

HIGH COURT

(BISHO)

CASE NO.: CC27/2000

In the matter between:

THE STATE

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versus

1. AMOS QONONDA
2. MZIWEKHAYA GANELO
3. SIBULELO TSOLOLO

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J U D G M E N T

EBRAHIM J: The three accused are AMOS QONONDA, the second accused is MZIWEKHAYA GANELO, and the third accused is SIBULELO TSOLOLO. They face one count of rape. The crime of rape is set out in the indictment as follows:

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"In that on or about the 1st day of August 1999 and at or near Zola Administrative Area in the district of Ntabethemba the accused did unlawfully and intentionally have sexual intercourse with Nokhayalakhe Speyi without her consent and against her will. It is further alleged that the accused persons acted in concert in the commission of the said offence."

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All three of the accused pleaded not guilty to this charge and in terms of **SECTION 115** of the **CRIMINAL PROCEDURE ACT**,

No./ ...

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No. 51 of 1977 elected not to disclose the basis of their defence.

In substantiation of the charge the State has tendered the evidence of the complainant, NOKAYALAKHIE SPEYI and two other witnesses namely Mrs LULEKA NGANTWENI and Mr TOTOYI SAMENTE. A summary of the evidence of the complainant is as follows:

On 1 August 1999 she visited the home of the mother of accused no. 1. She referred to accused no. 1 as JEMJIKILE. She arrived at his mother's home at about 4 pm and she says that she left at about 7 pm. A number of people were present at the house of accused no. 1. In addition accused no. 1 and accused no. 2 as well as accused no. 3 were also there. She had gone to the home of accused no. 1 as there was a celebration for young men who had returned from their circumcision. She drank some Sorghum beer, she says that she had two sips from a can which was being passed around. She saw accused nos. 2 and 3 sitting with accused no. 1. At the time that she left the home of accused no. 1 to return to her own home she did not see the accused there. On her way home she had to pass three water tanks which are near to the street in which her home is situated. When she approached the water tanks she saw three persons there. When she was about to pass them the tallest of the three persons came to her and struck her with his fist against her forehead. She could not identify this individual. She says/ ...

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says, however, that she heard his name being mentioned by
the other two persons later on. They had referred to him as
MZIWEKHAYA. After this individual had struck her the other
two also assaulted her with their fists and she was kicked 5
just about above her hip. This caused her to fall down. She
was wearing a shawl around her shoulders and one of the
individuals grabbed hold of the shawl in front of her neck
and twisted it and in the process strangled her. One of the
other individuals drew a knife and cut open her panties. 10
She identified accused no. 1 as one of the individuals. One
of the individuals then had sexual intercourse with her,
while the other two held her down. One of them held her by
her legs and the other pressed her neck down and also her
legs. While this person was having intercourse with her the 15
other two individuals argued and it appears that they said:

"MZIWEKHAYA you are taking a long time, let me
also do it."

She indicated that when he was having sexual intercourse
with her he penetrated her. This individual then got up and 20
one of the other persons also had sexual intercourse with
her in the same manner and penetrated her. The other two
individuals were then holding her down. After the second
individual had sexual intercourse with her he got up and
then the third individual also had sexual intercourse with 25
her. During the course of the third person having
intercourse with her the other two individuals became
impatient and tried to pull him off as they wanted to have
sexual/

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sexual intercourse with her again. She says that she screamed, but that whenever she tried to scream they muffled her screams. The person called MZIWEKHAYA then said that they should stab her with the knife in her head until it sinks, because the next day she was going to report them. The other two, however, disagreed and said that they had not yet decided upon this. At some stage she saw the light from a torch and she heard people approaching. The three individuals then ran away. One of the persons approaching shouted words to the effect: "MZIWEKHAYA stop there kwedini." She says that the individual did not stop running as he was called upon to do. She was unable to stand up and had to be helped by the individuals who had arrived. A wheelbarrow was brought and she was loaded into it and then wheeled to her brother's home. She related to her rescuers that she had been raped. Later it was reported to the police what had happened. The complainant says further that at the scene she saw clothing there and this was a lumber jacket and a cap. Later she was taken to a doctor in Queenstown.

The complainant was extensively cross-examined by Mr Manjezi who appears for all three the accused. The following emerged from his cross-examination: The complainant denied that she had drunk any intoxicated liquor before she arrived at the home of accused no. 1. Although she had two sips from the tin of as she described it "komboti" or Sorghum beer/ ...

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beer, she was not drunk. She did not have any brandy or clear beer to drink. She disputed that she had left the home of accused no. 1 at 12 midnight. She did admit that the mother of accused no. 1 had said that she should rather sleep there and not go home. The complainant, however, had indicated that she would rather go home as it was not too far away. She indicated that the persons had sexual intercourse with her over a long period of time and this could have been about two hours. When she had tried to scream they grabbed her throat and prevented her from screaming. She denied that she was drunk and could remember what had happened. When she left the home of accused no. 1 she had not seen accused nos. 2 and 3 behind her as she was walking home. She denied that she had joined the accused at the water tanks in order to drink beer. It was the taller person that punched her in the face on the first occasion. She could not say which of the persons had throttled her by using the shawl around her neck. She demonstrated in the witness box how this took place by exercising a grip and then turning her hand indicating that the person had grabbed hold of the shawl and twisted it. She knew accused no. 1 very well, and insisted that he had raped her. When she had screamed he had even at one stage said to her 'close that mouth'. She denied that she had given consent to any of the accused to have sexual intercourse with her. She denied further that she had at any stage said to any of them that they should hurry up while/ ...

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while they were having sexual intercourse. She had also not told them either prior to having sexual intercourse or at any other stage that they could have sexual intercourse but they should not tell anyone about this. She denied that they had agreed to keep the secret. She also denied that she had only screamed at the time that her rescuers approached. According to her the nearest house was about 15 or 20 paces away.

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In reply to questions from the Court she stated that she had only been able to recognise accused no. 1. All that she could say about the other two accused is that she had heard one being called MZIWEKHAYA. Her rescuers had asked her if she could identify any of the accused and she had indicated that she could only recognise one of them. The three assailants had run away at the time that they saw the light of the torch. None of the assailants had also asked her to tell the people that they had sexual intercourse with her, with her consent. She said that the person who had called to the individual MZIWEKHAYA to stop was Father SAMENTE. She also denied that any of the three persons had asked her to have sexual intercourse with her, nor had she at any stage indicated that she was willing to have sexual intercourse with them. She stated that it should have been cleared to them from her conduct that she was unwilling to have sexual intercourse with any one of them. This concluded her evidence.

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The witness IULEKA NOZUKO NGANTWENI testified that her house was near to the three water tanks. 1 August 1999 was a Sunday and she was awake from her sleep by the sound of a woman screaming. The scream came from close by and she heard the woman at one stage shout: "Oh uncle help me." The screaming continued off and on and at times it became softer and not as loud as before. It sounded to her that a struggle was going on. She went outside and then saw the image of people at the water tanks. She says she saw the image of one person and in addition to that of the person who was screaming. She then woke her children up and send one of them to call other people to come and find out what was taking place. She did not approach, but when the rescuers came closer to the water tanks she saw two individuals run away. She says she looked closely and was able to recognise one of them as being MZIWEKHAYA who is accused no. 2. She went to the assistance of the woman who was screaming and described her as being in a state of dizziness or fainting. She had found the complainant lying on her side. She also noticed a lumber jacket, an underpants and a cap lying on the ground. It seemed to her that the underpants was that of a male person. She confirmed that the complainant was not wearing a panty or underpants. They also found another underpants which was cut on both sides. Apparently someone asked if it was a man or a woman's underpants as it had a seam on the side. She confirms that the complainant was screaming and that they brought/ ...

brought a wheelbarrow and wheeled her to her brother's home. When they questioned the complainant she was at first unable to say what had happened, it appeared to this witness that the complainant was not in her full senses and seemed to be 5 shock. This witness had also heard Mr SAMENTE shouting that MZIWEKHAYA should stop. She observed further that the complainant's throat was swollen and that there was scratch marks on her forehead and just above it to the right hand side. She also confirms that the complainant was taken to 10 a doctor.

The following morning she accompanied the residents to the house of accused no. 1. She also referred to him as JEMJIKILE. She conveyed to him that MZIWEKHAYA had said 15 that they were together and that accused no. 1 had registered surprise. She had not spoken to either accused no. 2 nor accused no. 3. All three the accused were taken away by members of the community.

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During cross-examination she conceded that at the time the people arrived on the scene it could have been round about midnight. The person who had been carrying the torch was Mr SAMENTE. When she observed the people at the water tanks it appeared that two of them were going back and forth to 25 the water tanks. From what she could see they appeared to be males. She had watched what was going on for almost an hour and during this time she heard the woman screaming and moaning/ ...

moaning. She admitted that she had not seen a third man at the scene. It was only the next morning that she heard that there was a third person. It did not appear to her that the complainant was drunk, nor had she smelt any liquor 5 on her. She confirmed that the complainant had said that she could recognise one of the assailants. This information the complainant had volunteered after they had taken her to her brother's home and they had warmed the complainant up because she was obviously very cold. She also said that 10 when accused no. 1 was told that he was one of the individuals he had said that he was not present. She had not seen any members of the community assault any of the accused. She remembers that the accused said that they had used the complainant. She also indicated that it was only 15 at a later stage that the complainant had said that there were three individuals who had raped her. She had also confirmed that she had come from the house QONONDA.

In reply to questions from the Court she said that the 20 accused had admitted that they had sexual intercourse with the complainant. However, they had not said that she had consented to this. There was no other incident of this nature that occurred at the water tanks that evening. In her view when she saw the complainant she did not gain the 25 impression that she was faking, she genuinely seemed to be shocked. This concluded her evidence.

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The next witness for the State was Mr TOTOYI SAMENTE. He confirms that he was called to come to the water tanks because of an incident which was taking place. On his arrival he found a woman there whose name was unknown to him. He had a torch with him and then saw a young man whom he recognised as MZIWEKHAYA running away. He says he shouted to MZIWEKHAYA to come here, however, he did not respond and continued running away. He also confirms that they had to transport the complainant by means of a wheelbarrow to her brother's house. He says further that he saw a wound on her head and that her face was swollen, she was shivering and cold and unable to speak. At the time that he arrived at the water tanks she was lying down and screaming. He was unable to say whether she was drunk or not. At the scene he found a black pants and a panty, the panty had been cut on both sides with a knife.

He is the chairman of a Police Forum and the following morning he and other residents went to the house of MZIWEKHAYA. They questioned him about the events of the previous evening and asked him to whom the clothing belonged. He said that the lumber jacket belonged to Mr QONONDA. They then went to the house of QONONDA, that is accused no. 1. Where accused no. 1 said that it did not belong to him, but to a herd boy. He says that accused no. 2 admitted that he had sexual intercourse with the

complainant/ ...

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complainant. However, he had not said whether he had sexual intercourse with her with her consent or not. What accused no. 2 did say to him was that she was an older person with whom he had a love affair.

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The herd boy whom accused no. 1 had referred to is accused no. 3. He says further that all three the accused admitted that they had knowledge of the incident.

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Cross-examination of Mr SAMENTE revealed the following: He had not told the police that the complainant was drunk. He was an illiterate individual and therefore could not read or write. He confirmed that he had made a statement to the police. He was questioned on various aspects of the events of that evening, these related the state of sobriety of the complainant, the recovery of a lumber jacket and underwear at the scene and a cap and trousers. In his view it appeared that the panty had been cut with a knife. He had not questioned the complainant about how she had come there, nor about what had happened in relation to who had committed the rape on her. He says that when they took the complainant to her brother's house she went to sleep and he then left to go to the police. When it was put to him whether he could say whether the complainant was drunk his reply was that it was possibly seen by other. He was also questioned about the treatment that the three accused received from the members of the community and said they

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were not assaulted in his presence. He says that none of the accused had denied having sexual intercourse with the complainant. He insisted that accused no. 2 had told him that he had an affair with the complainant.

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In reply to questions from the Court he said that he had formed the opinion that she was genuinely upset and this was the reason for her crying. He had also seen the swelling on her face and another spot on her neck which was also swollen. The Court also asked Mr SAMENTE how old he was and although he said he was about 60 years of age it is completely apparent to the Court that he was far older than that. He was not able to disclose his date of birth to the Court, but says that he is in receipt of a pension. That concluded his evidence.

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The State then handed in **EXHIBIT "B"** which is a medical report prepared by Dr JJ KOPOWITZ and indicates that he conducted a medical examination on the complainant, NOKHAYALAKHE SPEYI on 2 August 1999. This report was handed in terms of **SECTION 212(4)(a)** of the **CRIMINAL PROCEDURE ACT**, 51 of 1977. Mr Manjezi on behalf of the accused indicated that there was no objection to the handing in of the report and they did not dispute the doctor's findings and conclusions. Under the heading "Clinical findings" the following is recorded by the doctor:

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"2 X 5 cm scratch abrasions to front of neck.

5 cm swelling of forehead.

Alleged rape 1 August 1999 at 19h00."

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This concluded the evidence for the State.

Accused no. 1 then testified. He confirms that the complainant visited his home on 1 August 1999. He says she arrived at 8 pm and left at about 12 pm. When the complainant arrived it appeared to him that she had been drinking. She had alcohol to drink at their place. By the time the other people had left and the complainant was still there they drank Sorghum beer. He confirms that when the complainant wanted to leave his mother tried to persuade her not to but she said that she was still going home. He confirms that accused nos. 2 and 3 were there. About 5 minutes after the complainant left accused nos. 2 and 3 followed her. He did not go with them but remained at home. After some while he decided that he was going to the mountain to the circumcision school. He left home, but then arrived at the three water tanks. He saw people sitting there and realised that they knew him. He went closer and recognised accused nos. 2 and 3. The complainant was there but she was lying on the ground on her side. She looked at him and asked him who he was and he replied that he was JEMJIKILE. She in turn asked if he was the son of MANQABANI and he said yes. He asked her what was being done to her and/ ...

and she replied that he should not tell anyone what they were doing as they were hiding this. He then asked her if he could participate in what was being done. This he described as that sexual intercourse was being had with her. 5 She agreed to this and said that he should hurry up. He then had sexual intercourse with her. However, he became afraid before he ejaculated and then got up and went home. He could not explain what had caused him to become scared it had just happened. He returned home but did not go to the 10 circumcision school. He left accused nos. 2 and 3 with the complainant. At no stage had he heard the complainant screaming, nor had he or accused no. 3 punched or kicked her. He had also not pinned her to the ground while either of the other accused were having sexual intercourse with 15 her. He says that he was drunk. The reason for the complainant claiming that she had been raped was because other people saw what had happened. He insisted that she had given him consent to have sexual intercourse with her. He says the complainant was also drunk. 20

Cross-examination by Mrs De Kock who appears for the State revealed the following: Accused no. 1 knew the complainant well and she had often visited their home. The visitors to his home had not left because there was no liquor left to 25 drink. When he approached the water tanks he had seen that one of the other accused was having sexual intercourse with the complainant, but when he arrived there accused nos. 2 and/ ...

and 3 were sitting and the complainant was lying on her back. He did not see them drinking. He was asked why it had been put to the complainant that when he arrived there that accused no. 3 was having sexual intercourse with her, 5 he replied that he did not know where his legal representative obtained that information from. He said that when the complainant agreed to have sexual intercourse with him he indicated to her that she should not worry as he would not tell anyone. He was unable to say who the 10 initiate was that he was going to visit at the circumcision school. He was again asked why he became scared before he ejaculated, but he was unable to provide any answer as to why this had happened. He said that it puzzled him that he had become scared. He denied that he had become scared 15 because he had heard members of the community approaching. At the time that he left the scene accused nos. 2 and 3 was still sitting there and the complainant was also sitting. There was an empty bottle beer there and he took that with him. When he was asked why he had done this, he said that 20 it was because there were bottles of beer also at his home. He insisted that he had not run away from the scene but that he had walked. He also said that he had not told his legal representative that he had left before the others, he had possibly made a mistake in not telling him and had not heard 25 that this had been put to the witnesses. He was then taxed on the fact that prior to cross-examination of the witnesses being completed that his legal representative had consulted with/ ...

with him before closing cross-examination and this provided him with an opportunity of informing his legal representative. He then answered that he had told him. When asked why he had not told his legal representative that this had not been put to the witnesses, his reply was that the witnesses had not said that they had seen him there. He also denied that he was still on the scene when the members of the community arrived.

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In regard to the events of the following morning when the members of the community came to his house he says that he was questioned about having sexual intercourse with the complainant and that he admitted this. He could not remember any other questions that were put to him as he was assaulted. He admitted he had not offered an explanation nor had he said that the complainant had given consent for him to have sexual intercourse with her.

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According to him the members of the community did not want an explanation from him. They were assaulting him and he could not tell them that she had given permission. Asked why he had not told the police that the complainant had given him permission to have sexual intercourse with him, he says that the police asked him to make a statement and did not question him. In any event the police had not asked him if there was an agreement between him and the complainant that he could have sexual intercourse with her. He was asked why he had not told them that he was innocent, to

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which/ ...

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which he replied that they merely wanted a statement from him. He also knew they were not going to try the case. When it was put to him that he had assaulted and throttled the complainant he says this was a surprise to him as this was the first he had heard about this. 5

In re-examination he was asked if the reason for him not saying anything to the police was because he was exercising his right to remain silent as entrenched in the Constitution. He confirmed that this was the reason for him not saying anything. 10

In reply to questions from the Court he says the complainant was lying when she says that she had been raped. He knew that the complainant was very much older than him, in fact that she was old enough to be his mother. However, he did not think about this as he could see that there was an agreement between the people there to have sexual intercourse with her. Although the complainant was drunk she was capable of standing. She had claimed that she had been raped as she was embarrassed that all three of them had sexual intercourse with her and the people who had come there had now discovered this. He also contended that the witness LULEKA NGANTWENI was lying when she says that the complainant screamed. However, he did not claim that Mr SAMENTE was lying. Although he had not asked how the complainant was to get home, this did not show unconcern on his/ ... 15 20 25

his part. This concluded the evidence of accused no. 1.

Accused no. 2 then testified. He says that when the complainant left the house of accused no. 1 they followed her, that is he and accused no. 3. They had beer with them and they were singing as they walked. At the water tanks they found the complainant sitting there. They sat there next to her and all three of them then drank beer. After they had finished the first bottle of beer she asked for another beer. He then requested her to lie down. She replied to this that she did not want other people to know and they should not tell anyone about this. He reassured her that he was not going to tell anyone. She then went to lie on the ground and he had sexual intercourse with her. After he had finished accused no. 3 had sexual intercourse with her also. After accused no. 3 had finished having sexual intercourse with her accused no. 1 arrived and asked what was going on. After the complainant had asked if he was MANÇABANI's child he replied that he was. Accused no. 1 then requested her to have sexual intercourse with him and she also asked him whether he was not going to tell other people, to which he replied that he would not. She then said that he should hurry and he also had sexual intercourse with her. After having sexual intercourse with her accused no. 1 left. The complainant then got up, pulled her clothes straight and all three of them sat down. At this stage he heard voices and he and accused no. 3 got up and left. When he/ ...

he was some distance away he heard a person calling him, but he did not respond to this and went home and then went to sleep. He denied that the underwear of the complainant had been cut with a knife, in fact according to him the complainant was not wearing any underwear. He denied having assaulted and kicked her, he knew that Mr SAMENTE was part of the Crime Forum and the following morning when he was questioned by members of the community Mr SAMENTE was present but did not ask anything of him. He admitted having told the members of the community that he had sexual intercourse with the complainant. He denied that he had said that she had been a girlfriend of his for a long time. He also admitted that the cap found at the scene belonged to him and that he had left it at the place near to the three water tanks. He said the complainant was drunk, but not heavily so and was able to walk on her own. He himself was not very drunk.

When cross-examined by Mrs De Kock he conceded that the complainant was old enough to be his mother. When then asked how he could suggest having intercourse with her, he said that the complainant had asked for it. When asked to explain this he said that she had lifted up her dress virtually to her hips and had sat down next to him with her dress pulled up. He says that her actions showed that she wanted sexual intercourse this was because of the manner in which she sat in front of them with her dress up. He

insisted/ ...

insisted that this showed that she wanted to have sexual intercourse. He did not feel embarrassed to ask her to have sexual intercourse with him. He denied having assaulted her. When it was put to him that the complainant had 5 screamed he says that he had not heard her screaming. When it was then put to him whether she had screamed at any stage, he said that it was only when the people were next to her that she screamed. At that stage he was no longer there as he had already left. When asked if he had told his legal 10 representative that he admitted that she had screamed at one stage, he says that it seems as if he did tell him. He could not explain why it had been put to the complainant that she had not screamed at all. At the time that she screamed he was near the gate of his own house which is 15 about 100 metres away from the scene at the water tanks. When it was put to him that the complainant says that he had ran he said that she was lying. It was also put to him that Mr SAMENTE and the witness LULEKA NGANTWENI confirmed this that he said that they were also lying. He knew both Mr 20 SAMENTE and the witness LULEKA NCANTWENI and was on good terms with them. When he was asked why he had not turned around when Mr SAMENTE called him he said that he did not do so because the complainant had not wanted him and the others to tell anyone about what had happened. This meant 25 if he returned he would have told them what had happened. When he was pressed on this he said he was shy of going back. When he was asked why he had not told the members of the/ ...

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the community the following morning when they asked him about this, he said he did not have an opportunity to do so as they were manhandling him. At one stage he complained that he could not hear a question which the interpreter Mr Majola had translated to him, at that stage the Court observed Mr Majola had been interpreting in the same level of voice as before. The question related to the issue of a ladies' panty being found at the scene. The question was then repeated and he said that there was no panty there. When asked if he could explain how the complainant had sustained the injuries he said that he did not know as she was not assaulted.

In reply to questions from the Court he said that the complainant was lying about accusing him of having sexual intercourse with her against her will. She had seen him at the home of accused no. 1 and she knew him and the others and also knew his name. He did not find it strange that she had not mentioned his name to her rescuers as they had agreed they would not tell anyone about the fact that they were having sexual intercourse. Mr SAMENTE was not lying when he said he shouted at him, but on all the other issues Mr SAMENTE was lying. The reason for Mr SAMENTE lying was because there was trouble between the two of them. He, that is accused no. 2, belonged to the African National Congress and Mr SAMENTE belonged to the United Democratic Movement and at some stage there had been a fight between the/ ...

the ANC and UDM. It is for this reason that Mr SAMENTE had come to court and told lies. He had not told his attorney about this as his attorney had not raised this with him. When it was pointed out to him that his attorney would have told him that Mr SAMENTE would be a witness, he claimed that he had not heard the question as the interpreter was not speaking loudly enough. Then when the question was repeated he said that he had made a mistake by not telling his attorney. The witness LULEKA NCANTWENI was also lying, although there was no trouble between the two of them.

This concluded the evidence of accused no. 2 and at this stage Mr Manjezi on behalf of all three accused closed the case for accused nos. 1, 2 and 3.

The argument of Mrs De Kock for the State is very briefly that the complainant's evidence should be accepted. The Court should be aware of the cautionary rule in accepting the evidence of a single witness, but the complainant had been a credible witness and there was no basis for not believing her. Moreover there was corroboration for the complainant's evidence by that of Mrs LULEKA NCANTWENI and Mr TOTOYI SAMENTE. The injuries that the complainant had suffered also served as corroboration of her version. There was also confirmation of the cut underwear from the other witnesses. They also confirmed they found the complainant in a state of shock and that they first had to warm her up before/ ...

before she could speak. Ultimately the Court had to take a global approach to the evidence on the basis of that the State had proved that the three accused had raped the complainant. In the case of accused no. 3 he had not testified and the evidence of the State against him he had not replied to this. 5

Mr Manjezi in his argument conceded that ultimately the only issue that really had to be determined is whether the complainant gave consent to the three accused to have sexual intercourse with her or not. The Court had to be aware that the complainant had been drinking that evening and the question was whether she was intoxicated to the extent where she could not remember if she had consented or not. It must also be borne in mind that the accused were also intoxicated and in that state they may not have been able to determine properly that there was lack of consent on the part of the complainant. He conceded that he could not attack the credibility of the witnesses LULEKA NGANTWENI and TOTUYI SAMENTE. However, there were certain differences in their evidence for example Mrs NGANTWENI spoke about one person leaving the scene whereas Mr SAMENTE says he saw two people. He conceded that the accused could be criticised for not proclaiming their innocence when asked by the members of the community about the events of that night. He also conceded that due to the complainant not incriminating all three accused it increase the credibility of her evidence. In the same/ ... 10 15 20 25

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same way the injuries she had sustained reflected adversely on the evidence of accused nos. 1 and 2, He contended, however, that even if the State case stood as what has been referred to as an unshakable edifice that the Court should nevertheless look at the versions given by accused nos. 1 and 2 and determine whether those version were not reasonably possibly true. He also contended that the Court should not draw an adverse inference from the failure of accused no. 3 to testify as the evidence of accused nos. 1 and 2 was literally testimony on behalf of accused no. 3. At the end of the day he contended that there should be a reasonable doubt in the Court's mind in regard to guilt of the accused and they were entitled to the benefit of such doubt and should be acquitted.

In reply Mrs De Kock contended that the Court should not consider the evidence piecemeal but in its totality. On that basis the State had proved its case against the accused beyond a reasonable doubt. Accused no. 3 should have testified in answer to the evidence against him and it could not be said that the evidence of the other accused was to be accepted as testimony on behalf of accused no. 3. Accused no. 2 has not testified in regard to whether the complainant had consented to sexual intercourse with him or not. She accordingly asked that all three accused be convicted of the charge of rape as set out in the indictment.

COURT/ ...

COURT ADJOURNS

COURT RESUMES 5 JUNE 2000

I turn to an evaluation of the evidence. I am mindful of 5
the fact that in assessing the evidence of the complainant
that I am dealing with the evidence of that of a single
witness. I refer to **R v MOKOENA** 1956(3) SA 81 (AD) at 85G:

"The conviction therefore rests solely on Wilson's 10
evidence. Sec. 256 of Act 56 of 1955 specifically
provides that - with exceptions not relevant here
- a court may convict an accused of any offence
alleged against him on the single evidence of any
competent and credible witness. In **REX** 15
v MOKOENA, 1932 CPD 79 at p. 80, DE VILLIERS, JP,
said of the corresponding sec. 284 of Act 31 of
1917:

'In my opinion that section can only be
relied on where the evidence of a single 20
witness is clear and satisfactory in every
material respect. Thus the section ought not
to be invoked where, for instance, the
witness has an interest or bias adverse to
the accused, where he has made a previous 25
inconsistent statement, where he contradicts
himself in the witness box, where he has been
found guilty of an offence involving
dishonesty/ ...

dishonesty, where he has not had proper opportunity for observation etc.'"

I also refer to **S v JACKSON** 1998(1) SACR 470 (SCA) from 5
476e-f:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants 10
in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may 15
call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

Then at 477c-d:

"Lord Taylor CJ then formulated eight guidelines, 20
the third of which is particularly important for our purposes. It reads as follows (see at 733c-d):"

This quotation appears from **R v MAKANJUOLA**; and **R v EASTON** 25
1995(3) All England Law Reports 730 (CA):

"(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence
of/ ...

27.

of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel." 5 10

Finally I refer to **R v BELLINGHAM** 1955(2) SA (AD) 566 from 569G:

"In **NHLAPO v REX** (AD 10th November, 1952), SCHREINER, JA, said in giving judgment that

'in deciding whether the guilt of an accused has been established beyond reasonable doubt a cautionary rule of the kind mentioned' 15

(by DE VILLIERS, JP, in **REX v MOKOENA**, 1932 OPD 79)

'may well be helpful as a guide to a right decision. It naturally requires judicious application and cannot be expected to provide, as it were automatically, the correct answer to the question whether the evidence of the Crown witness should be accepted as truthful and accurate. Certainly it does not mean... that the appeal must succeed if any criticism, however slender, of the/ ... 20 25

the witness's evidence were well-founded.'"

Whilst the sections referred to in the cases I have quoted deal with previous versions of the **CRIMINAL PROCEDURE ACT** a similar provision is contained in the existing present **CRIMINAL PROCEDURE ACT** 51 of 1977, and I refer to section 208 which reads:

"An accused may be convicted of any offence on the single evidence of any competent witness."

I have referred to these various cases to highlight that the Court may on the evidence of a single witness, provided the evidence is reliable and the witness is otherwise satisfactory and credible, convict an accused on such evidence. I have also sought to highlight that our law has moved from a position which it previously occupied in sexual offences cases where Courts were required to exercise additional caution so to say in convicting an accused as the line of reasoning that existed then was that there may be a tendency for a complainant in a sexual offence case to wrongfully implicate an accused. It is clear from the case of **S v JACKSON** that such an additional cautionary approach has been accepted by the Appellate Division as being outdated and no longer applicable. It remains, however, for a Court to exercise caution when faced with the evidence of a single witness. I have certainly borne this in mind.

It is convenient that I deal with the position of accused

no. / ...

no. 3 first before I proceed to that of accused nos. 1 and 2. Accused no. 3 has not testified. The effect of this is that he personally has not provided any version to contradict that which the complainant has furnished to the Court. Mr Manjezi has submitted that in effect accused nos. 1 and 2 had testified on behalf of accused no. 3 and the Court should therefore not draw an adverse inference from his failure to testify. His argument, as I understand it, is in effect that the testimony of accused nos. 1 and 2 should be accepted as the testimony, if I may say so, of accused no. 3 and should be weighed together with that of the evidence against it. It is so that where an accused does not testify that the Court may not be warranted in drawing an adverse inference from his failure to testify. At the same time his failure to testify is a factor to be weighed in the scale with all the other evidence before the Court. In this regard I refer to **S v NKOMBANI AND ANOTHER** 1963(4) SA (AD) 877 at 893G-H:

"...the failure to testify or the giving of a false alibi - whatever the reason therefor - ipso facto tends to strengthen the direct evidence, since there is no testimony to gainsay it and therefore less occasion or material for doubting it."

That is the case in regard to the evidence here. There is
no/

no direct evidence on accused no. 3 to gainsay the evidence of the complainant. In any event even if I were to take account of what accused nos. 1 and 2 have said where it involves accused no. 3 the fundamental problem is that it does not convey to the Court what the state of mind of accused no. 3 was at the time that he had sexual intercourse with the complainant. In other words there is no direct evidence from accused no. 3 which indicates that he had accepted that the complainant had consented to him having sexual intercourse with her or that her conduct was such that he inferred that she had consented to having such sexual intercourse with him. The import of that is clear. If the Court accepts the evidence of the complainant then on her version she says that accused no. 3 had sexual intercourse with her against her will. The only conclusion to be reached in that regard is that accused no. 3 is guilty of the charge of rape.

But I have nevertheless sought to find corroboration of the complainant's evidence since she is a single witness. This corroboration comes from the evidence of LULEKA NCANTWENI and TOTOYI SAMENTE. The evidence of both these witnesses establishes beyond a reasonable doubt that the complainant was screaming and that when they approached her she was extremely distressed. It also confirms that the impression they obtained from what had occurred there was that she had been raped, Or at the very least sexually interfered with

or/ ...

or assaulted in one manner or another. But their evidence goes further. They confirmed that the complainant conveyed to them that she had been raped by three individuals. It is important to realise that the complainant did not identify 5 accused no. 3 as one of her rapists. There can be no question therefore that she has shown a biased adverse to accused no. 3. But accused no. 3 is clearly implicated by virtue of the defence he has raised in this Court and by virtue of the evidence in its entirety. His decision to 10 contend himself with his defence by relying on the evidence accused nos. 1 and 2 is wholly inadequate to result in the accused being able to reject the evidence of the complainant. There is also the evidence provided by the doctor and this is of course that the complainant had 15 sustained certain injuries. The silence by accused no. 3 leaves this evidence completely uncontradictory and it further corroborates the evidence of the complainant.

The complainant was a very good witness and gave evidence in 20 a composed manner and did not evade answering any questions put to her. Such was her evidence that she even conceded propositions put to her by Mr Manjezi on behalf of the accused. It is only when certain propositions were put to her that indicated that she was under the influence of 25 alcohol to such an extent that she could not remember that she had consented and that she had sat with the three accused at the water tanks, with accused nos. 1 and 2

rather/ ...

rather, and drank two quarts of beer with them, that there was a distinctly discernable change in her demeanour. There was a similar change in her demeanour when it was put to her that she and the accused had reached a 'pack' so to say that 5 that they would not disclose that they had sexual intercourse. She was visibly distressed by the suggestions put to her that she had colluded with the accused to hide the fact that they had sexual intercourse. The same applied when it was put to her that she had drunk two quarts 10 of beer with accused nos. 1 and 2. Her distress is epitomised in the replies. On a few occasions her utterances were to the effect:

"Oh God, that is not so, oh God."

The same occurred also when it was put to her that she had 15 told the individuals who had sexual intercourse with her that they should hurry up. My observations of her have led me to the inescapable conclusion that she was not faking distress when these questions were put to her. The suggestions offended her to such an extent that she 20 responded in the manner that she did. I would like to mention that they were not aimed at Mr Manjezi he was simply doing what he was required to do and that is to put the defence of the accused to the witness.

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I find the complainant, NOKHAYALAKHE SPEYI to be an honest and reliable witness. I accept her testimony as being the truth in regard to the events that occurred that night. The

only/

only individual that she identified directly is accused no. 1 and she identifies him as one of the individuals who raped her. In regards to accused no. 2 she indicates that Mr SAMENTE called his name, but she on her own did not identify him as one of the assailants. It would have been the easiest thing in the world if she was fabricating her story to have identified all three of the accused as her assailants. Apart from accused no. 1 she also knew accused no. 2 and accused no. 3 and had seen them that evening at the home of accused no. 1. More importantly she had seen them in the company of accused no. 1. Notwithstanding this none of the accused deny having sexual intercourse with her, they simply dispute that they had sexual intercourse without her consent and thereby they deny that they had raped her.

The State witnesses LULEKA NGANTWENI and TOTOYI SAMENTE were equally good witnesses. Both of them also did not by virtue of the manner in which they gave evidence or the content thereof displayed any biased adverse to the accused. On the contrary they confined themselves to the individuals that they had been able to identify. In the case of Mrs NGANTWENI she indicated that she had recognised accused no. 1, in the case of Mr SAMENTE he indicated that he had recognised accused no. 2. Mr SAMENTE's evidence is that the following day he and members of the community visited all three accused and that they admitted that they had sexual intercourse with the complainant. If he had wanted to

falsely/ ...

falsely implicate the accused in regard to their admissions that they had sexual intercourse with the complainant it would have been an easy matter for him to first of all say that they had conceded that they had raped her and secondly 5 that he had seen all three the accused at the water tanks where the complainant was that evening. The same applies in respect of Mrs NGANTWENI, she observed what was taking place at the water tanks and from where she was she indicated that it appeared to her the person either being assaulted or 10 murdered. She also with the knowledge that she acquired the following day that the three accused had admitted that they had sexual intercourse with the complainant could easily have adjuster her evidence to say that she had seen all three the accused present there. That apart, both witnesses 15 NGANTWENI and Mr SAMENTE were very good witnesses. They answered questions forthrightly and conceded various propositions put to them. I am satisfied that their evidence is reliable and that they have been honest in their testimony. I accept that they have been truthful to this 20 Court.

On the basis of the evidence presented by the State the evidence clearly shows that all three the accused raped the complainant and have accordingly made themselves guilty of 25 the charge as set out in the indictment. But, notwithstanding this evidence, I am required to determine whether the versions given by accused nos. 1 and 2 and by implication/ ...

implication that of accused no. 3 may reasonably possibly be true.

The demeanour of accused no. 1 when he gave his evidence in 5
chief and during cross-examination created an extremely poor
impression. At no stage did he either raise his eyes to
look at his legal representative or anyone else and it was
only when he was confronted on this by Mrs De Kock who
appears for the State that he looked up and said that the 10
reason for him having looked down the whole time was because
of the lights in the court. He did not expand on this and
I am left to assume that he found the lights perhaps to be
glary in his eyes or too bright for him to be able to look
up. I must stress, however, that if he found this a 15
discomfort at no stage prior to that did he indicate that he
was having any problems with the lights in the court. It is
clear to all also that the lights are fluorescent lights and
the ceiling is extremely high in the court and I am at a
loss to understand why he found some distress with the 20
lights. But that is only one aspect that affects his
testimony and I am prepared to accept that he may possibly
have been distressed by the lights, but that does not
account for the tenor of his evidence. When cross-examined
he was evasive and contradictory. There were also a number 25
of inconsistencies in his evidence. He was also unable to
explain why he had not told the people who confronted him
that he was innocent of having raped the complainant. He
did/

did not convey this either to the residents who approached him nor the police. His attempt to rely on his right to silence as entrenched in the Constitution is clearly an attempt to justify why he did not tell the police that he was innocent. But I found it astounding that he would want to rely on his right to silence since to profess you are innocent is not to implicate yourself. Why anyone would not to want to tell whoever confronted him with the crime that he was innocent is beyond me. The only reasonable inference to be drawn is that he did not profess his innocence because he had been guilty of raping the complainant. As I have indicated his evidence was riddled with inconsistencies and contradictions and even lies. He was a very poor witness. Some of the examples of his inconsistencies and contradictions are the following:

The purpose of him leaving the house at midnight that evening according to him was to visit the initiates who had been circumcised and who were on the mountain. However, during the time that he was having sexual intercourse with the complainant he says that before he could ejaculate he became scared. He was unable to provide any explanation for this. He says for no reason at all he became frightened. He then left according to him, but instead of going to visit the initiates, which was the purpose of him leaving home, he inexplicably returned to his own home. He was unable to provide any reason why this had happened. He says also that at no stage did the complainant scream. Yes he can obviously/ ...

obviously, in terms of his story, only refer to the period when he was there, but he was adamant that she had not screamed at any stage. He claimed further that the complainant was drunk already at the stage when she came to his parents' house. However, although she, according to him, drank a substantial amount of liquor there she insisted on going home. I find it strange that his mother would have permitted her to go home if she was drunk, even if she insisted that she did not want to sleep there, his mother would at the very least have insisted that he accompany her to ensure that she got home safely. His claim in this regard sounds quite improbable. He says also that when he arrived at the water tanks he had seen one of the other accused having sexual intercourse with the complainant, but when he arrived there she was lying on her side. This was at no stage put to the complainant, similarly he says he left before the others left, he left them with the complainant at the water tanks. This too was never put to the complainant. He says that the complainant consented to having sexual intercourse with him and had asked him not to tell anyone about this. At the same time he concedes that she is well-known to him, that he knew that she had two mature children and was old enough to be his mother. He knew further that she stay very close by, he has not disputed either that there were houses close by. If this should have been a secret sexual relationship that was taking place I find it most improbable that it would have taken/ ...

taken place so close to the houses where they could have been seen. The evidence of Mrs NGANTWENI that this was taking place behind the water tanks has not been disputed. It appears that they had accosted the complainant and obviously subdued her out of sight of what they thought were the eyes of other people. 5

Accused no. 2 was similarly a poor witness. His version of events changed in material respect when he was cross-examined. For the first time it emerged that the complainant had in fact enticed him to have sexual intercourse with her. He says she lifted her dress when she came to sit next to him, that it was virtually up to her hips and this showed that she wanted sexual intercourse. In addition it had consistently been put to the complainant that she had not screamed at any stage. But under cross-examination again he admitted that she had in fact screamed at the stage that he and accused no. 1 had walked away from the scene. Both he and accused no. 1 conveyed that the complainant had claimed that she was raped because she had been found out by the members of the community who turned up there. Accused no. 2 accuses both Mrs NGANTWENI and Mr SAMENTE as well as the complainant of lying to this Court. Strangely it came out under cross-examination that in fact Mr SAMENTE had a grievance against him, this of course was never put to Mr SAMENTE at any time. When asked if he had conveyed this to his legal representative his reply was that his/. ... 10 15 20 25

his legal representative had never asked him about this. It is highly improbable that he would have withheld such important information from his legal representative, since he well knew that Mr SAMENTE was going to testify and would provide a version that corroborated the complainant's version that she had been raped. Accused no. 2 was evasive, questions had to be repeated and his excuse in this regard was that he could not hear what the interpreter Mr Majola was interpreting to him. He could not satisfactory explain that even although it was pointed out to him that the level of the tone of voice of Mr Majola had been at the same level throughout. He also could not provide any answer as to why he had not told the members of the community that the complainant had consented to having sexual intercourse with him. In any event if they were going to keep the secret why leave the complainant lying there when the members of the community were coming onto the scene. It was surely the easiest thing to assist her to leave the scene and to quietly slip away so that no-one should know what they had done. His reply also when asked why he had not returned to the scene when Mr SAMENTE called him was most unsatisfactory. In fact he showed very little interest in wanting to return there and simply went to sleep.

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I do not find the versions of either accused no. 1 or no. 2 reasonably possibly true. They have manifestly fabricated version in an attempt to exculpate themselves. They have tried/ ...

tried to paint a picture of the complainant that she was not only willing to have sexual intercourse with them, but that she had been drunk and despite the fact that she was old enough to be the mother of each one of them, that she submitted to having intercourse a relatively short distance away from her home. I reject their versions as being totally false. As I have indicated and I need to re-emphasise the complainant was a very good witness, I accept her version in its entirety, I similarly accept the evidence of Mrs NGANTWENI and Mr SAMENTE as being the truth. It is clear also that on the versions provided by the accused that they acted in concert, even though accused no. 1 claims to have left the scene prior to accused no. 2 and 3. He clearly associated himself with their criminal acts. The complainant says he as well as the other accused assaulted her. But on his own story he makes common cause with her since he says that when he arrived on the scene he asked that he wanted to join in with whatever was taking place there. In the circumstances I am satisfied that the State has proved the guilt of each of the accused beyond a reasonable doubt.

In the result all three accused are convicted of the crime of rape as set out in the indictment.

Y EBRAHIM

5 JUNE 2000

JUDGE : BISHO HIGH COURT