

IN THE HIGH COURT OF SOUTH AFRICA

BISHO

CASE NO. CC30/2006

In the matter between:

THE STATE

and

VUYANI DLENGE

ACCUSED

JUDGMENT

DHLODHLO ADJP:

1. The accused, a 47 – year – old male person is charged with one count of rape.
2. It is alleged that on or about the 31st day of May 2000 at Tshoxa village in the district of Keiskammahoek he unlawfully

and intentionally had sexual intercourse with Z W, a 10 – year – old female person without her consent.

3. The charge is accompanied by a warning in terms of the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, relating to minimum sentences, to the effect that the provisions shall apply if he is convicted, as the victim is a girl under the age of 16 years.
4. The accused pleaded not guilty and raised the defence of alibi.
5. According to Dr Lacey who examined the complainant on 08 June 2000 the complainant's hymen was perforated. Dr Lacey states that as the alleged sexual assault had taken place a week before the date of examination, no traces could be found.
- 6.1 The complainant who is now 15 years old, testified in an open court. Her evidence may be summed up as follows:
- 6.2 She said that on 31 May 2000 at about 14h00 she was at a Mfaca homestead playing with her friends, some of whom were Nohalala and Nonki.

- 6.3 She said that at some stage her friends went to a shop to buy dolls and she remained alone in the house in which they were playing.
- 6.4 While she was alone in the house the accused entered. He undressed her of her panty and inserted his penis into her vagina. She felt pain in her vagina. The accused closed her mouth with a handkerchief.
- 6.5 The accused warned her that if she reported the incident to any person he would kill her.
- 6.6 In her evidence – in – chief she said that she reported the incident to Wele and Fundiswa on the same evening and that she was taken to a doctor on the following day. She said that she told the doctor that she had been raped on the previous day.
- 6.7 Under cross – examination, the complainant said that she was raped on 22 May 2000.
- 7.1 Fundiswa Webhu is sister to the complainant's mother.

- 7.2 When she noticed that the complainant could not sit properly, she and Zoliswa asked her what had happened to her but she refused to talk.
- 7.3 On the second day Wele arrived. Ms Webhu and Zoliswa asked Wele to question the complainant about what had happened to her, as she would not tell them.
- 7.4 Wele questioned the complainant. The complainant said that she had slept with the accused.
- 7.5 The complainant said that the accused had inserted his penis into her mouth.
- 7.6 She told them that the accused had attempted to "do it underneath".
- 7.7 When they examined her they saw bruises on the inside of her thighs and on the side of the vagina where there was a swelling.
- 7.8 Four days after the report Ms Webhu reported the incident to the police. On that very day the complainant was taken to a doctor.

7.9 Ms Webhu said that she did not remember dates of the alleged sexual assault, of the questioning, of the report and when a report was made to the police.

7.10 The complainant told Webhu that the accused had said that he would kill her if she reported the incident to anyone.

7.11 She said that Zoliswa arrived when Wele was about to hit the complainant so that she could tell the truth. By then she had not yet mentioned the name of the person who had done it to her.

7.12 The complainant mentioned the alleged perpetrator's name when Wele was threatening that she would take her to the police who would beat her up.

8.1 Anathi Nohalala Koti is 15 years old. She is the complainant's friend.

8.2 On a certain day which she does not remember she was playing with the complainant on the premises of Mfaca family.

- 8.3 She said that the accused walked past them but later returned and stood in the doorway after which he closed the door.
- 8.4 She said that when the accused was about to close the door she and another girl by the name of Phelokazi ran out of the house, leaving the complainant inside.
- 8.5 She said that Nonki had gone to the shop when the accused came.
- 8.6 She further said that this incident occurred at about between 12h00 and 12h30.
- 8.7 She said that after the accused entered the house in which they were playing, she and Phelokazi ran to their homes. She did not report to any person and did not discuss the incident with the complainant later because she was "scared".
- 9.1 The accused denied the allegation. He said that from about two weeks before 31 May 2000 he was preparing for a traditional ceremony at his home and that at no stage during this period did he go to Mfaca family.

- 9.2 He said that the house in which he is alleged to have sexually assaulted the complainant is on the same premises as the shop.
- 9.3 He said that at the shop there are many people who sit outside the shop to enjoy liquor they buy from the shop.
- 9.4` He said that customers would have heard screams had the complainant screamed.
10. Mr Kristafor for the State submitted that he would not support the conviction because of serious contradictions in the State's case.
11. The Court shares this view. The complainant did not tell the Court that the accused performed oral sexual intercourse and that Nohalala and Phelokazi were inside the house when the accused entered it.
12. The Complainant said that she reported the incident on the same day. This is contrary to what her aunt Fundiswa Webhu told the Court.

13. Wele had to threaten her for her to mention the name of the accused.
14. The accused gave evidence in a straight forward manner. There is no indication that he was not telling the truth.
15. Both the complainant and Nohalala were ten and eight years old, respectively, at the time of the alleged incident. The cautionary rule which applies to children should apply to them as well.
16. In the Court's view reliance may not be placed on their evidence.
17. It cannot be said that the State has proved the guilt of the accused beyond reasonable doubt.
18. The accused is accordingly found not guilty of rape or of a lesser offence.

A E B DHLODHLO

ACTING DEPUTY JUDGE PRESIDENT

25TH APRIL 2006

HEARD ON: 24 APRIL 2006

FOR THE STATE: MR J KRISTAFOR

FOR THE DEFENCE: Ms N MTINI