

IN THE HIGH COURT

(BISHO)

CASE NO.: CC18/2002

DATE: 16 APRIL 2002

In the matter between:

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THE STATE

versus

LUNGA RULA

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EX TEMPORE JUDGMENT:

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EBRAHIM J:

The accused, Lunga Rula, who is a 27 year old male, has been charged with the crime of rape. The indictment states that on or about 30 October 2000 and at or near NU1 Section, Mdantsane, in the district of Mdantsane, the accused unlawfully and intentionally had sexual intercourse with Sikelelwa Mabhayi, a 5 year old girl, who is in law incapable of consenting to sexual intercourse.

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The accused pleaded not guilty to this charge and elected in terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 not to disclose the basis of his defence.

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Since the complainant was a child presently of 6 or 7 years of age the State brought an application in terms of section 170(A) of the Criminal Procedure Act for her to give evidence through an intermediary. In terms of section 158(3) of the Criminal Procedure Act an application was also made for the evidence of the complainant child to be given via a closed circuit television facility. In view of this the Court had to adjourn and resume sitting at the King William's Town Magistrate's Court

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where there were facilities for a closed circuit television transmission of her evidence. The proceedings also proceeded in camera.

Thereafter the Court called a social worker, Miss Andisiwe Msindwana as the State wished to lead the evidence of the child through her as an intermediary. After hearing her evidence with regard to her qualifications and the fact that she appeared on the list of intermediaries as approved by the Minister of Justice, the Court granted permission for her to act as an intermediary and she was then duly sworn in to act as same. 5

The evidence of the complainant or victim was then led. I need to mention that the Court conducted an enquiry before she tendered her evidence as to whether she understood the difference between a lie and the truth and whether she realised the consequences of telling an untruth. The Court also established whether she understood what was required of her namely that she had to testify in these proceedings. On the basis of this enquiry the Court was satisfied that she could distinguish between the truth and a lie and that she realised the consequences of telling a lie. She was then admonished to tell the truth as she also did not understand of what was meant by taking the oath. 10 15

Mrs De Kock who appears for the State then sought to lead her evidence and in the process asked her a series of questions. The pertinent questions in this regard related to whether she knew an individual called Luto and she replied that this person was a neighbour. However, when asked whether she played with this person, who I assume is a child, she indicated that this was not the case. It was established that she was presently in Substandard B at primary school and that in 2001 she was in Substandard B and in the year 2000 she 20 25

attended a creche. When asked whether she had played with Luto when she attended creche she indicated that this had not taken place. She was asked whether she knew Lunga Rula, that is the accused, and she indicated that he is also a next door neighbour. Although she had seen Lunga often when she attended creche she responded to the questions of Mrs De Kock by saying that she had not spoken to him, nor had he spoken to her. Further she had not gone to the accused's home, nor had she gone to the home of the person Luto. She has also never visited any other place on the premises where Lunga resided. Lunga had also never called her to come to his place.

She indicated that nothing had happened in the year that she attended creche of which she might be afraid off. She had not also been hurt by anyone whilst she was attending creche. Similarly, even prior thereto, nothing had happened that had caused her to be hurt. She confirmed that whilst she attended a creche her teacher a Miss Sheila had spoken to her about abuse and people hurting her. The intermediary was asked by the Court whether she had specifically used the word 'abuse'. The intermediary confirmed that she had said this. Mrs De Kock asked her what the discussion had been about she then indicated that she had forgotten what the teacher had told her. She could also not remember what she had told the teacher.

She confirmed that she had been examined by a doctor and during the course of this examination the doctor examined her private parts which he found to be red. Here again the Court acquired from the intermediary whether she had used the words 'private parts' and the intermediary confirmed that she had used the Xhosa word 'igusha' which translated means private parts. She confirmed that her mother had

taken her to the doctor, but could not remember what the reason for this was. When asked if anything had happened in relation to her private parts before she was taken to the doctor, she said she could not remember. Finally she was asked if anything was worrying her and her reply to this was to the effect that she had forgotten.

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This was the only evidence tendered by the State and concluded the case for the State.

Mr Maggabi thereupon closed the case for the defence.

At this stage it has come to my attention that I have not asked either Mrs De Kock nor Mr Maggabi to address the Court. I regret this oversight and in view of the fact that I have merely summarised the evidence thus far without drawing any conclusions it is in my view nevertheless appropriate that I afford both Mrs De Kock and Mr Maggabi an opportunity to address the Court with regard to whether the accused should be convicted or acquitted.

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JUDGMENT STANDS DOWN FOR BOTH COUNSEL TO ADDRESS THE COURT

JUDGMENT RESUMES

I now resume my judgment after hearing both Mrs De Kock and Mr Maggabi. I need to record that both of them have indicated that there is no evidence against the accused and in the case of the State it cannot support a conviction and in regard to Mr Maggabi he has asked that the accused obviously be acquitted. May I mention that this situation clearly does not prejudice the accused in any way whatsoever nor is the State prejudiced in any way.

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It is clear from the evidence adduced that there is no indication at all that the victim, Sikelelwa Mabhayi, was either sexually assaulted or

raped. On the basis of her evidence there is no case for the accused to answer. It is apparent to me that Mrs De Kock was caught by surprise by the replies she received from the victim, Sikelelwa Mabhayi.

Be that as it may, in view of the fact that there is no evidence against the accused he is entitled to be acquitted and accordingly he is found not guilty and discharged. 5

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Y EBRAHIM

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JUDGE

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BISHO HIGH COURT