

IN THE HIGH COURT

(BISHO)

CASE NO.: CC83/2003

DATE: 17 FEBRUARY 2004

In the matter between:

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THE STATE

versus

PHILILE ROBERTSON NCEDANI

JUDGMENT

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EBRAHIM J

The accused, Philile Robertson Ncedani, is charged with one count of rape. He pleaded not guilty to this charge. Mr Mhlaba, who appears for the accused, informed the Court in terms of section 115 (1) of the Criminal Procedure Act, 51 of 1977 that the accused had elected not to disclose the basis of his defence. This the accused, Mr Ncedani, confirmed as being correct.

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The State called the complainant, Nosipho Fani, to testify. Miss Ncobo, who appears for the State, applied for her to give her evidence through an intermediary and made a further application for her evidence to be received via a closed circuit television facility. These applications were not opposed by the defence and were duly granted by the Court. In view of the fact that Nosipho Fani, as the Court was informed, was 9 years of age the Court endeavoured to establish whether she was able to distinguish between a truth and a lie and whether she understood what it meant to take an oath. It was clear to the Court that, whilst she could distinguish between the truth and a lie, she had no conception of

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what an oath was. Accordingly, pursuant to the provisions of section 158 of the Criminal Procedure Act, she was admonished to speak the truth. Her testimony was adduced via an intermediary, Ms Phathiswa Papiyana.

Nosipho stated that she was 10 years old and what follows is the gist of her evidence. On a particular day she and two friends, Zizipho Tywini and Siphosihle Matiwane were playing on an open piece of ground. This had taken place after they had come from school. She could not recall the date, nor the day of the week, nor even in which year this had happened. She stated that the accused, who was known to her, approached them and called to her to fetch money from him. She responded by going to him and accompanying him to his home. There the accused gave her 20 cents so that she could buy sweets and proceeded to do funny things to her. She stated that the accused had placed her on a bed, taken off her panties, and inserted his penis, which she referred to as his 'kettle' in her vagina. She found this to be painful and cried. The accused then put his hand over her mouth and also moved his body back and forth. After he had finished the accused told her that if she reported at home what had happened he would kill her. She then put on her panties and noticed that there was blood on it. She stated further that she and the accused had been the only persons in the room. She left for her home and on her way met her friends at the open piece of ground. They enquired from her what had happened and she related what had occurred to her. According to her this conversation was not overheard by anyone. She returned home where she found her grandmother and Nosapho Fani. She did not tell anyone at home what had happened to her, as she was afraid to do so, because of the

accused's threat to kill her. At some stage she was taken to hospital by an adult, Nomfulile Fani, where she was examined by a doctor. She was unable to say how Nomfulile Fani had discovered that she had been raped, but then said that Nontsingiselo Fani had overheard what she had said when she told Siliswe Fani what had occurred. When she related what had occurred to Siliswe two other children, namely Anelise and Phindiwe, were also present. She was unable to recall when this took place, but said that it was on the same day when the rape had occurred.

Asked by Ms Ncobo about her bloodied panties she said that her grandmother had washed it. Asked further by Ms Ncobo whether she was prepared to point out who the person was who had raped her, she said that she did not want to see the individual.

Cross-examined by Mr Mhlaba she said the game she and the children were playing was called 'mancheli' and entailed jumping. She denied that they had played a game called 'ndize', namely hide and seek. She and the accused had been the only persons in the house at the time of the rape, but when she left she saw a boy Athenkosi in the kitchen.

Various questions were put to her concerning two written statements, namely **EXHIBITS "A"** and **"B"** which the police had obtained from her. She could not remember signing these statements. I need to record at this stage that Mr Mhlaba abandoned this line of questioning after the Court had pointed out on a few occasions that he had failed to establish that the complainant had actually made the statements.

The next witness for the State was Zizipho Tywini whom the Court was informed was 8 years old. In her case, too, the Court established whether she was able to distinguish between the truth and a lie and what was meant by taking an oath. In her case, too, the Court

was satisfied that she was a competent witness, but unable to comprehend what an oath was. (I have neglected to mention that clearly I found Nosipho Fani also to be a competent witness). Zizipho also testified via the intermediary Ms Papiyana and use was also made of the closed circuit television facility to receive her evidence. 5

She was not asked by Ms Ncobo to indicate when the particular incident occurred, nor how old she was at the time. She stated that she and the complainant and other children had been playing on a field. The names of the other children were, Phindiwe Fani, Nosima and Siyopa also known as Siyolise. She then said that only two of them were 10 playing the game 'ndize' that is hide and seek. At first she stated that no-one had arrived or called either of them, but then said that a person Boetie Philile arrived and told them to fetch money at his house. Boetie Philile had said it was 20 cents and the complainant Nosipho went with him whilst she, that is the witness, stayed behind. Zizipho then added 15 that Siphosihle had also stayed behind with her. Later Nosipho returned and they asked her why she had stayed there. To this Nosipho replied that Boetie Philile had done dirty things to her. Nosipho said that he had taken off her panties and inserted his 'totosi', meaning his penis, in her. Zizipho did not however say where he had inserted his 'totosi'. 20 Nosipho also told them that she had cried and the accused had then given her 20 cents. However, Nosipho had not shown the 20 cents to them.

Cross-examination did not reveal much of significance. It emerged however that she did not know what her date of birth was and 25 consequently exactly how old she was. She was presently in Grade 2 and according to her the incident involving Nosipho had occurred when

she was in Grade 1. By inference therefore the incident would have occurred in 2003. She stated that Nosipho was not happy when she returned from Philile's house. However, Nosipho was not crying. When the witness accompanied Nosipho to her house they found Nontsingiselo and some other children there. Nosipho had then told those children what had happened to her. The witness stated further that Nosipho had told her that Nontsingiselo had gone to tell the elders.

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Mntukanti Fani testified that he was the complainant's uncle and a cousin of the accused. Some time during the middle of 2002 he attended a feast at the home of a Mr Mntini. Mr Fani was unable to recall the specific date. He stated that the accused had also been present and he had seen the accused light a dagga cigarette in the presence of the elders. Because of this he confronted the accused and wanted to take the dagga cigarette away from him, but the accused had run away. Whilst running the accused had shouted that it was not because of the dagga cigarette that the witness was chasing the accused, but because of Thembile's child, Nosipho Fani. The accused also said that he, that is the accused, had sexual intercourse with her until she 'shat', that is defecated. The accused had then run towards his home but he had not pursued the accused as the residents had told him not to do so. He claimed the accused had made this admission freely and voluntarily and without undue inference.

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Very little of relevance emerged during cross-examination. The witness stated, however, that the conversation between himself and the accused had taken place after the accused had been charged with the offence of rape. He disputed the accused's claim that he was not telling the truth. He also rejected the suggestion by Mr Mhlaba that the

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accused may have been joking when he conveyed that he had raped the child Nosipho.

Dr Zubero Elabor a doctor attached to the Grey Hospital in King William's Town testified that he examined the complainant, Nosipho Fani, on 24 January 2001. A medical report which set out what had transpired at the examination and reflected his findings was submitted in evidence as **EXHIBIT "C"**. From what he had recorded in the report Nosipho's age was reflected as being 6 years old. He had also recorded that the rape had allegedly occurred on 16 January 2001. His examination revealed that while only a small part of her hymen remained he did not find any signs of anything else abnormal. In reply to a question from Ms Ncobo Dr Elabor stated that some girls were born without a hymen. The partial hymen could therefore have existed as from birth. He had not detected any tears or bruises and was therefore unable to determine if the complainant had been raped. It was possible that any injuries she may have sustained could have healed by the time of the examination.

Cross-examination was very brief and merely solicited a restatement by Dr Elabor that there was no indication of forceful penetration.

Questioned by the Court Dr Elabor stated that it was probable that an adult had accompanied the complainant at the time of the examination and that such adult would have provided the date of 16 January 2001 as the date of the alleged rape. He had no record of the rape having occurred on 9 January 2001. He stated further that after a week or two one was unlikely to find any signs of bruising or tearing. Bruises normally disappear within a week and so did mild tears. More severe

tears would take approximately 2 weeks to heal. He did not find any signs of scarring, nor any signs of healed wounds on her vulva, nor on the areas on the outside of the vulva. If there had been bleeding it was his view that it could have come from the mucosa, that is internally, or even from an external wound. However, he had not found any signs of either. He could not recall being informed of any reason for the complainant being brought for the examination at such a late stage, nor was he provided with a reason for the delay.

After the evidence of Dr Elabor the State applied for the date of the offence to be amended from 9 January 2001 to 16 January 2001. The application was opposed by Mr Mhlaba for the defence. The amendment was however granted by the Court. Thereafter Ms Ncobo tendered in evidence a certified copy of the complainant's birth certificate, namely **EXHIBIT "D"**.

This concluded the State case.

The accused elected to testify in his own defence. The pertinent details of his testimony are the following: He denied the events as outlined by the complainant, he stated that the events never occurred. He only became aware of the allegations against him on 20 January 2002 when he attended a feast at the Fani house. A woman Novulelo Fani had asked him what he had done to Nosipho. When he enquired what he was supposed to have done she did not reply and he left. He had also spoken to Nosipho's father to ask what he had done. Nosipho who was standing near to her father had then responded and said that Nontsingiselo had said that she must say so. However, Nosipho had not disclosed what it was he had done. As a result of this he became angry and left. He stated that he was arrested on 24 January 2002. A

policeman Mr Tywini had asked him what he had done to the complainant, but he had not replied. At the police station he had made a written statement to another policeman Mr Kawuti.

Cross-examined by Ms Ncobo he conceded that he had made a mistake and that the year was 2001 and not 2002 when he was arrested. He again denied that the events described by the complainant, Nosipho Fani, and the witness Zizipho Tywini had occurred. He and the witness Mntukanti Fani had argued on one occasion. On 16 January 2001 he had been at home with his father, his sister and her three children. In respect of the incident with Mntukanti Fani he denied having said that he had raped Nosipho. He claimed that Mr Fani had beaten him with a sjambok and had then told Mr Fani that he knew why he was beating him. He had told Mr Fani that it was because it was claimed that he had raped Nosipho. He had conveyed this to his legal representative and could not explain why his legal representative had not put it to the witness. His legal representative had also not asked him where he was on 16 January 2001. He had been told by his legal representative that the rape had occurred on 9 January 2001. When Novulelo Fani asked him what had happened to Nosipho he in turn had asked her what it is that he had done, but she did not respond to this. He had not spoken to Nontsingiselo about the incident. In his statement to Mr Kawuti he had stated that Nosipho had said that Nontsingiselo had told Nosipho to say that he had raped her.

In reply to the Court's questions he said that when he had consulted with his legal representative he was told that the date of the offence was 9 January 2001. It was only in court that he had heard that it was supposed to be 16 January 2001. This new date came to

his attention after all the witnesses had testified. He had told his legal representative that Mntukanti Fani had assaulted him and was unable to say why Mr Mhlaba had not put this to the witness Mr Fani. The argument he had with Mr Mntukanti Fani had taken place before the alleged rape. However, he had not conveyed this to his legal representative.

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Porto Enoch Kawuti testified on behalf of the defence. He confirmed that he had taken two statements, namely **EXHIBITS "A"** and **"B"** from the complainant Nosipho Fani. When he had taken down the first statement, namely **EXHIBIT "A"** Nosipho had been accompanied by her grandmother. Both he and Nosipho had spoken in Xhosa even though the statement had been written in English. He had written down the statement in January 2001, but could not remember on what date this had occurred. When he had taken the second statement, namely **EXHIBIT "B"**, Nosipho had been brought to him by her father. He could also not remember on what date this had occurred and claimed that the statement had been taken on the instructions of the Court, that is the Magistrate's Court. When this Court pointed out to him that it was most improbable that the Magistrate's Court would have given such an instruction, he responded that he would have to peruse the police docket to verify if this was so or not. Replying to a question from Mr Mhlaba he confirmed that in **EXHIBIT "A"** the complainant had stated that a child Athi had seen her when she was raped and had told his mother thereof.

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During cross-examination the witness confirmed that no adult had been present when he wrote down the statements. He had also read the statements back to Nosipho before she signed. He could not explain why he had not dated the statements and said that he had forgotten to

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do so. He had been a policeman for 9 years now and thus for 6 years in 2001. He had also taken down numerous statements. Nosipho had not said that she had been told what to say. She had told him she was telling him what had happened to her. He had established that Nontsingiselo was now in Port Elizabeth. However, he did not have a fixed address. Even her parents did not know where she was staying. She had left Pirrie Mission in January 2004, that is this year. Novulelo Fani was staying in Dimbaza and he knew her address. He was unsure but thought that Athi was 8 years old, he had interviewed Athi, but could not remember taking a statement from him. He did, however, remember that Athi cried when they spoke. He was unable to say why Athi had cried.

In re-examination Mr Mhlaba put it to the witness that he had taken a statement from Athi. But again he said he could not remember this.

Questioned by the Court Mr Kawuti said that Nosipho understood what the implications were when she signed the statements. When he was asked to explain why Nosipho's age had been changed in the second statement, **EXHIBIT "B"**, from 6 years to 9 years he replied that he was unable to do so. He could not say who had been responsible for changing the age. He knew Mntukanti Fani and said he was a policeman. Mntukanti Fani was also the brother of Nosipho's father. He had interviewed Mntukanti Fani but could not recall if he had taken a statement from him. He confirmed that he was the investigating officer in the case, but could not explain why it had taken so long for the matter to come to trial. Prior to the case being transferred to the High Court he had completed all his investigations and taken all the statements from

witnesses.

This concluded the case for the defence.

Both Ms Ncobo and Mr Mhlaba addressed the Court on the merits. I shall not repeat their submissions in detail since their main submissions will become apparent during the course of my evaluation of the evidence. 5
Needless to say however Ms Ncobo sought the accused's conviction on the charge of rape, whereas Mr Mhlaba argued in favour of his acquittal.

I turn now firstly to an evaluation of the medical evidence. This consists of the oral testimony of Dr Zubero Elabor and the written medical report **EXHIBIT "C"** which he had prepared at the time of his 10
medical examination of the complainant. From this evidence the following is evident:

- (a) The date of the alleged rape was given to Dr Elabor as being 16 January 2001. This information in all probability had come from one or other adult who must have accompanied the complainant, 15
Nosipho Fani.
- (b) His medical examination of the complainant did not reveal any bruises or any other injuries nor abnormalities save for one detail.
- (c) The gynaecological examination revealed that there was, what Dr Elabor described as, "a small tag of hymen left posteriorly". 20
Expressed in non-medical language this meant that only part of the hymen was present, however, there were no signs of any tears on the hymen.
- (d) On the basis of his findings Dr Elabor could not conclude if there had been sexual interference or that there had been forceful 25
penetration.

In evaluating the State's evidence in its entirety the following is

evident:

1. The State case is dependent on the evidence of a single witness, namely the complainant, Nosipho Fani.
2. Nosipho's evidence fails to reveal when the rape occurred. She was unable to say on which day of the week it happened, nor 5 which month, let alone the year. Dr Elabor's evidence did not assist in this regard since his knowledge of the alleged date is based on unsubstantiated hearsay evidence and speculation.
3. The State has failed to clarify why the date of the offence was alleged in the indictment to be 9 January 2001 and not 16 10 January 2001 as reflected in Dr Elabor's medical report. Despite the report being available to the State prior to the drafting of the indictment the State nevertheless cited 9 January 2001 and not 16 January 2001 as the date of the offence. It was only after Dr Elabor had testified that the State applied for the amendment of 15 the date of the rape to 16 January 2001.
4. Certain witnesses whose testimony would have greatly assisted the Court in establishing the truth of what occurred were not called to testify by the State. The precise reasons for the State's failure to tender their evidence have not been revealed to this 20 Court. Thus the State's failure to lead the evidence of Nontsingiselo Fani and Nosipho's grandmother as well Novulelo Fani and the child Athi leave a number of questions unanswered.
5. The testimony of Nosipho's grandmother, it appears to me, would have been of great assistance if, as Nosipho stated, she was the 25 person who had washed Nosipho's panties. The grandmother would have been able to confirm or deny whether there was blood

on the panties. Similarly the testimony of Athi could have verified whether or not Nosipho had been at the house of the accused.

6. I have not even touched on the absence of other crucial evidence or the failure to present such evidence to the Court. The whereabouts of the panties and whether any investigation was conducted in regard to this aspect have been left entirely unexplained. I am not even aware whether any attempt was made to establish whether any DNA could have been obtained from the relevant panties or from anyone else.

Ms Ncobo has submitted that the Court should accept the evidence of Nosipho and that of Zizipho. She has contended further that in spite of the absence of any signs of any forceful penetration it did not mean that Nosipho had not been raped. Mr Mhlaba has submitted on the other hand, and quite wrongly in my view, that the evidence of a child can only be accepted if it is corroborated by an independent source. I am unaware of any legal basis for this proposition. In my understanding of the law, a child's evidence, provided it is trustworthy, and the witness is credible may be accepted without any corroboration being necessary. It is self-evident that the evidence must be clear and satisfactory in every respect where the child is a single witness.

Having said this the problem that confronts me in this case is that crucial evidence which should have been adduced was not placed before the Court. In the summary of substantial facts the State disclosed that Nontsingiselo Fani had overheard Nosipho telling other children that the accused had raped her. Nontsingiselo thereafter reported this to some elders. This evidence, as I have stated, was inexplicably not adduced by the State. I am aware that the State is not bound by the contents of

the summary of substantial facts. However, the developments involving Nontsingiselo form a crucial part of the State case. It is an important link in the chain of events. Without Nontsingiselo's testimony the strength of the State case and the reliability of the evidence of the other witnesses was greatly diminished. While Nontsingiselo's testimony may not have provided corroboration for the actual act of rape it could have resulted in the reliability of Nosipho's testimony in particular being enhanced. I am left to speculate why such crucial evidence has been withheld from this Court.

The limited evidence before me certainly raises a suspicion that the accused may either have sexually interfered with the complainant or possibly even have raped her. But this limited evidence fails to reach the requisite standard of proof that the State has the *onus* to discharge. Fortunately for the accused suspicion does not amount to proof beyond a reasonable doubt. The evidence does not establish that the complainant, Nosipho Fani, was raped, nor even that she was sexually molested or indecently assaulted. The accused has denied that he raped her. This denial the State has failed to show is false. I find no evidence in his cross-examination by Ms Ncobo which compels me to conclude that he has lied or that he has fabricated a denial.

I find it necessary in this case to record my concern at the quality of evidence adduced by the State as well as the general presentation of the State case. No attempt was made to lead any evidence from which it could be established with some degree of certainty when the alleged rape occurred. The evidence adduced was of such a poor quality that it is impossible to conclude whether the offence occurred on 16 January 2001 or 9 January 2001 or some other date. Similarly no attempt was

made to clarify on what dates the respective statements were taken by the policeman Kawuti from the complainant, Nosipho Fani. Further if it was so important to record that the child Athi had been present when Nosipho was raped why was his evidence not adduced.

I am left with the uneasy feeling that the State did not believe that it had a sufficiently strong case against the accused to obtain a conviction. Consequently the State was content to lead a minimum of evidence and hope for the best.

Prosecutions should be pursued vigorously, but fairly and with due regard for the right of the accused to a fair trial. All relevant evidence should be placed before the Court to enable the truth to surface and to ensure that justice will prevail. The innocent are entitled to be set free, while the guilty should be convicted and be appropriately punished. Where evidence that is crucial in a case is not presented the guilty may very well be set free. There is concomitantly the danger that an innocent person may be incorrectly convicted. It brings the administration of justice into disrepute where the State case is poorly investigated and prosecuted in a half-hearted manner.

My criticism of how this trial was conducted are not directed solely at the State. It applies equally to the defence. The quality of trial advocacy displayed in the presentation of the accused's defence left much to be desired. Every accused person is entitled to legal representation of a standard which ensures that his defence will be conducted in an expert manner. It is expected of a legal representative to articulate an accused's defence in unequivocal terms and to challenge any evidence which conflicts with the version that the accused has provided to his legal representative. Any failure to do so is severely

prejudicial to an accused person and puts him or her at risk of being incorrectly convicted. I regret to say that the standard of trial advocacy provided in this case fell gravely short of what one would have expected. Most, if not all, the evidence of the complainant and the State witnesses went completely unchallenged, yet when the accused testified it was clear that he had furnished instructions to Mr Mhlaba on various issues, but these were never canvassed during cross-examination. I must express my deep concern at this failure on the part of Mr Mhlaba since it greatly increased the risk of the accused being convicted in the face of evidence which is far from satisfactory. Such a situation also results in the administration of justice being brought into disrepute. I trust that my comments will not fall on deaf ears.

After weighing up all the evidence I find that the State has failed to prove the guilt of the accused beyond a reasonable doubt. In the result the accused is found not guilty and acquitted on the charge of rape.