IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: **SS 16/12**

In the matter of

THE STATE

vs

MANTINISI (MATINISI) DAMANE

JUDGMENT DELIVERED ON 4 DECEMBER 2012

YEKISO, J

[1] The accused in these proceedings, Matinisi Damane, has been charged with 10 counts of contravening section 3, read with sections 1, 56(1), 57, 58, 60 and 61 of the Criminal Law (Sexual Offences & Related Matters) Amendment Act, 32 of 2007. The contravention of the aforementioned sections of the Criminal Law (Sexual Offences & Related Matters) Amendment Act should be read with sections 256 and 261 of the Criminal Procedure Act, 51 of 1977 as well as the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 in that the complainants in each of the counts preferred against the accused are persons under the age of 16 years. The allegations against the

accused are that in respect of each complainant in the 10 counts preferred against him, is that he unlawfully and intentionally committed an act of penetration with each such complainant.

[2] In as far as count 1 is concerned, the allegation against the accused is that on or about 20 August 2010 and at or near Site B, Khayelitsha, the accused unlawfully committed an act of penetration with Siphokuhle Majali, who was 11 years of age at the time of the alleged commission of the offence, by inserting his penis into her vagina.

[3] In as far as count 2 is concerned, the allegation against the accused is that on or about 21 August 2010 and at or near the toilet at VT 65, Site B, Khayelitsha, the accused unlawfully and intentionally committed an act of penetration with Siphokuhle Majali, who was 11 years of age at the time of the alleged commission of the offence, by inserting his penis into her vagina.

[4] Count numbers 3 and 4 relate to an alleged act of sexual penetration in respect of Nontyatyambo Menzi, who is alleged to have been six years of age at the time of the alleged commission of the offence, in that, the accused, in and during the year 2010, and at or near

VT65 Section, Site B, Khayelitsha, unlawfully and intentionally inserted his penis into the complainant's vagina.

[5] Counts 5 and 6 relate to an alleged act of penetration on Anelisa Gwe, who is alleged to have been 7 years of age at the time of the alleged commission of the offence, the allegation against the accused being that during the year 2010 and at or near VT65, Site B, Khayelitsha, the accused intentionally and unlawfully committed an act of penetration on the said Anelisa Gwe.

[6] Count numbers 7 and 8 relate to an alleged act of sexual penetration on Anam Mayekiso, who is alleged to have been 4 years of age at the time of the alleged commission of the offence whilst count numbers 9 and 10 relate to Lisakhanya Zitha, who is alleged to have been 4 years of age at the time of the commission of the offence, the allegation against the accused being that in respect of each complainant in respect of counts 7, 8, 9 and 10 he unlawfully and intentionally committed an act of penetration by inserting his penis into the vagina of each such complainant sometime during the year 2010.

[7] The accused pleaded not guilty to all the 10 counts of the alleged unlawful and intentional sexual penetration. With regards to the alleged act of sexual penetration on the complainant in count 1, Siphokuhle Majali, the accused admitted having had an act of sexual penetration with the complainant in count 1 on Friday, 20 August 2010, but in as far as this count is concerned it was pleaded on behalf of the accused that the accused will, when giving evidence, aver that his conduct was not wrongful or unlawful in that the complainant deceived the accused into believing that she was 16 years or older at the time of the alleged commission of the offence. With regards to the rest of the counts preferred against the accused, the accused pleaded not guilty in respect of all such counts, the accused denying that he had sexual intercourse or having committed acts of penetration in respect of each one of the complainants in count 2 upto count 10.

[8] Apart from a number of exhibits which were handed in during the course of trial, the state called 11 witnesses in all, whilst the accused testified in his own defence and did not call any witnesses.

The evidence of all the witnesses is on record. Each witness testified in some detail and all of them were extensively cross examined. It is not

my intention to repeat such evidence verbatim. A reference will only be made to the salient features of each witness' evidence.

DR MORNÉ SEPTEMBER (1)

[9] The first witness to have been called to testify by the state is Dr Morné September. He testified that he is a medical practitioner employed at Khayelitsha and Eastern Sub-District. His duties involve working at the Simelela Centre for Victims of Sexual Abuse and Sexual Violence. He has been employed thereat since 2007. He examined Siphokuhle Majali, the complainant in counts 1 and 2 on 31 August 2010. He completed a J88 form in which he indicated his observations arising from his medical examination. His findings on the complainant's general examination were normal and he found no injuries. The complainant was quiet and co-operative during examination and had not as yet reached puberty and was not sexually active.

[10] Dr September testified that a girl normally reaches puberty at the age of around 13. To establish a girl's age, so he testified, one looks at the breast development and pubic hair. An examination of these aspects would normally give the examiner and educated guess as to how old the girl might be. Her pubic hair was in stage 2 development,

which means she had one or two hairs on her pubic area. According to his examination the child's clitoris was normal, her hymen showed anulla, that is basically round, which refers to a circle and there was a rim on the opening of the vagina. The vagina allowed two fingers with ease which implies that she was penetrated with some form of blunt object. In a child of 11 years one would actually not expect to pass any fingers, or at most, with some difficulty. The fact that her vagina allowed two fingers to pass leads to the conclusion that she was penetrated more than once.

[11] Under cross-examination by *Mr Mohamed,* the witness testified that his function when examining the complainant was not to establish whether the complainant was raped or not. He stated that he merely conducted a medical examination. The witness further testified that the fact that the complainant had a discharge, this on its own does not indicate that she had reached the age of puberty. It was put to this witness that the penile entry of a male on a child as old as the complainant would have left injuries if it was by force and that the complainant would have had to be hospitalised. The witness responded that the conclusion arising from his examination was that the

complainant was penetrated more than once during her lifetime. That was about the gist of the evidence of Dr September.

THOBELA MPUMELA (2)

[12] The next witness to have been called by the state was Ms Thobela Mpumela, a social worker in the employ of the SA Police Service, holding a rank of a Captain. She is stationed at Khayelitsha. She testified that she obtained a BA degree in social work from the University of the Western Cape. She had also attended forensic social work related training to enhance her professional development. She had twice testified in court before. Overall, she had done assessment over 90 young victims. She had completed competency assessment reports on all the 5 complainants. These reports were requested by Constable Khanyile, the investigating officer in the matter. The purpose of the reports was to ascertain whether the complainant in each instance is able or competent to testify in a court of law.

[13] As requested by the investigating officer she had done an assessment on Siphokuhle Majali, the complainant in respect of counts 1 and 2. Her assessment report was ultimately handed in as exhibit "B".

Her assessment in respect of Siphokuhle Majali was done on 30 January 2012.

[14] In the report she states that the complainant dropped out of school when she was doing grade 4. According to her class teacher, a Miss Mgijima, Siphokuhle Majali was not progressing well in class. She was not completing her tasks. She could not read and write. When the teacher was not in class she would disrupt the class and beat other learners.

[15] The information she received from the complainant's mother is that the complainant started to present behavioural problems after the alleged incident. According to the report from the complainant's mother, the complainant would roam around the community and frequented taxi ranks. She would also disappear in the early hours of the morning and come home late at night. She stated that the complainant smokes glue and cigarettes and conduct herself as a boy. During the evaluation the complainant seemed tired. She ascribed this tendency to smoking glue. The complainant was 12 years of age when she was assessed. She is under-stimulated for her age and seem to function below her level. She could hardly read or write. She was able to remember and tell what

happened. She could narrate the details of the alleged incident but needed a lot of probing. She was unable to spontaneously provide information. She ultimately assessed her to be competent to testify in court.

[16] She also compiled assessment reports in respect of Nontyatyambo Avuyile Menzi, the complainant in counts 3 and 4 as well as Anelisa Gwe, complainant in counts 5 and 6. In the instance of Nontyatyambo Menzi, she had assessed her as having been able to give a coherent detail of what took place on each occasion of the alleged incidents. She ultimately assessed her to be competent and able to testify in a court of law.

[17] In the instance of Anelisa Gwe, she had observed that she has a good memory and excellent observation skills. She was able to distinguish between truth and a lie and also understands the consequences of telling a lie. She had ultimately assessed her to be able and competent to testify in a court of law.

[18] She had also compiled assessment reports on Anam Mayekiso, the complainant in counts 7 and 8 as well as Lisakhanya Zitha,

complainant in counts 9 and 10. The complainants in counts 7, 8, 9 and 10 were not called to testify so that the reports on their assessment as regards whether they would have been able to testify in a court of law will not be summarised in this judgment.

[19] This witness was extensively cross-examined by *Mr Mohamed*, counsel for the accused. Her evidence emanating from such cross examination will be referred to in the evaluation of evidence should a need arise to do so.

DR GENINE JOSIAS (3)

[20] The next witness to have been called by the state to testify was a Dr Genine Josias. She testified that she is a medical doctor attached to the Simelela Community Health Centre, Khayelitsha since 1998. She examined the complainants on counts 3 to 10 at the Simelela Centre, Khayelitsha. The examination on Nontyatyambo Menzi, complainant on counts 3 and 4, took place at 14h20 on 21 September 2010. She testified that Nontyatyambo Menzi was born on 14 August 2003 and was of normal built. She had no external injuries. There were also no injuries to her external genitalia. There was a yellow discharge between the *labia majora and minora*. According to her this could possibly be caused

by possible hygiene neglect. She had no fresh tears but a healed tear in her hymen. According to her this could have been caused by a blunt object penetrating the hymen. A penis is classified as a blunt object. Her conclusion is that the absence of severe injuries does not exclude the penetration of a penis between the hymen or labia majora.

[21] In response to a question by *Mr Mohamed,* the witness testified that any blunt object could have caused the tear in the hymen. However, to have caused a tear in the hymen severe force of penetration would have been necessary. The medical report arising from the witness' examination of Nontyatyambo Menzi was handed in as exhibit "G".

[22] The witness' examination on Anelisa Gwe, the complainant on counts 5 and 6, took place at 13h45 on 21 September 2010. Arising from her examination she noted that the complainant, Anelisa Gwe, was 7 years old and of normal built. She had no external injuries and also no external injuries to her genitalia. She had a 1mm rim on her hymen which was exceptional as it is expected to be about 4mm for a girl of her age. This was caused by the hymen pushed to the side. The hymen also had two clefts. This is compatible with healed injury to the hymen. According to her the absence of severe injuries does not exclude rape.

The insertion of a blunt object into her vagina could have pushed the hymen to the side. It emerged under cross-examination that when this witness spoke to the complainant for the first time, the complainant had indicated to her that nothing had happened to her. The complainant maintained this stance even after the examination was completed. This is about the gist of the witness' evidence arising from the examination of Anelisa Gwe.

[23] The witness further conducted medical examination on Anam Mayekiso as well as Lisakhanya Zitha. These complainants were not called to testify so that the witness' evidence relating to her examination of these complainants will not be summarised.

ANELISA GWE (4)

[24] The next witness to have been called was Anelisa Gwe. She is the complainant on counts 5 and 6. She testified that she is 9 years of age, having been born on 27 June 2003. She is currently doing grade 4 at Mangaliso Primary School, Khayelitsha.

[25] She knows the accused before court as Aqhamile's father. The accused stayed in the same street as the complainant. The accused's

daughter, Afunde, was her playing mate and at times they used to play at Afunde's place of residence. She was unable to indicate in her evidence specifically which days and month the incidents complained of occurred. On the day on which one of the incidents occurred the witness, as well as her friend, Nontyatyambo, went to the accused's residence. The accused was standing outside his house. They went in and the accused also entered the house and locked the door on top and at the bottom. Inside the house it was herself, Nontyatyambo as well as the accused.

[26] Whilst inside the house the accused gave Nontyatyambo his cellphone. Nontyatyambo was sitting on a chair playing games on the cellphone. All of them, the accused, Nontyatyambo and the witness, were in the diningroom. The accused, who was sitting on another small chair, undressed himself, lowering his pants and underpants down to his knees. He thereupon grabbed the witness from the back and undressed the bottom of her tracksuit as well as panties. The accused put her on his lap. The accused said he was playing "horse" with her. In the process the accused put his "thing" into her anus. She demonstrated how the accused executed up and down movements. She testified that it hurt but not so much. She forgot what a male "thing" is called. The

incident took a short time. Once the incident had happened, the accused dressed her and he also dressed himself. The accused thereupon grabbed the cellphone from Nontyatyambo and told the witness that if she would ever tell her parents, he would kill both her parents. He promised to give her R5-00 which he never did. The accused then unlocked the door and they went out to go and play.

[27] The witness also related another incident involving the accused which also happened. She does not know how long after the first incident this latter incident happened, but she was adamant that it was not the following day. She testified that she, Afunde and Sive were playing outside next to the toilets. Afunde suggested that they go to Sive's house but Sive resisted the idea saying the witness is too young to go with them. They were apparently going to watch a film.

[28] Whilst Afunde and Sive had gone, the accused appeared and asked the witness to accompany him to the communal toilets. It appears that the toilets referred to are not the toilets next to which they initially played. She did not ask the accused why she must accompany him to the toilets as she is obedient to adults. They went into the toilet. The accused undressed himself and asked her to undress herself. The

accused lowered his pants as well as his underpants to his knees. He also undressed the witness' tracksuit as well as her panties. He was already seated on the toilet seat when he undressed her. The accused then grabbed her onto his lap at a position facing the accused. The accused thereupon put his penis into her vagina. The accused said he was playing "horse". The witness demonstrated in court how the accused executed forward and backward movements. She testified that the accused was raping her but does not know what the word "rape" means. She testified that the ordeal was sore but not that much sore. Afterwards the accused dressed her. He then flushed the toilet. The accused once again warned the witness not to tell her parents and that should she do so, the accused would kill both her parents. For that reason, the witness did not report the incident to her parents.

[29] This witness was similarly extensively cross examined by counsel for the accused. Her evidence emanating from such cross examination will be referred to in the course of evaluation of evidence.

LINDA GWE (5)

[30] The next witness to have been called by the state to testify is Linda Gwe. She testified that she is the mother of Anelisa Gwe. Anelisa

Gwe was born on 27 June 2003. On 20 September 2010 and in between 19h00 and 19h30 her sister, Siziwe, informed her that she overheard Anelisa and Nontyatyambo saying that they should speak out that they were sexually molested by Aqhamile's father, Aqhamile's father being a reference to the accused. Once this was reported to her the witness then enquired from Anelisa what had happened and Anelisa replied that nothing had happened to her but that something happened to Nontyatyambo instead. The witness' brother and her sister, Siziwe, took her to Nontyatyambo's residence. Her sister reported what happened at Nontyatyambo's residence. She then asked her sister to take Anelisa to Simelela Community Health Centre as she had to take her own baby to hospital.

[31] On 21 September 2010 Siziwe took Anelisa to Simelela and reported back to her as to what had happened at Simelela. At Simelela it was found that Anelisa was raped. Anelisa also reported she was raped by the accused. However, Anelisa never told her in person what had happened. This witness was similarly cross examined by *Mr Mohamed.* Evidence emanating from her cross examination will be referred to in the evaluation of evidence.

SIZIWE NDARALA (6)

[32] The next witness to have been called by the state to testify was Siziwe Ndarala. She testified that she is the sister of Linda Gwe, the mother of Anelisa Gwe, the latter being the complainant on counts 5 and 6. After she received certain information she called Anelisa and asked her whether she was raped by the accused but Anelisa denied that she was raped but instead said Nontyatyambo was raped. Siziwe then went to confront Nontyatyambo and Nontyatyambo in turn said to her Anelisa was raped and not her. She later reported the incident to Anelisa's mother. When Anelisa's mother asked her whether she was raped, Anelisa denied that she was ever raped. She was then asked by Nontyatyambo's mother whether she was raped and she, on that occasion, indicated that she was raped by the accused in the toilet. But when Anelisa's mother asked her what had happened, Anelisa persisted with her denial that she was raped by the accused. It was then decided that Anelisa and Nontyatyambo should be referred to Simelela Community Health Centre. They were taken to Simelela the following day. The witness confirmed that she accompanied Anelisa to Simelela whilst Nontyatyambo was accompanied by her mother.

[33] At Simelela they saw a social worker. Anelisa still denied that she was raped. The social worker had dolls and put one on top of the other and asked Anelisa how it happened. Anelisa then admitted that she was raped. She said that the accused put her on top of him. After the social worker had shown Anelisa the dolls, Anelisa then admitted that the accused had put her on top of him. The witness was then asked by the social worker to leave the room and when she was later called the social worker made a report to her. After seeing the social worker, Anelisa was taken to the doctor who confirmed that Anelisa was raped at some stage but that it apparently was not a serious rape. This was the gist of this witness' evidence in chief and her evidence under cross examination will be referred to in the evaluation of evidence should a need arise to do so.

AVUYILE MENZI (NONTYATYAMBO) (7)

[34] The next witness to have been called by the state to testify was Avuyile Menzi. She testified that she was 9 years of age. The witness is also called Nontyatyambo by her friends. The accused is known to her as also his daughter, Afunde, as well as his son, Aqhamile. On one occasion the witness was in the accused's residence. Also in the accused residence was the accused himself, the witness, the accused's

two children, Afunde and Aqhamile, as well as the accused's wife. They were all sitting in the sitting room. At some point the accused called her to the kitchen to come and play a lotto game with him. It appears that the lotto game is a game in terms of which you shake the object concerned and the balls ultimate land in line. The accused and the witness were in the kitchen. As the accused and the witness were in the kitchen the rest of the members of the family were still sitting in the sitting room. The accused directed the witness not to stop playing the game. At some point the accused undressed the witness' pants and panties onto her feet. The accused then placed her on his lap and asked her to keep on playing. She kept on playing as ordered. The accused's son, Aqhamile, at some point peeped through the curtains into the kitchen. He was standing on a couch as he peeped through. Once Aqhamile saw what was happening he suddenly moved back. At that stage the witness was seated on the accused's lap facing the accused. According to the witness, the accused executed forward and backward movements whilst his penis was in the witness' vagina. According to the witness the whole episode was sore. After the episode the accused removed her from his lap and dressed her. She thereafter left the accused's residence.

[35] On a separate occasion the witness was once again at the accused's place of residence to play with his daughter, Afunde. Whilst in the accused's residence, the accused drew the witness' attention and pointed at the door and once the accused had done this, the witness went out. The accused also went out and asked the witness to accompany him to the communal toilets. Whilst on their way to the communal toilets the accused asked the witness to take a different route to the toilets whilst the accused had taken a different route to the toilets. She arrived at the toilet before him. The toilets were far from the accused's residence. Once they had reached the toilets the accused opened the toilet and she went in. The accused also went in, whereafter the accused locked the toilet door from the inside with a latch. The accused thereupon proceeded to undress the witness' pants as well as her panties. The accused also undressed himself and sat on the toilet seat. The accused then directed the witness to sit on his lap in a position facing him. The accused thereafter made forward and backward movements while his penis was inside the witness' vagina. After some time the accused removed her from his lap. The accused then proceeded to dress her. He also dressed himself and told her to wash her hands. The accused promised to give the witness an amount of R5-00 which she never received. She was then instructed by the accused

not to mention the incident to her parents. Should she do so the accused threatened to kill her parents.

[36] Once the witness got home, her mother asked her where she came from and the witness replied that she came from the accused's residence. The following morning she felt her vagina was sore and her mother put some Vaseline on. The witness confirms having gone to Simelela hospital where she saw a doctor. The witness also knows the complainant in counts 5 and 6, Anelisa Gwe. They live in the same street. The witness also relates an incident when she was walking with Anelisa. The accused had stood outside his house. According to this witness the accused's wife left the house. Thereafter Anelisa put her hands in the accused's pocket. The witness also put her hands in the accused's pocket. The accused then picked Anelisa up and went inside the house. The witness also went inside the house, locked the door from the inside. The accused thereafter took his cellphone out of his pocket, opened the games and thereafter gave the cellphone to Anelisa for her to play. The accused sat on the coach and put Anelisa on his lap. The accused then went to sit on a smaller couch. The accused undressed Anelisa's pants as well as her panties. He loosened his belt, undressed his pants and underwear and placed Anelisa on top of him. The witness

did not see if the accused did anything whilst Anelisa was on top of the accused. The accused thereafter dressed Anelisa. He also dressed himself. Shortly thereafter Afunde knocked on the door and Anelisa went to open the door. The accused ordered Anelisa not to tell her parents and that should she do so he would kill both her parents.

[37] Similarly the witness was extensively cross examined by counsel for the accused in the person of *Mr Mohamed*. A reference will be made to this witness' evidence under cross examination in the course of the evaluation of evidence.

YOLISWA MENZI (8)

[38] The next witness to have been called by the state to testify was Yoliswa Menzi. She is the mother of Avuyile (Nontyatyambo) Menzi, the previous witness. She testified that Nontyatyambo was born on 20 June 2003. Her birth certificate was handed in as exhibit "S". The witness confirms the incident on Sunday, 20 September 2010 at about 2 o'clock in the afternoon whilst she was sitting in the diningroom together with her husband. It was in that process when Siziwe called her aside and reported to her the conversation she had overheard between Nontyatyambo and Anelisa. The witness proceeded to relate a report to

her by her daughter, in the presence of her husband and Siziwe that Nontyatyambo and Anelisa were at the accused's residence to play with Afunde. The witness went on to relate how Nontyatyambo informed her that the accused had closed the door with a bolt and allowed them to play a game on the accused's cellphone. She also relates having been told by Nontyatyambo that the accused would have directed them not to tell their parents and that should they do so he would kill both their parents. This witness was similarly cross examined by *Mr Mohamed*. As is the case with the evidence of the other witnesses, a reference to this witness' evidence under cross examination will be made in the course of evaluation of evidence should a need arise to do so.

SIPHOKUHLE MAJALI (9)

[39] The next witness to have been called by the state to testify is Siphokuhle Majali who is the complainant in counts 1 and 2. This witness was generally referred to in evidence and indeed she is generally known in the community as Nongayindoda (tomboy). She testified that she is 13 years of age. She no longer attends school. She was expelled from school in 2011 whilst she was in grade 4. She knows the accused's two children, Afunde and Aqhamile. She testified that Afunde, the accused's daughter, is her friend. She also knows the

accused as well as his wife and has been to their residence on several occasions. She did not live close to the accused but visited them occasionally to watch TV. She herself lives in the WB section in Khayelitsha. The witness also knows Anelisa as well as Nontyatyambo although they are not her friends. She related two incidents when she was raped by the accused. On one occasion the witness was sent by her grandmother. She had on that day walked pass the accused's place of residence when she met the accused next to the toilets. The toilet where she met the accused is the one that is being shared by the accused as well as his neighbours. She testified that the toilet is about an hour's walk from her residence but that it is not far from the accused's residence. The accused called her into the toilet, opened the door of the toilet and when she and the accused were inside the toilet the accused closed the toilet door. The accused undressed her pants as well as panties. He also undressed himself. The accused then went on to sit on the toilet seat and placed the witness on his lap. He then proceeded to put his penis into her vagina. Her back was facing the accused. According to her evidence, the accused then proceeded to execute forward and backward movements whilst his penis was inside her vagina. At some point, sperm came out of the accused's penis. She saw the sperm on her vagina. Once the accused had finished he wiped

himself and also wiped the complainant. She dressed herself. Whilst they were still in the toilet the accused's wife came and asked the accused why he was sitting in the toilet. The accused replied that he had a stomach disorder. The accused's wife left and came back after some time. The witness said to the accused that she wanted to go home but the accused prevented her from going home. The accused's wife came back again. She again asked the accused why he is still sitting in the toilet. The accused replied that he still had a stomach disorder.

[40] There was a gentleman outside the toilet and the accused asked this gentleman to take his wife away from the toilet. The accused did this because he did not want his wife to see that the witness was inside the toilet. The toilet's door was closed. Whilst the accused was raping her, his wife asked who is inside. The accused's wife went on to remark that she hoped it was not the girl who lived in the informal settlement with whom the accused had an affair. The accused had furthermore directed her not to tell anybody about the incident. The accused threatened her, as also her parents with death should she tell her parents about the incident. She further testified that her vagina was sore whilst walking home. A certain lady by the name of Madlamini who lives somewhere in the informal settlement, saw her and asked her what

was wrong. She responded to this lady by saying that it was extremely difficult for her to walk. Madlamini told the witness' mother about the incident. According to her the incident occurred during 2010.

[41] This witness went on to relate another incident which, according to her, had happened a long time after the first incident had occurred. On this occasion she was walking past Nontyatyambo's place of residence on her way home from the accused's residence. On this occasion she met the accused at the accused's brother's home. He was sitting inside on a chair. The accused called her tomboy. According to her it was late at night. She went to the accused. He took off her pants and panties. He also took off his pants and underwear. He then got on top of her. She was lying on the bed when the accused got on top of her. The house where they were is a 1-room house. She demonstrated by means of dolls to show how the accused had laid on top of her simultaneously executing up and downward movements. In the process the accused inserted his penis into her vagina. At some point the accused ejaculated. She thereafter wiped herself, dressed herself and went home. Once again the accused told her not to tell anybody about the incident. He further threatened her with death as well as her parents should she tell anybody about the incident. She left for home and did not

tell anybody about the incident. The following day she could not walk properly and Madlamini's child asked her why she was walking with difficulty. Madlamini then told her mother.

[42] She was staying with her grandmother at the time. Her grandmother's name is Nonesi. Also staying with her grandmother was her aunt, Nosicelo as well as her uncle. The following day her mother arrived at her grandmother's place of residence at about 7 o'clock in the morning and asked her if it was true that the accused had raped her. She denied the allegation. Her mother threatened to smack her and demanded that she tells the truth. She thereupon told her mother the truth and said that she was raped by the accused and, furthermore, told her mother what had happened. She told her mother she did not report the incident as she was afraid she might get a hiding. Her mother then asked her uncle to go with them and go and confront the accused at the latter's residence. Once they were at the accused's place of residence, her mother demanded to know from the accused why he had raped the complainant. According to her, the accused admitted having had sexual intercourse with her. Her mother thereupon indicated to the accused that she was going to call the police which she did. The accused's wife was present when her mother confronted the accused. The witness

subsequently made a statement to the police and related to the police what had happened. The accused was subsequently arrested.

[43] The witness was similarly extensively cross examined by *Mr Mohamed.* A reference to her evidence under cross examination will be made in the course of evaluation of evidence.

NTOMBENTSHA MAJALI

[44] Once Siphokuhle Majali had testified her mother, Ntombentsha Majali, was called to testify. She confirmed in her evidence that she is the mother of Siphokuhle Majali, the complainant in counts 1 and 2. Siphokuhle Majali was born on 8 April 1999. During 2010 Siphokuhle lived with the witness' mother, sister and brothers not far from her. She heard about the incident of the alleged rape of her daughter from one Nontomzana Tyholo on Monday, 30 August 2010. She then confronted Siphokuhle at about 8am the following morning, the date having been 31 August 2010. According to her, when she confronted Siphokuhle about an allegation that she had slept with the accused, Siphokuhle had replied "Yes mother, I slept with Afunde's father". She then asked her why she did not tell anyone about the incident and her response was that she was scared of getting a hiding. She went on to relate that

Siphokuhle had admitted having had sexual intercourse with the accused in the toilet where the accused allegedly took off her panties. She had also told her that a matter of her alleged rape had occurred twice, once in the toilet and once in the accused's brother's place of residence. She then relates in her evidence how Siphokuhle described to her what happened in the toilet as well as in the accused's brother's residence. She also relates to an incident when she, together with her sister, Nosicelo and her brother, Matwenzi, took the complainant to the accused's place of residence where the latter was confronted. This had happened during the afternoon of 31 August 2010, about 3pm. Once confronted, the accused, according to her, admitted that "Yes, I slept with her", admitting that he had raped her both at the toilet and at his brother's place of residence. According to her, Siphokuhle was present when the accused was confronted and the conversation described above took place. Once the accused had admitted having slept with the complainant, she then proceeded to have the matter reported to the police whereafter the accused was arrested. She then relates how Siphokuhle was taken to Simelela Community Health Centre, was examined by a doctor and how the doctor would have called her in to inform her that Sipokuhle's vagina is red and was damaged. She and Siphokuhle subsequently gave statements to the police. According to

her, after the incident the behaviour of Siphokuhle became problematic and ultimately she left school during June 2011. She ascribes Siphokuhle's behavioural problems to the alleged rape incident. Ever since Siphokuhle left school, she never went back to school although she had made an attempt during 2012 to get her back at school.

[45] Similarly this witness was extensively cross examined by *Mr Mohamed.* Her evidence emanating from such cross examination will be referred to in the course of evaluation of evidence. The last witness to have been called by the state was the investigating officer, Constable Jabulani Khanyile.

CONSTABLE JABULANI KHANYILE

[46] The evidence of Constable Jabulani Khanyile revolves around the circumstances surrounding the arrest of the accused, how the accused was released shortly after he was arrested initially and also the circumstances surrounding his re-arrest at about 23h30 on 25 January 2011 at Khayelitsha.

SECTION 174 APPLICATION

[47] Once the investigating officer had testified, the state closed its case whereafter *Mr Mohamed,* on behalf of the accused, applied for the discharge of the accused in terms of section 174 of the Criminal Procedure Act, 51 of 1977 on the basis that in as far as counts 7, 8, 9 and 10 were concerned, the complainants in all such counts were not called upon to testify and that the only evidence that there is relating to the merits of those counts was only medical reports arising from the medical examination of the complainants in all those counts. *Mr Mohamed* argued that, as at the close of the state's case, there was no *prima facie* evidence against the accused in as far as counts 7, 8, 9 and 10 were concerned; that there was no case for the accused to answer, that there was no evidence on the basis of which a reasonable person could return a guilty verdict in the aforementioned counts and therefore called for the acquittal of the accused at the close of the state's case.

[48] *Ms Engelbrecht*, for the state, conceded that indeed there was no evidence on basis of which the accused might be expected to answer and did not resist the application for a discharge. Once I had heard argument in this regard, I acquitted the accused on counts 7, 8, 9 and

10. Once the accused was acquitted on the aforementioned charges, the accused was called upon to testify in his own defence.

MATINISI DAMANE

[49] The evidence of Matinisi Damane boils down thereto that he is 50 years of age, he is married and that there are two children born of the marriage, Afunde and Aqhamile. He also testified that he left school midway in standard 5. Before he was arrested he was employed by W P Ryan Builders as a painter; that he worked from Mondays to Fridays and at times also on Saturdays; that he never worked on a Sunday and that Sundays would be set aside to attend church services. He further testified that he is an ardent church goer. He further testified that there were occasions when he would be absent from work due to sick leave and also due to inclement weather. His evidence basically boils down thereto that before the incident on 20 August 2010, which he initially admitted when he pleaded, he had met the complainant (Siphokuhle) at a nearby tuckshop where he went to buy food that was short at home. He testified that whilst he was in the queue, tomboy, (the complainant in counts 1 and 2) came straight to him and demanded that he gives her R1-00. He told her he did not have R1-00 in his possession whereupon the complainant proceeded to put her hand in his pocket. He had R20-

00 with him out of which he bought a loaf of bread, polony, coffee and teabags.

[50] According to him the complainant thereafter constantly chased after him informing him that she, the complainant, was old enough, that she was in love with him and demanded that the two of them meet at a secret place where the complainant would prove to him that she is old enough. Because of the overtures on the part of the complainant, he ultimately arranged with the complainant to meet with him at his brother's place of residence and this occurred on Friday, 20 August 2010. He then describes in his evidence what the complainant did in inviting him to have sex with her, how the complainant undressed herself, how the complainant would have sexually aroused him and how he ultimately had sex with the complainant, with the complainant on top and him lying beneath the complainant. There is very little dispute as regards what occurred at the incident at the accused's brother's place of residence, in as much as the accused himself admits having had sexual intercourse with the complainant on that occasion.

[51] The next incident occurred at the toilet shared by the accused and his neighbour. On this occasion he met the complainant whilst he

was on his way to the toilet. He had earlier had an epileptic fit and simultaneously had a stomach disorder. He described how the complainant forced herself into the toilet and how the complainant once again attempted to sexually arouse him whilst in the toilet in order for him to once again have sexual intercourse with her. There is a dispute in as far as this incident is concerned, with the complainant alleging that sexual intercourse did take place on this occasion as well whilst the accused denies that he had sex with the complainant at the toilet incident. This constituted the gist of the accused's evidence.

[52] The accused, from the pleading stage and throughout this trial, denied having had sex with any one of the complainants in counts 3, 4, 5 and 6. He adopted this stance throughout the trial and even under cross examination and only admitted to having had sexual intercourse only once with the complainant in counts 1 and 2. As has already been pointed out, the only incident which the accused admits having had sexual intercourse with any one of the complainants, is the one which occurred at his brother's residence when he had sexual intercourse with Siphokuhle Majali, she being the complainant in counts 1 and 2.

[53] The accused was similarly extensively cross examined by *Ms Engelbrecht,* advocate for the state. Similarly his evidence under cross examination will be referred to in the course of evaluation of evidence, should a need arise to do so. Once the accused had testified the defence closed its case without calling any witnesses.

[54] What I have summarised in the preceding paragraphs is the body of the evidence on the basis of which I am required to make a determination if the state has succeeded to prove its case against the accused beyond reasonable doubt in respect of all those counts in respect of which evidence has been led. It is of course a trite principle of our criminal justice system that the onus to prove the accused's guilt beyond reasonable doubt lies on the state. There is absolutely no onus on the accused person to prove his innocence. In those instances where there is doubt if the state has succeeded to prove the guilt of the accused, the accused person, in line with the noble principles of our criminal justice system that has evolved over the years, is entitled to the benefit of such a doubt and, if doubt is found to exist, the accused will be entitled to the benefit thereof and, ultimately, to his acquittal.

EVALUATION OF EVIDENCE

[55] In the instance of the matter before me, all the counts preferred against the accused, in their very nature, and with regards to the commission of the offences themselves, involve the evidence of a single witness in respect of each such count. Section 208 of the Criminal Procedure Act provides that an accused person may be convicted of any offence on the single evidence of any competent witness. The court's approach to the application and interpretation of the provisions of the section 208 of the Criminal Procedure Act was summarised in a *dictum* by De Villiers JP in *R v Mokoena* 1932 OPD 79 at 80 (with reference to the corresponding section of the 1917 Criminal Procedure & Evidence Act) and which position is stated as follows:

> "In my opinion, that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus, the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunity for observation, etc, etc."

[56] Based on the approach by De Villiers JP in *R v Mokoena,* supra, the position seems to be that a finding can be based on the

evidence of a single witness, but that such evidence is always treated with caution, and in a criminal matter a conviction will normally follow only if the evidence is substantially satisfactory in every material respect or if there is corroboration. The corroboration referred to herein, as was held in *S v Artman* 1968 (3) SA 339 (A) at 341B, need not necessarily link the accused to the crime.

[57] Furthermore, all the complainants with regards to all the counts preferred against the accused are children. The evidence of a young child has been said to be unreliable because of the child's inexperience, imaginativeness, and susceptibility to influence. It is because of such inexperience, imaginativeness and susceptibility to influence that the evidence of a young child is treated with caution. Hoffman & Zeffert, in the celebrated work, *South African Law of Evidence* puts the position as follows:

> "Young children are competent witnesses if the judge considers that they are old enough to know what it means to tell the truth, but it has frequently been emphasized that their evidence should be scrutinised with great care. The danger is not only that children are highly imaginative but also that their story may be the product of suggestions by others. In sexual cases, for example, a child who is prompted by leading questions when he first makes a complaint

is quite likely to believe that things which were suggested to him really happened."

[58] Having thus set out the approach to be adopted in the evaluation of evidence in the instance of the proceedings before me, I shall now proceed to make observations about the *dramatis personae* in these proceedings, and in particular, the person of Matinise Damane, and, from that point, to proceed with the evaluation of evidence.

THE ACCUSED, MATINISE DAMANE

[59] The accused in these proceedings is known to all those complainants who have tendered evidence so that a question of the identity of the accused is not an issue. The accused, as well as his wife, so it emerged during the evidence in the course of this trial, are known in the community as generous persons and out of such generosity the accused, as well as his wife, would on occasions usher those children who are close to their children with gifts such as sweets and other like niceties. In particular, the accused is known as a highly religious person who is an ardent churchgoer. There is no evidence to suggest that the accused has at any stage been viewed as a terrible person in the community in which he lived or that he had at some point been associated with violent activities or has been perceived as such. As has

already been pointed out, the identity of the accused is not an issue here, so that all that I have to determine is whether the state has succeeded to prove the guilt of the accused beyond reasonable doubt and also whether the accused's version, viewed objectively, could be said to be reasonably possibly true.

[60] With regards to counts 1 and 2, it had emerged during the course of evidence in this trial and so did the accused confirm when he testified in his own defence that not only is the accused known to the complainant but that the complainant as well is known to the accused. The complainant testified that she has on several occasions visited the accused's residence to watch TV. She also testified that she knows both the accused's children, Aqhamile and Afunde. In regard to the events which preceded the first incident of the alleged rape, that is, the alleged rape at the residence of the accused's brother, the accused testified that a Thursday immediately preceding the Friday during which the first incident occurred, the accused met the complainant at a tuckshop where the accused went to buy bread, polony, coffee and tea for his family. The complainant in counts 1 and 2 conceded in her evidence that she did indeed meet the accused at the tuckshop a day before the incident at the accused's brother's place of residence.

[61] With regards to what happened on Friday, 20 August 2010, the latter being the day during which the first incident occurred, it was put to the complainant that the accused came back from work at 16h00 on that Friday, that when the accused got home he discovered that his wife was busy cooking and whereupon the accused decided to go to the shop to buy something to eat whilst his wife was busy cooking. It was put to the complainant that on this occasion as well the accused did see the complainant in the vicinity of the tuckshop and that when the accused went back home, having purchased whatever he had intended to purchase from the tuckshop, took a different route in a deliberate attempt to avoid being pursued by the complainant. While walking back home, having taken a different route, he observed the complainant running towards him out of breath and telling the accused that she wants to be with him and that she wants to show the accused that she is old enough and not a young person as the accused would be made to believe. It was on this occasion that the accused suggested to her that he would be attending his brother's place of residence to listen to a soccer game between Kaizer Chiefs and Orlando Pirates which would be broadcast over the radio. The accused suggested to the complainant that he would thus be at his brother's place of residence at 7pm and that

the complainant could meet with him thereat. The complainant conceded under cross examination that she did indeed go to the accused's brother's house as suggested by the accused earlier. The complainant admits having entered the dwelling of the accused's brother but denied that, in doing so, she had to push the door open or that she was not invited into the house by the accused. Her evidence was that the door was partly opened when she entered the dwelling.

[62] There is no dispute that the accused had sexual intercourse with the complainant on the bed whilst she was inside the dwelling. What is in dispute though is which of the parties played a dominant role leading to the actual sexual intercourse, the accused contending in his evidence that the complainant played a dominant role in sexually arising the accused and in actively leading the accused to the bed where they ultimately had sexual intercourse. There is no dispute that during the course of such a sexual encounter the accused's daughter came to knock at the door to ask the accused to give her money and that the accused did not respond. Similarly, there is no dispute that during the course of such sexual encounter the accused's brother came to knock at the door and ascertained from the accused whether he could come in, using words to the following effect "Hey, my bra, are you finished".

[63] As has already been pointed out, the sexual encounter at the residence of the accused's brother is not in dispute. Indeed, the accused admits having ejaculated in the process and, according to the accused's version, that the complainant also reached climax.

[64] As has already been pointed out, the accused did state in his evidence, and so much was put to the complainant, that the complainant was very well known to the accused; that the complainant had masculine features such that she was generally referred to as "Tomboy" in the community. The accused states in his evidence that before the sexual encounter he asked the complainant how old she was and that the complainant indicated to him (the accused) that she was 16 years of age.

[65] Once the sexual encounter was completed, the accused promised to give the complainant an amount of R10.00 and a further amount of R30.00 provided that the complainant would, from then on, leave him alone. The complainant had thereafter left and the accused continued listening to the radio with the hope that a soccer match between Kaizer Chiefs and Orlando Pirates would ultimately be

broadcasted. However, that was not to be and the accused ultimately left for home without the anticipated soccer match being broadcast live. It appears on the basis of evidence that after the event the complainant went home, did not report the incident to her grandmother but instead was accused of having stolen an amount of R100.00.

[66] By all accounts, it would appear that the sexual intercourse which occurred at the place of residence of the accused's brother was with the "consent" of the complainant. Rape can only be committed intentionally. For the accused to have had the requisite intention to rape, the accused should have known that the complainant had not consented to the intercourse. In my view, there is no evidence in this trial to suggest that the sexual intercourse between the accused and the complainant at the place of residence of the accused's brother, was without the complainant's consent. Had such sexual intercourse occurred without the complainant's consent, the complainant would have had two occasions to raise alarm, firstly, when the accused's daughter knocked on the door and called on the accused to ask for money, and secondly, when the accused's brother came and shouted "Hey my bra, are you not finished?"

[67] Section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act provides that a person who commits an act of sexual penetration with a child is, despite the consent of the child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child. A child is defined in the Criminal Law (Sexual Offences & Related Matters) Amendment Act as a person under the age of 18 years or, with reference to sections 15 and 16, a person who is 12 years old but under the age of 16 years.

[68] On the other hand, section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act and under the heading "DEFENCE AND SENTENCING" provides that whenever an accused person is charged with an offence under section 15 or 16 it is, subject to sub-section 3, a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and that the accused person reasonably believed that the child was 16 years or older.

[69] The question that then has to be answered is whether the accused, in the circumstances of this matter and, based on the evidence led at this trial, could reasonably have believed that the complainant was older than 11 years and 4 months, the latter being the complainant's age at the time of the alleged commission of the offence. Dr September, who examined the complainant after the alleged acts sexual penetration, found the complainant to have been 1,47 metres tall and weighing 48kg. Arising from the examination of the complainant, Dr September concluded that the complainant was "repeatedly raped". Dr September further testified that the complainant's vagina allowed two fingers with ease and the doctor's finding was that in the case of a child of 11 years one would not expect to pass any finger or, at the very most, such a finger would pass with considerable difficulty. Ultimately, Dr September concluded that it could not have been the first time that the complainant had sexual intercourse. At the time the complainant tendered evidence she herself said that the accused's penis went into her vagina with ease, which strengthens the findings that she had sexual experience before as the accused had testified. More so, there is evidence to suggest that the complainant sniffed glue, smoked cigarettes; would wake up early in the morning to go and wander in a taxi rank and would come back at home at times as late as midnight. There were also rumours and allegations

that the complainant went about sleeping with married men. All these factors taken into account and cumulatively, could easily have led a person to believe that the complainant was older than what she in fact was. When asked by the accused how old she was, according to the version of the accused, the complainant said she was 16 years of age. The accused also testified that according to his own observation, the complainant appeared to have been either 16 or 17 years of age. As a matter of fact, the accused testified that at the time of their sexual encounter, the complainant was short but strong and looked boyish, telling the accused that she loves him and that she wants to have a relationship with him. This is not the type of conduct that could be expected from a person who is 11 years of age.

[70] With regards to the incident at the toilet, there are two conflicting versions in as far as the occurrence of this incident is concerned. The complainant, on the one hand, and contrary to the averment contained in the indictment, states that the incident at the toilet was the first to occur and that the incident at the accused's brother's place of residence where sexual intercourse did in fact take place, occurred later. Nonetheless, nothing turns on this conflict as the events themselves are clearly separable.

[71] Prior to the incident at the toilet occurring, the accused testified that he had been to Site C, Khayelitsha when, whilst walking and near the bridge at Klipfontein Road Extension, he suffered an epileptic fit. He became unconscious and when he regained consciousness there were persons around him. He also had a stomach disorder. After this attack he went home but on immediate arrival at home he asked for a toilet key, told his wife that he had earlier had an epileptic fit, that he was going to the toilet as he had a stomach disorder and that his wife should keep him under observation whilst in the toilet, lest he would suffer an epileptic fit once again.

[72] There is no dispute that at the occasion of the toilet incident the complainant met with the accused, had gone into the toilet where the accused was, except that, according to the version of the accused, the complainant forced herself into the toilet whereas the complainant states that she went into the toilet per invitation by the accused. It does not appear to be in dispute that whilst the accused was in the toilet, together with the complainant, his wife called at the toilets, shouted for the accused with the accused indicating to his wife that he still had a stomach disorder and that when his wife came on the second occasion

he had asked a gentleman who happened to have been nearby the toilet to take his wife home, the idea having been that he did not want his wife to see that he was with the complainant in the toilet. The complainant does confirm these series of events except that the complainant states that whilst she was at the toilet she insisted on the accused to let her go home as opposed to the accused's version who stated that whilst at the toilet the complainant kept on attempting to sexually arise him with the accused intimating to the complainant that there is no way that he could be sexually aroused as he had a stomach disorder at the time.

[73] There appears to be no dispute that when the accused left the toilet, he locked the complainant inside the toilet and gave the key to a gentleman who happened to have been nearby, and insisted to the gentleman concerned to open the toilet when the coast would have been clear. The complainant confirms the accused's version in this regard.

[74] With regards to whether the accused did commit an act of sexual penetration on the complainant whilst at the toilet, one needs to look at the probabilities. Is it probable that the accused would ask his wife to keep observation on him whilst he is at the toilet, well knowing that he would be involved in an unfaithful sexual deed whilst in the toilet?

Is it probable that the complainant would have allowed the accused to lock her inside the toilet, give a key to the person who happened to have been nearby to open the toilet when the coast would have been clear so to speak, when she would have unwillingly allowed the accused to commit an act of sexual penetration on her? With the greatest of respect to the version of the complainant, to me, it would appear, that the version as proffered by the accused is more probable to that proffered by the complainant.

[75] On a particular Saturday, it being about a week following the incident at the toilet and whilst on his way to the toilet, the accused met with the complainant who told him that there was going to be trouble. In her evidence under cross examination the complainant conceded that she did tell the accused that there was going to be trouble and that the accused refrained from speaking to her. She did conced under cross examination that on this occasion as well, the complainant did see the accused going into the toilet, locked the toilet and then came out of the toilet and did not see the accused thereafter again.

[76] On 30 August 2010 Ntombentsha Majali heard about the incident relating to her daughter to the effect that her daughter (the

complainant) "sleeps with married men in the toilet". The following day, 31 August 2010, Ntombentsha Majali together with her brother as well as the complainant went to confront the accused at his place of residence about an allegation that the accused would have had sexual intercourse with the complainant in the toilets. The accused denied having had sexual intercourse with the complainant at the toilet but admitted the incident which occurred at his brother's place of residence during which incident he had sexual intercourse with the complainant. As a matter of fact, the explanation that the accused gave to the complainant's mother together with her delegation was that the accused had a love affair with the complainant. This explanation on the part of the accused is confirmed by the complainant's mother who confirmed it as much when she gave her statement to the police subsequent to the arrest of the accused. Once the accused had admitted to having had sexual intercourse with the complainant, the complainant's mother proceeded to go and lay a charge against the accused. The accused was arrested by the police shortly afterwards.

[77] Shortly after the accused was arrested the dwelling he used to occupy together with his family was destroyed. It appears that the accused's dwelling was destroyed a day after his arrest. Once his house

was destroyed his family relocated. It is not clear on the basis of the evidence specifically where the accused's family relocated to. Once the accused's dwelling was destroyed there surfaced further allegations of sexual abuse and sexual assault by the accused on several other children. Four other complainants emerged amongst whom was Avuyile Menzi, the complainant in counts 3 and 4, and Anelisa Gwe, the complainant in counts 5 and 6. A common thread relating to the incidents of the alleged rapes is that, ostensibly because the complainants involved are children, no specific dates are mentioned on which the alleged sexual molestation could have occurred, nor did each one of the complainants in the alleged incidents of sexual molestation report such incidents to their respective parents. A further common thread in the evidence of all those complainants who have testified is that they were reluctant into admitting or implicating the accused in the incidents of the alleged sexual molestation nor did each one of those complainants who had tendered evidence report such incident to their respective parents. The common explanation as regards the omission to report the incidents concerned is that once the accused had committed the incidents complained of, the accused threatened to kill the parents of each one of those complainants.

[78] Avuyile Menzi, the complainant in counts 3 and 4, relates in her evidence two incidents of alleged sexual molestation. One such incident occurred at the residence of the accused when, according to her evidence, the accused signalled her to go to the kitchen. This, according to her, happened in the presence of the accused's whole family, it being the accused's wife, together with his two children. According to her, the accused had called her into the kitchen to play a game called "lotto". I have already made a reference in the summary of evidence to her evidence that once they were in the kitchen, the accused undressed her pants as well as her panty and placed her on top of him whilst he was in a seated position and told her to continue playing the game of "lotto". It was in that process that the accused's son, Aqhamile, peeped through the kitchen curtain whilst the accused was, according to her, executing forward and backward movements whilst the accused's penis was inside her vagina. After this ordeal she simply left the kitchen area, walked past the family of the accused which was still sitting in the sitting room and simply left without even greeting. She then went home and did not report the incident to her mother. Instead, she proceeded to take some chocolate and chips out of her mother's bag.

[79] It emerged during her evidence under cross examination that she saw the accused's penis whilst he had sexual intercourse with her in the kitchen. She went to the extent of giving an indication of the size of the accused's penis and gave an indication that the length of the accused's penis measured 28cm. It further emerged in her evidence under cross examination that the evidence she tendered at this trial was mutually contradictory to the statements she made to the police in which she indicated that she was raped by the accused on two occasions and that each incident of such rape occurred in the toilet.

[80] The incident of the alleged rape in the toilet, according to the complainant's evidence, appears to have occurred as follows:
The complainant was at the residence of the accused playing with the accused's daughter. The accused instructed the complainant to go to the toilet. She was instructed to take a different route whilst the accused would take a different route. Whilst at the toilet the accused undressed himself and also undressed the complainant. The accused thereupon placed her on his lap and executed forward and backward movements. According to her she could not remember how long the forward and backward movements were. The accused thereafter dressed himself and also dressed the complainant. The accused unlocked the toilet door

and instructed the complainant to go and wash her hands. She thereafter left and went home.

[81] To all these allegations the best that the accused could do is to deny them. No specific dates are mentioned in the indictment as regards specifically when each such incident complained of would have occurred nor could each one of the complainants refer to specific days in their evidence. The best that the accused could say in refuting that evidence was that he was employed at the time, that the only instances when he would not go to work was when he would have been on sick leave or when he would not have gone to work due to inclement weather. Indeed, *Mr Mohamed* submitted and argued as much when the matter was argued before me that the accused was placed in an invidious position in that no specific dates were mentioned either in the indictment or in the evidence during which each such incident complained of would have occurred which omission, so *Mr Mohamed* argued, only had the effect of compromising the accused's right to adduce and challenge evidence.

[82] The evidence of Anelisa Gwe relates to two incidents of an alleged rape allegedly perpetrated on her by the accused. The first such incident was on a certain day (once again no specific day is mentioned)

when she, together with her friend, Nontyatyambo, went into the accused's place of residence. The accused, who had been outside before they entered his house, also came in and locked the door. Whilst inside the accused gave his cellphone to Nontyatyambo to play games therewith whilst he (the accused) sat on another chair. After he had given his cellphone to Nontyatyambo to play games therewith, the accused invited the complainant, Anelisa Gwe, to sit on his lap whereafter the accused not only undressed himself but also undressed the complainant as well. The accused then executed up and downward movements whilst Nontyatyambo, on the other hand, was seated on a separate chair completely not bothered about what was happening around her but continued to play games with the accused's cellphone. Once the accused was done, he dressed himself up as well as the complainant. The accused thereupon took the cellphone from Nontyatyambo and shortly thereafter the complainant, as well as Nontyatyambo, left the accused's residence and went out to play. Prior to the complainant leaving the accused's residence, the accused told the complainant not to tell her parents about the incident and that should she do so the accused would kill both her parents. They then left the accused's house and went to play with other children.

[83] The second incident of the alleged rape, according to the complainant's evidence, happened at the communal toilets. On this occasion the accused had met the complainant outside his (the accused) residence and invited the complainant to go with him to the communal toilets. According to the complainant the accused suggested to her that they go to the toilet in separate ways. According to her, the accused was the first to arrive at the toilet. Whilst the accused was inside the toilet, he invited the complainant to come inside the toilet. Once the complainant was inside the toilet the accused then undressed himself as well as the complainant, placed the complainant on his lap in a position facing the accused. Once again the accused executed up and downward movements. Once the accused was done he dressed himself up as well as the complainant. The accused thereafter flushed the toilet and closed the toilet door from the outside with a latch. On both occasions the complainant did not report the matter to her parents for fear that her parents would be killed by the accused. The complainant also relates in her evidence having come across children playing outside the toilet where she was allegedly raped and also having seen her biological father at a distance prior to the alleged rape occurring.

[84] It was only on 19 September 2010 that the complainant was confronted about the alleged rape perpetrated on her by her aunt, Siziwe Ndarala. Siziwe Ndarala, according to her evidence, had overheard the complainant as well as her friend, Nontyatyambo, accusing each other of having been raped by the accused. But once Siziwe confronted both Nontyatyambo and the complainant about their conversation which she had overheard, each one of them denied having been raped by the accused. The complainant, when further confronted by Siziwe Ndarala about the alleged rape in the presence of the complainant's mother, once again denied that she ever was sexually assaulted by the accused. This is an instance where the complainant had no less than four occasions during which she could have reported the two alleged incidents of rape, the first of these occasions having been after the first incident occurred, the second occasion having been after the second incident occurred, the third opportunity having been when she was confronted by Siziwe Ndarala about the alleged rape, and the fourth opportunity having been when she was confronted by Siziwe Ndarala, in the presence of her mother, about the alleged rape perpetrated on her by the accused. Evidence suggest that it was only after the complainant had been medically examined that she admitted, for the first time, of having been sexually molested by the accused. Furthermore, it appears

that the complainant made two statements to the police, the first one having been made on 21 September 2010 and the second one having been made on 12 January 2012. Certain material differences were highlighted during the cross examination of the complainant which fundamentally differ from the evidence the complainant had tendered at this trial.

[85] Once again, in the instance of the complaints by Anelisa Gwe as regards counts 5 and 6, no specific dates are mentioned with regards to when these incidents would have occurred. As has already been pointed out, the best that the accused could do with regards to both allegations was merely to deny them. The accused was not confronted with specific allegations which would have placed in a position where he would be able to refute such allegations and effectively challenge the evidence with regards to both incidents of alleged sexual molestation levelled against him.

[86] As has already been pointed out elsewhere in this judgment, both Nontyatyambo Menzi as well as Anelisa Gwe were medically examined by Dr G Josias of the Khayelitsha Community Health Centre, situate at Site B Simelela Centre, Khayelitsha. Both examinations were

carried out on 21 September 2010, the examination on Nontyatyambo Menzi having been performed at 14h20 on the said date and the one on Anelisa Gwe having been performed at 13h45. With regards to the medical examination of Nontyatyambo Menzi and with regards to injuries allegedly sustained there is a comment on the J88 form that "No external injuries seen". With regards to the clitoris and urethral orifice the comment made is "No injuries seen". With regards to the examination of the labia majora, the comment arising from this aspect of the examination is "pasty yellow discharge between labias". With regards to the posteria fochet and *forca navicularis,* the comment made with regards to both these aspects of the examination is "No fresh injuries seen". With regards to the examination of the hymen, in particular, configuration thereof, the comment made is "annular". The conclusion drawn by Dr G Josias arising from her examination of Nontyatyambo Menzi is: "General findings comparable with history. Absence of severe injuries does not exclude presence of penis between hymen or labia majora.".

[87] With regards to the examination of Anelisa Gwe, the comment with regards to her examination is generally that no fresh injuries were seen and Dr Josias' conclusion out of the examination of Anelisa Gwe is

"She has a 1mm run of her hymen with two depths. Compatible with healed injuries to hymen. Absence of severe injuries does not exclude rape."

[88] The medical examination referred to in the preceding paragraph was conducted in circumstances where it was not known precisely when the incidents of the alleged rapes occurred. This creates some difficulty in establishing whether there is any causal nexus between whatever healed injuries there may have been observed during examination to the accused's alleged conduct complained of. In my view, the medical evidence as was tendered in this trial is inconclusive and did not provide the kind of corroboration that is often to be found in cases of forceful penetration of a child by an adult.

[89] The evaluation of evidence highlights certain problem areas in as far as the required quantum of evidence is concerned. The first of these problem areas is the fact that in the instance of both the complainants in counts 3, 4, 5 and 6 did not report the incidents to persons in authority shortly after such incidents had occurred or even to their parents. Of course, the explanation by both the complainants arising from their failure to report the incidents concerned to persons in

authority or their parents is because of the alleged threats by the accused that he would kill both their parents if each one of them would report the incident concerned to their parents. Ancillary to the problem of omission in reporting the incidents concerned, there is an added problem of both the complainants being unable to recall specifically on which days and month each such incident would have occurred. One would argue that this is understandable in view of the ages of the complainants. But then, that is not the end of the matter. There also is the position of the accused that has to be considered and this is the fact that the accused was placed in an invidious position of being unable to effectively challenge the complainant's evidence purely on the basis of allegations the exactness of which remains uncertain.

[90] The alleged threats by the accused that he would kill each one of the complainant's parents should they report such incidents either to their parents or to any person in authority creates some basis of doubt. There is evidence to suggest that the accused was arrested on the allegation of the alleged rape of Siphokuhle Majali on 1 September 2010 and that the accused had been in custody since then. It transpired in evidence that during the course of trial that both the complainants were aware that the accused was in custody at the time but that still, though

the accused was in custody, they failed to report the incidents concerned to their respective parents on the grounds that the accused would be released from custody at some future date. A further problem area is the denial on the part of each one of the complainants once confronted with the rumour that they were allegedly sexually molested by the accused, that they were ever sexually molested by the accused. The medical evidence tendered at this trial does not assist either. The best that it reveals are healed injuries. It is not certain when the alleged injuries were sustained, and when would such injuries have healed and the fact that the evidence arising therefrom is inconclusive in providing the kind of corroboration that is often to be found in instances of sexual molestation by an adult person.

[91] There also is the position of the accused that has to be considered. The position of the accused, right from the onset, has been consistent. The accused only admitted incidents relating to the complainant in counts 1 and 2, Siphokuhle Majali. He admitted having had sexual intercourse with Siphokuhle Majali at his brother's place of residence. Although admitting to the incident at the toilet occurring, he consistently denied that he had sexual intercourse with Siphokuhle Majali at the communal toilets. With regards to complainants in counts 3,

4, 5 and 6, his position has similarly been consistent. He denied having sexually molested both the complainants in counts 3, 4, 5 and 6 and repeated such denial when he testified in his own defence. When the accused testified under cross examination he tendered evidence to the effect that the evidence by the complainants that he would have given them his cellphone to play with is not true as it is not his habit to give his cellphone to children other than his own to play with. *Ms Engelbrecht*, in her submissions and in argument before me, sought to persuade me that the denial by the accused that he ever gives his cellphone to children other than his own, is an attempt by the accused to distance himself as far as possible from the alleged incidents and thus, so *Ms Engelbrecht* argued, is a strong indication that the accused is not the angel he is holding himself out to be. But then, such submissions should be viewed within the context that the accused who, right from the onset, denied having had anything to do with all the complainants other than Siphokuhle Majali, complainant in counts 1 and 2.

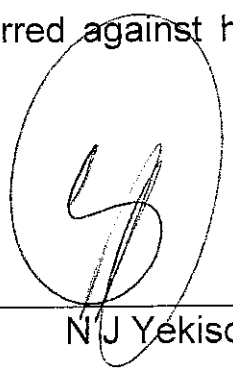
[92] I have already made a finding elsewhere in this judgment that the sexual intercourse with the complainant in counts 1 and 2 at the accused's brother's place of residence occurred with the complainant's consent. I have furthermore already made an observation and a finding

that, based on the evidence led at this trial, the accused was justified to have believed, reasonably so in my view, that the complainant was older than 11 years and 4 months at the time the sexual encounter occurred. As a matter of fact, the accused testified that when he asked the complainant how old she was, the complainant responded that she was 16 years of age. With regards to evidence tendered in an attempt to prove count numbers 3, 4, 5, and 6, I have already made an observation that the quantum of evidence tendered in an attempt to prove those counts, falls short of the required yardstick of proof beyond reasonable doubt.

[93] All the shortcomings in the quantum of evidence I have highlighted in the preceding paragraphs constitute a basis for a doubt if the prosecution has succeeded to prove all those counts preferred against the accused in respect of each one of the complainants beyond reasonable doubt. I must be perfectly understood here. It is not in this judgment suggested that the complainants are not telling the truth. All that is being said is that the quantum of evidence before me is just that doubt exists if the accused's guilt has been proved beyond reasonable doubt. On the other hand, it is similarly not suggested that the accused is the angel he is holding himself out to be. All that is being said is that

there is doubt if his guilt has been proved beyond reasonable doubt and if such a doubt does exist, he is entitled to the benefit thereof. The charges preferred against the accused are, in their very nature, very serious and, in the event of a conviction, carry heavy penalties. I have repeatedly said it in the past, and once again I am saying it in these proceedings, that judicial officers ought to be vigilant in the assessment of evidence relating to offences which, in the event of a conviction, carry heavy sentences in order to avoid instances of a conviction on the basis of evidence of doubtful quantum. I have already made a point that, in my view, there is doubt if the prosecution has proved all the charges preferred against the accused beyond reasonable doubt and, as I have found that such a doubt exists, the accused is entitled to the benefit thereof.

[94] In the result, the accused is given a benefit of the doubt with regards to all the charges of sexual penetration preferred against him and he is accordingly acquitted.



N J Yekiso, J