(Gauteng Transcribers)

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, GQEBERHA)

CASE NO: CC16/18

DATE: 2022.06.13 + 14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES : YES / NO
(3) REVISED

In the matter between

THE STATE

and

BHEKI WELLINGTON NXASANA + 2 OTHERS

J U D G M E N T

GOOSEN, J:

This case brings into focus attention between the line of development of a globally integrated legal system and localised customary uses and practice that constitute customary legal systems. It is a tension which is well recognised within our law and in the development of our constitutional democracy. At the heart of the case, however, is a young woman who at 13 years of age found herself ostensibly married to a 61-year-old man and subjected to

coerced sexual intercourse. At the heart of the matter lies the position of that 13-year-old in relation to persons of power and influence and control over her.

The prosecution has in this case relied upon legislation developed to combat and prevent a global scourge of trafficking in persons. The defence contends for adherence to customary practices to some degree resulting in essentially a lack of intention to commit the statutory offences of trafficking.

There are three accused. Mr Bheki Nxasana, who is accused 1, to whom I shall refer as Bheki, is charged with two contraventions of the Prevention and Combatting of Trafficking in Persons Act, to which I will refer as the Trafficking Act, and two counts of rape. Mr Mxosheni Beaker Sibiya, who is accused 2, and to whom I shall refer as Sibiya, and Ms Nomvo Nxasana, who is accused 3, and to whom I shall refer as Nomvo, are each charged with counts 1 and 2 being contraventions of the Trafficking Act.

By way of footnote I wish to make it clear at the outset that no disrespect is intended by referring to accused 1 as Bheki and accused 3 as Nomvo, their first names. It is done simply to avoid any confusion in the matter.

The indictment alleges that in the period between April and October 2016 the accused acted in concert, concluded a forced marriage for the purpose of exploitation between Akhona Manzi, the complainant, and to whom I shall refer

throughout as the complainant, and Bheki. At the time of the conclusion of this forced marriage the complainant was 13 years old and Bheki 61 years old. The forced marriage, it is alleged, was concluded in contravention of section 4(2)(b) of the Trafficking Act, and that is count 2.

The indictment further alleges that during or about November 2016 and April 2017 the accused caused the complainant to be transported between Shakaskraal in KwaZulu Natal, Bizana in the Eastern Cape and Gqeberha in the Eastern Cape on various occasions in contravention of section 4(1) of the Trafficking Act, that is count 1.

In relation to the charges of rape it is alleged that during November/December 2016 and again in March/April 2017 Bheki raped the complainant at his home in Gqeberha by forcefully performing acts of sexual penetration on the complainant against her will.

At the commencement of the trial Bheki pleaded not guilty to all charges. Sibiya pleaded guilty to count 1 and not guilty to count 2. He set out the basis of his plea and a plea explanation in terms of section 115 of the Criminal Procedure Act. The basis of the plea of guilty in relation to count 1 was not accepted by the prosecution. Accordingly, a plea of not guilty was entered in relation to both counts. Nomvo tendered a plea of not guilty in relation to counts 1 and 2, but offered a plea explanation in terms of section 115(1) of the Criminal

Procedure Act.

THE TRIAL

The offences for which the accused stand charged were committed in several magisterial districts and within the territorial jurisdiction of two divisions of the High Court. Prior to the commencement of the trial the state obtained a direction from the National Director of Public Prosecutions in terms of section 111 of the Criminal Procedure Act read with section 22(3) of the National Prosecuting Authority Act that the investigation and prosecution of the offences commence before this Court, thereby according this Court with the necessary jurisdiction to deal with the matters.

The trial commenced on 26 March 2019. In the light of the fact that this judgment is being delivered on 13 June 2022 it is necessary to provide a brief explanation for the lengthy delay in bringing the trial to finality. Throughout the trial the accused have been on bail. Bheki resides in Gqeberha although his family homestead is in Bizana. Sibiya and Nomvo reside in the district of KwaDukuza near Stanger, Shakaskraal, in KwaZulu Natal, and they reside in different villages in that area. At the commencement of the trial Bheki was represented by Advocate Marele. He was instructed by an attorney. Sibiya and Nomvo were represented by Advocate Crompton who was instructed by the Legal Aid Board. During the course of the initial stages of the trial at a stage when the complainant was

under cross-examination Advocate Marele and his attorney's mandate was terminated. This necessitated what turned into a lengthy postponement of the matter. Upon resumption of the matter the legal representatives of each of the accused changed. Bheki was then represented by Mr Malgas who was privately instructed, Sibiya was represented by Ms Cubungu on instruction of the Legal Aid Board, and Nomvo was represented by Mr Riley, also on instruction of the Legal Aid Board. That was because at some stage in those initial proceedings it appeared that there was a conflict of interest between Sibiya and Nomvo and Advocate Crompton withdrew. The matter was then able to progress to a stage when the state case was closed. During this period the continuation of the trial was, however, hampered due to the global Covid-19 pandemic and the resultant national state of disaster lockdowns. Particular logistical difficulties were encountered with travel restrictions. In addition, there was the need for caution because of the age and vulnerability of the accused. Various attempts were made to facilitate the finalisation of the matter during the latter part of 2020 and early 2021 during court vacations. Illness of the accused and difficulties securing the services of an interpreter fluent in both isiXhosa and isiZulu, however, bedevilled the arrangements. There were still more delays occasioned by further changes to legal representatives. Mr Malgas was unable to proceed with the matter due to lack of finances on

the part of his client. Mr Riley ceased practise and withdrew for this reason. In the event Mrs Roux for Bheki and Mr Bodlo for Nomvo came on record instructed by the Legal Aid Board.

Now it will be apparent from this brief account that the trial was beset by a multitude of difficulties within the context of a global pandemic all leading to considerable delays. Every effort was, however, made to ensure that neither the prosecution nor the defence was prejudiced by these delays, and it must be emphasised that counsel involved in the matter were in no way at fault.

THE STATE CASE – A DESCRIPTIVE NARRATIVE

Much of the evidence presented by the prosecution was common cause or not placed in dispute. What is set out below is a narration of the evidence presented by 10 witnesses who testified for the prosecution. I shall later in the judgment deal with the evidence of particular witnesses where necessary and deal with the evaluation of that testimony.

The complainant was born on 19 October 2003. She is one of six siblings, two older sisters and two younger brothers. Her father abandoned the children. She lived with her mother and siblings in KwaDukuza, Stander in KwaZulu Natal. Her mother passed away in June 2012 when she was not yet 10 years old. As a result, she and her siblings went to live with her uncle Sibiya who lived in Shayamoya, a village in Shakaskraal. When they moved in with Sibiya she was

attending school. Relations in the Sibiya household were strained. The complainant's sisters were working and apparently there were quarrels between them and Sibiya about contributing to the household. As a result of this the older sisters moved out. The complainant and her younger brothers continued to live with Sibiya. According to the complainant her uncle was very strict. He did not approve of her playing with other children and if she arrived home late he would give her a hiding. She was afraid of her uncle. At times she was too afraid to enter the house and she would sleep in the outside toilet. She stopped attending school at some stage and she did not complete grade 4. At some stage in 2014 Sibiya arranged for the complainant to stay with a member of his church, Deliwe Mbonga, whom I will refer to as Deliwe. Deliwe taught at the Sunday school classes. Nomvo assisted her.

It is common cause that the complainant, having met Nomvo at the church she attended with her uncle Sibiya, asked to be allowed to stay with Nomvo. She then went to live with Nomvo in Shakaskraal. At the time three of Nomvo's grandsons were staying with her. The complainant was not attending school. At the end of that year, 2014, during the December school holidays Nomvo's daughter, Nofikile Magadlela, to whom I shall refer as Nofikile, came to visit. She was accompanied by her daughter, Yonela, who was of more or less the same age as the complainant. Nofikile

suggested that the complainant should return with her to Bizana where she could be cared for by her and her husband. She could then attend school with Yonela. Nomvo discussed this with Sibiya who agreed. The complainant then moved to Bizana where she lived with Nofikile. In order to enrol her in school Sibiya provided Nomvo with the complainant's birth certificate and school reports. These were sent to Nofikile who enrolled the complainant in school. The complainant was enrolled in grade 5 despite not having completed grade 4. She was enrolled with Yonela. At the end of 2015 both Yonela and the complainant were promoted to grade 6.

The events giving rise to the prosecution of the accused commenced, it appears, in 2016. It is not clear when in 2016 they commenced, although as will be seen they were already somewhat advanced in March 2016. It is common cause that on an occasion when Nofikile and Yonela were away from the home the complainant answered Nofikile's telephone and spoke to a person reflected on the phone as Malume, which means uncle. She spoke briefly with this person and explained who she was. When Nofikile returned the complainant told her about the call. Nofikile called that person. It is common cause that the Malume who called was Bheki, Nofikile's uncle.

At some stage after this first telephone contact between Bheki and the complainant Nofikile asked the complainant what she would say if there was a man who wanted to marry her.

This occurred it appears on an occasion when she and Nofikile were collecting firewood. The complainant responded that she would love that. On their return to the homestead Nofikile telephoned someone and told this person that the complainant had agreed. Subsequent to this Malume called on several occasions. It was arranged that Lihle, Nofikile's son, take photographs of the complainant and send them to Bheki. Thereafter Bheki instructed Nofikile to purchase a cell phone for the complainant so that he could contact her directly as and when he wished to do so. At this stage the complainant only knew this person as Malume. She did not know that he was Nomvo's brother and only later came to know that his name was Bheki.

According to the complainant she first met Bheki on an occasion when she was instructed by Nofikile to travel to the town of Bizana. She was told to wait at the taxi rank. A man approached her and asked her name. He introduced himself as Bheki. He gave her money and she bought some groceries and baby products. They then sat at a fast food outlet called The Hungry Lion, but she did not have anything to eat. After this she returned home and gave the groceries to Nofikile.

This description of the meeting in Bizana is not supported by Nofikile's testimony. Bheki's evidence, however, confirms that he met the complainant in Bizana. He provided a further account which suggested that the complainant had

accompanied him to his homestead in Bizana and stayed there for two days. Nomvo's version of events also alleges a meeting in Bizana, but this version is plainly hearsay since she was not present at the time. I will deal more fully later in the judgment with the assessment of the testimony of the witnesses.

It is common cause that during the latter half of 2016 the complainant stopped attending school again. It is not clear precisely when. Yonela continued to attend school. The complainant stated that Nofikile had told her that Bheki had instructed that she be taught the practices of being a *makoti*, a young bride or bride to be. She did not, however, know what it meant to be a *makoti*. Nofikile taught her to cook, how to wash clothes and how to apply dung to the floor of the home. Towards the end of the year Bheki sent money to enable the complainant to travel to Nomvo's house in Shakaskraal. According to Nofikile her husband insisted that the complainant be returned to her family since she was to be married. The complainant travelled by taxi from Bizana to Durban. She was met there by Nomvo and they travelled to Nkobongo in Shakaskraal together. The complainant then travelled to Shayamoya to be with her uncle Sibiya.

Before proceeding with the broad narrative of events it is necessary to traverse the sequence of events which unfolded whilst the complainant was residing with Nofikile in

2016. The evidence in relation to these events is again largely common cause. The description is drawn from the testimony of Deliwe and the facts admitted by Bheki, Sibiya and Nomvo.

Following his first telephonic contact with the complainant Bheki spoke to his sister, Nomvo. Nomvo was then residing in Shakaskraal. He expressed a desire to marry the complainant. There is a conflict in the versions presented by Bheki and Nomvo about how this conversation progressed. For present purposes it suffices to state that Bheki requested Nomvo to solicit the support or intercession of Deliwe at some stage to approach Sibiya. In or about March 2016 Deliwe spoke to Sibiya about Bheki's desire to marry the complainant. Although there are different accounts of what occurred in these discussions, including as to the basis upon which agreement was ultimately concluded, it is common cause that there was a negotiation process, that a bride price was agreed and that some payments were made. It is common cause that Bheki was in communication with Nomvo throughout this process, that he transferred money into her account with which to make payments, and that Deliwe acted as the intermediary. It is also common cause that at a stage when certain agreements had been reached and some payments made a request was made by Sibiya to release the complainant to the groom's family. This request was framed as discussions regarding the payment of a borrowing cow. The precise meaning of this process is a

matter of dispute between the accused. I shall address this later. For present it suffices to record that the discussions relating to the payment of a borrowing cow occurred at a stage in October 2016 when the complainant was staying with Sibiya in Shakaskraal after she had returned from Bizana.

I return to the overall narrative to state that it was common cause that after the payment of an amount of money as the borrowing cow the complainant travelled from Shakaskraal in KwaZulu Natal to Gqeberha where she was met by Bheki. The complainant's travel to Gqeberha was at the request of Bheki. Bheki paid for the transport costs. The money was transferred to the bank account of Nomvo who purchased the required tickets. The complainant was accompanied by Sibiya to the town centre in Shakaskraal. From there she travelled with Nomvo to Durban. In Durban she was placed on a taxi which was headed to Mthatha. The taxi driver was requested to ensure that she took a taxi from Mthatha to Njoli Square in New Brighton, Gqeberha. After placing the complainant on the taxi to Mthatha Nomvo returned to Shakaskraal.

Upon the complainant's arrival at Njoli Square in New Brighton, Gqeberha in the early hours of the morning the complainant was met by Bheki. He drove her to his home in Kuyga which is on the western outskirts of Gqeberha. When they got to the house the complainant said she was tired and

wanted to go to sleep. She undressed and got into the bed in the bedroom. Bheki also got into the bed. He wanted to have sexual intercourse with her. She resisted. He physically overpowered her and proceeded to penetrate her sexually. He subdued her by placing his hands around her neck. Later that morning he left for work. He was working as a stable hand at the horse racing course in Fairview. When he left he told her to clean the house. After cleaning the house, she took a chair and sat outside. When Bheki returned home he scolded her for sitting outside. Bheki spoke to a tenant who was living on the property and told him to keep an eye on the complainant. She prepared hot water for him to wash and served him a meal. They watched television until about 9 PM when he switched off the TV and indicated that they should go to bed. He again had sexual intercourse with her against her wishes.

The complainant explained that this pattern continued. One day when they were at home together a young woman arrived. She was introduced as Nomabekisisa, his daughter. Bheki told her that the complainant is her young mother. Nomabekisisa, who was 19 or 20 years old at the time, asked him how that is possible since the complainant was still a young girl. According to Nomabekisisa Bheki told her that when people see them together and ask who the complainant is she must say that they are sisters.

I shall later in this judgment deal with the detailed

evidence relating to events that occurred during this period when the complainant was in Gqeberha. For present purposes it is sufficient to record that the complainant testified to several instances of violence or the threat of violence directed at her either to compel sexual intercourse or to punish her for some or other infraction. Bheki denied such conduct.

Nomabekisisa visited the complainant at Bheki's house on several occasions. On one occasion she accompanied the complainant to Korsten to buy clothes for the complainant. That evening when the complainant showed Bheki the clothes they had purchased he remonstrated with her. He told her that the clothes she had bought were inappropriate because she was a married woman and could not wear short dresses or trousers.

On still another occasion another woman called Thandeka visited them. Thandeka was Nomabekisisa's elder sister, although not Bheki's child. Apparently a stepdaughter. Bheki arranged for Thandeka to take the complainant to buy clothes and a bus ticket so that the complainant could return to Bizana to live with Nomvo. On the night before this shopping trip Bheki insisted that she have sex with him. If she refused, he would not give her the money with which to buy clothes. On the following day she was taken to Korsten to buy clothes. Thandeka was told that they should buy long dresses. She bought a suitcase, long dresses and shoes. A bus ticket was

bought for her to travel to Durban. When purchasing the ticket, the complainant told the person she was born in 2003. Thandeka heard this. She later reported this to her friend, Melanie Dapo.

On the following day Thandeka took her to the bus station where the complainant boarded a bus to Durban. She was met in Durban by Nomvo. They then travelled to Bizana. At Bizana they boarded a taxi to Amanzayoni, a nearby village. At Amanzayoni they went to live in a house owned by Bheki. Nomvo provided the complainant with what were described as *amadaki* clothing and dressed the complainant as a *makoti*, a young wife. The complainant and Nomvo lived in this house for some months. Shortly before Easter 2017 Nomvo asked to borrow the complainant's suitcase to travel to Shakaskraal for the Easter church services. At that time Bheki was phoning repeatedly to tell the complainant to return to him. She did not want to return. She therefore did not take his calls. It is common cause that this resulted in an argument between Nomvo and the complainant.

Nomvo left Bizana and travelled to Shakaskraal. The complainant remained in Bizana to care for Nomvo's young grandson. Whilst on her own in Bizana the complainant befriended a girl of her own age called Dumi. Bheki was informed and he telephoned her to scold her for befriending a girl. She was told that she could only befriend married women.

Nomvo also called her and scolded her for the same reason. When Nomvo returned to Bizana she informed the complainant that she would be returning to Bheki in Gqeberha. She was taken by taxi to Bizana where she was placed on a taxi to Mthatha. In Mthatha she boarded a bus to Greenacres, Gqeberha. She was met by Bheki who took her to his house. It was a Saturday. She was told to clean the house while Bheki was at work. During the course of the day the complainant telephoned Thandeka and told her that she was back at Bheki's house. Both Thandeka and Nomabekisisa came to visit her. She told them that she did not want to be there. They invited her to go to church with them on the following day. That evening the complainant asked Bheki if she could go to church with Nomabekisisa. He refused. Bheki confronted her about several things which had been reported to him about her stay in Bizana. These involved an instance where she had fallen out of bed, the fact that stones had been thrown on the roof and that a bottle had been buried in the yard. They had a heated row. That night he forcefully had sexual intercourse with her again. On the Sunday Bheki went to work. The complainant telephoned Thandeka and asked her to help her to leave. She wrote a letter which she left for Bheki telling him that she had left and that he would never find her.

Thandeka had come to the house. She agreed to help

the complainant to leave. They left without taking any of her clothes so as not to arouse suspicion in the neighbourhood. Thandeka and Nomabekisisa hid the complainant from Bheki and denied any knowledge of her whereabouts when he asked them. Thandeka had contacted her friend, Melanie Dapo, who said that she would arrange or make contact with a social worker she knew. On the following day they assisted her in reporting the matter to the police. Later that evening Bheki was arrested. The arrest of Sibiya and Nomvo followed some time thereafter.

The narrative outline of the facts which I have set out above serves as essential background. In order to determine the facts upon which the case is to be adjudicated it is of course necessary to consider and evaluate the evidence tendered by witnesses for the state and for the defence. Now I shall do so with reference to several key aspects of the case.

The first of those is the position of the complainant. As already indicated it is common cause that in or about November 2016 the complainant was 13 years old. However, both Bheki and Nomvo deny that they knew her age at the time. In the case of Nomvo her evidence was that she knew that the complainant was young, but did not believe that she was too young to be married. In the case of Bheki his evidence was that he at no stage enquired about the complainant's age and that he was not told that she was too

young to be married. Both Bheki and Nomvo stated that they did not know that a child under the age of 18 years could not lawfully consent to marriage.

The issue in respect of the complainant's age relates in essence to the broader pleaded defence raised by Bheki and Nomvo, namely whether they had the requisite *mens rea*, particularly in relation to their knowledge of unlawfulness, to commit the offences, and I will deal with this hereunder. It is, however, important to consider the facts upon which that assessment is to be made.

Dr Thabisa Mabusela, who is a qualified and registered clinical psychologist, conducted an assessment of the complainant in September 2017. Her expertise and qualifications were not placed in dispute. Dr Mabusela conducted the evaluation at the request of the social worker who was providing the complainant with assistance and counselling following her escape from the marriage to Bheki. Dr Mabusela conducted several tests and assessments. According to the Raven's test, which is a non-verbal test, the scores indicated that the complainant is moderately mentally challenged. This did not accord with her observation. Dr Mabusela then used the Senior South African Individual Scale, a revised test, and this is used to assess intellectual ability of English and Afrikaans-speaking children between 7 and 16 years. It assesses both verbal and non-verbal or practical

abilities. The test was conducted in isiXhosa and Dr Mabusela assisted with isiZulu where required. The test result indicated a mild rather than moderate mental challenge. In order to assess the complainant's mental capacity in relation to sexual knowledge Dr Mabusela applied the general sexual knowledge questionnaire. The results indicated significant gaps and misconceptions in the complainant's knowledge. Dr Mabusela concluded that the complainant's intellectual abilities were mildly retarded with a mental age estimation of about 9 or 10 years. She stated that insofar as engaging in sexual acts is concerned she was unable to communicate her unwillingness to participate in such acts. Her language performance indicated that she fell below average insofar as language and comprehension are concerned and that she would struggle to answer abstract questions that an average 14-year-old would easily be able to respond to.

This assessment was borne out in the evidence of several witnesses, including that of her uncle Sibiya. Sibiya described the complainant as not like other children. He said when compared with other children, "You can see that she is much slower than them. Everything that she does it is not as the other children. Everything is just behind.".

Thandeka Lubengu testified about her interactions with the complainant when she was in Gqeberha in January 2017. When she asked her age the complainant had said that she

was 17 years old. On a subsequent occasion when she had been instructed to purchase clothes for the complainant and a bus ticket for her to travel to Durban the complainant had told the assistant at the shop counter that she was born in 2003. When Thandeka asked her about this the complainant could not explain. She also did not answer when she was asked to whom she was married. Thandeka described the complainant as being a little bit childish. She likes to play around. Even if you work with her she likes to play around. You can see this is a child.

In cross-examination on this aspect Thandeka explained that she formed the impression that the complainant was childish because of her behaviour. The complainant had asked her to buy some snakes, sweets. She will also play and skip around when walking with her. She also said that the complainant did not always respond appropriately to questions. If asked a question about what was going on with her the complainant would not respond and simply stare.

Nomabekisisa described the complainant as a shy person. She said that she was young. She said that just by looking at her she could see that she was young. At the time Nomabekisisa was 19 years old. She said that when the complainant was asked her age the complainant had said she was 17. She, however, Nomabekisisa, thought that the complainant was perhaps 15 years old because she was as

she described a little bit big built.

Melanie Dapo is a neighbour who lived in a street behind Bheki's house. She and Thandeka were friends. A friend of Melanie's had rented Bheki's house. The friend had left the house in October 2016 and Bheki had moved back in. She said that when she first saw the complainant at the house she had assumed that she was Bheki's daughter. Ms Dapo has two children, one born in 2001 and the other in 2005. She testified that she thought the complainant was of an age between that of her children. In January 2017 Thandeka had told her that the complainant was married to Bheki, and she had also told her that she had discovered that the complainant was in fact 13 years old. In April of that year when the complainant was again in Gqeberha Ms Dapo had assisted Thandeka in securing the complainant's escape from Bheki's house. She had said she would provide access to a social worker.

Now the evidence of Dr Mabusela, when considered together with the observations of several witnesses, in my view establishes unequivocally that the complainant presented to the casual observer as a young child despite her physique. It is in this light that both Bheki and Nomvo's evidence of the lack of awareness of the complainant's age or maturity is to be considered.

Bheki's evidence was that he did not know the

complainant's age, that he never enquired. According to him he believed she was 17 years old, which is what she had said when she was asked. He never considered her to be a child. This is, for reasons I have indicated, at odds with what was evidently plainly observable. However, it was Nomvo's evidence that when she first heard from Bheki about his intention to marry the complainant that she told him that she was still young. When Nomvo spoke to Sibiya about Bheki wishing to marry the complainant Sibiya responded by laughing and said that she is still a child. Nomvo testified that she conveyed this response to Bheki. It was in fact this response that prompted him to ask whether there was another person who could intercede on his behalf.

Now this evidence, when weighed in toto, establishes that from the outset Bheki knew or must have known that the complainant was still a child and was not considered to be of marriageable age.

Insofar as Nomvo is concerned the complainant lived with her. She would have observed her childish behaviour. The complainant was of an age similar to that of her granddaughter and attended school with her granddaughter. These facts, when considered together with what she was told by Sibiya, point to the fact that she too knew that the complainant was still a child.

Both Bheki and Nomvo contended that according to

Mpondo cultural practices the complainant was, notwithstanding her age, of marriageable age. In support of this some reliance was placed on the fact that Nomvo herself had married according to customary rights at the age of 14 and that her daughter, Nofikile, had apparently married at the age of 15 years. I will address this later when dealing with the defences raised by the accused.

THE QUESTION OF AN AGREEMENT TO MARRY

It was a central aspect of the events preceding the *lobola* negotiations as presented by Bheki and, to a limited extent, Nomvo, that the complainant had agreed to the marriage. The complainant's testimony was that when the possibility of marriage was mentioned to her by Nofikile she had said that she would like to be married. She was not, however, given a choice. She was never asked if she wanted to marry Bheki. She did not understand what it meant to be a wife. She first heard from Sibiya that she was to be a wife, Bheki's wife, at a stage when she was about to travel from Shakaskraal to Gqeberha.

Sibiya confirmed the testimony of the complainant in important respects. He stated that at no stage had he discussed marriage to Bheki with her and did not ask her if she wished to marry Bheki.

It was Bheki's evidence, however, that as a result of his initial telephone contact with the complainant they had

developed a relationship. He telephoned the complainant on a telephone that he purchased for her. He testified that they exchanged photographs. He travelled to Bizana when he was on leave and he arranged for them to meet in Bizana, the purpose of which was to decide whether they would marry. According to him they met at the taxi rank and had something to eat at The Hungry Lion. In his evidence-in-chief he said that the complainant accompanied him to his home in Amanzayoni and stayed there with him for two days. He said that he spoke to Nofikile on the phone to inform her where the complainant was. While staying in his home he and the complainant did not engage in sexual intercourse according to him because they decided to wait until they were married. After two days he returned to Bizana with the complainant where she bought groceries and then returned to Nofikile's house. Bheki testified that whilst he and the complainant were in Amanzayoni he discussed his intention to send a delegate to negotiate *lobola*. He explained the process to her, and they even talked about the number of cows he would have to pay. Complainant denied that *lobola* negotiations were ever discussed with her.

When the version regarding the complainant's alleged visit to Amanzayoni was put to the complainant and to Nofikile during their testimony the complainant denied that she had been to Bheki's house on that occasion. Nofikile also denied

this, that this had occurred. She went further and denied that the complainant had travelled to Bizana to meet Bheki. This latter evidence represents the only significant conflict between the evidence of the complainant and that of Nofikile, and I will touch upon this later.

Bheki, however, did not sustain his version of events under cross-examination. He conceded that the meeting in Bizana could not have occurred in 2015 as he had initially claimed, but must have been in 2016. Several aspects of the version that was presented to witnesses were not repeated in his testimony. Two examples suffice. It was put to the complainant that when she met him in Bizana she was supposed to be in school but had taken the day off. In his testimony Bheki claimed not to know that the complainant was attending school at all. In cross-examination, however, he said that he knew she was in school with Yonela because the complainant had in fact told him so. It was put to the complainant when she testified that when they went to Amanzayoni his house was locked and unoccupied. Bheki, however, stated in his evidence that the house was occupied by a tenant.

In dealing with the timing of the *lobola* negotiations and the agreement to marry in relation to their meeting in Bizana Bheki's evidence underwent significant shifts. It was initially his testimony that the meeting in Bizana occurred before there

was any agreement to marry. They met in order to decide whether to marry or not. This was altered to an assertion that the complainant had agreed to marry him, had already informed Sibiya, and that he had already sent his delegate to negotiate with the Sibiya clan. He further stated that he had already started paying *lobola* by the time they met. Shortly after this testimony was given Bheki changed his evidence significantly. He stated that when he first met the complainant in Bizana she had returned home with the groceries she had purchased for Nofikile. She did not travel with him to Amanzayoni. He therefore confirmed the complainant's version. However, he proceeded to state that the complainant subsequently travelled on her own to his homestead and spent two days with him. This occurred in the same week of his leave and after they had made an arrangement by telephone. Still later in cross-examination he claimed that the complainant came to Amanzayoni on two occasions, and then he later stated that he was unable to remember when or how this occurred.

The evidence tendered by Bheki regarding the complainant's visit to Amanzayoni and the nature of their relationship, including an alleged agreement to marry, cannot be accepted. It is directly contradicted by the complainant's testimony regarding such agreement and by her denial of any visit to Amanzayoni. As I said Bheki eventually conceded that

her version of what had occurred when they met in Bizana was correct. Once it is accepted that the complainant did not visit Amanzayoni there is no scope for accepting Bheki's claim that an agreement to marry came about on that occasion. In the light of his inconsistent testimony there is also no scope for accepting his assertion that the complainant had agreed to marry him when he proposed to her, apparently at a stage during his first telephonic contact with her.

THE *LOBOLA* NEGOTIATIONS

Although a great deal of evidence was led in relation to the process of negotiating *lobola* in order to facilitate the marriage of Bheki to the complainant not much turns upon this process itself. The facts are also largely common cause.

Sibiya kept a record of the substance of the agreed *lobola*, or bride price, to be paid. The document, EXHIBIT G, records several dates upon which agreements were reached and payments were received. Based on this record it appears that the negotiations commenced in or about March 2016. The last date recorded is 5 November 2016, and I will return to this later.

As indicated earlier Bheki expressed a desire to take the complainant as his wife. This occurred after he had had some telephonic contact with her in Bizana. Nofikile's evidence was that Bheki already knew that there was a girl child living at her house at the stage when he called.

Whatever the true facts are in this regard it is common cause that he expressed his desire to marry her almost immediately after telephonic contact was made. Nofikile explained to him that she was a child. She stated that she informed him that the complainant was born in 2003. This did not deter Bheki. At some stage shortly thereafter Bheki spoke to his sister, Nomvo, and asked her to approach Sibiya to present the marriage proposal. Nomvo spoke to Sibiya who attended the same church as she did. His response was that the complainant was still a child. He rejected the proposal. Nomvo conveyed this to Bheki. He, however, was determined to pursue it and asked Nomvo whether there was anyone who could approach Sibiya on his behalf, and Nomvo said she would ask Deliwe to represent him. Now it is not clear whether Bheki suggested Deliwe or whether Nomvo did. Deliwe, it is common cause, was a church leader. She was referred to at various stages by Nomvo in her evidence as the evangelist, and it was common cause that she played a role in other instances where *lobola* was negotiated.

Deliwe Mbonga testified as a witness in terms of section 204 of the CPA. She was duly warned. She testified that she knew Sibiya, Nomvo and Bheki. She said she did not know why she was approached. She surmised it was because she lived in the same area. She said she knew the complainant, but not her age, despite the complainant having attended her

creche and having lived with her for a short while. She said she was reluctant to do as she was asked because she was amaXhosa and the Sibiya clan was amaZulu. She thought she would have to recite the clan names and did not know how to do so. She was assured by Sibiya, however, that this was not necessary. This occurred when she and Sibiya had a conversation at church. Now it is unclear how this conversation came about, but Deliwe was given an amount of R14 000 by Nomvo, and this money had been sent to her by Bheki. She met with Sibiya, his uncle and grandfather at the Sibiya house. She stated that Sibiya kept a written record of what had been agreed. This was EXHIBIT G. According to Deliwe it was Sibiya who indicated what was required. He did not need persuasion. At the first meeting, recorded as occurred on 19 March 2016, it was agreed that the initiating gift, *imvula mlomo* will be R500. In addition, a cow would be paid as a gift to the father, *isibizo sikobaba*, in the amount of R3 500, and one cow to the mother, *isibizo sikomama*, in the amount of R2 500. This was a mark of respect for the complainant's deceased parents. Each of these amounts was paid. Deliwe said that the *lobola* was set at 11 cows. This was calculated as an amount for 4 cows at R7 000 each, 4 cows at R6 000 each and 3 cows at R5 000 each. At that meeting Deliwe paid for one of the cows valued at R7 000. According to her testimony she paid a total of R13 000 on that

occasion and returned an amount of R1 000 to Nomvo. Nomvo confirms this evidence. Deliwe explained that she had a copy of the record kept by Sibiya. After returning from the meeting with the Sibiya clan she reported what had occurred to Nomvo. She showed Nomvo her copy of the document. She also telephoned Bheki and reported to him. Her copy of the document was handed to the police investigators when this case was being investigated. Deliwe testified that she did not follow any specific cultural practice in the negotiations. She simply acted as a negotiator because she was asked to do so. She stated that "Anybody can go and pay *lobola* whenever he had seen a flower to pick".

Deliwe had further meetings with Sibiya and his uncle. His grandfather was not present at those subsequent meetings. The next date is recorded as 22 June 2016. On this occasion R10 000 was paid for two of the cows valued at R5 000 each. Deliwe held a further meeting with Sibiya and his uncle on 27 October 2016. She explained that Bheki had telephoned her and told her that since he had already paid some of the *lobola* he now wanted to borrow the bride. She assumed that this meant that the family wanted to see the bride that they were paying for and that the bride would live and work for the in-laws in Bizana whilst Bheki was in Gqeberha. Deliwe received R5 000 from Nomvo which was paid to Sibiya on 27 October 2016. The balance of R2 000 for

the borrowing cow was paid on 5 November 2016. Deliwe said that she had not come across the practice of borrowing the bride at a stage when the process of paying *lobola* is still underway. She said that at that stage they were not yet married, a further process needed to occur. The Nxasana family would have had to formally request that the marriage occur whilst *lobola* is still being paid. At that stage an agreement would be reached about the type of ceremony to be followed for the marriage to be formally concluded.

In cross-examination it was put to Deliwe that according to Mpondo culture or practice the borrowing of the bride means that the bride to be is released by her family to go to the groom's household. Deliwe denied this and claimed never to have heard of such practice.

In relation to the *lobola* negotiations two crucial issues are relevant. The first relates to the position of Sibiya. It was the evidence of Sibiya that he had initially rejected the proposal of marriage, however, he subsequently engaged in the *lobola* negotiations and agreed to the bride price. Sibiya's evidence-in-chief, however, was that he remained reluctant because he knew that the complainant was too young to marry and that proceeding would "get them in trouble". He therefore said that the complainant should first finish school and only get married when she turns 18. Sibiya testified that he set this as a condition. He claimed that he consulted his family

member in this regard. It was common cause that he was accompanied by family members during the *lobola* negotiations. He claimed, however, that Deliwe insisted on the *lobola* issue despite his reluctance. Sibiya testified that he told Deliwe that the Nxasana family would have to wait another six years for the complainant to turn 18. According to him Deliwe responded by saying that Bheki works in Gqeberha and sometimes stays away for five years. He then agreed that they could talk.

Now this version was not presented to Deliwe when she testified. It is also contradicted by her testimony. Deliwe said that she encountered no reluctance from Sibiya and at no stage was there discussion about the marriage only occurring when the complainant turns 18. It is significant that the record of the negotiations, EXHIBIT G, which was kept by Sibiya does not reflect this condition. No reference is made to when the balance of the *lobola* was to be paid despite the parties apparently having agreed to pay "when the time is right".

The second issue concerns the sequence of events surrounding the borrowing of the bride. Nofikile testified that when it was clear that the complainant was to be married her husband insisted that she should be returned from Bizana to her home in Shakaskraal. This did not occur immediately because Bheki had to provide the money for transport. When the arrangements were made the complainant returned to her

home in KwaZulu Natal. The complainant confirmed that she travelled from Bizana to Durban where she met Nomvo and then travelled to Nomvo's home. When she went to Sibiya's home she was wearing *makoti* clothes.

Now as an aside there was considerable disagreement about what precisely comprises *makoti* attire and by whom and at what stage it is to be worn. Not much turns upon this however. It is common cause that at least at the stage that the complainant returned to Shakaskraal from Bizana she was made to wear *amadaki*, or long *makoti* dresses and a shawl, to signify her status as a wife. It is also common cause that when she was later in Gqeberha she was instructed to wear only long dresses since she was no longer a single woman. She was also told that she could not associate with unmarried women.

Now the complainant lived with her uncle Sibiya until she travelled to Gqeberha to Bheki's house, and this occurred in November 2016. All of the witnesses who testified on this fact, including Bheki and Nomvo, state that the complainant travelled to Gqeberha for the first time after payment was made for the borrowing cow. Sibiya's evidence in respect of the borrowing cow was that the request was made that the complainant should move from Nofikile's house to Bheki's house in Bizana. He was uncomfortable with this because the complainant was still a child. However, Nomvo said that she

was going to live there and stay with the complainant in the house. When he consulted his uncle he was advised that there was a cow that must be paid prior to the move. It was this that resulted in the payment of the borrowing cow.

Now this version is not supported by any of the witnesses who testified. The complainant explained that on the occasion she first travelled to Gqeberha she was accompanied by Sibiya to Shakaskraal. She was wearing *makoti* attire. On this occasion Sibiya told her that she was no longer going to go to school because she was now going to be Bheki's wife. Sibiya therefore knew that she was travelling to Bheki. They met Nomvo in Shakaskraal. Nomvo travelled with her to Durban and from there complainant travelled alone to Mthatha and then on to Gqeberha. During the time that the complainant was in Gqeberha Nomvo was in Shakaskraal. She only moved to Bizana in January 2017 when the complainant was sent back from Gqeberha. It was common cause that Nomvo and Sibiya attended the same church in Shakaskraal. In the circumstances Sibiya must have known that the complainant was not in Bizana with Nomvo, but in Gqeberha with Bheki. It was to achieve this that the borrowing cow was paid.

THE DEFENCE CASE

ACCUSED 1 - BHEKI

The defence presented by Bheki in relation to counts 1

and 2, the trafficking charges, was essentially twofold. He contended that he concluded a marriage with the complainant in accordance with customary law and practice. He was not aware of her age or mental disability and she was a willing participant. He had no knowledge of the requirements set out in the Recognition of Customary Marriages Act and accordingly lacked the *mens rea* to commit an offence in contravention of that act. He also had no knowledge of the Trafficking Act and lacked the *mens rea* to commit the offences for which he was charged.

In relation to the counts of rape Bheki admitted that sexual intercourse occurred between him and the complainant on numerous occasions during her first visit to Gqeberha. He denied that sexual intercourse occurred on the second occasion. He said that the sexual intercourse was consensual and that he did not assault or threaten to assault the complainant to succumb to sexual intercourse or forcefully engage in sexual intercourse with her. He did not know her age and was not aware that she could not consent to sexual intercourse.

ACCUSED 2 – SIBIYA

Sibiya pleaded guilty to count 1, the charge of trafficking by concluding a forced marriage. In relation to this count his evidence was premised upon the existence of a conditional agreement to marriage. He admitted, however, that

the complainant was not consulted about the marriage and that she was not asked to give her consent.

In relation to count 2 Sibiya pleaded not guilty. His defence was that he did not know that the complainant had travelled to Gqeberha to the house of Bheki. He took no part in the arrangements for the transportation of the complainant.

ACCUSED 3 – NOMVO

In relation to count 1 her defence was also twofold. She asserted that she paid no role in the conclusion of the forced marriage. She merely conveyed a request to Sibiya and thereafter requested Deliwe to facilitate the negotiations. She facilitated the transaction by receiving and transferring funds from Bheki to Deliwe. Although she was aware of the negotiations she had no knowledge that such a marriage was unlawful or prohibited. She did not know the complainant's age. The marriage was in accordance with cultural practices that both she and her daughter had followed. Based on this it was contended that she lacked the essential knowledge of unlawfulness necessary to establish *mens rea*.

Similar considerations applied in relation to count 2. She was involved in arranging for the transport of the complainant to and from Gqeberha in that she had on instruction of Bheki made those arrangements. She had no knowledge that this breached the Trafficking Act. She believed that the complainant was married in accordance with custom

and therefore that her travel to and from Gqeberha was to fulfil the duties of a wife. Now I am going to deal with these offences in the context of the applicable legal principles later in the judgment.

I have already in the preceding sections set out the evidence presented by both state witnesses and the accused in relation to the key aspects of the case, and what really remains to be done at this stage is to evaluate the evidence and the witnesses presented by the state.

THE EVALUATION OF THE EVIDENCE

I have repeated on several occasions that much of the evidence presented was common cause or not disputed. This bears emphasis because the aspects in respect of which the credibility or reliability of witnesses arises are limited. Nevertheless, it must be highlighted that the state case had as its foundation the evidence of the complainant. She is a child with mild mental incapacity. Her evidence must therefore be approached with caution. In relation to the rape charges in particular she was a single witness. For this reason, too caution must be applied in evaluating her evidence.

Insofar as the evidence of Deliwe and Nofikile are concerned they presented their evidence as section 204 witnesses, and accordingly their evidence too must be approached with a degree of caution.

The complainant testified via an intermediary in

accordance with section 170A of the CPA. As indicated earlier the case was bedevilled with several delays. Some of these occurred when the complainant was under cross-examination. Despite these difficulties, and notwithstanding her age, the complainant presented a clear and coherent account of events spanning a long period of time. She was forthright and consistent and she was unmoved in cross-examination. Her account was supported by the evidence of several witnesses on key aspects. The corroboration was extensive. I intend to highlight a few aspects.

She testified to very difficult home circumstances when she and her siblings went to live with her uncle Sibiya after her mother's death. She was 10 years old. She described Sibiya as strict, harsh, prone to punishment. He came into conflict with her older sisters because of finances and they left leaving her alone to cope in that environment. Her account was confirmed by Thandiwe, her sister. These circumstances, and her fear of Sibiya, appears to have given rise to her not attending school. Deliwe and Nomvo confirmed the thrust of this evidence. It was concern about her circumstances that prompted Deliwe to take her in and ultimately resulted in her going to live with Nomvo.

The complainant's account of how Bheki came to be known to her is confirmed in almost every respect by Nofikile, Nomvo and Bheki himself. The only respect in which there is a

contradiction between the complainant and Nofikile in this regard relates to her meeting Bheki in Bizana. Nofikile as I have indicated previously denies such a meeting, but Bheki confirmed it. In my view the complainant's version is plainly correct.

The complainant's testimony regarding her return to Shakaskraal from Bizana and that she went to Sibiya's house is confirmed by Nofikile and Nomvo. That she was wearing the *makoti* attire is confirmed by Nomvo. Insofar as her account of what occurred in Gqeberha at Bheki's house is concerned she is in large measure corroborated by both Nomabekisisa and Thandeka. She provided a detailed account of several violent rapes by Bheki. He throttled her, struck her, forcefully penetrated her. She described manipulation by him saying that he would provide money for clothes if she had sex with him. In respect of these events which occurred over a period of time in November 2016 through to January 2017 she is of course a single witness. The medical examination which occurred only after she was assisted to make an escape in April 2017 can provide no corroboration. It was too remote. But there is, however, other support to be drawn for her account. She testified that she spoke to Nomvo about Bheki hurting her and wanting sex. She said that after this Bheki berated her about talking to Nomvo about these matters. Neither he nor Nomvo denied this incident. That sexual intercourse occurred is not

in dispute. The only issue is whether it was accompanied by the sort of violence she described. In my view her account must be accepted. The level of detail provided points in itself to the veracity of her account. She came into the situation without having consented, and importantly, with little or no idea what could be expected. From the outset she wanted to withdraw, but she could not. She had no means to do so and she was afraid of what would happen. This is confirmed by Nomabekisisa who plainly wanted to assist by taking her to Johannesburg, and Nomabekisisa described the complainant as sad.

The complainant's description of how she escaped from Bheki's house provides important insight into her circumstances. It also points to an overall sense of truth in its telling. She decided to ask for help because she could not withstand what was happening to her any longer. She had again been raped. Thandeka and Nomabekisisa agreed to help. Thandeka got Melanie Dapo to assist. The description of subterfuge by not taking clothes when she left the house, and of the use of a fan to create the impression that the complainant was in a vehicle when Bheki phoned, an instance that Bheki confirmed, points to a person who was desperate to escape and living in fear. These are factors that support her account.

The complainant was in my assessment an excellent

witness whose evidence I accept as being credible and reliable. Where it conflicts with the evidence of Nofikile as I have indicated I accept that of the complainant. This is not to say that Nofikile's evidence is not accepted in other respects. On the contrary Nofikile's evidence was not generally impeached. I accept that it is open to some criticism and must be approached with caution. There are certainly contradictions between her evidence and that of the complainant and other witnesses, an example being that she denied ever having provided the complainant with *amadaki* or *makoti* attire, a fact to which both the complainant and Nomvo testified. There is also a conflict in relation to her conversation about marriage with the complainant when they were collecting firewood. The contradictions are, however, not of such a material nature as to warrant rejection of her evidence. I will deal with the question of indemnity in terms of section 204 of the CPA at the end of the judgment.

Deliwe's evidence, which was equally to be approached with caution, was not challenged in any significant respects. Her evidence as to the basis upon which the *lobola* negotiations proceeded is in direct conflict with that of Sibiya. In my view the account given by Deliwe accords with facts to which a number of witnesses testified as already indicated. There is therefore no basis to reject her evidence in this respect. In my view it is consonant with the probabilities and

is therefore to be accepted as reliable. I will deal with the consequences of this acceptance later. Insofar as the evidence of Deliwe is subject to some criticism I will deal with that in the context of consideration of her evidence for purposes of section 204 of the CPA.

Thandeka and Nomabekisisa in my view were excellent witnesses. They provided a coherent and consistent version of what they knew. They were both challenged in cross-examination as having some grievance against Bheki and therefore of conspiring to impeach his character. On consideration there was no substance to the challenge. It must have been particularly difficult for Nomabekisisa to testify against her father in the circumstances. That she did is testament to her character. Both she and Thandeka were confronted by a situation where Bheki had taken a young child to be his wife. In the case of Nomabekisisa she was required to lie about the relationship between Bheki and the complainant. It is to their credit that they dealt with the issue as they did and facilitated the complainant's escape from an intolerable situation. I accept their evidence.

Insofar as the remaining state witnesses are concerned, Melanie Dapo, Thandiwe, the police officer involved in the arrest of Bheki, and the social worker who provided assistance to the complainant, their evidence went unchallenged.

This brings me to an assessment of the evidence of the

accused. Now I wish to emphasise that although this assessment is recorded in the judgment sequentially the result reflects an assessment of all of the evidence in its totality, and for reasons which will become apparent that assessment properly requires appreciation of the relevant provisions of the law and of certain legal principles.

It is important to record that the accused presented as persons who had not had the benefit of substantial formal education. Each of them expressed anxiety and trepidation about their unfamiliarity with the court environment and a degree of intimidation by the process. I accept that the exercise of assessing credibility and reliability must occur mindful of these constraints, and I am mindful that the process of a trial is intimidating, and it must be so particularly for a person who comes from a rural area who has not been exposed to proceedings of this nature before and are faced with very serious consequences. But even taking into account the rigours that the trial presented for the accused and their circumstances none of the accused presented as witnesses whose evidence could be readily accepted. On the contrary, their evidence was inconsistent in the account of events which they presented. They each presented testimony which did not match versions which had been presented to witnesses called by the state.

Accused 1, Bheki, shifted position on several very

important aspects. In seeking to establish that the complainant had agreed to the marriage he presented several versions as to when this occurred. Initially it was as a result of and during his telephonic discussions with the complainant. This shifted to when they met in Bizana, and seeking to justify the complainant's alleged visit to his homestead he claimed that he was already paying *lobola*, but this conflicted with an earlier assertion that he discussed the whole question of *lobola* with the complainant before despatching a negotiator. Ultimately, as already indicated, he altered his version entirely. This was not the only respect in which he was not able to give a coherent account of what occurred. The overall effect is that his testimony provided little assurance of reliability. In relation to the allegations of sexual assault his denials were bolstered by an allegation that he made that his troubles were caused by animosity towards him by Nomabekisisa. In my view accused 1 did not present as a credible witness who gave an honest account of what had occurred. I will deal with certain further aspects later when dealing with the application of the onus and certain legal principles.

Accused 2, Sibiya, conducted his case upon a different and narrower ground. The central element of his case was the conclusion of a conditional agreement and a denial of knowledge of the complainant's transport to and circumstances in Gqeberha. In his evidence he sought to place himself in the

position of being a victim of the machinations of the Nxasana family. He went so far in his evidence to suggest that the complainant had failed to alert him to the problems she was experiencing. He suggested that she somehow shouldered responsibility. Now I have already pointed to the fact that on several of these issues Sibiya's evidence was in direct conflict with the evidence of the complainant and Nomvo and Bheki, as well as that of Deliwe. It is also not supported by the probabilities, and in light of this his testimony overall cannot be considered to be truthful or reliable.

Accused 3, Nomvo, presented as a witness who because of little or no formal education did not appreciate the issues raised by the case. Upon careful consideration, however, she was in fact often evasive and at times argumentative and belligerent when confronted with aspects of the state's case or aspects of her testimony. She did not always create a favourable impression. That, however, is not the basis upon which her account of events is not accepted as being reasonably possibly true as will be seen when dealing with the elements of the offences required to be proved by the state in the context of accused 3's evidence. Her evidence falls to be rejected because of inherent improbabilities and inconsistencies.

THE APPLICABLE LAW

The Trafficking Act was enacted to give effect to the

Republic's international obligations concerning trafficking in persons and to provide for an offence of trafficking in persons. The act was assented to in July 2013 and came into operation on 9 August 2015. The preamble to the act records the following:

> "Concerned by the increase of trafficking in persons, especially women and children, and the role played by organised criminal networks in the trafficking of persons globally, since the South African common law and statutory law do not deal with the problem of trafficking in persons adequately, and since the *Bill of Rights* and the Constitution of the Republic of South Africa, 1996, enshrines the right to human dignity, equality, the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, and not to be treated in a cruel, inhuman or degrading way, the right not to be subjected to slavery, servitude or forced labour, and the right of children to be protected from maltreatment, neglect and abuse or degradation, the act is enacted."

These considerations informed the enactment of the Trafficking Act. By way of footnote, for a discussion on the development of and the background to the legislation see the article *Bought*

at a price: trafficking in human beings, a brief study of the law in South Africa and United States by D C Subramanien in 2011 *South African Criminal Law Journal* 245. The principle objects and purpose are set out in section 3. Primary amongst these is to give effect to the Republic's international obligations, but this recognises, and indeed underlines, the global challenge posed by the persistent forms of modern slavery. While the object is to facilitate co-ordinated efforts to combat this global challenge the act recognises and seeks to address the problem within a domestic or national context. It does so by seeking to provide for prosecution of defined offences, by providing assistance to victims of trafficking and to provide for the development of a national policy framework.

I may indicate by way of footnote that although the act came into operation in August 2015 transitional provisions and definitions of the crime of trafficking were to be found in the Children's Act and in the Criminal Law Sexual Offences and Related Matters Amendment Act from a period considerably prior to the enactment of the Trafficking Act. It would be incorrect therefore to assume simply from the date of the enactment of the Trafficking Act that the offence of trafficking was unknown in South Africa prior to 9 August 2015.

The offence of trafficking in persons is defined in section 4 of the Trafficking Act. The section reads as follows:

"1. Any person who delivers, recruits, transports,

transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic by means of a threat of harm, the threat or use of force or other forms of coercion, the abuse of vulnerability, fraud, deception, abduction, kidnapping, the abuse of power, the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person, or the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person, or an immediate family member of that person, or any other person in close relationship to that person for the purpose of any form or manner of exploitation is guilty of the offence of trafficking in persons."

The prescribed conduct in this section may occur within or across the borders of the Republic. The definition contains several elements. Section 4(1) prescribes in broad language conduct, for example delivery, recruitment, transport, harbouring, selling, etcetera, which is achieved by defined means, which is aimed or directed at the victims or related

persons for the purposes of exploitation, and the means are also in some instances defined.

"Thus the abuse of vulnerability as defined means any abuse that leads a person to believe that he/she has no reasonable alternative but to submit to exploitation, and includes, but is not limited, to taking advantage of the vulnerabilities of that person resulting from:

(a) the person having entered or remained in the Republic illegally or without proper documentation;

(b) pregnancy;

(c) the desirability of the person;

(d) addiction to or the use of any dependence producing substance relevant here;

(e) being a child;

(f) social circumstances; or

(g) economic circumstances."

The purpose to which the conduct is directed must be exploitation, and exploitation is defined to mean *inter alia*:

"(a) all forms of slavery or practices similar to slavery;

(b) sexual exploitation, servitude, forced labour or child labour as defined in

section 1 of the Children's Act."

Sexual exploitation means the commission of any sexual offence referred to in the Criminal Law Sexual Offences and Related Matters Amendment Act, or any offence of a sexual nature in any other law, and slavery is defined to mean reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person.

Section 4(2) makes it an offence to conclude a forced marriage with another person for the purpose of exploitation of that person, and a forced marriage means a marriage concluded without the consent of each of the parties to the marriage.

Section 11 of the Trafficking Act provides that:

"1. It is no defence to a charge of contravening sections 4, 5, 6, 7, 8, 9(1) or 10 that:

(a) a child who is a victim of trafficking, or a person having control or authority over a child who is a victim of trafficking, has consented to the intended exploitation, or the action which was intended to constitute an offence under this chapter, or that the intended exploitation or action did not occur, even if none of the means referred to in section 4(1)(a) – (j)

have been used; or

(b) an adult person who is a victim of trafficking has consented to the intended exploitation, or the action which was intended to constitute an offence under this chapter, or that the intended exploitation or action did not occur, if one or more of the means referred to in section 4(1)(a) – (j) have been used."

Now this section, when it is read with section 4(1), suggests that where the victim is a child it is not necessary to establish that one or more of the means defined by the section was employed, and in any event section 11 precludes consent to the exploitation as a defence.

Now by way of footnote see an article titled *Human trafficking legislation in South Africa: consent, coercion and consequences* authored by Susan Kreston in 2014 SACJ20. See also *The Commentary on the Children's Act*, and in particular *The Commentary on the Former Section 284,* which considered that section and the UN protocol upon which that section and section 4(1) of the Trafficking Act was based. There the authors suggest, as I have suggested, that it is not necessary to establish one or more of the means defined and that a defence of consent is not a valid defence.

THE INTENTION TO COMMIT THE OFFENCES

The state is required to prove the guilt of an accused beyond a reasonable doubt, and this means that each element of the offence or offences must be approved to this standard. An accused person bears no onus. The burden of proof rests throughout upon the state. In *Sithole v S* 2012 ZASCA 85 it was held, paragraph 8, that:

> "The state bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent. The onus has to be discharged upon a consideration of all of the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true."

As was explained in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448f-g:

> "The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.

> These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other."

In this instance the innocent explanation which has been advanced by the defence, primarily on behalf of Bheki and Nomvo, is that they had no knowledge of the unlawfulness of their conduct in respect of the marriage of Bheki and the complainant. The absence of knowledge of unlawfulness arises by virtue of two factors, namely:

(a) the belief that they were acting in accordance with cultural practices; and

(b) their lack of knowledge of the prescripts of the Trafficking Act.

Upon this basis they contend that they lack the necessary intention to commit the offences.

It is well established that the absence of knowledge of unlawfulness may preclude a finding that an accused possessed the required *mens rea*. In *S v De Blom* 1977 (3) SA 513A the question of knowledge of unlawfulness was examined

in relation to the requirement that criminal conduct is carried out with *dolus* or intention, and how it bears upon establishing that the accused acted with the required *mens rea*. It need not of course only be *dolus*, it could be *culpa*. The case involved a statutory offence, *inter alia* of taking foreign currency out of the country without having obtained authorisation. The accused had been found to be in possession of tens of thousands of US dollars in her luggage, and she claimed to have no knowledge that a permit was required, and there the court held at 532E, now it is a quotation, judgment is reported in Afrikaans, and what I intend to do is to, I do not intend to read the Afrikaans version into the record. It is part of the judgment. It extends from 532E, commences with the phrase "*In 'n saak soos die onderhawige*" and it continues to 532H and ends with the portion of the sentence which reads "*sou die staat sy saak nie sonder redelike twyfel bewys het nie*". For present purposes I will proffer a rough translation of that passage to explain the principles as follows. This is the approximate translation:

> "In a case such as the present it must be accepted that when the state has presented evidence that the prohibited act has been carried out an inference may be drawn, as circumstances permit, that the accused intentionally and knowingly, that is to say with knowledge of unlawfulness committed the act.

> In the event that an accused relies upon a defence, such as in the present case, that she did not know that her act was unlawful, her defence can succeed if it can be deduced from the evidence as a whole that a reasonable possibility exists that she cannot be held juridically or legally blameworthy. That is to say in all the circumstances it is reasonably possible that she took reasonable and careful measures to ascertain whether it was required to obtain authorisation to take the money out. If on the evidence as a whole, including the evidence that the act was committed, a reasonable doubt exists that the accused had *mens rea* as described, the state would not have proved its case beyond a reasonable doubt."

What the passage highlights is that the court must, upon consideration of the evidence as a whole, determine whether there is a reasonable possibility that the accused did not know and appreciate that his/her conduct was unlawful. This requires a careful consideration of the facts. It is not sufficient to claim a lack of knowledge. The alleged lack of knowledge must in the circumstances of the case, and having regard to the accused, be reasonably sustainable.

Now as indicated Bheki and Nomvo contend for a lack of knowledge in two respects. Insofar as the claim of a lack of

knowledge of the prescripts of the Trafficking Act is concerned it is argued that this was a new statutory crime created to deal with the Republic's international obligations. Neither of the accused, who were uneducated, semi-literate persons from deep rural backgrounds, had heard of the notion of trafficking. In these circumstances they could not as a matter of logic form the requisite intention to commit offences prescribed by the Trafficking Act.

The starting point on this aspect must necessarily be the evidence. At no stage in his evidence did Bheki allege that he had no knowledge of the existence of an offence such as trafficking, nor that he did not know or appreciate that the conduct prescribed by section 4 of the Trafficking Act constituted a crime. He was at the conclusion of his evidence-in-chief specifically asked to comment upon the charges which were preferred against him. It is appropriate to record the exchange in full. He was at that stage represented by Mr Malgas, and the transcript reads as follows:

> "MR MALGAS: Okay, let us stop there. As far as count 1 is concerned the state is alleging that it is trafficking in persons, concluding a forced marriage for the purpose of exploitation.
>
> ACCUSED 1: I do not agree, but at the same time I want to understand how you traffic someone when you speak to that person and there is an agreement

between you, you pay *lobola* for that person when there is an agreement between you, how is it then that it is human trafficking? I want to understand that before I answer.

MR MALGAS: Lastly, sir, it is count 2, the allegation is that it is also trafficking in persons for the purpose of any form or manner of exploitation. Do you have any comment on that?

ACCUSED 1: I disagree with that. I cannot agree with someone to take that money, pay *lobola* for a person, sent people to her home, and then there is an agreement and all this, why then that this person is being forced? I am not going to say I paid *lobola* according to the Mpondo culture. I say that according to in any way where you pay *lobola* accordingly and then there is an agreement, and you could say that that person is trafficking."

Now these responses address the substantive elements of the offences. They do so on the basis that there was an agreement, that the marriage was not forced, and that it followed a customary or cultural practice. Accused 1 does not assert that he had no knowledge that the prescribed act, in this case a marriage concluded without the consent of either of the parties for the purposes of exploitation was unlawful. On the contrary his answers and, as will be indicated hereunder,

his evidence throughout demonstrated knowledge of or an awareness of the necessity for consent.

This with respect to the argument advanced on behalf of accused 1 is the proper basis to determine whether an accused person had the requisite knowledge of unlawfulness, i.e. with reference to the essential elements of the prescribed act and not the existence of the relevant legislative instrument.

Similar considerations apply in relation to accused 3, Nomvo, although she was asked in general terms what her knowledge of law and customary marriage was at the time that she was asked to speak to Sibiya. Her answer was that she does not know law. Now this general claim to lack of knowledge is in itself not decisive. Whether it can be said that the accused lacked knowledge of unlawfulness is to be determined on the basis of the evidence which is considered as a whole.

It is to be emphasised that it is the knowledge of unlawfulness of the proscribed act that must be considered since it is the intentional commission of that act which constitutes the offence. This means that in relation to the charge under section 4(1) of the Trafficking Act the question to be asked is whether the accused knew or ought reasonably to have known that it is unlawful to deliver, recruit, transport, transfer, sell, harbour, exchange, lease or receive another person for the purpose of any form of exploitation.

Now in the context of this case the act consists of the steps that were taken to facilitate the transport or transfer of the complainant to and from Gqeberha for the purpose of exploitation. The question is did the accused know or understand that such conduct is unlawful? In relation to the charge under section 4(2) the proscribed act is in essence the conclusion of a forced marriage for the purpose of exploitation. Now a forced marriage is one where each of the parties has not consented, and in respect of both accused 1 and accused 3 the question can be answered with reference to their evidence, in other words upon a consideration of their respective versions.

The premise upon which Bheki presented his case was that he wanted to secure a wife in accordance with customary practice. Having met the complainant, and once he had developed a relationship; with her he proposed to her in accordance with his custom, he called it *ukudolo*, and she agreed. Based upon this agreement he asked Nomvo to initiate negotiations with Sibiya, and this was to secure the agreement of the family to the marriage. Now in cross-examination, as I have already indicated, in relation to the purpose of meeting the complainant in Bizana he stated that it was necessary to meet in order to decide whether they wanted to be married. It would only be once the person to be married had agreed to do so that a delegate would be sent to negotiate

the *lobola*. Although as previously indicated Bheki altered his version in relation to these events his testimony nevertheless remains significant. It indicates an acceptance that a customary marriage is premised upon agreement and that a forced marriage was unacceptable from a customary practice perspective. The fact that accused 1, Bheki, throughout his testimony asserted the process of achieving agreement in relation to the marriage permits of only one reasonable conclusion, namely that he knew and understood that to conclude a forced marriage, i.e. one in which a person does not consent, is unlawful. Now I will deal later with the broader question of the intention that must be inferred. For the present it is sufficient to state that the averred lack of knowledge of unlawfulness in relation to count 2 is in my view not reasonably possibly true on the evidence on his own version.

The same conclusion applies to the position of accused 3 in respect of count 2. Her case was that she was initially not in favour of Bheki's declared intentions. This was because the complainant was young, even though this in itself was to her no impediment. However, once it was conveyed to her that the complainant had agreed she accepted it because she could not do anything about it, and in this respect she went on to describe it ultimately as a beautiful thing.

Now in relation to count 1 the required knowledge of

unlawfulness relates to the transportation or transfer for the purpose of exploitation. The avowed purpose of the travel arrangements was that the complainant should be with her husband. Now the assessment of what the accused reasonably knew or ought to have known is inextricably bound up with their knowledge of unlawfulness in relation to the marriage as a whole. Now it was Bheki's case that he did not know the complainant's age, and in accordance with Mpondo custom did not enquire about her age. He claimed no knowledge of the provisions of the Recognition of Customary Marriages Act, 120 of 1998. I will refer to it as the RCMA. He believed, he said, that the complainant was of marriageable age and that in accordance with his customary practice his marriage was lawful. Nomvo asserted a similar position. She too claimed no knowledge of the complainant's age and saw no impediment to the marriage.

The RCMA sets three essential requirements for a valid marriage at customary law. The prospective spouses must both be above the age of 18 years, both must consent to the marriage and the marriage must be negotiated and entered into in accordance with customary law. These are set out in sections 3(1)(a) and (b) of the act. In the event that a prospective spouse is a minor the consent of both parents or his/her legal guardian must be obtained. Now there can be no doubt on the evidence that the "marriage" concluded between

Bheki and the complainant was not a legally cognisable marriage in accordance with the RCMA. The complainant was 12 years old when the negotiations commenced, she did not consent, nor could she, and upon Sibiya's version of what occurred the marriage was only to be concluded when the complainant turned 18. According to Deliwe there was no marriage in accordance with customary law. All that had been established was good relations. Further agreements would need to have been reached before the marriage could be said to have been concluded, and this never occurred. She was also clear that no particular cultural practices were followed.

Insofar as Bheki was concerned the marriage had been concluded. His evidence as to when this occurred was entirely unclear however. Initially he said that the marriage occurred when the Sibiya family agreed, i.e. when Deliwe first visited them and made certain payments. Later his version was that upon payment of *lobola* in full the marriage would take place. This was further altered to contend that the marriage was concluded when Sibiya released the complainant to come to his house upon payment of the borrowing cow.

Now it is not, however, the validity of the marriage itself that is at stake. The central question is whether the purported adherence to cultural practices can negative an inference of knowledge of unlawfulness, and here again the evidence in regard to the complainant's age and what the accused knew

about her age is important. It bears emphasis that Bheki was told at the outset that the complainant was a child and that she was still too young for marriage. That is the effect of what was conveyed to him. Nofikile told him when she was born. Nomvo, whose own knowledge of unlawfulness is at issue, told Bheki that Sibiya had refused because the complainant was still a child, indicating not only that this was conveyed to him, but that she knew that she was still a child. Upon this evidence he must have known that the complainant's age was an obstacle. He took no steps on his version to satisfy himself that her age was not in fact an impediment to marriage. All he did was to proceed with the acquisition of a wife by using another intermediary. Now couple to this is the evidence of Nomabekisisa regarding Bheki's instruction to her to present the complainant as her sister if asked. This plainly reflects an awareness of the unlawfulness of his marriage to the complainant.

In addition to this the evidence presented by Sergeant Mgibe about the arrest of Bheki is instructive. The complainant accompanied the police to his house. She knocked on the door and Bheki spoke to her. When the door was opened the police officer asked if he knew the complainant. He was asked if she was his child, to which he replied in general terms that the children go up and down. When asked if she was his wife he did not reply. After he was

arrested and while en route to the vehicle he telephoned Nomvo, told her he was arrested and that they will also come for you. Nomvo confirmed that this telephone call had occurred. Now when all of this evidence is considered it points in my view to only one conclusion, namely that Bheki knew that the complainant was still a child and that she was not of marriageable age.

The shield of cultural practice or Mpondo custom by Bheki and Nomvo to clothe the marriage in some form of legitimacy is not sustainable. No particular cultural practices were followed. Even if it is accepted that in broad terms a process akin to or recognisable as a customary marriage process was followed, i.e. an initial negotiation process which was referred to as *vula mlomo*, an agreed *lobola* negotiation, and even part payment, and clothing the bride to be in *amadaki* or *makoti* attire. These elements in themselves do not meet the requirements for a customary marriage. They are at best practice analogous to cultural practice.

Now in *S v Jezile* 2015 (2) SACR (WCC) reliance was placed upon the cultural practice of *ukuthwala* in answer to charges of trafficking and rape. Now in this matter we are not dealing with *ukuthwala*, nor circumstances involving some form of abduction. What the court noted in that matter, paragraph 92:

"The trial court found and correctly so, that the

> appellant had not asserted any customary law precept to have justified his conduct, or that he had acted in the belief that he had entered into a customary marriage that permitted sexual coercion. It appeared, however, on appeal that the appellant re-asserted a reliance on the practice of *ukuthwala*, albeit in its aberrant form, which was permissive of coercion in respect of the sexual assaults to subdue her, and that her family (her uncles in particular) had negotiated the payment of the *lobola* for the marriage and had not objected to her removal to Cape Town."

The court then deals with submissions that were made in relation to that cultural practice and some of the evidence that was led, but at 94 the following is said, and then the finding at 95. 94:

> "On appeal the appellant relied on this practice as constituting the living customary law that eschewed the requirements of consent and the prescript of age as determined in the RCMA. Counsel for the appellant submitted that the appellant had effectively entered into what he termed a *"putative customary union"*."

and at 95:

> "However, in our view, it cannot be countenanced

that the practices associated with the aberrant form of *ukuthwala* could secure protection under our law. We cannot therefore, even on the rather precarious ground of the assertion by the appellant of a belief in the aberrant form of *ukuthwala* as constituting the *"traditional"* customs of his community, which led to a *"putative customary marriage,"* find that he had neither trafficked the complainant for sexual purposes (as defined) nor committed the rapes without the necessary intention."

Now while the particular cultural practice relied upon in that case differs from that asserted here it is no less true that what was asserted here as justifying the conduct, the marriage, the transportation and the sexual intercourse, is objectively speaking an aberrant practice, not countenanced by customary law, and aberrant cultural practices can provide no shield of protection against charges relating to forced marriage, child marriages and coerced sexual intercourse. In any event it was not the case that the customary practices of either the AmaMpondo or AmaZulu entitled the conclusion of a forced marriage or a marriage without consent in some form or another, nor was it the case put up by Bheki that upon conclusion of the customary marriage with the complainant that he was entitled to sexual intercourse with her without her consent.

Customary law and practice must comply with the Constitution and with the provisions of the *Bill of Rights*. It is to this purpose that the RCMA was enacted. It has been on the statute books since 1998. It can hardly be suggested that the adaptation and development of customary law to accord with constitutional values and principles is a novel or recent undertaking, nor can it be suggested that the particular protections enshrined in our Constitution in relation to children is a novel or notionally unknown phenomenon.

The Constitution requires that the interests of the child are treated as paramount in all matters that affect the child. The Children's Act, 38 of 2005, gives expression to this paramountcy principle. It defines a child as a person under the age of 18 years. Section 12 deals with social, cultural and religious practices. It provides *inter alia* as follows:

> "1. Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his/her wellbeing.
>
> 2. A child:
>
> (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and
>
> (b) above that minimum age may not be given out in marriage or engagement without his/her consent."

Chapter 18 of the Children's Act contained provisions which prohibited trafficking in children. This chapter was included in the act to give effect to the Republic's obligations in relation to the United Nations Protocol to prevent trafficking. The provisions of that chapter have now been repealed by the Trafficking Act, but the prohibition and the criminalising of conduct constituting trafficking has been a component of our criminal law since at least 2005.

Now the protection accorded to children due to their vulnerability is also a feature of the Criminal Law Sexual Offences and Related Matters Amendment Act, 32 of 2007. It provides that a person who is mentally disabled is one who is affected by any mental disability, and this includes a person unable to communicate his/her unwillingness to participate in a sexual act, and in terms of section 15 sexual intercourse with a minor under the age of 16 years constitutes an offence.

Section 56 provides that whenever an accused person is charged with an offence under section 3 it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant.

Now these broad ranging statutory provisions which embody the constitutional imperative to protect children and to give expression to their interests as paramount are highlighted for two important reasons. First they stipulate the legal

prescripts and principles which this Court is obliged to protect and enforce. Second they reflect the far-reaching and substantive transformation that our constitutional order has brought about and continues to facilitate. This has been a transformative process which has been underway for three decades. To the extent that the accused claim that they are unaware of and therefore have no knowledge of the unlawfulness of concluding a marriage with a child, particularly one as young as the complainant, it is not a claim that can readily be countenanced.

In this case the facts, based upon the reliable evidence of credible witnesses, do not permit a logical deduction that the accused did not have knowledge that their conduct was unlawful. In this respect their denial to this effect is not reasonably possibly true.

What remains to be considered is the charges against each of the accused. I begin with counts 3 and 4, the rape counts, in relation to accused 1. I have already dealt with the essence of the evidence presented by the complainant in this regard. I have dealt also with the requirement that caution must be applied when dealing with the evidence of a single witness, and I take into account also that she was a child witness. Complainant was, as I have already stated, a compelling witness. She remained consistent throughout her testimony in regard to the instances in which she was

subjected to forced sexual intercourse without her consent. She attempted to resist but she could not. She expressed herself in a forceful manner when during cross-examination it was suggested that she consented to sexual intercourse. At one stage when it was suggested to her that she was not shy and unassertive she agreed and she said that during a physical altercation with Bheki she had even managed to pull an armband off his arm such as how she had fought with him. Her evidence as a whole pointed to repeated acts of violence directed at her and in numerous instances, and that she was sexually penetrated when her resistance was overcome.

Bheki's evidence to the effect that the sexual intercourse was consensual is in my view false. Upon his own version of what occurred in his house on the occasion of her first visit to Gqeberha the relationship had he claimed soured and they did not see eye to eye. He suggested that this was because she was going around with Nomabekisisa, visiting taverns and the like. He sought to suggest that she was troublesome and that this ultimately prompted him to send her back to Bizana to be properly schooled as a *makoti* by Nomvo where they would live at his house. In my view it is far more probable that the complainant gave expression to her discontent at her situation by continuing to resist as best she could. This would accord with her reaching out to Nomvo and Sibiya to complain about her circumstances. Rather than

securing assistance though she remained trapped.

I have no hesitation in accepting the complainant's evidence in respect of the repeated forced sexual penetration to which she was subject. Not only was she subjected to sexual penetration, to which she in fact objected, she was at the time under the age of 16 years, she was on the evidence a child with a mental disability and not able to consent to sexual penetration. I am satisfied that the state has proved beyond a reasonable doubt that accused 1 is guilty on counts 3 and 4.

Count 2 is a contravention of section 4(1) of the Trafficking Act, and it is not necessary as indicated in the earlier discussion for the state to prove that one or more of the means set out in the section was employed, or that intended exploitation in fact occurred. In the case of a child victim it is sufficient to prove that the purpose was intended.

In this instance exploitation as defined did in fact occur. The complainant was subjected to sexual violation. The evidence presented by the state, which was not in dispute, is that the complainant was an orphan. From the age of 10 she lived with her uncle Sibiya. As a result of conflict between Sibiya and her older sisters the complainant was separated from her older sisters. On the evidence it appears that Thandiwe only discovered what had become of the complainant when the complainant made her escape from Bheki's house. The complainant's description of her living circumstances with

Sibiya indicates that she was in a position of vulnerability. She was essentially isolated without adult protection and vulnerable by reason of her age, her mental disabilities and her social circumstances. There is an element of tragedy in her account. She reached out to a mother or grandmother figure in the form of Nomvo. She had come to trust her and rely upon her. When she went to live in Bizana she was able to return to school and had a girlfriend of her own age with whom to grow up. She remained, however, a vulnerable child. In my view the evidence points to the abuse of this vulnerability by the adults around her. Although Nofikile presented an account in which chance played a role, the coincidental phone call, there is evidence to suggest that this was not so. Bheki's evidence was that he was looking for a wife. He had spoken to Nofikile about this and she had even introduced him to a prospective candidate. Nofikile denied this. But according to Bheki it was after he had come to learn that the complainant lived with Nofikile that he then pursued this opportunity.

Now I need not find that this was indeed how the marriage came about. It is sufficient to find that the purpose of the marriage and consequential transportation of the complainant was directed to exploitation in one form or another. Bheki made it apparent that he wanted a wife to build his home, to look after his household, to look after his young

children or grandchildren, to cook and to clean, and in fact to bear him children. Now in the abstract these objectives or purposes of pursuing a marriage may not be conceived as exploitation. That was the thrust of an argument advanced by Mr Bodlo on behalf of Nomvo. He argued that these obligations of a *makoti* or a wife were quite usual and ordinarily expected.

I am not at all persuaded that these obligations do not arise or have their origin from deeply held gendered notions of the position of women and that they are consonant with patriarchy and its consequent distribution of power in marital relations, but I need not rule upon that in the abstract. That is so because the concept of exploitation as defined encompasses a broad spectrum of abuse, all of which is premised upon coercion. It is for this reason that purported consent to such abuse is excluded as a defence in the case of adults. It is for this reason too that it need only be intended in the case of children.

When the complainant was made to travel from Shakaskraal to Gqeberha in November 2016 it was at the instance and with the financial aid of Bheki. He expressed in his evidence the fact that now that the Sibiya had agreed upon acceptance of the borrowing cow that he was entitled to have his wife at his side. This was to fulfil his purposes in securing a wife, namely to have someone to look after his household, to

cook and to clean for him, and to meet her conjugal obligations.

Sibiya's denial that he did not know that the complainant was to be with Bheki, I have indicated, is not supported by the evidence. He had told the complainant that she was now to be Bheki's wife. He knew what this entailed, and so too did Nomvo. In the event the complainant was in fact subjected to exploitation by being sexually violated and abused.

Now I need not repeat what I have said about the accused's knowledge of unlawfulness. As the quoted passage from *S v De Blom* indicates upon proof that the prohibited act has been committed or performed it may, having regard to the circumstances of the case, be deduced that the accused committed the act intentionally and with knowledge of its unlawfulness. What has been established in this instance is that the complainant was transported by travelling from Shakaskraal, and on a separate occasion from Bizana, to Gqeberha. Section 4(1) defines the prohibited conduct in terms that cover the acts of delivering, transporting, transferring from one place to another and receiving the person. The evidence establishes this conduct in relation to each of the accused.

I am in the circumstances accordingly satisfied that the state has proved beyond a reasonable doubt that the accused are guilty of a contravention of section 4(1) of the Trafficking

Act, and for that reason unnecessary to consider the alternative charges to that section.

In respect of count 1, the conclusion of a forced marriage, I have indicated that I accept the evidence of the complainant that she did not consent to the purported marriage. The definition of a forced marriage does not contemplate a marriage that is, apart from being forced, otherwise a valid or lawful marriage. That would give rise to an absurdity. It would mean that an accused could escape liability for conduct in concluding a forced marriage on the basis that the marriage is in fact not validly executed. The reference to marriage in that context must include that which is purported to be a marriage, and this accords with the approach adopted to the putative customary marriage in *S v Jezile* to which I referred earlier.

The discussion regarding the purpose for which the marriage was concluded which I have just set out applies in relation to this count as well. The evidence establishes that sexual exploitation occurred. But section 4(2) strikes at the person who concludes a forced marriage with another person. Upon an ordinary grammatical reading this suggests that it envisages that the other party to a marriage falls within its reach. The phrase "conclude a marriage" is ordinarily used in relation to the parties to the marriage, for example in relation to their capacity to conclude a marriage. See for example

Hardy v Jansen + Others 2015 JOL 33508 (WCC) and *Francescutti v Francescutti* 2005 JOL 13472 (WCC). Section 4(2)(b) would accordingly apply in relation to accused 1, Bheki. The fact that he employed agents or intermediaries to conclude the marriage does not alter the position in law that he concluded the forced marriage, i.e. the purported marriage to the complainant, without the consent of the complainant. The word "conclude" would ordinarily suggest some event or occurrence bringing about the marriage. It is certainly not used in a sense denoting the mutual agreement that would otherwise ordinarily give rise to the marriage, nor upon execution of a ceremony of some sort, since as far as the former is concerned there is of course no agreement. It is unnecessary to engage in that interpretive exercise since on the facts accused 1, Bheki, and indeed others, acted upon an agreement which excluded the complainant, and the effect of the agreement was to treat the complainant as if she was married.

I do not consider that section 4(2)(b) strikes at the person or persons who facilitated or participated in the conclusion of the forced marriage. If that were intended, the section would no doubt have been worded differently. Now the prosecution no doubt alive to this possibility, relied upon three alternative charges, namely contraventions of section 10(1)(a), (b) and (c) of the Trafficking Act respectively.

Now these provisions read as follows. 10(1) reads:

"Any person who:

(a) attempts to commit or performs any act aimed at participating in the commission of;

(b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or

(c) conspires with any other person to commit."

Section 10(1)(a) is framed in terms sufficiently broad to strike at the role performed by both accused 2, Sibiya, and accused 3, Nomvo, in relation to the conclusion of the marriage. It covers also the conduct, in my view, of Deliwe and perhaps Nofikile. Sibiya participated directly in the negotiation of the terms of the proposed marriage. On his version he at no stage sought to obtain the consent of the complainant. He undoubtedly participated in the commission of a forced marriage. Deliwe, who acted as negotiator, equally participated, although I need not and do not make any specific and definitive finding as to whether she knew that it was a forced marriage.

In the case of Nomvo she was aware of the process and facilitated the transfer of the money. She was kept informed

throughout. She certainly performed an act aimed at participating in the conclusion of the marriage. Did she know that it was forced, i.e. without the complainant's consent? She said that she enquired from the complainant who indicated to her that she had agreed, yet she knew that the complainant was still a child and she had expressed her misgivings about this to Bheki, and on her version to the complainant. Now I am not able to accept that she did not appreciate that the complainant was incapable of giving proper and informed consent, and in these circumstances I am satisfied that the state has established beyond a reasonable doubt that both accused 2 and accused 3 are guilty of contravening the alternative charge of section 10(1)(a) of the Trafficking Act.

SECTION 204 WITNESSES

I must return to the witnesses Nofikile, Magadlela and Deliwe Delta Mbonga. They testified in terms of section 204 of the Criminal Procedure Act and were duly warned. Section 204 confers upon a court hearing the evidence of a witness called in terms of this section power to grant that witness indemnity from prosecution. In order to do so the court must be satisfied that the witnesses answered all questions frankly and honestly notwithstanding that in doing so they may have incriminated themselves in the commission of an offence. The purpose of the section is to enable the state to present evidence which might not otherwise be available to it in

prosecuting a charge.

Nofikile played an important early role in the circumstances that gave rise to the commission of the offences. It was through her that initial contact was made by the accused, Bheki in this case, with the complainant. It was also through her that the process of initiating the eventual marriage without the complainant's consent occurred. Her evidence shed light on how situations like this may, indeed do, arise. There were two aspects of Nofikile's evidence that raised some concern. The one involved a direct contradiction between her and the complainant in relation to the meeting at Bizana. As indicated earlier the version of the complainant, corroborated as it is by accused 1, Bheki, himself must be accepted. It is not clear why Nofikile should not have testified to this occurrence. Perhaps it reflected upon her having played a more active role than she was prepared to admit. The second aspect related to how the initial contact with Bheki had come about. Bheki's version suggested that he had been actively looking for a person to take as his wife and that Nofikile had been engaged in assisting him in this regard. Nofikile denied this. Bheki's version, however, provides a more plausible and probable explanation for how this matter originated. In my view other aspects of Nofikile's testimony which are subject to critique are of no great moment. I am of the view that while she may not have disclosed all aspects of

her involvement she was not dishonest in her account of what occurred. I accept that for the purposes of section 204 she testified frankly and honestly. She is accordingly entitled to an indemnity from prosecution for offences in terms of the Trafficking Act she may have committed arising from the events giving rise to the charges brought against the accused.

The other section 204 witness was Deliwe Mbonga who acted as the negotiator in the *lobola* negotiations. Her conduct facilitated the commission of the offences in terms of the Trafficking Act and placed the complainant in a position ultimately where she was subject to sexual exploitation. It is undoubtedly a fundamental role. But she provided in my view a frank account of what this role involved. She was in my view sufficiently open and honest in doing so. I am accordingly satisfied that she too is entitled to be indemnified from prosecution for any offences she may have committed in breach of the Trafficking Act pursuant to the role she played in this matter.

At the commencement of this judgment I indicated that the trial had proceeded subject to numerous postponements over a lengthy period of time. A very substantial body of evidence was presented. I have sought to highlight the essential aspects of that evidence and to deal with it as best I can and to provide as succinct and coherent account as possible of my reasoning in coming to the conclusions I have

reached. I have carefully considered all of the evidence presented notwithstanding that I have not specifically referred thereto in the judgment. I am satisfied that the prosecution has proved its case against each of the accused beyond a reasonable doubt, and in the result I would enter the following verdict.

Accused 1, Bheki Wellington Nxasana, is found guilty on counts 1, 2, 3 and 4.

Accused 2, Mxosheni Beaker Sibiya, is found guilty on count 2 and on the first alternative to count 1, being a contravention of section 10(1)(a) of the Prevention of Trafficking in Persons Act, 2013.

Accused 3, Nomvo Nxasana, is found guilty on count 2 and on the first alternative to count 1, being a contravention of section 10(1)(a) of the Prevention of Trafficking in Persons Act, 2013.

Nofikile Magadlela and Deliwe Mbonga are indemnified in respect of any charges of criminal conduct pursuant to breaches of the Prevention of Trafficking in Persons Act arising from the events giving rise to the prosecution of the accused in this matter.

GOOSEN, J

JUDGE OF THE HIGH COURT

DATE: 2022.06.13 + 2022.06.14

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