

IN THE HIGH COURT

(BISHO)

CASE NO.: CC25/03

DATE: 18 JUNE 2003

In the matter between:

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THE STATE

versus

MZOXOLO DYONASE

JUDGMENT

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EBRAHIM J

The accused, Mzoxolo Dyonase, has been charged with one count of rape. He pleaded not guilty to this charge. Mr Lalla who appears for the accused informed the Court that the accused was not making any statement pursuant to the provisions of section 115(1) of the Criminal Procedure Act, 51 of 1977. In other words the accused was not disclosing the basis of his defence. Mr Lalla, however, conveyed to the Court that the accused admitted that on the night of 24 November 2001 he had slept next to the complainant in the same bed but under a separate blanket. In terms of his plea the accused was therefore denying that he had raped or indecently assaulted the complainant. The accused was asked by the Court whether he confirmed if this was correct, and he then confirmed that it was so.

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The State then adduced the evidence of certain witnesses. The first witness was the complainant, Nomandla Mayekiso, who was 12 years of age. After the Court had enquired into whether she understood what an oath was and whether she was able to distinguish between a

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truth and a lie the Court found her to be a competent witness. However, since she did not comprehend the meaning of an oath she was admonished in terms of section 164 of the Criminal Procedure Act to testify as to the truth.

A summary of her evidence is the following: On Friday, 23 November 2001, she went to the home of her friend Abongile to sleep there. The following day, that is Saturday 24 November 2001, at about 7:00 or 7:30 pm she and Abongile went to the bathroom to wash themselves. The two of them were alone at that stage. While they were busy washing, the accused arrived and entered the bathroom in order to fetch water. They were both undressed and because of this bent down to cover their private parts. The accused asked what they were hiding and then left. Shortly thereafter he again returned to fetch water and once more they bent down to cover their private parts. The accused then left and said he would return. After washing themselves they dressed and proceeded to the bedroom to watch TV. With them was the 1 year old child of Abongile's sister Nandipha.

At about 11 pm there was a knock at the kitchen door. Abongile's grandmother, who was in another bedroom, shouted to them to open the door. However, they were unable to do so as the bedroom door would not open. This was because the lock was faulty. The accused then shouted from outside that he would enter through the bedroom window. At his request Nomandla opened the window and he climbed into the bedroom. She says the accused told Abongile to go to her grandmother's bedroom to sleep there but, Abongile refused to do so.

The three of them lay on the same bed next to each other and were under the same blanket. They were all facing in the same direction

as they were watching television. Nomandla says she was lying in between Abongile and the accused. Later she fell asleep.

Sometime during the night she awoke to discover that the accused had one hand over her mouth and another behind her back. She ignored this and fell asleep once more. Sometime later she again awoke to find the accused lying on top of her. Her night dress had been lifted up and her panties were pulled down to her knees. The accused had also inserted his penis in her private parts. She says she found this to be painful. She was unable to scream as the accused had closed her mouth with his hand. At the same time the accused was moving the bottom part of his body up and down on top of her and this caused the bed to creak. She says she tried to wake Abongile, but Abongile did not respond. After a while the accused stopped, got up and then wiped her private parts with a green cloth. She then noticed that there was a mucous like substance on the green cloth. Thereafter the accused went to the toilet to wash himself. She noticed that the time was 6:50 am. After dressing himself the accused left.

After he departed she told Abongile that the accused had done dirty things to her and explained to her what had happened. Abongile suggested that they go to the police, but she told Abongile that they should wait for Nandipha and that when Nandipha arrive she would tell her what had happened. Nandipha arrived just before noon and Nomandla then told her what the accused had done to her. As a result of this Nandipha telephoned the police who arrived at a later stage and took Nomandla to the Cecilia Makiwane Hospital. At the hospital a doctor examined her and she was also given an injection.

During cross-examination by Mr Lalla she denied that the accused

had said that he had come to visit Nandipha or Abongile's grandmother. Neither she nor Abongile had told the accused that he had to wait for Nandipha. It was correct that the first occasion when the accused arrived it was about 8 pm and that he was accompanied by a boy. They stayed to watch TV for a short while and left during the middle of the film. She denied that the accused returned at about 8 pm. She also denied that the door was opened for him after he had knocked. He had also not slept under a separate blanket. She said when they were in bed the accused was dressed in a vest and black short pants and not in long green pants. At the time that he was lying on top of her he had pulled the short pants down. She denied that he had asked her the following morning to wake up Abongile's grandmother so that she could go to town. Abongile had asked her the following morning if her stomach was paining as Abongile said that she had heard her groaning during the night. She denied that Abongile's grandmother was a witch doctor, but said that the accused was one. The accused was lying if he claimed that he had not inserted his penis in her vagina. He was also lying if he said he had not used a rag to wipe her private parts. When she was examined by the doctor he had not told her of any injuries to her vagina.

In reply to questions from the Court she said that she had known the accused very well. Prior to the incident she considered him to be a good person. He attended the Zionist Church and had encouraged them to attend. After the initial examination she returned to the hospital the following Wednesday and a blood sample was then taken from her arm. She said she was unhappy about what the accused had done to her.

Abongile Kona, who is 12 years old, was then called to the testify. In her case, too, the Court enquired into whether she understood what

an oath meant and if she was able to distinguish between the truth and a lie. The Court found her to be a competent witness, but since she did not comprehend what an oath was she admonished in terms of section 164 of the Criminal Procedure Act to speak the truth.

Her testimony is briefly the following: She confirmed that on a Friday Nomandla had come to her home in order to sleep there. The following day, it was a Saturday, she and Nomandla were washing themselves in the bathroom when the accused entered. Both of them bent down to hide their private parts. She said that they had been taught to do this at school. The accused had asked what they were hiding, but they did not reply. He had a glass in his hand and said that he had come to fetch water. After he had drunk some water in the bathroom the accused left. She said also that the boy Landile had arrived at the house with the accused. After she and Nomandla had dressed they watched television in her mother's bedroom.

Sometime later there was a knock at the door. She could not remember if her grandmother opened the door or not, but the accused had entered the bedroom and had watched TV with them. She later fell asleep. They had all shared the same blanket and duvet. The accused had not slept under a separate blanket. Astendile her sister's child had been placed on a mat on the floor by the accused.

Sometime during the night she awoke and then saw the accused on top of Nomandla. He was doing dirty things to her. She said the dirty things that he was doing was sex, but could not explain what was meant by this. She stated, however, that Nomandla was lying on her back and that the accused was on top of her. Nomandla and the accused were facing each other and the accused had his hand over Nomandla's mouth

and was moving his body up and down. Nomandla was groaning. She, that is Abongile, did not do or say anything.

In the morning when the accused was in the bathroom Nomandla told her that the accused had done dirty things to her. She suggested to Nomandla that she told Nandipha of this. Later when Nandipha had arrived Nomandla told her what the accused had done to her. She also told Nandipha that the accused had closed her mouth. Thereupon Nandipha phoned the police. Abongile also testified that on previous occasions the accused had slept in the same bed with her.

Cross-examination revealed that the accused's relationship with her sister, Nandipha, had ended long ago. A week after the incident the accused had come to their home and asked her if he had done that to Nomandla and if she had seen him do it. The accused was lying if he said he had not entered the bathroom while they were washing themselves. The lock on her mother's bedroom door had been faulty. However, the accused had opened the door and entered the bedroom. She then said that she thought that the accused had entered the bedroom through the window, but could not remember very clearly. She disagreed with the suggestion that the accused had seen her and Nomandla in the kitchen when he entered the house. She fell asleep when the three of them were watching television. She had woken up during the night and it was then that she saw that the accused was having sex with Nomandla. However, they were covered with the blankets and she could not see if the accused had undressed himself. She could not remember if she had approached Nomandla to tell her that she had seen what had happened. Nomandla had shown her the cloth that the accused had used with which to wipe her. It was green in

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colour and not very small. The accused was lying if he said that he did not have sex with the complainant. She had asked the complainant why she had not screamed, and the complainant had replied that the accused had covered her mouth with his hand.

In reply to questions from the Court she said that when the accused was on top of the complainant she was afraid to say something. She feared that the accused would do the same to her. She did not think of calling to her grandmother, and had then fallen asleep again. Nomandla had told her the next day that she had tried to wake her. She was unable to recall what she had replied when Nomandla told her this. She had told her grandmother of the incident when her grandmother returned from church the following day. The accused was a witch doctor and was a friend of her mother. Her mother had trusted the accused and had allowed him to sleep in the same bed with her, that is the witness.

Nandipha Kona testified that her relationship with the accused had ended in 1998. He had often visited her and slept in the dining room and bedroom and shared the same bed with her, Abongile and two other children. On Saturday, 24 November 2001, she went to King William's Town and returned home on Sunday at about 12:15 pm. Nomandla then told her that the accused had done dirty things to her in the bedroom. She understood this to mean that he had sexual intercourse with Nomandla. The complainant had told her of this of her own accord and appeared to be frightened when she related what had occurred. The complainant had also said that the accused had used a cloth with which to wipe her vagina. The complainant had explained that they were all sleeping in the same bed and that she awoke to find the accused on top

of her. Her panties had been removed and the accused was doing dirty things to her. The accused had put his hand over her mouth. She had tried to wake up Abongile by pinching her thigh but Abongile had not responded. She also related to her what had occurred when she, that is Nomandla, and Abongile had been in the bathroom. 5

The complainant had shown her the cloth that the accused had used, it was green in colour and she had observed that it had a man's semen on it. She kept this cloth and later handed it to a policeman, Sergeant Sam. She had not washed the cloth prior to handing it over to Sergeant Sam. After the complainant had related what had occurred to her she telephoned the police. They were then taken to the Cecilia Makiwane Hospital where the complainant was examined in her presence. 10

It emerged during cross-examination that she had asked the complainant if she had told her grandmother, but she had said that she was waiting for her, that is Nandipha, to arrive. Abongile was present when the complainant related to her what had occurred. Abongile said that she had heard what was taking place in bed, but had not seen what the accused was doing. She, that is Nandipha, had not asked the complainant if she had been injured in any way. 15 20

During re-examination Abongile said that she had felt someone pinching her during the night and had also heard Nomandla groaning.

In reply to questions from the Court she said that the accused had been treated as a member of their family. The accused had been allowed to sleep in the same bed as the children, but not on his own. She did not confront the accused about the incident as she was too shocked. The accused was a witch doctor and had the ability to 25

diagnose a person's problem without questioning the person. She confirmed that the accused and her mother were friends.

Thereafter the State tendered in evidence the medical report which had been completed by Dr Hofmeyr who examined the complainant, and this is **EXHIBIT "A"**. The defence had no objection to the report being submitted in evidence and accepted the doctor's findings.

Sandile Elias Tongo, a sergeant in the South African Police Services then testified. He was attached to the Child Protection Unit in East London. On 25 November 2001 he had received swabs from a doctor. These were sealed in a container and bore the serial no. 1K36221ZZ. This container he handed over to Sergeant Sam. While the container was in his custody it had remained intact. His evidence was not challenged by the defence.

Mzonke Sam, a sergeant in the South African Police Services testified that he was a member of the Child Protection Unit in East London. On 25 November 2001 he received a crime kit containing swabs from Sergeant Tongo. This was sealed under no. 1K36221ZZ. This he handed over to Inspector Van Dyk. During the period that the crime kit was in his possession it remained intact. He had also received a blood sample in respect of the complainant from a Dr Klopper. This had been sealed under no. 01D1AB0599XX. He also handed this over to Inspector Van Dyk. The blood sample had also remained sealed and intact while in his custody. He also received a blood sample of the accused from a nurse, Sister Manya Kanyaka. This was also sealed under no. 01D1AB0590XX. This he similarly handed over to Inspector Van Dyk and during the period that it was with him the sealed had remained intact.

He testified further that he had ascertained that Dr Hofmeyr was no longer at the Cecilia Makiwane Hospital. From the information he had obtained it appeared that Dr Hofmeyr has left South Africa. He had also enquired at the Frere Hospital where Dr Hofmeyr had worked at some stage. His enquiries there had also not been successful in terms of locating Dr Hofmeyr. 5

Cross-examination of this witness related to the serial number in respect of the blood sample of the accused. He was asked to explain why the documents from the forensic science laboratory reflected the last two letters as ZZ and not XX. The only explanation he was able to offer was that it could possibly be a mistake. 10

Questioned by the Court in respect of the whereabouts of Dr Hofmeyr, Sergeant Sam conceded that his enquiries had been inadequate thus far. To his knowledge Dr Hofmeyr had gone to Australia, however, he had not ascertained if Dr Hofmeyr had obtained a passport and whether indeed he had left South Africa or not. He had not communicated with the Australian Embassy to establish whether Dr Hofmeyr had travelled to Australia or not. He had enquired from the medical council, but they were not able to help him. 15

Re-called at a later stage Sergeant Sam confirmed that he had received an old green T-shirt from Nandipha Kona. He had handed the T-shirt over to Inspector Van Dyk. It was in a brown envelope and sealed with a serial no. 1201. This was evidence was not challenged by the defence. 20

Re-called once more Sergeant Sam stated that he had made further enquiries into the whereabouts of Dr Hofmeyr. But he had been unsuccessful in tracing him. 25

The State then called Sharleen Otto to testify. She held the rank of superintendent in the South African Police Services and was a chief forensic analyst at the Biology Unit of the Forensic Science Laboratory in the Western Cape. She had a BSc degree which she obtained at the University of the Orange Free State and numerous other qualifications. 5

She had been attached to the laboratory since 1993. Her testimony related to the DNA analysis she had conducted in respect of exhibits which she had received in this case. She detailed the process of DNA profiling and the reliability thereof. Her evidence revealed that the DNA profile of each person, save in the case of twins, was different. Her test 10

established that the DNA of two persons, one a male and another a female, was present in genetic material on the green T-shirt. She compared these with the DNA in the blood samples from the complainant and the accused and found that they corresponded. In respect of a swab which had been taken of the vaginal fluid of the complainant her test 15

revealed the presence of semen, but she was unable to isolate the DNA therein. The reason for this was that the DNA of the complainant had masked, that is covered, the DNA in the semen. The report in respect of the analyses and other explanations was set out in documents which were handed in and are **EXHIBITS "B", "C" and "D"** respectively. 20

Cross-examination revealed that the reference number of the Forensic Science Laboratory ended in MX in comparison to the police reference number which ended in XX. In the case of the swab the semen had mixed with the vaginal fluid and prevented the DNA of the male being separated from that of the female. The cutting of the T-shirt 25

had definitely revealed the presence of a male DNA.

In response to the Court's questions Superintendent Otto said that

the DNA profile obtained from the swab taken from the complainant was the same as the DNA in the complainant's blood sample. Both semen and female genetic material were present on the T-shirt. The DNA profile from that semen was the same as the DNA profile in the blood sample of the accused. The female DNA profile extracted from the T-shirt was the same as the DNA profile of the blood sample of the complainant.

A list of admissions made by the accused were then handed in and is **EXHIBIT "E"**. This document was signed by the accused by him marking it with an "X". In view of this the Court deemed it necessary, therefore to get the accused to confirm the admissions in the document. The accused then indicated that he did not dispute that the crime kit had been properly sealed and received in the same secure state by the Forensic Science Laboratory. The same applied in respect of the blood samples taken from the complainant and himself. However, in respect of the T-shirt he was not prepared to make the same admissions as he had not seen Nandipha Kona handing it over to Inspector Van Dyk. Save for the question of the T-shirt the remaining admissions were then recorded in terms of section 220 of the Criminal Procedure Act, 51 of 1977.

The necessitated the State recalling Sergeant Sam to testify in relation to the T-shirt. He confirmed that he had received the T-shirt from Nandipha Kona and then handed it over to Inspector Van Dyk.

In turn Inspector Van Dyk was called to testify and stated that he had received a brown envelope with seal no. 1201 from Sergeant Sam which purportedly contained the T-shirt. He had forwarded this to the Forensic Science Laboratory.

Save for being asked whether he had been able to see what the contents of the envelope was, his evidence was not challenged under cross-examination.

Dr Rema Elizabeth Matthew testified that she was qualified medical practitioner. She had qualified with a MBBS degree from the University of Madras in India in 1991. This qualification was equivalent to an MBChB from a South African university. She was registered with the Health Professions Council of South Africa to practice as a medical practitioner. She had been attached to the Cecilia Makiwane Hospital for the past 11 years. She had previous experience of rape victims. She was shown **EXHIBIT "A"**, namely the report of Dr L Hofmeyr which is a report of a medical legal examination Dr Hofmeyr had conducted in respect of Nomandla Mayekiso, the complainant, on 25 November 2001. Dr Matthew was asked to comment on the findings in the report. She explained that the notches Dr Hofmeyr had observed on the complainant's hymen could possibly be normal, but they could also be interruptions of the hymen that had healed. The bruises which Dr Hofmeyr had observed on the inner aspect of the labia minora of the complainant's vagina was an indication of attempted penetration. The fact that the hymen did not show any signs of penetration could be because of the elasticity of the hymen.

Cross-examination of Dr Matthew did not reveal anything of note.

Questioned by the Court Dr Matthew said that there was a 50 percent probability that a hymen could remain intact even if there had been sexual intercourse on three occasions. The doctor's findings supported the conclusion that the complainant was sexually interfered with; I am referring to Dr Hofmeyr's findings. There was a possibility

that the person who sexually interfered with the complainant could have inserted his finger and not his penis. But, the bruising on the inner aspect of the labia minora was consistent with a man having inserted his penis. Even if the hymen was not penetrated the penis had nevertheless entered the complainant's vagina. Penetration had taken place beyond the labia minora, that is inside the vagina. This is so because of the bruising on the inner aspect of the labia minora. The bruising had been visible to the naked eye of Dr Hofmeyr.

Questioned by Mr Lalla on this evidence she said the bruising could not have been caused by a man rubbing his penis against the complainant's vagina. It was also not possible for the penis to be rubbed against the labia minora unless a man inserted his penis in the vagina and attempted to penetrate the hymen.

This completed the State case.

The accused, Mzoxolo Dyonase, elected to testify. On 24 November 2001 at about 7 pm he went to the home of Nandipha Kona. He was accompanied by a boy Landile. Nandipha was not at home and he therefore did not stay there too long. He briefly watched television and then left. He denied that he had entered the bathroom. He returned at about 8 pm and someone then opened the door for him. Nomandla and Abongile were in the kitchen. They then entered the bedroom through the bedroom door. He denied that he had climbed into the bedroom through the window. He, Abongile and the complainant then watched television while lying on the bed. They all eventually fell asleep. They were facing the same direction next to each other, but he could not remember whether it was the complainant or Abongile who was lying next to him. He had slept under a separate blanket and was

wearing a long green trousers and white T-shirt. At no stage did he lie on top of the complainant, nor did he have sexual intercourse with her. The following morning he awoke the complainant and told her to take the young child to Abongile's grandmother. He later left after his sister had arrived to call him. He knew nothing of a torn green T-shirt. He had never used it to wipe the complainant nor had he wiped himself with it. He was the only male in the house that night.

Cross-examined by Miss Ncobo the accused said that he had arranged with Nandipha Kona that he would come to visit her the Saturday evening. But he conceded that this had not been put to Nandipha during cross-examination. He claimed that he had resumed his relationship with Nandipha and that they were still in love, even though Nandipha had said that this was not so. He denied that the complainant and Abongile were in the bathroom on the occasion of his first visit to the house. He did not know who had opened the kitchen door when he returned later, but Abongile and the complainant were in the kitchen. When he went to the bedroom the children accompanied him. He was not disputing that it was his semen that was on the T-shirt as stated by Superintendent Otto, but he had no idea how it got there. He denied that he had ejaculated at any time. He was also unable to say why the complainant would claim that he had raped her.

In reply to the Court's questions he admitted that it had not been put to either the complainant or Abongile by Mr Lalla that he had told them he would be returning after his first visit. On his first visit he had watched television even though Mr Lalla had put it to Nomandla that he had not done so. Mr Lalla had also been incorrect in putting to the witnesses that he had not entered the house on the first occasion. It

was also incorrect, as put by Mr Lalla, that it was only on his second visit that the complainant and Abongile had said to him that he should wait for Nandipha. He had told Mr Lalla that he was still in a relationship with Nandipha. He was not aware that Nandipha's evidence that their relationship had ended in 1998 had not been challenged. He had not heard the cross-examination properly as he had a hearing problem. However, he never told his legal representative of this. He admitted that he had told the Court at an earlier stage that he had not had any difficulty in hearing a witness who had spoken very softly.

This concluded the defence case.

Both Miss Ncobo and Mr Lalla addressed the Court on the merits. I do not intend repeating all their submissions. Miss Ncobo contended, however, that the accused should be convicted of rape, alternatively attempted rape, if the Court found that the evidence did not prove that penetration had actually occurred. Moreover, if the Court was of the view that the evidence did not even establish that there had been an attempt to rape the complainant then the accused was at the very least guilty of contravening section 14(1)(b) of Act 23 of 1957.

The only criticism levelled by Mr Lalla at the State case was that Abongile Kona was not a truthful witness. He contended that in regard to what she alleged she had seen, namely that she saw the accused on top of the complainant, she had not told the truth. This was so as the complainant had said that she was unable to wake Abongile up. He conceded, however, that the complainant's evidence could not be criticised. Similarly the evidence of Dr RE Matthews that penetration had occurred could also not be criticised. In addition, he accepted that the accused had not been able to explain how his semen had come to be

deposited on the green T-shirt. Notwithstanding this it was his submission that the accused should not be convicted of rape. At most the accused could be convicted of attempted rape, alternatively of a contravention of section 14(1)(b) of Act 23 of 1957.

I turn now to an evaluation of the evidence. The following is 5
evident from the medical evidence:

- A There had been bruising on the inner aspect of the labia minora of the complainant's vagina. This had been the finding of Dr Hofmeyr when he examined her on 25 November 2001.
- B This bruising was consistent with a man forcing his penis into her 10
vagina.
- C Even though the vagina was still intact it did not mean that sexual intercourse had not taken place.
- D The notches which Dr Hofmeyr had observed on the hymen were healed interruptions. These were indicators of previous sexual 15
interference.
- E The medical findings support the conclusion that sexual interference had occurred.

In so far as the remaining State evidence is concerned the following is evident: The testimony of Superintendent Sharleen Otto, a 20
chief forensic analyst at the Biology Unit of the Forensic Science Laboratory in the Western Cape, was not challenged by the defence. Her evidence, as I indicated previously, concerned scientific tests that she conducted on blood samples and genetic material which had been sent to her for analysis. These tests established that the genetic 25
material deposited on the green T-shirt contained a mixture of both male semen and female genetic material. More significantly the DNA profile

in the semen matched the DNA profile in the accused's blood sample, in other words the semen on the T-shirt was that of the accused. In addition the DNA profile in the female genetic material matched the DNA profile of the complainant's blood sample. In other words the female genetic material was that of the complainant. The swab of the complainant's vaginal fluid showed the presence of semen, but the male's DNA profile could not be established as the complainant's vaginal fluid had concealed it. The results of the DNA analysis provides corroboration for the evidence of the complainant, Nomandla Mayekiso, that the accused had wiped her vagina with a green T-shirt after he had sexual intercourse with her. The fact that the accused's semen was mixed with her vaginal fluid supports this. 5 10

The accused claimed that he had no idea how his semen could have been deposited on the T-shirt. It is clear that he must have ejaculated at some stage. The inference is inescapable that he did so during the time he had sexual intercourse with the complainant. Superintendent Otto confirmed that semen had been present in the vaginal fluid of the complainant. Even though this could not be identified as being that of the accused the only reasonable inference to be drawn is that the semen was that of the accused. There is no suggestion at all that the semen could have come from any other male person. Indeed the accused himself confirmed that he was the only male person in the house that night. 15 20

Further, both the complainant and Abongile testified that they had washed themselves the previous evening when the accused entered the bathroom. It is highly unlikely, therefore, that if some other male person had deposited semen in the complainant's vagina that it still would have been present after she 25

had washed herself. In addition, the bruising on the inner aspect of the labia minora of the complainant's vagina and the presence of the semen in her vagina provides corroboration for the evidence of the complainant that the accused had inserted his penis in her vagina and therefore had sexual intercourse with her. 5

Nomandla Mayekiso impressed me as a honest and trustworthy witness. She was consistent in her version of what had occurred and did not contradict herself during cross-examination. Mr Lalla has correctly conceded that her evidence cannot be criticised. I find her testimony to be reliable and that she has told the truth of what occurred to her. 10

In so far as Abongile Kona is concerned I agree with Mr Lalla that her evidence that she saw the accused raping the complainant cannot be accepted. She has not been truthful in this regard, but, as I have said, I accept Nomandla's version of what occurred. I also accept 15
Nomandla's version that Abongile did not wake up when Nomandla tried to wake her up during the night. In regard to other events, however, Abongile has been truthful. Her evidence of what occurred in the bathroom is consistent with that of the complainant, Nomandla Mayekiso. From their evidence it is clear that the accused walked in on 20
them when they were naked and in the process of washing of themselves. Similarly Abongile has also been truthful in saying that she, Nomandla and the accused all slept under the same blankets. Again her evidence is in line with the testimony of the complainant, Nomandla, that the accused did not sleep under a separate blanket, but that all three of 25
them shared the same blankets. I accept their version in so far as this is concerned.

The accused was an extremely poor witness. His testimony was riddled with contradictions, inconsistencies, improbabilities and untruths. The version he provided during his evidence-in-chief of what had transpired on the Saturday differed in material respects from the version Mr Lalla put to Nomandla and Abongile. The same is true in respect of his relationship with Nandipha Kona. Her evidence that their relationship had ended in 1998 was not disputed, but during his evidence-in-chief the accused suddenly claimed that they were still having a relationship at present.

The most incriminating evidence against the accused is the presence of his semen on the green T-shirt. He has not been able to provide any explanation for its presence, nor how it came to be mixed with the vaginal fluid of the complainant. The accused during cross-examination denied that he ever ejaculated. In other words, at no time did he emit any semen. This is clearly a lie. The DNA analysis has established beyond a reasonable doubt that the semen is that of his. It is obvious that it could only have come onto the green T-shirt if he had ejaculated at some stage. Nomandla, the complainant, is completely truthful when she says that he wiped her vagina with the green T-shirt. This provides the explanation for the presence of his semen and her vaginal fluid on the green T-shirt.

I find the accused's denial that he raped the complainant to be palpably false. I reject his version of events. Needless to say there is no reasonable possibility that it may be true.

After weighing up all the evidence I am satisfied that the State has proved beyond a reasonable doubt that the accused raped the complainant, Nomandla Mayekiso.

In the result the ACCUSED IS FOUND GUILTY OF THE OFFENCE
OF RAPE AS SET OUT IN THE INDICTMENT.

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JUDGE, BISHO HIGH COURT

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