

IN THE HIGH COURT

(BISHO)

CASE NO.: CC45/2002

DATE: 30 AUGUST 2002

In the matter between:

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THE STATE

versus

BULELANI JINGQI

EX TEMPORE JUDGMENT

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EBRAHIM J:

This trial was conducted behind closed doors, that is in camera, in terms of the provisions of section 153(3)(a) of the Criminal Procedure Act, 51 of 1977. The accused, Bulelani Jingqi, is charged with one count of rape. The indictment specifies the charge in the following terms:

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"IN THAT during the period December 2001 and January 2002, and at or near Pakamisa, Zwelitsha, in the district of Zwelitsha, the accused did unlawfully and intentionally have sexual intercourse on three occasions with NONTOMBI BOZO a 9 year old female child, without her consent."

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The accused pleaded not guilty to this charge. In terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 Mr Manjezi who appears for the accused informed the Court that the accused elected not to make a statement indicating the basis of his defence, save to say that he denied having sexual intercourse with the victim. This was confirmed by the accused.

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Mrs De Kock, who prosecutes on behalf of the State thereafter applied in terms of section 170A of the Criminal Procedure Act for an intermediary to be appointed so that the victim could testify through her. And, further, in terms of section 158 of the Criminal Procedure Act for the victim to testify by means of a closed circuit television facility. Mr Manjezi did not object to either of these applications and both were granted.

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Ms Andisiwe Nsindwana a registered social worker and competent to act as an intermediary was thereupon appointed to do so.

The alleged victim Nontombi Bozo was called to testify. Since she was only 9 years old the Court conducted an enquiry to establish whether she could distinguish between the truth and a lie and the consequences of telling a lie. She was found to be a competent witness, but as she did not comprehend what was meant by an oath the Court admonished her to speak the truth.

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She testified that on a particular day whilst she and a few friend, namely Siposethu, Lindiwe, Zukiswa and Nonsamo were gambling with cards a person whom she called Kamayo called her. She could not remember when it was, except that it was a Monday in December last year, that is 2001. She did not respond to the call immediately but her friend Zukiswa told her to go to find out why she was being called. Kamayo then came to her and lifted her up and said that she must accompany him to the supermarket to buy skins. This she did. On returning to her home, and when they were next to it, Kamayo said that she should go with him as he wanted to send her somewhere. She again accompanied him and they went to his shack and entered it. Kamayo closed the door and locked it. He told her to get on the bed, but

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she refused. He then dragged her and made her lie on her back on the bed and took off her panties. He also undressed, opened her thighs and lay on top of her. He inserted his penis in her and moved his buttocks back and forth. When he was finished he wiped her vagina with a white washing towel and put her panties back on. He also dressed and told her to go home threatening to stab and kill her if she told anyone. Despite this she did tell someone.

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The following day, a Tuesday, Kamayo again fetched her. She could not remember where she was when this occurred, but he took her to his shack once more. There he called her to him, but she refused. He then undressed her and again made her lie on her back on the bed. He again opened her thighs and inserted his penis in her and moved his buttocks back and forth. When he was finished he wiped her with the same washing towel he had used on the previous occasion. He then opened the door and told her to go, but did not threaten her again. She says that what he had done to her was painful.

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On Friday of the same week she was at home with her mother and Lwando and Meshwa. Kamayo arrived and spoke to her mother who then asked her where he was going to take her, that is Nontombi, as it was evening. Kamayo replied that he wanted to send her to Zikela's home to buy tea bags. She accompanied Kamayo, but instead of them going to Zikela's house they went in another direction. Near the home of Nomalezi was a field and he dragged her to it and made her lie on the ground on her back. This was near to Nonsiswe's place. He took off her panties, lowered his pants to his knees, opened her thighs and inserted his penis in her and moved his buttocks back and forth. Afterwards he took an item of clothing similar to a jacket and wiped her.

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They returned to her home where he told her mother that he had brought her back. She did not tell her mother what had happened because of his previous threat to kill her. She eventually told Lwando and Siposethu who was also known as Tetise, but could not remember when she did so. She then said that she had told them the following day and they in turn told Nozakhe who told her mother. At first her mother wanted to go to Kamayo, but then said that they should not go as he had a bush knife. Nozakhe telephoned a policeman, named Witbooi, who arrived and took them to Kamayo's home. Thereafter she was taken to the police station and to a doctor who examined her.

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Nontombi was extensively cross-examined by Mr Manjezi. From this it emerged that the person Kamayo was the accused and that he was actually known as Kamayi. The first incident had occurred during the day. She could not remember if she had asked the accused why she had to accompany him to the supermarket. He told her he was going to buy chicken skins. She did not want to go with him, but could not explain why she did not tell him this. She could not recall if he had threatened her or forced her to go with him. At the supermarket she waited outside while the accused went inside to purchase the chicken skins. When he came out he did not say anything and she just followed him. When they were close to her home he said she should go with him as he wanted to send her somewhere. She went with him and they went to his shack. When he told her to enter she asked why she had to do so, but she could not now remember his reply. After closing the door he told her to take off her panties. When she refused to do so, he took it off. She could not remember if he lifted her onto the bed. He told her to lie on her back and forced her thighs open with his hands in spite of

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her resisting this. In the process he hurt her thighs. He had undressed and then forcibly inserted his penis in her while lying on top of her. It was the first time this had happened to her. Afterwards he wiped her vagina and she could feel that it was wet. When she left the shack she had her panties on. She only told Lwando and Siposethu what had happened to her after the third occasion and in spite of the accused's threat to kill her.

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Questioned about the second occasion she said that she could not recall where she was when the accused took her away. She could also not recall if she was with anyone at the time, nor what time of day it was. She remembers that he took her to his shack again and took off her panties but she was not sure of this. She could not recall anything in regard to the second occasion.

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The third occasion was during the evening. He told her mother he wanted to send her to his girlfriend. Lwando and Meshwa were present, Lwando was older than her, but her mother did not suggest that Lwando go instead of her. The accused then dragged her onto the field and made her lie on the grass, but she could not recall how this occurred. Afterwards when he wiped her vagina he used an article of clothing that appeared to be a jacket and which he had worn. The third occasion was also in December. He did not threaten her then. She could not recall if her mother asked her upon her return where the accused had sent her. She denied having a boyfriend, but admitted that she had slept at a friend's house on one occasion. The accused was lying if he claimed that he never took her to the supermarket or his shack, or that he never had sexual intercourse with her. The accused had not come to her home during the day to fetch her but it was in the evening. He also did

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not send her to his girlfriend, Nonsikelelo's house. She admitted that her mother never asked her what the accused had done to her.

In reply to questions from the Court she said that she had a good relationship with her mother. She always told her mother if something happened to her. But she did not tell her of these events as the accused had threatened to kill her. Siposethu had asked her on the Saturday what had happened to her, she did not know why Siposethu asked her. After the first occasion she had washed herself when she arrived home. She then put her clothes aside and washed them herself. She did the same after the second and third occasions. It was only with the first occasion that she noticed a white water like mark on her panties. When the accused fetched her at her home her mother had said it was too late for her to go out, but then still allowed her to go. On her return her mother asked her where they had gone and she told her mother that he had sent her to Nonsikelelo. The accused had told her to say this. She also said that he sent her to buy tea bags. On each occasion she was able to walk home, but could not walk normally as it was painful. After she told her friends what had occurred they told Fezeka. She then told Fezeka that the accused had raped her. She could, however, not explain to the Court what the word rape meant. She, Lwando and Siposethu were sitting on the kitchen steps when Fezeka conveyed this to her mother. All three incidents occurred in December 2001 and in one week. She knew Christmas was on 25 December, but could not say if these incidents occurred before or after Christmas. She could also not recall when the doctor examined her.

Nonayisi Bozo testified that she was the grandmother of the victim and the person to whom Nontombi referred to as her mother. Although

she cannot recall the date she does recall that on a Friday evening the accused came to her home and asked if he could use Nontombi to run an errand. She, that is the witness, was in bed already and at first refused as it was night time, but then allowed Nontombi to go. A little later the accused brought Nontombi back who then undressed and went to bed. 5

She did not notice anything unusual until the next day. She saw that Nontombi had difficulty in walking and her eyes were dark, but she did not ask her what was wrong with her. Later Tetise came to her with Nontombi and asked Nontombi to explain what had happened. Nontombi cried and Fezeka then threatened her and told her to respond to Tetise's 10

request. Nontombi then related that the accused had taken her to his house and the field and had sexual intercourse with her. She also said that he had told her he would kill her if she told anyone. Nontombi said it had occurred twice. The witness thought the third occasion was when he fetched her in the evening. She then laid a charge with the 15

police.

During cross-examination she said it was early on the Saturday morning that she noticed that Nontombi had difficulty in walking. She now claimed that she had asked Nontombi about this, but Nontombi then cried. This occurred after they had returned from Tetise's home. 20

Tetise's correct name was Siposethu. When it was put to her that Nontombi testified that she had not told her, she said that Nontombi replied when Fezeka questioned her. She denied that she was informed of the incident by Fezeka. When the accused approached her and said he wanted to send Nontombi somewhere she had not thought of sending 25

Lwando although he was older and a boy. She denied that this occurred during the day. Also the accused had not waited with her for Nontombi

to return. She knew Nonsikelelo was the accused's girlfriend. Her daughters Nozakhe and Nomathu were not present when the accused came to fetch Nontombi.

Replying to the Court's questions she said it was about 7 pm when the accused arrived. Nontombi had not gone to bed yet. She could not say whether or not Nontombi was willing to go with the accused. Her daughter Nozakhe took Nontombi to the doctor but she could not remember when this was. Nontombi had said that the accused had on one occasion taken her to a field, but the night that he fetched her he took her to his home. She had not noticed on any previous occasion that Nontombi walked with difficulty.

Siposethu Mpahla, 14 years old, also testified after the Court had enquired into whether she understood the difference between the truth and a lie and the consequences of telling a lie. She also did not comprehend what an oath was and she was then admonished to tell the truth. She was Nontombi's friend and knew the accused. She remembers an occasion on a Wednesday when the accused approached them while they were playing cards. He called Nontombi and when she did not go to him he came to her and lifted her to her feet. He then walked away with her holding her hand. Later Nontombi returned on her own, but they did not ask her where she had been. She did not notice anything different about Nontombi. On Thursday the accused again came to where they were playing cards and called Nontombi and walked off with her. After a long time Nontombi returned. She only asked her on the Saturday where she had been. She replied that the accused had asked for her brother Simphiwe. Nontombi appeared to be dull and did not want to do anything. She seemed to be in low spirits and cried.

Siposethu then told Fezeka and thereafter Nontombi told them that the accused had taken her to his house, locked her inside, undressed her and inserted his penis in her. This had happened on Wednesday, Thursday and Friday. Siposethu then said that Nontombi told them she was taken to the accused's shack twice and once to a field. On the first occasion he took her to a field after he had said he was taking her to a supermarket. On the third occasion when he fetched her at home he took her to his house. Fezeka then told Nontombi's grandmother, but the witness was not present when this took place.

Cross-examination revealed that she spoke to Nontombi while they were going to Sizwe's house. Nontombi did not reply but cried. When they returned to Nontombi's home she reported to her grandmother on their errand, but did not tell her that Nontombi had cried. When Nontombi told Fezeka she did not say what happened on the second and third occasions, when Fezeka asked her where he had taken her on the second occasion she said it was to a field. This also happened on the third occasion. He had only taken her to his shack once.

In reply to the Court's questions she said that when Nontombi returned on the first occasion she did not notice anything unusual about her. On the second occasion she only appeared to be dull and did not want to speak. On the Saturday Nontombi did not complain that she had difficulty in walking.

Nozakhe Ligwa testified that she was Nontombi's aunt. She was present on the Saturday when Tetise told Nontombi to tell them what had happened. When Nontombi would not speak Fezeka threatened to punish her if she did not tell them. Nontombi then related that the

accused had fetched her whilst she was playing cards with her friends
 and taken her to his home. There he undressed her and inserted his
 penis in her. Afterwards he wiped her and told her to go. This occurred
 on a Wednesday in the last week in December 2001. On the Thursday
 he again fetched her whilst she was playing cards. Once more he took 5
 her to his home, undressed her and inserted his penis in her. This time
 he placed a big knife next to her and said he would stab and kill her if
 she told someone. The third time he fetched her at home during the
 evening after supper. He told her to accompany him to the shop but
 then took her to a field. There he undressed her and inserted his penis 10
 in her. Afterwards he wiped her with a T-shirt that he was wearing and
 then took her back home. She and Nomathu had taken Nontombi to be
 examined by the doctor.

It emerged during cross-examination that Fezeka had threatened
 to beat Nontombi when she refused to talk. Nozakhe said she asked 15
 Nontombi if she had been raped or beaten, even though there was
 nothing to indicate that this had happened. She only appeared to be dull
 and her eyes were red. It looked as if she wanted to sleep. She did not
 ask Nontombi whether she was ill.

In reply to the Court's questions she said she had not noticed 20
 anything physically wrong with Nontombi. They did not go to the police
 on the Saturday as they did not have the money to do so. Fezeka only
 telephoned the police on the Monday. Fezeka did not telephone on the
 Saturday as she went to Mdantsane. Someone had taken her there by
 car. They did not telephone on the Sunday as Fezeka was busy. She 25
 did not think of doing so as Fezeka had said she would telephone on
 Monday. She then said that Fezeka had said that she would telephone

on the Saturday, but returned too late from Mdantsane to do so.

Dr OC Harbor a qualified medical practitioner testified that he had been in practice since 1985. He often examined children who had been raped. On average at least two cases a week. On 8 January 2001 he examined Nontombi and recorded his findings in **EXHIBIT "A"**. These 5
were that there was no indication of sexual maturity and she had no external wounds. Her vulva showed signs of friction. It was reddish and swollen. This type of injury was usually caused by something rubbing between the thighs and would have been involuntarily, in other words it was not a wound that she inflicted on herself. Also it was not 10
caused by a sharp instrument. There were also clefs in three places which indicated that the wounds were less than 48 to 96 hours old. Her hymen was not intact. She would have suffered pain and walked with difficulty. She would not have been able to conceal this.

During cross-examination Dr Harbor stated that in the initial period 15
she would have bled from the injuries. It was reasonable to expect that the bleeding would have stained her underwear. The bruising appeared to be less than 24 hours old and the clefs 2 to 3 days old.

In reply to questions from the Court Dr Harbor said that from the notes on the hospital folder he was informed that Nontombi had been 20
raped on 4 January 2002 and twice in December 2001. However, his findings indicated that she had been raped more recently than that, unless she had healed more slowly. In his experience she definitely would have bled. He had not asked her how the injuries had been caused, nor when it happened. He did not observe any wounds on her 25
back. Even if her legs had been forcibly parted this need not necessarily have left bruising. He would have expected her to cry, or at least cry

out, when she was raped.

This concluded the case for the State.

The accused, Bulelani Jingqi, then testified in his own defence. He denied that he had taken Nontombi to his home on two occasions and had sexual intercourse with her. He also denied fetching her on a Friday evening and taking her to a field where he had sexual intercourse with her. He claimed that he went to Nontombi's home on Sunday, 6 January 2002, about 10 am and had asked her grandmother to let her run an errand for him. He then sent her to the house of his girlfriend, Nonsikelelo to look for her. He denied having sexual intercourse with Nontombi either in December 2001 or January 2002.

Cross-examined by Mrs De Kock the accused said he did not usually send Nontombi on errands. She was the only child there when he came to her house. He went to their house as he bought cigarettes there. During the time that he waited for her to return from the errand they spoke about social matters. Nomathu had then told him about Nontombi having slept at someone else's place one evening. He had not gone to his girlfriend's house himself as they had agreed that he would send someone.

In reply to the Court's questions he said that he knew Nontombi since 1992 when he arrived in Pakamisa. The shack he stayed in was at the back of a brick house which he and his brother owned. He never took Nontombi to the supermarket, nor had he taken her away from her friends with whom she was playing cards. Nontombi and Siposethu were not telling the truth in this regard. He was arrested on 10 January 2002 at the shack. The police did not search the shack nor did they remove any of his clothing.

This concluded the case for the defence.

Both Mrs De Kock and Mr Manjezi addressed the Court on the merits. I do not intend detailing their submissions suffice to say Mrs De Kock argued in favour of a conviction whereas Mr Manjezi contended that the accused should be acquitted. 5

An evaluation of the medical evidence reveals the following:

- (a) The medical evidence establishes that Nontombi Bozo was sexually abused and in all probability raped and possibly more than once.
- (b) In the opinion of Dr Harbor the wounds to her vagina were inflicted within 48 to 96 hours, that is 2 to 3 days before his examination on 8 January 2002. 10
- (c) In Dr Harbor's experience genital injuries usually bled and the nature of these injuries were such that they would have been bleeding. Her panties would therefore have been stained. 15
- (d) The act of rape would have been very painful for her and would have caused her to cry or at the very least to cry out.
- (e) Because of the pain she would have walked with difficulty afterwards.
- (f) The medical evidence in regard to when the wounds must have been inflicted does not provide support for the evidence of the State witnesses in respect of when Nontombi was raped by the accused. 20

In evaluating the evidence as a whole the following has emerged:

- 1. Nontombi testified that she was raped three times and that these occurred on the Monday, Tuesday and Friday of the same week. 25
- 2. The first and second incidents took place in the accused's shack

during the day and the third in an open field at night.

3. The witness Siposethu Mpahla claims that Nontombi said she was raped on Wednesday, Thursday and Friday of the same week. She says further that Nontombi said that the accused had sexual intercourse with her in his shack twice and once on a field. He had taken her to the field on the first occasion. 5
4. During cross-examination, however, Siposethu said that the first occasion that the accused raped Nontombi was in the accused's shack and the second and third occasions was on a field.
5. Nozakhe Ligwa's evidence is also that the three incidents occurred on the Wednesday, Thursday and Friday of the week. However, whereas Nontombi testified that the accused took her to the supermarket on the first occasion, that is the Monday, Nozakhe claims this happened Friday evening. 10
6. In her testimony Nontombi says that on the first occasion the accused threatened he would stab and kill her if she told anyone. She makes no mention of him producing a knife. Nozakhe claims however that Nontombi had said that on the second occasion the accused had placed a big knife next to her and threatened to stab and kill her. 15 20
7. Nontombi only revealed what had happened to her after the third occasion and then only after Fezeka had threatened to give her a hiding if she did not speak.

In assessing the evidence I am mindful of the fact that the State case rests on the evidence of a single witness who is a child, 9 years of age. At the time of the alleged incidents of rape she was probably 8 years old. I have taken into account that due to her tender years her 25

ability to remember dates may not be the same as in the case of an adult. At the same time I also recognise that she may be susceptible to suggestions and influence from older individuals and even other children. In weighing up her evidence I have borne these factors in mind.

As indicated previously Dr Harbor's observations and conclusions 5
in respect of the injuries which Nontombi sustained are in conflict with her own evidence and the observations of certain of the State witnesses. Thus, while Nontombi does say that the first act of rape was painful there is little indication by her that she had difficulty in walking after the incident. Dr Harbor's evidence is that he would have expected her to 10
experience difficulty. Although her grandmother, Nonayisi Bozo, says that she saw Nontombi walking with difficulty on the Saturday the significance of this evidence is greatly diminished by her reaction thereto. She made no attempt whatsoever to ascertain what was wrong with Nontombi. Further Nonayisi says that the previous evening when 15
Nontombi was brought back by the accused she did not notice that there was anything wrong with her. It seems unlikely that Nontombi would have been able to walk normally the Friday evening if she had been raped in the field, a short while before that. Moreover, neither Siposethu nor Nozakhe say that they observed Nontombi walking with 20
difficulty on the Saturday. Siposethu also says that she did not notice this during the course of the week. I did not find the evidence of Nonayisi Bozo to be persuasive on this aspect.

Then Nontombi's evidence does not reveal that she sustained any wounds which may have resulted in bleeding on any of the occasions. 25
It is clear from Dr Harbor's evidence that there was a strong probability that her wounds would have bled and thereby stained her panties. But

there is no evidence that this occurred. It is hardly likely that there would not have been any bleeding, particularly after the first act of rape and more especially if she was raped three times over a period of three to four days.

There are further aspects of the State case which give rise for concern. The evidence of Nontombi, Siposethu, Nozakhe and Mrs Nonayisi Bozo is that the rapes occurred during December 2001. None of them are able to provide any dates, but are adamant that it was during December. The closest any of them come to defining a time period is Nozakhe who says that it was in the last week of December. But, even this time frame conflicts with the findings of Dr Harbor that the wounds to the vagina of Nontombi would have been inflicted at most 4 days before he examined her, that means between the 4th to the 8th January 2002.

Another issue which causes concern is the reaction of Nontombi and the other State witnesses to certain incidents. At no stage did Nontombi resist or show any reluctance to the accused taking her away from her friends on either the first or second occasion. Even if I accept that she had been threatened with death on the first occasion her subsequent conduct is difficult to understand. If she feared the accused for what he had done to her then this would have manifested itself in various ways when he approached her again the following day. It seems unlikely she would have gone willingly or without trying in one way or another not to go. Yet, neither she nor Siposethu indicate that there was a fear or reluctance on her part to go with the accused. The evidence in any case is that she walked of her own accord and that the accused did not hold her hand. Nontombi provided very little

information about what occurred on the second occasion as she says she could not remember where she was or what happened. But it is clear from Siposethu's evidence that she was called by the accused and then went to him.

Siposethu's conduct is equally strange. On the first occasion 5 when Nontombi returned she did not ask her where she had been or what she had done. Natural curiosity would surely have prompted questions of such a nature. Siposethu's lack of reaction to the accused fetching Nontombi on the second day is difficult to understand. Here was an adult taking a young child away but it did not elicit any response 10 from her. At the very least one would have expected her to ask Nontombi where she was going. After all they were playing cards and this would have disrupted their game. While she says that Nontombi did not seem to be herself when she returned she did not enquire into this until the Saturday. Siposethu is presently 14 years of age and was 15 probably 13 years old when these events occurred. In my view she was certainly old enough to have realised that if there was anything untoward in what was taking place that she should immediately inform an adult and raise her concerns. Even though she did so on the Saturday she did not say that she suspected that the fact that Nontombi was upset was linked 20 to the events of the two previous occasions. It appears to me this never created any concern on her part.

But more inexplicable is the behaviour of both Nontombi and her grandmother Nonayisi Bozo on the Friday evening. I am at a loss to understand how a grandmother could allow an eight or nine year old child 25 and a girl at that, to be taken away by an adult man at night so that she may carry out an errand for him. It defies logic. Any rational thinking

person would not have allowed this, more especially when there was an older boy available to carry out the task. The explanation that the accused gave that this occurred during a Sunday morning is far more plausible and understandable.

Insofar as Nontombi is concerned it is equally difficult to understand why she would willingly go with the accused, and then at night, if he had raped her twice a few days earlier. She was in the safety of her grandmother's home and could have made any number of excuses in regard to why she did not want to, or was unable to, go with the accused. However much she may have feared that the accused could do her harm she was far safer remaining at home than going with him. She was at the time in a position to seek the protection of her grandmother if she considered the accused to be a threat to her. However neither she nor her grandmother testified that she was in any way reluctant to accompany the accused. I am left to conclude therefore that she went willingly and without fearing the accused. Mrs Nonayisi Bozo says further that when Nontombi came back she did not notice that there was anything untoward and that Nontombi walked normally. It hardly seems likely that she would not have been upset if she had just been raped in a field. She would also, most probably, have walked with difficulty. But, this is not what the evidence reveals.

A further issue of concern is the fact that on the Saturday Nontombi only revealed what had supposedly occurred after she was threatened with punishment if she did not speak. This coupled with the fact that Nozakhe pointedly asked her whether she had been raped or beaten raises a serious question mark in regard to what she revealed and the truthfulness of her accusation that the accused was the perpetrator.

None of the State witnesses, barring Dr Harbor, impressed me with their testimony. In the case of each witness, and this includes Nontombi, there were numerous inconsistencies and contradictions in their own testimony and between the testimony of each witness. I have highlighted these previously and there is no need to repeat them. The reliability of their testimony leaves much to be desired and it is difficult to determine where the truth lies. I have a strong impression that the truth has not emerged.

The accused similarly did not impress me as a witness. Fortunately for him he does not have to prove his innocence. It rests on the State to prove his guilt beyond a reasonable doubt. His story was a simple one, namely that he denied having sexual intercourse with Nontombi. On a proper assessment of all the evidence it cannot be said that his version of certain events is not reasonably possibly true. The State has failed to show otherwise.

After weighing up all the evidence I find that the State has failed to discharge the onus which rests on it and the accused is found not guilty and discharged on the count of rape as set out in the indictment.

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Y EBRAHIM

JUDGE : BISHO HIGH COURT

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