken her panties off. Despite this Mrs Maseti considered the actions of the accused to amount to rape. Nontsikelelo had been taken to hospital by someone else in 1999. Thereafter Mrs Mzele did not make any further enquiries in respect of the incident.

In reply to the Court's questions she said that she did not go to report the incident to the police as she was pregnant with another child who was born on 17 December 1999. The police had visited her during 1999, but she could not recall when this was. It was possible that it was December 1999. The police had then taken a statement from her. She did not ask the police to conduct a investigation, she had also not made any further statement thereafter. She could not explain why the statement signed by her, namely **EXHIBIT "C"**, was dated 27 November 2000. She then said that she thought it had been obtained from her by a new investigator. After the accused's arrest on 3 December 1999 she did not make any further enquiries in regard to the progress of the case. Asked if she had told the police that the indecent assault or rape had occurred in November 1999 she could at first not provide a reply. She

then said she had told them, but added that it was in December 1999. She was unable to explain how she knew that the incident had occurred in November 1999. Thereafter she said she was told this by Nosiphiwe and again said that she had not heard this from Nosiphiwe. This concluded her testimony. 5

In reply to an enquiry from the Court Mrs De Kock indicated that she could not offer an explanation in regard to why a statement had only been taken from Mrs Maseti on 27 November 2000. She confirmed that the crime had been reported on 4 December 1999 and the accused arrested on 5 December 1999. 10

This concluded the case for the State.

An application by Mr Dokolwana for the discharge of the accused in terms of section 174 of the aforesaid Criminal Procedure Act was opposed by the State. After being addressed by both Mr Dokolwana and Mrs De Kock the Court refused the application as in the Court's view 15 the evidence tendered by the State was such that a Court might convict the accused of the offences set out in the indictment.

The accused then elected to testify. His testimony was brief. He said that he knew Nontsikelelo Maseti, but claimed that she and her parents and he only shared a house until 1997. He denied having 20 assaulted her indecently. He had also not raped her. He also denied having raped Zam Mzele. He could not recall the date, but sometime in the middle of 1999 Zam and Nontsikelelo watched television in his room with two other children whose names he had forgotten. At that time Nontsikelelo was living in the house behind his. He had become aware 25 of the allegations against him on a Saturday in November in 1999. There was a meeting of members of the community which he attended. They

threatened to assault, burn or kill him and to evict him from his home. He denied having said that he removed Zam's panties because of the smell coming from her. He had also not said that Nontsikelelo slept in his bed because her parents were not there. This concluded his testimony.

During cross-examination by Mrs De Kock the accused stated that since 1996 he did not have a good relationship with Zam's parents. Zam and her friends had on occasions come to sweep the floors in his house as they wanted fruit. On her last visit he detected a smell and he asked who had stepped in human faeces. The children said the smell came from Zam. He did not touch her but told the other children to take her home to be washed. He denied that he had called her into his house as she had claimed. He further denied asking her when they were going to fall in love. Questioned about the explanation he had given about Nontsikelelo and Zam making a noise and his giving them pills for their headaches, he said that he was merely stating what he knew. He could not explain why his legal representative had only put this to Babalwa and not to Nontsikelelo as well. He had conveyed to his legal representative what had happened. He denied having indecently assaulting Nontsikelelo or raping her.

Questioned by the Court he said that the police had told him that there was an allegation that he had slept with the children. The police did not say how many times this had occurred. He had denied these accusations. He had told his first legal representative, Mr Simoyi, what had taken place at the meeting with the community members.

This concluded the case for the defence.

Addressing the Court on the merits in relation to count 3 Mrs De Kock submitted that in respect of Zam Mzele the medical evidence

showed that there could have been sexual intercourse even though there were no injuries. She submitted that the evidence of Zam as to what occurred should be accepted. There was no need for the Court to apply the cautionary rule in respect of her evidence, merely because she was a child. In support of this she referred the Court to an unreported decision of the Transvaal High Court in the **DIRECTOR OF PUBLIC PROSECUTIONS v S** case. Regrettably this judgment was not made available to the Court and I am unable therefore to comment on the Court's reasoning in that matter and the conclusion that was reached. When Mrs De Kock was asked to explain the discrepancy between the date of the offence as stated in the indictment and the evidence tendered by the State she responded by applying for the indictment to be amended. The amendment she sought was for the phrase 'the month of December 1999' with the phrase 'an unknown date'. The Court deferred its decision until Mr Dokolwana had replied at a later stage.

Mrs De Kock continued with her submissions on the merits and asked that the accused's version be rejected as fabrication as there was no reason for a child to lie. Accordingly in respect of count 3 she sought a conviction of the offence of rape, alternatively attempted rape.

In regard to count 1 Mrs De Kock submitted that the evidence showed that the accused had lain on top of Nontsikelelo Maseti, whilst she had her panties on. The accused had then executed up and down movements whereafter her panties had become wet.

In respect of count 2 she submitted that the accused had inserted his penis in Nontsikelelo's vagina. This was supported by Nontsikelelo's evidence that there had been a brownish stain on her panties. Dr Klopper had also found a healed tear in her vagina which is supportive of

there having been sexual intercourse. Mrs De Kock conceded that there was a major problem in relation to the dates of the offences in the indictment and the evidence tendered during the trial. Here too now she sought amendments to the indictment so substitute the phrase 'an unknown date' for November 1999 in count 1 as well as in count 2. A decision on these amendments as was the case in respect of that in relation to count 1 was deferred until the Court had received Mr Dokolwana's submissions. 5

In respect of the merits she submitted further that the accused had not been a satisfactory witness and his evidence should therefore be rejected. There was no reason for the complainant to lie. Accordingly the State sought convictions on counts 1 and 2 as set out in the indictment, namely the offences of indecent assault and rape. 10

Mr Dokolwana addressed the Court firstly in regard to the amendments the State was seeking in respect of the indictment. He opposed both applications on the ground that it would prejudice the accused if the amendments were granted at this late stage of the trial. 15

Addressing the Court on the merits in respect of count 1 Mr Dokolwana submitted that Nontsikelelo's evidence did not meet the requirements of that expected of a single witness. Her evidence was not clear, nor was it reliable, and it was uncorroborated. The evidence of Babalwa Siney contradicted her in various respects. For example whether the accused had called her to come and lie in the bed. They also contradicted each other in respect of what had occurred when Babalwa went home. Then the evidence of Mrs Nowonga Maseti also differed from that of Nontsikelelo in regard to whether the accused was lying behind her or on top of her. Mrs Maseti's evidence was 20 25

contradictory, at first she had said that she had not made a statement to the police, then she admitted she had done so. However, this statement was only made on 27 November 2000 and no explanation had been forthcoming as to why it was taken almost a year later. In regard to the State's submission that there was no reason for either of the complainants to lie, he contended that it did not rest on the accused to explain this or to provide a reason why they were lying. He referred the Court to the case of **S v LESITO** 1996 (2) SACR 682 (O) where the Court said that it was not for the accused to explain this. Mr Dokolwana submitted therefore that the State had failed to prove the accused's guilt in respect of count 1. 5 10

In respect of count 2 Mr Dokolwana said that his previous submissions in regard to Nontsikelelo being a single witness were also applicable here. The same applied in respect of the State's submission that she had no reason to lie. In addition her claim that the accused had raped her only came to the fore when she was interviewed by counsel for the State. Prior thereto she had not made any mention of the rape to anyone. On the basis of Dr Klopper's medical examination which was only conducted on 1 August 2002 the findings that she had been raped were inconclusive. The evidence was therefore insufficient to sustain a conviction and the accused was entitled to be acquitted on count 2 as well. 15 20

In regard to count 3 Mr Dokolwana contended that the evidence did not prove that Zam had been raped. The findings from Dr Van Wyk's medical examination did not support that Zam had been raped nor did the evidence of Zam herself support this. He contended therefore that the accused was entitled to be acquitted on this charge as well. 25

Mrs De Kock made certain submissions in reply, but since these did not raise any new issues I do not intend to deal with them.

Before I proceed to an analysis of the evidence I need to pronounce on the application by the State to amend the indictment in respect of all three counts to reflect that each of the offences occurred on an unknown date and not in the month of November and December 1999 as previously alleged. After due consideration of the application I am of the view that the accused would be prejudiced should the amendment be granted at this late stage of the trial. Nothing prevented the State from seeking amendments immediately when it emerged from the evidence of the victims that they were unable to specify when the offences had occurred. Instead it was only after the Court had highlighted the contradiction between their evidence and the indictment that the State deemed it necessary to seek the amendments. If the amendments were to be granted at this late stage of the trial there can be no question whatsoever that it would clearly prejudice the accused in the defence that he has presented in respect of these offences. Throughout the trial the allegation was that the offences occurred in November and December 1999 and not on an unknown date. The accused's defence was conducted on the basis that these offences had occurred within the specified period. In my view it would not serve the interests of justice that I grant the amendment at this stage. I am not even addressing the question as to the failure of the State to identify at a stage prior to the trial commencing that it could not specify the particular time periods when the offences had occurred.

Accordingly the application to amend the indictment in respect of all three counts is refused.

I turn to consider the evidence tendered by the State. An analysis of the evidence in respect of the medical examinations conducted on the victims confirms the following:

- (a) Nontsikelelo Maseti was not examined by a doctor until 1 August 2002. That is a day before the trial commenced. This means that from the date that she first indicated that she had been sexually molested and the date that it emerged that she had been so molested which appears to be 2 December 1999 the medical examination only took place 2 years and 8 months after the report of the sexual molestation. Since the evidence tendered does not establish when the alleged offences in counts 1 and 2 occurred it is impossible to determine what period of time has elapsed between the actual incidents of sexual molestation and the medical examination. 5 10
- (b) This medical examination by Dr Klopper was done at the behest of counsel for the State Mrs De Kock to whom Nontsikelelo had revealed that in addition to being indecently assaulted she had also been raped. It is apparent therefore that this information, namely the allegation of rape only surfaced during the course of a pre-trial consultation conducted by Mrs De Kock and not at any stage prior thereto. 15 20
- (c) The examination by Dr Klopper revealed that there was a thickening and distortion of part of the hymenal rim and this was highly suggestive of vaginal penetration, albeit not of recent origin. Dr Klopper was unable to say exactly when the sexual molestation occurred except that it would have been at least 3 months before the medical examination conducted by her. 25

- (d) Although Dr Klopper could not exclude that the injuries could have been due digital penetration, that is by a finger, she was of the view that it was more likely due to penile penetration, that is by a penis.
- (e) Zam Mzele was examined by a Dr Van Wyk who was unavailable to testify. Instead the State submitted her report to Dr Klopper for comment. 5
- (f) Dr Van Wyk had recorded in her report that all her findings were normal. However, in conclusion she stated "Normal findings does not exclude sexual abuse." 10
- (g) In the report Dr Van Wyk recorded that there was an irregular border to Zam's hymen. When counsel for the State asked Dr Klopper to comment on this Dr Klopper confirmed that this was not abnormal.
- (h) Even though Dr Klopper agreed that the medical examination of Dr Van Wyk did not reveal any physical signs of sexual molestation she nevertheless agreed with Dr Van Wyk that this did not exclude sexual abuse. In support of this Dr Klopper has quoted various research studies. 15

The foregoing is the sum total of the medical evidence adduced by the State. On the basis of this evidence it is clear that Nontsikelelo Maseti was most probably sexually molested and possibly even raped and that this occurred at least 3 months prior to the medical examination conducted by Dr Klopper. It was possible that this could have occurred 4 to 5 years ago, but Dr Klopper could not determine exactly when it took place. Insofar as Zam Mzele is concerned the medical evidence does not corroborate that she was raped or even sexually assaulted in 20 25

any manner whatsoever.

In assessing the remaining evidence the following emerges:

- (a) In regard to count 1 the State's case rests on the evidence of Nontsikelelo herself and that of Babalwa. Theirs is the only direct evidence of the offence. Nontsikelelo's evidence in regard to what occurred was somewhat confusing. Initially she said that when the accused laid on top of her he had on a bikini underpants, she also said that she did not feel anything when he moved up and down. Thereafter she stated that he put his front thing, as she called it, inside her. That is her vagina. But thereafter she again said that it was only placed on her panties. 5 10
- (b) During cross-examination she said that the accused had been dressed in his pyjamas. She also said that at some stage Babalwa had looked at them and the accused had then told her, that is Nontsikelelo, to get out of bed. During cross-examination she said that when Babalwa looked at them it was the accused who had gotten off her and then told her to get out of bed. At some stage she also claimed that she did not know if Babalwa had seen what had happened. There were also contradictions and inconsistencies in her evidence and between her evidence and that of Babalwa. 15 20
- (c) In respect of count 1 Nontsikelelo said the accused called her to come to his bed. But Babalwa says she did not hear this. At the time this happened, however, Nontsikelelo was sitting on Babalwa's lap. 25
- (d) Further in respect of count 1 Nontsikelelo said that the accused told both her and Babalwa not to say anything about what had

- happened and gave them 10 cents. Babalwa on the other hand claimed that the accused had not said anything to her nor had he given her any money. Nontsikelelo stated further that after the incident she accompanied Babalwa to her home and waited there for her parents to fetch her. Babalwa, however, stated that Nontsikelelo accompanied her part of the way and then turned around and went home on her own. 5
- (e) According to Nontsikelelo when they were on their way to Babalwa's home she did not tell Babalwa what had occurred. Nor had Babalwa asked her about the incident. Babalwa on the other hand said that she asked Nontsikelelo what had happened and that Nontsikelelo replied that she should not tell anyone. Nontsikelelo had also said that she would give her some money. 10
- (f) They also differ in respect of other issues, but I do not intend to enumerate all of these. 15
- (g) It is of significance that although Babalwa claims that the accused had lain on top of her at some stage whilst she was lying in bed, she did not tell any of the adults of this. Surprisingly too no charges were preferred against the accused in respect of this incident, even though such conduct would have amounted to an act of indecent assault. No explanation has been tendered for the failure to charge the accused with this offence, if it indeed occurred, I cannot conceive of any logical reason for the accused not being prosecuted in respect of this unless the State was unaware thereof until it only emerged at the trial. 20 25
- (h) Count 2 was added to the indictment at the commencement of the trial. The reason for this charge only being included in the

indictment at such a late stage is that the State only became aware of the alleged offence during a pre-trial consultation. When applying for the amendment Mrs De Kock informed the Court that it was while she was consulting with Nontsikelelo in respect of count 1, namely the offence of indecent assault, that Nontsikelelo then disclosed to her that the accused had also raped her. As a result of this disclosure Mrs De Kock then arranged for Nontsikelelo to be examined by Dr Klopper on 1 August 2002.

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(i) The only direct evidence of the alleged rape has been provided by Nontsikelelo herself. At the time that it occurred Babalwa was asleep in the other bedroom. The partitioning between the rooms it has been said is not a solid structure but consists merely of a blanket. It appears, however, that at that stage was Babalwa aware of anything untoward happening in the room next door behind the blanket partitioning. After the accused had sent Nontsikelelo back to the other bedroom she claimed she did not tell Babalwa what had happened as the accused had said he would give her a hiding and had also given her money to keep quiet.

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(j) Nontsikelelo stated further that the reason for her not telling her mother was because she was afraid of her mother. She admitted, however, that she enjoyed a good relationship with her mother. Yet in spite of her supposed fear of her mother she nevertheless told her of the incident where the accused had lain on top of her at the time that Babalwa was present in the room.

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(k) The indictment alleges that both the act of indecent assault and the act of rape occurred in November 1999. During cross-examination Nontsikelelo first said that both incidents occurred

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before 1998. And later claimed she was four or five years old when these incidents took place. At the time that she testified her age was given as being 12 years, if this is so, then the incidents would have taken place in either 1994 or 1995. Not surprisingly due to the confusion in regard to when the offences supposedly occurred the State was compelled at the very belated stage of the proceedings to seek an amendment in respect of the dates of the offences. This application has of course failed.

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(l) In regard to count 3 the only direct evidence of the rape is again that of the complainant, in this case Zam Mzele. On the basis of her testimony, however, it is clear that sexual intercourse did not take place. Her evidence should it be accepted by the Court does not disclose that she was raped, but that she was indecently assaulted.

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(m) I consider the foregoing to be the most pertinent issues to arise from the testimony of the witnesses.

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I turn now to consider the reliability of the evidence tendered by the State as well as the credibility of all the witnesses. In respect of the two complainants and their witness Babalwa Siney I am mindful of the fact that they are young children, they may therefore not have the ability to remember dates and recall events in the same way as adults do. Their ability to express themselves is also quite clearly not as well developed as that of most adults. But even if I allow for this there are various aspects of their evidence which nevertheless gives rise to problems. Nontsikelelo Maseti did not impress me as a witness nor did Babalwa Siney. Not only did they contradict each other in material respects, but crucial aspects of their evidence were improbable.

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In respect of count 1:

The reasons provided by them for their failure to disclose to their parents or someone else either that evening or shortly thereafter of what had occurred to Nontsikelelo is difficult to accept. They have contradicted each other in respect of why this did not take place and although Nontsikelelo claims that she feared that the accused would give her a hiding if she told anyone she is contradicted in respect of count 1 by Babalwa. Babalwa only mentions that the reason why she was asked to keep quiet is because Nontsikelelo had offered her money to do so.

In respect of count 2:

It is even more difficult to accept that if Nontsikelelo had been raped that she would not have said anything to Babalwa when she returned to the bed in which the two of them were sleeping. After all she witnessed the accused climbing on top of Babalwa and Babalwa having to push him away. I will return to this in due course.

While Nontsikelelo's mother Zolelwa Patricia Maseti stated that Nontsikelelo revealed on 2 December 1999 what had taken place there is no indication in any of the evidence when this act of indecent assault would have occurred. What is more Mrs Maseti claimed that Nontsikelelo had said that she was raped whereas what Nontsikelelo had described to her was an act of indecent assault. But even insofar as this is concerned the act of indecent assault as described by Mrs Maseti clearly differed to that as related by Nontsikelelo. During cross-examination Nontsikelelo claimed that the incidents occurred before 1998, in contradiction to the averment in the indictment that it had occurred during November 1999. In view of these host of contradictions

it is impossible to establish when the incidents in both counts one and two occurred, it is obvious from what I have said that it spans a difference in time periods stretching over a few years. No matter how much I allow for the inability of children to be able to provide dates etc, the unreliability of their evidence in this regard does not enable me to draw any conclusion as to when these offences may have occurred. As I have indicated Nontsikelelo's failure to tell Babalwa that she had been raped by the accused, and this relates to count 2, is inexplicable. There was no apparent reason for her not even to disclose to Babalwa that the accused had also lain on top of her, the two incidents are so close to each other in terms of time period that I find it difficult even allowing, as I have indicated, for the difficulties children have with time periods to accept that she would not have disclosed what had taken place. Moreover even if I allow for the fact that she was only 9 years of age at the time or possibly even a year or two younger it is by no means unreasonable to have expected that she would have told Babalwa at the very least that the accused had picked her up and carried her to his bed and then laid on top of her. To some extent one could understand that she might possibly have been embarrassed to go into more detail, that is to disclose the act of rape or to describe what further had taken place, but her total silence is impossible to understand. Whilst Dr Klopper has quoted from various research studies that children may not easily disclose what has happened the absence of any psychological evidence relating to Nontsikelelo in regard to her psychological state does not enable me to simply draw the conclusion that this has happened in her case as well.

Equally difficult to understand is Nontsikelelo's failure to tell her

own mother when questioned by her that she has been raped, instead the only incident that she did disclose is the one where she and Babalwa were in the same room watching television with the accused and where Nontsikelelo then went to lie in the same bed with the accused. I should mention that as much as one may be sensitive to the fact that children 5
 ying with adults in the same bed may lead to untoward sexual contact the fact that an adult and young child are in the same bed does not necessarily warrant the conclusion that something improper is taking place.

Equally puzzling to me is Babalwa's failure to disclose to anyone 10
 that the accused had lain on top of her and that she had been forced to push him away. As I have indicated previously it appears to me that the failure to charge the accused with this offence could only be as a result of this information surfacing when Nontsikelelo and Babalwa testified.

I turn to the issue of how Nontsikelelo came to reveal the details 15
 that have resulted in count 2 being included in the indictment. From what Mrs De Kock has conveyed to the Court to the effect that details of this offence only emerged during pre-trial consultations with Nontsikelelo it has created a serious difficulty in this regard. It is clear that on the basis of this disclosure Mrs De Kock, and rightly so I may 20
 say, arranged for Nontsikelelo to be examined by Dr Klopper. This resulted in Nontsikelelo only being examined on 1 August 2002. But the problem that this has caused in respect of the State's case is that there is no evidence before this Court in respect of what Nontsikelelo conveyed to Mrs De Kock. I appreciate the invidious situation Mrs De 25
Kock found herself in, but at the end of the day unless she testified about what Nontsikelelo told her the comments she has made from the

Bar does not amount to evidence which is of a sufficient nature for this Court to be able to accept without further ado what took place. I want to emphasise that I cast no reflection on the character of Mrs De Kock whatsoever. I fully accept that she has in a bone fide manner conveyed to the Court what has taken place, but the difficulty is this: Mr Dokolwana could not cross-examine her on what Nontsikelelo has disclosed to her since she did not testify. This opportunity would have been available to Mr Dokolwana in the case of any other witness who was called to testify to disclose what Nontsikelelo had told her in respect of the rape. Accordingly I must regard what has been conveyed to me in terms of its evidential value with caution and I re-emphasise that it is not because I in any way doubt the truth of what Mrs De Kock has conveyed. It should be apparent however to all that in terms of our procedures in regard to trials that a person should be available to be cross-examined. While Mrs Maseti in her testimony eluded to the fact that she had become aware of the information that had been conveyed to Mrs De Kock the evidential value of this testimony is very little. Moreover as will become apparent shortly I must treat Mrs Maseti's evidence with a great deal of circumspection. In the circumstances I must find that there is no corroboration of what Nontsikelelo disclosed to Mrs De Kock when she claimed that such an act of rape had occurred.

In my assessment of Nontsikelelo Maseti and Babalwa Siney I am unable to hold that they were credible witnesses. I do not find their evidence to be reliable. The same applies to Mrs Zolelwa Patricia Maseti the mother of Nontsikelelo. She created a very poor impression. I appreciate the difficulty and the trauma a parent has to experience when exposed to an allegation that the child has been sexually molested

or raped. It does not require any deal of imagination to realise what a traumatic experience that must be. But what emerges from her evidence is that facts seems to have become submerged with speculation and supposition and hearsay evidence. I found it impossible to sift what is fact from the rest. I consider it unsafe to rely on the versions of either of these witnesses as the truth of what occurred. 5

In regard to count 3 it is evident that neither the evidence of the complainant Zam Mzele herself nor the medical evidence proves that sexual intercourse occurred. The question remains whether the evidence does not establish that she was indecently assaulted. It is 10 evident that Zam had originally claimed that she has been raped and hence the accused was indicted on such a charge, but this was clearly not her evidence. I have not been provided with any explanation for the serious deviation from her original claim. In the absence thereof her truthfulness as a witness is adversely affected. There were in addition 15 improbabilities and inconsistencies in her version of the events. She was also vague in regard to when the incident occurred and it is not possible to conclude in which year even this took place. I do not find her to be a credible witness nor do I consider her evidence to be reliable. The evidence of Zam's mother, Nombeko Mzele, was even more 20 unreliable. Her evidence was riddled with speculation, supposition and hearsay. Mrs Mzele was an extremely poor witness. Many of her replies were evasive and did not make sense. She was by no means a credible witness and I cannot place any reliance on her evidence, it is clearly unreliable. 25

I failed to mention that the problem regarding the delay in the statement from Mrs Maseti has not been clarified in any manner

whatsoever. She also seemed to me to display a total indifference in regard to exploring further the information she had received and whether the case was being pursued or not or properly investigated or not.

I am left with the impression at the end of the day that certain events may very well have taken place, but it is impossible to determine exactly what that is. It may very well be that on some day the accused asked Nontsikelelo to climb into the bed with him, but I am unable to find that beyond a reasonable doubt. It may even be that at some stage he went to lie on top of Babalwa, but again because of the poor nature of the evidence I am unable to conclude that this is what took place. I am not even able to find that he may have sexually molested Nontsikelelo by using his finger or anything of that nature. The quality of the evidence tendered by the State left much to be desired. The unreliability of the evidence creates serious problems in the State's attempt to seek a conviction either on the charge of indecent assault or on either of the charges of rape or any competent offences.

The accused's version was a very simple one in that he denied any wrongdoing in respect of both Nontsikelelo and Zam. His was a simple story to tell and whilst he may not have been the best of witnesses I do not find it possible to reject his version as being false. The test has been adequately stated in a number of cases. It is not a question whether I personally believe him, the question is whether it can be said that the version he has provided is not reasonably possibly true and it palpably false. The State has failed to show that this is the case in cross-examining the accused. Even though the cross-examination revealed certain uncertainties in the accused's version these were not of such a nature that I would be justified in rejecting his version as an

untruth or as a story that he has concocted in order to conceal the truth. It has been stated also in a number of decided cases that it is not for the accused to prove his innocence but for the State to prove his guilt beyond a reasonable doubt.

After weighing up the evidence in its totality I find that the State has failed to prove the guilt of the accused beyond a reasonable doubt in regard to any of the counts in the indictment. In view of the unreliability of the evidence I am unable to find that it would be correct to conclude that the accused is guilty of a competent offence in respect of any of the charges. Whatever suspicions the evidence may have evoked the fact remains that the evidence does not reach the requisite standard necessary to sustain a conviction in respect of any of the offences.

In the result the accused is found not guilty and discharged of the offences of indecent assault and rape set out in counts 1, 2 and 3 of the indictment.

Y EBRAHIM : JUDGE PRESIDENT
BISHO : HIGH COURT