**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: SS64/2007

DATE: 7 NOVEMBER 2007

In the matter between

**THE STATE**

and

**JONATHAN WILLEMSE**

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**J U D G M E N T**

**HLOPHE, JP:**

This is the matter of the State versus Jonathan Xolile Petros Willemse. The accused, Mr Willemse was about 45 years old at the time of his arrest in April 2006. He will be now anything between 46 and 47 years old.

The state preferred four counts of rape against the accused but it was clear however during the course of the evidence that was given by the victim of this crime, the complainant, Nicole Titus, that the court was dealing with three counts of indecent assault and one count of rape. That much was also

abundantly clear in argument namely that there were just three counts of indecent assault and one count of rape.

The accused was represented throughout these proceedings before us by Mr Buntting. The state throughout these proceedings was represented by Miss Allie. When the trial started all four charges or counts were put to the accused person. The accused person pleaded not guilty to each and every one of the four counts put to him. The plea of not guilty was communicated by Mr Buntting on behalf of the accused person and the accused person confirmed that the plea was in accordance with his instructions.

Essentially the state's case against the accused was that in or about April 2006 and or at near Riebeeck West in the district of Malmesbury the accused did unlawfully and intentionally have sexual intercourse with a minor who was about nine years old at the time and her name was Nicole Titus, his stepdaughter.

At the start of the trial a number of orders were made by the court, they were essentially by agreement between the parties. The first order was in terms of Section 153(5) of the Criminal Procedure Act 51 of 1977 namely that the proceedings be held in camera, that order was granted by the court.

The second order which again was ordered by agreement between the parties related to Section 154(3) of the Criminal Procedure Act, i.e. to protect the identity of the minor child, the complainant. Thus it is an order which this court made that the name of this minor should not under any circumstances be made public, be it in the Law Reports or in the Newspapers. It should not under any circumstances be made public.

Furthermore there was an order again which was made by agreement between the parties relating to Section 158(3) of the Criminal Procedure Act, i.e. that evidence be given by way of close circuit television. For that reason the facilities in court number 15 of this division were used. The final order was made in terms of Section 170A of the Criminal Procedure Act relating to the use of an intermediary, Miss Gerda McQueen.

The trial started and it proceeded smoothly. A number of witnesses were called by the state in an attempt to bolster its case. In my judgement the evidence of other witnesses, not much turns on the evidence of other state witnesses. The important evidence is that given by the complainant as well as the doctor. Furthermore I can be bold even to suggest that

their evidence can be totally discarded as with respect to the state advocate that evidence given by those state witnesses does not take the matter any further.

What was the evidence? We turn now to the evidence of the complainant. Her evidence in-chief was to the following effect. The four of them lived together under the same roof. When I say the four of them I am referring to the complainant herself, Nicole Titus, her brother who was known as Boetie, the accused Jonathan Xolile Willemse and the accused girl-friend, the mother of Nicole. Those four lived together as a family under the same roof.

The evidence Furthermore of the complainant was that there was nothing amiss, there was nothing wrong as far as the relationship between them was concerned. It appears that at all material times Nicole, the complainant treated the accused as her father. In deed she even obeyed his instruction to accompany him to Wellington where she was subsequently raped.

That there was good ...(indistinct) in the family, that they lived together as a family was corroborated by the accused himself as well as the mother of the child Nicole, when she testified.

That was corroborated even by the accused himself when he later testified.

Nicole Titus told the court that on the day in question, the 16th of April 2006 she was asked by the accused person before us to accompany him on a shopping spree to Wellington. Her mother and her brother Boetie were left behind and her mother was attending to domestic duties such as cleaning the house, doing the washing and so on and so forth.

As they boarded the train from Hermon to Wellington the train was full and the accused person asked the complainant to sit on his lap, which she did. In fact it is common cause that she sat on the accused lap for the duration of the journey from Hermon to Wellington. When they got to Wellington they naturally alighted from the train. The accused thereafter asked her to accompany him and they went to the bush. Her evidence was furthermore that this bush was in fact an orchard and it had a stream or a river.

When they got there the accused asked the child to take off her clothes and in particular it was her jersey, and she obeyed the instruction. Thereafter she was commanded to strip all her clothes, to take off all her other clothes including her underwear and pants. This instruction was similarly obeyed by

the minor. Thereafter the accused proceeded to have sexual intercourse with the child without her consent. In fact she even gave evidence that the accused attempted to strangle her from behind by putting his arm across her neck and that was demonstrated.

The complainant described in minute detail what the accused did to her. Among other things the accused lay on top of her and made the usual movements which would normally occur when people are making love. Furthermore she described that she was subjected to pain as the accused was sleeping with her. At the end of the day, at the end of this rape incident the child said that she felt dirty and there was white stuff and the accused was responsible for that. This court is prepared to take judicial notice of the fact that the white stuff must have been semen which came from the accused when he ejaculated.

The child gave evidence furthermore that the accused person, Mr Willemse threatened to kill her in the event of her telling anybody what had happened to her in the bush. She gave minute details of what the threat was. According to her evidence the accused threatened to kill her and put her body in a black plastic bag and throw it down the river so that it could be washed away by the river.

Quite clearly her evidence proceeded to say after the rape incident she dressed up and thereafter they went shopping with the accused person. The accused according to her evidence bought a pie for the victim, the complainant. After their shopping they hitch hiked, got a lift and they went back to her mother. The child went on to say in her own words: "*Ek het vuil gevoel*", she felt dirty. And she decided to have a bath, to wash her body. She took off her panties or underwear and put it into the washing basket.

She was cross-examined at length regarding among other things why she did not report the incident to her mother. And she gave a credible explanation of why she did not report the incident to her mother. The brief and short, she was scared or terrified of the accused. And if one looks at the sequence or the chronology of the events one has no reason but to accept that the child must have been terrified or scared of the accused person.

Furthermore Nicole Titus gave evidence relating to the other incidents preceding the rape in April 2006. She gave an account of an incident relating to the use of finger by the accused person who inserted his finger into her vagina. That was the first incident and obviously the child does not

remember the date and the time and when this incident occurred.

It would seem that this is the incident whereupon the accused person put Vaseline on his finger before inserting it into the child's vagina. On this occasion as well Nicole, the complainant did not tell her mother this was at the instance of the accused person.

The second incident also similarly involved the use of a finger. If my memory serves me well the mother of the complainant was present but she was sleeping at the time and therefore she could not possibly have witnesses the incident because she was sleeping at the time. Again when the child was cross-examined she was very emphatic, she did not tell her mother because she feared the accused who usually was present when her mother was ...(inaudible).

The third incident involved the use of a toe. According to Nicole this incident occurred and her mother was present when the toe incident occurred. Remarkably, Nicole Titus, notwithstanding the trauma which these incidents must have caused to her gave very good detail relating to the toe-incident.

She told the court that she was sleeping between the accused and her mother and she was busy doing her mother's hair. It was at that time that the accused inserted his toe into her vagina. All these three incidents, the first two involving the use of a finger and the third one involving the use of a toe occurred prior to the rape incident which was on or about the 16th April 2006 and in Wellington.

Nicole Titus was cross-examined at length. In my judgement she withstood cross-examination. This was so notwithstanding her very tender age, namely she was about nine when the rape incident occurred. Furthermore this was so notwithstanding undoubtedly the trauma that these incidents must have caused to her. I am satisfied that she gave evidence in a cool, calm fashion and her evidence may safely be relied upon. Therefore there is no reason whatsoever to reject her evidence. No basis it was argued existed for rejecting it anyway.

I am satisfied that she was a reliable and truthful witness and indeed her evidence can be safely relied upon. There is absolutely no basis for rejecting her evidence particularly in the light of the history which I outlined earlier on in this judgement. Just to recap on that, the evidence was very clear that there is no reason for the child to falsely accuse her

stepfather of such serious crimes.

On all the counts, and this was the evidence of the accused, the child, they all lived together happily as a family and the child looked up to the accused as her father. To the extent that Mr Buntting who appeared for the defence argued that there were some discrepancies between the statement made for and on behalf of Nicole and her evidence in court, that is entirely understandable.

For example the accused person has been charged on four counts of rape but the evidence is very clear that there was just one rape incident. Furthermore the child Nicole gave evidence that she didn't know the meaning of the word "*verkrag*". So quite clearly each time a finger or a toe or anything was inserted into her vagina she regarded that as rape. With respect to Mr Buntting whatever discrepancies may exist between the statement that the child made and her evidence in court can never be material as to warrant the rejection of her evidence in court.

Her evidence was very clear and satisfactory evidence in court in all material respects. Accordingly the court finds that her evidence was credible and may be safely relied upon. Her evidence was furthermore corroborated by the doctor, Dr

Cronje who examined the child on the 16th day of April 2006. Dr Cronje came and testified in this court, I think it was on Monday or on Tuesday. He was a district surgeon at the time attached to Malmesbury. He gave evidence of the fact that he did in deed examine Nicole Titus on the day when the child was brought to him for examination. He confirmed that he is the author of the J88 medical report which is before court now.

He gave evidence-in-chief indicating that the history of the alleged incident was outlined to him by the child with the aid of a social worker and an adult. The doctor himself, Dr Cronje subsequently examined the child and concluded that there were injuries to her private parts. The injuries were not fresh according to Dr Cronje, they were not fresh injuries. Therefore that rules out the possibility of any semen or blood being found by the doctor because the injuries were not fresh.

According the doctor he estimated that the injuries were anything between a week and two, about a week to two weeks old. Dr Cronje was cross-examined at length by, well he was cross-examined by defence council relating to his conclusions and/or observations. A picture which clearly emerges from his evidence is the following: The child had sustained injuries to her private parts. This was more than just one injury, it was multiple injuries to her private parts. In fact this is clear from

the diagram on the J88, the diagram of the child's private parts. It is clear that there were multiple injuries to her vagina.

Furthermore Dr Cronje confirmed that these injuries were consisted with being inflicted by a blunt instrument such as a finger or a toe or a penis for that matter. This rules out with respect the possibility of the fact which was raised by Mr Buntting in argument, it rules out in my view the possibility of these injuries having been inflicted on the child whilst they were playing with their private parts.

If one accepts the old English saying that once bitten twice shy, Nicole I have no doubt had she played with her private part and got herself injured she would never have done that again or allowed anybody to do that again, it is just common sense.

Thus a picture which emerges between the evidence of Nicole and the doctor is the following. The child says on the day in questions she was raped by Jonathan, her stepfather and she gave detailed blow-by-blow account of how that happened. There is clearly no room for mistaken identity because the child knows Jonathan Willemse as her stepfather. Furthermore

no suggestion was made whatsoever as to why the child would fabricate so serious allegations against her stepfather.

The evidence of the child, namely that she was sexually abused is confirmed and/or corroborated by Dr Cronje. Dr Cronje was at the time employed as a district surgeon, he had absolutely no interest in this matter and clearly he had no reason to lie that the child indeed was raped if that was not so. Quite clearly on the evidence of Nicole and that of Dr Cronje the child was raped and/or sexually abused and the author thereof is none other than the accused before this court.

What does the accused have to say to this? In other words we turn now to the evidence of the accused. His evidence at best is tad amount to a bear denial. What is remarkable about the evidence of the accused person and that of Nicole is that it is essentially similar but in one respect. That in the judgement of the court is very remarkable indeed. The accused conceded for example that on the day in question he together with Nicole went shopping, they went to Wellington. Nicole sat on his lap because the train was full. His girlfriend as Nicole's mother and Nicole's brother Boetie were left behind because his girlfriend was busy attending to domestic duties such as washing and so on.

That the purpose of the trip to Wellington was to do shopping for the family. Furthermore it is common cause between Nicole and the accused that the accused bought a pie for Nicole. All of that is common cause between Nicole and the accused, in fact it was even corroborated by Nicole's mother when she testified. The only difference between the evidence of the child Nicole and that of the accused is the fact that Nicole points her finger at the accused as the person who raped her and inserted the finger and the toe in her vagina, and the accused denies that.

In the judgement of this court the accused defence can not reasonably possibly be true. It is just nonsensical to say the least. The evidence of the child as well as that of Dr Cronje is very clear and convincing and there is no reason to reject the evidence of those two witnesses in particular. The court is satisfied that the defence of the accused must be rejected as not being reasonably possibly true. The onus in matters of this nature is on the state to prove its case beyond any reasonable doubt.

The unanimous finding of this court is that the state has succeeded in proving its case against the accused beyond any reasonable doubt. The unanimous finding therefore of this court is that the accused is guilty as follows: **FIRST THREE**

**COUNTS HE IS GUILTY OF INDECENT ASSAULT AND THE MAIN COUNT BEING THE FOURTH COUNT THE COURT IS UNANIMOUSLY OF THE FINDING THAT THE ACCUSED IS GUILTY OF RAPE AS CHARGED.**

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b/12/2012

10 **HLOPHE, JP**