

IN THE HIGH COURT

(BISHO)

CASE NO.: CC5/2002

DATE: 4 JUNE 2002

In the matter between:

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THE STATE

versus

SIKELELA 'JOLA' MZANYELWA

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EX TEMPORE JUDGMENT:

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EBRAHIM J:

The accused, Sikelela "Jola" Mzanyelwa has been charged with the crime of rape. The indictment states:

"..that on diverse occasions during the period extending from the month of June, 2000 to the 16th day of February, 2001, the accused did unlawfully and intentionally have sexual intercourse with Surea Malgas, a female person who was then a child of nine years of age, and incapable in law of consenting to the act of sexual intercourse."

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The accused pleaded not guilty to this charge. In terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 Mr Magqabi who appears for the accused disclosed the basis of his defence and this was that the accused denied that he had sexual intercourse with Surea Malgas. The accused confirmed that it was correct as conveyed by Mr Magqabi.

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Ms Esau who appears for the State applied in terms of section 170A of the Criminal Procedure Act, 51 of 1977 for the victim who is a

child now of 10 years of age to be allowed to testify through an intermediary. This was not opposed by the defence and the application was granted. The State called Miss Zoliswa Magwentshu who testified that she had a B Social Science degree in Social Work and was registered in terms of the Social Service Profession Act of 1978 to act as an intermediary. She had acted as an intermediary in over 30 cases. Her evidence was not challenged by the defence. Miss Magwentshu was then sworn in to act as an intermediary. 5

Surea Malgas was then called to testify. In view of the fact that she was 10 years old the Court questioned her in order to establish if she was able to differentiate between a lie and the truth and what the consequences were of telling a lie. The Court was satisfied that she was able to distinguish between the truth and a lie and that she was therefore a competent witness. It was evident however that she did not know what an oath was and the Court then admonished her to tell the truth. 10 15

She testified that she was presently in Substandard A at school. She knew the accused as Buti Jola. She, her brother Ndoda and her mother had resided with him at NU 4 Mdantsane. She stated the accused had done, as she described it filthy things to her. She described what the accused did as 'tabu' and that 'tabu' was rape. She said the accused had taken off her panty when she refused to do so and made her lie on a bed. The accused then undressed and lay on top of her. He inserted his penis in her vagina and moved his bum upwards. She claims that it was painful and also that she did not know how long this continued. She also says she felt she was wet. When it was over she and the accused dressed. The accused had then taken out a 20 25

big knife, shown it to her and said that he would kill her if she told anyone what had happened. She claimed that it was not the first time that the accused had done this to her and that it had happened many times. Afterwards she went outside and told her brother Ndoda, who was playing with his friends, that the accused had raped her. Ndoda did not reply. Thereafter they went to her sister and NU 2. She indicated that the person that she was referring to as her sister was actually her mother and that she had always referred to her as her sister. She could not explain why this was so. She did not tell anyone else what had happened, but Ndoda told her aunt, Nandipha. She was present when Ndoda told her aunt. She was taken to a doctor at the hospital who examined her vagina.

During cross-examination by Mr Maggabi she said that the incident that had occurred was not the first time the accused had raped her. She could not explain why she had said in her evidence in chief that it was the first time if it was not so. It was also not the last time that the accused had raped her. When the accused raped her again she also told Ndoda of this. She was asked if she recalled making a statement to the police, but said that she did not know if the person was a policeman, but it was a Mr Slager. Mr Maggabi confirmed that indeed it was an Inspector Slager who had taken the statement and proceeded to question her on its contents. Although she had said it was the first time that the accused had raped her, she did not know why she had said so. She conceded that it was a lie to have said so, since she now maintained it had not been the first time. She also said she could not explain why she remembered this incident if it was not the first time that it had occurred. She could not provide any explanation for why she had lied.

She had heard about rape from her friends after the incident. To her rape meant that a person was doing filthy things. She had not told her mother what had happened to her as the accused had said that he would kill her if she told anyone. She had not told Inspector Slager that she had told her mother or her aunt Nandipha. She did not play afterwards and did not tell Inspector Slager either that she went to play with Ndoda and the others. She then admitted that she had played, but said that she stopped and called Ndoda aside and whispered to him what the accused had done to her and then told him to go and play again. Although she was upset at what the accused had done to her and her private parts were painful she joined the others to play. On the other occasions she was playing outside with her friends when the accused fetched her and took her into the house. She had resisted and screamed, but he picked her up and chased her friends away. On each occasion she had also told Ndoda what had happened. She and Ndoda were taken to her grandmother's home at NU 2 on the same day as this incident and did not return to NU 4. When asked how the accused could have raped her again if she had not returned to NU 4 she said she went there for holidays. But then she said that she had never gone and subsequently again said that she went there for holidays. She denied having visited her mother at NU 4 this year, that is the year 2002. She had never told her mother that she did not want to go back to NU 4.

In reply to questions from the Court she said that she could not remember how many times the accused had raped her. She cannot remember when this particular incident had occurred, but the other incidents occurred before this one. There had been a long interval between each incident. Ndoda was her younger brother and had been

8 years old last year. She had told him but not anyone else as the accused had said he would kill her if she told anyone. She could not explain why she had then told Ndoda if the accused had threatened her. She did not know when the accused and her mother stopped living together or why this had happened. Although she and her mother enjoyed a good relationship she had not told her because of the accused's threat to kill her. After Ndoda told her aunt she confirmed to her aunt what the accused had done to her despite the accused's threat. She could not explain why she had done this. She did not know if she was happy or not when she stayed with her mother and the accused, she also did not know if the accused had ever given her hiding for any reason. But then said that he had not beaten her at any time. She had also not told anyone that she had heard her mother and the accused arguing about her telling her mother what the accused had done to her.

The next witness was the victim's brother Lwando Malgas. The Court conducted a similar enquiry in his case as had taken place in respect of Surea in order to establish if he understood the difference between a lie and the truth. The Court was satisfied that he was a competent witness and he was then admonished to tell the truth.

After his evidence in chief and shortly after Mr Magqabi had started cross-examining the witness the Court realised that the State had not adduced his evidence through an intermediary. The Court then ruled that his evidence had to be adduced afresh with the assistance of an intermediary.

The following was his testimony as given through an intermediary. He said he was 8 years old and in Substandard "A". He knew the accused as Buti Jola. He said he came from school one day and

undressed and Buti Jola then said that he had to go out and play whilst Surea had to remain inside. He left and went to play at Anela's home. Later Surea came there and told him that the accused had thrown her on a bed and raped her. He had told his father's sister, whom he referred to as Timama of this but had not told anyone else. (I should mention that Lwando is also known as Ndoda.)

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Cross-examination revealed that he had not told his mother in view of the fact that the accused had threatened to kill Surea. However, when he told his aunt he had not been afraid that the accused would kill her. He was unable to say why he had not been afraid at that stage. He did not know what was meant by Surea having been raped by the accused. He had also not asked Surea what she meant by this. He could not remember if they went to stay at his grandmother's home at NU 2 on the same day that Surea had told him. He thought this had taken place on another day. Surea had only told him on one occasion that she had been raped. When she told him she was happy and had been smiling. It was only after he had been staying at NU 2 for a long time that he told his aunt of this incident. He told her as he was afraid the accused would kill Surea. He could not explain why he thought so.

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In response to questions from the Court he said that he went to his aunt out of his own to tell her as he was afraid the accused would kill Surea. He had never told Surea that he was going to tell his aunt. After Surea had told him of the incident he had never spoken to her again about it. He could not remember when she told him of this and was also unable to say whether it was near to Christmas or not, or when it had occurred. Surea had never told him how she felt about what had happened to her, nor did he ask her. When Surea came to him to tell

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him he was playing with a ball. After she told him Surea then went to play with a skipping rope and jumped up and down. He could not remember how long she played with the skipping rope nor if she had played any other games.

Nandipha Gomba was next to testify. She said Ndoda had told her that Surea was raped. She then asked him by whom she had been raped and he said it was Buti Jola, that is the accused. Surea had cried and she comforted her. She had asked Surea if she had told her mother. Both Surea and Ndoda told her that they had told their mother. Ndoda had told her about the incident when she had asked him who had bathed and fed them, she did not remember on which date this conversation took place. She had known Surea since birth and said she was a bright fresh child although still fresh as she says, was now forgetful. She explained fresh as meaning that Surea played with other children and easily answered questions when asked. Surea was still in Substandard "A" whereas her own child of the same age was in Standard 2.

When cross-examined she said she thought that Ndoda had told her of the rape at the beginning of last year, that is the year 2001. But she was uncertain if this was so. She did not remember when Surea was taken to the doctor and said it might have been the following week. Ndoda had told her of the incident on a Friday and she had then told her mother on the Saturday. The children had been staying at NU 2 for a while before Ndoda told her of the incident. Surea had confirmed that she was raped while she was busy comforting Surea. Surea had also told her that the accused would kill her if she told anyone. She never asked Surea what had happened. Neither Surea nor Ndoda told her how the rape occurred and she had not asked. She had not asked when the

rape had occurred either. She said that she had not inspected Surea's private parts. She denied that she dislike the accused, and said that she did not know him. She was seeing him for the first time in court. She denied her mother was trying to get the children's mother and their father to reconcile. She denied she and her mother had fabricated the story of rape and told the children to do so.

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In reply to the Court's questions she said that her younger brother was the father of the children. He brother and the mother of the children had parted at a time when Ndoda was still very young. Prior to the mother of the children and her brother parting company the mother left the children with the witness's mother and would fetch them from time to time. She did not know when the relationship between the accused and the children's mother started but said it was some while after the mother had parted from her brother. She could not say how old Ndoda was when he told her of Surea's rape. She thought that he may have been 5 or 6 years old. Ndoda's exact words to her were:

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"Surea was raped."

When she asked Ndoda what he meant all that he said was that she was raped. She had not asked Ndoda what he meant by rape. However, she was not surprised that he had used the word rape. She had not asked either of the children when the incident of rape had occurred. When she asked Surea what had happened, Surea replied that she was raped.

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Questioned further by Mr Maggabi she was asked if Surea said how many times she had been raped. She replied that she had no power to ask as Surea had cried. When the question was repeated she said that she had not asked Surea. Surea had also not indicated out of

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her own how many times she had been raped.

The next witness was Dr Ntombe Tamsanqa Ntsebeza. She was a qualified medical practitioner and had been in practice for 4 years. On 22 February 2001 she examined Surea Malgas and recorded her findings on a form J88, that is **EXHIBIT "B"**. She observed that the hymen of Surea's vagina was incomplete, it had lost its normal structure. There were scarring on both side of the urethral folds and there was a bump on the anterior vaginal wall. The bump was a remnant of the hymen. It appeared to her there had been penetration of the vagina, but it was not of recent occurrence.

During cross-examination she was asked about her experience in respect of rape cases, she indicated that she had not undergone any special training, but had been examining children since she qualified in 1998. She described the injury to the hymen as an injury caused by a blunt instrument. She concluded that there had been penetration as the hymen was not intact. She conceded the hymen could be disrupted as a result of exercise, but said it was unlikely that this would leave scarring around the urethra. She could not say what the age of the scar tissue was, but healing was a long term process and therefore the injuries were not of recent origin. The hymen could rupture if a child play with the vagina and inserted her fingers. But the position of the scarring made this unlikely. It appeared to her the injuries had been caused by penetration by a penis. This would not result in the hymen being completely destroyed as it depended on the frequency of penetration.

In reply to the Court's questions Dr Ntsebeza said she must have been told that the child had been raped. She had not recorded this on **EXHIBIT "B"**, but it would probably have been written on the hospital

folder. She could not recall if she had been told that the child had been raped more than once. She could also not say if this was the case merely from her clinical notes. She could not exclude that the injuries may have been caused by some other instrument, but it was more probable that it was as a result of penetration by a penis. It would not surprise her if there had been penetration on five occasions.

Ms Namhla Soga then testified and said she was a school teacher. Surea was in her class, that is Grade 1 for the second year. Surea was forgetful and did not understand the school work. Surea appeared not to listen to what was said in class. It even took Surea some time to write the word 'lala'. In her view Surea could not write at all. New learners appear to fare better than Surea.

She was not cross-examined.

In reply to a question from the Court she said there were several reasons why a child did not learn well. In reply to a further question from Ms Esau she said that a dramatic event could cause a child to have learning problems.

A certified copy of the birth certificate of Surea Malgas was then tendered in evidence, that is **EXHIBIT "C"**.

This concluded the case for the State.

The accused then testified in his own defence. He indicated that his correct first name was Sikelela and not Siseko. He, Surea, Ndoda and their mother had lived together. As a result of an argument between the children's mother and himself the children went to stay with their grandmother at NU 2. He denied that he had sexual intercourse with Surea. He had never produced a knife nor had he threatened to kill her. He had not asked her to remain behind in the house while Ndoda

went outside to play. He knew who Nandipha Gomba was, she was a family member from the home of the children at NU 2. The relationship between members of the children's family and himself was not a good one. He claimed they were not in favour of him living with Surea's mother. Surea was accusing him of raping her as she had noticed that her family members at NU 2 disliked him and wanted him to part company with her mother.

During cross-examination by Ms Esau he said he had a relationship with Surea's mother, Nomvuyo for about 5 to 6 years. Nomvuyo and he were presently still living together. At the time that the children stayed with them they did attend school. On occasions he would be at home when they came from school and he would then take care of them. The children would undress themselves, have something to eat and then go outside to play. He would be busy working outside. He did welding work and was self-employed. The children and he had a good relationship. The allegation of rape had only been made after the children went to stay at NU 2 at their grandmother's home. The allegation was made about a month or two after they were there. He had never been to the home of the grandmother, nor that of Nandipha Gomba and had never argued with either of them. The grandmother had come to visit at his home at NU 4 but never entered the house. The grandmother and her family members would park outside and call to Nomvuyo and the children and then hand things to them. He had also seen Ms Gomba there. Nomvuyo had pointed out the grandmother and Ms Gomba to him. They never spoke to him and he asked Nomvuyo why they did not come inside. He again denied raping Surea or threatening to kill her and said he had never had sexual intercourse with

her. He said that if he had done this things to her she would have told her mother. He had been told by Nomvuyo's sister, Tandiwe, that the grandmother and the other members of the family wanted the grandmother's son to reconcile with Nomvuyo.

In reply to questions from the Court he said the house was a shack 5  
structure and that it had two rooms. He and Nomvuyo slept in the bedroom and the two children in a bed in the kitchen. Nomvuyo had never spoken to him about the relationship between Surea and himself, nor had she raised any problems in regard to this relationship. Nomvuyo only told him of the accusation of rape on the day when she came from 10  
NU 2 and it was the same day that he was arrested. After his release Surea and Ndoda had still come for visits and spent weekends with them. These had been problem free. Nomvuyo fetched the children at the grandmother's house and would then return them after the weekend. At present he and Nomvuyo was still living together. 15

This concluded the case for the defence.

Both Ms Esau and Mr Maggabi addressed argument to the Court. I do not intend detailing their submissions. The relevant aspects of their submissions will become apparent during the course of my evaluation of the evidence and from the conclusions I have arrived at. Suffice to say 20  
that Ms Esau submitted that the guilt of the accused had been proved beyond a reasonable doubt whereas Mr Maggabi submitted that the State had failed to do so.

An evaluation of the evidence reveals the following:

1. In her testimony Surea Malgas claimed that she had been raped by 25  
the accused a number of times and that the incident she was describing to the Court was not the first occasion he had raped

her. In spite of this claim on her part Ms Esau did not ask her to related what had occurred on any of the other occasions. Surea's testimony was confined solely to what allegedly occurred in respect of one incident. Her evidence therefore does not substantiate the allegation in the indictment that the accused

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"on diverse occasions during the period extending from the month of June, 2000 to the 16th day of February 2001" had sexual intercourse with her. This is a material contradiction between her evidence and the indictment and reflects adversely on her credibility.

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2. Surea Malgas was not able to provide any indication of when the accused had raped her. The State has not adduced any other evidence to indicate on which date the act of rape, which Surea testified about, had occurred. Neither the evidence of Lwando Malgas, nor that of Nandipha Gomba was of any assistance in this regard. There is no substantiation therefore that it occurred during the period June 2000 to 16 February 2001.

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3. The evidence of Dr N Ntsebeza indicates that it is unlikely that the injuries which Surea had sustained to her vagina could have been caused through exercise or by Surea herself. The injuries were most likely as a result of penetration by a penis. However, it was apparent that the injuries were not of a recent nature as scar tissue had formed. Healing was a long process until finally scar tissue was formed. This evidence does not support the State's claim that the intercourse took place until 16 February 2001 a mere 6 days before the medical examination. Dr Ntsebeza could also not exclude that the injuries may have been caused by

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another blunt instrument, but she thought this was unlikely. While her evidence does indicate that Surea was sexually molested it does not provide any acceptable prove in regard to when this occurred. The fact that the injuries had healed made it impossible for Dr Ntsebeza to place any time frame on when such molestation may have occurred. Her evidence does also not link the accused to any of the acts of sexual molestation which she says occurred.

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4. Surea says that immediately after the accused raped her she went outside to play, even though her vagina was painful. Ndoda goes further and says she played with a shipping rope and jumped up and down. In her submissions Ms Esau said that there was nothing improbable in this. I do not agree. It is hard to imagine a child of 9 years playing with a skipping rope and jumping up and down immediately after she had been raped by an adult. Ndoda even said she was happy and was smiling. I find it improbable that she would have reacted in this manner if she had been raped a few minutes earlier.
5. Surea claimed she was raped a number of times and on each occasion she told Ndoda afterwards that the accused had raped her. Ndoda, however, speaks of only one incident. Nandipha Gomba also refers to a single act of rape. This is a material contradiction. Ms Esau has brushed this aside on the basis that Surea and Ndoda are young children. I am mindful of their tender years, but this cannot justify writing off as a misunderstanding or a mistake on the part of either of them an issue which is of a material nature. It impacts directly on whether the allegations in the indictment are true or not. Needless to say it does not

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substantiate the allegation that sexual intercourse took place on diverse occasions.

6. During the cross-examination of Surea Malgas various contradictions were revealed between her evidence and the statement the police had taken from her on 14 March 2001, 5  
namely **EXHIBIT "A"**. Ms Esau argued that the Court should disregard these contradictions as the defence had not proved that Surea had made the statement. Surea had said that she could not remember having append her mark to the statement. The defence  
Ms Esau says failed to call Inspector Slager who took the 10  
statement in order to prove that Surea had made it. When the Court asked Ms Esau if she refuted that the statement had been handed to the defence as a statement which Surea Malgas had made to the police Ms Esau accepted, if somewhat reluctantly, that this was so but persisted that the Court could not place any 15  
reliance on it. I am not impressed with the position adopted by the State. At no stage during the trial did the State indicate that the veracity of the statement was being disputed and that its contents had to be proved. I find this argument without merit.  
When Mr Maggabi initially asked Surea if she could remember 20  
making a statement to the police she responded by saying she had made a statement to a Mr Slager, but did not know if he was a policeman. Mr Maggabi then confirmed to her that it was indeed an Inspector Slager who had taken the statement. This fact is evident from the statement itself. Surea did not deny making a 25  
statement, but claimed merely that she could not remember saying certain things. The interest of justice required that this evidence

should be admitted and I accordingly admit same.

The contradictions which emerged are the following:

- (a) During cross-examination she claimed that the incident she had related was not the first time the accused had raped her. But in the statement she said that it was the first time. She was unable to explain this contradiction. 5
- (b) During cross-examination she claimed that she did not play outside, but in her statement she said she did. She denied that she told Inspector Slager this. Later in cross-examination she again said that she had played outside. 10  
Her testimony was that she had not told her mother what happened, but in her statement she claimed to have told her mother on one occasion and had added that her mother now claims that she had not done so. It is self-evident that these contradictions are of a material nature. 15

- 7. As I have pointed out the testimony of Surea Malgas is by no means satisfactory. There are numerous contradictions, inconsistencies and improbabilities in it. She claims she was afraid to tell anyone what had happened as the accused had threatened to kill her, yet she had no hesitation in telling her younger brother Ndoda 6 years of age immediately after she had supposedly been raped and threatened with death. At no stage, however, did she confide in her mother with whom she had a good relationship, nor even in any other adult. I do not consider that she was a credible witness and I find her testimony unreliable. 20 25
- 8. There are also improbabilities in the evidence of Lwando Ndoda Malgas. While he says Surea told him she had been raped by the



accused, he never asked her what she meant by this. He clearly had no conception of what rape meant and could not provide an explanation when asked to do so in court. He claims he never told their mother because of the accused's threat that he would kill Surea. Yet the same threat did not prevent him from telling his aunt, Nandipha Gomba. On the contrary he says it was because of the threat that he told his aunt and when asked why the accused would kill Surea he said he did not know. I was not impressed with him as a witness, nor his credibility and I do not consider his testimony to be reliable. I am unable to rely on his evidence.

9. Nandipha Gomba was not only a poor witness, but her evidence was riddled with improbabilities, inconsistencies and contradictions. She was evasive and uncertain with many of her replies. She cannot provide any idea of the date when Ndoda told her Surea had been raped, nor when Surea was taken to the doctor. These events were of an important nature and her failure to provide any indication of when this occurred is to say the least highly questionable. Whilst she claims that the allegation shocked her she made no attempt to tell her own mother, that is the grandmother of Surea immediately but waited until the following day, she also made no attempt to find out from Surea herself what had happened, she claims Surea was crying and therefore could not pursue the matter. It is clear she did not even bother to find out after Surea had stopped crying. There are various other improbabilities in her testimony as well. She was by no means a credible witness and I find her testimony to be

unreliable, accordingly I cannot place any reliance on her evidence.

10. In his testimony the accused denies that he raped Surea or threatened to kill her. He claims that the children's grandmother and the members of her family are not well disposed towards him. He suggested they had put Surea up to making these false allegations against him as Surea's grandmother would like to see her own son reconcile with Nomvuyo who is the mother of the children. He says that when the grandmother and Nandipha came to his home they never entered, but remained outside in the car and called the children and Nomvuyo to hand over whatever they had brought for them. Ms Esau submitted that the accused's version must be rejected as there was no evidence that there was any ill-feeling between him and the grandmother and other members of the family. I cannot agree. Ms Gomba admitted that she had never seen the accused before she testified in court, however, she was aware that the accused and Nomvuyo had been living together for a number of years. Prior to Surea and Lwando moving to their grandmother's home they stayed with the accused and Nomvuyo. I find it strange that throughout this entire period neither Nandipha nor her own mother appeared not to have made any effort to meet with or speak to the accused. This is despite the fact that the accused was now to all intents and purposes the father figure in the lives of the children in place of their real father, that is the son of the grandmother. I do not find it improbable that they kept their distance and did not want to associate with the accused. There is no evidence to contradict the accused's claim that the relationship between him and the grandmother and

other members of her family was not a good one. Similarly his claim that they may have influenced Surea and Lwando against him, cannot without more be rejected. But even if it is rejected it is still does not assist the State and there is no onus on the accused to show that Surea has a motive to lie. The State bears the burden of proving his guilt beyond a reasonable doubt. ms Esau's submission that the accused is lying when he says that the children still visited him after the incident, is without substance.

There is no indication that his claim is false. Indeed the State could not contest his claim that he and Nomvuyo the mother of the children still live together. It is by no means unlikely therefore that the children do visit his home. The accused was a reasonable witness and did not contradict himself in respect of material issues during cross-examination. Whatever criticisms one may wish to direct at his story there is no basis for rejecting it as false. In my view his version is reasonably possibly true and I accordingly accept same.

The State case rests on the evidence of a single witness. She is a child who is presently just over 10 years of age. As I have indicated she was an unsatisfactory witness and her testimony was beset with contradictions, improbabilities and inconsistencies. I do not find her testimony to be reliable. Mr Magqabi is correct when he submitted that her evidence is not clear and satisfactory in every material respect. In the absence of any corroboration her evidence cannot sustain a conviction. It follows that the State has not discharged the onus which rest on it and has failed to prove the guilt of the accused.

One final issue requires comment and this concerns the manner in

which the indictment has been drafted. The allegation that the accused had sexual intercourse with Surea Malgas on diverse occasions clearly indicates that there were a number of acts of sexual intercourse it is clear that these should have been reflected as separate and distinct counts of rape. In this respect the indictment was defective and would not have permitted a Court to return a conviction on a number of counts of rape which, so Ms Esau informed me, the State was indeed seeking. This issue is, however, no longer of relevance in view of the failure of the State to secure a conviction.

In the result the accused is found not guilty and discharged of the crime of rape as set out in the indictment.

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Y EBRAHIM

JUDGE

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BISHO HIGH COURT