

IN THE HIGH COURT OF SOUTH AFRICA

BISHO

CASE NO. CC14/2006

In the matter between:

THE STATE

and

SIZWE DAMANI

ACCUSED

JUDGMENT

DHLODHLO ADJP:

1. The accused, a 34 – year – old male person is charged with one count of rape. It is alleged that on or about the 25th day of October 2004 at or near Mabaleni Administrative Area in the magisterial district of Mdantsane, he unlawfully and intentionally had sexual intercourse with A Y, a 6 – year – old female person without her consent.
2. The charge is accompanied by a warning to the effect that, if he is convicted, the provisions of section 51(1) of the

Criminal Law Amendment Act 105 of 1977, relating to minimum sentences, will apply, as the victim is a girl under the age of 16 years.

3. The accused pleaded not guilty and elected not to disclose the basis of his defence.
4. The complainant who is now eight years of age testified through an intermediary and through electronic means from a room adjacent to the court room. Her evidence may be summed up as follows:
 - 4.1 On a certain day, while she was in the company of Thoko, her brother Nkosinathi called her and asked her to go and buy lower legs (amanqina) from a shop.
 - 4.2 She then proceeded to the shop. She was walking alone.
 - 4.3 On her way back from the shop she met the accused who she refers to as Paraffin. She said that his real name is Sizwe.

- 4.4. The accused called her. She went to him after which he dragged her to a spot near a cemetery.
- 4.5 He then undressed himself of his underpants and later undressed her of her skirt and panty.
- 4.6 The accused then inserted his penis (which she referred to as a "pitosi") in her vagina (which she referred to as "unomdeselele").
- 4.7 She was lying on her back and the accused on his stomach on her when he inserted his penis into her vagina.
- 4.8 The accused made upwards and downwards movements while lying on top of her.
- 4.9 While the accused was on top of her certain children, namely Asanda, Aviwe, Amanda and Nontombi appeared.
- 4.10 When the children appeared the accused ran away in the direction of a ravine.

- 4.11 Under cross – examination the complainant said that the children saw what was happening, namely that the accused was on top of her.
- 4.12 Asked whether or not she told the police about the children, the complainant answered in the negative and further said that she was scared.
- 4.13 After the accused had run away the complainant picked up her clothes and put them on. She then proceeded home.
- 4.14 When she arrived home she did not report to anyone that she had been sexually molested.
- 4.15 While the complainant was playing a game known as “Nomqo” with other children, some of the children noticed that her panty was dirty with blood stains.
- 4.16 Later her grandmother Ntombizakhe Nolineti Mdelela and a lady by the name of No-First questioned her whether or not something had happened to her.

4.17 She said that she told her grandmother Mdlela on the following morning what had happened. She said that she did not tell her grandmother immediately because she was scared "because they were threatening to beat me up for failing to disclose it to them".

4.18 She further said that she was given two rand because she had reported what had happened to her. She added that if she saw her assailant she would point him out.

4.19 The complainant said that she eventually told her brother Nkosinathi in the presence of her grandmother what had happened to her.

4.19.1 She told them that she met the accused who first removed his underpants, undressed her after which he inserted his penis into her vagina.

4.19.2 She said that they told her that they would telephone her sister Zukiswa who would come with "nice things".

4.19.3 She said that this happened when she was in the process of telling them.

5. The complainant was later taken to Cecilia Makiwane hospital where she was seen by a doctor.
6. She said that on a certain day while she was at Mqolekiso's place she saw the accused walk past and pointed him out to some other people. She later saw him when he was inside a police van.
7. She said that on a certain Friday when she was in the company of some school children walking to their homes from school she saw the accused in a mealie field. The accused chased them and stopped doing so when he saw teachers. She did not tell any of the school children about what he had allegedly done to her.
8. The complainant said that she knows the accused by the name of Paraffin which she got from Thoko who is a girl aged seven years.
9. She knew the accused by the name Paraffin before he allegedly raped her.

10. Responding to the comment by Mr Dukada for the defence, that the accused says that he is not Paraffin, the complainant said that he indeed is Paraffin.
11. She said that when the accused was running away after some children appeared when he was on top of her he was not wearing his clothes but was holding them in his hands.
12. She did not tell the police about the children who appeared when the accused was raping her.
13. She said that her grandmother and Nkosinathi said that they would beat her up if she did not tell them what had happened to her.
14. Responding to the question why she was given two rand, the complainant said:

“because I had made a disclosure. I said that if I would see him I would point him out”.
15. Under re-examination by the Court, the complainant said that she decided to tell Nkosinathi who had done something to her because he (Nkosinathi) promised to bring her “nice things”.

16. Dr Noloyiso Hardy who examined the complainant at Cecilia Makiwane hospital found that her skirt and panty were blood stained. Bruises were found in the vestibular. The hymen was not visible. The complainant had a foul smelling vaginal discharge. Dr Hardy concluded that findings on vaginal examination were suggestive of vaginal penetration.

17.1 Ntombizakhe Nolineti Mdlela is the complainant's grandmother. On 25 October 2004 on her arrival at her home she was informed that the complainant's panty was blood stained.

17.2 She then called the complainant and looked at her. She saw dry blood stains on her panty and on her dress.

17.3 When she asked the complainant what had happened, she (the complainant) cried. It was already night time and she decided to take her to a clinic on the following day.

17.4 On the following day Mdlela asked the complainant again. She did not talk but she cried.

17.5 Mdlela invited another lady No-First so that they both could question the complainant. Still the complainant would not say anything.

17.6 Nkosinathi who is Mdlela's child questioned the complainant "begging her to tell the truth". He even produced a phone saying that he would tell sisi Zukiswa. Then Asanda opened up saying that it was Paraffin who raped her.

17.7 The complainant told them that Paraffin lived at Mbolompeni.

17.8 She told them that Paraffin called her while she was on her way from a shop, pulled her to a certain spot, took off her panty, took off his pants and caused her to lie down.

17.9 Mdlela said:

"She did not explain what Paraffin did but she said that he raped her."

17.10 Mdlela said that even at the hospital when she was questioned she was hesitant to answer and that she (Mdlela) was asked to walk out of the room where she was.

17.11 Later they were taken to Berlin police station where two male persons were brought to them and the complainant pointed out the accused. Mdlela had not seen the accused before.

18.1 Nophindile Mqolekiso said that the complainant showed her the accused after the alleged rape incident when he (the accused) was walking past her (Mqolekiso's) home.

18.2 She said that the accused wagged his finger at them.

19.1 Aviwe Giyose and Asanda Zone were called by the Court after both sides had closed their cases. Both said that they were among school children who were returning to their homes from school and were chased by the accused in a mealie field.

19.2 Both knew the accused as Paraffin.

19.3 A G who is 13 years old, said that, as the accused was moving towards them, he said:

"I am going to insert my penis into the group straight away". She later said that she did not personally hear

the accused say this but heard it from June and Vuyisile.

- 19.4 She said that they ran into a certain house.
- 19.5 Giyose said that she knew the accused before the day when he chased them. She knew that he lived at Mbolompeni.
- 19.6 She said that, that is all she knew concerning the rape allegation by the complainant.
- 20.1 A Z who is 15 years old said that she knows the complainant and that they attend the same school.
- 20.2 She said that she knew nothing about the rape allegation by the complainant.
- 20.3 She confirmed the incident when the accused allegedly chased them in the mealie field.
- 20.4 She said that the complainant was among them.

205. She further said that she knows the accused by the names of Paraffin and Sizwe.
- 20.6 She said that, that is all she knows about the accused.
21. Both Giyose and Zono did not confirm that they saw the accused run away on the day he allegedly raped the complainant.
- 22.1 The accused denied that his other name is Paraffin.
- 22.2 He said that some people call him Mhlali and Joubert and that these are his only nicknames.
- 22.3 He denied that he dragged the complainant. He said that he did not rape her and that no children appeared while he was raping the complainant.
- 22.4 He further said that he knows of no person whose name is Paraffin.
23. The complainant was only six years old when she was allegedly raped by the accused. She is now eight years old. She is a single witness.

24. The Court should treat her evidence with caution.
25. She did not report the alleged rape to her grandmother when she returned home.
26. Bloodstains were seen by other children on her panty when they were playing a certain game.
27. When her grandmother asked her what had happened to her she would not talk but simply cried.
28. It was only after her grandmother had threatened to hit her and Nkosinathi had promised to telephone her sister Zukiswa and promised her "something nice" that she said that the accused had raped her.
29. Another disturbing fact is that two girls Aviwe Giyose and Asanda Zono did not corroborate her evidence to the effect they saw the accused rise from her and run away naked in the direction of a ravine while holding his clothes in his hands after he had seen some children approach them.

30. She said that she would not tell her grandmother what had happened to her because she was scared. She however did not say that the accused threatened to harm her if she reported the incident.
31. Medical evidence suggests that the complainant's vagina had been penetrated.
32. The accused denied that he is Paraffin even though the complainant, Giyose and Zono knew him as such. The Court does not believe him on this aspect. But this does not take the State's case any further. It cannot be said that he was a bad witness.
33. Both Counsel do not believe that the State has proved its case beyond reasonable doubt. The Court shares this view.
34. The accused is found not guilty of rape or of a lesser offence.

A E B DHLODHLO
ACTING DEPUTY JUDGE PRESIDENT
03 APRIL 2006

**HEARD ON: 14 AND 20 FEBRUARY 2006, 29 AND 30
MARCH 2006.**

FOR THE STATE: Ms N TOKOTA

FOR THE DEFENCE: Mr P DUKADA