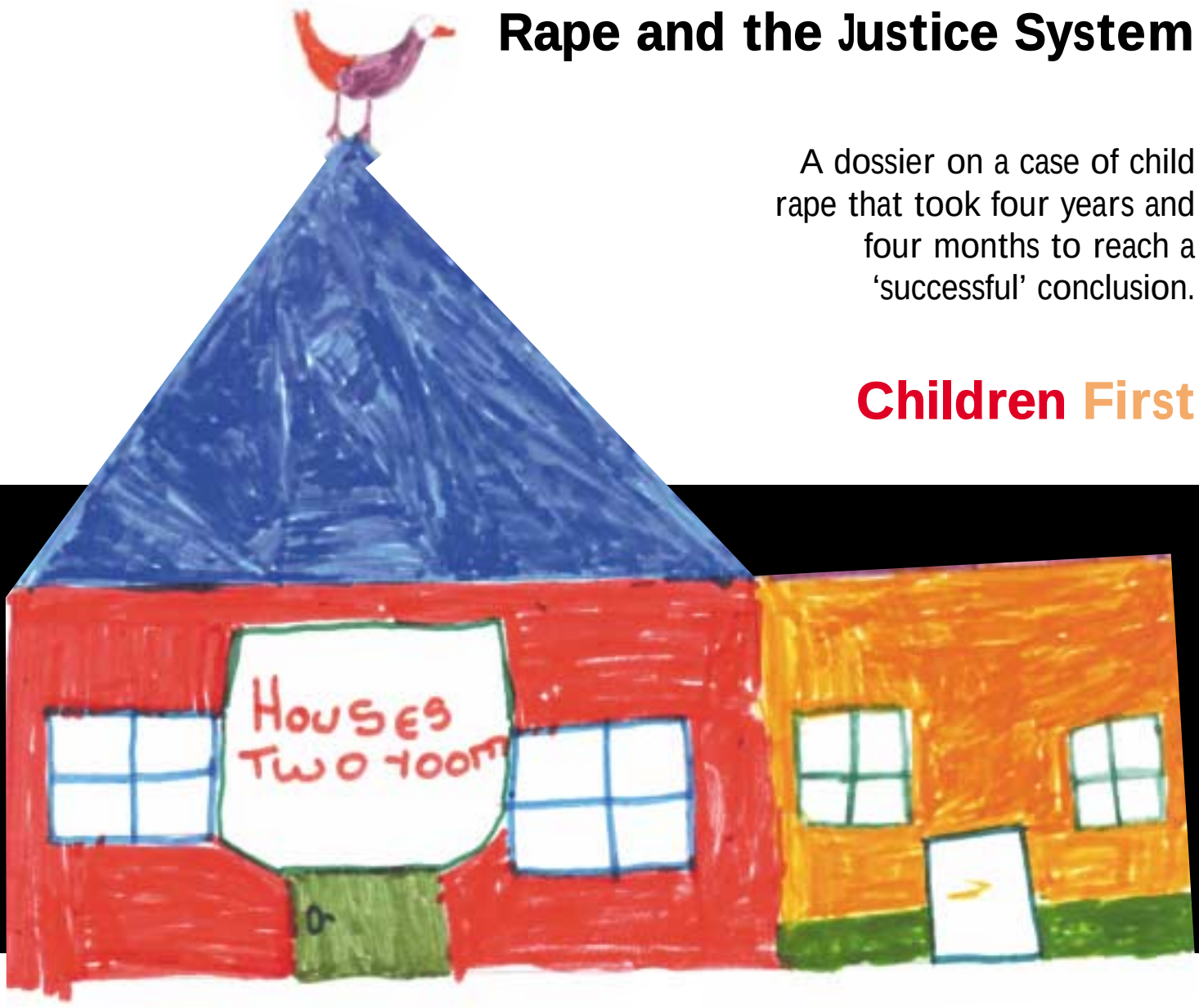
Stolen Childhood

Rape and the Justice System

A dossier on a case of child rape that took four years and four months to reach a 'successful' conclusion.

Children First



Children First *is grateful to the* **FORD FOUNDATION,** *whose generous funding made the publication of this book possible.*

ISBN: 0-620-30632-7

First published by Children First
Diakonia Centre
20 St Andrews Street
Durban 4001

Cover picture: House with a bird on the roof, by Sibongile
Back cover: Main image, village scene by Sibongile; other images by Sihle and Sibongile

All the artwork used to illustrate this document was produced by Sihle and Sibongile during the hours they spent waiting to give evidence.

Editor: Cos Desmond
Design and layout: Jess Nicholson
Printing: Natal Printers

Stolen Childhood

Rape and the Justice System

A dossier on a case of child rape that took four years and four months to reach a 'successful' conclusion.

Deborah Ewing

ChildrenFIRST

Durban 2003

"Maybe, after many years, this thing is going to be better for us. One day this bad dream is going to pass."

Sihle, rape survivor, Msinga, KwaZulu-Natal

Foreword

As I read 'Stolen Childhood', I felt incredibly sad – here were these two children who suffered such acute trauma as a result of the rape, and then had that compounded over and over by the secondary abuse and the neglect of what is supposed to be a caring system. The girls' experience is not an unusual one.

What is even more tragic is the fact that these children had lots of support, and Children First advocating for them – the average abused child has nothing like this. It saddens me that no matter how hard we try at Childline we cannot give a single victim the attention that was given to these girls – the need is so great and the service spread so thinly – it is such a dilemma.

Just about every child we see – and we see hundreds in a single year – has this kind of criminal justice system experience – without the level of support that Sihle and Sibongile received.

I would like to see this dossier read by all role-players who work within the child protection system, to sensitise them to what the abused children experience when the system fails to respond to them appropriately and timeously.

If the experience of these two girls was an isolated and unusual one, the story told in the dossier would be negative enough. My concern is that this – and worse – is the experience of the average child who reports to the Criminal Justice System. The time has come to conscientise all role-players so that they do everything in their power to ensure that the children that they take responsibility for do not experience this form of secondary abuse and trauma.

Joan van Niekerk
National Director, Childline

Contents

Dedication and Acknowledgements

This publication is dedicated to:
Sihle and Sibongile, for their courage and determination, and their willingness to share their stories. May they inspire other children to be brave enough to demand justice and more adults to support them.

The author takes responsibility for errors or omissions with regard to this publication but would like to thank the following people for their support in following and documenting the case:

Sihle, Sibongile and their families;
Creina Alcock and Natty Duma, of the CAP Farm Trust;
The late iNdunankulu Petros Majozi, of the Mchunu community, and iNduna Nkanyakhe Dladla, of the Mthembu community;
Detective Inspector Mfiselwa Madondo, Weenen SAPS
Prosecutor Christa Landsberg, Estcourt Regional Court
Magistrate Edward Hall, Estcourt Regional Court
Senior Advocate Rita Blümrick, DDP
Joan van Niekerk, Childline
Conrad Barbeton, Cornerstone Economic Research

Introduction

In the spring, slate-coloured clouds rumble above the rocky slopes around Msinga and Weenen bringing empty promises of rain. Every living thing seems to strain its head to heaven, hoping for just one more drop. Lack of water is one of the main reasons for the desperate poverty in the valleys here.

Equidistant from the small rural towns of Tugela Ferry and Weenen, on the southern (Weenen) side of the Tugela River, lies the farm Mdukatshani, 'place of the lost grasses'. Mdukatshani, run by the CAP (Churches Agricultural Project) Farm Trust, straddles parts of the Mchunu and Mthembu traditional authority areas. It is also neighbour to Nomoya, the first Black community in KwaZulu-Natal to be resettled under the land reform programme. Nomoya is part of the Mthembu community, which has its headquarters at Tugela Ferry in Msinga District.

Creina Alcock and Natty Duma, of CAP, have always been concerned about the vulnerability of the children in this area. More than half live in homes that are effectively single-parent households, many with absolutely no monetary income. Most households barely subsist, relying on rare remittances from migrant workers, on pensions, on *togt* (increasingly scarce day labour on commercial farms) and on small-scale harvesting of dagga.

Children spend hours walking for water and, if they are lucky, only an hour or so trekking the unmade roads to and from school (Msinga district has the highest number of out-of-school 6-14 year-olds in the province). Children are regularly taken out of school for want of fees, uniforms, shoes, or books, or because they are needed at home to work and look after siblings.

1. Child abuse a national emergency. *Saturday Star* 13 September 2002.

Leisure time is short. Days are filled with scraping a living and there is no electric light to lengthen the evenings. There is no community hall, no proper sports facilities, no youth club, no TV or video. Many people do not have radios and most never see a newspaper, let alone a magazine. It is over 30 kilometres to Tugela Ferry or Weenen and the taxi fare prohibits all but essential trips.

In May 1998, Children First, in partnership with CAP Farm Trust started the first of three series of 'Children's Voices' work-shops at Mdukatshani. The workshops were intended to give children from the surrounding communities the chance to express themselves and explore their creativity through art. A total of 66 boys and girls aged 8-16 participated. They were children of farmworkers, of bead workers from the CAP bead project, and members of the CAP children's gardening project. Among them were two girls from Nomoya, aged around 11, who we will now call Sihle and Sibongile.

This was the first time most of the children had ever held a coloured pencil or a paintbrush and it was a scene of indescribable delight to see them decorating giant name tags and fixing them with copper wire, laughing at each other's portraits hung on thorn trees, collecting leaves to press into handmade paper, and crouching over huge canvases to depict the *rondavels*, the traditional dress, the goats, the mambas, the men with guns, the women with pots, that typify life in Msinga.

It's hard to get to know many individuals in a group that size but Sihle and Sibongile were notable for sticking together, for giggling with their heads bent towards each other, for their self-conscious concentration on their colourful pictures.

The last art workshop for that year took place on 21-22 August. One month later I received a phone call from Creina Alcock to say that Sihle and Sibongile had been raped on their way home from school. The full horror emerged in a letter a few weeks later, which included the girls' description of the attack and an update on what had happened since. The girls had reported the rape but the suspect had not been found and they were scared to go back to school.

> *"When we walk anywhere, we are frightened because if we meet with this boy, he will shoot us because he's frightened they [the police] can charge him and make a case."*

Children First reported on the incident and offered to document how the case was handled and seek support for the children.

No one suspected that this would be an endeavour taking over many people's lives for more than four years. The children had to attend court 20 times and their family members and supporters attended at least 30 times. Often this meant a round trip of 4 hours, with 6 hours spent in court for the sake of a five-minute remand.

Neither the community organisation that assisted the children nor Children First had a budget to do this so no one was paid for this time.

Was it worth it? Yes: between us all – 2 very brave children, their parents and supporters,

17 witnesses, some expert advisers and a few very dedicated professionals in the criminal justice system – we secured a conviction and a life sentence.

Did it change anything? That remains to be seen.

In the time we spent pursuing this case, the rape of tens of thousands of other children was reported and more than 90% of the rapists remain free. No one really knows how many children are raped, each year, each month, each hour. Children First spent days searching for reliable statistics. They don't exist. We found estimates, assumptions, projections, contradictions. The closest we came to a recent figure was: more than 21,000 child rapes (and some 37,000 adult rapes) reported in South Africa in 2002. That is one every 25 minutes and according to the South African Police Service (SAPS), only one in 35 rapes is actually reported.

Aside from the problem of under-reporting, the current definition of rape is so narrow that it obscures understanding of the extent and brutality of sexual violence. The offence of rape is limited to penetration of the vagina by the penis. It excludes anal/oral rape or penetration with an object. These acts are defined as indecent assault, legally a lesser offence although they can be equally, if not more, traumatising. Male victims are not uncommon and suffer the same problems – and trauma – as female victims. The attitude of both the legal system and the public means the abuse of boy children is usually concealed or not taken seriously.

Childline takes an average of 19000 calls a month on its hotline. Most are from victims of abuse. These are from boys and girls who have access to a phone and know about the service. The SA National Council for Child and Family Welfare deals with 20 000 cases of abused children – many victims of rape and sexual abuse – every year and reported in September 2002 that the figure was 'increasing at an alarming rate'.[1]

The detailed record of the case that follows is intended not simply to draw attention to one case involving 2 girls. It aims:

- to highlight the things that routinely go wrong in cases of this nature;
- to draw attention to the fact that many children suffer immeasurable secondary traumatisation as a result of the system malfunction;
- to share lessons with those who engage in these processes on behalf of children;
- to offer recommendations to those whose responsibility it is to protect children in the criminal justice system;
- to count the cost to the victims, to society and the state of a flawed criminal justice process.

1. Child abuse a national emergency. *Saturday Star* 13 September 2002.

Summary

The days of school friends picking *amajikijɔla* (berries) from a furrow above the Tugela River are a lifetime away for Sihle and Sibongile[2].

The taste of the fruit was forever poisoned on 17 September 1998. A group of children were dawdling home, searching for berries, when a young stranger with 'bad eyes' appeared in the bush at the furrow, saying they would be shot for stealing 'the white man's fruit'.

The terrified children scattered. But Sihle and Sibongile had dropped their books and were suddenly more scared of being punished if they returned home without them so they ran back. Then began an ordeal that ended their childhood.

The young man blocked their way with a branch of thorn bush. He showed them a gun and threatened to hit them if they tried to pass. Sihle started to run but stopped in her tracks when the man yelled at Sibongile, "Tell this dog I am going to shoot at her right now". He led the two girls, aged 11 and 12 up a steep path through thick bush. Slabs of ironstone characterise the countryside and the stranger stopped by a large flat stone. He ordered the girls to take off each other's clothes and to slap each other. Then he made Sihle sit on the stone and watch while he raped Sibongile. Then he ordered Sibongile to sit on the stone while he raped Sihle.

The details "fill one with revulsion", as Judge Herbert Msimang would later comment in sentencing.

The man ordered the two girls to dress, took them down the hill to the river and made them wash their bodies and underwear, to remove the evidence. He warned them to tell no one what he had done and then disappeared up the hill.

A local taxi driver came upon the two children as they staggered crying along the path to their homes in the late afternoon. He picked them up and took them to Sibongile's home, where the women joined the children in weeping as they related what had

The road above the Tugela River, where the two girls were threatened and abducted.

This photo was taken in February 2003, a day after the only rain that fell in two months

2. The names of the two rape survivors have been changed and the names of close family members omitted.

happened. They quickly decided that the rapes must be reported to the police, though some of the men were in favour of an armed search party. The girls come from a small, traditional Zulu community in a remote area of KwaZulu-Natal. The journey by road to the police station at Weenen is 32 kilometres. The families decided rather to go across the river to the nearest shop, to phone the police.

The girls were carried piggy-back through the water in the dark and when the police arrived, their fathers accompanied them to the station. No statements were taken and they were told to go back home because if they were reporting rape, they should have come with their mothers. As a result they were not examined by the district surgeon until the following day.

No one had any hope that the rapist would be found. Even if he was still around, the Tugela Estates, a vast agricultural area on the Msinga side of the Tugela River, recently resettled after the forced removals, would have made an ideal hiding place because of its large population. The girls were too scared to go back to school. Then, just a week after Sihle was persuaded to return, with a bodyguard of her peers, the rapist reappeared, on the same road, with his gun. An adult, finding him suspicious, chased him away and Sihle then revealed who it was.

Sipho Gift Khanyile was arrested on a white-owned farm in Weenen district, on 19 November 1998. He was charged at Weenen District Court with two counts of rape of a minor and denied bail. The girls' families, their teachers, the traditional leaders, the police, community workers, a paralegal officer and a children's rights organisation rallied around the children. There was medical evidence of rape, the girls could identify the rapist and were eye witnesses to each other's rape. All positive factors when one considered the statistical odds against a conviction are almost 9 to 1 for reported cases of child rape and 13 to 1 for all reported rape.

It took 3 years and 8 months to get a conviction on both counts of rape. It was another 8 months before the rapist was sentenced.

It is a 140-kilometre round trip from the girls' homes to Estcourt, where the trial was held. Sihle and Sibongile had to make this journey to court 20 times over a period of 3 and a half years before finally giving evidence. The witnesses and supporters attended at least another ten times. During this period, every aspect of the system intended to bring the girls justice failed them to some degree, and compounded their distress.

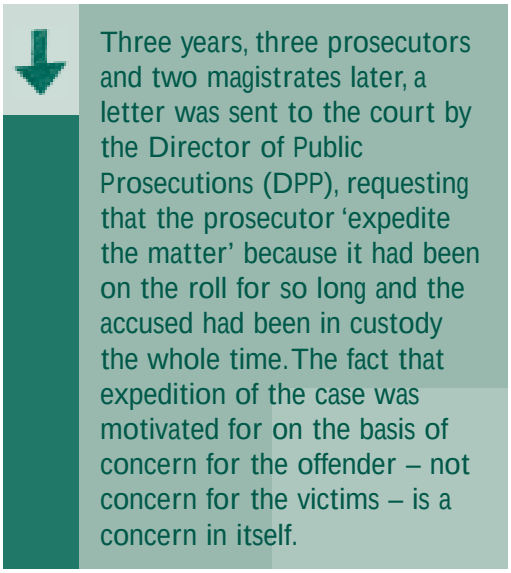
The Constitution (Act 108 of 1996) makes it clear in Section 28(1)(d) that 'Every child has the right to be protected from maltreatment, neglect, abuse or degradation' and 28(2) A child's best interests are of paramount

importance in every matter concerning the child.'

In most instances throughout this case, Sibongile and Sihle's best interests were not top of the agenda. The secondary trauma experienced by the two children (and thousands of others) was not, however, as a result of deliberate maltreatment but a consequence of dysfunction in a system that is overloaded, fragmented, outdated and under-resourced. It's a system in which lack of money, lack of training and lack of information keep policy and practice poles apart.

Three times the children were called into open court to face the rapist, despite the fact the case had been sent to Estcourt so that they could testify through an intermediary. Once they were made to sit in the corridor opposite Khanyile's mother who had been overheard at the police station trying to buy the docket and threatening the investigating officer.

There were 19 remands in the regional court at Estcourt before the case finally went to trial (and 9 earlier remands in the Weenen district court). Sometimes the case was remanded because there was no space on the court roll, sometimes because there was no social worker available to serve as intermediary. Twice it was remanded because the accused dismissed his legal aid lawyer. Once it was remanded because he was hungry, having left prison before breakfast and been given no lunch. (After this, Creina Alcock and Natty Duma brought food for the accused to every hearing, to make sure the hearing went ahead). Once the case was remanded because the prosecutor found on file a letter from the pathology lab asking if DNA tests were required on the samples taken by the district surgeon. The letter was two years old and no one had replied to it.



At the next hearing, there was still no social worker available and the prosecutor pleaded that the children should give evidence in open court because he was under pressure to go ahead with the case. In October 2001, the court was informed that Khanyile had dismissed his second legal aid lawyer and was conducting his own defence. This meant that if Sihle and Sibongile agreed to testify in court, without an intermediary, they would be cross-examined directly by Khanyile. The girls were adamant they could not do this. The case was reluctantly remanded and the children's rights organisation, Children First, arranged at its own expense to bring an intermediary from Durban for the next hearing.

The next hearing, on 10 November 2001, was before a different magistrate with a different prosecutor. That magistrate insisted on having a formal hearing into the need for an intermediary. This turned into a trial-within-a-trial, with Khanyile cross-examining witnesses about why on earth it would be traumatising for the two children to answer his questions about what he had allegedly done to them. He also questioned how a witness who had not been raped could say it was traumatic. The magistrate eventually exercised his discretion to allow an intermediary.

From October 2001 to March 2002, the case was heard on Saturdays, to speed things up

because the weekday roll was full. Taxis do not run from Estcourt to Msinga on Saturday afternoons, so the children had to travel in private transport. On ten Saturdays, Sihle and Sibongile climbed into the back of a bakkie (pick-up truck) at 5.30am and faced a bumpy journey to court, come spring storm or scorching sun.

Shortly after the rape, the children told their full story to Natty Duma, whom they knew well and trusted. A social worker whom CAP consulted before the case opened felt this was adequate counselling but when it became clear that after many months the girls were still severely affected by their ordeal, Childline recommended professional counselling, which it offered free of charge. However, once the case was opened discussion of the facts of the case might have been viewed as an attempt to influence the evidence. Since the trial dragged on for so long, the children did not see a counsellor until 3 years and 9 months after the rape. Due to the distance involved, they were only able to attend two sessions.

Child rape carries a mandatory minimum sentence of life imprisonment. A life sentence can only be handed down by a judge so such cases are remanded for sentencing to the High Court. By the time the girls finally gave evidence, there had been at least a dozen convictions set aside or referred back to magistrates because the statutory procedure for administering the oath to minors had not been followed to the letter. The prosecutor in the Khanyile case assured everyone that there would be no such setback.

In giving his verdict, the magistrate commended Sihle and Sibongile for their strong testimony, found Khanyile guilty and referred the case to Pietermaritzburg High Court for sentencing. On 21 October 2002, Judge Msimang, referred the case straight back to Estcourt on the grounds that the magistrate had not ascertained whether the children understood the prescribed oath.

On 13 November, the two children were summoned back to court so the judge could decide whether the magistrate had acted correctly. The prosecutor arranged an intermediary but the judge decided to call the children into court in the presence of Khanyile. The relief of the children, their families and supporters was palpable as the judge upheld the conviction.

Everyone thought the ordeal was over as the defence attorney declared that he could offer no reason why Khanyile should not receive two life sentences. But then he declared that Khanyile was now 18, which would have made him 14 at the time of the rapes. There was an affidavit in the docket from a doctor confirming that X-rays proved Khanyile was at least 18 at the time of the rape. This was the basis on which he had been tried. But no one in the High Court made mention of this and the judge adjourned the case twice more while conflicting claims about Khanyile's age were examined.

Sipho Gift Khanyile was sentenced to life imprisonment on two counts of raping a minor on 22 January 2003.

After so long, after so many obstacles, after so much pain, it hardly seemed a victory, especially considering the many tens of thousands of children who were raped during this time and know that their attackers are still freely roaming the streets.

We hope that something positive can come out of our experience for some of those children and the others who become victims of abuse every day. Perhaps those in positions of power will use that power more effectively to address the problems documented below. Perhaps the many people who work with and support child rape survivors will be able to avoid some of those problems.

Background to the case

On Thursday 17 September 1998, Sibongile and Sihle had left the cares of the classroom behind them and brushed aside thoughts of the chores that awaited them back in the homestead, as they chatted with their classmates and feasted on mulberries.

By the time they did reach home that day, they were shaking with fear and misery. The following account of what happened is summarised from the story they told to CAP Farm Trust community worker Ms Natty Duma some days later, as reported in ChildrenFIRST[3]. This account is repeated here because it is from the children's own (translated) words – not in the distant, disjointed dialogue of evidence led from a police statement. It also shows, when compared with the court evidence, how clearly they remembered the events after more than 3 years and how closely they corroborated each other.

As the children ambled along the winding road between the Tugela River and a steep, bush-covered hillside, on their way back from the local farm school, a young man suddenly stepped out from a furrow: "He shouted – 'Ha! *Umlungu* said I must come and fetch you! You are eating the *amajikijola*'."

The girls were scared – the stranger gestured towards a field where the body of a young girl killed for medicine was found in 1984. That was before Sibongile and Sihle were *born but all the children had heard the story and the girls feared something bad would happen to them if they went th*ere.

The children ran away but Sibongile and Sihle turned back when they realised they had left their school books on the ground, and would get into trouble if they returned home without them. The young man told them he wouldn't do anything to them but when they tried to walk away again he blocked their path with a thorn bush that he was holding. He showed them a gun and threatened to hit them if they tried to pass. Sihle started to run but stopped in her tracks when the man yelled at Sibongile. "He said: 'Tell this dog I am going to shoot at her right now'." He led the two girls up a steep path through thick bush.

There were no homes within screaming distance – the area was only just beginning to be resettled by households of the Nomoya community after their successful land claim.

When they reached the top he made them sit on the ground and he sat on a flat stone "like a table". He covered the gun with a piece of clothing and ordered the girls to take off their school uniforms, told them to kiss each other, then slap each other, then he said they must sleep with him. He started undressing himself.

He then made Sihle watch while he raped Sibongile. "My whole body was shaking",

> *"Ha! Umlungu said I must come and fetch you! You are eating the amajikijola."*

3. ChildrenFIRST issue 22, p32.

she said. “We couldn't run away – the gun was next to him on the rock. This thing he was putting inside me was so sore, so sore. I cried. When I was crying he *klap* [hit] me.”

The rapist ordered Sibongile to move up and down like he was doing but in her pain and fear she couldn't move at all. “I just lay [on him]. He said ‘You stupid girl! You stupid girl!’”

When he had finished, he forced the child to kiss his hand, covered with his semen and her blood. Then he pushed her away. Then the rapist pulled Sihle on top of him. She said: “I cried and cried and cried and cried. Then he said ‘Stupid girl! Stupid girl!’”

He told the two children to wipe clean his penis with their tongues. Sihle vomited and he asked her why, and she said she couldn't help it, and he hit her. He questioned the girls to reassure himself that they couldn't identify him and then told them to walk away on the other side of the hill.

The attacks on Sihle and Sibongile in 1998 were part of a 34% increase in violent crimes recorded between 1994 and 2000[4]. The girls were among 8,525 rape survivors in KwaZulu-Natal in 1998 and 49,280 throughout South Africa[5] ; about 40% of whom were children[6].

According to 1998 figures from the South African Police Service (SAPS) Child Protection Unit and the Victims of Crime Survey from 1999, rape is the most prevalent reported crime against children, accounting for one-third of all serious offences against children reported between 1996 and 1998. A SAPS statistical analysis of reported rape cases showed the victim age group reflecting the highest rape ratio per 100,000 of the female population was the category of 12 to 17-year-old girls. Gauteng and KwaZulu-Natal showed reported rape/attempted rape cases far higher than the national average and both increased over that period[7].

4. *Monograph*, Issue 75. Institute for Security Studies. October 2002.
5. Crime Information Analysis Centre, SAPS
6. SAPA Crime Information and Analysis Centre (CIAC). Quoted in Nedbank ISS Crime Index, Vol 3, 1999. No. 2
7. Ibid

As the children staggered home, a bakkie pulled up beside them. It was driven by the *induna* (headman) for that area and he drove the girls first to Sibongile's home. They tearfully explained that a man had forced them into the bushes and Sibongile's mother summoned the other family members and it was agreed they should call the police. It was dark by then and the police station was at Weenen, 32 kilometres away, so it was agreed to take the children across the river to the nearest shop to phone for the police. The children were carried piggy-back across the Tugela, accompanied by their fathers, Sibongile's mother and an aunt. When the police came to meet them at the shop, the fathers accompanied them in the police vehicle to the station at Weenen. The families say that at the station, the police refused to take a statement, saying the children should have come with their mothers because rape was a sensitive matter. The children were sent home, where they stayed, too terrified to go out, until they were taken back to the police station the next day to give statements. Only after that were they taken to the doctor. Twenty-four hours that might have been vital in terms of looking for the rapist and gathering forensic evidence were lost.

Such a delay in taking a statement and referring a complainant for medical examination – which is not unusual – may compromise the collection of evidence. It also impedes prompt access to medication to prevent HIV-infection, although this was not available in the public health sector at the time of the rapes, and is still not accessible to many child rape survivors.

The medical examination was carried out by a male doctor who did not speak Zulu, the girls' home language. The children did receive medication, though they did not know what it was for. They were tested for HIV but without their knowledge or any counselling. KZN Health Department has issued a protocol for the Management of Child Survivors of Violence. In the case of Sihle and Sibongile, only two of the 12 requirements were met. Post Exposure Prophylaxis (PEP) with anti-retroviral drugs is recommended for rape survivors, to prevent infection with HIV. This is available now at most provincial hospitals – it was not then. However, the Health Department Protocol for PEP only applied to people over 14; a protocol for counselling and testing for PEP for children has since been developed in KwaZulu-Natal. Much depends on the medical practitioners examining the children as to how the children are prepared for the medical. Childline finds that the children it sees are seldom given information about the outcome of the exam and long-term physical issues. This gives rise to many anxieties that can increase the child's sense of trauma.

The Weenen police station does not have a Child Protection Unit. It has a Youth Desk, headed by a female officer, but she was away at the time of the incident.




A report to parliament by the Democratic Alliance on a survey of Child Protection Units (CPUs) and Family Violence, Child Protection and Sexual Offences Unit (FCS) from November 2002 to January 2003, found that only 35 of the 42 policing areas were covered by any CPUs. Nationally, these are understaffed by 48%.– they have 739 officers, which is 693 members short – though the Western Cape CPU is understaffed by 78.2%[8]. According to a parliamentary briefing on CPUs in November 2002, SAPS provides two training courses specifically for investigators of sexual offences. These are the Family Violence, Child Protection and Sexual Offences Unit Investigators' Course (which replaced the CPU Investigators' Course in 1996) and the Sexual Offences Investigators Course. The investigating officer in this case had not received either course. This seems to be true of the majority of police officers investigating rape cases. Up to 79% of police members surveyed last year had no training in Family Violence, Child Protection and Sexual Offences.

Joan van Niekerk, Director of Childline, says: "Even more difficult to understand and accept is the lack of selection, training, debriefing of CPU officers themselves – despite the fact that they belong to a specialised unit. The Durban South CPU has a commanding officer who has no training in Child Protection."

Victims generally have to give their statements to officers who are often not trained to understand offences of this nature. They may also have to wait, with no privacy, for several hours for someone to take their statement.

Sergeant (Detective Inspector as of 2000) Mfiselwa Madondo, of Weenen SAPS, was appointed Investigating Officer (IO) in the case. The Weenen/Msinga area is vast. There is only one police officer to every 16 000 inhabitants, and no sophisticated technology to assist investigators. Sgt Madondo had an average of 30 cases a month to investigate and the 5 Weenen detectives had 2 motor vehicles between them. Sgt Madondo had a fraction of the resources that were mobilised around the same time to hunt down the rapists of two Swiss tourists attacked near Umfolozi game reserve – helicopters, huge teams of police and detectives to comb the area, and the immediate back-up of forensic and information technology. Given the terrain, even if the resources were there, there was little hope that the rapist would be caught.

The proportion of rape cases in which the perpetrator is never found is higher in KwaZulu-Natal that in South Africa as a whole. The leaked findings from an inter-departmental task team on an anti-rape strategy in 2002 showed that[9]. the perpetrators could not be traced in 30% of the total reported rape cases in 2000, and in 43% of reported cases in KwaZulu-Natal.

In an estimated 70% of cases, the rapist is known to the victim; the odds against tracing the suspect in other cases are extremely high.

8. It was reported last year (Star 26 November 2002) that the FCS units that incorporate the CPU functions) would be getting 445 (50%) more members nationally adn 71 (20%) more vehicles. It was not stated when this would be implemented.
9. 'Most rapists go unpunished, says report' *Mail and Guardian*. 15 November 2002.

Sihle's father took it upon himself to try to find the rapist. He took his daughter to the gate of the nearby High School and asked her to look for her attacker among the male pupils but she did not see him.

Knowing that their attacker knew their faces well, Sibongile and Sihle were filled with terror when their local *induna* suggested a further identity parade. According to Creina Alcock, at Mdukatshani, the prospect of an identification, an arrest and a court case filled the girls only with dread.

The children knew nothing about crime statistics. They had not heard that for every 100 violent criminals arrested only seven were likely to end up behind bars.

Creina says Sibongile did not know what *ukudlwengula* was when it happened to her aunt a few months earlier. She knew that her aunt had been attacked and hurt in the bush near her home by five young men. The aunt had later recognised one of the attackers and he was arrested. The man was charged but hired a lawyer who managed to get the case dismissed. By the time she was 12, Sibongile knew that *ukudlwengula* was rape and that the rapists were free.

For several weeks after the rape, though their physical injuries were healed, Sibongile and Sihle would not leave home without their mothers. They and six of their classmates refused to go back to school, despite a visit from their teacher who was concerned that they would miss their exams and despite offers of transport from a taxi driver – they said they would not accept a lift if their friends still had to walk. The fear spread and all the children from Nomoya refused to attend school. Their families even considered sending them to another school across the Tugela, which would involve another danger – the small children would have to be carried across the fast-flowing river on whose banks crocodiles were sometimes sighted.

Eventually, on 26 October, Sihle and the other children, but not Sibongile, plucked up courage to go back to their school. They walked in large groups, with even the smallest Grade 1 pupils wanting to serve as 'bodyguards'. Their mothers would meet them along the

The inter-departmental task team report showed that only 8,9% of the child rape cases (7.7% of rape cases overall) reported in 2000 resulted in convictions and that the conviction rate in rape cases declined by 4% between 1999 and 2000 after growing at 3% between 1996 and 1998.

The conviction rate for all rape cases prosecuted is the lowest across all categories of crime, at 49%. However, the rate of convictions in cases where a suspect actually went to trial is 78%. One can't say on the basis of this that the police are performing badly and the prosecution are performing well, because police have far less choice over which cases they take than the prosecution has. Prosecutors only prosecute where 'there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution[10].

In mid-2000, the National Prosecuting Authority of South Africa (NPASA) started to encourage prosecutors to withdraw cases referred to court that were flawed and not likely to proceed to a successful prosecution. Between 2000 and 2001, the number of cases referred to court increased by 30% but the number of cases withdrawn increased by 44% and the number of successful convictions only increased by 15%[11]. This raises serious questions about both the quality of police investigations and the capacity of the prosecution service.

Human Rights Watch noted in a report in 2000 that rape ranks last on the list of South African crimes in terms of conviction rates and that trials for child victims regularly take longer than trials with adult victims and witnesses.

10. National Prosecuting Authority of South Africa Policy Manual October 1999. Page A.3. Quoted in ISS
11. *Monograph*, Issue 75. Institute for Security Studies. October 2002.

way. On 4 November, a young man fell in with a band of pupils just ahead of where Sihle was walking with a friend. He was allegedly carrying a gun and a knife – and Sihle recognised him as the rapist. Moments later, Squbudu Sithole, a worker from a nearby farm, saw the intruder and approached him. He questioned him, asking who he was, why he was with the children and why he was carrying a gun. The young man gave an unfamiliar family name, Sithole asked the children if they knew him and they all said no. The stranger walked off toward the river and Sithole followed him.

Sihle hurried home. On the way she met a man she knew, Nkosimandla Masoka, and urged him to hurry back and tell Sithole that the stranger was indeed the rapist. By that time, the alleged rapist had crossed the river and disappeared.

Throughout this terrible period, the two girls had support from their families and friends, from the traditional authority leaders. They had people they could trust to talk to. But Sibongile and Sihle had no one to tell them they were safe, no one who could promise that they would be protected if the rapist was not caught, or if he was caught and then let out on bail. Sibongile did not return to school for 3 months.

According to the court prosecutors and the Child Protection Unit (CPU) covering this area, the incidence of child rape has been steadily increasing in recent years. *Induna* Nkanyakhe Dladla, of the Nomoya ward, said it was not that child rape was previously unreported but that it simply didn't happen. Other elders of the community confirm this and say there is an urgent need to protect their children.

The communities in this district are governed by both statutory and customary law. Although traditional authorities lost their criminal jurisdiction under colonial rule, they had clear procedures for dealing with rape in the community, which still exist today. In an interview shortly after the rapes were reported, *Induna* Dladla said his people were facing a dilemma because neither the customary nor the statutory system was equipped to deal with the rape of children. He explained how customary law was developed to prosecute rape before western law was introduced, in the context of compensating men for attacks on wives and grown-up daughters. Women were regarded as minors, effectively the property of their husband or father, and therefore as not being victims in their own right.

"It seemed to people as if the rape had happened to the husband, not the wife, because he was supposed to protect the woman and no other man should touch her. People might assume that the rapist was in

love with the woman and trying to take her from her husband, or that she was willing."

Such an attack would be reported to the *induna*, who would send the *iNkosi's* police to investigate. He would then take the case to the tribal court. The *Indunankhulu*, who is the Judge President of the court, would hear the case and if the alleged rapist was found guilty he would usually be fined. He would have to pay three cows to the father or husband of the victim and to the *iNkosi*. He might negotiate a fine of up to R1000 instead. *Induna* Dladla says the 'sentence' had never been increased in his memory. In the past, he said, there was some protection against a rapist striking again because he would be known and stigmatised by the whole community; he would be pointed out to everyone and wouldn't have the opportunity to rape again. In addition, there were obligations between traditional authorities to hand over people suspected of crimes in other communities. Today, however, communities were not so close, there was more movement and strangers passed in and out. The rape of children was causing great distress as people did not know how to address it, but it was also beginning to highlight the rights of victims.

From that point of view, *Induna* Dladla said the traditional leadership believed it was appropriate for the state police and the criminal courts to have jurisdiction. "It is better for a rapist to be taken to court because in our rural system a man can go free, say he has 'paid' for the rape and then rape again."

On the other hand, the community had no faith at all that the criminal justice system would protect them from violent offenders; there had been too many cases of known rapists and murderers going free.

Failure to apprehend rapists and lenient treatment of offenders had led people to hunt down and kill suspects. *Induna* Dladla recalled a case in which a man who attempted to rape a girl was chased into the Tugela River, where he drowned. More than one person associated with this case thought a bullet might be more effective than a court case in protecting children from rapists.

Induna Dladla stressed: "The traditional authority would advise the community not to take the law into their own hands but sometimes people feel that is the only way because the police don't arrest anyone and a rapist or murderer is strutting around in front of everyone."

The House of Traditional Leaders has instructed traditional leaders that they may not deal with child sexual abuse and arbitrate these matters – they have to be referred to the criminal justice system.

A member of the Ladysmith Child Protection Unit, which covers the Weenen district, says that the police simply do not have the personnel to deal effectively with the growing number of cases of child rape being reported. However, he sees the lack of communication and partnership between police, welfare services and government as a great obstacle to making best use of resources. "Rural people are very unaware of their rights, they often don't know what steps to take, where to go when cases of child rape happen. If a case does get reported I don't feel happy about the treatment the child gets."

He expressed concern that interventions by the system with rural children from traditional communities added to the trauma of the victims because they were often culturally insensitive. "We need to finds ways of involving the whole community with the authorities in preventing, identifying and reporting child rape."

During the period of the Khanyile trial, there was outcry nationwide about a suddenly reported spate of rapes of babies and young children. The rape of 9-month-old baby Tsepang in October 2001and later rapes of even younger babies drew universal condemnation. Community frustration with the failure of police to apprehend alleged child rapists had been mounting for some time. In December 2001, a man suspected of raping a five-year-old was stoned to death in Soweto, and in February 2003 a woman was arrested for helping to beat to death one of a group of men who raped her. In the Khanyile case, some of the community elders made clear that if the suspect was seen in the area or that if he was released on bail or acquitted because the case was not properly investigated or prosecuted, the community would take the law into their own hands. All the time the public cannot trust the police and criminal justice system, summary justice, even execution, are likely to be considered as options.

In June 2002, the Parliamentary Task Team on Child Abuse published a report on its extensive public hearings with government officials and service providers. In the course of the hearings it found that all the senior people working in the criminal justice system – advocates, prosecutors, magistrates – who were interviewed, said that if one of their own children was raped they would not take the matter to court due to the secondary abuse that occurs in the system.

The message this situation communicates to offenders is that they can act with impunity and that rape and sexual abuse are tolerated by society, despite political rhetoric to the contrary. The message it sends to victims is that sexual violence is an occupational hazard of being female, being young or otherwise vulnerable. In the absence of protection, one self-defence response to this hazard is to accept or normalise it.

It is not surprising, therefore, that in 1998, when Sihle and Sibongile were raped, one in four young men surveyed in the Southern Metropolitan region of Johannesburg reported having had forced sex with a woman by the time he had reached eighteen. Eight in 10 young men believed women were responsible for causing sexual violence (as did 2 out of 3 young women) and 3 in 10 thought women who were raped 'asked for it'. Two in 10 thought women enjoyed being raped[12].

12. *Beyond Victims and Villains: The Culture of Sexual Violence in South Johannesburg.* Study conducted by CIET 1998- 2000.

An arrest is made and the trial is awaited...

In mid-November 1998, Squbudu Sithole, the worker who had chased the rapist away from the children, spotted him in the area again. This time the police were called and on 19 November Sgt Madondo took the man into custody. It then took more than four years for Khanyile to be tried and sentenced.

20 November 1998

On 20 November 1998, the day after his arrest, Sipho Gift Khanyile was charged at Weenen District Court with 2 counts of rape of a minor. The rapes became 'case 663/98' and Khanyile was remanded in custody for further investigation. Prisoners remanded from Weenen have to be held in custody at Colenso – 30km away – and transported back and forth to each hearing by police officers with a shortage of vehicles because Weenen has no jail. The town also has no hospital (emergency treatment requires a 70km dash to Estcourt), no chemist, no resident lawyer, no supermarket. It does have a bank – open 3 mornings a week – a post office, even a town hall but as Creina describes it: "It's a bit like a frontier or border post, existing as a taxi rank more than a town".

There were nine remands at Weenen, hence 9 rounds trips of 60km to transport the accused, before the case was committed to the regional court for trial.

Children First promised to follow the case, to report on how it was handled and how the girls and their families coped. We knew that organisations working on children's rights issues in rural areas all over South Africa would have many equally devastating stories to relate of how the innocence, health and hope of our most disadvantaged children were snatched away. However, everyone who knew Sibongile and Sihle hoped that publicising their ordeal, and the effort to protect them, might offer some lessons on improving the safety and security of children in all rural communities.

December 1998 passed as usual in the valleys. The migrants (some workers, most work-seekers) came home from Gauteng for the annual leave that allowed family life for a month. Beer was brewed, engagements were announced (though not followed by weddings, for unemployment and widespread poverty make such celebrations unaffordable for most), news was exchanged and arguments started about problems encountered while the men were away. Khanyile spent the holiday in Colenso jail.

11 December 1998

Khanyile appeared in court on 11 December and the case was remanded for further investigation until 8 January 1999.

8 January 1999

On 8 January the case was remanded to the 15th for an age assessment. Sihle and Sibongile had thought the rapist looked young – maybe he was still at school – but he had no birth certificate or any form of ID and told the police he was born in 1980. At some stage in the early hearings, according to the prosecutor, Khanyile's mother presented a birth certificate to court showing that her son was 16. However, this was not accepted as an authentic document.

15 January 1999

On the 15th, it was found that the age assessment had not been done, though we could not ascertain why. So the case was remanded until the 29th.

29 January 1999

On that day, an affidavit was handed to the court, dated 20 January 1999 at Estcourt and signed by a Dr S M H Loot, who said that radiological examination proved Khanyile to be 'at least 18 years of age'. There is no record of this being challenged and on this basis, the defendant was treated as an adult. The case was then remanded again, to 5 February.

4 February 1999

On 4 February 1999, Sihle and Sibongile were summoned to attend an identity parade at the Weenen police station. It was later reported to the court that this ID parade was conducted in the presence of the accused's legal aid lawyer. The father of one of the girls reported how they had to walk directly in front of a line-up of nine men and were told that if they saw their attacker, they must touch him on the arm. Imagine their fear as, one at a time, they walked down the line of men, looked up at each face, finally looking into the 'bad eyes' of the man who raped them, the man they had been hiding from, and then having to reach out and touch his arm.

A victim of crime has a right to be protected from direct contact with the alleged perpetrator. Identity parades are covered by regulations governing police procedures. Under the SAPS Sexual Offences National Instructions, standard procedure is to use one-way glass and victims need not touch the alleged offender. Court officials in the area acknowledged these regulations but said identity parades where the victim had to touch their alleged attacker sometimes occurred because of the lack of facilities in rural police stations and courts. Weenen police station has no one-way mirror to shield witnesses and the Estcourt Court prosecutor reported that the nearest available was at Ladysmith. The cost, in terms of police time and use of vehicles, to transport witnesses and suspects (separately) to a station where a legal ID parade could take place is also a factor.

Following the rape, *Induna* Dladla supported the families in preparing for the case. At every step, the children had to be reassured, by adults who themselves were not reassured, that a court case was the right thing.

Induna Dladla accompanied Sibongile and her father to the police station for the identity parade. He reported shortly afterwards that the mother of the accused came into the police station and – in front of him and the children's parents – asked to speak to a certain police officer about paying to have the charges against her son dropped.

"I told them they should just keep calm and listen to what was going to happen", said *Induna* Dladla.

The *Induna* said Khanyile's mother was told the charges could not be dropped but the parents became afraid the children might be intimidated.

5 February 1999

The day after the ID parade, Khanyile appeared in Weenen District Court again and this time the IO requested a remand until the following week. We do not know why but it seems reasonable that it might take more than one day to finalise a report and process the photographs of the line-up that had to be presented to the court.

The families were not told about the remand and were very anxious that the case may be dropped. On 11 February, Creina Alcock wrote to prosecutor Estelle De Lange, relating what had been overheard in the police station and asking what was happening.

12 February 1999

On 12 February, Khanyile appeared again at Weenen Court and the case was remanded, for unknown reasons, to 19 February.

19 February 1999

On 19 February, it was remanded, for unknown reasons, to 26 February.

26 February 1999

On 26 February, it was remanded for a regional court date to be set. The docket was sent to the control prosecutor for him/her to decide when the case could go to trial. In the meantime, Khanyile applied for bail.

Legislation on bail applications at that time required that bail applications be heard only in a regional court (this put tremendous pressure on the regional court rolls and was later amended) so the case was transferred to Estcourt Regional Court on 4 March 1999 for a bail hearing.

4 March 1999

The magistrate in the Estcourt Regional Court refused bail but the case, now Case SH43/99, was not ready to proceed and so was remanded to 25 March for further investigation.

25 March 1999

On 25 March the case was postponed to 26 April.

26 April 1999

On 26 April the case was postponed to 20 September for trial and all the witnesses were warned to attend court.

Children First contacted the regional court to confirm the procedure – what would happen, where would the girls wait, who would be in court? The clerk of court told us the court was 'child-friendly', with a comfortable room where children could play with toys, and facilities for them to give evidence on closed-circuit television, through a mediator.

Sihle and Sibongile had never been to Estcourt before – some 70km from their homes – let alone to a criminal court. Knowing how important it was to prepare children for a court appearance, for their own well-being as well as to help them make effective witnesses, Creina Alcock and Natty Duma arranged to take the girls to visit the court.

On 27 August 1999, Creina and Natty took the girls to court. The interpreter remembered the women from a robbery case in which they had given evidence 15 years earlier and Creina said that he "gave the little girls VIP treatment". He introduced them to the prosecutor, Mrs Sandra Chetty, and to Magistrate Barend Willemse. The children were taken around the court and invited to sit in on a case, which they did. It was explained that they would not have to sit in court when Khanyile came to trial; they would sit with a social worker in a brightly decorated room filled with toys. Creina reported: "The whole experience was so much like a treat they've lost every vestige of fear, I think. They know they are buttressed by a warm human defence and there's definitely a glamour about going to 'town'."

The day came for the trial to begin, Monday 20 September 1999, just over a year since the rapes – reckoned to be about average for such cases to get to trial.

From this point, in the belief that justice must be seen to be done, CAP provided transport to every hearing for the parents, some witnesses, and local *izinduna*. The organisation also provided meals for the exhausting long days in town. Even if a hearing started at midday and lasted only 10 minutes, everyone had to be present from before 9am and remain until witness fees were paid after the hearing. As both the children's fathers were unemployed during most of the period of the trial, and did not qualify for witness fees as they did not testify (Sihle's father gave evidence on one occasion), they would have been unable to attend the trial without CAP's help.

There are 386 magisterial districts in South Africa. According to a recent survey[13]: "Nationally there remain over 200 magisterial districts without child friendly court facilities" and where they do exist, "These facilities are not always used since intermediaries are not always available to assist the child."

13 South Africa's Betrayed Children: Government's Broken Promises. A report to parliament, on 11 February 2003, by Mike Waters MP on personal visits to Child Protection Units (CPUs) and Family Violence, Child Protection and Sexual Offences Unit (FCS) from November 2002 to January 2003

Seeking protection

20 September 1999

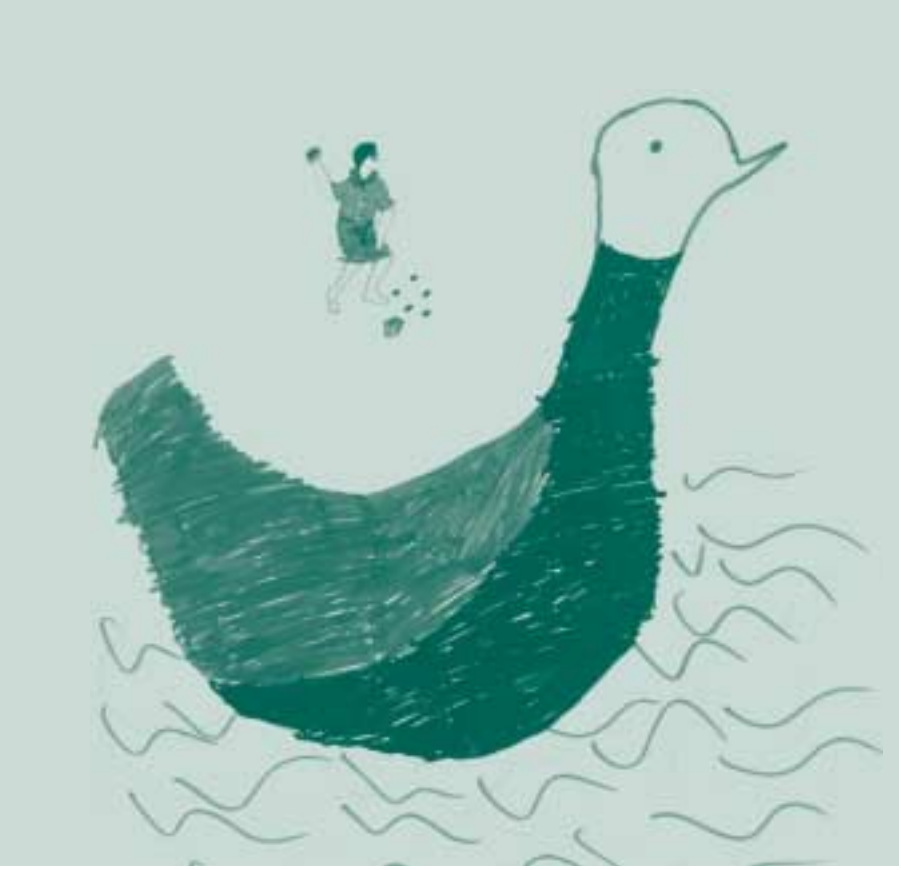
The girls set off at about 6.30am from Msinga, in a minibus taxi, with Sibongile's father, Natty Duma, Squbudu Sithole, who had helped to apprehend the suspect, and a paralegal worker. A representative of Children First (the author) travelled from Durban to attend court. When the children arrived, they were apprehensive but calm and sat quietly outside the court. There was no one to explain what to do or where to go. We didn't know how to get to the intermediary room from the public entrance to the court and we couldn't find the prosecutor. There were several cases on the list for the day and witnesses and family members of the different accused were arriving and sitting in the corridor outside the court. Most of the adults went into the courtroom to listen to the ongoing cases and wait for the Khanyile case to be called. Natty sat with the girls, who soon realised they were sitting a couple of metres from the alleged rapist's family. At the first hearing, Khanyile's mother had chatted to Natty but this time she glared at everyone and shouted about how she would hit the police if they didn't let her son out on bail. The girls said nothing and buried their heads between their knees.

When the case was finally called, things happened quickly. The defendant was brought into court. The magistrate exchanged a few words with the prosecutor and then ordered that the case be remanded to 10 January 2000. And then he summoned the witnesses, including the girls, to hear the ruling and to be cautioned to return to court on that day.

Khanyile turned to face the door as Sgt Madondo opened it and called the girls' names – the girls were about to be brought face to face with the alleged rapist despite the promise they would be protected from seeing him.

I blocked the door and told the children not to come in. While trying to explain the reason for this to Madondo, I was expecting to be charged with contempt by Magistrate Willemse but he ordered that Khanyile be led down to the cells and then called the girls again.

Outside court, another magistrate, Alphonse van der Merwe, alerted to the fact that the children had been left sitting with the accused's family, gave up his lunch break to show them around the intermediary room and showed us how to enter the court precinct to reach it without passing any other witnesses.



The room was small but brightly decorated and filled with toys and cushions – and a set of anatomically correct dolls, including male and female children, adults and grandparents. Mr Van der Merwe encouraged us to bring the children early to court for the next hearing, so they could sit there and get to know the intermediary. Then he went to speak to the interpreter to remind him of the children's right to be protected from secondary abuse and ask him to look out for them next time.

Mr Van der Merwe then told us we should contact the prosecutor before the next hearing, and again on the morning of the case, to seek confirmation that the intermediary room would be used and that a Zulu-speaking female social worker was available.

Very few complainants or their families would be aware that they needed to keep in touch with the prosecutor and check that the services of a social worker have been secured. Fewer still, especially on their first visits to court, would have the confidence to do this. Trying to contact a named court official can take up to a dozen phone calls. This is impossible for the majority of people who do not have access to a telephone and are not fluent in English or Afrikaans.

Khanyile spent his second Christmas in jail – he was moved to Estcourt prison from Colenso when the trial was due to begin.

In early January 2000, Children First called the court to establish whether everything was in place – only to be told that there was no social worker available to serve as intermediary.

10 January 2000

The case was again postponed, this time to 23 May, and Khanyile remained in custody.

23 May 2000

The morning of Tuesday 23 May dawned bitter cold in Msinga but Sihle and Sibongile were up before the sun to prepare for the journey to Estcourt. On arrival they were ushered to the prosecutor's office, the key to the intermediary room was found and they spent most of the morning in that relatively pleasant and protected environment but with no social worker in sight. They were assured that if they had to give evidence, they would do it from that room, via closed circuit TV, without having to go into the court or the waiting room, or having contact with the accused or anyone else involved with the case.

Since a murder trial was running longer than expected, the prosecutor presented several outstanding cases for remand. In one case of alleged rape, after the accused was remanded until November, his alleged victim, an 11-year-old girl looking scared out of her wits, was called to be cautioned – in front of the accused and alongside another child and several people who were apparently witnesses for the accused.

By the time the Khanyile case came up, Khanyile, the prison official, the IO, the children, the adult witnesses and the supporters from Msinga and Durban had been on standby for several hours. Then, within minutes, the case was remanded to 9 November. Khanyile, standing in the dock, raised his hand and complained, quite rightly, that he had been told he would be tried on 23 May and that this was too long to wait. The magistrate, Mr Barend Willemse, explained that the court was very busy, the case had been 'crowded out' and this was the earliest available date.

Witnesses were summoned to be warned of the latest remand and then, before anyone knew what was happening, a court official fetched Sihle and Sibongile from the intermediary room and they were sent into court, two metres away from Khanyile.

Before the magistrate had time to speak, we ushered the girls out again and told the policeman on duty that they should not come into court in the presence of the accused – in fact, they shouldn't have been in court at all. The magistrate agreed that their families could be warned on their behalf but no official of the court seemed even to register what had happened. The purpose of the intermediary facility seemed not to be understood. The traumatic effect upon Sihle and Sibongile (and the child brought into court before them) of being confronted with their alleged attacker seemed to be of no concern.

Representations to the court were met with assurances that the girls would in future be protected from any such encounter and that use of the intermediary room would become routine in cases involving children or other victims of violence who could be at risk by giving evidence in open court.

In another cruel twist to this waiting game, we discovered, in June 2000, that the girls did not know whether they had been infected with HIV by the rapist. According to the mother of one of the girls, who accompanied them to the district surgeon, the children did have blood taken but did not know they were being tested for HIV. They were not counselled and were not notified of the results. Neither were they called back for a second test. Sibongile's mother learned the results because the investigating officer told her at court that the girls had tested HIV negative. Follow-up tests were then to be arranged.

Several phone calls to the court in the days before the 9 November hearing produced assurances that everything would be different that day – the magistrate had instructed that the trial must finally go ahead after three remands due to outstanding documentation and lack of space on the court list.

But it wasn't to be. During a final advance call to the court, we found no one could confirm whether the intermediary room had been prepared or a social worker assigned.

9 November 2000

On arrival at court, the prosecutor could not be found, the intermediary room was locked and Sihle and Sibongile found themselves once more sitting in the metre-wide corridor outside the courtroom, with witnesses, family and caregivers, the local *induna*, community workers, and a paralegal adviser. Various defendants were called into court and Sihle and Sibongile shifted anxiously on the bench opposite the door, half-expecting their attacker to suddenly loom in front of them. We took them to the other end of the court, where there was a room marked

'Public Waiting Room' but on opening the door we discovered that it was now a *private* meeting room, whose occupants claimed to be officers of the Traditional Affairs Department.

The case might have been called at any moment. Several people ran around looking for someone who could help. The prosecutor's office was empty. In the large administration office a young woman continued a lengthy phone conversation and refused to make eye contact. Another office accommodated three people, waiting patiently for someone to return with an answer to their query. A clerk listened carefully to the problem and promised to take us to someone who could help. That someone turned out to be magistrate Mr Edward Hall, who listed his own problems with a resigned smile as he lead the way down the corridor, back past the intermediary room (empty – no one had informed him of the need for an intermediary), the court and the interpreter's office to the prosecutor's office. By this time, prosecutor Estelle de Lange was at the desk, with a huge pile of dockets between her and Sihle and Sibongile and the community workers.

Mrs De Lange had handled one of the first remand hearings at Weenen, while she was attached to the Ladysmith court, and had been assigned to Estcourt since August. It was Mrs de Lange who had noticed there was something not quite right with the birth certificate submitted by Khanyile's mother that stated the accused was 16. It was she who had sent him for X-rays, in Estcourt, which proved he was over 18 by showing the fusion of certain bones that only occurs after that age.

Mrs De Lange immediately started phoning around to locate a Zulu-speaking female social worker to serve as intermediary. After several calls she established that there was no one available.

A number of professionals can act as intermediaries: paediatricians straight out of medical school; psychologists and social workers with a minimum of 2 years' experience and a 4-year qualification; child care workers and teachers with a minimum of 4 years' qualifications and 4 years' experience. When a social worker is instructed to serve as an intermediary, compensation is no more than R50 a day, even on a weekend. The Justice Department is supposed to contract with these professionals on a case-by-case basis. Up to now they have not taken responsibility for training, appropriate payment, or appropriate notice of intermediaries prior to cases. When intermediaries are used in Court they are treated like any other witness – cases are not prioritised – the expectation is that they will be at the beck and call of the court and perform their task regardless of the fact that they have a workload outside of the court. Intermediaries cannot just drop their caseload to spend a day in Court.

As she phoned, Mrs De Lange leafed through the case file…

There was a letter on file from a pathology laboratory. It said they had taken samples from the smears supplied by the district surgeon who examined the two girls and asked whether the prosecutor wanted the lab to do a test to isolate the DNA. The letter was dated November 1998 – two years previously – and no one had replied.

Mrs De Lange accepted the possibility that the significance of the letter might have been overlooked due to the high caseloads and lack of experience of prosecutors assigned to the various hearings. But she said: "This should be the first thing you do when you see that a sample is available and you know the defendant has pleaded 'not guilty' and denies intercourse. A DNA test would prove whether the defendant was the rapist. If he had admitted intercourse, you do not need a DNA match.[14] The laboratory first asks if a test is required because it costs thousands of rands."

DNA tests are only conducted by the government forensic laboratory in Pretoria if the prosecutor sends a written request to the police calling for such a test. There is a backlog of samples for testing at the laboratory and it can take up to 12 weeks for a test result to come through. It seems that DNA tests are rarely sought, in rural cases especially, apparently on the grounds that they are 'too expensive'. Even when they are done, the police say there is often a delay in the prosecutor submitting the request, although a delay of 2 years as in this case is extreme. A DNA test costs on average R3000. However, a lengthy trial costs hundreds of thousands of rands, to say nothing of the human costs.

Mrs de Lange arranged for the DNA test to be requested. She said it could take up to ten weeks to get a result. She persuaded the presiding magistrate, Mr Andrew Reddy, that the trial should not go ahead in the absence of an intermediary and said the remand would allow time for the DNA test to come back. A positive result could enable the trial to be concluded within a day, whereas if the rape had to be proved without a DNA match, there could be days of evidence and cross-examination.

By 12 noon, the girls and the witnesses were told they could go home and that they would be subpoenaed as soon as the trial date was fixed. We were warned that this might be as late as August 2001 because of the backlog of cases.

The girls were reassured that the defendant would remain in custody, that the blood tests (if needed to match the samples sent for DNA testing) wouldn't hurt much and that next time they came to court, they would go straight to the prosecutor's office and then a social worker would help them tell their stories from the intermediary room.

Unfortunately, Mrs De Lange would not handle the next hearing, since her resignation was due to take effect at the end of November, as soon as she concluded a serial rape case, involving two accused and 13 counts of rape and robbery with aggravating circumstances.

Half the rape cases coming from the Weenen police district in this period involved rape of children.

Mrs De Lange had recently referred a rape and murder case to the High Court for trial. She told us how she had woken up at night for six weeks with images of the little girl's mutilated body and slit throat frozen into her mind. She did not resign because she could not cope with such horrors but because "being a good prosecutor takes over your whole life". Most of the dozen or so case files

14. Sexual intercourse with a child under 12 years is rape with or without consent.

on her desk would have to be worked on at home late into the night to be properly prepared for court the next day. She planned to go into private practice in the hopes that she might have more time and energy to help protect children from some of the unspeakable things she has seen done to them[15].

Khanyile was sent back to prison for his third Christmas. During the December holidays, the children were informed that the case would go ahead on 29 January 2001.

29 January 2001

The usual preparations ensued. The children awoke before dawn and gathered with their family members and witnesses to board the minibus taxi to Estcourt. I set out from Durban at 6.45am. We arrived at court to discover there was no intermediary.

There was a new prosecutor, Mr Ntuli. He had been working at Ladysmith court and had to travel to Estcourt for the hearing. This made it difficult to follow up between hearings on issues such as arrangements for an intermediary.

The prosecutor asked to speak to the girls in his office. This seemed to be in line with procedure, since he would need to go over their statements with them before he could lead evidence. But we were concerned that this was done in the absence of an intermediary and without inviting Natty Duma to accompany them as a female support person.

The case was adjourned, to 19 March 2001.

> While we waited, we encountered Khanyile's legal aid lawyer, who smugly informed us that he would get Khanyile off as there was no forensic evidence and the ID parade had not been properly conducted. We retorted that there happened to be two eye witnesses, that is the girls who were raped, to which he replied that girls often lied about rape cases. Accepting a lawyer's duty to defend his client by all means, this was a further indication of the level of insensitivity in the system towards rape survivors, and women in general.

On telephoning the court a few days before the scheduled hearing, we could not find anyone who knew whether an intermediary had been arranged.

19 March 2001

When we arrived, we discovered the arrangements had not been made. The prosecutor, Mr Ntuli, said he would like to speak to the girls. When they came out of his office they said he had asked them if they were afraid to give evidence against the man accused of raping them. They had assured him they were not; they would never forget what had happened to them and they were going to tell the court.

Mr Ntuli then hurried past, heading towards the courtroom, answering over his shoulder a question called out to him: "Yes, we are starting just now."

15. In 2002 Mrs De Lange accepted a post as a magistrate in Bergville, KwaZulu-Natal, where, she said she felt her powers of sentencing might also help protect children from abusers.

But what about the intermediary room? Mr Ntuli stopped. "No, we don't have an intermediary… but don't worry, there won't be anyone in court; it's a closed hearing and the girls told me they are not frightened to give evidence."

But what about the accused? He would be in court and the girls were frightened of *him*. Mr Ntuli walked back and asked the girls if it was true, that they were afraid to see the accused. "*Siyesaba*" (we are afraid), they whispered in unison to their shoes.

Yet again, the children's right to be protected from direct contact with their alleged rapist was overlooked in an effort to speed things up. This despite the fact that the girls had said several times they would be too afraid to give evidence properly if they had to speak in court.

It was not just a question of fear of their attacker, the whole nature of the court proceedings, however familiar it might become, was anathema to their upbringing. At home, a child would not stand and speak directly to an adult, certainly not to a group of adults, let alone men. A girl child would not describe intimate sexual details to a man in any circumstances, let alone these.

> *"Siyesaba (we are afraid), they whispered in unison to their shoes."*

Mr Ntuli sighed. Did we realise how difficult it was to find an intermediary? Yes, indeed, we did. Did we realise it was at the discretion of the court to agree that children could give evidence from an intermediary room? Certainly, but since the case had been remanded to Estcourt as opposed to any other regional court in the first place because it had intermediary facilities and since it had been postponed in November in order for a social worker to be found to serve as intermediary, it seemed the court had exercised its discretion.

By the afternoon an intermediary had been found and everyone waited for the case to be called. But then it was discovered there was no closed circuit television. It was agreed the case would be adjourned to the morning, which meant the witnesses would have to be cautioned to return – requiring another vigil to ensure Sihle and Sibongile were not brought into court in front of Khanyile. There was a benefit to this remand: Creina Alcock had discovered the intermediary room was infested with fleas and complained to a court official that it must be fumigated before they returned, which it was.

20 March 2001

Finally, everything seemed to come together for the trial. The closed circuit TV was hoisted onto its bracket. A social worker arrived and dusted the seats in the intermediary room with a toy clown. The witnesses assembled in the corridor. The clerk, the interpreter, the police, the prosecutor, the defence lawyer, all took their places. The accused was called. The magistrate appeared. The charges were read.

Khanyile pleaded not guilty to both counts of assault and having sexual intercourse with a child under 16 without her consent. The magistrate asked who represented him and then the case fell apart yet again.

Khanyile stood in the dock, his body still but his hands behind his back manipulating a small object. "*Muthi*", whispered a paralegal officer. Difficult to say; it looked like a piece of prestik with a feather sticking out of it but nevertheless, when the magistrate, Mr Barend Willemse, addressed him, Khanyile twice raised his left hand to his temple and waved the object towards the bench from behind his fingers. "This attorney doesn't satisfy me", he declared. "I want to know why the previous lawyer withdrew".

The court records showed that the first legal aid lawyer appointed by the court, a Mr Scott, had withdrawn in December 1999, following the reduction of legal aid tariffs, which he and many other lawyers decided made it uneconomical for them to work outside of their magisterial districts. A new legal aid lawyer, Mr Desigan Pillay, had been appointed in January 2000. Khanyile said he had met with him several times, including that morning, but now he wanted a new lawyer.

At a previous remand, Khanyile had complained that the case was taking too long to go to trial; he did not complain about the quality of his defence. However, it being his right to be properly represented at the taxpayers' expense, his legal aid lawyer withdrew, somewhat irked, and the court was adjourned while the defendant was taken off to apply for a new lawyer.

Sibongile returned from the intermediary room and met up with Sihle in the prosecutor's office. They had been nervous but relieved that the case was finally going ahead and now they were distressed to hear that it was to be delayed yet again. They sat in the dark passageway outside the prosecutor's office, with their heads on their knees, tracing the patterns on the floor tiles with their fingers, waiting to hear what would happen.

Creina Alcock had supplied the girls with paper and crayons whenever they came to court, so they could draw to pass the time. This they mostly did as they waited for court to start. During short, 'unscheduled' breaks they had nothing to do – they hardly spoke to each other, having been warned so thoroughly that they were not allowed to discuss their evidence.

Attorney Mr Van Rooyen, was appointed to defend Khanyile. The case was remanded to 16 October. The trial, Magistrate Willemse warned, would proceed on this day whether Khanyile disliked his lawyer, the weather, or anything else.

The witnesses were called, to be warned to appear again on that date, and this time the message finally permeated the courtroom that the girls should not be brought into court in Khanyile's presence, and the adults were warned on their behalf.

Outside, Sihle and Sibongile were now tired. They simply said that they wanted the case to be over; they would be happy then. They said they could never forget what happened to them; it had changed them forever but the support they were getting at home, at school and in the community, was helping them to cope. Sometimes they would think back to the day they were raped and feel the pain again but when they were at school, their minds were busy.

They were confused about why Khanyile would have wanted to postpone the case since it meant he would have to stay in prison. Only Khanyile could answer that; even the lawyer he dismissed was not sure. However, one explanation put forward by people experienced in such cases is that, facing a lengthy jail sentence if convicted, Khanyile might have been advised by fellow prisoners to delay things as long as possible, perhaps in the hope that witnesses would start failing to turn up or that the two girls would forget what they said in their statements.

The government task team study showed that 43% of the rape cases reported in 2000 were withdrawn, either before court or in court. Research by the Crime Information Analysis Centre (CIAC) showed that 46% of the withdrawals were 'at the request of the victim'. These withdrawals are often not voluntary but occur as a result of intimidation, or long delays after which families simply want to get on with their lives and heal. Cases are also withdrawn in response to payment of damages, which might be seen to offer tangible benefit to a family compared to the distress and uncertainty of a court case. Sometimes there is little or no consultation with the victim at all. Even if there is, a child will normally do what significant adults in their lives tell them to do.

According to CIAC, 36% of the withdrawals were requested by the director of public prosecutions and 14% by the police.

16 October 2001

On 16 October, we recalled Mr Willemse's assurance that the trial would proceed. But it didn't.

It was remanded yet again because the intermediary was not available. And yet again, the magistrate called the two girls into court. Det Insp Madondo, who three years earlier wasn't clear what all the fuss was for when we complained about the girls being brought into court in front of the alleged rapist, stood up and said that they should not be brought in – but they were.

The accused himself said he wanted to see the children and the Magistrate said he wanted to see them too – so they were taken into open court! By this time the children must have had little confidence in anyone's assurances that they would be protected. They didn't say so; they just made clear that their course of last resort was simply to refuse to testify.

The case was remanded to Saturday 3 November 2001 because the weekday court roll was full until the following year. Mr Somaru, also from Ladysmith, had now taken over from Mr Ntuli and would be prosecuting but Magistrate Willemse was not available on Saturdays so the case would be heard by Magistrate Andrew Reddy. Children First phoned the court on several occasions to make sure the intermediary would be available and we were assured that everything was in place – the chief social worker herself would appear.

3 November 2001

On Saturday, 3 November, Sihle and Sibongile, their parents, supporters and the witnesses, had to travel the 70kms to court in the open back of the CAP Farm Trust bakkie, because it is not possible to get a taxi back to Msinga from Estcourt on a Saturday afternoon.

The transportation of child victims to court is the responsibility of the police. In some instances, victims and accused are forced to travel together due to transport constraints. In the Khanyile case, it would not have been possible for the investigating officer to get the accused and the victims to court separately and on time. In this case, an NGO made its own vehicle available to take the children to court (and had to account to funders for such use) but most families in rural areas do not have access to private transport. MP Mike Waters recently told parliament in a report on the state of the FCS/CPUs: "The most disturbing case is that of the shocking circumstances in the Northern Cape. As there are no child court facilities… at De Aar, cases are heard in Cape Town or in Upington...Because of a lack of co-operation with the police, a shortage of staff, and a lack of vehicles, the child victim travels with the person responsible for their violation."[16]

Almost 80% of the 166 role players in the criminal justice system interviewed in the survey, from the East Rand, Cape Town and Soweto, complained of poorly trained staff, no budget for overtime and a lack of resources, especially the availability of vehicles.

16 South Africa's Betrayed Children: Government's Broken Promises. A report to parliament, on 11 February 2003, by Mike Waters MP on personal visits to Child Protection Units (CPUs) and Family Violence, Child Protection and Sexual Offences Unit (FCS) from November 2002 to January 2003

This was the first of 10 hearings held on Saturdays. Holding special Saturday courts was an attempt by the court to 'fast-track' the process. A remand in the normal court schedule could mean a delay of several months, whereas in the Saturday court, a case could be remanded from week to week, as there were fewer other cases to deal with. Despite the inconvenience the weekend schedule caused, the effort was greatly appreciated by those associated with the case.

Saturday courts have their own problems. Court staff must volunteer for weekend duty. They get paid overtime but can refuse the duty. On the other hand, social workers do not volunteer but are instructed to perform intermediary service if needed on Saturdays. This reportedly causes some resentment and makes it unlikely you will secure the most enthusiastic and conscientious staff for such duty. Court officials also told Creina Alcock that there was a lack of cooperation from victims and witnesses subpoenaed to Saturday courts. On several occasions when we attended Saturday court, other cases had to be further remanded because witnesses did not turn up. According to Childline, it is a continuing problem with child abuse cases that witnesses do not receive subpoenas and are often dependent on the SAPS for transport – which is often not available over the weekend. Whatever the reason, the result was that court staff – and often a prosecutor who had travelled from another town – had wasted their time.

On arriving at the court with the children on 3 November, Creina Alcock was approached by a worried Mr Somaru, who said we wouldn't believe what had happened and he was very sorry but the social worker who was to act as intermediary had been rushed to hospital. No one else was available to stand in.

We also learned that Khanyile had again dismissed his legal aid lawyer. From now on, the accused conducted his own defence, which was to have several negative consequences for the progress of the case and his role in it.

We admittedly had little sympathy for the accused and could only speculate as to why he had dismissed the legal aid offered. However, it should be noted that he was a Zulu-speaker whose grasp of English was limited and the legal aid lawyers appointed to defend him could not speak Zulu. On one occasion while waiting in court for this case to be called, we witnessed another trial in which the defendant neither spoke nor understood English. His lawyer was unable to take instruction from him, did not seek interpretation, and submitted wrong information about him. The constitutional right[17] to have court proceedings interpreted into a language the accused person understands seems to be very loosely applied with regard to legal aid lawyers.

Mr Somaru said everyone was anxious to get this case heard. He had a letter on his desk from the DPP instructing the court to expedite the matter because it had been on the roll for three years and the accused had been in custody all that time. The girls of course had been coming to court for three years. Incidentally, the accused had effectively remanded himself in custody for the past six months because he had dismissed his legal aid lawyer for the second time, preventing the case from going ahead.

Mr Somaru proposed we go ahead without an intermediary – the police could send to Ladysmith court for some one-way glass for the girls to sit behind, since the intermediary room could not be used. Mr Gideon Malinga, the interpreter, whose

17 Constitution of South Africa. Chapter 2, Section 35 (3) (k).

family was from Msinga, would interpret the questions on behalf of the prosecutor and he was very sensitive.

Mr Malinga was indeed very sensitive, and kind and competent, but we had to explain again that it would be difficult for the girls to describe to a man in graphic detail the things that had been done to them. Then we asked who was defending the accused, since he had just dismissed Mr Van Rooyen.

The prosecutor confirmed that Khanyile had elected to defend himself. This meant that, in the absence of an intermediary, the man alleged to have raped Sihle and Sibongile at gunpoint would have the right to cross-examine them directly, face to face.

We explained the situation to the girls. They were adamant: they were not afraid to give evidence but they would not do it in the presence of the rapist and they would find it hard to give evidence to a man. The prosecutor and interpreter seemed suddenly to accept the scale of the problem and the degree of trauma that would be inflicted on the children. Mr Somaru said the case could be postponed to the next Saturday but he could not guarantee getting a social worker. Children First offered in despair to "bring our own social worker". The offer was accepted and the case was remanded to 10 November – without the girls being called into court. We were then informed that Mr Somaru would not be available but the control prosecutor, Ms Christa Landsberg, would take the case.

Ms Landsberg was based in Estcourt, which was to make liaison and follow-up much easier. Having a female prosecutor also reduced the distress felt by the children when going over their evidence.

For the first time, on phoning the court on the following Tuesday, 6 November, the person who answered the phone immediately knew the case I was referring to and put me straight through to Ms Landsberg. She thought she would have an intermediary but it might be a good idea if we did bring ours. By Friday, everything was set. Children First paid for Ms Busi Ntshingila, an experienced social worker based in Ulundi, to travel to Durban and accompany us to court. The prosecutor confirmed by phone that the CCTV was working.

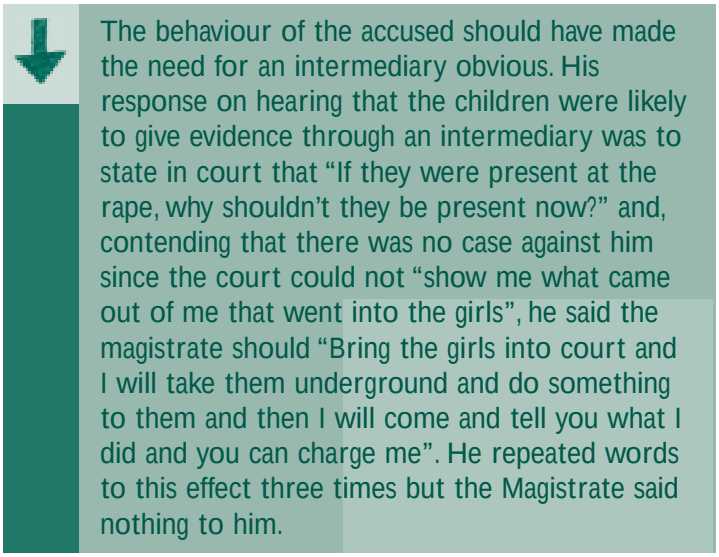
Victims' rights on trial

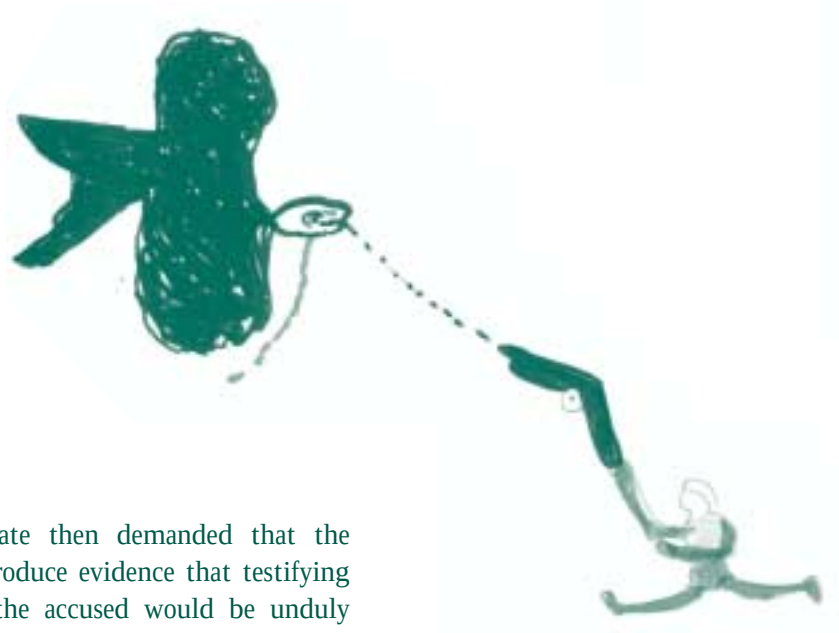
10 November 2001

On Saturday 10 November, at 5am, the girls got up and dressed. It was pouring with rain. They climbed into the bakkie with Sibongile's mother and Sihle's father and the witnesses. They arrived at court just after 7am, soaked and anxious. At 8.45, the prosecutor met the social worker and the girls, with the interpreter, to go through the statements. Since Ms Landsberg was the control prosecutor, many people needed to consult with her. While she was with the girls, five men and one woman arrived on separate occasions, knocked on the door and just walked in. At this point, we started to tell people she could not be disturbed. After a while, Mr Malinga came out of the office and said the girls had asked him to leave because they were talking about the rape. They later said that although they were shy to talk in front of him, Mr Malinga had told them that when he heard them describe what happened to them, he thought of his own children and he felt heartsore for them. They said they could tell his heart was crying for them.

The prosecutor prepared to go into court. She explained that the girls should remain in her office with the social worker. When the case started, they would be called to the intermediary room, one at a time. Creina would wait with Sihle while Sibongile was giving evidence. After several remands and part of another trial, the Khanyile case was called. Khanyile was brought into court and turned to face the public gallery, his piercing eyes scanning the faces for people he knew and then alighting darkly on each of us.

Having finally got an intermediary into the building, everyone concerned with the case was shocked to hear Magistrate Reddy demand evidence of the *need* for an intermediary. The prosecutor explained to him that the girls were traumatised by the attack, frightened to speak in the presence of the accused, and in view of the intimate nature of the evidence they would give and the events they would describe, it would cause undue stress to make them testify in open court.





The magistrate then demanded that the prosecutor produce evidence that testifying in front of the accused would be unduly stressful.

According to Section 170A, Criminal Procedures Act, the use of an intermediary is at the discretion of the presiding officer of the court. The defence has the right to object and to give evidence in support of the objection. In practice, defence attorneys commonly support the use of an intermediary but in this case the accused was undefended and clearly did not understand the purpose and implications of this. The South African Law Commission has proposed that under new Sexual Offences legislation, the use of an intermediary shall no longer be at the discretion of the magistrate but automatically available to child witnesses and other victims of sexual offences. The legislation is expected to be introduced during the current parliamentary session.

The sudden demand for evidence in relation to the need for an intermediary had not been expected. Creina Alcock was outside the courtroom, with Sihle; Natty Duma was in court but too anxious to give evidence on such short notice and so the prosecutor asked if I would agree to take the stand.

I testified that, having met both children before and after the rape, I could say that the two girls had changed from being just carefree little schoolgirls who liked to play with their friends to being withdrawn and frightened. They had expressed their fear of seeing the accused on several occasions – especially after being put through the ID parade. I pointed out that the court had already exercised its discretion in the matter of an intermediary by making arrangements for one and remanding the case three times to ensure one was available. The girls had been assured of protection by the court; if they didn't get it, it would affect not only their evidence but also completely undermine their confidence in the justice system.

After cross-examining me, the accused was asked if he wanted to call a witness and he asked for his mother – who lived in Soweto, Johannesburg, and was not in court. This was agreed and the case was adjourned again – to 17 November.

We conferred in anger and confusion with the prosecutor: three years of remands, of the girls being called into court by mistake, of being left in the corridor for the accused's mother to make snide remarks about them, constituted the kind of secondary abuse that the government said it was committed to preventing. Why was the magistrate now

letting the alleged rapist put the girls on trial over the request for an intermediary?

It was then that we learned one of the consequences of an accused person conducting their own defence in a serious case. The prosecutor explained that the magistrate must do everything by the letter of the law (Section 166 of the Criminal Procedure Act), especially since the accused was now undefended and faced a life sentence if convicted.

Prosecutor Landsberg was completely sensitive to the children's situation and was the only person ever to suggest that Sihle and Sibongile did not need to make the journey to court until it was confirmed that they would definitely give evidence. So, on 17 November they stayed home and we reported back to them the latest developments.

She said the magistrate had made clear that he intended investigating the application for an intermediary very thoroughly. The case would be reviewed in the High Court and the judge would make allowances for a person defending himself. Any slip-up, or denial of a reasonable opportunity to the accused, might result in a conviction being set aside.

We asked if we should we not call an expert witness on rape trauma. No, the prosecutor told us, the magistrate wanted evidence that these two children would be too traumatised to testify in this court, not that rape victims generally were traumatised. We discussed who would be the best person to give evidence – Creina Alcock, Natty Duma, who was in her 70s and suffered with arthritis and hypertension, or perhaps the girls' teacher. Creina and Natty went to visit the children's school – an old farmhouse of a white-owned farm, so badly vandalised that it had neither doors nor windows. "It was hard to believe it was being used for any human activity, least of all teaching", recalled Creina. They met the girls' current teacher, who attended court to support them on several occasions. She said she had done a course on child abuse prevention as part of in-house training by the Education department. She was not the teacher at the time of the rape so could not testify to its impact. The girls' previous teacher could not remember how much time the girls had taken off school after the attack or what effect it had on them, and there were no proper registers. This visit was just one example of how people who were not part of the criminal justice system had to run around, spending days of their time, unpaid, trying to ensure Sihle and Sibongile would be properly protected.

17 November 2001

On Saturday, 17 November, Khanyile's mother was nowhere to be found. When Khanyile was called, the orderlies reported that although he had been standing at the bottom of the stairs leading from the cells, he was now refusing to come up because he was sick. He could be seen lying at the foot of the stairs. Magistrate Reddy requested the orderlies to carry him up. Khanyile was gasping, crying and sweating, and did not respond to questions about what was wrong and whether he wanted to see doctor. The magistrate instructed that Khanyile be seen by a doctor and then he was carried downstairs – he had taken off his shoes and black crosses could be seen on the soles of his feet. He could have drawn them to pass the time – or they could be *izigqabo* – black marks that people apply in the belief that they will affect you if you look at them – for example, you will forget what you are going to say, or faint. The magistrate retained the power of speech, however, and remanded the case to Thursday 22 November.

The prosecutor decided to apply to reopen her case and call further witnesses in support of the intermediary application. If the magistrate decided against an intermediary she didn't want to risk losing an appeal on the grounds that the prosecution had failed to make its case fully.

22 November 2001

On 22 November, Creina Alcock was called and sworn in. She told the court about Mdukatshani, "a wild piece of country, just open bush". She had known one of the children's families for 21 years and the other since 1997. The girls both came from homes where their parents were in stable marriages. The families were from the Nomoya community and were resettled on the first farm in KwaZulu-Natal to be awarded for land reform. "It is a very traditional community, very close". Asked what she meant by 'traditional', Creina replied: "The men and women sit on different sides of the room and father and mother have their own huts. Children never see father and mother embrace because it's not done; you don't touch or kiss or hug in public; you might shake hands when you meet but you don't hug each other. When girls are at the age of getting engaged they sit in a room with other girls and an older woman; they can't come and go as they please; the woman is like a chaperone. There is no radio or TV in these two families. I mention this to emphasise the innocence of the girls; they haven't seen men and women embracing; they are not exposed to what young boys and girls do on TV. They have no newspapers, no magazines.

"We have never had case of rape or child abuse in the community since we came there and the chief *induna* says he has never had such a case in all the years he has lived there."

Creina said that before the rape the children were: "Children. They played hopscotch in the garden; they were outgoing, sociable. They have both become quite solitary since.

"Sihle is hunched, doesn't meet your eye, she is an indrawn person. For a long time she wept when she looked at anybody. Because of what occurred at the time of the assault, she was unable to eat, when she tried to swallow she vomited, and that still happens; if you get near the subject she will vomit. She was persuaded to go back to school but Sibongile never went back until the accused was arrested. All the children in that community stopped going to school for a period and only went back when a man started accompanying them. One of the small children has never gone back and wades over the river to go to another school because he is frightened to use that road."

Therapists working with child abuse victims have found that forced oral sex has a profound impact on the victim – often more so than forced vaginal/anal sex. Joan van Niekerk says: "Many victims are able to disassociate from their bodies during rape and to some extent this does alleviate to a limited degree the extent of the trauma – but with oral rape victims cannot use this defence. We also find persistent eating problems with victims where the offender has ejaculated in the mouth – particularly with children." Members of the South African Law Commission had wanted to include oral rape in the new definition of rape but it was eventually developed into an offence on its own – oral/genital sexual violation. It is proposed that this will carry the same penalties as rape.

Creina pointed out that the rape was carried out at gunpoint and that weeks later the rapist approached a group of children, including Sihle, with a gun and a knife: "Apart from the damage of the rape they thought they were going to die and they feel that if he was out they would be hunted down. They were hauled into court by Mr Willemse to hear the remand date and it was the first time they had seen him since the ID parade. He has a way of trying to gaze you down... the girls say he has bad eyes and say 'the way he looked at us we were really afraid'. If they were called into court, apart from the delicacy of what they have to say, they are terrified of him and a gaze like that would prevent them giving evidence…"

Creina told how the children stopped coming to the vegetable gardens on Saturdays. "We have loved these girls for a long time. One father was working with me at that time and the women who were the teachers at the gardens were very sad because the girls no longer spoke to anyone, they sat indoors all day, they didn't play with anyone."

Creina was cross-examined by the accused. He started out by accusing her of lying and questioned her knowledge of the area.

He questioned why she thought the children should give evidence via CCTV: "Did what happen to the children happen on TV or were they standing next to me?"

And then he asked: "Have you been raped?"

Neither the prosecutor nor the magistrate objected.

Creina answered: "No."

Khanyile: "Then how do you know [what it's like]?"

The prosecutor then objected that you didn't need to be raped to know it was traumatic.

Khanyile had no further questions.

The magistrate invited him to testify further or call a witness. Khanyile had previously said he intended to call his mother to testify on the need for an intermediary but she did not attend court. So he said he would like to address the court and surprised all present when he made a statement that indicated something of what Creina had said had moved him:

"I liked what she said in connection with the children and how the children were abused. I liked and admired the way she is working hand in hand with black people. I also liked the way they are living together with each other. I asked her questions and some of the things she said I didn't know but I know now."

The magistrate summarised what he had heard. He told Khanyile that he had not overlooked his rights: "I am aware of the dangers of the court granting an application for an intermediary – the obvious ones being the nature and purpose of cross-examination, which may be less effective than direct examination of the witness and the constitutionally enshrined right that you should be entitled to confront your accusers.

Finally it is so that human experience shows it is easier to be untruthful when not in direct contact with the person."

Finally, Magistrate Reddy pronounced: "I am of the view that looking at their innocence, the kind of upbringing they have, the trauma they have suffered as a result of these allegations, as well as the psychological effects that such incidents are bound to have on these children I have decided that the application for an intermediary should succeed."

The case was adjourned to Tuesday 27 November for a new trial date to be set. We were into the fourth year and had forgotten how many times we had been to court.

27 November 2001

On 27 November, the case was set down for trial on 26 January 2002 and Khanyile was remanded in custody, to spend his fourth Christmas in jail.

In December 2001, there were 175 000 inmates in SA prisons, which have an approved occupancy level of 105 000. That is a national occupancy level of 166%. In KZN, overcrowding is slightly above average, at 170% occupancy. One third of these inmates were, like Khanyile, awaiting trial[18].

Children First and Creina Alcock made the usual calls to the court a few days before the scheduled January hearing to check whether everything was in place. We were told we did not need to attend because the case would not go ahead; we were not told the reason.

26 January 2002

Prosecutor Landsberg telephoned after the remand to say that the trial date was now set down for Saturday 9 February 2002. It was no small thing to keep the people in Msinga/Weenen informed of what was going on. Creina Alcock has the closest telephone to the girls' homes. It doesn't take more than a flash of lightning or a gust of wind for the line to go down. If no one could get hold of Creina, the Investigating Officer had to make a 64km round trip and walk up to one of the children's homes.

The phones were down on 7 February but the news via Durban was that prosecutor Christa Landsberg was on leave due to stress and no one at Estcourt seemed to know who was prosecuting or who would be the magistrate. Children First was advised to phone the control prosecutor, Mr Chris Botha, who was able to tell us that Mr Somaru was back on the case as prosecutor and Magistrate Edward Hall would be presiding – he was the magistrate who had dropped his problems to deal with ours at an earlier hearing. Mr Botha assured us that everything was in place and the intermediary was arranged. By now, no one believed it.

During the period that Sipho Khanyile was awaiting trial (1999-2001) the country's regional courts finalised an average of just over 3000 cases a month. They had an average of 45 000 cases per month outstanding on the rolls. Each regional court is supposed to finalise an average of 15 cases per month. In October 2000, National Director of Public Prosecutions Bulelani Ngcuka said that the 180 000 cases outstanding at that time would take 2 years for the prosecutors to deal with – if they didn't get any new cases. In fact over three quarters of a million new cases entered the lower court system during 2001. The backlog was reduced despite this but only through the use of Saturday courts and additional courts. Overall, average productivity of courts declined during 2001[19].

18. Monograph, Issue 75. Institute of Security Studies. October 2002.
19. Monograph, Issue 75. Institute of Security Studies. October 2002.

The case goes ahead

9 February 2002

Any hope that the children might not need to testify because the DNA test would prove the accused's guilt had been dashed by the news that the tests were inconclusive. The absence of forensic evidence was mentioned on many occasions by the defendant, even though his defence was ostensibly that he was not in the area on the day in question. It seems clear that destruction of any such evidence was his intent when he made the girls wash in the river after he raped them.

So, on Saturday 9 February 2002, the girls arrived at court with Natty and Creina, family members, community leaders and witnesses, at 7.30am. They had been told to come early so that prosecutor Christa Landsberg could go through their statements with them to clarify a couple of details she was concerned about. These concerns had not been communicated to Mr Somaru after Ms Landsberg went on sick leave due to stress.

The social worker, Ms Phumzile Manyathi, arrived and sat with the girls. Ms Manyathi told us she was from the Estcourt office of the provincial welfare department and that there were only three social workers covering the whole region, which includes three courts.

Mr Somaru summoned the girls to his office to go through their statements with him and the interpreter, Mr Malinga.

> Given how concerned the girls had been about going through their statements with men present the last time, we were surprised the same men made the same arrangement again. The social worker remained behind until we asked her to follow and act as interpreter. She expressed uncertainty about this – it is considered best if the intermediary knows as little as possible prior to the child's evidence being led through her, as this enables her to be neutral – but the alternative was unacceptable and so she agreed.

The girls went through their statements and then came to sit inside court before the day's proceedings started. We then went through a complex process to get each of the girls out of the court and waiting area, into the intermediary room and then back to the prosecutor's office before the trial started without their being exposed to the accused or any potential defence witnesses or supporters.

The CCTV was turned on and three chairs came into view against a background of painted trees and meadows. The magistrate and stenographer fiddled with the knobs and viewed the screen anxiously, then disappeared out of the courtroom. They reappeared on screen moving the chairs and putting on the lights. They returned to the courtroom to test the microphones and then they were seen, back on screen, dusting down the chairs. The magistrate returned, laughing that it looked like this was the first time the room had ever been used.

On further investigation, we were told that the intermediary room had been used before but the only way to find out how many times and under what circumstances was to read through the entire case record since the facility was opened, because its use was not monitored. It will be recalled that in the only case we had observed involving child witnesses, the child had not given evidence through an intermediary.

While waiting for the case to start, Children First sought permission from the new magistrate to be present in court and take notes. This was agreed provided no evidence would be reported until after judgement was given.

Phumzile Manyathi was called to present her credentials and be sworn in. The magistrate first confirmed with the defendant that he was aware that the court had gone through the procedures to establish that an intermediary was necessary and gave Khanyile the opportunity to comment on whether Ms Manyathi was a suitable person to act as an intermediary; he said he did not want to say anything.

At 10.17am, the CCTV was switched on and Sibongile was visible on screen sitting next to Ms Manyathi.

The charges were read and it was stated that the complainants were 'about 13' although the prosecution would argue that they were 11 and 12 at the time.

Khanyile pleaded not guilty to both charges and, when asked if he wanted to make a statement, said "…I was arrested for something I never knew".

The magistrate explained how the trial would proceed and then Sibongile was called. She had been in court for more than 3 hours and sitting in the intermediary room not knowing what was going on for about half an hour.

The magistrate asked if she understood the oath and she replied "*Ehe!*" (yes) but he then admonished her to tell the truth, asking whether she knew the importance of telling the truth and understood what was a lie, checking by saying "Would it be a truth or a lie to say Ms Manyathi has a white dress on?"

"A lie"

"What happens if you tell a lie in court?"

"I'll get arrested."

"What if you tell a lie to your mother?"

"I get a hiding".

In terms of the Criminal Procedure Act 51 of 1977 (Sections 162-164), there is provision for a witness who "from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation" to give evidence after being admonished by the presiding judicial officer to tell the truth. Several convictions for child rape had been set aside during the course of this case on the grounds that the legal process was not followed to the letter. The magistrate's questioning of both girls' on this issue turned out to be a critical issue, on which might hinge the outcome of the entire case.

The prosecutor then started to lead Sibongile's evidence.

Asked what happened on the day of the incident, she related the story, prompted occasionally when she didn't understand a question clearly or stopped short of a full explanation. The word *amajikijɔla* (wild berries) was translated differently 3 times, as mulberries, strawberries and raspberries. This wasn't a matter of substance but highlighted the difficulties of 4-way translation – between the prosecutor, the interpreter, the intermediary and the witness.

Sibongile told Mr Somaru of the stranger who said the children would be shot for eating berries, "He looked scary". She told how she and Sihle had met two men they knew coming in the other direction and asked the men to accompany them home. "They said we must proceed, he won't do anything to us... We said 'please accompany us, we are scared of this person', and they said we must go... Then the two men disappeared. Then the guy blocked the way... He was carrying a [branch of] thorn tree and said if we passed through he would hit us with it. When Sihle tried to get away he threatened to hit her. He said to me 'Tell this dog I am going to shoot at her right now'."

The prosecutor asked how far down the path the girls went before the accused told them to sit down. "Do you know distances?"

"No", she replied, so he tried to establish distance by comparative places in Estcourt and the court.

There followed questioning about every single detail of the rapes, which Sibongile described with her head down and her body twisted to one side as if trying to escape from the misery she was recalling.

"[Sihle] threw up and he asked her why. It was because he asked us to suck his penis and she did and then she vomited…He hit her on the face and asked why was she vomiting on him. He asked me if I have ever slept with my father and I said no. He said I must say that I once slept with my father. He ordered us to get dressed then he walked in front of us. He told us to go by the river and wash ourselves. We did."

"What did you wash?"

"We washed the red fluid that was coming from our vaginas."

"What red fluid?"

"It was like blood…Then Sihle washed her panty because there was something whitish that came from him that was on her panty. He told us to make it snappy because he wanted to go and drive the tractor. He didn't go with us; he went before us and we don't know where he went to."

Sibongile described their tearful homecoming, how they had told her mother that "we had been caught by someone on the way and my mother cried."

She described how her mother and an aunt and their fathers had carried them on their backs to

the water, the Tugela River, to reach the shop across the river to phone for the police.

"Then the police came and took us to the police station in Weenen. It was late at night. We were told to wait and the doctor was not there... The police didn't do anything at the station. They asked us while we were at the shop what had happened. They didn't take a statement then. They took a statement the next day. They also took us to the doctor."

After more detailed questioning about the ID parade, Sibongile had been giving evidence for nearly 2 hours. She was almost falling off her chair. I sent a note to the prosecutor drawing his attention to the fact that Sibongile was looking very tired and that the questioning had been stressful; could he not request a break for her. The prosecutor continued questioning, asking her about the amount of time she was with the attacker when she had already said she didn't know about time.

The prosecutor asked if the child could come and point out the accused in court! Thankfully, the Magistrate pointed out that we had an intermediary at the request of the state, expressly so that the witnesses didn't have to come in contact with their alleged attacker and that bringing the children into court would defeat the object of that!

We are not sure why the prosecutor made this request – whether he thought it genuinely necessary, whether it was a question of habit from having asked adults to point out an accused in so many other criminal cases. We are certain it was not his intent to distress the child. However, it illustrates the fact that there is not a 'child-friendly culture' in our courts. It is not second nature to court officials to think about what is in the best interests of the child victim.

Khanyile was then invited to cross-examine Sibongile but finally the prosecutor asked for her to have a break and the case was adjourned for lunch.

During the lunch-break, food was taken to Sibongile and Sihle, separately, so they could not discuss the questioning. Creina and the Mdukatshani driver went off to buy pies and cool drinks for the family members and witnesses. The food had to be consumed on the narrow concrete walkway at the side of the court, partly because Natty could not walk without severe pain and partly because everyone feared the case starting unexpectedly in our absence.

Back in court, Khanyile, cross-examining from the dock, greeted Sibongile and asked how she was. He tried to confuse her, asking how

she knew he was carrying a firearm and which hand she used to hit her friend, and which side of the face she hit her. He asked whether it was possible for someone to have intercourse with one person standing up and the other lying down. She stayed calm and explained what she had said.

She showed some pluck despite her tiredness and anxiety.

Khanyile said: "What was I wearing on that day?"

She replied: "A striped T-shirt and a cream pair of pants."

"What if I told you I don't have such clothing, what would you say?"

"Maybe they are worn out now!"

The magistrate eventually directed Khanyile to continue with other questions but he tried to confuse Sibongile again, by asking the same questions in different ways.

After a while, he asked for an adjournment, saying he needed time to prepare his questions, despite having with him a sheaf of papers with closely written notes. The magistrate pointed out that he had already had quite a lot of time to do that, having been in custody since November 1998, having dismissed his last legal aid lawyer in March 2001, and having had two weeks since the last remand. The magistrate gave him half an hour.

During the adjournment, the prosecutor explained that he had not requested a break for Sibongile earlier because it was not a good idea to interrupt the evidence, in case the child contradicted herself or lost concentration. This concern seemed to override the child's welfare – Sibongile clearly had been exhausted during the second hour of questioning. At this point, the intermediary came into the courtroom, complaining that *she* was very tired and that *she* had never had to sit through such a long session of questioning. She expressed no concern about the effect of this on Sibongile, who trailed behind her.

The child was hungry and tired but said she was fine to continue. Receiving praise for having been so brave and answering so well, she seemed reassured and even quite proud of herself. Creina had been sitting with Sihle in the prosecutor's office. They had no idea what was happening so we reported that Sibongile had given her evidence and that Khanyile had requested an adjournment in the middle of the cross-questioning.

When Khanyile returned, he requested more time. Sibongile was back in the intermediary room. She could be seen, via the TV monitor, sitting on a rug on the floor, playing with a doll. It was a touching image, this child in her black school tunic sitting engrossed with a doll with long blonde hair and lacy clothes. She and Sihle did not own any toys. All their entertainment came from their friends and their colouring pens and paper.

The magistrate looked at the CCTV screen and said, "It seems our witness is busy with her toys now". He agreed to an adjournment. The case could not be remanded to the following week as the magistrate was not available so it was postponed to 23 February. He warned Khanyile: "We are busy with a trial and this is not a game. If the court is of the opinion that you just want to delay matters I will not allow an adjournment again. I am aware you are conducting your own defence and will allow this…but there are certain limits. You are not going to get a week or two weeks every time a witness gives evidence; attorneys don't get it and it will be the same with you."

Clearly, here was a magistrate with the interests of children and justice at heart, yet we still seemed doomed to return to court for infinity!

The prosecutor consoled everyone about the delay, pointing out that at any

"Clearly, here was a magistrate with the interests of children and justice at heart, yet we still seemed doomed to return to court for infinity!"

time, if the defendant decided not to continue with his own defence and to request a lawyer, the lawyer would probably recall all the witnesses so the trial would effectively start over and the girls would have to go through the ordeal again. He said if the adjournment was denied and the case went on appeal, there was a possibility that the trial would be declared unfair, so the magistrate was doing the best thing by giving the defendant every opportunity to prepare his case.

After the hearing, the children's family and supporters discussed our concern that the intermediary was only present to translate questions and answers, and not to comfort Sibongile or act on her behalf if she needed a rest or a break. We were later told, by an official in the DDP that, under the Criminal Procedures Act Section 153 (3A), a child witness is entitled to have a support person present, in addition to the intermediary, when giving evidence. We decided to apply for Natty Duma to act as a support person in following hearings. This request was immediately granted. Clearly there was no intent by anyone involved in the system to neglect the needs of the children; it was simply that the court was too busy with managing cases to think about the children all the time.

23 February 2002

23 February was the seventh Saturday that everyone had to cancel their weekend plans, take unpaid leave from work and drive either 2 hours from Durban or over an hour from Msinga/Weenen. Sihle's father at that time had a temporary job near Mooi River (about 40 minutes from Estcourt) and his income was critical to the family's survival. He had to apply for (and was readily granted by his employer) leave to attend all these hearings and arrangements had to be made to collect him and take him back.

We arrived at court by 9am faintly hoping this might be the last time the girls had to make the journey, only to discover that the social worker had called to say she was 'unavailable' and that the court had not been able to contact anyone to let us know. Creina's phone had not been working properly for three weeks but on previous occasions the police had gone to the farm to let everyone know what was happening; the Children First contact details had apparently disappeared from the file.

So the case was remanded for another week to 2 March.

2 March 2002

On 2 March, just after 8.30am, Sihle was bent over the side of the bakkie in the car park at Estcourt Court, complaining about stomach pains. She had suffered a running stomach in the night and was reluctant to eat anything. Christa Landsberg was back on

the case and expected to seek an adjournment if Sihle was still feeling unwell when it was time for her to give evidence. Creina Alcock rushed off in search of medicine, in the faint hope a further adjournment could be avoided.

Natty Duma had agreed to be a support person for the girls, so she would sit in the intermediary room to comfort them and ask for a break if necessary. By 9.45, Sibongile was sitting with the social worker and Natty in the intermediary room. And they waited.

At 10.05am, the hearing started and Khanyile's cross-examination of Sibongile continued. He tried to make Sibongile repeat the last question he had asked her the previous week; the magistrate intervened.

Khanyile asked her how many people were in the court that day. She said she didn't know.

He tried to confuse her, asking many questions related to her claim that he had worn a photograph (of the religious leader Shembe) around his neck during the ID parade.

"The person that raped you, was he wearing a photo?"

"You were wearing it at the Weenen court."

"So the person who raped you was not wearing a photo."

"It was one and the same person."

"I see you as a person who is lying because you cannot understand yourself", Khanyile said.

Sibongile held her head up a bit and said "You are telling lies."

He called her Sisi.

She ignored his next question and asked: "Why are you calling me Sisi? You were calling me a dog at the time, not as your sister."

The defendant asked the child if she was prepared to come out and demonstrate what happened to her.

The prosecutor intervened and Khanyile then said he had no more questions, and Sibongile was allowed to stand down.

An adjournment followed for the prosecutor to check whether Sihle was in a fit state to testify. She was curled up on a cushion, covered with a blanket in the prosecutor's office, looking a bit weak but when I asked if she wanted to come back another time to give evidence, she sat straight up and said: "No, I am going to do this thing now!" and walked to the intermediary room.

Christa Landsberg led Sihle's evidence, which was in substance the same as Sibongile's, with slight differences of detail and sequence. She explained how the accused "asked us to choose between him hitting us and misusing us. He said if he hit us we would lose our teeth. Then he told us to take off each other's school belts and then to lick each other's tongues. We did. Then he told us to hit each other heavily on the cheeks. He told us to take off all our clothes except our panties. We did."

After an hour and a half, the prosecutor asked if Sihle was OK to carry on and she said she wanted to continue.

She described how Khanyile took his gun from his hip and hid it with a shirt. Khanyile had suggested it was a cellphone and that she had mistaken it for a gun.

"Did you see clearly it was a firearm?"

"Yes…He then came back and sat down and unzipped his pants and showed us his penis and asked if we knew what was it. We said we didn't know."

She answered detailed questions about all the things the rapist had done and made her and her friend do.

The prosecutor asked how long the ordeal lasted, even though it had already been established that the girls did not know how to measure time in minutes and hours. The exchange showed the importance of officials knowing how to formulate questions in a way that takes account of inability to measure time or distance, recognising that people may lose their sense of time under stress.

Sihle told how she vomited when the rapist pushed his penis into her throat, and how he wiped the white substance that came out of his penis onto her underwear, and told her to wash it when she got home

The prosecutor showed consideration of Sihle's age and lack of experience when she asked about the ID parade and Sihle wasn't sure if "the big house" where it took place was a police station

"Were there people dressed like police?"

"Yes."

There was a lot of questioning about the photo that Khanyile wore round his neck at the ID parade. The magistrate asked: "If he didn't have that, would you still be able to point him out?"

"Yes."

"Why?"

"I remember him because he did a bad thing to us."

The prosecutor checked again if Sihle needed a break or anything else before the cross-examination. She said she was OK to go on.

Khanyile used the same approach of asking a few questions in several different ways, trying to catch Sihle out by asking with which hand he had unzipped his pants, with which hand had taken out the gun.

He questioned her about the time after the rape when she saw him with Squbudu Sithole, the worker who called the police. Everyone became confused about which day each question referred to – and the magistrate told Sihle off for the confusion.

On several occasions, Khanyile accused her of being a liar and she replied calmly: "I am not lying; you are a liar."

Khanyile asked what Sithole had said to her and the other children.

"He asked if we knew this boy and we said 'No', because we were scared because you had a knife."

"*Did* I have this knife?"

"Yes, you were opening and closing it."

"You say you knew that I was the person.

Why did you not then tell Sithole?"

"We were afraid that you might stab Sithole because you had already done something bad to us."

Sihle explained how she had then told Nkosimandla Masoka, when the children met him on the way back from the encounter with Sithole, that the stranger with him was the rapist but that she had been afraid to say so because he was carrying a knife.

Khanyile finished his cross-examination and Sihle was allowed to stand down.

At this point, after 20 trips to court, Sihle and Sibongile were allowed to go home.

The questioning and the evidence of the children was relatively audible to the courtroom in both English and Zulu, given that it had to be translated for the benefit of the intermediary and relayed via the closed circuit television. However, much of the proceedings in open court were very difficult to hear, especially in Zulu. CAP had to summarise what was happening during adjournments for the family members and witnesses.

Creina Alcock commented: "In triple language courts (English, Zulu and Afrikaans), the need for translation can make proceedings interminable, and sometimes the magistrate, impatient at the slowness of translation, would not pause long enough for the interpreter to translate what he had said, so there would be an overlap of voices and abbreviated or ineffectual translation. Often the interpreter appeared to be there just to pass on the gist of the case to the accused, speaking so quietly that his or her words were inaudible to the gallery, and on several occasions we had to approach the interpreter to speak loudly and clearly enough for our Zulu-speaking group to hear what was going on."

After the girls had finished their testimony, Doboza Dladla was called. He was the first person to see them after the rape and gave evidence of how he found them walking towards their home. "I stopped the vehicle because I noticed the way they were walking along the road – apart from each other, one on this side of the road and one on the other, and they were crying. They are children from my area. They were walking not up straight but like staggering, moving from side to side and crying. I asked what happened and they said someone had caught them up and misused them."

Doboza said the children tried to tell him what happened but "I stopped them because there were some people in the vehicle who were not from my family. I took them home... They said what happened to them in my presence but then I had to rush to find Sibongile's father."

The mother of Sibongile was called to testify and recalled how her daughter and Sihle had returned with Doboza "sorrowful and crying. When Sibongile stopped crying after a long time, she told me they were caught up while eating some berries. They said they came across a man... He took them into the bush and said he would shoot them when they deviated from the path. He threatened to hit them if they refused to admit they had slept with their father." She said the children told her what the man had done and described the attack as the children did.

"On several occasions, Khanyile accused her of being a liar and she replied calmly: "I am not lying; you are a liar.""

She confirmed that after crossing the river in the dark, the fathers had gone with the girls to the police and that the police had sent them back, saying that the children should have been accompanied by their mothers. "So they came back and we only went back with them to the doctor the following day."

The prosecutor asked if Sibongile took a long time to recover and her mother replied: "Her mind was always in a state of shock after this incident. Even now if someone comes she runs away."

The prosecutor tried to confirm Sibongile's age. Neither child had a birth certificate, a baptism certificate or an ID. At first, it was estimated they were about ten years old, then, based on their school record it was thought they might be 12. Sibongile's mother could only remember that she was 8 months old during the faction fight between the Msusanaphi and KwaDimbi people, when houses were burned – she didn't know the year. She said the child was in her second year of primary school when the rape occurred.

Khanyile was invited to cross-examine but said he was hungry, having been given no lunch. The case was adjourned for an orderly to organise food. However, the orderly reported it would take until 3pm to get the food and till 3.30 for Khanyile to eat it – so the case had to be remanded to the next week.

Saturday 9 March 2002

On Saturday 9 March, Sibongile's mother returned to the witness stand. She said she had been frightened when she first came into court but told Creina that when she thought of what the defendant had done to her children (the girls were members of the same extended family) she just wanted to shout at him.

The prosecutor was anxiously writing witnesses' names on her hand – the names by which the witnesses were known were different from the names given at birth and sometimes different from the names on their ID documents.

Sihle's father sat in the corridor clutching a brown envelope containing a form from the local clinic, stating the date, place and time of his daughter's birth.

Khanyile greeted Sibongile's mother and she turned away from him. He asked how she felt when the children came home and, looking very distressed, she said: "There is nothing I am going to answer because the wounds are being taken back to the incident, the memories are being brought back."

He asked what action she took.

More perturbed, she said: "I can't answer anything; what am I going to say?"

She seemed close to tears and the magistrate granted a short adjournment. The prosecutor was frustrated and said that if Sibongile's mother didn't answer the questions, "We might as well pack our bags and go home". Natty and Mr Malinga explained the importance of answering so that she wasn't declared a hostile witness. She agreed to return, with a very hard expression to mask her feelings.

Facing a barrage of questions from Khanyile, she corroborated everything the children

said, until he asked her "Was there anything they didn't tell you."

The prosecutor objected that the witness could only testify to what they told her, not to what they didn't tell her.

After several more questions, Khanyile said: "Are you truthful in saying they related the whole story to you?"

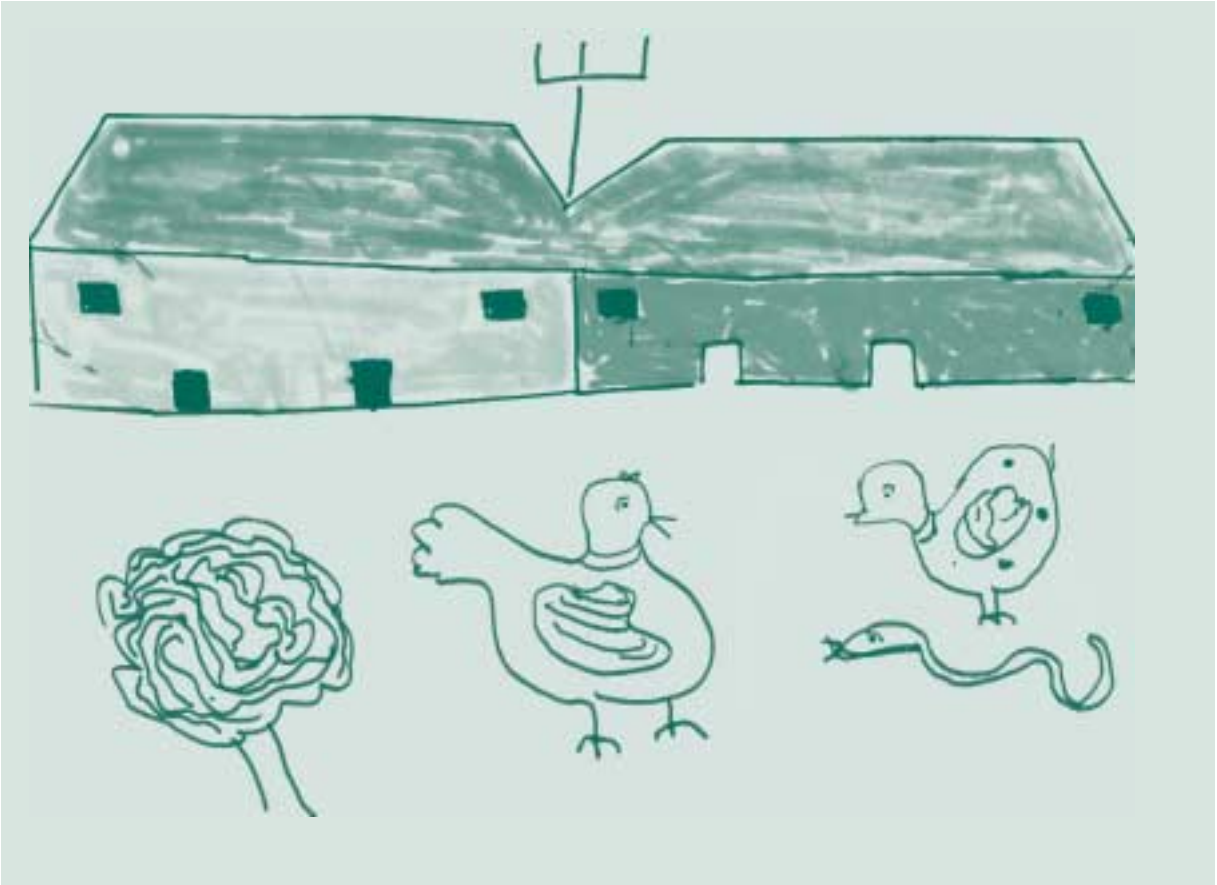
"I would not know if you are aware of something they did not mention."

He then accused her of telling lies and eventually said: "I can't see the point of carrying on with the questions because the witness does not give clear answers."

Sihle's father was called to the stand. He is a tall, graceful man with deep eyes, ebony skin and the long pierced earlobes of men who have worn the traditional ear plugs for many years. He wore a towel around his shoulders and stood disconsolately with his hands clasped in front of him. He had come to court on every occasion he could, to support his daughter, and he had listened, still and in silence, to the appalling things that had been done to her – the kind of abuses that no one should have to hear have been perpetrated against their child. Now he had to face the alleged rapist and say only what he was asked to say by the prosecutor.

He was asked how old his daughter was. He didn't know off-hand but said he had brought her yellow clinic card. The card had her first name misspelt and the explanation for this was that the nuns couldn't spell the name, or maybe this was what they thought the mother said. It gave her birth date as 23 September 1986, which meant she was 11, about to turn 12, when she was raped.

Creina was called to help determine the age of Sibongile. She had kept a detailed record in her journal of all the events in the area, including the fighting and violence: "One of the most memorable [faction fights] was what has become known as the Nomoya conflict…A fight broke out on New Year's Day 1987 and in March half the village was burned out and about two weeks later the other half was burned out by raiders carrying guns. The year is very memorable because we had never had anything like it before: it was spectacular, it was at night and the reflected light of the fires turned the river blood red. The burning of the village was not reported in the newspapers at the time because there were 2 others wars in the



district and 19 men were killed in another fight, which made TV news."

Creina submitted her journal and a newsletter she had produced in June 1987, reporting on the events of previous 3 months. If Sibongile was about 8 months old during the fighting in March, she would have been born around July 1986 and, therefore, was 12 at the time of the rape.

At this point, evidence was taken about the ID parade. Five police officers were involved in this and, since Khanyile did not have a lawyer present in court to confirm that the ID parade had been conducted according to the law and that there were no objections, each of these officers had to attend court to give evidence.

Due to all the remands, five policemen had to attend court for most of the day on five Saturdays, leaving a skeleton staff and one vehicle at the police station in Weenen. The prosecutor explained that although the defendant had a lawyer at the ID parade who did not object to the way it was conducted, there was no way of knowing what Khanyile might have disputed in the police evidence so it was safest to prove each point before him in court.

It was now the end of the day and the case had to be adjourned to 23 March.

23 March 2002

On Saturday 23 March 2002, the case proceeded at a fairly swift pace – with Squbudu Sithole, who had helped apprehend the suspect, and Nkosimandla Masoka, to whom the girls had identified the accused, finally giving evidence after having travelled to court about 20 times before. Khanyile held that Sithole could prove his innocence by confirming that Sihle had denied to him that he was the rapist. However, Sithole reiterated that he had seen Khanyile with a gun and a knife, that Khanyile had told him he had an illegal weapon, and that Masoka had come straight to him after encountering Sihle and told him that Khanyile was the rapist but that the child had been too scared to say so. Khanyile at this point dismissed Sithole as "mad".

The district surgeon who examined the girls, Dr Khan, gave evidence that they both found the examination painful and that it showed they had both been penetrated.

He was cross-examined by Khanyile about what specimens he sent for testing and the case was then adjourned to Wednesday 3 April.

3 April 2002

On 3 April, Khanyile concluded his cross-examination of the doctor. He again indicated that he wanted his mother to give evidence on his behalf but she was not in court. The case was adjourned to 13 April.

13 April 2002

On 13 April, Khanyile took the oath to give evidence in his own defence, after accepting the court's offer to subpoena his mother to come from Johannesburg as a witness.

He made a statement about his arrest but said nothing about the charges until asked directly about them by the magistrate, when he declared: "It is alleged that I raped some people and there is just no evidence from me, from my body, that could be brought before this court."

Prosecutor Christa Landsberg, in cross-examination, established that Khanyile did not know the two girls or their families before the incident in 1998. Khanyile claimed he was in Johannesburg for the whole month and couldn't remember the specific day.

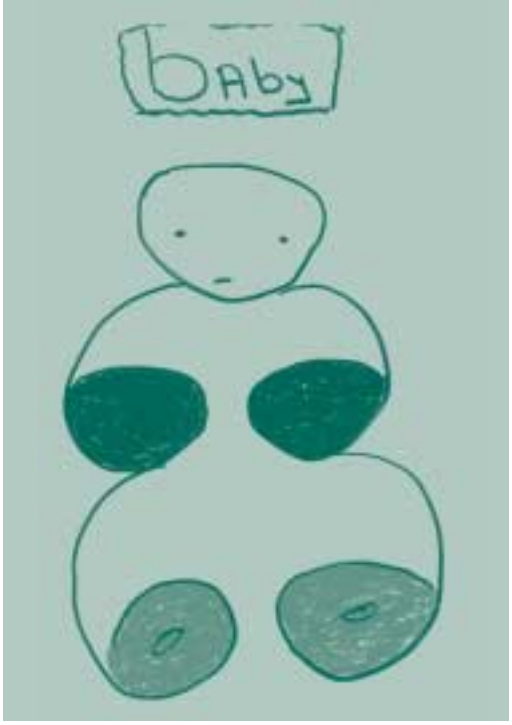
"How can you remember you were in Johannesburg then?" she asked.

"I was forced to stay at home in Johannesburg for the whole month because of a traditional ceremony."

He then claimed to have been in Johannesburg with many members of his mother's family, although he could not identify anyone who could corroborate this.

Ms Landsberg questioned Khanyile's cross-examination of Sibongile: "I don't understand, if you weren't there, how could she have known you had something on your hip that could have been a cellphone that she mistook for a gun?"

"I posed the question because she said she could see something concealed…and



because she was talking about someone who raped her."

"Nonsense, sir! You were talking about yourself; you told her you were carrying a cellphone and she said you were carrying a gun."

"It must have been someone else."

"Then why didn't you say so – 'It was not me, I was in Johannesburg'?"

"I wanted to check if she saw me."

The prosecutor asked: "Why would the girls choose you to say this terrible thing about – because rape is a terrible thing – why would they choose you if you were out of town?"

"It was just my bad luck."

"Accusing someone of rape is not bad luck…these girls were very sure it was you. Why would they do that?"

"I could only answer that question if there was evidence that came out of my body that was brought to court."

> *"It was just my bad luck."*

The defendant repeated this line on many occasions, indicating his belief that a rapist can only be convicted on DNA evidence and that the word of a person who has been raped counts for nothing. That is the word that goes around the prisons – just deny it, delay things, confuse the witnesses and you'll never get convicted. It is a fairly accurate reflection of the state of the criminal justice system when it comes to child rape.

The prosecutor cross-examined Khanyile at length about the fact that both the girls testified he had a gun and that Sithole and Sihle had later seen him with a gun and a knife: "Sithole testified that you had a knife that day and that you had a firearm; you even told him you had an unlawful thing and showed him this firearm. You never told him you didn't have a knife or a firearm that day."

"It was a cellphone."

"Then why didn't you put that to him."

"I didn't want to dispute it that day because he had just begun telling lies."

"But you were disputing everything else."

Khanyile first said he had written down his questions and left the paper in the jail, and had asked questions from memory so he didn't think to ask about the firearm. Then the magistrate read the transcript, reflecting that Sithole had mentioned Khanyile had a firearm and a knife, and that Khanyile confirmed that's what he said but did not dispute it.

He then said he had been frightened to keep asking questions because of the prosecutor's objections.

"Sihle said she saw you one day carrying a knife…you carried on asking questions but you did not say you were not carrying a knife... She said you hid a gun, you didn't say you didn't have a gun, you asked her where you hid it…this was not the cross-examination of a person scared to ask questions."

Khanyile maintained he was not in Msinga on the day and at the end of the cross-examination gave his mother's address in Orlando, Soweto, so that she could be called on his behalf at the next hearing, set down, ironically for all concerned, for Freedom Day – 27 April.

27 April 2002

On Saturday 27 April 2002, Khanyile appeared in Estcourt Regional Court looking tired and shaking his head a lot, wearing the same cream pants as before but with a large denim jacket and his shirt tails hanging out. He was carrying two small keys on a ring and fiddling with them. We wondered where a prisoner got keys.

Khanyile's mother was at court, for the first time since the trial started, and was called to the witness stand. She stated her name, Gladys Madintja Mchunu, but when Magistrate Edward Hall asked if she was prepared to take the prescribed oath, she asked why and then said she had a big

problem with taking the oath. Asked what her problem was, she then said she had a problem with September 1998. The magistrate asked if she had religious objections to taking the oath but she simply refused. The magistrate warned that if she didn't agree to tell the truth, she couldn't give evidence, to which she replied: "I would rather not testify in this court and that is all".

The magistrate asked Khanyile if he had any other witnesses or if he still wanted his mother to give evidence on his behalf. He still wanted her to speak, so the magistrate urged her that even if she felt she couldn't say very much, she should be sworn in and then say on record that she could not answer a question or could not remember. She then made statements, referring to evidence in the case that could incriminate her son, and the magistrate ruled that what she had said could not go on the record. After a further appeal by Khanyile, she refused and was allowed to stand down.

The prosecutor asked for a 15-minute adjournment for Khanyile to think of other witnesses he might want to call, which seemed generous considering he had had three and a half years to come up with an alibi or a character witness.

As the court was adjourned, Khanyile's mother went downstairs to the cells to speak to her son. All the court officials, the orderlies, the interpreter, the police, criticised the mother for not giving evidence on behalf of her son. The interpreter said this was the first time he had ever heard a witness refuse to take the oath or affirm. The mother came back into the court and sat on a chair next to the witness box. An official wearing a Dolphins (the Natal cricket team) T-shirt, a pistol on his right hip and a cellphone on his left, stood in the witness box and, revealing a gold tooth as he spoke, told Mrs Mchunu that as a mother she must at least stand up and say, "This is my son". He said she was not helping her son or the state by refusing to testify. The interpreter pointed out that if she had even gone into the witness box and said, "I know nothing about the case", she would have got her transport money back to Johannesburg, whereas now she wouldn't get it.

When the court reconvened, Khanyile announced that he had reconsidered and was not going to call any witnesses.

The prosecutor requested an adjournment to 2 May, to prepare her address on behalf of the state.

The process was explained to Khanyile – that the state would have the opportunity to address the court on the merits of the argument and that he would have the same chance to address the court.

When he was taken down to the cells, he passed in front of us, greeted Creina Alcock and myself and asked Creina how she was. He always tried to talk to Natty. Since he had no family nearby, she had responded to his requests for telephone money, magazines and food on various occasions.

The case was adjourned to 2 May 2002.

2 May 2002

On 2 May, prosecutor Landsberg outlined the state's case against Sipho Gift Khanyile.

She concluded it did not make sense that the two complainants would point out the accused and let the real rapist go free and that there was no evidence of any bias on the part of the complainants. She submitted that both the complainants gave a logical and chronological exposition of the events in

their evidence in chief, that any contradictions were not material and that in every important aspect the witnesses corroborated each other's versions.

She noted that the accused did, on several occasions, place himself on the scene. "The accused's mother refused to testify and say anything about that time. We can only speculate as to the reasons. But one must ask oneself that if the accused was indeed in Johannesburg, what would be easier than for his mother to just say so.

"It is my respectful submission that as far as the probabilities favouring the State are concerned, no acceptable, satisfactory explanation has been given by the accused and does not in fact exist…the accused's version is not reasonably possibly true, and is indeed false and…the Court must accept the State's case."

The state argument continued until the end of the day's hearing and was due to continue on 7 May 2002.

7 May 2002

On 7 May, the case only came up at around noon and the prosecutor finished her statement just after 1pm. Since they had only been in court for a little over an hour she, the magistrate, the interpreter, and everybody else agreed to carry on – but Khanyile wanted a lunch break.

After lunch, Khanyile gave a final statement in his defence. His evidence was rather rambling, fairly incoherent and repetitious at times. He said his problem was that he did not feel guilty because no eye-witnesses had been called - even though the two complainants were eye witnesses for each other - and only Sithole had said that he had seen him. He admitted that he did meet Sithole but did not say everything Sithole said he had. All the state witness, he said, wanted to see him in jail and had only testified because they wanted him found guilty. He insisted he was not guilty and

knew nothing about the matter. The doctor had found something – semen-like fluid – but had not linked it to him. He was not satisfied with the doctor because if he had found something why did he not give it to the investigating officer? Also the state did not call the person to whom the doctor gave the fluid.

Khanyile wanted to know whether anybody could "hit two birds with one stone". He said that could never happen so he could not have raped two girls. "How can a normal person rape two girls at once? How many penises does one person have?" Later, he said: "If a person has eaten meat how can you say that he has? If you cannot see or smell it, then you can't know." He said the court should not consider the ID parade, as people were sometimes found guilty without an ID parade. Therefore, he submitted, he was not guilty.

Once Khanyile had concluded his defence, the case was adjourned for the magistrate to consider the evidence. Judgment would be given on Saturday 18 May 2002.

The verdict

18 May 2002

18 May 2002 was the twelfth scheduled hearing and the tenth actual hearing of the trial in case SH43/99.

The hearing was attended by the usual group – the parents of Sibongile, the father of Sihle, Natty Duma, Creina Alcock and Children First. In addition, the *indunankulu* of the Mchunu community, Mr Petros Majozi, came to hear the verdict. The Mthembu chief, *iNkosi* Ngoza Mvelase, had been following the case since its inception, with reports from CAP and his *induna*. He happened to be present that day and listened to the verdict.

The case started around 9.45am. Compared to previous occasions, when Khanyile has tried to stare us down, he looked very subdued.

Magistrate Edward Hall said that Khanyile was stated at the time of the offence to be 18 years old. He stressed that his rights to representation had been explained to him several times and that he was represented by at least two lawyers but later elected to defend himself. His plea was that he didn't know anything about the rape and said he thought he was arrested because his cattle had damaged someone's land.

Magistrate Hall noted that the state had called no fewer than 16 witnesses. Khanyile had taken notes and cross-examined the witnesses while holding a sheet of paper with pre-written questions. He had also asked for the hearing to be postponed whenever he wanted to think of more questions or was not feeling well, and the court mostly granted his requests.

Sibongile's evidence was summarised and then the magistrate said that Sihle corroborated Sibongile's evidence. He noted that Sihle had later encountered the accused but had denied he was the rapist because she was afraid since he had a gun and a knife. Witnesses corroborated this.

The magistrate reiterated that medical opinion was that there was definitely rape.

Khanyile stood the whole time with his hands in his pockets, looking ahead at the magistrate and occasionally tilting his head to one side.

Mr Hall said he was fully aware that Sigongile and Sihle were juvenile complainants and that the identity of the accused was in dispute; "therefore I'm approaching the evidence with caution".

He said he had to look for factors that would reduce a wrong conviction but more importantly, “the exercise of caution must not displace the exercise of common sense”.

Caution, he said, related to age – the children were approximately 12 at the time of the offence and were testifying about the incident 3-4 years later.

He noted, “There were 19 postponements in the regional court before this trial commenced... This position is unacceptable.”

Magistrate Hall said Sibongile impressed the court in the way she answered, even when the questions were not very clear. She did not contradict her evidence in chief during cross-examination. Sihle also answered all questions, motivated where necessary, and did not contradict her evidence in chief. He concluded that discrepancies between their evidence – such as Sibongile saying the firearm was placed in a loose jersey, while Sihle said it was hidden in a T shirt – were not material. He quoted State v Grum: 75 and State v Khoza 78; in the latter case the court held that if one had a complete picture of an occurrence, and not a partial picture, differences in recollection would be shown not to be discrepancies at all: different witnesses see the same events from different vantage points, at slightly different points in time.

In terms of the accused’s identity, Mr Hall said it had not been shown they had any interest or bias against the accused; there was no evidence that they were dishonest or did not have a proper opportunity to observe; the incident had happened in broad daylight; it was their first sexual experience; the accused induced fear; he was close to them, spoke to them, was on top of them. Why would they not be able to identify him?

The magistrate said it appeared from Khanyile’s questioning that his defence was that he was not in the area at the time of the rape and he repeatedly asked for DNA evidence; but later he contradicted himself by saying he was there but had a cellphone and not a gun.

“Upon consideration of all the evidence, the version given by the defence cannot be reasonably, possibly true and must be

rejected as false. The evidence of the state proves beyond reasonable doubt that he committed the offence and he is accordingly found guilty."

The case was then adjourned to 21 May 2002 for consideration of sentencing.

The verdict of guilt came 3 years 6 months after the arrest, after 38 hearings and postponements, in a case heard by 4 magistrates (including the district court), conducted by 5 prosecutors and with the investigating officer, the defendant, a prison warder and 17 witnesses going back and forth on most occasions.

The inter-departmental task team that compiled the report on an anti-rape strategy referred to earlier was set up in March 2000 by the National Directorate of Public Prosecutions, the departments of health, safety and security and social development, following a Cabinet directive to develop a communications strategy and link it to an initiative to reduce rape. The team pointed out that the rape problem could not be addressed in isolation from the criminal justice system and had to be considered in relation to victim support and prevention. The team suggested that a 'longer-term, sustainable, anti-rape strategy can only become a reality once the criminal justice system as a whole improves'.

This is also the conclusion of those involved in this particular case. That improvement, therefore, in every aspect of the system, is a matter of greatest urgency. However, as Childline Director Joan van Niekerk points out, the NGO sector and civil society as a whole were excluded from the development of this strategy. Since NGOs provide the bulk of victim care services in South Africa, and are likely to be expected to help implement the strategy, this is totally unacceptable.

Awaiting sentence

21 May 2002

On 21 May the case was simply remanded to the following day. The reason was that, under the Criminal Law Amendment Act No 105 of 1997, child rape carries a statutory life sentence. Regional courts can impose a maximum sentence of 15 years in prison and a maximum fine of R300 000, under Section 92(1) of the Magistrates' Courts Act 32 of 1944/GN R1411, Government Gazette 19435, 1998.

Therefore, the case would have to be remanded for sentencing to the High Court. However, the court wanted to investigate whether sentence could be handed down in the regional court on the basis that the magistrate could hand down two sentences to run consecutively, of 15 plus 5 years, for each of the two rapes. This would effectively be as severe a sentence as a life sentence from the High Court, which would carry the possibility of parole after 25 years.

22 May 2002

On 22 May, Children First and other support people did not attend the hearing, on the advice of the prosecutor that the case would not proceed. By now we had been to court 29 times and were thankful for the respite. We spoke to Ms Landsberg on the phone for a report. She said she had discussed with the chief prosecutor and the magistrate the possibility of sentencing in the regional court. However, in terms of the legislation (Article 51 of the Criminal law Amendment Act 105 97) they were not able to do this, so the case had been remanded to 24 June to get the transcripts of the case to be sent to the DPP with the referral to the High Court. From there the prosecutor hoped it would not be more than 2 months for sentence to be passed.

The defendant had been informed of his right to appeal conviction and sentence, and had indicated that he might appeal and that he would like to be represented by *pro deo* counsel when he was sentenced.

Children First consulted Sharon Marks, Specialist Magistrate at Durban Court about the sentencing procedure – to question whether it was a legal requirement in any circumstances for a child rapist convicted in the regional court to be sentenced in the High Court. She said in a telephone interview on 24 May that some provincial magistrates had taken the route of handing down a severe sentence within their powers in the regional courts but that in all cases these had been set aside by the High Court. She said the provincial magistrates' association was lobbying for the sentencing provisions to be changed so that magistrates could hand down the mandatory life sentence in cases that they had convicted.

24 June 2002

On 24 June 2002, Children First phoned the Estcourt Regional Court and Christa Landsberg said that the case had been remanded for a further month as nothing had been heard from the High Court.

22 July 2002

I called the court again on 22 July and still nothing had been heard. Ms Landsberg said she would call us as soon as she had any news.

She called back at 9.25 the same morning to say she had just received a fax stating that the case had been set down for the High Court at Pietermaritzburg on 23 August 2002. The magistrate/prosecutor at Estcourt would now transfer the case to the High Court for sentencing. The unknown quantity was whether the judge would accept the verdict or raise any queries.

If everything was satisfactory, Khanyile would appear on 23 August with an advocate. He, as well as the state, would have chance to address the court. He and the state might call witnesses with regard to sentencing. Ms Landsberg said she would speak to the state's advocate to see if it would help for any of the people supporting the girls to give evidence.

We phoned the DPP and the High Court at Pietermaritzburg several times to check whether the case would proceed. We eventually ascertained that Advocate Rita Nel would be handling the case. She said it was unlikely the case would proceed because the roll was busy on Friday 23 August. She would confirm on Wednesday whether the judge could fit it in.

If it could not proceed, it would be set down for the week 9-13 September. Adv Nel told us that if the defendant was handed down the statutory minimum sentence of life imprisonment, he would be entitled to apply for leave to appeal. If he was granted leave to appeal, this could probably be heard and concluded within three months.

On Thursday 22 August, we learned that the sentencing would not go ahead. On 31 August, *Indunankulu* Petros Majozi, one of the traditional leaders who had followed the case so closely and asked to be informed of the sentence, died of a stroke aged 84.

Adv Nel said she had not read the record but understood that there was a concern about the way the oath was administered. She said Judge Vuka Tshabalala, the Judge President, was scheduled to hear the case and that he had not yet read the record either so she didn't know whether he would refer it back to the magistrate.

This concern arose from the fact that we had heard of several child rape cases in which convictions had been overturned by judges, owing to queries about the administration of the oath. The magistrates who heard those cases had not administered the oath, or cautioned the children to tell the truth, in exactly the way required in Section 164 of

the Criminal Procedure Act. There was by this time case law and a full bench decision from KwaZulu-Natal that said magistrates must clearly follow the requirements of Section 164. This stated that, in the case of a minor witness, the magistrate must first attempt to administer the prescribed oath. If he forms the opinion that the child is unable to grasp the import and meaning of this, he may then establish whether she understands the difference between truth and lies and warn her to tell the truth. In several instances, cases had either been retried or the convicted rapist had gone free on this technicality.

Although the magistrate who tried the Khanyile case, Mr Edward Hall, had been very thorough about ascertaining that each of the girls knew the difference between truth and lies, understood the importance of telling the truth, and knew that they could be punished for telling lies, he had not attempted to administer the prescribed oath.

After 12 attempts, I reached Adv Nel by phone again on Tuesday 3 September. She did not have the Khanyile file with her but said the sentencing had been remanded to either 21 October or 4 November. She would let me know. The reason was it was 'not feasible' to go ahead on 23 or 25 August and these were now the first dates available.

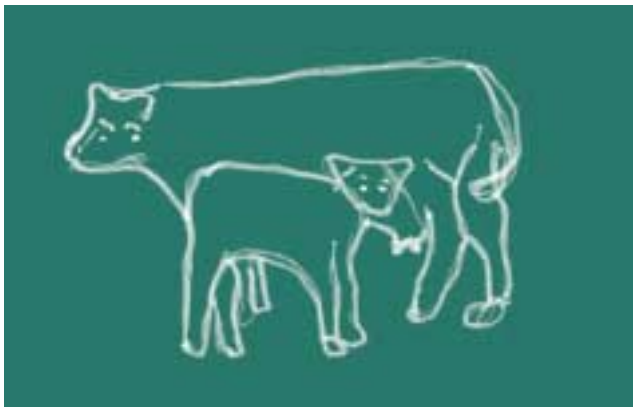
The date for sentencing at Pietermaritzburg Supreme Court was confirmed as 21 October three days before the due date. However, when I spoke to Adv Nel, she said she would not be in court on that date and she didn't know who was handling the matter. It took at least 10 more calls before I located someone who was able to tell me that Adv David Bailey would be prosecuting – and that JP Vuka Tshabalala would *not* be presiding. Adv Bailey did not expect the case to go ahead until the afternoon – though it might go ahead in the morning if space became available, so we needed to be there. This meant the family members and witnesses for the children leaving home by bakkie at 6am, for the journey of at least 2 hours to Pietermaritzburg.

Adv Bailey said he had read the record and was not concerned about the way the children were cautioned before giving evidence. However, by the time we arrived at court, he had discussed the issue with the defence counsel and they were both of the view that the judge would send the case back to the regional court. His view was that the matter was not 'unsalvageable' and that it was quite possible the magistrate could explain how he had formed the opinion that the girls would not understand the prescribed oath and so had decided to admonish them to tell the truth. If so, Adv Bailey felt it unlikely there would be a retrial, since it would not serve the interests of justice and he was sure the conviction was sound.

21 October 2002

On 21 October, we sat in the courtroom and nothing happened until 11am, due to the apparent non-arrival of the three accused in another case. They were being brought from prison and the presiding Judge, Justice Herbert Q Msimang, sent a complaint to the prison authorities about the unexplained delay.

Court adjourned for lunch at around 12.30 pm. It reconvened at 2.15 pm, for a remand. Khanyile was standing behind the other defendants and turned to greet us. His mother had come from Johannesburg to be



in court for the sentencing. The other defendants were remanded and then Khanyile was called. Adv Bailey addressed Justice Msimang on the matter of the oath. He quoted from a judgement on a similar case, stating that ways to deal with this under Section 52 of the Criminal Procedure Act were to set aside the conviction, rehear the testimony, or go back to the lower court to establish the admissibility of the evidence.

Justice Msimang decided to retire to consider the relevant section of the law. He asked how the case came to this court – was it on appeal? This filled us with apprehension that he was not familiar with the case record. This would surely not be surprising, given his caseload, the fact that he had not been scheduled to preside over this case and that the case record was so long.

The judge returned at 3pm and told Khanyile "We unfortunately cannot proceed with the matter because we need to request the magistrate to give us a statement as to how he convicted you."

The case was adjourned to 13 November 2002. Khanyile was again remanded in custody, this time to Pietermaritburg prison.

A few days before the scheduled hearing, the police went to the girls' homes with the message that the judge had ordered Sihle and Sibongile to be in court so he could clarify how they had been cautioned. The prosecutor confirmed that he had arranged for an intermediary to be present but warned that the judge might choose to call the children into open court. He did not say why.

13 November 2002

On 13 November at Pietermaritzburg High Court, the hearing was not due to start until 10am.

The children had arrived in Pietermaritzburg before 9am. They sat on a bench outside the courtroom in their school uniforms, anxious but excited that maybe today was the day their ordeal would be over. (After the hearing, a security official came and gave the girls soft toys donated by the Wartburg Women's Association. He offered them coffee and asked if they were hungry, and showed us two beautifully painted rooms that had been designated as waiting rooms for survivors of violent crimes. No one had mentioned this when the children arrived).

The intermediary arrived, Ms Maud Mthembu, a teacher in a special school who performs this service part-time. She introduced herself to the children and their families, and the witnesses. A moment later, the court convened. Sibongile was called into the witness box. She was face-to-face with her rapist once more. The interpreter, Mr Sibeko, stood next to her. Maud Mthembu was near the entrance to the courtroom. The Judge asked her to come and sit next to Sibongile, and instructed the interpreter to tell Sibongile that she may answer through the intermediary if she felt intimidated.

The Judge asked if she remembered giving evidence on 21 November 2001 at Estcourt. She said yes but actually this was the wrong date – she gave evidence on 9 February 2002.

He explained that by law before you testified in court you must take an oath and that before you take an oath, you must obviously understand what is an oath.

"On this occasion, you were not asked whether you understood what was an oath. It was simply assumed you did not understand because you were not requested to take an oath, you were admonished to tell the truth.

"…When you testified at Estcourt regional court, did you understand the meaning and import of the oath."

"No."

"So the magistrate was correct in assuming you did not know what was the oath and admonishing you to tell the truth?"

"Yes."

Sibongile stood down. The Judge then queried whether Sihle testified through an intermediary and when told she did so he said the intermediary must come back.

The girls were by now 4 years older than when they had been raped, the process of attending court was much more familiar, they knew they had a strong band of supporters and knew that Khanyile had been convicted. However, we were concerned that the High Court did not see the need even to consider protecting them from direct contact with the rapist – especially if there was a possibility that the court might have to set him free on a technicality. Again, the Judge did not seem familiar with the circumstances of the case, which is understandable but is still a flaw in the process, caused by having one court convict and another sentence.

Sihle had been asked if by the magistrate if she knew what it meant to take an oath and had said 'Yes' but was then not sworn in. Asked by the judge what the oath was, she said 'to tell the truth'. Justice Msimang said this was not a full answer and so the court was correct in admonishing her.

Within minutes, Justice Msimang ruled that the magistrate had been correct in concluding that the children would not understand the oath and therefore admonishing them to tell the truth. He upheld the conviction and announced that he would proceed to sentencing[20].

20. Since the Khanyile case was concluded, this matter has been addressed by rulings of the Supreme Court of Appeal, which found that '*a technical problem caused by a mistake should not mean that the jail door, for child rapists, should be thrown wide open.*' This was reported in 'Blow for freed rapists: legal loophole finally closed' (*Daily News*, 28 March 2003 page 4): 'In many cases…magistrates did not make a formal finding that the witness did not understand the oath. This led to defence counsel arguing that the witness's evidence was not properly sworn in before court.

'In almost all cases it led to the proceedings being set aside and an order made that the trial start afresh. But scores of child rapists slipped through this legal loophole because the children they attacked could not be found again to testify, or their parents refused to put them through the trauma a second time.

'Eventually the Directorate of Public Prosecutions took the case of a father, who had allegedly raped his daughter but was set free because of his technical defence, to the Supreme Court of Appeal.

'[Justice] Streicher reminded judges that a technical problem caused by a mistake should not mean that the jail door, for child rapists, should be thrown wide open.'

The court said that the case against the father had to start again, but that even if the child had to testify again, she could simply confirm that what she previously said was the truth, to spare her from a second cross-examination. Counsel for another child rapist, John Mekka, argued that this ruling was wrong. Mekka had been acquitted on appeal by the Pietermaritzburg High Court after advancing the same defence. The Supreme Court of Appeal, however, reinstated his conviction and the 10-year sentence handed down by a regional court.

Although he had chosen to defend himself during the trial, Khanyile was represented in the High Court by Advocate van Heerden. When he began his address, there was so little he could say on behalf of his client that it sounded as though he was appearing for the State. Apart from noting that Khanyile had no previous convictions, he stressed that: "He has been convicted of two very, very serious charges. The record speaks for itself". Adv van Heerden said he had twice given the accused the opportunity to forward any reasons why the court should consider a lesser punishment than two life sentences. He had failed to provide any such reasons and Van Heerden concluded: "I submit there are no reasons".

Everything sounded straightforward at last. Except that Adv van Heerden had stated Khanyile's age as 18. If he was 18 now, he would have been 14 – a child – when he raped Sihle and Sibongile. He had also stated that Khanyile passed Std 4 in 1990, which would make him about 24 years old now. If he was 18 now, he would have passed Std 4 aged six – surely a child prodigy. The judge speculated with the defence as to whether Khanyile was a juvenile at the time of the rapes. They seemed to estimate he might have been about 16.

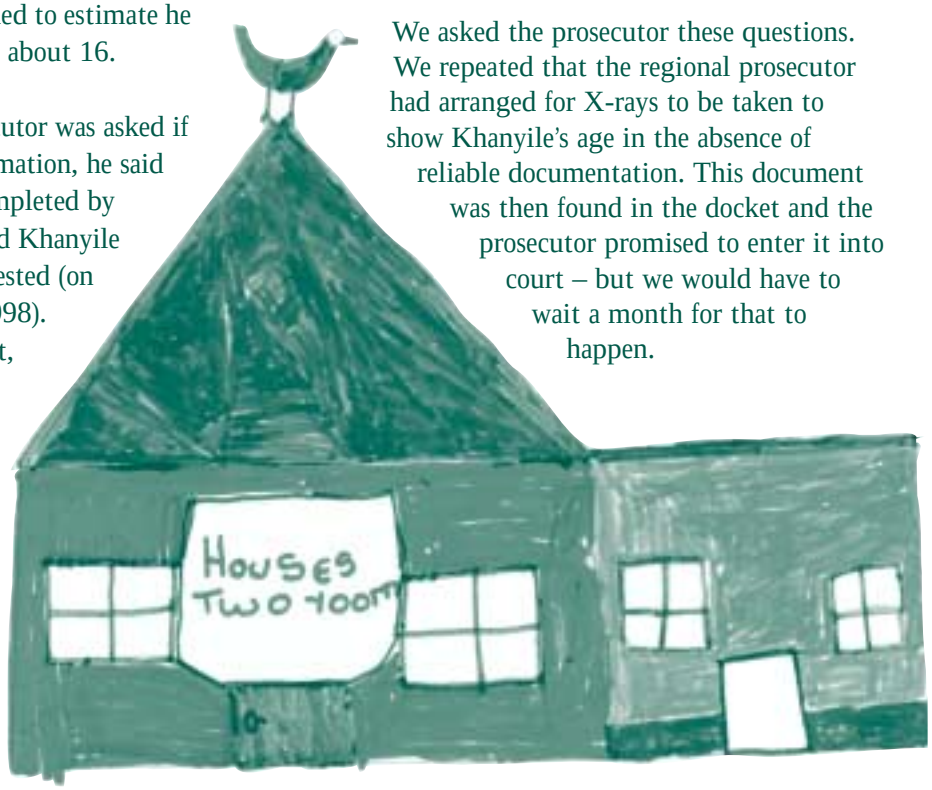
When the prosecutor was asked if he had any information, he said the J15 form completed by the police showed Khanyile was 18 when arrested (on 19 November 1998). He then said that, according to the docket, his date of birth was 21 December 1980. This would have made him 17, in fact, at the time of the offence.

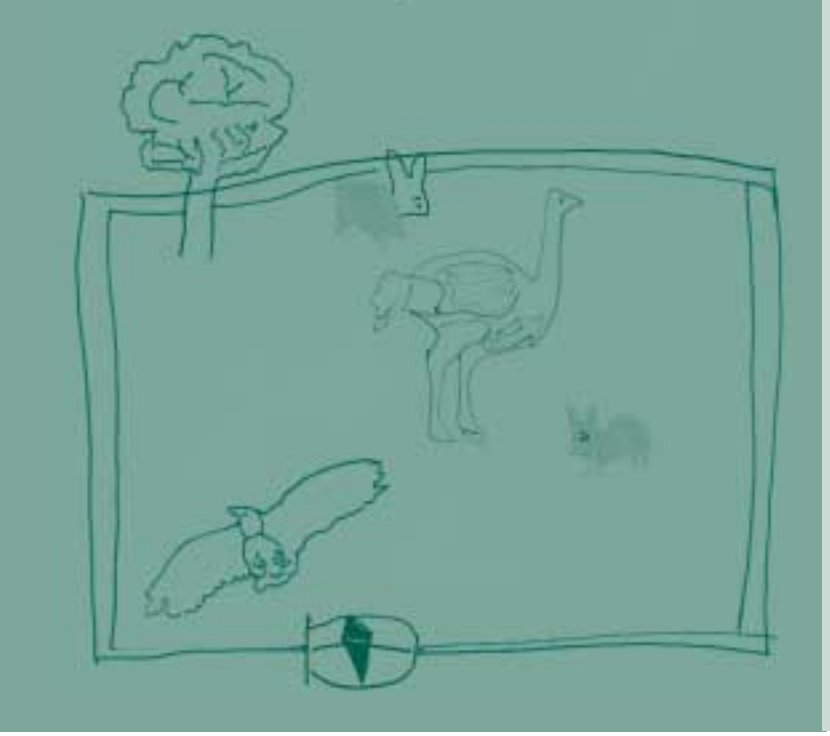
Justice Msimang adjourned the case to 12 December for social worker reports and asked for a probation officer to be in court for the sentencing.

The regional court had in fact accepted an affidavit from a doctor who had taken X-rays of Khanyile as proof that he was at least 18 when he committed the rapes. There was no reference to this in the High Court. Clearly, no one was familiar with the record. The case had to be remanded at considerable expense to everyone purely because of this.

Outside the court, the children, their families and supporters were shocked. Why, they asked, had the prosecutor not submitted to the court the documentary evidence that Khanyile was at least 18 in 1998? Why, they asked, did the Judge want to call Khanyile's mother to confirm his age when she had reportedly submitted a false birth certificate and then refused to testify?

We asked the prosecutor these questions. We repeated that the regional prosecutor had arranged for X-rays to be taken to show Khanyile's age in the absence of reliable documentation. This document was then found in the docket and the prosecutor promised to enter it into court – but we would have to wait a month for that to happen.





Given the fact a case is tried in one court and sentenced in another, given the length of the record and the caseload of prosecutors, it is understandable that everyone is not familiar with all the facts and developments in a case. But it is not acceptable when it means further lengthy delays at a cost to the victims, the perpetrator and the state. This is a serious flaw in the system of referring cases for sentencing to the High Court.

There is a dilemma in that magistrates cannot hand down life sentences and the High Court does not have the capacity to hear all child rape cases. According to the DPP, in the year 2000, there were 1000 cases of under 16 rape ready for trial and it would have taken five years to hear them all if they had to be tried in the High Court. The compromise solution has been to have magistrates try, and judges sentence, offenders.

We met immediately with an official in the Directorate of Public Prosecutions to express our concern at the further delay and request that a further age assessment be made to ensure Khanyile was sentenced according to his true age[21].

This was followed up with a letter to the DPP on 15 November, expressing our dismay on behalf of the girls about the way the matter was being handled and again asking the office to ensure a further age assessment was done on Khanyile. A reply was faxed on 10 December 2002 but not received by the time we went back to court on 12 December

A few days before the hearing, Detective Inspector Madondo sent a message to the two girls and their families that they must go to see a social worker, a Ms Van Wyk, in Weenen, on Tuesday, 10 December. This cost them each R26 return in taxi fares. The social worker had never met the children before and did not speak Zulu. The children did not understand why they had to meet with her. According to Sibongile's mother, the social worker asked the children, through DI Madondo and in the presence of their fathers, to repeat the details of the rape. This caused everyone great distress.

21. Around this time, the *Mail and Guardian* carried several stories on the failures of the justice system to protect child rape survivors. One mentions that it can take 'up to a year' to resolve a case. They agreed to publish a summary of this case, which appeared in the 22 November 2002 edition on page 4.

An official of the DPP later told us that it was becoming standard practice for social worker reports to be taken from both the defendant and the victims. The purpose was to find out how the victims had fared since the rape and seek their opinion on an appropriate sentence. If this was the case, the social worker should have visited the children in their homes and asked only those questions. The details of the rape would have been in her case file and there was no reason at all that she should have asked the children to repeat such painful testimony, let alone through a male and in the presence of their fathers. Even if the proper procedure had been followed, we question the appropriateness of asking young children what kind of sentence they would like handed down. That is putting the responsibility of the judge onto the shoulders of a child. It could also have a negative bearing on the sentencing if their views were taken into account – if for instance, the children said they thought the rapist should get a 'long' sentence and, having no sense of time, suggested that a long time was 4 or 5 years.

12 December 2002

We reported to the office of the DPP the children's experience with the social worker. The official we spoke to agreed that this should have been more sensitively handled and that it was unnecessary for the children to go over their evidence.

In court, Adv Van Heerden, for the defence, reported that Khanyile's mother had given a birth date but that he was aware of a dispute over a fraudulent birth date. She had now given a birth date of 24 November 1982, which would have made Khanyile 15 at the time of the rape.

The prosecution contested this.

At 11.40am, DI Madondo was asked by Adv David Bailey to take Khanyile to the radiologist to get a further age assessment. The X-rays were sent back in the afternoon with a report saying only that Khanyile was 'at least 20 years old and probably older'. Adv Bailey said the doctor thought he was probably now about 22 but couldn't say with certainty.

Adv Bailey then said that the defence would concede Khanyile could have been 17 when he committed the rapes and that he was prepared to proceed on that basis.

However, the Judge said that a person's mother was the best person to say how old he was.

Khanyile's mother, Gladys Mchunu, was called to witness box. This time she took the oath and answered questions. She said Khanyile was the third born of her 5 children, counting 2 who had passed away. He stayed with her and then moved to KZN, Weenen, to stay with her husband's first wife and grandmother (mother of his father). She said he came to stay permanently in Msinga only in 1998. She stated his date of birth as 24 November 1982. Adv Bailey pointed out that she told the police he was born on 20 December 1980, as appeared on the docket. Justice Msimang did not accept that as evidence and asked Adv Bailey if he was going to call the IO. He replied that he didn't expect the judge to ask him that because he and Adv Van Heerden had agreed that Khanyile was probably 17.

Adv Bailey asked if Mrs Mchunu had a birth certificate for Khanyile and was told it was burnt when her house was gutted by fire. She said she had his 'white card' but when the Judge asked for it she said she had left it at home – "in Soweto", she smiled.

The Judge said the court would pay for her to go back and fetch the card and the case was postponed till 22 January 2003.

The prospect of Khanyile's age and sentence being decided on the basis of such a card, the authenticity of which might be impossible to check, was alarming. We asked whether the prosecution would try to ascertain from the records at Chris Hani Baragwanath if Khanyile was born there when his mother said he was, and the prosecutor told us the state didn't have the resources for this. We also asked whether the police could check out the school records to find out if Khanyile was a pupil where his mother said he was, and which Grade he completed in which year. Again we were told the state didn't have the resources. One questions why the state could find the resources to send the defendant's mother to Johannesburg and back but not to make a few phone calls.

Khanyile was driven off by the Investigating Officer to spend his fifth Christmas in prison.

The average length of time that unsentenced prisoners spent in custody was 136 days in December 2000 and 145 days in December 2001. Sipho Khanyile spent 1523 days in custody before he was sentenced. That is more than ten times the average. Awaiting trial and unsentenced prisoners do have a constitutional right to settlement of their cases within a reasonable period. However, when concern was expressed about Khanyile's case by the DPP's office, the response of one of the magistrates and two of the prosecutors in the regional court had been to try to speed up the trial by over-riding the rights of the complainants to protection – trying to get them to give evidence in open court and face cross-examination directly by the man accused of raping them. The constitution also states that children's best interests are paramount.

The taxpayer also has rights – to accountable and cost-effective government. Taking the official 2002 estimate of R97.75 a day to keep an unsentenced prisoner in custody, the average cost for 2001 was R14 101.25 per prisoner. Using this estimate for the case of Khanyile the cost to the state of his imprisonment up to sentencing was R148 873.25.

During the Christmas period, Children First contacted Chris Hani Baragwanath Hospital and discovered that records of birth are destroyed after 5 years. We contacted forensic medical specialists to ascertain if there were any tests that could accurately determine a person's age. We learned that such tests (dental and bone X-rays) become less and less reliable with age. CAP attempted to check the school records but days of running around produced nothing as the local schools did not have registers and the Johannesburg schools could not be contacted.

Life after life

22 January 2003

On the morning of 22 January 2003, the ground floor at Pietermaritzburg High Court looked deserted. We tried to find out what had happened. Was the case going ahead? A police officer reported that the Judge was around but no one had seen the prosecutor. It turned out that he had had to go to Durban so court started at 12.15pm.

There was a different interpreter for this hearing. Creina Alcock asked him if he would please translate everything and speak up, so that the families and witnesses in the public gallery, who were all Zulu-speaking, could understand what was going on. This he did.

Khanyile's mother had returned from Soweto with a torn pink hospital card that was reluctantly entered into the record as 'Exhibit C'. She claimed under oath that it showed her son was born on 22 November 1982 but the year was not legible. The Judge said it looked like 1980 but agreed with his assessors and counsel that it wasn't clear.

Pertinent cross-examination of the mother by the prosecutor, Adv Bailey, had revealed her evidence to be unreliable at best. In cross examination she conceded that Khanyile left home in 1990 when he was 14 . "She is totally confused and her evidence is unreliable," the prosecutor found.

CAP repeatedly raised the issue of translation during the course of the hearings. As Creina noted: "If justice must be seen to be done – it must also be heard to be done, and too often the members of the public gallery are left out of proceedings, unable to understand what is happening, and with no explanation provided by the interpreter.

"Because of the rules of court, interpreters are not allowed to interrupt argument for translation. As a result, the Zulu-speaking gallery could sit, mystified, for 30 minutes while the court was engaged in what was, to all intents and purposes, a private ritual. While the Africans attending the trial may not follow the discussion on details like the legal precedents, they need to be informed about what is happening, and why, and given, at the very least, a summary of the argument.

"Instead this was a service we had to provide ourselves."

The judge concluded that the accused must have been one or two months short of 18 at the time of the offence and then heard argument about what would be an appropriate sentence.

Adv Bailey referred to the judgment in the case of Davis R and State v Jansen, which said that "the rape of a child is an appalling and perverse abuse of male power that strikes a blow at the core of our claim to be a civilised society…and that a community has the right to demand protection and not live in fear of 'terror inadequately punished'."

He argued that the sentence should reflect censure and retribution and that the circumstances of these rapes were so aggravating that Khanyile should go to prison for life despite his age.

The families and supporters of the children were very concerned that the use of a firearm in the attacks and the threat to shoot Sihle and Sibongile were not mentioned as aggravating factors. The assessment of the prosecutor that the issue of the gun was not material may reflect the differences of perception that will occur when one court hears a case in full and another deals with sentencing.

Adv Van Heerden, having previously advocated life on both counts, then proposed that Khanyile should be sentenced to 15 years. He tried to suggest that Khanyile had been influenced in the commission of the rapes, perhaps by reading something – to which the Judge inquired whether he was arguing the offences were premeditated.

Justice Msimang concurred with the prosecution that Khanyile's age alone was no reason to impose a lesser sentence than life. He also concluded that the rapes were pre-planned:

> *"The accused had decided in advance that one day he would commit these offences"*

"…The accused had decided in advance that one day he would commit these offences because they couldn't have been committed on the spur of the moment. He not only raped the girls but ordered them to perform lewd and obscene acts, and caused each complainant to witness the sexual intercourse he had with the other. It is hardly surprising that one of the complainants had to vomit and that when she did he assaulted her…

"These offences were not, therefore, only serious but they also fill one with revulsion. It is difficult to understand why a human being can behave in this fashion to another human being. As a matter of fact, to call you an animal would be an insult to the animal kingdom. The systematic way in which you committed these offences suggests that you were older than the 17 years you claimed. You did not display conduct one would expect of a 17-year-old. I am satisfied that the sentence of life imprisonment would be an appropriate one. You are therefore sentenced to a term of life."

Khanyile turned slowly to face the public gallery, looking for his mother and looking for some reaction from the people gathered there. Perhaps he expected signs of jubilation from the family and supporters of his victims. There was the father of Sihle, whom Khanyile had threatened to 'come for first' when he got out. There was Squbudu Sithole, whose evidence had helped convict him. There was MaMbatha (Natty Duma) and 'those whites' (Creina Alcock and myself), whom Khanyile's mother blamed wholly for his arrest and conviction – though MaMbatha kept reminding her that she had never raped anyone.

But no one was gloating. The courtroom was poorly lit – an ironic cost-saving measure, if it was one, after the hundreds of thousands of Rands that this case had cost. Everyone looked back sadly at Khanyile and then stared at each other in the gloom, as if wondering whether there shouldn't be some more momentous finale to this miserable saga. Shouldn't he cry out? Shouldn't his mother wail? Shouldn't we all raise our fists in the air and chant our victory. But the two fathers looked almost as if it was their son being led from the dock to start his life in prison.

Outside, they explained how they felt. They were relieved it was over; drained too. They were glad that the children would be protected from their rapist: Khanyile had done a terrible thing and must be locked up for a long time.

But at the same time, there was something depressing about having a hand in sending a young man forever to a place where there was no hope of rehabilitation and a high risk of death from HIV/AIDS.

If Khanyile's sentence had been 15 years, we would all probably have let out howls of outrage. "Thirty years would be all right. But life, life is too long!" said Sihle's father, shaking his head. He cheered up on hearing that life probably meant 25 years with good behaviour. In the context of HIV/AIDS, it could actually be a death sentence.

According to an ISS study conducted in October 2002, there was an increase of almost 750% in natural prison deaths over the eight-year period 1995 to 2002 – from 186 to 1087; 90-95% of the deaths were attributable to HIV/AIDS. It was estimated that life expectancy of HIV positive inmates was half that of people with HIV/AIDS outside prison. The Department of Correctional Services has refused to release the findings of an HIV-prevalence study conducted in Westville Medium B (a men's maximum security prison in Durban) in 2001. The researcher, KC Goyer, in the study HIV/AIDS in Prison[22], presented projections for HIV-prevalence and said that "…a conservative estimate of HIV prevalence amongst South African prisoners is approximately 41% for the year 2002."

This suggests that some 10 000 out of the 25 000 people released from prison each month are coming out of jail with HIV/AIDS. Maria Mabena, acting Director of Health at the Department of Correctional Services told the seminar in Pretoria where the findings were announced in February 2003, that South Africa currently had a prison population of 182 000 but the capacity to handle only 90 000.

Discussion turned to what the outcome of the case would mean for the community. It was agreed the impact would be very positive. Men would know they could not come to the area and assault children. They would know that if they tried, they would be caught, that Detective Inspector Shadrack Fiselwa Madondo and his police colleagues at Weenen would make a good case against them and that the courts would send them to prison until they were old. Children would know that they have a right to protection and that if they speak out because someone abuses them, they will be supported. The community would know

22. ISS 2003

Sibongile with her mother, at home, after the sentencing.

that a case like this *can* be won if everyone stands together.

The news was discussed widely in the Weenen-Msinga area. Although *iNdunankulu* Petros Majozi, did not live long enough to hear sentence pronounced, his chief, *iNkosi* Ngoza Mvelase, and the Mchunu chief, *iNkosi* Simakathi Mchunu, received updates from the hearings, which they shared with their councillors and *izinduna*. In the settlements on both sides of the Tugela river, in homes an hour's walk from the road, in all the schools, on the farms, people discussed the case: "Ah, yes. The Khanyile case. What is happening? Life? *Ehe!* that is how it should be."

The prosecutor from Estcourt, Christa Landsberg, on hearing the sentence, expressed her relief and her joy for Sihle and Sibongile. She said: "It was a privilege to be with them in court. When I saw how brave they were, I knew we all had to be brave for them."

The children and their families were also relieved. They said the support they had received has helped them to cope with the ordeal and the outcome was what they wanted. 'Life' imprisonment is not a concept of time that means much to them. The case had been long but their childhoods had flashed past them. Sibongile is now in high school; Sihle had to leave school to labour on a farm temporarily when her father's job came to an end. No one knows if their recovery will ever be complete; Sibongile can't face red meat since the rape and Sihle still becomes nauseous at the sight of soup. For Sibongile at least there is a clear sign of healing; she has become engaged. The wedding could be several years off, for the young man must still find work and the means to pay *ilobolo* (bride price). But it's an easier wait than the wait for justice.

Conclusion

This case was about two young girls from an area most people have never heard of. An area so vast and under-developed that early in the morning you can look for miles across the river and the valleys, and the pin-pricks of white progressing slowly across the hills will be the only sign of life you see – children on their way to school.

These two girls, Sihle and Sibongile, for all that their lives were different to those who grow up in cities and informal settlements, had something in common with children across South Africa. They were preyed upon by a young man who thought he could steal their childhood and walk away smiling.

There are really only two things that make this case different from the dozens of cases of rape of children that happen every day. One is that a cordon of support was thrown around the children to protect them as they embarked on a court case. The other is that they 'won' the case. I use the word advisedly since after more than 4 years the winning was more about closure than victory.

In all other respects, at every step, the case turned out to be distressingly similar to the tens of thousands of other cases that were opened during the period. That is, it was a tedious, arduous journey through the labyrinth that is the criminal justice system. A journey whose destination was the right of children to protection, so plainly guaranteed in our Constitution. A journey signposted by sound laws and progressive policies. The route passed from the pillars to the posts of the justice system. There were islands of professionalism, sensitivity and commitment in a sea of confusion and ignorance. The bridges between those islands were often strained or broken. By the time Sihle and Sibongile had navigated a course from surviving rape to seeing the rapist jailed for life, most people involved were too drained to celebrate. We merely stood looking back at the far shore, blinking guiltily towards all the children who were left behind in these 4 years.

In the course of this case, we often complained about the conduct of particular officials, the difficulty of getting information, the lack of understanding of the needs of children, the lack of sensitivity towards potential and actual abuse of children in the system, the endless delays and inefficiencies. It is important to note that most of these failings were not intentional. They did not stem from apathy, incompetence or malice. They were largely a product of the fragmentation of the system, the overloading of that system, the lack of training and resources to put into place the policies and programmes that the government promotes so loudly, and the deeply flawed approach of trying rape cases in one part of the system and sentencing them in another.

One conclusion from this experience is that if you have a large enough team of people, working with strong enough rape survivors,

backed up by enough resources, connected to enough people who know the law and a few people dedicated to applying it, you can make the system work.

If there could be teams of community-based child justice monitors on hand every time a child entered the criminal justice system – ensuring a prompt medical examination, monitoring the statement-taking, the investigation, the court process and leaping up to hit people on the head with legislation and policy documents every time something went wrong – perhaps the system would work better everywhere.

Given the demands on the human and material resources currently available for providing services to children, a national network of child justice monitors is hardly in prospect.

However, the rights of all our children to survival, development, protection and participation are not negotiable on the basis of lack of resources. We have a duty to uphold those rights whatever the constraints.

Bearing this in mind, the recommendations below, arising from this case, fall broadly into 2 categories:

1. Actions that must be taken by policy-makers, officials and professionals in the criminal justice system, to implement laws designed to protect children and to run the system in a way that puts the best interests of the child first.

2. Actions that can be taken by families, community organisations, NGOs and other members of civil society to support and advocate for the rights of child survivors of rape.

Recommendations to families and civil society are made in the context of the majority of complainants having no access to professional legal advice.

Some of these recommendations have already been proposed by other organisations, in which case our comments are an endorsement. Some have already been accepted in principle by government, in which case they must be implemented urgently.

By its nature, this report is not focused on prevention of child abuse but we agree strongly with those who argue that the successful prosecution of offenders and the proper treatment of victims do in fact help to prevent child abuse. Convincing rapists that they will be caught and punished, and showing victims that they will be protected and respected will deter the former and encourage the latter to come forward.

Recommendations

These recommendations arise directly from experience in this case at the various stages of the criminal justice process. However, research cited in the report makes clear that the problems are widespread and the recommendations are made with a view to implementation on a national scale.

Policy-makers, officials and professionals

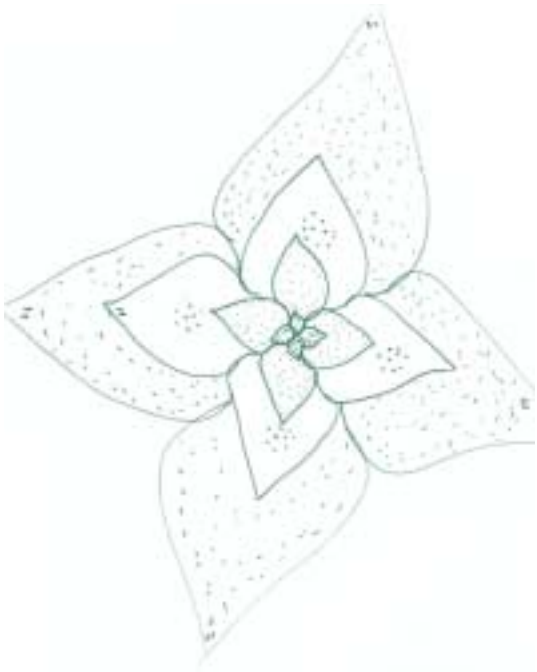
Families, support persons, civil society

Reporting/statement taking

There must be at least three police members – at least two female – in every station (including satellite) who have received specialist training in the reporting and investigation of sexual offences. In some police stations, that will represent half the personnel. In many policing districts, rape accounts for half the reported cases so it is not valid to say resources cannot be found for this. Training must include sensitivity training to ensure that child victims are treated with compassion and afforded dignity. Again, given the scale of child abuse, all new police recruits should be required to demonstrate a special commitment to effective and sensitive investigation and referral of child abuse cases.

A system of statement-taking being conducted by accredited lawyers or paralegals assigned to police districts and available on call might mitigate some of the existing problems.

People accompanying children to report need to demand sensitive treatment, including privacy for statement-taking, and complain formally about insensitive treatment.



Medical examinations

Many victims suffer unnecessary distress due to the way medical examinations are arranged and conducted. Girls who have just been raped must then undergo an uncomfortable, and usually painful, internal examination by a stranger, usually a man, who even if he can speak the child's language, rarely explains

A child has a right to be accompanied by a support person at all stages in the criminal justice process. It is not necessary for a police officer to be present at the examination, although the police have a duty to provide transport to the district surgeon/Accredited Health Care Person. Caregivers or support



what he is doing. In 1999, the Minister of Health replaced the use of District Surgeons for medical forensic examinations with a new system of Accredited Health Care Persons (forensic nurses). An AHCP is a medical officer, specialist or specially trained nurse who, unlike the District Surgeon, is limited to examining and treating sexually abused children.[23] ACHPs, especially female, must be trained and deployed as a matter of urgency.

According to Pietermaritzburg Child Welfare Director Julie Todd, the KZN Health Department had, by the end of 2002, failed to put in place adequate interim measures while the district surgeons were phased out. "All agree about the need to move towards the concept of trained forensic nurses but to date there are none 'on the ground/in the field'. Many who have received the first-phase training are non-practitioners. Most district surgeons (the few that are left and operational) are male."[24]

people need to know the rights of the child to privacy, to caring treatment and to an appropriate explanation of what is being done to them. The caregiver should check that the correct form/crime kit is completed and handed directly to the police.

HIV testing/PEP

The protocols for the voluntary counselling and HIV testing (including re-testing) of child rape survivors, and for the provision of PEP, where indicated, must be implemented throughout the country immediately. If PEP cannot be provided at the health care facility where the child is examined, they must be referred (and transported) at once to a facility that can provide PEP.

Civil society can contribute to a programme of public education around access to VCTR (voluntary counselling testing and referral) and PEP. Caregivers need to be equipped to demand prompt appropriate treatment for child rape survivors.

23. Report on Sexual Offences against Children. *Does the Criminal Justice System Protect Children?* South African Human Rights Commission. ft.60, p79
24. Julie Todd, Chairperson CHIP, Director of Child Welfare, personal communication.

DNA testing

There is a need to ensure that where samples are available, DNA testing is done as a matter of course in child rape cases. Samples should be taken from an accused for DNA analysis on arrest.

A positive test could secure a conviction without children having to go through the trauma of giving evidence and being cross-examined. The cost of the testing will be saved several times over through cases in which it will not be necessary to go through a lengthy prosecution and bring witnesses to court. Even senior members of the CPU and Investigating Officers are not clear about the procedure for taking and sending samples for DNA analysis.

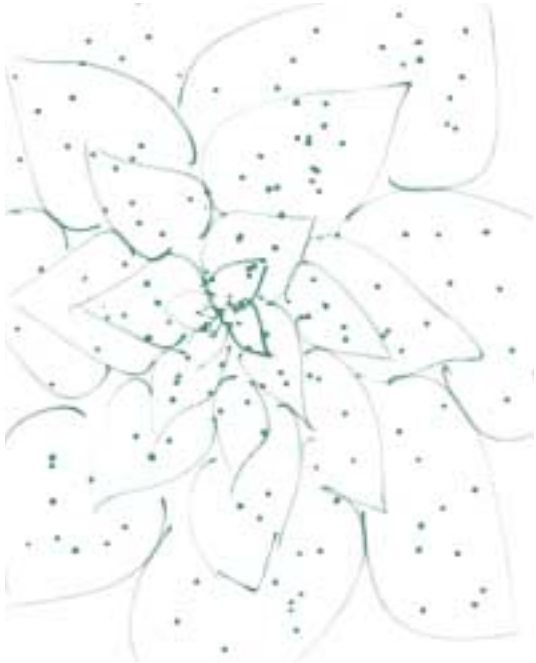
Caregivers and support persons should check with the prosecutor that samples taken for testing are sent for testing and are actually tested. In problematic cases (eg where someone has attempted to buy the docket), a community organisation or NGO should be asked to follow up.

Investigations (training and resources)

Few investigating officers have the specialist training, the resources, the time or the support that is required for effective investigation of sexual offences against children.

As mentioned with regard to statement-taking, this training must be provided as a matter of urgency, and more female police must be recruited and trained.

Resources that are sorely needed by the police for investigations in rural areas (personnel time and vehicles) are spent driving defendants to and from court. A cost-benefit analysis should be conducted of the money 'saved' by not having prisons within easy reach of district courts.



ID parades

'Lack of resources' is not an excuse for forcing a child to confront an alleged rapist face to face, let alone touch him. Even if every police station cannot be equipped with one-way glass, every police station must be within easy reach of a central point where such a facility exists. An instruction must be issued that all stations make use of that facility.

Once an arrest is made, a support person for the child victim should find out from the investigating officer whether an ID parade will be held and in what circumstances. They should point out the right of the child to be protected from direct contact with the alleged rapist.



ID issues – age assessments

Many people in rural areas still do not have ID books and it is not uncommon for accused persons to fail to produce their ID books or other identification where their age is at issue.

In a child rape case, the age of the complainant is critical to how the case is handled and the age of the accused may also have a bearing (especially if, as in this case, he claims after the trial to be a juvenile).

Efforts to confirm the ages of complainants and accused persons should be made at the outset. This is much easier to do when a case is first opened because the investigating officer is in contact with the child's family, the accused and possibly family and associates of the accused.

The scope and limitations of age assessments need to be made clear to police and prosecutors. No one in this case (including Children First) was aware that age assessments become less accurate as a person ages.

Community organisations or people assisting families of child rape survivors need to raise awareness of the need to supply the court with documents that verify the age of the child.

Intermediary facilities

We support the recommendation of the SALC that all victims of sexual offences, as 'vulnerable' witnesses should have an automatic right to give evidence through an intermediary.

Given the number of rapes and indecent assault cases that the courts are handling, there should be a dedicated corps of trained, motivated and experienced intermediaries available to courts on a full-time basis. We support the view of the Sexual Offences Unit in the National Directorate of Public Prosecutions that the prosecution service would improve were there to be established a pool of intermediaries or permanent posts.

Anyone involved in supporting a child at court needs to understand the role of an intermediary.

The use of an intermediary is currently at the discretion of the presiding officer. Support people must request on behalf of the child that an intermediary be used. If the court does not have intermediary facilities, request that the case be transferred to a court that does.

In addition to an intermediary, the child has the right to be accompanied by a support person while giving evidence.

Such intermediaries need to be properly recompensed. Their brief should include intervening on behalf of a child who needs a break or support during a hearing.

Preparation and protection of witnesses

When an investigating officer informs a child/caregiver of a court date, s/he should also inform the child where to report (to which courtroom and to which prosecutor).

The prosecutor should make adequate arrangements to ensure the child is protected from contact with the alleged rapist or his family and witnesses.

The prosecutor should confirm that all arrangements are in place for an intermediary and for the case to proceed before requiring the child to attend.

A support person should explain thoroughly to the child what will happen at court.

The child should be taken, preferably with a friend, to visit the court, to be introduced to the prosecutor and to see where s/he will give evidence. They should be shown where to wait, where to use the toilet and who to ask if they need help.

During a hearing, if a support person feels a child is not being properly protected, they should notify the prosecutor.

One effective way of protecting children is simply to be in court and monitor all the proceedings – officials perform better with an audience.

Public liaison with prosecutors

The relationship of the prosecutor with the complainant is critical to the successful outcome of a case.

In the Khanyile case, there were 5 prosecutors involved at different stages. While they were all helpful and professional, communication and liaison was difficult up to the point of the trial when the control prosecutor handled the case.

The prosecution service is understaffed and the caseload of prosecutors makes it very difficult for them to give the kind of attention that we demanded and received in this case.

A public liaison officer should be appointed at every regional court to handle queries about remand dates, progress of cases and who is handling them, etc.

Training of prosecutors, magistrates, judges

Given the scale of sexual offences against children in South Africa, skills in prosecuting such cases need urgently to be extended to every court in the country, as recommended by SALC[25].

Prosecutors need training in questioning children and in appreciating the cultural context from which the child comes.

Magistrates and judges, too, need to receive specialised training in order to afford children the protection to which they are entitled.

Prosecutors, magistrates, and judges need training in the use of intermediary facilities. This includes understanding the need for an intermediary and some familiarity with the technical requirements, such as the use of CCTV. A court should not require documentary evidence of trauma before protecting a child from secondary trauma.

Support people cannot assume that prosecutors and magistrates are always clear about provisions for children. It is important to check in advance the procedures to be followed and what arrangements have been made for the child.

Oath/evidence of minors

It is unacceptable for convictions on child rape to be referred back to the magistrate (let alone set aside) due to discrepancies over the handling of the oath. There needs to be a clear procedure, communicated to all courts, whereby magistrates indicate on record how they formed the view that a witness would not understand the nature and import of the prescribed oath and was therefore admonished to tell the truth.

We support the recommendation of the SALC that the cautionary rule be abolished.

Implementation of legislative and policy improvements

Examples of good practice, such as special sexual offences courts, need to be replicated[26].

Some 20 specialised courts have been set up nationwide with the intention of limiting secondary victimisation, including special facilities for child witnesses and the provision

25. South African Law Commission. Project 107: Sexual Offences. Executive Summary, p8
26. 'R5m boost for women and child abuse campaign.' *Daily News* 20 November 2002.

of intermediaries. Such courts must be linked to victim support services.[27]

Partnerships between Criminal Justice System (CJS), business, and civil society should be developed to help change attitudes, as well as operating and management systems to improve the running of the system and boost cooperation and enthusiasm, as has been attempted in Port Elizabeth for example.

Delays and backlogs in court

The Institute of Security Studies (ISS) survey of opinions of the National Prosecuting Authority (NPA) found one of the prime causes of dissatisfaction was lengthy delays in trials.

In the Khanyile trial, there were 9 hearings in the district court (including 7 remands for further information or investigation), 29 hearings in the regional court (including 18 remands before the trial) and 4 hearings in the high court (including 3 remands for further information).

This was exhausting and costly to all concerned. Most of all it was unnecessary.

At least 2 of the district court remands could have been avoided if the prosecutor had confirmed that information was available in advance.

At least 4 of the regional court remands could have been avoided if an intermediary was available. At least 2 remands could have been avoided if the right to an intermediary was automatic.

At least 3 of the 4 high court hearings could have been avoided if the issues of the oath and the defendant's age had been clarified between the courts before the case was accepted for sentencing.

Courts invariably, in our experience, start late, finish early, and waste a lot of time in between.

The management of the court rolls must be urgently overhauled so as to expedite remand procedures and to coordinate the roles of court officials, police, and prison authorities.

27. It has been reported, for example, that the victim support centre, known as a Thuthuzela, at GF Jooste Hospital, Manenberg, Western Cape, has reduced secondary abuse of rape survivors by ensuring reporting, examinations and treatment, statement-taking and counselling can all be done in one place, in a comforting environment. It is said this could dramatically reduce the time spent finalising a case from up to 2 years down to as little as 2 months.

Translation/interpretation

Witnesses and family members in the public gallery have a right to hear what is happening in court. Creina Alcock says: "Interpreters tend to be invisible people, but they play a crucial role in our courts. We found them all only too willing to help, often talking with our group afterwards, explaining legal points, and answering questions. They could be used to, great effect, as a tool for legal education, demystifying the justice system for the ordinary people who for various reasons find themselves sitting in on court."

Support persons and representatives of NGOs or paralegals should make representations to court to request audible interpretation.

Sentencing legislation

The referral of cases from regional to high court for sentencing brings the risk that officials will not have time to make themselves familiar with all the facts of the case, especially a lengthy case such as that described above. It also means that the presiding officer does not have a meaningful opportunity to see the demeanour and behaviour of the child, and of the accused, which should have a bearing on the conduct of the court and on the sentence. We support the recommendation of specialist magistrate Sharon Marks that, if child rape cases have to be sentenced in the High Court, there should be one specialist high court set up to hear them. One presiding officer would then hear the whole case and would ensure that the child victim was properly treated.

Caregivers and support people, and organisations involved in preparing children for court, or counselling them, should report problems arising from the transfer of cases from the Regional to the High Court to the DPP.

Probation officer reports for sentencing – interviews with children

If a social worker is instructed to conduct a pre-sentencing interview with a child rape survivor, that social worker must be adequately trained and experienced. The interview should be conducted at the child's home, in the presence of a person with whom the child is comfortable, in her own language. The social worker should not require the child to repeat details of the rape. The age and experience of the child should be considered when asking that child to give an opinion on sentencing.

A caregiver or other support person should be present in the interview if desired by the child. That support person should clarify the reason for the interview and confirm that the questions that will be asked are necessary and relevant.

Inter-departmental and inter-governmental cooperation

The fragmentation of the CJS and the departments with which it needs to interact is a serious impediment to support of the child in the system.

Policy on alignment of social delivery functions with Justice needs to be implemented. Intergovernmental cooperation must be improved to mobilise all support for the victim (health care, counselling, welfare services – especially in cases of abuse within the family or where the arrest causes financial hardship) and ensure that the justice system is sufficiently resourced.

Urgent implementation of the National Child Protection Strategy, which was drawn up by the National Committee on Child Abuse and Neglect and presented to the then minister of Social Development in 1997, is recommended.

Community monitoring of courts

The Department of Justice and the Directorate of Public Prosecutions should invite and facilitate community organisations to monitor cases of sexual offences involving children.

This would improve public understanding of the criminal justice process, improve cooperation between the public and the courts and help to identify, at an early stage, problems that are impeding the smooth functioning of the system.

In late 2001 the NPA commissioned the ISS to conduct an opinion survey to evaluate the services provided by the NPA. This found that people who had been to court as state witnesses or in other capacities were more positive about the work of the prosecution service compared to those who had not.

The NPA commissioned the survey to help it improve its service to the public. One step towards this would be to develop a working relationship with community organisations and to welcome them into the court to monitor and document the treatment of children and make recommendations for its improvement.

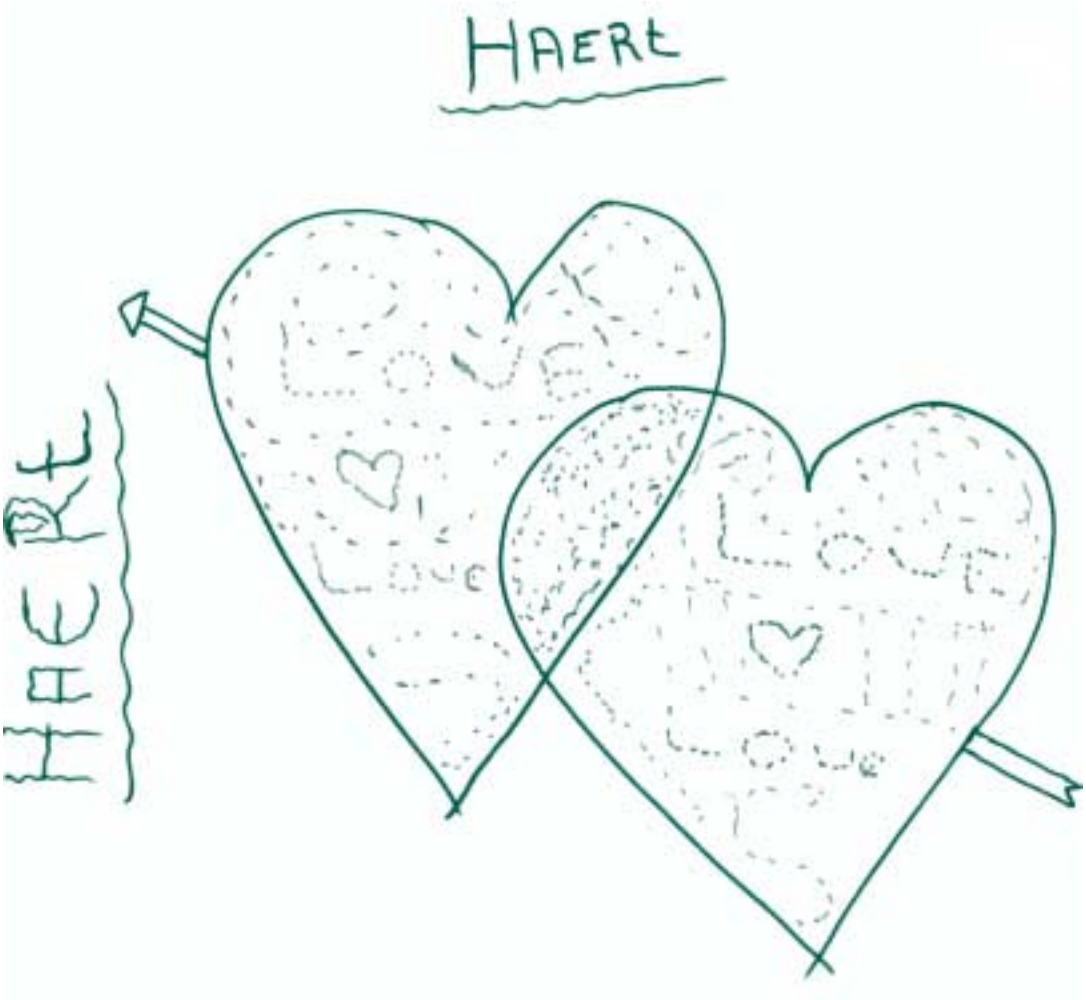
Timeline

Date	Event
21/22 Aug 1998	Last in series of Children First art workshops is held at Mdukatshani.
17 Sept 1998	Sibongile and Sihle are raped. Police decline to take a statement until they return with their mothers.
26 Oct 1998	Sihle goes back to school.
04 Nov 1998	Sihle sees the rapist with a knife and a gun on her way from school.
19 Nov 1998	Sipho Gift Khanyile is arrested and detained at Colenso.
20 November 1998	Khanyile appears at Weenen District Court and the case is remanded to 11 December for further investigation – the first of 9 hearings before the case is committed to the regional court.
11 December 1998	The case is remanded for further investigation to 8 January 1999.
8 January 1999	The case is remanded to 15 January 1999 for an age assessment.
15 January 1999	The age assessment had not been done so the case is remanded to 29 January.
29 January 1999	The age assessment shows the accused is at least 18 and the case is remanded to 5 February.
4 Feb 1999	An ID parade is held and the girls are instructed to walk past nine men and point out their attacker by touching him on the arm.
5 February 1999	The case is remanded at the request of the Investigating Officer – to 12 February.
12 February 1999	Remanded to 19 February – reason unknown.
19 February 1999	Remanded to 26 February – reason unknown.

26 February 1999	Remanded for a regional court date to be set. Transferred to the Estcourt regional court for a bail hearing on 4 March.
4 March 1999	Accused applies for bail and the application is rejected. The case is remanded for further investigation to 25 March. This is the first of 29 hearings at Estcourt Regional Court, including the sentencing remand.
25 March 1999	Case postponed to 26 April.
26 April 1999	Postponed to 20 September for trial.
20 September 1999	Case postponed (see ChildrenFIRST issue 25) to 10 January 2000 (see issue 27)
10 January 2000	Remanded to 23 May 2000. Accused dismisses his legal aid lawyer.
23 May 2000	Case postponed until 9 November
June 2000	1 year and 9 months after the rape, the children have not been given the results of their HIV tests.
09 Nov 2000	Remanded for DNA tests – remand date to be advised.
29 Jan 2001	Remanded – no intermediary arranged.
19 March 2001	No intermediary is arranged so the witnesses are cautioned to return in the morning.
20 March 2001	No intermediary is available – the girls are pressed to give evidence in court and refuse. The accused dismisses his second legal aid lawyer. Case remanded to 16 October.
16 Oct 2001	No intermediary available so case remanded to 3 November.
3 Nov 2001	No intermediary is available – girls refuse to give evidence in camera since the accused will cross-examine them directly. Remanded until 10 November 2002.
10 Nov 2001	Children First brings a social worker to serve as intermediary. Interview with prosecutor is interrupted 6 times. Magistrate demands evidence that giving evidence in court will be unduly stressful to the girls. Case remanded until 17 November 2001.
17 Nov 2001	The accused is sick; his mother fails to attend as a witness. Case remanded to 22 November 2001.
22 Nov 2001	Magistrate agrees to use of an intermediary. Case adjourned to 27 November to set new trial date.
27 Nov 2001	Remanded for trial on 26 January 2002.
26 Jan 2002	Trial date moved to 9 February.

9 Feb 2002	Sibongile gives evidence via intermediary but prosecutor tries to bring her into court to identify the accused. The accused starts cross-examination then requests more time to prepare. Remanded to 23 February.
23 Feb 2002	Intermediary 'unavailable'. Remanded until 2 March 2002.
2 March 2002	Sibongile is cross-examined, Sihle gives evidence and is cross-examined. Two other witnesses give evidence. Case remanded until the following week – because the accused is hungry. The children are allowed to go home, having come back and forth to court 20 times.
9 March 2002	8 witnesses, including 5 police officers, give evidence. Case adjourned to 23 March.
23 March 2002	5 witnesses give evidence. Adjourned to 3 April.
3 April 2002	1 witness gives evidence. Adjourned to 13 April.
13 April 2002	The accused requests that his mother be subpoenaed from Orlando, to appear on his behalf. Case adjourned to 27 April.
27 April 2002	Accused's mother refuses to testify. He has no other witnesses. The prosecutor requests an adjournment to prepare her address on the state's behalf. Case adjourned to 2 May.
2 May 2002	Prosecutor presents state's case. Magistrate adjourns to 18 May to prepare judgment.
18 May 2002	Accused is convicted on both counts of rape. The case is adjourned to 21 May for consideration of sentencing.
21 May 2002	Confusion about sentencing jurisdiction. Adjourned to the following day.
22 May 2002	Referred to the High Court for sentencing – expected date for hearing is 23 August.

23 August 2002	High Court is not ready to proceed.
21 Oct 2002	First of 4 hearings at Pietermaritzburg. Case is referred back to magistrate with query about the procedure for administering the oath. Remanded until 13 November. Sihle and Sibongile are subpoenaed.
13 Nov 2002	Sibongile and Sihle called into open court to confirm that they did not understand the oath. Conviction upheld. Dispute over Khanyile's age. Remanded to 12 December.
12 December 2002	Dispute regarding Khanyile's age not settled. Remanded to 22 January 2003.
22 January 2003	Khayile's age accepted as just short of 18 at the time of the rapes. He is sentenced to life imprisonment. Children First and CAP went to court 31 times – 27 at Estcourt and 4 at Pietermaritzburg. Children First went to Msinga/Weenen 3 times for follow-up and Weenen once to check records. We also made at least 100 calls to court, 30 calls to Msinga and 20 calls to officials of Department of Justice and fellow children's rights organisations. CAP staff spent several days trying to find witnesses and information needed for the case, as well as bringing the children, families and witnesses to court



Costs[i]

District Court Costs

Cost Assumptions

Transport

Cost per km	1.3

Salaries	Basic	Benefits	Other	Total	Hourly rate
Magistrate	203994	69846	714	274554	140.0785714
Prosecutor	144605	55129	506	200240	102.1632653
Interpreter	50909	31911	489	83309	42.50459184
Clerk of Court	50909	31911	489	83309	42.50459184[1]
Court Orderly	31100	27003	299	58402	29.79693878
Stenographer	53264	32495	511	86270	44.01530612
Investigating Officer	50909	31911	489	83309	42.50459184[2]
Police Officer	31100	27003	299	58402	29.79693878[3]

Premises

Assumed hourly cost of court room	100

Detention costs

Daily cost of detention	97.75

Other

Average number of working hours for personnel (based on 49 weeks)	1960
No. of appearances	9

i. Costings kindly prepared by Conrad Barbeton, Cornerstone Economic Research.

1. Used salary for court messenger
2. Used salary equivalent to a court interpreter
3. Used salary equivalent to the Court Orderly

District Court Costs

Cost Calculations

Transport Costs

Vehicle cost	Trips	Time	Distance (km return)	Cost	Total
Colenso-Weenen	9		65	760.5	
Personnel cost					
Investigating Officer	9	1		382.5413265	
Police Officer	9	1		268.172449	
					1 411.21

Personnel Costs

Personnel	Number	Time Assumptions	Number hearings	Total Time	Cost	Total
Magistrate	1	0.33 per hearing	9	2.97	416.0333571	
Prosecutor	1	0.33 per hearing	9	2.97	303.424898	
Interpreter	1	0.33 per hearing	9	2.97	126.2386378	
Clerk of Court	1	0.33 per hearing	9	2.97	126.2386378	
Court Orderly	1	0.33 per hearing	9	2.97	88.49690816	
Stenographer	1	0.33 per hearing	9	2.97	130.7254592	
Investigating Officer	1	0.33 per hearing	9	2.97	126.2386378	
Police Officer	1	0.33 per hearing	9	2.97	88.49690816	
						1 405.89

Detention Costs

Days in detention	105	10263.75	
			10 263.75

Other current costs

Item	Average cost	No appearances	Cost	Total
Admin costs	20 per appearance	9		180
Equipment costs	15 per appearance	9		135
				315.00

Infrastructure Costs

	No.	Average time	Total hours	Cost	Total
Court room	9	0.33 per hearing	2.97	R 297	
					297.00

Total costs **R13 692.86**

Regional Court Costs

Cost Assumptions

Transport

Cost per km	1.3

Salaries	Basic	Benefits	Other	Total	Hourly rate
Magistrate	203994	69846	714	274554	140.0785714
Prosecutor	144605	55129	506	200240	102.1632653
Interpreter	50909	31911	489	83309	42.50459184
Clerk of Court	50909	31911	489	83309	42.50459184 [1]
Court Orderly	31100	27003	299	58402	29.79693878
Stenographer	53264	32495	511	86270	44.01530612
Investigating Officer	50909	31911	489	83309	42.50459184 [2]
Police Officer	31100	27003	299	58402	29.79693878 [3]
Prison Warder	31100	27003	299	58402	29.79693878 [4]
Public Defender				27000	13.7755102 [5]
Attorneys					100 [6]
Social worker	50909	31911	489	83309	42.50459184 [7]
District Surgeon					200 [8]

Premises

Assumed hourly cost of court room	200

Detention costs

Daily cost of detention	97.75

Other

Average number of working hours for personnel (based on 49 weeks)	1960
No. of appearances	28
Length of court appearances (assumed average)	6 hours

1. Used salary for court messenger
2. Used salary equivalent to a court interpreter
3. Used salary equivalent to the Court Orderly
4. Used salary equivalent to the Court Orderly
5. Based on cost used in Child Justice Project
6. Assumed hourly rate of attorneys
7. Used salary of Court Interpreter
8. Assumed hourly rate based on standard consultation fee

Regional Court Costs

Cost Calculations

Transport Costs

Vehicle cost	Trips	Time	Distance (km return)	Cost	Total
Escourt Prison to court	28		5	182	
IO Weenen to Escourt	28		90	3276	
PO Weenen to Escourt	10		90 [1]	1170	
Personnel cost					
Prison warder	28	0.5		417.1571429	
Investigating Officer	28	1.25		1487.660714	
Police Officer	5	1.25		931.1543367	
					7 463.97

Personnel Costs

Personnel	Number	Average Court Time	Total	Other Time	Total Time	Cost	Total
Magistrate	28	6	168	8 [2]	176	24653.82857	
Prosecutor	28	6	168	28 [3]	196	20024	
Interpreter	28	6	168		168	7140.771429	
Clerk of Court	28	6	168		168	7140.771429	
Court Orderly	28	6	168		168	5005.885714	
Stenographer	28	6	168		168	7394.571429	
Investigating Officer	28	6	168	28 [4]	196	8330.9	
Police Officer	25	6	150		150	4469.540816	
Prison Warder	28	6	168		168	5005.885714	
Public Defender	1	6	6		6	82.65306122	
Attorneys	3	6	18	3 [5]	21	2100	
Social worker	4	6	24		24	1020.110204	
District Surgeon	2	6	12	2 [6]	14	2800	
							95 168.92

Detention Costs

Days in detention	1326		129 616.50	
				R129 616.50

continued on the next page....

1. two vehicles for the five officers
2. writing up
3. preparation
4. preparation
5. consultation
6. preparation

Other current costs				
Item	Average cost	No appearances	Cost	Total
Admin costs	20 per appearance	28	560	
Equipment costs	15 per appearance	28	420	
CCTV and Monitor	1000 assumed one-day hire	7	7000	
Winess fees	10	167	1670	
Transport of witness	90 assumed bus fare	2	180	
				9 830.00

Infrastructure Costs					
	No.	Average time	Total hours	Cost	Total
Court room	28	4 per hearing	112	22400	
					22 400.00

Total costs	**R264 479.39**

High Court Costs

Cost Assumptions

Transport

Cost per km	1.3

Salaries	Basic	Benefits	Other	Total	Hourly rate
Judge				364000	185.7143
Assessor					100
Senior Prosecutor	257631	83137	902	341670	174.3214
Interpreter	50909	31911	489	83309	42.50459
Clerk of Court	50909	31911	489	83309	42.50459
Court Orderly	50909	31911	489	83309	42.50459
Stenographer	53264	32495	511	86270	44.0153
Investigating Officer	50909	31911	489	83309	42.50459
Police Officer	31100	27003	299	58402	29.79694
Defence Advocate	257631	83137	902	341670	174.3214
Social worker	50909	31911	489	83309	42.50459

Premises

Assumed hourly cost of court room	300

Detention costs

Daily cost of detention	97.75

Other

Average number of working hours for personnel (based on 49 weeks)	1960
No. of appearances	4
Length of court appearances (assumed average)	4 hours

High Court Costs

Cost Calculations

Transport Costs

Vehicle cost	Trips	Time	Distance (km return)	Cost	Total
Weenen-PMB	4		270	1404	
Personnel cost					
Investigating Officer	4	3.5		595.0643	
Police Officer	4	3.5		417.1571	
					2 416.22

Personnel Costs

Personnel	Number	Average Court Time	Total Time	Other Time	Total Time	Cost	Total
Judge	4	4	16	1 [1]	17	3157.14	
Assessor	8	4	32	2 [2]	34	3400	
Senior Prosecutor	4	4	16	2 [3]	18	3137.79	
Interpreter	4	4	16		16	680.073	
Clerk of Court	4	4	16		16	680.073	
Court Orderly	4	4	16		16	680.073	
Stenographer	4	4	16		16	704.245	
Investigating Officer	4	4	16	2 [4]	18	765.083	
Police Officer	4	4	16		16	476.751	
Defence Advocate	4	4	16	3 [5]	19	3312.11	
Social worker	4	4	16		16	680.073	
							17 673.41

Detention Costs

Days in detention	92		8993	
				8 993.00

Other current costs

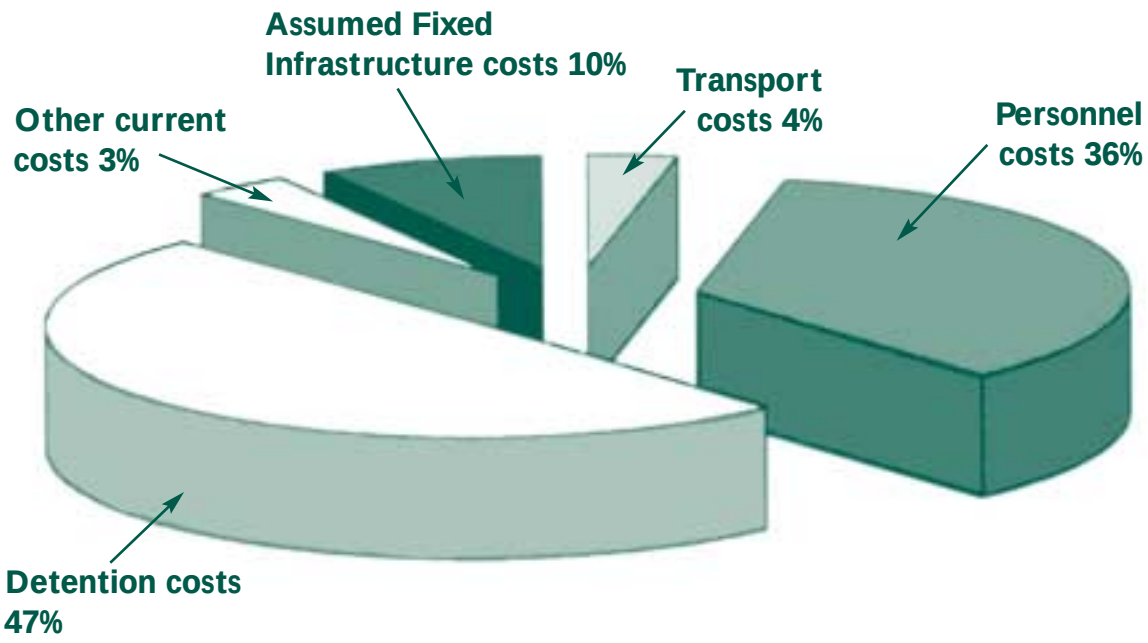
Item	Average cost	No appearances	Cost	Total
Admin costs	20 per appearance	4	80	
Equipment costs	15 per appearance	4	60	
Transport of witness	90 assumed bus fare	4	180	
				320.00

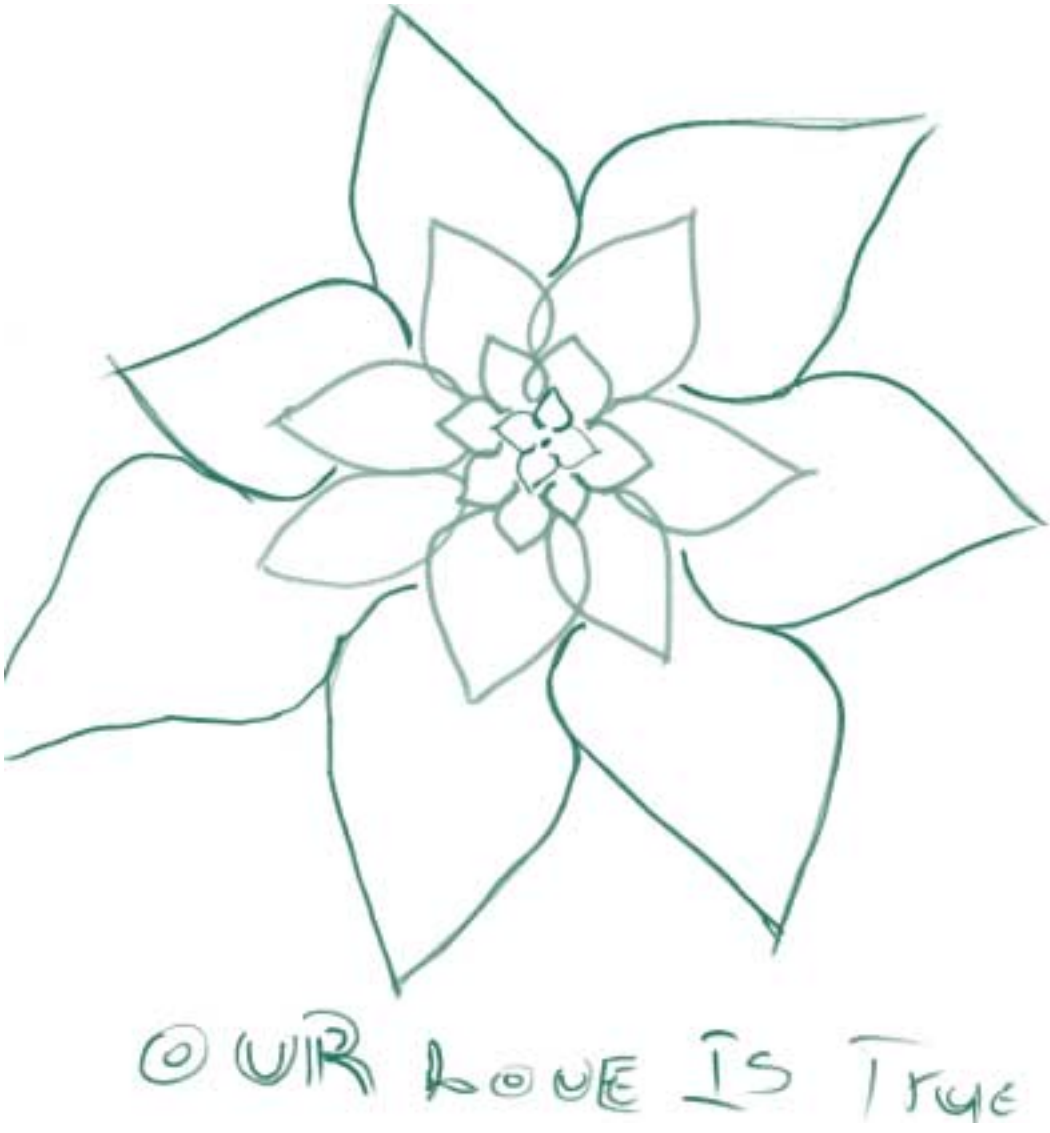
1. preparation
2. preparation
3. preparation
4. preparation
5. preparation

Infrastructure Costs					
	No.	Average time	Total hours	Cost	Total
Court room	4	8 per hearing	32	9600	
					9 600.00
Total costs					**R39 002.63**

Total Court Costs		
Cost Calculations		**R11 291.41**
Vehicle	6792.5	
Personnel	4499	
Personnel Costs		**R114 248.22**
Detention Costs		**R148 873.25**
Other Current Costs		**R10 465.00**
Assumed Fixed Infrastructure Costs		**R32 297.00**
	Court Subtotal	**R317 174.88**
Community Costs		
CAP		**R26 440.00**
Children First		**R20 731.00**
	Community Subtotal	**R47 171.00**
	Overall Subtotal	**R364 345.88**

Costs to the State





Recommended Retail Price: R95