

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: CC 20/2017

In the matter between:

**THE STATE**

v

**BERTUS KOCH**

**ACCUSED**

**Neutral citation:** *S v Koch* (CC 20/2017) [2018] NAHCMD 290 (18 September 2018)

**Coram:** DAMASEB, JP

**Heard:** 18-22; 26-29 June 2018, 1-3 August 2018 and 6 August 2018

**Delivered:** 18 September 2018

**Flynote:** **Criminal law** – Child Trafficking and Rape of minor children under coercive circumstances – Elements in terms of the Prevention of Organised Crime Act 20 of 2004(‘POCA’) and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children – The act of harboring or receiving children for purpose of exploitation– Meaning of harbouring

or receiving; and meaning of exploitation - State proving the offence beyond reasonable doubt - Rape – Combating of Rape Act 8 of 2000 (CORA) – State bearing onus failing to prove offences beyond reasonable doubt – Accused to be given benefit of the doubt.

**Evidence** – Cautionary rule to be applied to evidence of children – Versions of minor complainants unsafe to support conviction - Complainants' versions internally inconsistent in material respects as well as inconsistent as between the complainants – Rape charges unsustainable – Accused found guilty on alternative charges of contravening s 14(c) of the Combating of Immoral Practices Act 21 of 1980 (CIPA).

**Summary:** The accused pleaded not guilty to charges of child trafficking and rape under coercive circumstances of five minor girls. The accused lived in the same neighborhood with the complainants and from the collective version of the complainants, the accused would invite them to his room where he would commit sexual acts with them. The court is called upon to determine whether the accused harboured or received the girls for purpose of sexual exploitation.

The court reiterates the cautionary approach when dealing with evidence of minor complainants. Court observes that the quality of the evidence led at the trial is very poor; and investigation was poorly conducted.

*Held*, on the charge of Human Trafficking of children, that the State proved its case beyond a reasonable doubt that the accused harboured or received the minor complainants within the meaning of POCA and the Protocol by engaging in lewd and lascivious conduct for his sexual gratification. The court satisfied that, at the very least, the accused solicited the complainants to engage in indecent and immoral conduct with him for his sexual gratification, contrary to s 14(c) of the CIPA.

*Held further*, on a charge of rape under coercive circumstance, that the evidence of the complainants is tainted with contradictions and inconsistencies, that there exists a possibility of fabrication or suggestibility and apart from the child complainants' mere say-so, there is no physical evidence to show that the accused committed sexual acts on the complainants, alternatively, there is no physical evidence linking the accused to the alleged crimes of rape which require physical contact. Court finds therefore that it is unsafe to convict the accused of rape based on the allegations of the complainants.

*Held further*, accused found guilty on child trafficking and on alternative charges of committing a sexual act with a child below the age of 16 years on divers occasions contrary to the CIPA.

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**\_ORDER**

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**Count 1: Guilty:** Contravening section 15 read with section 1 of the Prevention of Organized Crime Act 29 of 2004 ('POCA') read with section 94 of the Criminal Procedure Act 51 of 1977 ('CPA') - child trafficking on divers occasions in respect of NG a child below the age of 18 years old.

**Count 2:** Not guilty.

***Alternative to count 2:*** Guilty Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 3: Guilty:** Contravening section 15 read with section 1 of POCA read with section 94 of the CPA – child trafficking on divers

occasion of CB a child below the age of 18 years old.

**Count 4:** Not guilty.

***Alternative to count 4:*** Guilty      Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 5:** Guilty:      Contravening section 15 read with section 1 Prevention of Organized Crime Act 29 of 2004, read with section 94 of the Criminal Procedure Act, 51 of 1977 – Child trafficking (divers occasion) [in respect of MB a child below the age of 18 years old).

**Count 6:** Not guilty.

***Alternative to count 6:*** Guilty      Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 7:** Guilty:      Contravening section 15 read with section 1 of the POCA, read with section 94 of the CPA – child trafficking (divers occasion) in respect of MB a child below the age of 18 years old.

**Count 8:** Not guilty.

***Alternative to count 8:*** Guilty      Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of

1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 9:** Guilty.

Contravening section 15 read with section 1 of the POCA, read with section 94 of the CPA– child trafficking (divers occasion) in respect of RH a child below the age of 18 years old.

**Count 10:** Not guilty.

**Alternative to count 10:** Guilty

Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

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## JUDGMENT

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DAMASEB, JP:

### Introduction

[1] The accused, an adult 42-year-old male, was arraigned in the High Court of Namibia (Main Division) on:

- (a) Five counts of child trafficking in contravention of s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 ('POCA'), read with s 94<sup>1</sup> of the Criminal Procedure Act 51 of 1977 ('CPA');

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<sup>1</sup> Section 94 of the CPA states: 'Where it is alleged that an accused on divers occasions during any period committed an offence in respect of any particular person the accused may be charged in one charge with the commission of that offence on divers occasions during the stated period'.

- (b) Five counts of rape of minor girls under coercive circumstances in contravention of s 2(1) (a) of the Combatting of Rape Act 8 of 2000 ('CORA') read with s 94 of the CPA; and in the alternative to each of the rape counts;
- (c) Five counts of committing or attempting to commit a sexual act with a child below the age of 16 years in contravention of s 14(a) of the Combatting of Immoral Practices Act 21 of 1980 ('CIPA') read with s 94 of the CPA.

[2] The alleged crimes relate to five minor girls respectively aged 9 ('NG'); 11 ('CB'); 13('MB'); 12('RS') and 12('RH'). In order not to add unduly to the length of this already long judgment, I have chosen not to include the indictment which is itself quite extensive, but to add it as Annexure 'A' at the end of the judgment. Annexure A to the judgment is an integral part of and should be read together with the judgment.

### The Plea

[3] The accused pleaded not guilty to the charges and denied trafficking the complainants or performing any sexual acts with them.

### Admissions

[4] After being questioned by the court in terms of s 115(2) of the CPA, the accused admitted, in terms of s 220 of the CPA, that he knows all the complaints and that he does not dispute the complainants' ages as stated in paragraph 2 of this judgment.

### Common cause facts

[5] It became common cause during the trial that the complainants and the accused live in an informal settlement called 'DRC' in Swakopmund and that both he and the complainants are from poor backgrounds. They all seem to find it hard to make ends meet. The accused is unemployed and makes a living from collecting thrown-away items from dumpsites and using the same either as food, toiletries or, where possible, for selling to support himself financially. It is also common ground that during the period stated in the indictment the complainants visited the accused regularly to share in the food that he would either prepare for himself or had available for consumption.

[6] The accused lives next door to a man called Immanuel (who also testified for the prosecution) and who is related to one of the five complainants (RS). Immanuel was loosely referred to at the trial as RS's grandfather although that was not strictly so; but they are related. Immanuel and the accused have a very close bond of friendship and also shared food as circumstances permitted. The minor complainants would on occasion join Immanuel either by himself or with the accused to share in the food that was available. This was considered normal in the community which Immanuel described at the trial as a poor community. It was not in dispute that the mothers of two of the complainants (NG and RH) were on good personal terms with the accused with whom they mutually assisted each other by sharing small food items and socializing.

[7] It was common ground that the accused would on occasion send some of the minor complainants on errands to buy for him tobacco in return for small cash-gifts. That also seemed to be with the knowledge and approval of some of the parents. It was not appreciated by both the accused and the complainants' parents that it is illegal for someone to sell tobacco to a minor. I take judicial notice that s 18 of the Tobacco Products Control Act 1 of 2010 makes it a criminal offence to sell a tobacco product to a child under 18 years. It is to be accepted therefore that by sending the minor girls to buy tobacco for him the accused was party to the

contravention of the law.

[8] This is a difficult case. The difficult issue I am called upon to decide in this case is whether the accused abused the social bond that was forged in the crucible for survival in the manner I described above, to sexually exploit the five minor girls. The case is difficult because the quality of the evidence led at the trial is very poor. Since it is not alleged that he acted by proxy in that regard, there is no physical evidence linking the accused to the alleged crimes of rape which require physical contact. His guilt or innocence therefore falls to be determined solely on the say-so of the complainants. It is difficult because the investigation was poorly conducted as no serious attempt was made after the allegations surfaced to try and garner additional evidence that would add greater weight to the complainants' allegations. In some respects, the statements made by the complainants to the police are hard to reconcile with the versions given at the trial and the evidence given at the trial is, at best, sketchy and so generalised that it would be difficult for an accused even with an abundance of resources to offer exculpatory evidence.

#### Framing of charges

[9] To compound the problem, there is no particularity to the charges the accused is facing as regards dates, time and months that he is alleged to have committed the alleged offences. The only particularity he has been given is that the offences occurred on 'divers' occasions between November 2015 and March 2016. Although it is permissible<sup>2</sup> for the State to charge an accused in that way, the accused is at an obvious disadvantage. It is next to impossible to present alibi evidence or to identify witnesses to provide exculpatory evidence which negates the allegations.

#### The onus

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<sup>2</sup> Vide s 94 of the CPA.



[10] The onus is on the State to prove the accused's guilt beyond reasonable doubt. There is no onus on the accused to prove his innocence. The applicable principle has been iconically stated by Viscount Sankey LC in *Woolmington v DPP*<sup>3</sup> (and is universally applied in the common-law tradition) as follows:

'Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner. . . the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.'

[11] I am in respectful agreement with Lord Phillips' dictum in *R v Horncastle and others*<sup>4</sup> at para 18 that:

'There are two principal objectives of a fair criminal trial. The first is that a defendant who is innocent should be acquitted. The second is that a defendant who is guilty should be convicted. The first objective is in the interests of the individual; the second is in the interests of the victim in particular and society in general. The two objectives are sometimes in tension and, where they are, the first carries more weight than the second.'

#### Children's evidence: cautionary rule

[12] There is no requirement that a child's evidence must be corroborated. It is settled however that the trier of fact must approach such evidence with caution and be alert to the dangers inherent therein.<sup>5</sup> Those inherent dangers were reiterated in the following terms by our Supreme Court in *Minister of Basic Education, Sports and Culture v Vivier No and Another*<sup>6</sup> at 623F- H - 625A:

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<sup>3</sup> [1935] 1 AC 462 at 481-482.

<sup>4</sup> [2009] UKSC 14.

<sup>5</sup> *R v Mhanda* 1951 (3) SA 158 (A) at 163 and *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1027H-1028A.

<sup>6</sup> 2012 (2) NR 613 (SC).

'The approach of the courts in assessing the credibility of child witnesses and the reliability of their evidence is informed by the evidential risks associated with their, as yet, inchoate social, emotional and intellectual abilities: their suggestibility and imaginativeness; their capacity to accurately observe, remember, recollect and relate events and experiences; their appreciation of the duty and importance of being truthful when testifying and their, sometimes, incomplete comprehension of the — often complex — matters which they are required to testify about. These evidential concerns must always be individualised when courts assess the evidence of child witnesses but, given the gradual maturation of children's social skills and of their emotional and intellectual abilities from infancy to adulthood, it normally follows naturally and logically that the younger a child witness is, the more pronounced these concerns become and the greater the measure of care required from the court in assessing the reliability of their evidence.'

[13] It is important, in hearkening to the injunction for caution, for the court to pay special attention to aspects and circumstances which accentuate the risk of the child's evidence having been influenced in some way or being the product of a child's fertile imagination. It is unhelpful in that exercise to take an armchair approach to the evidence. As the primary fact-finder, the trial court must, within the parameters of the law of evidence, be guided by common sense. All told, a court should only convict on a child's evidence if it is safe to do so. It should be satisfied beyond reasonable doubt as to the truth of the child's evidence and the guilt of the accused.

[14] The State's case against the accused is based on the allegations summarised in the pre-trial memorandum. It is alleged that in November 2015, the accused began to call the complainants to his residence in order to send them to buy cigarettes or tobacco for his use. Upon their return, the accused would lock the minor girls in his shack dwelling, then undress the girls after threatening them, apply baby oil on his penis (hereafter 'male genital') and inserted it in their vaginas (hereafter 'female genitalia'). It is further alleged that he would lick the complainants' female genitalia with his tongue. In addition to the accused

threatening to kill them if they reported or told anyone about what he had done, it is alleged that after the sexual acts with the minors, he would give them food items of varying types.

[15] In his reply to the State's pre-trial memorandum, the accused denied the allegations and recorded that he would send the complainants on errands, one child at a time, and that the children would come to his dwelling in a group out of their own free will without being enticed, invited or lured. Although he admits having given food to the children, he denies that this was done as an enticement or reward for a nefarious purpose.

#### Trafficking defined

[16] Namibia's POCA adopts the UN Convention on 'trafficking in persons' for what constitutes the offence of 'trafficking in persons' under Namibian law. The offence of trafficking in children is established if it is proved that the alleged perpetrator (i) either recruited, transported, transferred, harboured or received a child, (ii) for the purpose of exploitation.<sup>7</sup> When a child is involved, it is not a requirement for the accused to have engaged in any of the conduct ('the means') set out in paragraph (a) of the Annex to Article 3 of the Convention. That is the effect produced by paragraph (c) of Annex 11 to Article 3 of the Convention (the 'Protocol').<sup>8</sup> Under the law, a person below 18 years is considered to be a child for the purpose of the offence of trafficking in children.<sup>9</sup>

[17] Thus, the accused can only be convicted of trafficking the complainants if the evidence proves beyond reasonable doubt (a) that he either recruited, transported, transferred, harboured or received the complainants, (b) for the

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<sup>7</sup> Section 15(a), (c) and (d), read with s 1 of POCA and read further with Article 3 (a) of Annexure 11 of the United Nations Convention Against Transnational Organized Crime and Protocols thereto, adopted by General Assembly Resolution 55/25 of 15 November 2000 (the 'Protocol'). See further *State v Lukas* (CC 15/2013) [2015] NAHCMD 124 (2 June 2015), paras 4-6.

<sup>8</sup> *State v Lukas*, para 6.

<sup>9</sup> Article 3(d) of the Protocol.

purpose of exploitation. In terms of paragraph (a) of the Annex 11 of the Protocol, exploitation can take one of the following forms: (i) prostitution of others, (ii) sexual exploitation, forced labour, slavery or similar practices and (iii) the removal of organs.

[18] It is common cause that the oldest of the complainants was 13 years old at the time of the alleged offences. The accused admitted the ages of the complainants. Based on the evidence led at the trial, what the prosecution needed to prove beyond reasonable doubt is that the accused either recruited, harboured or received the complainants for the purpose of exploitation. As Ms Nyoni for the State correctly submitted, if the evidence proves to the required standard that the accused also used any of the 'means' (such as force, abuse of power or position of vulnerability) it will only serve to strengthen the trafficking in children charges preferred against the accused.

#### Rape under coercive circumstances

[19] In terms of s 2(1) (a) of the CORA, it is an offence to commit a sexual act against another under coercive circumstances. In terms of s 2(2) of the CORA, coercive circumstances include the use of physical force against a victim, threats to cause harm, the complainant is under the age of 14 and the perpetrator is more than three years older than the complainant, or the complainant is unlawfully detained by the perpetrator.

#### The alternative counts to rape: indecent or immoral acts

[20] The Combatting of Immoral Practices Act 21 of 1980 ('CIPA') states as follows:

'Section 14. Any person who -

a) . . . .

- b) commits or attempts to commit an indecent or immoral act [with a child under the age of sixteen]; or
- c) solicits or entices such a child to the commission of a sexual act or an indecent or immoral act, and who –
  - i. is more than three years older than such child; and
  - ii. is not married to such child (whether under the general law or customary law),shall be guilty of an offence. . .'

### Prosecution Evidence

[21] All the complainants' allegations against the accused, as will become apparent as I summarise the evidence, lack particularity in a material way. All of them could not remember a specific month, or date when the alleged crimes were committed against them. I will however endeavor to present their accounts in the sequence they recollect that the events occurred.

### *Complainant NG*

[22] NG is the youngest complainant who was 9 years old when the alleged offences surfaced. It was as a result of a report she made to her mother that the allegations against the accused first emerged. NG is the complainant in respect of counts 1 and 2 of the indictment, including the alternative to count 2.

[23] In describing how she was allegedly raped by the accused, complainant NG testified that on the **first occasion**, while she and the other complainants were playing at the fire brigade located in the neighborhood where all complainants and the accused live, the accused called her and the others and asked them to go and buy him a cigarette. After they handed the cigarette to the accused they returned to play. The accused then called her and CB back and pushed them inside his one-room dwelling and locked the door, firstly with a wire and thereafter with a padlock. The other three complainants went about playing at the fire brigade building. When

NG and CB were inside his house, the accused asked NG and CB to lie down on the bed, and when they refused, brandished a knife he picked from the table and threatened to harm them if they did not comply. The accused proceeded to lie down on the bed facing up. Whilst in that supine position, he pulled NG on to his chest and took off his clothes. He took hold of a baby oil container then in his room, applied its content to his male genital and ordered NG to sit on it. He was unable to penetrate NG and proceeded to insert his pointing finger into her female genital. According to NG, the accused proceeded to do exactly the same to CB although, in respect of the latter, it was his middle finger that he inserted into CB's female genital.

[24] After the accused molested them in the way described above, the duo wanted to go home as it was getting late, whereupon the accused told them to come back again. According to NG, when she and CB remonstrated to the accused about his conduct, he told them to not tell anyone about it. He unlocked the door and 'threw' them out of the house and warned 'If you tell the truth, I will kill you'.

[25] Complainant NG testified about a **second occasion** when she and complainant CB came to the house of the accused, being the day following the day they were first molested. She narrates that on the second occasion the accused invited them inside his dwelling and when they got inside, he locked the door, took off their panties, tossed them away, and put a condom on his male genital. NG recounted that he then started 'shaking' his male genital. It was apparent that what she described amounted to masturbation. According to NG, this shaking of the male genital by the accused resulted in a white substance coming from it inside the condom: An apparent reference to ejaculation.

[26] According to NG, the accused wanted to deposit the white substance then in the condom in their female genitals but they refused and closed their legs. (She also testified under cross examination that on the second occasion, the accused made them sit on his male genital by threatening them with a knife and also made

them drink a bitter drink which, in context, was a reference to alcohol.) Before opening the door to let them out, the accused threatened to kill them and their mothers if they told the truth or if they do not come back. He allegedly also threatened to kill them if he meets them in the street.

[27] According to NG, the **third occasion** was the day immediately after the second occasion. According to her, on the third occasion she was in the company of CB, MB, RS and RH. According to NG, whilst she and the other complainants were inside the accused's room, she observed him consume 'bad drinks' (an apparent reference to alcohol) which he forced them to drink. She observed that the accused was wielding a knife with which he threatened to harm them if they did not take off their panties. NG stated that she was ordered by the accused to sit on his male genital. (It is not clear from her account in chief if she actually complied with the command).

[28] NG's evidence suggests that CB was the next to be ordered to sit on the accused's male genital, but she refused. RH was next to be made to sit on the genital of the accused. The tenor of NG's evidence is that the accused applied baby oil to his male genital and on RH's female genital to ease penetration. After RH, the accused moved on to RS. Again, he applied baby oil on his male genital and on RS's female genital and attempted to penetrate her but was unsuccessful. When it came to complainant MB, the accused merely touched her breasts without attempting to penetrate her as he did with the others. The complainants were then let out of the house by the accused. He ordered NG and CB to come back the next day, which they did, being the fourth occasion.

[29] According to NG on the **fourth occasion**, she and CB came back to the accused's house. It appears they entered the room on his invitation. He proceeded to lie on the bed and made NG and CB sit on his neck, starting with complainant CB. As he alternated them, he licked their female genitals. Once he was done, the accused gave NG N\$ 2-50 and CB N\$ 3-00. He also gave them Formula baby milk.

He then gave NG a hairspray container into which he had urinated in their sight. She says she took it home to tell her mother 'the truth'- which, obviously, she did not do.

[30] According to NG, she and CB returned to the accused's home on a **fifth occasion**. On that occasion, the accused threatened her and CB with a knife and forced them to braid and lick his pubic hair. NG was further made to lick the accused's male genital after he placed a 'bread plastic' on it. CB was made to sit on the accused's neck area as he licked CB's female genital. When the ordeal was over, the accused gave NG and CB rotten soft sweets and told them to go home. NG further testified that this was the day MB was knocking on the accused's door while she and complainant CB were inside. She testified that they could not shout because they were 'held down' by the accused.

[31] NG testified that the following morning, she was approached by her aunt, Tessa, who asked her what it was she was doing in the accused's house the previous day when MB was knocking at the accused's door. It was then that she decided to tell her mother, PG, the truth after being assured that PG would not beat her if she told her what happened. According to NG, on the same day PG approached CB's mother and thereafter the police.

[32] In cross examination, complainant NG testified that she only revealed the fact that they were threatened with the knife and were forced to drink bitter colorless drinks by the accused to the police when they were being questioned while on holiday in Okombahe following the arrest of the accused.

#### *Complainant CB*

[33] CB is the complainant in respect of counts 3 & 4 and was 11 years old at the time of the alleged offences. She testified that one afternoon (**first occasion**), while all the complainants were playing at the fire brigade, the accused called RS



to go and buy him a cigarette. RS went with MB, while the others, including CB, were playing in the yard of the accused. Upon their return, the accused offered the complainants macaroni to eat. Whilst they were eating, he closed the door and secured it with a hook. Gesturing to them that no one will go out of his house, the accused in addition told NG not to scream or else he would kill her.

[34] CB recounted that the accused then ordered NG to undress. NG refused but he proceeded to remove NG's clothes including her panty, and threw her on the bed. According to CB, the accused attempted to insert his male genital into NG's female genital but failed. He then stood up from the bed and pushed NG off the bed. CB testified that the accused approached her next. He went on to remove her clothes and also threw her on the bed. The accused wanted to insert his male genital in her female genital but aborted the attempt without penetrating her. On CB's version, RH was taken next by the accused who similarly undressed her and attempted to insert his male genital in RH's female genital. She however jumped and the accused's male genital 'went through the buttocks' of RH instead. CB testified that the accused then mentioned that RH is 'tastier' compared to NG and CB. The accused next moved to MB, undressed her and also attempted to insert his male genital in her female genital, but (just like with RH) it 'passed by her buttocks'.

[35] According to CB the last victim on this occasion was RS whom the accused gold hold of, undressed and while he was attempting to penetrate her female genital RS 'turned and moved away before the accused could penetrate her'. When it had all ended, the accused told them to come back the next day to get their 'stuff'. According to CB, the following day, all five complainants went back to the accused's house and they were given sweets and powder baby milk.

[36] The **second occasion** that complainant CB testified about allegedly happened on a school day following the day after they were given sweets and powder milk by the accused. On that occasion, the accused offered NG more milk

which she had to fetch from his home. CB accompanied NG to the accused's place. When they reached there, the accused forcefully pushed NG into the house and ordered CB to also get inside. When the duo was inside, the accused ordered NG to undress. She refused but was forcefully undressed by the accused. At some point, the accused closed the door and secured it by tying it with a wire. He removed his clothes, put a condom on his male genital and shook it until a white substance was discharged in the presence of CB and NG. Whilst seated on the bed, he attempted to open their legs to place the white substance in their female genitalia but they closed their legs and the discharge got wasted on the bed. The accused thereafter disposed of the condom by flushing it down the toilet. After CB and NG got dressed, CB was given N\$ 3-00 and complainant NG was given N\$ 2-50 by the accused and they were told to go and buy sweets.

[37] The **third encounter** was the following day when the accused approached NG and CB while they were cycling in the street. The accused called the duo and gave them custard. He asked NG and CB to look after the house for a while. He returned with an alcoholic drink called 'Zorba' which he poured for the girls and threatened to kill them if they refused to drink. The accused then closed the door and hooked it from the inside with a wire. While inside, the accused ordered NG to undress, which she did. The accused then inserted his male genital in her female genital. CB was next to be undressed by the accused who went on to insert his male genital in her female genital. The accused thereafter told NG and CB to dress up. He then gave a hairspray bottle to NG which contained urine and told her to give it to her mother. CB testified that she personally saw the accused urinate in the bottle and was present when NG gave the bottle to NG's mother.

[38] The following day (**fourth occasion**), CB was in the company of NG on an errand by the latter's mother. They met the accused at a local electrical shop when the accused told the complainants that they should come to his house when they are done. CB testified that the accused had an alcoholic drink called 'Ombike' in his hands which was the same drink she found at his place later on when she and NG

returned as ordered. The accused was drinking the alcoholic drink inside the house when he offered it to CB and NG. He eventually forced it down their throats against their will. At this point, the room was locked from the inside and MB was outside knocking at the door. According to CB, the accused answered to the knock and told MB to go away since he wanted to sleep and that there is no one inside apart from himself. The accused silenced CB and NG inside whilst MB insisted that CB was inside. At that moment, CB testified that she heard Tessa pass by and ask MB to stop knocking and to leave the accused alone since he wanted to sleep. After a while, CB assumed that MB had left and that is when they were let out of the room by the accused and she and NG went on cycling.

[39] It is evident from CB's account in-chief that on all the four occasions she related, she was not penetrated by the accused although a different picture emerged in cross-examination. The following day, CB was approached by NG's mother and asked what they were doing in the house of the accused when MB was knocking. This encounter happened in the presence of CB's mother. CB then reported that the accused slept with her and NG against their will. She further testified that she saw pictures of naked women in the accused's room in addition to the knife that the accused always brandished to threaten her. She further testified that she kept on going back to the accused's house because she was scared of being killed and out of fear of the accused and not because she needed food.

#### *Complainant MB*

[40] MB is the complainant in respect of counts 5 & 6. She was 13 years old at the time of the alleged offences. MB testified that on or about December 2016 (**first occasion**), she, NG, CB, RS and RH were playing in the street when the accused requested them to go and buy for him a cigarette. RS and MB went to get the cigarette and upon their return, found that NG, CB and RH were already inside the accused's house. When all the complainants were inside, the accused allegedly closed the door and told NG to undress. NG refused and the accused removed his

clothes and proceeded to undress himself as well as NG. He then told her to lie down on the bed next to him. According to MB, the accused lay facing NG as opposed to him being on top of her. The accused thereafter put baby oil on his male genital, and started making back and forth movement (suggestive of sexual congress). MB could not with certainty state if the accused succeeded to penetrate NG's female genital.

[41] CB was next to be called by the accused and ordered to remove her clothes. When she refused, the accused took off her legging and her panty, applied baby oil to his male genital and placed CB on the bed and inserted his male genital in CB's female genital and made movements suggestive of sexual congress. On MB's account, RH was also subjected to exactly the same sequence of events by the accused and was complimented by him to be the best amongst all the complainants. When RS and MB were called by the accused, they refused and opened the door and left. The accused then told NG, CB and RH to return the next day without MB and RS. The following day, all complainants came to the house of the accused and complainant NG, CB and RH were given hair accessories, grips, apples and oranges. The fruits were later on shared with MB and RS and they went home.

[42] The next day (***second occasion***), the witness testified that after school, the girls went to their respective houses to do their homework, and later met up to play. While playing, the accused returned to his house and MB and the other four complainants went to his house. The accused sent MB and RS to buy a cigarette for him. NG, CB and RH remained behind. Upon the return of MB and RS, NG, CB and RH were inside the house of the accused. The accused closed the door with a padlock and turned it over to the outside to give the appearance that no one was inside. The accused ordered NG to undress and when she refused, he took off her trousers and panties, undressed himself, applied baby oil on his male genital, made her lay on top of him and made back and forth movements. According to MB, although it was around sunset, she could clearly see everything. MB further

testified that while the accused was busy with NG, she and RS went under the bed to hide from the accused.

[43] CB and RH were subjected to the same sequence of events as described above. MB noted that what is different from the first encounter is that this time the accused made the complainants sleep on top of him instead of next to him. RS refused when she was ordered to take off her clothes but the accused managed to take off her pants and panties, applied baby oil to his male genital, made her lie with her back facing the accused and penetrated her female genital from the back, accompanied by the back and front movements. When it was her turn, MB refused to be subjected to the same treatment and wrestled with the accused after he pulled down her trousers as well as her panty. The accused once again applied baby oil on his male genital, made MB face him while lying on the bed before trying to insert his male genital in her female genital while making movements suggestive of sexual congress. MB testified however that the accused did not penetrate her on this occasion because she avoided it by 'ducking'. She further testified that the accused took some time with her as well as with the other girls as opposed to the first time the accused did the same to them. According to MB, it was on this occasion that the candle was put out by the accused and it was dark in the room.

[44] MB testified that although the door was hooked, it was not locked and she could have exited the room if she wanted but chose to remain in the room because of the others. When all was done, the accused told the complainants to return the next day to collect their 'stuff'. The following day, the accused gave RS and MB hair accessories, apples and oranges. The day thereafter, the five complainants were all at MB's house doing their homework after school. Subsequently they all left for the accused's house. In addition to the accused, Immanuel also joined them by the fire. The complainants went home after a while.

[45] The next day after school, the complainants visited Immanuel, RS's grandfather. The next day, MB went to check up on RS, NG, CB, RH and not

finding them at their homes made a turn at the accused's home where she found them (**third occasion**). When she knocked at the door of the accused's house, RS opened for her and when she entered observed her friends laughing. It was on this occasion that Tessa saw MB knocking at the door of the accused. After a while, MB and CB left for home at the request of their mother. The others also left for their houses.

[46] According to MB, there was a further occasion after she had been observed by Tessa that she had been to the accused's house (**fourth occasion**). According to her that was on a Saturday, when all the complainants were in the house of the accused and the accused did exactly the same things in exactly the same sequence as he did to them on the previous occasions. It was on this occasion that the accused said that RH was the best compared to the rest. She maintained that the candle was lit throughout and that she could clearly see everything that was happening. According to MB, after this fourth occasion, she and RS decided not to go back to the house of the accused but NG and CB kept on going back to the accused's house.

[47] In cross-examination MB confirmed that the accused penetrated her female genital on more than three occasions although in chief she makes reference to only two occasions. She testified that during December 2015, she went to the house of the accused alone without her friends. She says that she had gone to greet Immanuel when the accused called her into his room, closed the door and without a word started undressing her, put baby oil on his male genital and then 'slept' with her. She also testified that the third time she visited the accused's house, he played with her breasts.

[48] MB testified that she was afraid to tell her mother what the accused had done to her and the other complainants because the accused threatened to harm them if they spoke a word to anyone. She however denied being threatened by the accused with a knife at any time that she was at his house. When NG's mother

questioned her in front of her mother the following day, which was a Sunday, she admitted that the accused had slept with her against her will.

*Complainant RS*

[49] RS is the complainant in respect of counts 7 & 8. She was 12 years old at the time of the alleged offences. Narrating her **first encounter** with the accused, complainant RS testified that the accused gave them bread to eat after MB asked for it. She was in the company of NG, MB and CB. After they left the house, the accused invited them back inside and then locked the door from the inside with a hook and not a padlock. While inside, the accused grabbed CB and ordered her to remove her trouser and panty. CB refused, whereupon the accused grabbed her, threw her on the bed and managed to take off her panty. The accused threatened to harm CB if she refused to comply. The accused then removed his trousers and underpants and wanted to lay on top of CB who wrestled with him and managed to jump off from the bed. RS then picked up the trousers and panties and gave them to CB. RS further testified that on this occasion she did not see any penetration. The accused thereafter opened the door and the girls left.

[50] According to RS, she, MB and NG protested against what the accused wanted to do to CB. All the time, the accused would tell them to keep quiet and indicated that since they were in his house, they should comply with his requests. Being afraid of being harmed by the accused, the complainants complied and did not raise the alarm.

[51] After a few days, RS, NG, MB, RH and CB were playing near the accused's yard when he asked RS and MB to buy him a cigarette from the Tuck Shop. All 5 complainants however went on the errand after which MB delivered the cigarette to the accused. Nothing untoward happened on this occasion.

[52] On the **third encounter**, which was the next day after the errand above, RS

was playing with NG, CB and MB at the latter's house when they saw the accused approach his house. MB suggested that they go to his house to get the '*Huisgenoot*' magazine to read. Apparently after they got the *Huisgenoot*, RS and MB left, leaving NG and CB with the accused. When RS and MB returned, NG and CB were seated inside the accused's dwelling, laughing and chatting. The accused then offered yoghurt to NG and CB which they also shared with RS and MB. Since it was getting dark, RS wanted to leave for home. At that point, the accused stopped her from leaving and closed the door. All five complainants were inside. The accused put out the candle saying that he wanted 'to do something'. It became dark inside.

[53] According to RS, and despite the room being dark, she saw that the accused removed his trousers and underpants and ordered NG to do likewise. When NG did not comply, he pushed her onto the bed. RS could not state with certainty what the accused was doing to NG as it was a 'bit dark'. The accused ordered the rest of the complainants to sit on a chair. When the accused finished with NG, he moved on to CB whom he also told to undress. She removed her clothes and got on the bed. It is not clear from the evidence what transpired next.

[54] CB however joined the other complainants where they were seated. The accused then called RS and likewise demanded that she remove her clothes. She refused but the accused managed to throw her on the bed and managed to take off her clothes. The accused then lay on his back, applied baby oil to his male genital and to RS's female genital and attempted to penetrate her. According to RS, she then jumped up but the accused pushed her down and inserted his male genital in her female genital.

[55] MB was next. She was also commanded to undress, which she did and went to lie on the bed. RS could not say what the accused did to MB. RS testified under cross examination that she never saw the accused with a knife on the occasions that she visited his place and was therefore not threatened with the knife.



[56] Before the accused opened the door for the girls to leave, he warned them that he would kill them if they reported what happened. RS testified that after this incident she never went back to the accused's house although he repeatedly asked her to come. She stated that it was because of the threats made by the accused that she did not report what he had done to her and others.

#### *Complainant RH*

[57] RH is the alleged victim in respect of counts 9 & 10. She was 11 years old at the time of the alleged offences. The **first occasion** she encountered the accused was when she and the other complainants were playing at CB's home. On that occasion the accused sent RS to buy for him a cigarette. RS was accompanied by MB. When the duo returned, RH, NG and CB were already locked inside the accused's house. RH's evidence suggests that, in the absence of RS and MB, the accused told NG to remove her clothes and to lie on the bed. He then started licking NG's female genital with his tongue. After the accused did that to NG, CB was next to be undressed and to be licked in the same way as NG was whereafter it was RH. When RS and MB came back and entered the room, the accused again licked complainant NG, RH and CB's female genitalia and thereafter that of complainant RS and lastly of complainant MB. Allegedly, the accused did to NG the same things he did to the others. She testified that the accused threatened to kill them if they tell their parents.

[58] The **second occasion** that RH encountered the accused was the day after the first encounter with him. According to RH, the accused came to her home to ask permission from her mother to send her on an errand. After she got what the accused had sent her, RH proceeded to the accused's house accompanied by NG, CB, MB, and RS. When they arrived, the accused told them to come inside the house and then locked the door. He instructed NG to undress, lay on the bed and then had sex with her. RH testifies that the accused failed to penetrate NG's female

genital and his male genital 'went through the buttocks instead'. RH testified that she could clearly see this because she was standing close to the bed where the accused was with NG. RH was next. She was told to undress and did so. The accused then applied baby oil on his male genital and although he attempted to penetrate her female genital, he failed. It instead went 'through the buttocks'. The accused then proceeded to do the same with CB, RS and MB but he was unable to penetrate any of them. The complainants thereafter left for their respective homes.

[59] The next day (***third occasion***), all five complainants went to visit Immanuel. Whilst they were playing in Immanuel's yard, the accused called them inside his house. When they entered, he closed the door, ordered RH to undress and thereafter tried inserting his male genital in her female genital but he failed to and the male genital 'went through the buttocks'. The accused then proceeded to do the same to MB, RS, CB and lastly NG. In all instances, his attempts to penetrate the complainants failed.

[60] RH testified that she left for Khorixas with her mother thereafter and only returned when the allegations surfaced after her grandmother communicated to her mother when the police got involved. When RH's mother inquired about the matter, RH confirmed that she was raped by the accused. She further testified that although she had been at the accused's place often, she had never gone there alone. She testified that there were knives at the accused's place that were always kept in the drawer but that the accused never threatened her with a knife. According to her, on all occasions, the complainants would lie on their backs and the accused would either lick their female genitalia or try to insert his male genital in their female genitalia. In cross-examination, she contradicted NG's evidence that she was made to sit on the accused's chest while he was licking her female genital.

[61] RH confirmed that the accused uttered words to the effect that she was the best compared to the other complainants. She stated that she would go to the accused's house because he asked her to come. RH had no recollection of the

accused giving MB bread or the door being locked by the accused with a padlock. She only remembers him securing the door with a wire.

*Ms. PG (hereafter 'Funa')*

[62] Funa is NG's mother. The accused is her neighbor. She testified that on the morning of 1 May 2016, and on Tessa's request, she asked NG what she and CB were doing in the accused's room the previous day when MB was knocking at the door of the accused's house. According to Funa, NG was afraid to look in the direction of the accused's house since he was seated outside his house at the time.

[63] According to the witness, NG informed her that the accused did 'improper' things with her and CB. In explaining what 'improper' meant, NG stated that the accused pulled off her panties and those of CB, took out his male genital and inserted it in their female genitalia. NG further stated that the accused would push her and CB on the bed, pour baby oil on their female genitalia and insert his male genital 'half way', and used his finger if he did not succeed. NG informed her that the accused threatened to kill her, if she reported the abuse.

[64] According to Funa, NG further told her that the accused gave her a hair spray bottle and N\$ 2-50, and N\$ 3-00 to CB. Funa stated that NG brought home a hairspray container with a brown liquid which she allegedly got from the accused who told her that it was hair spray that she could use on her hair. However, the liquid in the bottle was discovered the next day to be urine belonging to the accused. Funa thereafter went to CB's house to confirm the allegations. CB confirmed that the accused would pull down their panties and have sexual intercourse with them. Funa then proceeded to report the matter to the police resulting in the arrest of the accused.

[65] It became apparent from Funa's testimony that it was not uncommon or unusual for NG, MB, CB, RS and RH to visit the accused's place and that he would

occasionally send them on errands to buy tobacco or sugar for him. She further admitted under cross examination that the accused would call the girls and give them food. According to Funa, NG had informed her when reporting the alleged molestation, that the accused gave money to her and others to buy for him tobacco and when they returned the accused made them enter his room, secured the door from the inside by tying it with a wire and proceeded to commit sexual acts with her and CB. She added that NG had told her that at the time MB was knocking at the accused's door (as told by Tessa) the accused had covered NG's mouth to prevent her from answering to MB's call.

*Ms. TG (hereafter 'Tessa')*

[66] Tessa is NG's aunt. Tessa testified that on 30 April 2016, and on her way home from a drinking spree, she saw MB knocking at the door of the accused's home. Upon enquiry by Tessa, MB said that the accused, NG and CB were inside the accused's house and refusing to open for her. Tessa says she then told MB to leave the accused alone as she could be disturbing his sleep. The following morning, according to Tessa, she saw NG running towards the house of the accused and asked Funa to enquire from NG what the latter and CB were doing at the accused's house the previous day. NG then made a report in Tessa's presence that the accused had done 'bad things' to her and CB: That they were made to lie on the bed of the accused who then removed their panties and tossed them away.

[67] Disturbed by what NG related, the trio (Funa, Tessa and NG) proceeded to CB's house where they inquired about what NG had narrated earlier and that CB confirmed NG's report implicating the accused.

*Ms SB*

[68] SB is the mother of MB and CB. She testified that it was Funa who told her about the report made by NG and that her daughters (CB and MB) were also

involved. According to SB, both MB and CB confirmed the allegations made by NG when put to them by Funa. She stated that CB and MB in her presence confirmed that the accused would lock them in his house and sleep with them and that CB reported that this had been going on since November 2015, while MB said it was since December 2015. MB and CB further told SB that the reason why they did not previously report the alleged abuse to her was that they feared for their lives because of threats made by the accused. SB recounted that MB and CB made no reference during the report that they were ever locked inside the house and threatened with a knife by the accused.

[69] SB testified that she is a parent of three and always made sure that CB and MB had enough to eat at home and has no reason to believe that the accused used to give the girls food because they were hungry.

*Ms. CS*

[70] Ms. CS is the biological mother of RS. She testified that on 3 May 2016, she was approached by Funa who told her about what the accused had done to the complainants. CS did not at that point ask RS about the report. She stated however that since the incident came to light, she noticed that RS had changed. She is now withdrawn and her performance at school has taken a turn for the worse. CS confirmed that RS is a grandchild of Immanuel.

*Ms. AH*

[71] AH is the mother of RH. She testified that she had left with RH to Khorixas where they stayed for about a month. She became aware of the incident involving the accused and RH from her mother who was staying with them in Swakopmund. When she put the report received from her mother to RH, the latter started crying and admitted that the accused would call her, lock her in his room and attempt to have sex with her. It was after the allegations surfaced that AH returned with RH to

Swakopmund and saw the police.

[72] AH confirmed that the accused is her neighbor and that they had a good relationship.

*Mr. IN (hereafter 'Immanuel')*

[73] Immanuel is the accused's neighbor and grandfather of RS. He confirmed that he knows all the complainants who, together with RS, would at times visit him to share in his food. The witness confirmed that he would share his food with the girls on many occasions. He bore no knowledge of anything untoward happening between the accused and any of the complainants.

#### Medical evidence

[74] The State called two medical doctors who performed the examinations on the complainants on 6 and 10 May 2016.

*Dr Ottlie Shigwedha*

[75] Dr Ottlie Shigwedha examined NG on 6 May 2016. The examination revealed that the inner layer of NG's genital organs, the vestibule was inflamed and was reddish as opposed to being pink in colour. That was consistent either with forced penetration, trauma or infection. The doctor ruled out trauma as the possible cause of inflammation because no trauma was reported and since there was no infection-like discharges observed on complainant NG's female genital. The doctor further observed that there was tenderness in NG's female genital to which the complainant reacted. She further testified that NG's hymen was not intact, which could have been caused by doing sports, by trauma or something which penetrated the female genital. She concluded that sexual penetration was likely to have opened the hymen since no other trauma was reported. She also observed

some bruising on the outside parts of NG's female genital.

[76] Dr Shigwedha also examined RS on the 6 May 2016. The doctor observed that the inner layer of the RS's genital organs, the vestibule was inflamed and her hymen was absent. During the examination, RS reacted to the insertion of two fingers which gave an indication that the female genital was stretched from possible penetration. Apart from bruises observed on the outside of the genital, the doctor did not observe any infection-related discharges. The doctor's conclusion is that the opening and tenderness may have been caused by forced penetration.

*Dr. Michael Manhando*

[77] Dr. Manhando conducted an examination on CB on 6 May 2016. The examination revealed no bruising or abrasions, except on the vestibule area. There was no vaginal discharge and the hymen was found to be intact. Dr. Manhando concluded that there might have been non-penetrative sexual contact, although penetration could not be ruled out.

[78] Dr Manhando also examined MB on 6 May 2016. MB showed no signs of a vaginal discharge or infection. The examination revealed further that her hymen was not intact and was rugged, torn in several places and the female genital was stretched as it allowed two fingers. The hymen was torn and that was an indication that the complainant was exposed to more than one sexual encounter.

[79] Complainant RH was examined by Dr. Manhando on 10 May 2016. The doctor observed a creamy normal discharge, no bruises and the hymen was intact. There was no suggestion of sexual penetration.

[80] In all respects, the doctors' conclusions were based on the complainants' history and the examinations performed. What is common cause from the medical evidence is that the time period that passed between the alleged commission of the

crime and the examination of the complainants is irrelevant because, medically, the bruising would normally heal or disappear after 14 days.

### The Investigation

#### *Sgnt. C Kongolo*

[81] Sgnt. Kongolo was an investigating officer in this case. She testified that she got involved in the case on 2 May 2016 when the accused was arrested but since the accused was also detained for drunkenness, the witness could not consult with the accused that day. The following day, Sgnt. Kongolo interviewed MB, CB, NG and RS in the presence of their parents. She testified that one of the complainants that she interviewed, she could not remember which one, informed her that the accused would call them to his house, lock them inside and would order them to undress and thereafter would undress himself. She further testified that the complainant informed her that the accused would use baby oil on his male genital before penetrating their female genitalia and that the accused also licked their genitalia.

[82] The witness testified that the medical kit in respect of the complainants was not submitted because of the time that had lapsed between reporting and the date of the medical examination of the complainants. She further narrated that the complainants mentioned of threats made by the accused although the method was not identified, justifying no attempt being made to seize a knife from the residence of the accused or to attempt to include it in the photo plan. The complainants interviewed also made no mention of the accused's semen being discharged on the bed during the alleged molestation of the complainants and for that reason no linen was retrieved from the accused's house for forensic examination.

#### *Detective Warrant. D Skewer*



[83] DW. Skewer prepared the photo plan at the scene of the crime officer. The photo plan was submitted as an exhibit during the leading of his evidence. The photo plan was compiled with the assistance of the complainants interviewed by DW. Skewer on 6 May 2016. Significant from the pictures taken, apart from the surrounding of the room belonging to the accused, are the pornographic pictures and the lubricant, identified to be Johnson's baby gel, alleged to have been used by the accused.

[84] The witness further testified that the complainants did not point out the locking mechanism used by the accused and the photo plan did therefore not include the door as part of the photo plan.

*Sgnt. HL Kuutondokwa*

[85] The State further led the evidence of Sgnt. Kuutondokwa who also works at the gender based violence department of NAMPOL in Walvisbay. The witness identified the accused as being the suspect in a rape case that she investigated. According to this witness, she arrested the accused at the Swakopmund Police charge office where the latter was detained for drunkenness since the previous night. Sgnt. Kongoro pointed out the accused to her whereafter she approached the accused. After explaining the constitutional rights to the accused, the accused was detained on charges of rape. That was the last encounter that Sgnt Kuutondokwa had with the accused.

[86] Sgnt Kuutondokwa also testified that she took the statement of RS after the complainant narrated the happenings to her. RS narrated to her that her first encounter with the accused happened during November 2015, the second one during January 2016 and the third and last one during March 2016. Sgnt. Kuutondokwa testified that RS told her that on that last day, she was playing with MB and other girls when MB approached the accused and asked for bread. After the accused gave them bread, they went inside the house and the accused

demanded sex from them and threatened to kill them if they told anyone. The accused then had sex first with NG, then with RS followed by MB. RS further indicated, without giving any details, that the accused had also played with her female genitalia. After the accused finished having sex with the complainants, the girls left the accused's house. Sgnt. Kuutondokwa testified that RS only told her about the last incident when she was in the company of other complainants and that on the other occasions during November 2015, January and February 2016 she was not with anyone else. She further testified that the complainant stated that the accused had sex with her so many times that could possibly be three times a week over a long time.

[87] Sgnt. Kuutondokwa testified under cross examination that the complainant did not mention to her about the room of the accused being locked or about a knife that was used to threaten her, let alone about her clothes and those of her friends being thrown in the toilet by the accused or that the latter made her drink bitter drinks against her will. She accordingly also never told her about a dark room or ejaculation by the accused into a condom.

*W/O NK Haimbondi*

[88] W/O Haimbondi is also an investigator at the Gender Based violence department. She testified that she got involved in the matter when she received a report that there was a case of child rape reported at the Mondesa police station. Upon her arrival, she met the complainants who she then interviewed. She identified three of the complainants as complainant RS, NG and RH. She testified that she was with W/O Kongoro and Kuutondokwa.

[89] W/O Haimbondi interviewed complainant RH who told her that the accused would call her to his house, would give her food and sweets, would lock her inside his house and would touch her private parts. She further narrated that there are pictures of naked women in the accused's house and that he would use baby oil to

put on his hands before touching her female genital and had also sucked her on that part of her body. RH also indicated that the accused did this to her on many occasions without indicating how many time this was done to her by the accused.

[90] W/O Haimbondi accompanied Sgnt. Skrywer to the scene of crime with the complainants and their parents but found the accused's house locked with a chain which had a lock on it that could be locked from inside or outside. She testified however that the complainants did not indicate that the accused locked the door with a chain but she herself found it at the scene of the crime. Her evidence is however not supported by the photo plan which does not indicate a chain or a hole in the door where the chain would be placed to lock the door as testified by some of the complainants and W/O Haimbondi. After a relative opened the accused's house, W/O Haibondi recalls finding pictures of naked women and baby oil that was on the table. She confirmed the items from the photo plan admitted in evidence, although she could not dispute the fact that the substance in the bottle may not be baby oil since the bottle in the picture was not labeled. W/O Haibondi testified under cross examination that the victims did not mention anything about ejaculation of the accused into a condom, or that their clothes were thrown into the toilet or forced to drink bitter drinks and that is why no forensic examination was done and the photo plan did not include same. W/O Haibondi was further not informed of any knife that was allegedly used by the accused to threaten the complainants.

[91] W/O Haimbondi further testified that she accompanied the victims for a medical check-up on 6 May 2016, more than 5 days after 30 April 2016, and on the 10<sup>th</sup> May 2016 in respect of complainant RH who had left for holidays to Khorixas. She testified that she remembers accompanying the victims to the hospital the very next day after the incident although they were sent back because there was only one doctor at the Swakopmund hospital who could not attend to the complainants.

#### Evidence of the accused

[92] The accused testified on his own behalf and did not call any other witness. He testified that during the period November 2015 to May 2016, he was unemployed and made ends meet in the manner I already described at the beginning of this judgment. The accused admitted that on occasion he sent the complainants on errands and that he had a good relationship with their parents. He described his relationship with Funa as good and that she on occasion complimented him for his good looks. He added that she once told him that he had a nice dwelling and that she liked his bed. She also expressed the wish to be his girlfriend but that he turned down the advances.

[93] The accused further testified that once upon a time Funa had requested him to build a shack dwelling for her sister, Tessa, which he did and was paid N\$100 for his labour. According to the accused, Tessa occasionally borrowed money which she repaid but on the last occasion when he told her that he was unable to, she did not take that kindly and said unkind things towards him. This, according to him, resulted in there being some animosity between him and Tessa. He advanced this as a possible explanation for Tessa making up unfounded allegations against him concerning the complainants. Similarly, he stated that his refusal to strike up a romantic liaison with her might also have induced Funa to fabricate the allegations against him.

[94] The accused admitted that he on occasion, and at their request, gave to the complainants some of the items that he collected from dumpsites, such as sweets, hair accessories and hair sprays. He, however, only shared with them food he bought from the shops out of fear they might come in harm's way if he offered them food items sourced from the dumpsites.

[95] According to the accused, on 30 April 2016 he went about his routine of collecting items from dumpsites early in the morning and was away for the entire day. He only returned home around 20h00. At some point whilst he was at home

NG and CB came to his place and asked for the baby powder milk that was on the table. They said they were hungry and he gave it to them. According to him, nothing untoward happened between him and the complainants.

[96] As regards NG, the accused testified that during November 2015-April 2016, he did not have much interaction with NG apart from observing her play in the streets with CB. He testified that he also saw NG at times play in Immanuel's yard with RS and shared food items if he had and they asked for it. He testified that NG and the other complainants would come to his abode on their own and that he at no stage gave them any cash-gifts or food as an inducement to come to him. The accused denied inserting his male genital or his finger into complainant NG's female genital, stating that he saw her as a child. He further denied licking her female genital or undressing her against her will. The accused denied ever threatening NG and further added that he never uttered any words that would induce fear in her. Although the accused admitted that NG and CB entered his room, he denied doing anything to prevent them from leaving if they wanted. He denied keeping them in his room against their will.

[97] As regards MB, the accused testified that she also used to play around his yard with the other complainants. He would also share food with her as he did with NG and CB. He denied ever having any sexual contact with MB. The accused testified that he would often meet RH when he visited her mother's house to have a drink with RH's mother. If there was reason to do so, he would, whilst there, send RH on errands.

[98] As a general matter, the accused denied any impropriety towards the complainants and considered it unthinkable because they were children whom he could not in all conscience exploit sexually. He also made a general denial about brandishing a knife to threaten any of the complainants. He denied that he locked the room in the manner described in the evidence of some of the complainants. He also denied forcing any of the complainants to drink alcohol.

## Submissions

[99] Ms Nyoni for the State submitted that although there are divergences in detail in the evidence of the complainants, their individual accounts corroborate the charges preferred against the accused and that he should be convicted on all the counts. Mr Ndube for the accused for his part submitted that the inconsistencies and contradictions in the evidence of the complainants are such that it is unsafe to base a conviction thereon and that, consequently, the accused should be acquitted on all the charges.

### Counts 1, 3, 5, 7 and 9: Is the accused guilty of trafficking the complainants?

[100] A precondition for a trafficking in children conviction in the context of the present case, is that the accused must have harboured or received the complainants. The words 'harbour' or 'receive' are not defined in POCA or the Protocol. The Shorter Oxford Dictionary gives the following possible meaning of the word harbour: 'Give shelter or refuge to'. It defines 'receive' as 'be visited'. In my view, an act of harbouring or receiving a child would be complete if there is evidence to show that the accused allowed or tolerated the presence in his dwelling of the minors to facilitate the pursuit of his unlawful intention with them, or in circumstances where – had their presence there been known by their parents – the parents would have objected thereto if fully aware of the risks (such as exposure to pornography) to which the complainants were exposed by their presence in the accused's home.

[101] The accused admitted that there were three framed pictures of naked women hanging on the walls of his room and that the complainants must have seen them. He said he had collected them from a dumpsite because he wanted to sell the frames when the opportunity presented itself and in the meantime hung them on the walls so that the glass on the frames does not break in a fall. The accused

admitted that each of the complainants at some stage entered his one-room dwelling. He maintains that it was for an innocent purpose.

[102] What is clear from the evidence beyond reasonable doubt is that the complainants either alone or as a group frequented the accused's dwelling. They did not only end up outside his dwelling. They frequently found their way into his room with his full knowledge and encouragement. Each one of them described the interior of the accused's one-room dwelling. The accused made no suggestion whatsoever that any of the complainants was being untruthful about being in his room. One complainant (MB) testified that on one occasion she and three others (RS, NG and CB) went to the accused's house to borrow a copy of the '*Huisgenoot*' magazine from him. What this demonstrates is that MB knew that he kept such a magazine. The accused did not deny the allegation or made the suggestion that he did not keep such a magazine. Viewed in isolation, this might at first blush seem a trivial matter, but seen in context, it shows a certain familiarity between the accused and that complainant.

[103] Another important common cause fact is that each of the complainants confirmed at the trial seeing the pornographic pictures of women displayed on the walls of the accused's room. He made no suggestion, either in cross examination of the complainants or in his evidence-in-chief that he made any effort to hide those pictures from the minors, or to prevent them from entering the room so that they do not have sight of them. I have seen the pictures and can safely say that it is the sort of thing no responsible parent would want their child exposed to. I have no doubt that had the complainants' parents been aware that these minor girls regularly had sight of these pictures, they would not have permitted them to enter the accused's room. The accused displayed a disturbingly casual attitude towards the minor girls' exposure to such hardcore porn. Besides, he had no compunction about sending them on errands to buy tobacco for him in breach of the law.

[104] The evidence demonstrates beyond reasonable doubt that the accused

created a climate in which he found himself, not once, but on several occasions, with minor girls of 13 years and below with whom he had no blood relationship, without any oversight of their parents.

[105] I am therefore satisfied beyond reasonable doubt that the accused harboured or received the minor complainants within the meaning of POCA and the Protocol. The question is if it was for a purpose outlawed in the law. In other words, was it with the intention to exploit the complainants? It is to that issue that I turn next.

### Exploitation

[106] Namibian law does not define 'sexual exploitation'. There is also no internationally recognised definition of the concept.<sup>10</sup> And as the UNODC *Issue Paper* recognises, some international instruments list certain 'practices' as amounting to sexual exploitation of children.<sup>11</sup> For example, the inducement or coercion of a child to engage in any unlawful sexual activity, and the exploitative use of children in prostitution or other 'sexual practices'. In my view, the use of the word 'practices' in that context- as opposed to 'sexual acts' - is important because it recognises the reality that people derive sexual pleasure and gratification not only through actual physical contact but through other deviant behavior. It certainly includes an act of a sexual nature that is by its nature immoral or indecent, if performed in the presence of a child who is incapable of consenting thereto. It is instructive that at common law it is recognised that indecency connotes acts that have an element of lewdness or lasciviousness.<sup>12</sup> Baring of the body for the purpose of inducing sexual desire has also been considered as indecent or immoral conduct.<sup>13</sup>

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<sup>10</sup> UNODC Issue Paper: *The Role of 'Exploitation' in the Trafficking in Persons Protocol* (United Nations, Vienna, 2015 at 29.

<sup>11</sup> For example, The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, ETS 201, 25. X. 200, done 25 October, entered into force 1 July 201, Arts. 3(b) and 18-23.

<sup>12</sup> R v Mcunu 1940 NPD 99; R v E 1960 (4) SA 445 (C) at 448.

<sup>13</sup> R v H 1959 (1) SA 803(T).



[107] I come to the conclusion therefore that the offence of trafficking a child ‘for sexual exploitation’ is committed if the child is ‘harboured’ or ‘received’ for the commission of any sexual offence known either to statute law or the common law. That would involve either rape under the CORA, an indecent or immoral act with a child as contemplated in s 14(b) of the CIPA, or solicitation or enticement of a child to commit a sexual act or an indecent or immoral act in terms of s 14(c) of the CIPA. I need not be satisfied that he did all of those. It will suffice if only one of those potential offences is proven.

[108] But what if the State fails to prove a sexual act as understood under the CORA<sup>14</sup> or the CIPA<sup>15</sup>, or an indecent or immoral act within the meaning of the CIPA? Would the accused escape liability where the evidence proves that he engaged in lewd and lascivious conduct in the presence of the minor complainants short of physical contact, or solicited the complainants to commit a sexual act or an indecent or immoral act?

[109] Suffice it to say, at the bare minimum, ‘sexual exploitation’ within the meaning of POCA and the Protocol is conduct by a perpetrator whose aim is to give sexual gratification to the person who harbours or receives a child. Therefore, a conviction would be possible even if actual sexual acts are not committed but it is established that the accused ‘solicited’ or ‘enticed’ the complainants to the commission of a sexual act or an indecent or immoral act within the meaning of s 14(c) of the CIPA.

[110] Lewd behavior and indecent exposure such as masturbation in the presence of a child, from which the trafficker derives sexual pleasure or gratification because of the presence of the child, is therefore caught by the prohibition. If it were otherwise, the law would fail to recognise the corrupting influence such conduct has on a child, and society’s corresponding obligation to protect children (who are

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<sup>14</sup> See para 16 of this judgment.

<sup>15</sup> Section 14(b) of the CIPA.

considered vulnerable because of their age) from the base sexual desires and pursuits of adults.

[111] In an event, the CIPA makes it an offence for a person with criminal capacity to solicit or entice a child to the commission of a sexual act or an indecent or immoral act.<sup>16</sup> It has been held that solicitation involves asking or inviting the child to participate in a sexual act.<sup>17</sup> Therefore, sexual exploitation is established if the evidence shows either that the accused committed an indecent or immoral act under the CIPA or solicits or entices a child to commit such an act.

[112] I will now proceed to consider if the accused committed indecent or immoral acts with the complainants, individually or collectively within the meaning of s 14(c) of the CIPA.

[113] The evidence shows that on two occasions the accused was in a state of undress in the presence of some complainants. According to NG and CB, there was an occasion when he put a condom on his male genital and masturbated. On another occasion he put a plastic bread wrapping on his genital in NG's presence and she was made to lick it.

[114] That evidence has a ring of truth to it. It is most improbable that the minor complainants NG and CB could have been coached to provide that sort of detail. It is one thing to say that he put a condom on his male genital, but to recount that a white substance came out of his male genital adds a different complexion, coming as it does from two children respectively aged 9 and 11. That a child observed a plastic wrapping intended for bread being used by the accused in the manner she described, in my view precludes the possibility of a fabrication because it is such a unique feature that one does not expect to be easily fabricated.

[115] The importance of this evidence is that it shines light on the accused's

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<sup>16</sup> Vide s 14 (c) of the CIPA.

<sup>17</sup> R v Guttenberg 1905 TS 207; R v 1951 (2) SA 178 (E); R v 1952 (2) SA 554 (C).

motive for his association with the complainants. It makes it clear to me, beyond reasonable doubt, that he had a sexual motive for associating with the girls. I need not be satisfied that he actually physically molested them. On the strength of my observation in paragraph 107 above, it suffices if I am satisfied that, in the presence of one or more of the complainants, he engaged in acts of indecency or immorality from which he derived sexual gratification.

[116] Each of the complainants testified that whilst they were in his room at the several intervals to which they testified, the accused demanded to have sexual intercourse with them. Those allegations are strengthened by the fact that on the evidence of NG and CB he had engaged in lewd and lascivious conduct. The intent he formed for his sexual gratification cannot be confined to the two specific incidents where he was actually observed but it permeated the association he nurtured with the entire group. He knew these girls moved about in a group and would often come to him in a group. They all entered his room with his knowledge and were exposed to the pornography he displayed in his room. The conduct in which he engaged in full view of CB and NG was the physical manifestation of the mental frame he had for his association with all the complainants. He received and harboured them so that he could, when the opportunity presented itself, engage in indecent and immoral conduct from which he derived sexual pleasure as evidenced by the indecent and immoral conduct testified to by NG and CB.

[117] On the accused's own admission, NG and CB came to his home on 30 April 2016. According to him, they asked for and he gave them baby Formula powder milk. There is therefore corroboration of Tessa's version that she saw MB outside the accused's dwelling and that MB told her that NG and CB were inside the accused's room and that those inside were refusing to let her in. It bears mention that it was after this incident that the allegations against the accused surfaced. The evidence establishes beyond reasonable doubt that on the eve of the allegations surfacing the accused had the opportunity to commit the crimes in which NG and CB implicated him.

[118] Each complainant independently made a report that she was in the accused's company in his home at some point during the period stated in the indictment; and that he, at the very least, sought to have sexual relations with her. Take RH for example who, at the time the allegations surfaced, was in Khorixas with her mother, AH. It will be recalled that AH testified about being telephonically informed by her own mother of the allegations and then asking RH who confirmed improper liaison with the accused. RH could possibly not to have been prompted by Tessa and Funa or any of the other complainants to implicate the accused at that time as she was far away from Swakopmund. Her report to AH was therefore spontaneous.

[119] The independent reports made by the complainants corroborate their versions (and render their allegations so much more trustworthy) that during the period stated in the indictment the accused, at the very least, solicited them to engage in indecent and immoral conduct with him for his sexual gratification. He certainly had the opportunity to do so because, by his own admission, these girls were often times alone in his company during the period mentioned in the indictment.

[120] I am therefore satisfied that the accused harboured all the complainants and sexually exploited them contrary to s 15 of the POCA.

#### The Rape counts (Count 2,4,6,8 and 10)

[121] In respect of the sexual exploitation allegations, I had set out the circumstances which exclude the risk of the children's evidence being tainted and which made reliance thereon safe. Similarly, I must be satisfied in respect of the rape counts that there is no danger of fabrication or suggestibility; and that the versions of the complainants implicating the accused in the rapes are safe to support a conviction.

Is fabrication or embellishment possible on the rape allegations?

[122] The accused denies the allegation that he raped the minor complainants. He suspects that Tessa and Funa might have fabricated the allegations. In the case of Funa because she had in the past made advances to him which he rejected, and Tessa because he had on one occasion not assisted her financially. Funa and Tessa are sisters and common sense suggests that they could easily work together to place the accused in an unfavourable light. Since the accused offers a possible motive for the allegations implicating him, did the prosecution disprove it beyond reasonable doubt? In other words, is the accused's suspicion of a false accusation on the rape counts reasonably possibly true?

[123] Ms Nyoni for the State put it in cross-examination of the accused, and submitted in oral argument, that the accused's insinuation of fabrication is far-fetched. According to her, if there was fabrication there would have been far greater similarity in the evidence of the two adults with that of NG as to the content of the first report made by NG; but that there is none. For example, that Tessa could easily have said that the door was locked when she observed MB outside the accused's home on the eve of the allegations surfacing.

[124] I do not share Ms Nyoni's optimism. There is something about Tessa's account which concerns me. On her own version, when she passed by the accused's home on 30 April, she was not very drunk and had control of her full faculties. According to her, MB told her that NG and CB were inside the accused's home with the accused and that they were refusing to open the door. The clear implication is that the door was locked and her own niece (NG) was inside that house with an adult male. Yet that seems not to have concerned her in the least! Why? Tessa offers no explanation. In fact, she went about her business as if nothing untoward had occurred. She never reported what she had seen to her sister, Funa, immediately or later that evening; yet they live next door to each other.

Surprisingly, the next day she alerts Funa to what she saw the previous day at the accused's house in terms that raise concern about her absence of animosity (for whatever reason) towards the accused. She asked Funa to inquire from NG what she was doing in the accused's home the previous day. That raises the inference that she did not consider NG's presence at the accused's home at the time as something innocent, proper or acceptable. It is even worse: On Tessa's own version, when she saw NG in the morning of the latter making the report, she suspected the minor child was on her way to the accused's home. There is no satisfactory explanation on the record why she formed that suspicion. NG could have been destined for any other place than the accused's. But why the accused? I have no satisfactory reason on record for that.

[125] There is something else that merits mention. NG testified about the conversation that occurred between Tessa and Funa as if she was present. She said in giving an account of her first report to her mother that her aunt (Tessa) suspecting that she was on her way to the accused's home asked her mother to ask her what she got up to the previous night at the accused's house. In other words, repeating the thoughts in Tessa's mind at the time. The only way NG could bear knowledge of Tessa's thoughts is if she was told as much by Tessa. The danger that NG had been coached in some form by an adult is real. But the risks don't end with NG.

[126] Although the medical evidence does not exclude the possibility that some of the complainants were exposed to penetrative sex, the question is whether the accused is the one who was responsible. I should be satisfied beyond reasonable doubt that it was he to the exclusion of anyone else.

[127] One of the complainants (RH) whom the accused is also alleged to have raped denied in oral testimony that he penetrated her. It emerged when one of the investigation officers came to testify that RH had said to her that she had been to the accused's home at least three times a week during the period stated in the

indictment and had been repeatedly raped by him. That police officer who interviewed RH in the immediate aftermath of the allegations first surfacing testified that this complainant told her that she was made to have sexual intercourse with the accused at least three times a week during the period alleged in the indictment. In other words, at least a staggering 37 times. It was clear from the court's questioning of the officer that what the complainant meant was penetrative sex in circumstances where she was alone with the accused. Yet, against the tenor of RH's version to the police, the medical evidence shows that RH had not been exposed to penetrative sex because her hymen was intact. This highlights the disadvantage the accused faces which I alluded to at the beginning. This was not disclosed in the charge sheet, the summary of substantial facts or the testimony of the complainant. How could he possibly have challenged it? In any event, the version is far-fetched and most improbable.

[128] Curiously, RH not only refused to make a dock identification of the accused but said she would not recognise him if she saw him; and yet she is the one complainant who on her account to the police spent considerably more time with the accused than the other complainants.

[129] As I adumbrated earlier on, apart from the child complainants' mere say-so, there is no physical evidence to show the accused committed contact sexual acts on the complainants. The question therefore arises whether it is safe for me to convict him of rape on the evidence of the complainants alone. An allegation of rape is very easy to make and quite difficult to disprove. The complainants' versions are most confusing even to the seasoned and hardened judicial mind. Their versions are internally inconsistent and, in material respects, inconsistent as between the complainants - even when supposedly referring to the same incident. I will demonstrate.

[130] On the version told by NG, she had been to the accused's house on five occasions and on only one of those occasions (third occasion) were all five of them

present. The other four times it was she and CB only. On CB's version, she had been to the accused's house four times, and only on one occasion were all five complainants present. On RS's version, she had been to the accused three times and on none of those occasions were all five present. According to RS, on her third occasion, it was her, NG, CB and MB. On MB's account on the other hand, she had been to the accused three times. It was on her first and second encounters with the accused that all five were present. On RH's account in chief, she had been to the accused's home three times and on all these occasions all of them were present. MB made the startling allegation that after the day that Tessa had observed her outside the accused's room, she and the others had been back to the accused and were again molested by him. But that is impossible because it was the day after MB was seen by Tessa outside the accused's home that the alleged abuse surfaced and the accused was arrested. How does one explain such discrepancies?

[131] NG's persistent reference to the use of a knife by the accused is denied by all the complainants except CB – yet on NG's version the knife was brandished when all five were present. There was a reference to the accused ordering the complainants to sit on his chest and licking their female genitals but that was disowned. There was a reference by RS to one occasion when the accused put out a candle as he molested the complainants. That was denied by the other complainants and that the witness could then see what was happening in the dark, is most improbable. The manner and sequence in which the collective rapes allegedly happened (on different occasions) is so strikingly similar as to be improbable. It proves my point about the ease with which such an allegation can be made and the difficulty in disproving it. I find it most improbable that the rapes could have happened as described: That the accused would rape the complainants one after the other and those not yet got to by him (but who knew they were next and could remove themselves from the harm with ease) would just stand-by without making an escape, not once, but at least two times.



[132] I have made reference to some of the contradictions and inconsistencies to demonstrate that there are serious and yet unexplained contradictions in the testimony of the complainants. Many of these were so ably highlighted by Mr Ndube in his cross-examination of the complainants and can be seen in the record. The record demonstrates that the cross-examination of the complainants revealed remarkable inconsistencies between the reports made to the investigation officers and the versions told in court. I do not find it necessary to repeat all of them. The important point though is that the State made no attempt to deal with the contradictions and to explain, based on the record, the immateriality of the contradictions and inconsistencies. It is not for me as trier of fact to speculate what the true reason or import is of the contradictions. Besides, where there are divergences in the testimony of the complainants concerning the same events, one or other of them is being untruthful. The State has not suggested, with reasons, which version I must accept and which not; and why?

[133] The unavoidable conclusion to which I come is that it is unsafe to convict the accused of rape based on the allegations of the complainants.

#### Alternative counts under CIPA

[134] My finding, in the context of trafficking, that the accused solicited the complainants to have sexual intercourse with him must hold true for the offence of solicitation in terms of s 14(c) of the CIPA. I am therefore satisfied that in contravention of that section he solicited each one of the complainants to commit sexual acts with him for his gratification.

#### Conclusion

[135] I am satisfied that the prosecution proved beyond reasonable doubt that during the period named in the indictment and on divers occasions, the accused received and harboured the complainants for sexual exploitation in the form of

soliciting them to the commission of indecent and immoral acts for his sexual gratification.

[136] For the reasons that I have set out already, I consider it unsafe to convict the accused on the rape charges. I am however satisfied that the evidence is overwhelming that he solicited the complainants to the commission of indecent and immoral acts on divers occasions during the period stated in the indictment and must therefore be convicted on each of the alternatives to the rape counts.

### Order

[137] In the result, I enter judgement as follows:

**Count 1: Guilty:** Contravening section 15 read with section 1 of the Prevention of Organized Crime Act 29 of 2004 ('POCA') read with section 94 of the Criminal Procedure Act 51 of 1977 ('CPA') - child trafficking on divers occasions in respect of NG a child below the age of 18 years old.

**Count 2:** Not guilty.

***Alternative to count 2:*** Guilty Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 3:** Guilty: Contravening section 15 read with section 1 of POCA read with section 94 of the CPA – child trafficking on divers occasion of CB a child below the age of 18 years old.

**Count 4:** Not guilty.

**Alternative to count 4:** Guilty      Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 5:** Guilty:      Contravening section 15 read with section 1 Prevention of Organized Crime Act 29 of 2004, read with section 94 of the Criminal Procedure Act, 51 of 1977 – Child trafficking (divers occasion) [in respect of MB a child below the age of 18 years old).

**Count 6:** Not guilty.

**Alternative to count 6:** Guilty      Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 7:** Guilty:      Contravening section 15 read with section 1 of the POCA, read with section 94 of the CPA – child trafficking (divers occasion) in respect of MB a child below the age of 18 years old.

**Count 8:** Not guilty.

**Alternative to count 8:** Guilty      Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

**Count 9:** Guilty.

Contravening section 15 read with section 1 of the POCA, read with section 94 of the CPA– child trafficking (divers occasion) in respect of RH a child below the age of 18 years old.

**Count 10:** Not guilty.

***Alternative to count 10:*** Guilty

Contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers occasions.

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PT Damaseb  
Judge-President

## APPERANCES

For the State

I Nyoni

Office of the Prosecutor General,

Windhoek.

For the Accused:

M Dube

Instructed by Directorate of Legal Aid,

Windhoek.

## **ANNEXURE A**

### **ANNEXURE A: THE INDICTMENT**

The charges preferred against the accused are particularised in the indictment as follows:

COUNT 1: Contravening section 15 read with section 1 of the Prevention of Organized Crime Act 29 of 2004 ('POCA') read with section 94 of the Criminal Procedure Act 51 of 1977 ('CPA') - child trafficking on divers occasions in respect of NG a child below the age of 18 years old.

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and unlawfully recruit and/ or receive and/or harbour the complainant NG, a minor child below the age of 18 years, with intent that the said NG is subjected to sexual exploitation by the accused, an adult male.

COUNT 2: Contravening section 2(1) (a) read with section 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 ('CORA') as read with section 94 of the CPA, being on Rape on divers occasions.

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and intentionally commit sexual acts with the complainant NG by inserting his penis into her vagina and also licking her vagina with his tongue under the following coercive circumstances: Threatening by word or conduct to apply physical force against NG; threatening by word or conduct to cause harm to NG under circumstances where it was not reasonable for NG to disregard the threat; and that NG was at the time under the age of fourteen years and the accused more than three years older than NG.

*Alternatively*, contravening section 14(a) (i) (ii) of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000 ('CIPA') – as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years on divers

occasions.

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch, unlawfully and intentionally committed sexual acts with NG, a child of 9 years.

COUNT 3 - Contravening section 15 read with section 1 of POCA read with section 94 of the CPA – child trafficking on divers occasion of CB a child below the age of 18 years old.

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and unlawfully recruit, and/or receive and/or harbour the complainant CB, a minor child below the age of 18 years, with intent that the said CB is subjected to sexual exploitation by the accused, an adult male.

COUNT 4 - Contravening section 2(1) (a) read with section 1, 2(2), 3, 5, 6 and 7 of the CORA as read with section 94 of the CPA b being Rape (divers occasions).

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and intentionally commit sexual acts with the complainant CB by inserting his penis into her vagina and also licking her vagina with his tongue under the following coercive circumstances: Threatening by word or conduct to apply physical force against CB, and/ or threatening by word or conduct to cause harm to CB under circumstances where it was not reasonable for her to disregard the threat; and CB was at the time under the age of fourteen years and the accused more than three years older than CB.

*Alternatively*, contravening section 14(a) (i) (ii) of the CIPA as read with section 94 of

the CPA - committing a sexual act with a child below the age of 16 years (divers occasions).

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch unlawfully and intentionally committed sexual acts with CB, a child of 11 years.

COUNT 5 - Contravening section 15 read with section 1 Prevention of Organized Crime Act 29 of 2004, read with section 94 of the Criminal Procedure Act, 51 of 1977 – Child trafficking (divers occasions) [in respect of MB a child below the age of 18 years old).

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and unlawfully recruit and/or, receive and/or harbour the complainant MB, a minor child below the age of 18 years, with intent that the said MB is subjected to sexual exploitation by the accused, an adult male.

COUNT 6 - Contravening section 2(1) (a) read with section 1, 2(2), 3, 5, 6 and 7 of the CORA– as read with section 94 of the Criminal Procedure Act 51 of 1977 Rape (divers occasions).

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and intentionally commit sexual acts with the complainant MB by inserting his penis into her vagina and also licking her vagina with his tongue under the following coercive circumstances: Threatening by word or conduct to apply physical force against MB and/ or; threatening by word or conduct to cause harm to MB under circumstances where it was not reasonable for MB to disregard the threat; and MB was at the time under the age of fourteen years and the accused more than three years older than the complainant.



*Alternatively*, contravening section 14(a) (i) (ii) of the CIPA as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years (divers occasions).

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch unlawfully and intentionally committed sexual acts with MB a child of 13 years.

COUNT 7- Contravening section 15 read with section 1 of the POCA, read with section 94 of the CPA – child trafficking (divers occasion) in respect of MB a child below the age of 18 years old.

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and unlawfully recruit and/or, receive and/or harbour the complainant RS, a minor child below the age of 18 years, with intent that the said RS is subjected to sexual exploitation by the accused an adult male.

COUNT 8 - Contravening section 2(1) (a) read with section 1, 2(2), 3, 5, 6 and 7 of the CORA as read with section 94 of the CPA, being Rape (divers occasions).

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and intentionally commit sexual acts with the complainant RS by inserting his penis into her vagina and also licking her vagina with his tongue under the following coercive circumstances: Threatening by word or conduct to apply physical force against RS and/ or; threatening by word or conduct to cause harm to RS under circumstances where it was not reasonable for RS to disregard the threat; and RS was at the time under the age of fourteen years and the accused more than three years older than RS.

*Alternatively*, contravening section 14(a) (i) (ii) of the CIPA as read with section 94 of the CPA - committing a sexual act with a child below the age of 16 years (divers occasions). In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused, Bertus Koch, unlawfully and intentionally committed sexual acts with RS, a child of 12 years.

COUNT 9 - Contravening section 15 read with section 1 of the POCA, read with section 94 of the CPA– child trafficking (divers occasion) in respect of RH a child below the age of 18 years old.

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and unlawfully recruit and/or, receive and/or harbour the complainant RH, a minor child below the age of 18 years, with intent that the said RH is subjected to sexual exploitation by the accused, an adult male.

COUNT 10 - Contravening section 2(1) (a) read with section 1, 2(2), 3, 5, 6 and 7 of the CORA as read with section 94 of the CPA, being Rape (divers occasions).

In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused Bertus Koch did wrongfully and intentionally commit sexual acts with the complainant RH by inserting his penis into her vagina and also licking her vagina with his tongue under the following coercive circumstances: Threatening by word or conduct to apply physical force against RH, and/ or threatening by word or conduct to cause harm to RH under circumstances where it was not reasonable for RH to disregard the threat; and RH was at the time under the age of fourteen years and the accused more than three years older than the complainant.

*Alternatively*, contravening section 14(a) (i) (ii) of the CIPA as read with section 94 of the CPA - commit a sexual act with a child below the age of 16 years (divers occasions). In that on a date unknown but during the period extending from the month of November 2015 to the month of May 2016 and at or near DRC in the district of Swakopmund, the accused, Bertus Koch, unlawfully and intentionally committed sexual acts with RH, a child of 12 years.