

IN THE HIGH COURT

(BISHO)

CASE NO.: CC76/2002

DATE: 6 JUNE 2003

In the matter between:

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THE STATE

versus

ZALISILE POLISA VALAKAHLA

EX TEMPORE JUDGMENT:

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EBRAHIM J:

The accused has been charged with the offence of rape, in that on or about 1 September 2001 and at or near Zone 2, Zwelitsha, in the district of Zwelitsha, the accused unlawfully and intentionally had sexual intercourse with Andiswa Davashe, a 6 year old girl.

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On 3 October 2002 before the accused was asked to plead to this charge Mr Dukada, who appears for the accused, informed the Court that he had not been able to consult properly with the accused and had been unable to ascertain what the accused's defence was to the charge.

Mr Dukada stated further that it appeared that at some stage the accused had attended a school for mentally handicapped children, but he had not been able to verify this or investigate it further due to a lack of time. The accused, Mr Dukada said, did not know what he was alleged to have done, nor did he know why he was here. The accused was also not able to comprehend what Mr Dukada's function was.

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In view of this Mr Dukada applied for the accused to be examined by a Dr Pentz who had previously treated him for the purpose of

establishing his mental condition. Dr Pentz was stationed at the Cecilia Makiwane Hospital. The application was not opposed by Miss Ncobo who appears for the State. The Court thereupon ordered that the accused be examined by Dr Pentz and postponed the case until 28 October 2002 to await his report. 5

On 28 October 2002 a brief report from Dr Pentz was handed in and this is **EXHIBIT "A"**. In the report Dr Pentz briefly outlined that the accused had never attended school and was mentally retarded. Dr Pentz indicated further that the accused denied that he had raped anyone and had said that he had no knowledge of such an incident. It was the 10 opinion of Dr Pentz that "the accused was not fit to give evidence in court".

Miss Ncobo informed the Court that in view of this the State would be seeking an order that the accused be committed to Fort England Hospital for psychiatric observation. This was supported by Mr Dukada. 15 However, this application was to be made later and accordingly the case was postponed until 13 December 2002 for this purpose. The delay in the application had been necessitated as there were no beds available at the Fort England Hospital.

On 13 December 2002 Mr Dukada moved an application for the 20 accused to be committed to the Fort England Hospital for psychiatric observation. This was not opposed by the State. The Court thereupon granted an order which is set out in **EXHIBIT "B"**, this order being pursuant to the provisions of section 77(1), 78(2) and section 79 of the Criminal Procedure Act. 25

In terms of this order two psychiatrists were to enquire into the following:

1. Whether the accused was at the time of the commission of the alleged offence, by reason of mental illness or mental defect, not criminally responsible for the offences charged; or
2. If he was so criminally responsible whether his capacity to appreciate the wrongfulness of his act, or to act in accordance with an appreciation of the wrongfulness of the act, was diminished by reason of mental illness or mental defect. 5
3. Whether the accused is by reason of mental illness or mental defect not capable of understanding the court proceedings so as to make a proper defence. 10

The case was then postponed until 29 January 2003 to await the report from the panel of psychiatrists.

On 29 January 2003 the matter was again postponed until 6 February 2003. On the latter date a report signed by Dr H Erlacher a psychiatrist and Professor C Stones, who it has now transpired was a clinical psychologist and not a psychiatrist, was handed in as **EXHIBIT "C"**. In terms of the order dated 13 December 2002 the accused had to be examined by two psychiatrists. Since Professor Stones, it transpired, was a clinical psychologist and not a psychiatrist, as the Court had been informed previously by counsel for the State, the Court considered it necessary that another psychiatrist be added to the panel and that the reconstituted panel examine the accused. A further order was issued and this is set out in **EXHIBIT "D"**. The case was then postponed until 17 March 2003. 15 20

On 17 March 2003 the Court received a report from a panel of two psychiatrists and the clinical psychologist and this is **EXHIBIT "E"**. The unanimous findings of the members of panel were that the accused 25

suffered from what is described as moderate mental retardation. The panel was also unanimously of the view that at the time of the alleged offence the accused was able to appreciate the wrongfulness of his act, but his ability to act in accordance with such an appreciation was diminished due to his significantly limited intellectual capacities. It was also the unanimous view of the panel that the accused was not fit to stand trial. The panel recommended therefore:

"that he be certified under section 28 of the Mental Health Act, and admitted to an appropriate institution for further care, control and treatment."

However, since the report was very brief and did not expand on any of the findings of the panel the Court considered it necessary that the two psychiatrists and the clinical psychologist testify and that they amplify on their findings and recommendation. For this purpose the case was postponed until 25 April 2003.

On 25 April 2003 Dr Helmut Erlacher a member of the panel and a duly qualified medical doctor and psychiatrist testified. Dr Erlacher stated that he held an MBChB degree which he had obtained in 1969 at the University of Kingsbrook in Germany. Since 1987 he had been registered to practice in South Africa and from 1 January 1997 he practised exclusively as a psychiatrist. He was currently the principal psychiatrist at the Fort England Hospital and its medical superintendent and head of the forensic unit. He handed in a further report, **EXHIBIT "F"**, which supplemented **EXHIBIT "E"** and in his testimony proceeded to expand on various aspects thereof.

He said that as a result of the accused's moderate mental retardation his IQ, that is his Intelligence Quotient, was between 40 to

50. The average for an individual was in the vicinity of a 100.

Dr Erlacher said that the accused had great difficulty in understanding even the simplest of concepts. While the accused could distinguish between night and day he did not have a concept of time, nor did he know which day of the week it was. The accused could not even comprehend television programmes. The accused was unable to explain his family circumstances or give an account of who he was. Further the accused did not comprehend court proceedings, nor did he comprehend what would happen to him if he was found guilty of the offence. He did not understand why he was in hospital instead of being at home and appeared to be unhappy about this situation. 5 10

In response to a question from the Court, Dr Erlacher said that there was no indication that the accused was malingering, ie., that he was faking his mental state. In response to a further enquiry from the Court, Dr Erlacher agreed that it would be advisable that he hold a further short consultation with the accused for the purpose of establishing whether the accused could comprehend what was meant by him having to be institutionalised in a psychiatric hospital. Dr Erlacher also confirmed that special facilities were not available for a person with the accused's disabilities and he would have to be kept in the same ward as psychiatric patients with far more serious ailments. He confirmed the findings and the conclusions reached in the reports. 15 20

The Court then informed Dr Erlacher that he would be allowed an opportunity to consult with the accused again and thereafter he could report his findings to the Court. Neither Mr Dukada nor Miss Ncobo posed any questions to Dr Erlacher. 25

Professor Christopher Robin Stones testified that he held a BsC

degree and had a PhD from Rhodes University which he obtained in 1980. He was a trained clinical psychologist and had since 1994 been the head of the Department of Psychology at Rhodes University. He also was in part-time practice. He had examined the accused together with Dr Erlacher and another psychiatrist Dr P T Woods. He confirmed that he had reached similar conclusions to those of Dr Erlacher and Dr Woods. The IQ of the accused was between 40 to 50. The accused did not suffer from a mental disease but had an intellectual disability. His mental development was that of a child in the age range of 10 to 12 years. He pointed out, however, that a normal child of that age had a better understanding of situations than the accused. In addition such a child would still be developing mentally whereas the accused would not. To put it bluntly there was no prospect of any mental improvement in so far as the accused was concerned. There were multiple causes for mental retardation. This could have been as a result of a defect of birth, that is an injury, or it could have been caused by some genetic defect, a defect in the genes, or an organic injury, that is an injury to his brain. He was unable to say what the cause was in so far as the accused is concerned. While the accused understood that the offence of rape was wrong, he was unable to fully comprehend why this was so. He could not grasp what a trial meant, nor what a judgment was, nor did he understand the concept of being convicted or acquitted.

The accused, therefore, had no grasp of the essence of the whole court process.

Professor Stones pointed out that the accused's hormones were functioning, although in a muted sense, that is less intensely than someone else's. He also confirmed the findings in the report. He was

not questioned by either Mr Dukada or Miss Ncobo.

Thereafter Dr Erlacher was recalled to report on his consultation with the accused. Dr Erlacher conveyed that he was still of the opinion that the accused was not fit to stand trial. The accused would not be able to follow the proceedings, nor was he in a position to comprehend what was taking place. 5

In regard to treatment of the accused he said that this could include what he termed behaviour modification in respect of the accused's social conduct. He could also be taught certain basic occupational skills, but there was no prospect of treating his mental retardation. Dr Erlacher also stated that his attempts to trace the family of the accused had been unsuccessful. 10

On 30 April 2003 Dr Peter Tennant Woods testified. He held the MBChB degree and was a qualified psychiatrist. He had been in practice since 1987. He similarly consulted with the accused and had found that the accused had sub-average intelligence for someone of his age. His ability to reason and understand concepts was impaired. There was nothing or very little that could be done to improve the accused's position as his mental retardation was permanent. The accused's mental capacity would remain as it is for the rest of his life. Although the accused knew that rape was something bad he could not explain what rape was. The accused was physiologically developed and therefore had the sex drive of an adult. It was his opinion that the accused posed a danger to young women and children. He also ruled out that the accused was faking his disability. He said that the accused should not be sent to gaol, but should be institutionalised in a psychiatric hospital. If the accused went to gaol there was a risk that the accused 15 20 25

could be exploited and even harmed and sodomised. He confirmed that the accused did not understand what court proceedings entailed. It was the view of Dr Woods that the accused could be treated by means of medication and behaviour modification for his sexual behaviour. A few minor questions were put to him by Mr Dukada, but that concluded his evidence.

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This also concluded the testimony of the members of the panel who had conducted the enquiry as ordered by the Court. Their evidence confirmed that, although the accused was able to appreciate the wrongfulness of the offence of rape, his ability to act in accordance with such an appreciation, was diminished due to his significantly limited intellectual capacities. Further in view of the moderate mental retardation from which the accused suffers he was not fit to stand trial.

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Since the Court had concluded that the accused was unfit to stand trial, the accused could not be called upon to answer the charge as set out in the indictment. However, the accused in the Court's view, could not simply be ordered to be detained in a psychiatric hospital in terms of the provisions of section 77(6)(a)(i) of the Criminal Procedure Act, 51 of 1977 without the Court having determined whether he had in fact committed the offence or not. For this reason the Court ordered that the relevant evidence be placed before the Court in regard to the commission of the offence to enable the Court to determine whether the accused had committed the offence or not.

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The first witness to testify in respect of the offence was the complainant herself, namely Andiswa Davashe. She testified through an intermediary, Andisiwe Msindwana and via the closed circuit television facility. She had no conception of what an oath was and accordingly

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she was admonished to speak the truth. The following is a brief summary of her testimony:

She said she was presently 9 years old and in Grade 1 at a primary school. She could not recall the date, but on a certain day when she went to the toilet a man Polisa fetched her, picked her up and carried her to a shack in the yard and put her on a bed. When he fetched her from the toilet she had not yet pulled up her hipster pants and her panties. These were still around her knees. In the shack he put his tongue in her mouth and pulled down the zip at the front of his jeans. She says he then put his penis in her vagina. She found this to be painful and cried, but Polisa, as she named him, closed her mouth with his hand. A short while later he ran away. She then observed that her mother was entering the house through the kitchen door and followed her inside. There she related to her mother what Polisa had done to her. Her mother then took her to the police station and from there she was taken firstly to Grey Hospital and thereafter Bisho Hospital. Asked by Miss Ncobo whether she could identify Polisa, she said that she was able to do so.

Cross-examined by Mr Dukada she denied that anyone had told her what to say in court. He questioned her about whether she had seen a man's penis and where it was located. She indicated that she could not say where a man's penis was located and had not seen a penis before. Mr Dukada persisted with cross-examination on this aspect and was eventually curtailed by the Court from pursuing this issue any further. She also said that she had not discussed the incident with any of her friends. She stated that when Polisa lay on top of her she felt something entering her vagina. Asked whether Polisa had moved while

he was on top of her, she said that he had not.

In reply to questions from the Court she said that Polisa had previously visited their home. On the occasions that he visited he did not play with anyone. She had not been asked by the police to point out Polisa. However, her mother knew who Polisa was.

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Thereafter Miss Ncobo asked Andiswa to enter the court and to point out if Polisa was there. She duly came into court and pointed out the accused as the person Polisa.

The mother of the complainant then testified. She is Boniswa Davashe. She stated that the complainant was presently 8 years old. She confirmed that Polisa had visited her home on various occasions. On a certain day in September 2001, the exact date she could no longer recall, she returned from the butchery. Andiswa had entered the house and was crying and trembling. At first Andiswa would not speak. She then threatened to beat Andiswa unless she disclosed what was wrong. Thereupon Andiswa reported that the accused had inserted his penis in her vagina. She was crying when she related this. Mrs Davashe also indicated that when Andiswa entered the house she had seen the accused running away from their premises. Andiswa had related to her what had occurred and also mentioned that the accused had put his tongue in her mouth. She then took Andiswa to her room to inspect her vagina and found that there was a sticky substance on her vagina. She dressed Andiswa and took her to the police and from there Andiswa was taken to the Grey Hospital where she was examined and then to the Bisho Hospital. She was present when the doctor examined Andiswa. She was of the view that Andiswa seemed to be alright at present.

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Cross-examination revealed that Andiswa was crying and therefore

not able to speak. For this reason the witness had to force her to speak. She had not washed Andiswa after she noticed the sticky substance on her vagina. She had also not noticed any bleeding.

The medical report from Grey Hospital was then handed in and is **EXHIBIT "G"**. Mr Dukada consented to the admission of the report and conveyed that he accepted the findings and conclusions therein.

Dr Zuberu Braimah Elabor testified that he was a qualified doctor. He had obtained a MBChB degree in 1984 at the University of Benin in Nigeria. He was registered to practice as a doctor in South Africa and had been at Grey Hospital since 1996. He estimated that he had seen between 10 to 20 rape victims over this period of time. On 1 September 2001 he examined the complainant Andiswa Davashe and completed a medical report, namely **EXHIBIT "G"**. He had noticed that her panties were slightly wet. His examination revealed that there was a bruise on her hymen and that the hymen was still intact. The bruise was visible to the naked eye. In his opinion the bruise must have been caused by a firm object, such as for example a man's penis.

Cross-examination did not reveal anything of note.

In reply to questions from the Court it emerged that a child's hymen would not necessarily be perforated or torn when a man inserted his penis. Whether a perforation or tear occurred depended on various factors. These were, for example, the size of the man's penis; the force used; and the hymen itself. In women and, therefore, in girls as well the hymen differed from person to person. It was unlikely, he said, that the bruise had been caused by the child bumping into something. In his view therefore there was either an attempt to rape the complainant or she had been raped.

This concluded all the evidence.

It is evident from the testimony of the complainant and that of her mother, Boniswa Davashe and Dr Elabor that Andiswa Davashe was sexually molested. It is improbable that the bruise on her hymen could have been caused accidentally. The bruise was as a result of a firm object being inserted in her vagina. The testimony of Andiswa is that the accused had inserted his penis in her vagina, but had not executed any movements thereafter. In the opinion of Dr Elabor the bruise could have been caused in this manner.

Andiswa was a credible witness and I find her evidence to be reliable. She was truthful and honest in conveying what had happened to her. I believe her story. She was also able to identify the accused as the person who had raped her.

Her story is corroborated in material respects by her mother and by the findings of Dr Elabor who examined her shortly after the incident. In my view the evidence establishes that the accused inserted his penis in her vagina and consequently raped her. I am satisfied that the accused has committed the offence set out in the indictment.

In the circumstances, on the basis of the aforesaid evidence and the testimony of the psychiatrist Dr H Erlacher and Dr PT Woods and the clinical psychologist Professor CR Stones, the accused must be detained in a psychiatric hospital.

Accordingly, I make the following order:

In terms of the provisions of section 77(6)(a)(i) of the Criminal Procedure Act, 51 of 1977 the accused is to be detained in a psychiatric hospital pending the decision of a Judge in Chambers in terms of section 47 of the Mental Health Care Act, 17 of 2002.

Y EBRAHIM

JUDGE, BISHO HIGH COURT