Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No.: CA&R20/2022
Date Heard: 13 June 2022
Date Delivered: 4 October 2022

In the matter between:

SIPHO MKHIZE Appellant

and

THE STATE Respondent

Coram: Tlaletsi JP *et* Nxumalo J

ORDER

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1. The appeal succeeds.
2. The conviction of the appellant for contravening section 3 of the Sexual Offences Act and the sentence of life imprisonment are set aside and replaced with the following:

   "The accused is found not guilty for contravening Section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007."

JUDGMENT

Tlaletsi JP

[1] The appellant, was despite his plea of not guilty, convicted in the Northern Cape Regional Court on one count of rape in contravention of Section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (Sexual Offences Act). He was subsequently sentenced to life imprisonment. Acting in terms of section 276B of the Criminal Procedure Act[1] (the CPA), the trial court attached a condition that the appellant be not considered or released on parole before serving at least four fifths (⅘) of his term of imprisonment. He was legally represented throughout his trial.

[1]Criminal Procedure Act 51 of 1977.

[2] The appellant erroneously applied for leave to appeal against his conviction and sentence immediately after the conclusion of the sentencing proceedings. He was granted leave to appeal against sentence only. He subsequently, on the advice of Legal Aid South Africa, filed a Notice of Appeal against both his conviction and sentence. He did not require leave of the Regional Court to appeal against both his conviction and sentence. The Notice of Appeal was accompanied by a condonation application. The application was correctly not opposed by the respondent. The application is meritorious and condonation was granted at the hearing of this appeal.

[3] At the heart of this appeal is the question whether the evidence presented by the respondent was sufficient to sustain a charge of rape. Put differently, whether the state had proven beyond a reasonable doubt that the appellant raped the complainant. The appellant's conviction and the resultant sentence arise from the following factual matrix. The complainant who was 15 years old at the time of the incident, testified when she was 17 years old. The state successfully brought an application in terms of section 170A[2] of the CPA. It was supported by a report of a probation officer who proposed that the complainant testifies

[2] Section 170A (1) of the CPA provides:

> *(1)Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—*
> *(a) under the biological or mental age of eighteen years;*
> *(b) who suffers from a physical, psychological, mental or emotional condition; or*
> *(c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006),*
>
> *to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.*
> *[Sub-s.(1) substituted by s. 68 of Act No. 32 of 2007 and by s. 8 (a) of Act No. 12 of 2021 w.e.f 5 August, 2022.]*

through an intermediary so that she should not be exposed to undue mental stress or suffering. Despite her age, the complainant was admonished to speak the truth in terms of Section 164 of the CPA[3] as the trial court was not satisfied that she understood the nature and import of the oath or affirmation. The proceedings were conducted in camera.

[4] The complainant testified that on 2 April 2019, she was sent to the shop by one Boitumelo to buy her cigarettes. Along the way, she met an unknown male person. He offered her a soft drink if she accompanied him to his shanty. She refused to accompany him. The man pulled her by her hand until they both entered a nearby shanty. Inside the shanty, the man prepared and smoked some drugs. When he finished smoking his drugs, he threw her on the bed and undressed her 'tights' and panties. He took off his pants and inserted his penis into her private part. He made some sexual movements. The complainant felt pain and screamed. The man stopped. She left the shanty and went to a nearby toilet. Along the way, she met her friend, Ms TM. The latter asked her what was going on. The complainant replied that nothing was happening. As she was passing some water, the complainant noticed what she called 'sperms' coming out of her private part. After that, she left for home. She bought some chips for other children with the R100 that the man had given her inside the shanty. He

[3] Section 164 provides for an instance when unsworn or unaffirmed evidence is admissible:

*"**164 When unsworn or unaffirmed evidence admissible***

(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence."

gave her the money before he hurt her. He further gave her R5-00. Before she left the shanty, the man did not say anything to her.

[5] The complainant mentioned that she wanted to report to her sister, Maletsatsi what happened. She however did not do so because the man told her that he will kill her if she told Maletsatsi. The following day in the evening Maletsatsi came to her home, she asked her what happened and she told her that she was raped. Maletsatsi then called the police and they all questioned her about what happened.

[6] In cross-examination, the complainant testified that she had never seen the man before the incident. She only heard from the street that his name is Sipho. Asked why she did not report to Boitumelo about what happened to her, she replied that she does not know. Before the incident, she neither knew about the shanty nor who owned it. She had never walked past that shanty before. She does not know whether the toilet she went to was part of the shanty she was in. She mentioned that Ms TM told her that she heard her scream loudly. She then told Ms TM that she never screamed. She did not tell Ms TM what happened to her because she knew that the latter was going to tell Maletsatsi. She did feel some pain when he penetrated her vaginally. However, by the time she went to buy chips, she was no longer feeling the pain. The incident was her first sexual encounter.

[7] She was referred to Ms TM's written statement to the police that when she asked her why she was screaming, she replied to Ms TM that the man wanted to

assault her. She does not know why she did not tell her about the rape. The police obtained her statement through or with the assistance of Maletsatsi. She confirmed that the police took her to a doctor for examination. It was put to her that the appellant does not stay at Riemvasmaak, but Ipopeng and that the shanty in Riemvasmaak belongs to one Khokhoza. She replied that the appellant is lying. It was further put to her that on that day, the appellant was assisting in the taxi business of his aunt and was never at the shanty; that he never had any contact with her and never raped her. She confirmed that it was the first time that she saw the man on that day, and that he raped her.

[8] A report by the Medical Practitioner who examined the complainant on 3 April 2019 was presented by the appellant to be part of the record. The report indicates that no physical injuries were observed. Also on the gynaecological examination, no injuries were observed. The *posterior* rim of the hymen was not present. The forensic report also indicates that no semen was detected on the exhibits presented to the Forensic Science Laboratory.

[9] The second witness for the State was Ms TM, a ten-year-old girl who also testified through an intermediary. She was also admonished in terms of section 164 of the CPA, to tell the truth as the court was not satisfied that she understood the nature and import of the oath or affirmation. She testified that she was playing with friends in the street next to one Khokhoza's shanty. She heard a person scream *"ah oo"* from the shanty. Later the complainant came out of that shanty and proceeded to a toilet. On her return, the complainant asked her where Sipho went to. Ms TM showed the complainant the direction

Sipho had taken. She knew who Sipho was and that he stayed with Khokhoza in the latter's shanty. She did see Sipho at Khokhoza's shanty that day. Sipho exited the shanty first and was followed by the complainant. According to her, Sipho did not leave in a rush. He was walking normally. The complainant closed the shanty door when she went out. The complainant was just fine when she came out of the shanty. The two did not talk about anything else and the complainant left for home.

[10] Under cross-examination, she testified that the complainant did not know Sipho's name. She mentioned that she did not know who screamed inside the shanty. She was playing tins with a friend Kgothatso. Upon hearing the scream Kgothatso put the tins away and went home to tell her mother that she heard someone scream. Also, when Sipho came out and later the complainant, she did not know who screamed. She did not enter the shanty to see who else was inside. She mentioned that she also asked the complainant who was screaming and she replied that Sipho wanted to hit her. It was put to her that the complainant never testified that she asked her where Sipho went to. She replied that the complainant *"likes lying"*, and she did ask her where Sipho went to. She did not see Sipho and the complainant enter the shanty. She insisted that the person she saw was Sipho and that he is lying when he says he was not at the shanty. She mentioned that Sipho knows that he had *'sex with [the complainant*].' She was asked to describe Sipho and she replied that she is unable to describe him.

[11] Ms Maletsatsi Maine (Maletsatsi) is the complainant's eldest sister. She testified that the complainant was born with a down syndrome condition. She takes medicine for epilepsy and for her mental condition. She is someone who forgets and cannot read or write. She is attending a special school. They are not staying in the same house. She was however seeing her almost every day because she had to fetch her child from her parental home when she returned from work.

[12] One afternoon she received a report from one Dede who told her about what Ms TM told her relating to the complainant and Sipho. She requested her to take her to the shanty. She took her to the shanty in the vicinity. Maletsatsi called the name *"Sipho"* several times. A male person came out of the shanty. She told the man that she is looking for Sipho and she wanted to ask him what was the complainant doing in Sipho's shanty. The man told her that he is Khokhoza and that Sipho was not present. She pointed at the appellant in the dock as the person she spoke to. She left and returned home. She decided to go to her parental home to interview the complainant about what she was told. As she went out, she saw the appellant outside her gate and he voluntarily told her that he is in fact Sipho and not Khokhoza and that nothing happened in the shanty. He mentioned that he only sat with the complainant and shared a "cold drink". She ignored him. She later met him standing in front of a tuckshop. He followed her and again voluntarily told her that he was with the complainant in the shanty and that nothing else happened between them. She ignored him and proceeded to walk to where she was going.

[13] She found the complainant at home. She asked the complainant what happened the previous day at Sipho's shanty. The complainant asked her who Sipho was. She replied that the *"the boetie you were sitting with drinking cold drink in the shanty. What happened?"* The complainant started crying and replied that she does not know the *"boetie's name, but I can show you who he is. And we were drinking cold drink. And the "boetie" said I must lay on the bed, on top of the bed."* She told her that she refused to lie on the bed and the man took off her pants, and inserted his private parts into hers. Maletsatsi calmed her down and decided to call the police.

[14] Maletsatsi testified that the incident was heart-breaking to her and the family. She had developed anger at the appellant from the time he told her that he is not Sipho. The family feels that they failed the complainant by not protecting her against the rapist. They took the complainant through counselling sessions from 2019 until sometime in 2020, four times in a month. The appellant's version that he never met her and spoke to her as she alleged was put to her and she insisted that she met him. She mentioned that the appellant was untruthful when he said he did not sexually assault the complainant.

[15] Ms Cecilia Diratsagage, testified that the complainant is her younger sister. She testified that she does not know anything about the incident. She was at home washing some clothing. The complainant was present from the morning with her. Around 15:00 she went to the street to play. On her return, she asked the complainant where she had been and she replied that she had been in the street. She was having a packet of chips, biscuits, sweets, and a Tweeza soft

drink. She asked her where she got the money to buy these items. She did not answer. To her, she was just fine and looked okay.

[16] The appellant's defence was that of an *alibi*. He testified that he had been residing at 62 Ratanang at Ipopeng since 1991, which is his parental home. He lives there with his two aunts and his two girl children. He is working for his aunt who owns a taxi business. On 2 April 2019, the day of the alleged incident, he started work at 08:00 and knocked off at 20:00. He does not know Khokhoza. He was never at a shanty in Riemvasmaak. He knows a friend who owns a shanty in that area. However, he does not know him to be Khokhoza. He denied ever meeting the complainant, Ms TM or Maletsatsi. He denies raping the complainant. The state witnesses could be mistaking him for someone else.

[17] Under cross-examination, the appellant testified that members of a vigilante group met him and took him to a house, in Riemvasmaak, where Maletsatsi was. They asked her if it was him. She confirmed and he was taken to the police station and was detained.

[18] In its judgment on the merits, the trial court moved from the premise that the following facts were common cause: that the complainant departed her residence and was accosted by a person who took her to a shanty; that the complainant was penetrated; that she screamed; that Ms TM and another were playing outside; that Ms TM heard a scream; that Ms TM saw the complainant exit the shanty; that the complainant sustained no physical injuries; that the gynaecological report indicated that there were no injuries observed, safe that

the posterior of the hymen was absent; that Maletsatsi was informed about the incident and was accompanied by a 'vigilante group' which pointed out the appellant.

[19] Having made the said remarks, the trial court held that the only issue in dispute was the identity of the perpetrator. The court reasoned that the incident happened in daylight, the complainant had an opportunity to see the perpetrator who lay on top of her; she spoke to him as a result, she had an opportunity to make an identification. The court held further that Ms TM was able to see the appellant, the person she previously knew, exiting the shanty. Furthermore, the court remarked that an independent witness, Maletsatsi, was able to point out the appellant to the vigilante group. The trial court was satisfied that the identity of the appellant as the perpetrator had been proven beyond a reasonable doubt and that the appellant's version was improbable and could not be reasonably possibly true. The appellant was consequently found guilty of rape.

[20] The appellant raised the following grounds of appeal: that the trial court erred in finding that the complainant and the two witnesses for the respondent correctly identified the appellant as being the perpetrator; the court erred in attaching weight to the dock identification made by Maletsatsi; and the court erred in accepting the hearsay evidence of Maletsatsi, regarding the pointing out. Finally, that the trial court erred in rejecting the appellant's version as not being reasonably possibly true and finding that the respondent had proven the appellant's guilt beyond a reasonable doubt.

[21] It is trite that the State bears the onus to prove the guilt of an accused person beyond a reasonable doubt. There rests no duty on the accused to prove his/her innocence. In ***S v Van Der Meyden***[4] the court held:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[22] As regards the evaluation of evidence in a criminal trial, in ***Chabalala***[5] the Supreme Court of Appeal held:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the appellant's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only

[4]1999 (1) SACR 447 (W) at 449i-450b, see also ***S v V*** 2000(1) SACR 2000 (1) 453 (SCA) at 455A-C
[5]***S v Chabalala*** *2003(1) SACR 134 (SCA) at para 15.*

be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence."

[23] In ***Haarhoff v DPP, EC***[6] the court had the following to say about the proper approach to the evidence of a child who is a witness and that of a single witness:

"It is settled law that evidence of a child must be approached with caution. The same principle applies to the evidence of a single witness. The court has to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in material respects. The court is to look for features, in the evidence, which bear the hallmarks of trustworthiness to substantially reduce the risk of wrong reliance upon the evidence of a single witness."

[24] This Court should deal with the matter bearing in mind the powers of an appellate court in the factual findings of a trial court which were spelt out in ***R v Dlhumayo***[7] as follows:

"The trial judge has advantages which the appellate court cannot have in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial, not only has he had the opportunity to observe their demeanour but also their appearance and the whole personality. This should never be overlooked. Consequently, the appellate court is very reluctant to upset the findings of the trial judge. There mere fact that the trial judge has not commented on the demeanour of the witness can hardly ever place the appeal court in as good a position as he was. Even in drawing inferences, the trial judge may be in a better

[6] *2019(1) SACR 371 (SCA) at para 37.*
[7] **R v Dlhumayo** 1948 (2) 677 at 705-706

position than the appellate court, in that he may be able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial"

"…where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct, the appellate court will only reverse it where it is convinced that it is wrong. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. There may be misdirection on fact by the trial judge where the reasons are either in their face unsatisfactory or where the record shows them to be such, there may be such misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities".

[25] The appellant pleaded not guilty to the charges against him. He elected not to present any plea explanation. He also did not make any admissions. By this approach, he called on the respondent to prove all the elements of the charge against him and to prove his guilt beyond a reasonable doubt. The defence of an *alibi* which the appellant relied upon did not relieve the state of its duty to prove the commission of the offence which the appellant was facing, and to disprove his *alibi*.

[26] As pointed out, the trial court commenced by stating that the only issue in dispute was the identity of the 'perpetrator' and that everything else was common cause. It accepted the evidence presented by the state in the commission of the offence without conducting a proper analysis of the evidence that was presented. For the reasons that will be apparent below, this approach by the trial court has

its inherent difficulties. There are in addition some unsatisfactory aspects relating to the respondent's case.

[27] It is to be recalled that the only time the complainant may have mentioned that she had been raped was the following day when she was confronted by Maletsatsi. At that time, Maletsatsi had already received information from one Dede that Ms TM told her that she heard the complainant screaming from the shanty in which she was with Sipho. The complainant had the opportunity to report to Ms TM who specifically asked her what had happened. To show that the complainant had a presence of mind at the time, she replied that nothing happened. She also did not report to Boitumelo, who had sent her to the shop to buy cigarettes for her. In fact, there is no evidence as to whether she ultimately bought cigarettes and what happened to the money she was to buy the said cigarettes with. Furthermore, the complainant had an opportunity to report to Cecilia who lived with her. To both Ms TM and Cecilia, the complainant appeared as if there was nothing untoward that happened to her or bothering her.

[28] The manner in which Maletsatsi obtained information from the complainant about the incident also raises some questions. She confronted the complainant with information and leading questions as to what allegedly happened the previous day at Sipho's shanty. It is then that the complainant mentioned that she does not know the name of the person, but he asked her to lay on the bed. She refused and he undressed her and inserted his penis in her vagina. It is not unreasonable to conclude that had it not been for Maletsatsi, there would not

have been a charge of rape and the prosecution thereof against the appellant. The evidence and conduct of the complainant can only point to the fact that she was an unwilling complainant. She appeared to have decided to conceal the incident indefinitely. This is also evident from her denial to Ms TM that she ever screamed in the shanty.

[29] The evidence of both the complainant and Maletsatsi must be contrasted with that of Ms TM, who testified that the complainant asked her where *"Sipho"* had gone to. She also testified that the complainant said to her *"Sipho wanted to hit me."* If indeed she did not know the name Sipho before, she could not have mentioned his name. It is not clear from the evidence of Ms TM, what the complainant actually said to her when she asked about the person. It is possible that Ms TM concluded that she must be referring to Sipho. In any case, the complainant denied that she ever asked Ms TM about Sipho and where he went to. From the evidence of both witnesses, it is difficult to discern what the true position is.

[30] The other fundamental difficulty in the respondent's case is the identification of the perpetrator. According to the complainant, she was seeing the perpetrator for the first time when she met him on the day. Although she referred to the perpetrator as Sipho in court, that is the name she got from Maletsatsi. At no stage did the prosecution request her to describe the perpetrator, or to point him out in court, to confirm whether indeed the appellant is the person who raped her. The evidence does not suggest that she was present when the appellant

was arrested, to be able to say the person arrested and standing trial is the perpetrator.

[31] Ms TM, who testified that she knew Sipho and that he stayed with Khokhoza, was unable to describe him in her evidence. She was also not requested to make a dock identification of the appellant. Had she at least done the dock identification, and pointed at the appellant, that would have given the appellant the opportunity to challenge her identification evidence. The trial court concluded that the complainant and Ms TM were referring to the appellant when they had in fact not identified him as the perpetrator. The fact that Ms TM was unable to describe the appellant, was found by the trial court to be a neutral factor to be expected of any witness. This aspect was not pursued to establish why the witness was unable to describe the perpetrator. Instead, the learned Magistrate reasoned that it is difficult to describe a person as he could also not describe the appellant from where he was sitting. Furthermore, the Magistrate mentioned that he owned a Jack Russel dog for 15 years and if asked to describe it, he won't be able to do so other than to mention that it is short and long-haired with white and brown spots. There is more than a million of such dogs in the world, but he surely will be able to identify his. Nonetheless, it should have been left to the witness to give an explanation why she could not or was unable to describe the appellant who was at the time not within her sight.

[32] It must be mentioned though that Ms TM's evidence also had material contradictions. She concluded that she was going to tell Maletsatsi that she heard the complainant scream when she also conceded that she did not know

between her and Sipho, who actually screamed. In her evidence in chief, she testified that the only conversation she had with the complainant is when she asked her where Sipho had gone to. She never mentioned the further discussions relating to her scream and that it was the reason given by the complainant that Sipho was attempting to hit her. Even if it was to be accepted that she asked her about her scream, the problem then is that the complainant denied that she screamed and the explanation that Sipho wanted to hit her was disavowed by the complainant. If the discussion about the scream took place, the prosecutor would in all likelihood have asked her more about it since it is a crucial aspect of the rape itself. When it was put to Ms TM that the complainant did not mention that she asked her where Sipho went to, Ms TM discredited her by stating that she likes telling lies. She put the complainant's credibility into question.

[33] The only person who made the dock identification was Maletsatsi. It is clear that her evidence was tendered to try and close the gaps that were in the state's case. Her identification must be considered having in mind that the proceedings were in camera and the appellant was, other than the court officials, the only person who was in court and in the dock. Her evidence as to the identity of the appellant is of a single witness. It was neither corroborated nor confirmed by the complainant and Ms TM. The latter did not even testify that she related to Maletsatsi what she saw or knew about the incident.

[34] There are other aspects of Maletsatsi's evidence that raise some questions. When she went to the shanty and called the name Sipho, a person who

responded by exiting the shanty, claimed that he was not Sipho but Khokhoza. Maletsatsi, without any debate or questioning, left the person. However, it is strange that the same person who knew that Maletsatsi was looking for Sipho who had at least been with the complainant in the shanty, something that she was not happy about, would wait at her gate and later at the tuckshop, and volunteer or confess that he is in fact Sipho and not Khokhoza; that he was indeed with the complainant and nothing else other than sharing a soft drink happened. Furthermore, Maletsatsi's evidence that she received a report from one Dede about the incident was not confirmed by any other witness and remains hearsay. The trial court mainly relied on this inadmissible evidence to convict the appellant. The state, which bore the onus to prove the guilt of the appellant beyond a reasonable doubt, did not tender any evidence to corroborate the evidence of Maletsatsi. It is to be remembered that she was unhappy about what she heard and without reporting to the police, undertook an investigation herself. It appears that a vigilante group was also invited to participate in the investigations.

[35] ***S v Sauls and Others***[8] directs us to the correct approach in evaluating evidence of a witness that has contradictions:

"The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he [she] is satisfied that the truth has been told."

[8]1981 (3) SA 172 (A) at 180E-G.

[36] Not every contradiction will result in the evidence of a witness being rejected. The correct approach was aptly stated in ***Haarhoff***[9] that:

"... It behoves the courts to keep in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Contradictory versions must be considered and evaluated on a holistic basis. Furthermore, the circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions, the quality of the explanations and the connection between the contradictions and the rest of the witness' evidence are among other factors to be taken into consideration and weighed up."

[37] In its judgment, the trial court did not deal with the contradictions in the state's case. The reason for not doing so may be that the court accepted that what the state witnesses testified to was common cause. In my view, this approach is a misdirection on the part of the trial court. The medical report does not assist the state's case in proving an act or sexual penetration. At best it may raise more questions as to the veracity of the complainant's version that this was her first sexual encounter. The trial court concluded that the perpetrator paid the complainant money to buy her silence. Unfortunately, the complainant testified that the perpetrator gave her the money without saying anything to her. The evidence as to how she received the money is also not clear. She mentioned receipt of the after she had already given her narrative of the events and in response to questions from the prosecutor. She mentioned that she bought

[9] ***Haarhoff v DPP, EC*** 2019(1) SACR 371 (SCA) at para 42

chips and one Cecilia took the rest of the money. However, Cecilia testified about more items than chips that the complainant had when she returned home. When she was asked by Cecilia as to where she got the money to buy those items, the complainant did not say anything. The evidence as to how she received the money is also not clear.

[38] It is unfortunate that the police did not do much to investigate the case. The evidence suggests that the appellant was taken by a vigilante group and presented to the police as the perpetrator. One would have expected the police to have conducted a thorough investigation of the scene. This would have included requesting the complainant and Ms TM or taking them to the shanty in question to make some pointing out and observations of the scene. It is still unclear how the shanty looked like and what exactly was inside. Even a picture of the shanty was not presented as evidence.

[39] I am not satisfied that the state had proved the guilt of the appellant beyond a reasonable doubt. It must be emphasised that the appellant was not charged for having sexual penetration with a child below the age of 12 years. The complainant was 15 years old at the time. Neither was the appellant charged for an act of sexual penetration with a person with disability. The evidence of Maletsatsi, who is not an expert in mental health, to the effect that the complainant had a ‘down syndrome condition’ as well as a ‘mental’ condition for which the complainant is taking some medication, was not the basis for the charge against the appellant. The appellant was charged with an ordinary

charge of sexual penetration of the complainant without consent, which in my view the state had not succeeded to prove beyond a reasonable doubt.

[40] In the result, the appeal must succeed and the conviction of the appellant must be set aside. With this conclusion, the appeal against sentence ought not to be considered.

Order

3. The appeal succeeds.
4. The conviction of the appellant for contravening section 3 of the Sexual Offences Act and the sentence of life imprisonment are set aside and replaced with the following:

   "The accused is found not guilty for contravening Section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007."

_____

L P TLALETSI

JUDGE PRESIDENT

I concur

_____

APS NXUMALO

JUDGE

On behalf of the Appellant:	**Mr H. Steynberg**
Instructed by:	Legal Aid South Africa, Kimberley
On behalf of the Respondent:	**Adv. RR Makhaga**
Instructed by:	Director Public Prosecutions, Kimberley